THE WHITE HOUSE

WASHINGTON

September 22, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: ROBERT M. KRUGER

SUBJECT: Department of Justice Testimony on the Administration's Proposals Regarding Drug Testing

OMB has requested views on the above-referenced testimony which will be presented by Richard Willard to the House Subcommittee on Human Resources on Thursday, September 25, 1986. Although the cover page of the testimony and the OMB staffing sheet indicate that the testimony is addressed to the Administration's proposals for a drug-free federal workplace, I have learned that the Department of Justice was asked to testify specifically about drug testing. Justice seems to have interpreted this request literally, omitting from its testimony any discussion of non-testing elements of the recent Executive Order and the Administration's proposed legislation.

I have also learned that the core of this testimony (pages 10-28) consists of the amicus brief that the Department of Justice filed in support of the constitutionality of the Boston Police Department's drug testing program. This fact explains both why the testimony appears to be a legal memorandum (complete with citations, footnotes and subheadings) and why it aggressively argues and states the parameters of the existing law, reaching beyond the analysis issued by OLC in support of the Executive Order. A prime example of this latter point is Justice's repeated assertion that "drug testing does not implicate the Fourth Amendment." Justice bases this statement on an employer's wide latitude in testing for fitness for duty and on the relative unintrusiveness of unobserved urination. However, OLC, in its opinion memorandum, stated that "the drug testing regime called for under the proposed executive order must withstand scrutiny under traditional Fourth Amendment principles."

The issue, as I see it, is whether Justice should present to the Subcommittee the same legal arguments it has already made in court. While I would not suggest that Justice take an inconsistent position or concede any of those arguments before the Subcommittee, I would point out that Congressional testimony is clearly different from a litigating position. What makes good argument in court may come across in a hearing as glaring evidence of the Administration's insensitivity to Constitutional

and privacy issues. On page 30 of the testimony, Justice addresses legislation proposed by the Subcommittee Chairman which would bar use of drug tests in the federal government except in very narrow circumstances. Rather than dampen support for such legislation, I think Justice's proposed testimony will make it appear more reasonable.

I recommend that Justice's testimony be shortened and rewritten with a much greater emphasis on the positive features of the testing program authorized by the Executive Order and that Justice's amicus brief be attached as an addendum. The testimony should place drug testing in context as a diagnostic tool to identify drug use in certain circumstances and among certain employees. It should stress both the limitations on its usage and the numerous provisions geared to safeguard privacy and confidentiality, to ensure the reliability of test results and to help drug users break their habits, set out in the Executive Order. A memorandum to Naomi Sweeney, conveying this recommendation is attached for your review and signature. The memorandum also includes the following comments about other aspects of the testimony.

1. The Administration's drug testing program should not be directly compared with the program implemented by the military (see, for examples, page 4 and page 7). Such a comparison suggests a lack of understanding for the fundamental differences between military and civilian work forces.

2. Not all of the protections built into the Executive Order are noted in the description contained at page 4 to page 9. There is, for example, no mention of the provision for rebuttal of positive drug test results by other evidence that an employee has not used drugs. The testimony should not overlook any potential public relations advantage.

3. For the record, the arguments set out in the first paragraph in Section "C" on pages 15 and 16, seem particularly extreme and inconsistent with OLC's memorandum in support of the Executive Order. It also seems a gratuitous overstatement to describe unobserved drug testing as "one of the most minimally intrusive searches in Fourth Amendment jurisprudence."

4. The description of the effect of Section 103 of the Administration's bill on page 28 should not imply that the nexus or Rehabilitation Act issues are currently "unresolved."

Attachment

THE WHITE HOUSE

WASHINGTON

September 22, 1986

MEMORANDUM FOR NAOMI R. SWEENEY
DEPUTY ASSISTANT DIRECTOR FOR LEGISLATIVE REFERENCE

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

SUBJECT: Department of Justice Testimony on the Administration's Proposals Regarding Drug Testing

Counsel's office has reviewed the above-referenced testimony which will be presented by Richard Willard to the House Subcommittee on Human Resources on Thursday, September 25, 1986. We understand that the core of this testimony (pages 10-28) consists of the amicus brief that the Department of Justice filed in support of the constitutionality of the Boston Police Department's drug testing program.

While we would not suggest that Justice take an inconsistent position or concede any of the arguments contained in its amicus brief in testifying before the Subcommittee, we would point out that Congressional testimony is clearly different from a litigating position. What makes good argument in court may come across in a hearing as glaring evidence of the Administration's insensitivity to Constitutional and privacy issues. On page 30 of the testimony, Justice addresses legislation proposed by the Subcommittee Chairman which would bar use of drug tests in the federal government except in very narrow circumstances. Rather than dampen support for such legislation, we are concerned Justice's proposed testimony will make it appear more reasonable.

Accordingly, we recommend that Justice's testimony be shortened and rewritten with a much greater emphasis on the positive features of the testing program authorized by the Executive Order and that Justice's amicus brief be attached as an addendum. The testimony should place drug testing in context as a diagnostic tool to identify drug use in certain circumstances and among certain employees. It should stress both the limitations on its usage and the numerous provisions geared to safeguard privacy and confidentiality, to ensure the reliability of test results and to help drug users break their habits, set out in the Executive Order.

We would also make the following comments about other aspects of the testimony:

1. The Administration's drug testing program should not be directly compared with the program implemented by the military (see, for examples, page 4 and page 7). Such a comparison suggests a lack of understanding for the fundamental differences between military and civilian work forces.

2. Not all of the protections built into the Executive Order are noted in the description contained at page 4 to page 9. There is, for example, no mention of the provision for rebuttal of positive drug test results by other evidence that an employee has not used drugs. The testimony should not overlook any potential public relations advantage.

3. For the record, the arguments set out in the first paragraph in Section "C" on pages 15 and 16, seem particularly extreme and inconsistent with OLC's memorandum in support of the Executive Order. It also seems a gratuitous overstatement to describe unobserved drug testing as "one of the most minimally intrusive searches in Fourth Amendment jurisprudence."

4. The description of the effect of Section 103 of the Administration's bill on page 28 should not imply that the nexus or Rehabilitation Act issues are currently "unresolved."

PJW:RMK:dmh 9/22/86
cc: PJWallison
RMKruger
chron.

ID #_____ CU

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		Referral Note:				
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

September 19, 1986

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer -

Office of Personnel Management-Jim Woodruff-632-5244
Department of Education-Jack Kristy-732-2670
Department of Labor-Seth Zinman-523-8201

SUBJECT: Department of Justice testimony on the Administration's bill to provide for a drug-free workplace introduced by Sen. Dole, and on H.R. 4636, H.R. 5530, and H.R. 5531, all bills relating to drug testing in connection with Federal Employment.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than Tuesday, September 23, 1986. Hearing is September 25, 1986.

Questions should be referred to Hilda Schreiber (395-7362), the legislative analyst in this office.

Naomi R. Sweeney for
Assistant Director for
Legislative Reference

Enclosures

cc: Peter Wallison
Jack Carley
John Cooney
Ken Ryder
F. Seidl/T. Grams
J. Murr
Naomi Sweeney

STATEMENT

OF

RICHARD K. WILLARD
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON HUMAN RESOURCES
COMMITTEE ON THE POST OFFICE AND CIVIL SERVICE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE PRESIDENT'S PROGRAM TO FOSTER A
DRUG-FREE FEDERAL WORKPLACE

ON

SEPTEMBER 25, 1986

Mr. Chairman and Members of the Subcommittee--

I appreciate the opportunity to be here this morning to talk about the serious drug problem facing our nation and the President's goal of establishing a drug-free federal workplace. Although the war against illegal drugs can and must be fought on many fronts, the President's program recognizes that we cannot devote our efforts solely to law enforcement--we must also reduce the demand for illegal drugs. The administration believes that the federal government has a duty to adopt a leadership role in reducing the demand for illegal drugs by attaining a drug-free federal workplace. We must make clear that drug use by federal employees--whether on or off duty--is unacceptable conduct that will not be tolerated. We hope that the carefully designed program set forth in Executive Order 12564 will not only assure that we have a drug-free federal workplace, but will also serve as a model for similar programs in the private sector and, in schools. We also hope that the federal initiative will provide an incentive for state and local government to initiate their own programs that will serve the unique needs of their local communities.

I would also like to note at the onset that testing is only one means by which the Executive Order will help us to achieve a drug-free workplace. Other evidence of drug use could be used to identify drug users, and of course, an aggressive program of public education would be continued to warn of the dangers of illegal drug use.

The Federal government is just one of an increasing number employers who have recognized a need to create an environment of zero tolerance for drug use by drug testing employees. In fact, "testing" is a very effective way to treat drug abuse in the workplace. When Dr. Charles R. Schuster, Director of the National Institute on Drug Abuse testified before Congress last summer, he emphasized that "the integration of drug screening into programs of treatment, prevention and drug education will prove to be a highly effective way to manage substance abuse problems in industry."[1] Dr. Schuster also pointed out that testing can be an extremely useful tool within the context of an overall program or policy.

Because of the high rate of illegal drug abuse in our society and its debilitating effects on the workforce, both public and private employers are increasingly instituting drug testing programs to deter employee's use of illegal drugs. In private industry, approximately 25 percent of the Fortune 500 companies, including Ford Motor Company, IBM, Alcoa Aluminum, Lockheed, Boise Cascade and the New York Times have instituted testing programs using urinalysis for drug detection. Testing programs such as these have been enormously successful resulting in fewer-on-the-job accidents, increased productivity and improved employee morale.[2] Consequently, their use is growing.

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[1] Statement of Dr. Charles R. Schuster before the Select Committee on Narcotics Abuse and Control, U.S. House of Representatives on May 7, 1986, at p.6.

[2] Employees who use drugs have three times the accident rate of non-users, double the rate of absenteeism, higher job turnover

(continued...)

It is estimated that an additional 20 percent of Fortune 500 companies will institute drug testing programs within the next two years. The success of these programs gives us real cause to hope that a carefully implemented program of drug testing can lead to real progress in the war on drugs.

Before turning to the specifics of the program under the Executive Order, I would like to reiterate a point stressed by the President in his recent address to the nation: no matter how much the government does about the problem of drug abuse, in the long run, it is up to each American to make the drug-free decision. As the President stressed:

> As much financing as we commit, however, we would be fooling ourselves if we thought that massive new amounts of money alone will provide the solution. Let us not forget that in America people solve problems and no national crusade has ever succeeded without human investment. Winning the crusade against drugs will not be achieved by just throwing money at the problem.
>
> Your government will continue to act aggressively, but nothing would be more effective than for Americans simply to quit using illegal drugs. We seek to create a massive change in national attitudes which ultimately will separate the drugs from the customer--to take the user away from the supply. I believe, quite simply, that we can help them quit.

Americans can beat the drug problem if we all work together as managers of the federal workplace, and guardians of public health

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[2](...continued)
rates and cost three times as much in terms of medical benefits. See The Conference Board Research Report, "Corporate Strategies for Controlling Substance Abuse", The Conference Board, Inc., 1986; Peter Bensinger, "Drugs In The Workplace: Employer's Rights and Responsibilities"; National Institute on Drug Abuse National Household Survey.

and safety, it behooves us to begin with the problem in the federal workplace itself.

I

Let me turn now to the specifics of the President's program to foster a drug-free workplace. The Executive Order, by its very nature, sets forth a general authorization for a drug testing program without specifying in great detail how such a program would be conducted. While the details on how the Order will be implemented have yet to be decided, I would like to take this opportunity to elaborate on the sort of program which we envision and stress some of the protections which will surely be included. Our program will undoubtedly be guided by the successful experience of the military, which has reduced drug use rates substantially since instituting its program. [3]

1. Employees Covered by the Random Testing Requirement. Under the President's Executive Order, random drug testing would only apply to "employees in a sensitive position", defined in section 7(d) of the order by reference to five separate catagories. These would include law enforcement personnel, employees designated Special-Sensitive, Critical-Sensitive and Noncritical-Sensitive under federal personnel rules, all

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[3] Statistics on drug use in the Navy, based on survey data, show reductions in use rates from 48% to 9% over a few years.

presidential appointees, all employees with a secret and top secret security clearances and any other employees whom that agency head determines hold positions "requiring a high degree of trust and confidence."[4]

Because of the great number of employees who necessarily must hold a top secret or secret security clearance, that category alone would extend coverage to a substantial number of employees. However, the total number covered is misleading because it would be up to the head of each agency to decided how many of the covered employees would actually be tested, and on what basis. Obviously, those with the most sensitive positions would be tested first. In addition, the testing could take the form of random testing of only a small fraction of covered employees each year. Our program will be flexible--testing frequency can be adjusted based upon extent of drug use and degree of job sensitivity. Most of these issues have yet to be resolved, but my point is that it is misleading to imply that millions of employees will automatically be tested.

2. Reliability of Testing Procedures. Many critics of drug testing have alleged that the "false positive" [5] error rate for

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[4] In addition, where there is "reasonable suspicion" of drug use, in the course of a safety investigation, or as a follow-up to a rehabilitation program, any federal employee could be asked to take a test. Section 3(c). In addition, any applicant for a job could be tested for illegal drug use. Section 3(d).

[5] "False positive" refers to a test result which erroneously concludes that a subject is using drugs. A "false negative"

(continued...)

the most commonly used drug tests can be as high as 20%, clearly an unacceptable level given the serious consequences which can follow a finding that an employee has used drugs. And there have apparently been abuses in the private sector, where employers have discharged employees based solely on a single, positive result from an unreliable first screening.

However, the Administration will not base any action on this initial test. Instead, following a positive test result indicating drug use, we would test the same sample using a second, much more reliable devices, the gas chromatography/mass spectrometry (GC/MS) test. This test is considerably more expensive than the initial screening, but, as the Office of Technology Assessment (OTA) has recognized, is virtually 100% reliable. We would agree with OTA's recent statement before this subcommittee that "when positive results from the screening tests are confirmed with a specific test such as GC/MS, the results are highly reliable and difficult to dispute." Testimony of Lawrence Miike, at pp 13-14.

Moreover, the order would require that, before conducting a drug test, the agency shall inform the employee of the opportunity to submit medical documentation that may support a legitimate use of a particular drug. Section 4(b). And all such information, as well as test results themselves, would be kept confidential. Section 4(c). I can assure the Subcommittee that

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[5](...continued)
means that a test failed to detect the actual presence of drugs in a specimen.

we have an absolute, unshaking commitment to ensuring the absolute integrity of any program.

Of course, there would be no way to detect a "false negative", short of performing the GC/MS in every case, which we do not see as cost-effective. However, a properly run testing program, such as that of DOD, only produce results in false negatives in 5% to 10% of samples, an acceptable number.

3. Privacy Concerns. Because there is a danger of an individual attempting to adulterate or substitute a specimen, many firms which have used the urinalysis test, require that the sample be provided in the presence of, and under observation by an attendant. Obviously, this is a significantly greater infringement on an individual's privacy than if he or she is permitted to provide the sample behind closed doors, as is routinely the case in most physical examinations.

In an attempt to minimize the intrusiveness of the required drug test, the administration's Executive Order provides that "[p]rocedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided." Section 4(c). Although this might make it easier to adulterate a sample, it has been our experience under the military testing program, that the mere fact that a test is required, will ensure a significant deterrent effect. The percentage of employees who are sufficiently committed to illegal

drug use that they are prepared to chemically tamper with a specimen, or to substitute a "clean" specimen, is so low as to have a marginal effect on the effect of the program.[6] We feel that with this single change, the program will be no more intrusive on an individuals privacy than an ordinary visit to the doctor.

5. The Non-Punitive Nature of the President's Program. Our program is premised on the President's strongly-held belief that federal employees who are found to be using drugs should be offered a "helping hand" to kick their habit before any disciplinary action is taken. Each agency would be required to establish Employee Assistance Programs to ensure an opportunity for counseling and rehabilitation, Section 2(b)(2), and to refer employees to counseling if found to be using, illegal drugs. Section 5(a). The sixty day warning period prior to implementation of a drug testing program would allow casual users to cease and addicts to come forward and request treatment. Moreover, no disciplinary action would be required for an employee who comes forward voluntarily agrees to be tested, obtains counseling or rehabilitation and refrains from illegal drug use in the future. Section 5(b).

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[6] After the 60 day general notice, testing need not be announced in advance, making it difficult to be prepared every day. Also, we could test for chemical tampering and where it is indicated, retest with observation.

Obviously, agencies must have the discretion to relieve employees in sensitive, and potentially life threatening positions, of their assignments where drug use is indicated. Section 5(c). However, even here, the agency head would have the discretion to allow an employee to return to a sensitive assignment as part of a rehabilitation program.

In addition, agencies would not be required to report evidence of illegal drug use to the Attorney General for criminal prosecution. Section 5(h).

6. Procedural Protections. Career employees in the civil service are protected by statute from preemptory dismissal or discipline by their superiors. Instead, due process protections included in the Civil Service Reform Act ensure them of a right to impartial adjudication of their claims before any adverse personnel action can become final. None of these rights would be abrogated by the President's Executive Order, which expressly provides that "[a]ny action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act." Section 5(g).

II

Having outlined of the President's program for fostering a drug-free workplace, I would like to turn now to the constitutional issues raised by the Order, and the use of drug testing generally. Although the issues are raised by the program, and these matters are not entirely free from doubt, we are confident that Executive Order 12564 fully complies with all legal requirements.

Many critics of the President's program allege that drug testing contravenes the Fourth Amendment. However, as explained below, drug testing does not implicate the Fourth Amendment as it does not intrude on a legitimate expectation of privacy protected under the Fourth Amendment. Simply stated, in the employment context, there is no recognized right of privacy that precludes an employer from conducting reasonable inquiries into an employee's fitness for duty -- particularly where the employee has advance notice of the test. Employers, including the Federal government, are afforded great latitude and deference in testing for fitness for duty, and drug testing raises no greater constitutional concern than other testing devices such as physical examinations, fingerprint checks, or background investigations routinely employed as screening devices. Unobserved drug testing is no more intrusive than the taking of hair samples or fingerprints, and, when used solely as a screening device for employment, raises none of the traditional concerns regarding abuse of police power that the Fourth Amendment is designed to reach and prohibit. Unobserved drug

testing as a condition of employment does not trigger the Fourth Amendment.

Moreover, even if a Fourth Amendment interest is implicated, the reasonableness of random testing of employees in sensitive positions fully comports with the Fourth Amendment. Unobserved testing is not intrusive, the standards governing the program here preclude subjective and arbitrary harassment by administering officials, and all employees have advance notice of the requirement before testing is initiated. Most importantly, the program furthers a substantial governmental interest -- the integrity and effectiveness of the Federal service, particularly relating to sensitive positions with responsibility for national security and law enforcement efforts.

A

The Fourth Amendment protects expectations of privacy that society is prepared to consider reasonable. Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring). See also California v. Ciraolo, No. 84-1513, slip. op. at 3 (May 19, 1986); Maryland v. Macon, 105 S. Ct. 2778, 2782 (1985). The Supreme Court has repeatedly held that the protections of the Fourth Amendment are implicated only when "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by

government action." Smith v. Maryland, 442 U.S. 735, 740 (1979). Whether there has been a "search" or "seizure" within the meaning of the Fourth Amendment, the decision turns in each instance on the facts and circumstances at issue.[7] Numerous cases underscore the fundamental point that the Fourth Amendment does not recognize privacy interests in the abstract, but only in the concrete circumstances in which the objective reasonableness of a claimed privacy interest can be examined in the most practical light. See, e.g., Wyman v. James, 400 U.S. 309 (1971) ("home visit" by welfare workers not a Fourth Amendment search because of context and purpose).

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[7] Historically, the courts have applied a two-part test to determine whether the Fourth Amendment protects an asserted privacy interest. See Katz v. United States, 389 U.S. 347, 351-53 (1967) (announcing test to determine expectation of privacy). First, the individual must exhibit a "subjective expectation of privacy." Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978). Second, the expectation must be "one that society is prepared to recognize as 'reasonable'". Id., (quoting Katz 389 U.S. at 361 (Harlan, J., concurring)). The first part, however, adds nothing to the analysis, and the second cannot be taken literally.

A subjective expectation of privacy cannot add to or detract from a claim of Fourth Amendment protection because were it to do so the government could eliminate that protection by announcing in advance its intent to perform a search or seizure. The objective reasonable expectation approach is similarly unhelpful because it suggests that protection extends to any place where there is so little probability of being inspected or probed that a reasonable person would feel secure. Taken to its logical extreme, such a position would mean that narcotics peddlers, accidentally discovered by police in a midnight drug transaction in a desolate corner of a public park, would be protected by the Fourth Amendment merely because a person at that location would ordinarily run virtually no risk of discovery. Whether a privacy interest is recognized under the Fourth Amendment is thus determined by whether "an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984).

Drug testing must accordingly be viewed in the context in which it is performed which necessarily defines the privacy interests to be considered and respected. See Terry v. Ohio, 3902 U.S. 1, 21 (1967). As shown below, in the employment context, there is no recognized right of privacy under the Fourth Amendment that precludes an employer from conducting reasonable inquiries into an employee's fitness for duty, particularly where the employee has advance notice of the requirement.

B

In the employment context, the scope of the privacy interests that society is prepared to recognize for employees have traditionally been defined by the employer's judgment in prescribing reasonable conditions of employment. Thus, the courts have repeatedly recognized that employers are afforded broad latitude and deference in defining conditions of employment. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1936).

In practice, this deference afforded the employer to determine an employee's fitness for duty explains the general acceptance of a variety of testing devices that might otherwise raise Fourth Amendment concerns. In the federal government, employees routinely submit to fingerprint checks, full field background investigations, physical examinations and, for employees engaged in national security functions, questioning

subject to polygraphs as conditions of employment.[8] These employment tests involve differing degrees of intrusiveness into an employee's privacy as well as exercises of dominion and control, albeit slight, over the employee. Nonetheless, none of these activities have been found to impinge upon an applicant or employee's Fourth Amendment rights, because, in the employment context, there is no recognized right of privacy that precludes an employer from conducting reasonable inquiries into an employee's fitness for duties. See Schlagenhauf v. Holder, 379 U.S. 104, 114 (1964) (physical examinations under Fed. R. Civ. P. 35 are "free of constitutional difficulty"). Drug testing presents no different concerns, nor should it be evaluated by a different yardstick. In an analogous context, courts have recognized the employer's right in regulating the workplace and thereby establishing or circumscribing the privacy expectations of an employee that society is prepared to recognize as protected under the Fourth Amendment.

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[8] The federal government routinely requires applicants for or employees in positions which have physical or medical standards to submit to physical examinations either prior to appointment or selection, 5 C.F.R. § 339.301(a)(1), on a regularly recurring periodic basis, id. at (a)(2), or whenever there is a direct question about an employee's continued capacity to meet the physical or medical requirements of the position, id. at (a)(3). In so doing, the Government may designate the examining physician, although employees are permitted to submit medical documentation from their personal physician which the Government will review and consider. In addition, the Government conducts extensive full-field investigations into the background of applicants for sensitive positions in the federal service to determine the individual's suitability for employment. See Federal Personnel Manual, Chapter 733 (attached as Exhibit B).

Like any employer, the federal government is fully authorized to prescribe reasonable conditions of employment for its personnel to determine fitness for duty, and these conditions control an employee's privacy interests. Thus, in the first federal case to address drug testing of law enforcement personnel, the court held that an FBI agent had a "diminished expectation of privacy," because he had been advised in advance "of the FBI's strong interest in assuring that its agents' personal and professional affairs are beyond reproach." Mack v. United States, No. 85 Civ. 5764, slip. op. at 7 (S.D.N.Y. April 21,; see also Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.)(in view of "paramount interest in protecting the public," bus and train operators "can have no reasonable expectation of privacy with regard to submitting to blood and urine tests."), cert. denied, 429 U.S. 1029 (1976); Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986) (persuasive regulation of industry eliminates expectation of privacy). Hence, the employer's discretion in setting reasonable conditions of employment allows the Federal government to require drug testing of its employees without implicating the Fourth Amendment.

C

Unobserved drug testing by an employer fails to raise a Fourth Amendment concern for additional reasons. First, where,

as here, the program is preceded by advance notice affording an opportunity for employees to avoid the testing by declining the employment, no legitimate expectation of privacy to the contrary can reasonably be recognized. Second, drug testing is conducted by the government in its proprietary capacity as an employer rendering inapposite general concerns lying at the core of the Fourth Amendment regarding abuse of the police power. Finally, where drug testing of employees is conducted without observation, none of the activities involved in testing constitutes a "search" or "seizure" under traditional Fourth Amendment analysis. Each of these considerations buttress the conclusion that drug testing as planned pursuant to the President's Executive Order does not raise Fourth Amendment concerns.

In the employment context, there is no recognized right of privacy under the Fourth Amendment that precludes an employer from conducting reasonable inquiries into an employee's fitness for duty -- particularly where the employee has advance notice of the possibility of drug testing. The Fourth Amendment does not disable government employers from exercising the "power of the Government as . . . employer, to supervise and investigate the performance" of its employees. United States v. Collins, 349 F.2d 863, 868 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966). The Federal government's decision to test its employees for drug use therefore does not violate the Fourth Amendment. See Allen v. City of Marietta, 610 F. Supp. 482 (N.D. Ga. 1985).

D

Even if the applicability of the Fourth Amendment is to be resolved from the narrow perspective of whether any of the governmental actions involved in drug testing constitute a "search" or a "seizure," drug testing as contemplated under the Executive Order does not implicate the Fourth Amendment. Whenever "physical evidence" is obtained "from a person," there is "a potential Fourth Amendment violation at two levels -- the 'seizure' of the 'person' necessary to bring him into contact with government agents . . . and the subsequent search for and seizure of the evidence." United States v. Dionisio, 410 U.S. 1, 8 (1973) (emphasis supplied). In the case of unobserved drug testing as an employment screen, the first level of concern is entirely absent, and any second-level concerns raised by the mere taking of a urine sample produced in private are exiguous to the point of not reaching the threshold where the Fourth Amendment would be implicated.

First, there is no "seizure" of the person when a public employee, during paid working hours, is directed to report to a facility for the collection of a urine sample rather than to the employee's usual working station. When the government asks employees to take drug tests, the employee's freedom of movement is not appreciably greater or different than when an employee is directed to go and remain at his usual work site. "Ordinarily, when people are at work their freedom to move about has been

meaningful restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." INS v. Delgado, 466 U.S. 210, 218 (1984).

Second, the requirement that an employee produce an unobserved urine sample is, not intrusive urine specimens are commonly drawn and examined with consent for numerous routine purposes, and, while that factor is not itself decisive, it has been given important weight in a context (blood tests) that is far more intrinsically invasive due to the required penetration of body tissues for collection of the fluid. Schmerber v. California, 384 U.S. 757, 771 & n.13 (1966).

Third, the collection of the urine itself should not be deemed a seizure since urine is a body waste customarily abandoned without concern, the collection of urine constitutes a seizure no more than the collection of hair clippings, voice exemplars or handwriting samples. Turner v. Fraternal Order of Police, 500 A. 2d 1005, 1011 (D.C. App. 1985) (Nebeker, J., concurring).

Fourth, the analysis of the urine, limited to revealing only the use of illicit substances, also fails to constitute a search within the Fourth Amendment. In United States v. Jacobsen, 466 U.S. 109, 113 (1984), the Court held that a field test conducted to determine whether a suspicious white powder was cocaine did not compromise any legitimate privacy interest and thus was not a search:

> A chemical test that merely discloses whether or not a particular substance is cocaine does

> not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative--merely disclosing that the substance is something other than cocaine--such a result reveals nothing of special interest. Congress has decided--and there is no question about its power to do so--to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.

Thus, approaching drug testing on the basis of a step-by-step analysis, none of the activities constitute a "search" or a "seizure." For this reason, unobserved drug testing does not raise a Fourth Amendment issue.

E

But even if a court were to disagree with the analysis and conclude that drug testing does implicate the Fourth Amendment, we are confident that the testing program will withstand constitutional scrutiny. The "underlying command of the Fourth Amendment is always that searches and seizures be reasonable," and what is reasonable "requires 'balancing the need to search against the invasion which the search entails.'" New Jersey v. T.L.O., 105 S. Ct. 733, 741 (1985), quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). Reasonableness does not turn

on whether the government could have used less intrusive means. Cady v. Dombrowski, 413 U.S. 433, 447 (1973). Rather, whether a search conducted without a warrant is reasonable under the Fourth Amendment requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion." Tennessee v. Garner, 105 S. Ct. 1694, 1699 (1985), quoting United States v. Place, 462 U.S. 696, 703 (1983). The factors to be considered are "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979).

The foregoing discussion largely answers each of these considerations. If drug testing triggers the Fourth Amendment, unobserved drug testing through urinalysis surely must be one of the most minimally intrusive searches in Fourth Amendment jurisprudence. Although "intrusiveness" is impossible to quantify, the intrusiveness associated with drug testing falls somewhere between the taking of hair clippings, which does not implicate the Fourth Amendment, United States v. Weir, 657 F.2d 1005 (8th Cir. 1981); In re Grand Jury Proceeding (Mills), 686 F.2d (3d Cir.) cert. denied, 459 U.S. 1020 (1982), and the extraction of blood which is subject to the Fourth Amendment, Schmerber v. California, 384 U.S. 757, 767 (1966). Even within this range, however, drug testing plainly falls closer to the taking of hair samples, as drug testing does not require

penetration of the body, and concerns a product that would otherwise be abandoned without concern as waste much like hair clippings which may normally be shed and swept away. See United States v. Thornton, 746 F.2d 39 (D.C. Cir. 1984). See also United States v. Mack, No. 85-5764, slip op. at 7 (S.D.N.Y. April 21, 1986) (urine testing less intrusive than blood sampling or fingerprinting as it "calls for nothing more than a natural function performed by everyone several times a day -- the only difference being the collection of the sample in a jar.") Random searches and seizures that have been held to violate the Fourth Amendment have left the discretion as to selected targets in the hands of a field officer with no limiting discretion. See, e.g., Delaware v. Prouse, 440 U.S. 648, 661 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 882-84 (1975).[9] However, the objective and random selection of federal employees in the most sensitive positions for testing precludes any conduct that could be considered subjective and arbitrary harassment by administering officials.

In contrast, where subjects are chosen on the basis of some neutral, nondiscretionary criterion, searches conducted in the absence of particularized suspicion have been upheld. United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976) (upholding use of fixed checkpoints to stop vehicles on a systematic basis). See also Donovan v. Dewey, 452 U.S. 594 (1981). Thus, a system

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[9] Testing on "reasonable suspicion"as contemplated by section 3(c)(1) of the Order, would, of course, not suffer from this infirmity.

of testing based upon random selection does not violate the Fourth Amendment. Shoemaker v. Handel, 795 F.2d 1136, 1143 (3d Cir. 1986).

Balanced against these considerations is the government's critical interest in precluding the use of illegal drugs, by employees in sensitive positions. To consider in detail, just one example, it is clear that illegal drug use renders a law enforcement officer unfit for duty as the officer's violation of the law undermines his ability to enforce and uphold the law on a fair and impartial basis. Illegal drug use, on or off duty, evidences an unreliability, an instability, and a lack of judgment that is inconsistent with the special trust reposed in law enforcement officers. See Masimo v. United States, 589 F.2d 1048, 1056 (Ct. Cl. 1978).[10] Law enforcement officers are sworn

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[10] In the federal sector, "where an employee's misconduct is contrary to the agency's mission, the agency need not present proof of a direct effect on the employee's job performance" to remove the employee. Allred v. Department of Health & Human Services, 786 F.2d 1128, 1131 (Fed. Cir. 1986). Thus, a federal agency need not keep an employee "in a responsible position until it can prove, by the cumbersome methods of litigation, what ought to be obvious -- that the credibility and effectiveness of the department are undermined by the discordance between public duty and private conduct." Wild v. United States, 692 F.2d 1129, 1133 (7th Cir. 1982).

Other courts have similarly recognized that there should be no need to maintain an employee whose misconduct will impair public confidence in the employer even though the misconduct may not be reflected in the employee's work performance. Thus, for example, in Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986), the court upheld random testing of jockeys, noting "[i]t is the public's perception, not the known suspicion, that trigger's the state's strong interest in conducting warrantless testing."

to uphold and enforce all the laws; illegal drug use by an officer violates that oath.

The use of illegal drugs also impairs an officer's ability to discharge his duties:

> Without a doubt, drug abuse can have an adverse effect upon a police officer's ability to execute his duties. Given the nature of the work and the fact that not only his life, but the lives of the public rest upon his alertness, the necessity of rational action and a clear head unbefuddled by narcotics becomes self-evident.

Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. App. 1985). Police officers are armed with weapons of deadly force, and are expected to be able to make, without warning, life and death decisions. Illegal drug use is simply incompatible with fitness for duty.

Finally, the scandal of illegal drug use by law enforcement officers seriously undermines respect for the law, and public confidence in law enforcement generally. "Even a hint of police corruption endangers respect for the law." O'Brien v. DiGrazia, 544 F.2d 543, 546 (1st Cir. 1976). No confidence may be reposed in law enforcement personnel who demonstrate by their illegal conduct that they do not take their responsibilities seriously. Moreover, "A trustworthy police force is a precondition of minimal social stability in our imperfect society." Biehunik v. Felicetta, 441 F.2d 228, 230 (2d Cir. 1971).

A similar analysis, with equally compelling governmental interests, could be identified for each of the many other sensitive positions covered by the order: air traffic

controllers, intelligence agents and analysts, safety inspectors, Assistant U.S. Attorneys and others. Certainly, we feel that the federal interest in this area far outweighs the very limited intrusion of a non-observed, random drug test. Hence, we are confident that the Order will survive Fourth Amendment scrutiny.

III

Let me now turn to two statutory issues raised by the President's drug testing program: the so-called "nexus" requirement contained in the Civil Service Reform Act and the application of the Rehabilitation Act.

With respect to the first issue, we believe that a drug-free requirement for federal employees is reasonably related and furthers "the efficiency of the service" because illegal drug use - whether on or off duty - is inconsistent with the nature of public service, undermines public confidence in the government and entails unwarranted costs in terms of employee productivity.

The statutory issue arising from an application of the Civil Service Reform Act, is closely related to the Fourth Amendment balancing test question. As a general proposition, federal personnel law provides that adverse action can be taken against a covered federal employee "only for such cause as will promote the efficiency of the service." 5 U.S.C. §7513(a). The Civil Service Reform Act of 1978 further barred discrimination against any covered employee or applicant "on the basis of conduct which

does not adversely affect the performance of the employee or applicant or the performance of others." 5 U.S.C. §2302(b)(10). Taken together, these two provisions are understood to require a "nexus" between employee misconduct for which severe sanctions may be imposed and the employee's performance of his job.[11]

Within these constraints, the President has broad authority to define conditions of employment. Under 5 U.S.C. §3301, the President may prescribe regulations for the admission of employees that "will best promote the efficiency of the service," as well as "ascertain the fitness of applicants" for employment. This authority is contained under 5 U.S.C. §7301 which explicitly recognizes the President's authority to prescribe "regulations for the conduct of employees in the executive branch." These provisions accordingly afford the President broad discretion to define conditions of employment that will best promote the efficiency of the service. The President exercised his power under these authorities when Executive Orders were issued freezing federal rehiring in 1981, and later barring the reemployment of air traffic controllers for participating in an illegal strike. Likewise, we believe that imposition of a drug-

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[11] The protection afforded by 5 U.S.C. §7513 applies to employees in the competitive service and certain preference-eligible employees in the excepted service whereas 5 U.S.C. §2302(b)(10) covers employees in the competitive service, career appointee members of the Senior Executive Service and most of the excepted service but for Schedule C employees and Presidential appointees. Because Schedule C appointees are not covered by either of the statutes, there is no nexus issue for these employees should a drug-free requirement be imposed by the President.

free requirement for federal employees would be found to further the efficiency of the service.

First, there is no logical reason why federal service which turns on public trust requires tolerance of on-going illegal behavior by public servants. As noted above, the courts have recognized that "where an employee's misconduct is contrary to the agency's mission, the agency need not present proof of a direct effect on the employee's job performance," Allred v. Department of Health and Human Services, 786 F.2d 1128, 1131 (Fed. Cir. 1986). Similarly, "Congress expressly permitted removal of employees whose actions might disrupt an agency's smooth functioning by creating suspicion, distrust, or a decline in public confidence." Borsari v. Federal Aviation Authority, 699 F.2d 106, 112 (2d Cir. 1983). The illegal use of drugs by a federal employee -- whether on or off duty -- is inconsistent with the nature of public service and undermines the general confidence of the public in government. It also creates suspicion and distrust that is inimical to the cooperation among employees necessary for the efficient operation of an agency. See Wild v. United States Department of Housing and Urban Development, 692 F. 2d 1129, 1133 (7th Cir. 1982).

Second, on a more mundane level, employee drug use imposes an extraordinary cost on the government in terms of the safety of the workplace and employee productivity. Studies by the National Institute on Drug Abuse document that employees who use drugs have three times the accident rate as non-users, double the rate

of absenteeism, higher job turnover rates and cost three times as much in terms of medical benefits. These high costs provide a sufficient foundation for any requirement that federal employees abstain from the use of illegal drugs, and demonstrate that there is a clear nexus between drug abuse, employee productivity and the efficiency of the service.

These concerns are expressly set forth in the Executive Order as Presidential findings to dispel any uncertainty over the fact that there is a nexus between drug abuse and the efficiency of the service.

B

Now let me turn briefly to the Rehabilitation Act, 29 U.S.C. §791, and its effect on the President's Executive Order. That Act prohibits discrimination against, and requires accommodation of persons suffering from handicapping conditions. Current regulations include drug addiction as a handicapping condition. 29 C.F.R. §1613.702. The Executive Order contains provisions to ensure that an employee who is addicted to drugs will receive counseling and therapy, Section 5(a), as required by the Rehabilitation Act. The level of accommodation provided--an opportunity for counseling and therapy with removal only after the employee has failed a single time in treatment--is, we believe, adequate to satisfy the requirements of the Act.

Moreover, the Act applies only to drug "addicts"; it has no bearing on recreational users. Hence, individuals who could cease using illegal drugs but have not done so are not entitled to any protection under the Act.

Section 103 of the Administration's bill would resolve issues for all time by providing that an individual could not be handicapped merely by reason of his or her drug addiction. (Those with other, physical, handicaps, would still be considered "handicapped" under the Act even if they are also drug users.) This change is needed because of the propensity of some courts to adopt an overly broad reading of the Act, requiring repeated offers of rehabilitation before allowing the government to take action against drug addict who is unable to perform his job. Whitlock v. Donovan. It makes no sense, either as a matter of federal personnel policy or as a matter of treatment strategy to permit an employee to seek treatment, come back to work, fall off the wagon and resume drug use and then seek treatment again and again and again.

IV

Finally, I would like to discuss the various pieces of legislation which have been introduced bearing on the issue of drug testing. Of course the administration's bill, introduced by Senator Robert Dole as part of S._____, would, while not expressly authorizing a drug testing program, make a useful

contribution by clarifying current law to make clear that neither the Rehabilitation Act nor the Civil Service Reform Act would affect our program. I should stress at the outset that we feel that the President's program, as set forth in Executive Order 12564 is fully consistent with the requirements of those two statutes, for the reasons set forth above. However, we can foresee legal challenges based in whole or in part on those statutes, and we feel that Congress ought to amend the law to set those issues to rest.

Two other bills would also authorize or require drug testing in some measure. Congressman Clay Shaw's bill, H.R. 4636, would require that each federal agency and member of Congress institute a drug testing program for employees having access to classified information. This bill is premised on the sound recognition of the fact that employees with drug habits are particularly susceptible to blackmail and the temptation to sell classified information to agents of foreign government in order to get money to buy drugs.

Congressman Charles Schumer recently introduced a bill to extend many of the protections which will be included in the administration's drug testing program to similar programs in the private sector. While considerations of federalism may preclude us from supporting a sweeping federal regulatory scheme in this area, we are heartened by Congressman Schumer's recognition that a carefully tailored program of drug testing can play a major role in reducing the scourge of drug use. We also share his view

that any program of drug testing must be carefully designed to include basic protections to ensure accuracy and fairness. A second confirmatory test if an initial screening indicates drug use and an opportunity for the employee to examine test results are clearly essential to any effective program. It is our hope that firms in the private sector would voluntarily adopt these protections without the need for federal legislation.

Finally, we come to your bill, Mr. Chairman. This legislation would bar any use of drug tests in the federal service except where two of an employee's supervisors concur that his performance is impaired and that the impairment is due to his "then being under the influence of a controlled substance." Thus, this approach would not only bar random testing, but would also bar testing where a supervisor concluded that an employee's performance was impaired due to off-duty drug use. We cannot share your view that the use of illegal drugs is acceptable behavior as long as it is not done on the job. The President feels that there is too much at stake to permit federal employees with the responsibility for public health, safety and national security the unrestricted right to use marihuana, cocaine, heroine or PCP as long as they not do it at the office.

This bill would effectively block most existing drug testing programs, only the CIA and NSA would be exempted from its restrictions. We cannot share your apparent belief that illegal drug use by agents of the FBI and DEA--and both of these agencies

recently instituted drug testing programs--is not something we should be trying to detect and halt.

Moreover, even the limited testing which the bill proports to authorize--upon reasonable suspicion of the employee then being under the influence of drugs--would not be effective. By authorizing suit against the government for any infringement of rights under the statute, the bill would have a chilling effect on any exercise of this authority.

We do not believe that your legislation is premised on a realistic recognition of the very real problems of drug use. Instead it seems to accept and countenance drug use by federal employees, by codifying a right to be free from discipline for such behavior. We simply have no sympathy for that view Mr. Chairman. And we do not feel that the American people share it either.

That concludes my prepared statement. I would be happy to answer any questions which the Subcommittee might have.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SEP 12 1986

MEMORANDUM FOR THE PRESIDENT

FROM: James [illegible] Miller III
Director

SUBJECT: Proposed Executive Order Entitled "Drug Free Federal Workplace"

SUMMARY: This memorandum forwards for your consideration a proposed Executive order, prepared under the direction of the Domestic Policy Council, that would implement your decision to institute new procedures to insure a drug free Federal workplace.

BACKGROUND: The proposed Executive order would establish a policy that Federal employees may not use illegal drugs, whether on-duty or off-duty. The head of each Executive agency would be instructed to implement this policy by developing a plan to achieve the objective of a drug-free workplace with due consideration to the rights of the government, the employee and the general public. The military services have separate procedures for detecting drug use and therefore would not be covered by this order.

Under the proposed order, the head of each agency would establish and conduct a program to test any employee in a sensitive position for illegal drug use. Each agency head would determine the positions deemed to be sensitive, from within broad categories of eligible positions defined by the order, and the frequency with which drug tests would be conducted. The agency's decision would be based on a determination that the failure of an employee in such a position to fulfill his or her responsibilities would endanger national security or the public health and safety. Each agency head also would establish a program for voluntary employee drug testing, pursuant to your policy that persons who use drugs should be encouraged to come forward and take voluntary steps to solve their own problems.

In addition, the order would authorize heads of agencies to require testing for employees in non-sensitive positions if the agency had reasonable suspicion that an individual was using illegal drugs. Finally, the proposal

would authorize agencies to test applicants for any position for illegal drug use.

Limited drug testing currently is being carried out in several agencies for persons in especially critical and sensitive positions. Existing laws require that illegal drug use must adversely affect on-the-job performance before an agency may base a personnel action on that drug use. The President is authorized by the Civil Service laws to establish standards of conduct for Executive Branch employees and ascertain the fitness of applicants for employment. By signing the proposed Executive order, you would make extensive findings about the substantial adverse effects of drug use, either on-job or off-job, upon the effectiveness and performance of Federal employees. These determinations would provide additional justification for extension of the drug testing program.

The agency drug testing programs would be conducted pursuant to scientific and technical guidelines promulgated by the Secretary of Health and Human Services. Agencies would be required to notify employees, 60 days in advance of the implementation of their new drug testing programs, that testing for use of illegal drugs would be conducted and that employees may seek counseling and rehabilitation. Agencies also would be required to establish procedures to protect individual privacy in the testing program, which would govern unless there were reason to believe that a person would attempt to defeat the integrity of the program.

Under the proposal, agencies would be required to take disciplinary action against any employee found to use illegal drugs, unless the employee voluntarily identifies himself as a drug user or volunteers for drug testing, and thereafter obtains counseling or rehabilitation. In order to avoid creation of disincentives to voluntary participation by employees, agencies would have the authority to retain employees in service while they are undergoing treatment. However, if an employee refuses to obtain rehabilitation or thereafter uses illegal drugs, the agency would be required to remove that person from service. Any adverse actions instituted against an employee who uses drugs would be conducted in compliance with existing procedures, including those established under the Civil Service Reform Act.

While the head of each agency would be responsible for conducting that agency's drug testing program, the Director of the Office of Personnel Management would guide and assist the agencies in implementing the proposed order.

The proposed Executive order has been the subject of extensive discussions by the agencies that are members of the Domestic Policy Council and has been formally circulated to the Cabinet departments and interested White House offices for comment. The departments have suggested several minor modifications to the proposal. As revised, none of these agencies objects to the proposed Executive order.

RECOMMENDATION: I recommend that you sign the proposed Executive order.

Attachment

Office of Legal Counsel

SEP 12

Office of the
Assistant Attorney General

Washington, D.C. 20530

SEP 12 1986

MEMORANDUM

Re: Proposed Executive Order entitled
"Drug Free Federal Workplace"

The attached proposed Executive order has been submitted by the Domestic Policy Council. The Office of Management and Budget, with the approval of its Director, has forwarded the proposed order to this Department for review of its form and legality.

The proposed order will require agency heads to develop plans to ensure a drug free federal workplace, including the establishment of a program of drug testing to identify federal employees who use illegal drugs. Section 1 of the proposed order requires federal employees to refrain from the use of illegal drugs and declares that illegal drug use is contrary to the efficiency of the service. Section 2 requires the head of each agency to develop a plan to achieve the objective of a drug free federal workplace. Section 3 requires the head of each agency to establish drug testing programs, including a program to test employees in "sensitive" positions and a program of voluntary testing. Section 3 also authorizes the head of each executive agency to test any employee who is under reasonable suspicion of illegal drug use and any applicant for federal employment. Section 4 specifies drug testing procedures and includes a requirement that procedures for providing urine specimens must allow individual privacy in the absence of a reason to believe that a particular person may alter the specimen provided. Section 5 of the proposed order requires that agencies refer all employees who are found to use illegal drugs to employee assistance programs and that agencies initiate disciplinary action against such employees unless the employees have identified themselves as illegal drug users or have undertaken voluntary testing. Section 6 requires that the Director of the Office of Personnel Management coordinate all agency programs established under the order in consultation with the Attorney General, who will render legal advice regarding the implementation of the order. Section 7 defines the categories of employees who hold "sensitive" positions. Section 8 provides that the order will become effective on the date of its issuance.

The proposed order raises two chief legal issues: first, whether the contemplated drug testing programs are consistent with the Fourth Amendment prohibition against unreasonable searches and seizures and, second, whether the personnel actions authorized by the order are permitted by current federal statutes. We have comprehensively addressed these issues in a lenghty memorandum previously prepared for the Attorney General.

1. Because drug testing can be characterized as a search and seizure, we must consider whether any testing required by the order is "unreasonable" within the meaning of the Fourth Amendment. In our judgment, the order has no such infirmity. While it can be argued that applicants and employees waive their Fourth Amendment rights by seeking to secure or maintain federal employment, we believe that given the current state of the law,[1] the drug testing regime called for under the proposed executive order must withstand scrutiny under traditional Fourth Amendment principles. Given this assumption, we believe the courts would determine whether drug testing is reasonable by balancing the government's interests in conducting the testing against an individual's privacy interests. See, e.g., New Jersey v. T.L.O., 105 S. Ct. 733, 741 (1985). The government's weighty interests are recited in the preamble of the order and need not be reiterated. Individual privacy interests are present, but less significant, because in response to the advice of this Office, section 4(c) of the proposed order ensures that an individual must be allowed to produce his or her urine sample in private, unless reasonably suspected of intending to alter the sample.[2] Thus, when government and individual interests are balanced, we conclude that the Fourth Amendment leaves ample room for the provisions of the order requiring agency heads to establish drug testing programs for sensitive employees and authorizing them for applicants.[3]

The order naturally does not attempt to specify every detail regarding the implementation of drug testing. Instead, agency heads (sec. 3), the Secretary of Health and Human Services (sec. 4(d)), and the Director of the Office of Personnel Management (sec. 6) are authorized to make several important determinations that may have a bearing on the constitutional analysis governing

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[1] See, e.g., Pickering v. Board of Education, 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138 (1982).

[2] In view of this provision, we do not think that the testing would involve a search of the person but merely a seizure and search of personal effect, i.e., body wastes. Moreover, under the reasoning of United States v. Jacobson, 466 U.S. 109, 122-125 (1984), the testing of the sample would have little if any effect on legitimate expectations of privacy.

[3] We think that a structured drug screening program would sufficiently constrain administrative discretion so as to obviate any need for a warrant.

actual drug testing. Thus, while the order is constitutional on its face, any definitive constitutional analysis of the implementation of the order must await these administrative determinations. In this regard, we note the importance of section 6(b) of the order which provides that "the Attorney General must be consulted with respect to all guidelines, regulations and policies to be adopted pursuant to the order" and "shall render legal advice regarding the implementation of the order."

2. The provisions of the proposed order prescribing personnel actions against employees who are found to be users of illegal drugs are consistent with applicable federal statutes. The Drug Abuse Office and Treatment Act of 1972, 42 U.S.C. 290ee-1, prohibits the denial or deprivation of federal civilian employment or other benefits "solely on the ground of prior drug abuse," except with regard to certain law enforcement or national security positions. Because the statute refers only to "prior" drug abuse, we construe the Act to permit a program calling for personnel actions based on current drug abuse.[4]

Nor do the terms of the proposed order conflict with the Rehabilitation Act of 1973, 29 U.S.C. 791, 794. The Act has been construed to prohibit the federal government from discriminating against employees or applicants on the basis of handicap, and may require the government to take affirmative steps to promote the employment of the handicapped. Drug addiction, with certain exceptions, is a handicap for purposes of this statute, but mere use or abuse of illegal drugs is not. Accordingly, personnel policies that single out addicts for special treatment are likely to be subject to scrutiny under this statute, but policies based on drug use are not handicap-based, and thus do not implicate the Rehabilitation Act. The proposed order does not contemplate that any judgments be made based on addiction, and thus does not call the Rehabilitation Act into play.

Finally, certain provisions of the Civil Service Reform Act of 1978, 5 U.S.C. 2302(b)(10), 7513(a), require the government to show a "nexus" between disapproved conduct and the "efficiency of the service" before initiating adverse personnel actions against employees or applicants covered by the statutes (primarily persons in the competitive service). The phrase "efficiency of the service" can include the employee's job performance or the effect of his conduct on the performance of fellow employees, workplace morale, or public confidence in government. Where illegal drug use would frustrate the mission of a particular agency, see Allred v. Department of Health and Human Services, 786 F.2d 1128, 1131 (Fed. Cir. 1986), or the employee is in a position involving national security, public safety, or requiring public trust, see Borsari v. FAA, 699 F.2d 106, 110 (2d Cir. 1983), cert. denied,

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[4] The statute, however, has never been judicially construed, and other constructions are possible.

464 U.S. 833 (1984); Swann v. Walters, 620 F. Supp. 741, 746 (D.D.C. 1984), the government is permitted to presume that illegal drug use will have an effect on job efficiency. Section 1 of the proposed order embodies such a presumption, specifying that the use of illegal drugs, whether on-duty or off, by federal employees is contrary to the efficiency of the service. In light of the foregoing principles, application of this presumption to civil service employees in sensitive positions, as defined in section 7(d) of the proposed order, does not appear to pose a problem. Application of the presumption to employees or applicants outside the range of positions specified in section 7(d) who are found to be illegal drug users is more problematic. The preamble to the proposed order, however, finds that there is a connection between illegal drug use and productivity and reliability on the job, and that illegal drug use necessarily erodes public confidence in government, thus impairing the efficiency of the illegal drug user's fellow employees. Assuming that the factual findings in the proposed order have an evidentiary basis, they are sufficient to provide the requisite presumption of nexus under the Civil Service Reform Act.

For the foregoing reasons, the order is acceptable with respect to form and legality.

Charles J. Cooper

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

The President,

The White House.

My dear Mr. President:

I am herewith transmitting a proposed Executive order entitled "Drug Free Federal Workplace." This proposed Executive order has been submitted by the Domestic Policy Council. It has been forwarded, with the approval of the Director of the Office of Management and Budget, to this Department for review of its form and legality.

The proposed Executive order is approved with respect to form and legality.

Respectfully,

Charles J. Cooper

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

EXECUTIVE ORDER

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DRUG FREE FEDERAL WORKPLACE

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national workforce and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime and otherwise contribute to the breakdown of our society;

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 drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to

perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability and good judgment that is consistent with access to sensitive information, and creates the possibility of coercion, influence, and irresponsible action under pressure which may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. Drug Free Workplace. (a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. Agency Responsibilities. (a) The head of each Executive agency shall develop a plan for achieving the objective

of a drug-free workplace with due consideration of the rights of the government, the employee and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. Drug Testing Programs. (a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is

authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. Drug Testing Procedures. (a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabiliation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be

provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. Personnel Actions. (a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, provided that such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agenicies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation

through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. Coordination of Agency Programs. (a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is

maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal workforce.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Sec. 7. Definitions. (a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate commission, and employing units or authorities in the judicial and legislative branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position which an agency head, designates Special Sensitive, Critical-Sensitive or Noncritical-Sensitve under Chapter 731 of the Federal Personnel Manual or an employee in a position which an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2).

(f) For purposes of this Order, the term "Employee

Assistance Program" means agency-based counseling programs which offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs which affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Sec. 8. Effective Date. This Order is effective immediately.

THE WHITE HOUSE,