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SIGNING STATEMENT

As I stated in my remarks at the signing ceremony for this bill, I am pleased to sign the Anti-Drug Abuse Act of 1986.

One other matter concerning the bill is worthy of note. This bill contains several important provisions reforming the Freedom of Information Act (FOIA), that will considerably enhance the ability of federal law enforcement agencies such as the Federal Bureau of Investigation and the Drug Enforcement Administration to combat drug offenders and other criminals. My Administration has been seeking such reforms since 1981.

These FOIA reforms substantially broaden the law enforcement exemptions in that Act, thereby increasing significantly the authority of federal agencies to withhold sensitive law enforcement documents in their files. The statutory language changes make clear, for example, that any federal law enforcement information relating to pending investigations or confidential sources may be withheld if its disclosure could reasonably be expected to cause an identified harm. The Act also includes, for the first time, special exclusions whereby certain law enforcement records would no longer be subject to the requirements of the FOIA under particularly sensitive, specified circumstances.

Additionally, this bill makes several changes with respect to the charging of fees under the FOIA. Agencies will now be able to charge and recover the full costs of processing requests for information under the FOIA, consistent with the federal user fee concept, in the large number of cases in which FOIA requests are made for "commercial" purposes, a term which has been broadly construed in other contexts of the FOIA. At the same time, the Act will somewhat limit the fees applicable to noncommercial educational or scientific institutions and to bona fide representatives of established news media outlets. It is important that no such special treatment is accorded to organizations engaged in the business of reselling government records or information.

Finally, the bill improves the standard governing the general waiver of FOIA fees, by mandating that such waivers be granted only where it is established that disclosure is in the "public interest" because it is likely to "contribute significantly to public understanding" of the operations or activities of the government. This standard is intended to focus upon benefits to the public at large, rather than upon the interest of a particular segment of the public, and thus clarifies the type of public interest to be advanced.

10/27/86



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

12
Sign
12/15/86

MEMORANDUM FOR DAVID L. CHEW

FROM: James C. Miller III
Director

SUBJECT: Department of Justice Signing Statement for
Anti-Drug Abuse Act - H.R. 5484

The Department of Justice has submitted a signing statement (attached) for "delivery at the signing ceremony for H.R. 5484, the Anti-Drug Abuse Act of 1986."

The proposed signing statement generally (1) clarifies how a bill provision will be interpreted; (2) highlights certain positive provisions of the bill; (3) expresses regret about certain omissions -- e.g., the death penalty -- from the bill; (4) expresses pleasure that certain provisions are not included in the bill; and (5) expresses concern about some of the bill's other provisions.

With respect to Justice's concerns about some of the bill's provisions, the signing statement objects strenuously to Title XII -- Commercial Motor Vehicle Safety Act of 1986 -- as a nongermane amendment that raises "federalism concerns." It states that "I intend to seek the repeal of the provisions . . . at the earliest possible date."

Generally, Title XII would prohibit drivers in interstate and intrastate commerce from having more than one commercial driver license and would require the Department of Transportation (DOT) to develop uniform minimum standards for the States to use in licensing commercial drivers. DOT advises that, while it would have preferred to address these matters through its existing regulatory authorities, it does not object to Title XII. DOT also advises that, as enrolled, Title XII has been modified to address some of its earlier concerns when the Title was considered as a freestanding bill (S. 1903).

While we should not dismiss Justice's concerns about the federalism issues associated with Title XII, I think it would be inappropriate for the President to state his intention to seek its repeal in connection with a signing ceremony on the anti-drug abuse bill. This would not, of course, preclude the Administration from carefully considering Justice's repeal recommendation. If appropriate, and after consultation with concerned agencies, repeal legislation could be proposed next year.

c: Peter Wallison
Jack Carley

Attachment



U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 24, 1986

Honorable James C. Miller III
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Jim:

Attached please find a revised copy of our draft Presidential signing statement for delivery at the signing ceremony for H.R. 5484, the Anti-Drug Abuse Act of 1986. Of particular importance to the Department is a new paragraph at the bottom of page one relating to the Money Laundering Control Act of 1986, a key element of the overall package, and language appearing on pages five and six relating to Title XII of the bill, the Commercial Motor Vehicle Safety Act of 1986. The latter raises significant federalism issues. Both of these additions have had the personal attention of the Attorney General and are transmitted to you with his personal recommendation that they be included in any formal statement delivered by the President next Monday, October 27.

Sincerely,


Arnold I. Burns
Deputy Attorney General

Enclosure

Signing Statement for H.R. 5484. The Anti-Drug Abuse Act of 1986

It is a pleasure to sign into law today the Anti-Drug Abuse Act of 1986, a comprehensive drug control measure which marks a further commitment to attacking the drug epidemic which threatens to undermine our youth and our society itself. In most important respects, this measure corresponds with the Drug Free America Act of 1986 which I submitted to the Congress on September 15. Like that measure, the bill before me today includes strong new enforcement measures based upon prior Administration proposals for tougher penalties, including mandatory sentences, for drug trafficking and drug possession; stronger laws to curb the money laundering associated with drug trafficking; new laws to address the growing problem of controlled substance analogs; forfeiture law improvements; measures to strengthen the ability of the Coast Guard and the Customs Service to interdict drugs being smuggled into the United States; and other overdue international and enforcement related measures. On the demand side, the Anti-Drug Abuse Act includes new funding authority for drug education and drug treatment programs throughout the nation. Taken together these provisions constitute a landmark drug law.

The new Money Laundering Control Act of 1986, in particular, constitutes major criminal legislation. It will help us strike a blow against the money launderers without whom drug traffickers could not reap the profits. This legislation will make money laundering itself a crime, improve our ability to investigate it and previously enacted related crimes, and encourage financial

✓
Justice
Interest

institutions to cooperate with law enforcement by making it clear that the Right to Financial Privacy Act permits them to volunteer information to the Government of possible wrongdoing in sufficient detail to warrant law enforcement agencies obtaining the necessary grand jury subpoenas or search warrants to get the financial records that will help establish this wrongdoing.

The strong support for the Department of State's narcotic control program is a gratifying endorsement of our policy of bilaterally expanding eradication and interdiction programs while rallying the world community to a global control effort. We have been given major new resources to meet a growing challenge.

Congress has given us another important diplomatic lever; we intend to use the certification process to highlight the accomplishments of cooperating nations and to promote improved efforts where cooperation has been inadequate.

I do regret, however, that Congress has confused the issues by earmarking the eradication budget for Mexico and withholding one million dollars in eradication funds pending the successful prosecution of the murderers of DEA Agent Camarena and the persons who assaulted DEA Agent Cortez. This is a program that benefits the United States, not simply Mexico. We will all lose by this action.

*Criticism
of bill
Justice
interest*

- 3 -

*Appropriate
to
sign
statement*

[The "Controlled Substance Analog Enforcement Act of 1986," set forth in Title I, Subtitle E, is worthy of particular note because it addressed the growing problem of synthetic drugs. This provision defines "controlled substance analogs" in three different ways. I sign this bill on the understanding that there are three alternative definitions for this term even though the word "or" is not inserted between the second and third definition. I have been informed that it was the clear intention of the Congress that three separate definitions be provided to insure that this provision could be meaningfully enforced.]

[NOTE: CHECK ENROLLED BILL TO SEE IF WORD "OR" WAS INSERTED. IT DOES NOT APPEAR IN THE CONGRESSIONAL RECORD.]

*Justice
interest*

This bill contains several important provisions reforming the Freedom of Information Act (FOIA), that will considerably enhance the ability of federal law enforcement agencies such as the Federal Bureau of Investigation and the Drug Enforcement Administration to combat drug offenders and other criminals. My Administration has been seeking such reforms since 1981.

These FOIA reforms substantially broaden the law enforcement exemptions in that Act, thereby increasing significantly the authority of federal agencies to withhold sensitive law enforcement documents in their files. The statutory language changes make clear, for example, that any federal law enforcement information relating to pending investigations or confidential

- 4 -

sources may be withheld if its disclosure could reasonably be expected to cause an identified harm. The Act also includes, for the first time, special exclusions whereby certain law enforcement records would no longer be subject to the requirements of the FOIA under particularly sensitive, specified circumstances.

Additionally, this bill makes several changes with respect to the charging of fees under the FOIA. Agencies will now be able to charge and recover the full costs of processing requests for information under the FOIA, consistent with the federal user fee concept, in the large number of cases in which FOIA requests are made for "commercial" purposes, a term which has been broadly construed in other contexts of the FOIA. At the same time, the Act will somewhat limit the fees applicable to noncommercial educational or scientific institutions and to bona fide representatives of established news media outlets. Significantly, no such special treatment is accorded to organizations merely engaged in the business of reselling government records or information.

Finally, the bill improves the standard governing the general waiver of FOIA fees, by mandating that such waivers be granted only where it is established that disclosure is in the "public interest" because it is likely to "contribute significantly to public understanding" of the operations or

Justice
interest
no
legal
issues

- 5 -

activities of the government. This standard appropriately focuses upon the public at large rather than the interest of a particular requester.

*Criticism
of
bill*

I regret that filibuster threats prevented inclusion in the Act of death penalty and exclusionary rule reform provisions which enjoy overwhelming bipartisan majority support in both the House and Senate and among the general population. We must not permit a determined minority to frustrate the will of the people again on these important issues.

✓

As with other bills enacted in the closing days of a Congress, H.R. 5484 became a vehicle for non-germane amendments, some of which raise serious concerns. For example, Title XII, the Commercial Motor Vehicle Safety Act of 1986, effects a significant nationalization of the regulation of operators of commercial motor vehicles through establishment of minimum federal standards for testing and ensuring the fitness of operators, minimum uniform standards for the States' issuance of licenses, and a uniform national standard for defining the offense of driving a commercial motor vehicle while under the influence of alcohol. The States are required to adopt programs and laws embodying these federal standards, or face the loss of federal highway funds.

I share the concerns about safety and fraud that led Congress to pass Title XII. I believe, however, that this legislation represents such a substantial intrusion into traditional state responsibilities as to endanger the fundamental structure of federalism that underlies our system of government. Matters of public safety, including highway safety, are at the core of the States' sovereign interests. Accordingly, the States have always had the primary role in the regulation of the operators of commercial motor vehicles. Title XII goes a long way toward ousting the States from that role. Not only does it preempt a significant amount of state regulatory authority, but it also disregards state sovereignty by ordering the States, on pain of losing federal highway funds, to take specific regulatory actions. I regard this measure as an abuse of the national government's spending power. To the extent there are safety problems common to the States, encouragement of uniform state laws and interstate compacts, rather than national regulatory legislation, is the appropriate course.

Since I am enthusiastically signing the drug legislation of which Title XII is a part, I must accept the Title, albeit over the most strenuous objections. Because of these federalism concerns, however, I intend to seek the repeal of the provisions of Title XII at the earliest possible date.

Criticism
of
bill

I am also concerned about certain specific provisions in the Act which constitute attempts by the Congress to mandate certain executive actions. One example is the provision allocating surveillance aircraft to two different agencies even though the National Drug Enforcement Policy Board is in the process of studying this issue now. I sign this legislation on the understanding that specific allocations made in this legislation are subject to change under the terms and mechanisms established by the National Narcotics Act of 1984.

Criticism

Returning to the more positive side, I am pleased to note that this bill does not include some very bad ideas which were proposed. It is a credit to the Department of Defense that it led the successful fight against the provision which would have involved the military directly into the drug interdiction effort. Such measures, while having obvious superficial appeal, jeopardize two hundred years of American tradition of civilian rule and would not have been effective to stop drug trafficking. Similarly, the so-called "drug czar" provision was not included in this bill. That proposal, while also enjoying superficial appeal, would jeopardize two centuries of cabinet organization of the Executive Branch and is clearly inconsistent with the concept of having a National Drug Enforcement Policy Board just established in 1985.

*Not
Necessary
to
sign
statement
-lecturing*

In sum, this is an important measure that on balance will dramatically enhance our ability to move toward the goal of a drug free America. I salute the Congress for working together in the best bipartisan tradition to make this measure a reality and I give my pledge that the Executive Branch will strive to use these new weapons and resources effectively in seeking to curb our common enemy: the scourge of illegal drugs.

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

October 6, 1986

October 4, 1986

MEMORANDUM FOR ALL EXECUTIVE BRANCH EMPLOYEES

As you know, I recently approved several new initiatives with an overriding goal of a drug-free America. This is no easy task, requiring as it does the commitment and support of all Americans. I am asking you, as citizens, parents, friends, and colleagues, to take a leading role.

As members of the Nation's largest work force, you can continue to set an example for other American workers. I know an overwhelming majority of Federal employees have never had trouble with illegal drugs, but our goal is a safe and drug-free workplace for all employees and the American public. Certainly the issue of drug testing has caused some concern, but I want to assure you that my Executive Order contains provisions to ensure that any testing program will be fair and will protect your rights as citizens.

Our intention is not to punish users of illegal drugs, but to help rehabilitate them. When you see colleagues or friends struggling with a drug problem, encourage them to seek help from your Employee Assistance Program or from some other organization or person skilled in drug counseling and treatment. Together we can send a message that illegal drug use in every office, shop, and laboratory simply will not be tolerated. The combined efforts of all of us will make it easier for Federal as well as private sector employees to "Just Say No."

Your efforts to increase public awareness and prevention of drug abuse are also crucial. Illegal drug use is not a "victimless crime," nor is it glamorous or a matter of personal choice. Drug abuse victimizes everyone in productive time lost, lives shattered, and families and communities torn apart. We must send this message beyond the workplace to friends and neighbors and especially to our young people.

I have called upon you many times in the past, and your support and dedication have already helped us achieve so much. Now I am asking you to get personally involved in ridding our offices, schools, homes, and communities of drugs and making them better places to live and work. I know I can count on your personal help.

RONALD REAGAN

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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

October 6, 1986

NATIONAL DRUG ABUSE EDUCATION AND PREVENTION WEEK
AND NATIONAL DRUG ABUSE EDUCATION DAY, 1986

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BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Drug abuse is a veritable plague that enslaves its victims, saps their health, turns their dreams to dust, and endangers their lives and the lives of others. Unchecked, it poses a threat to our Nation. But Americans are fighting back against this insidious evil. More and more young people are choosing to "Just Say No" to drugs. This heartening development is due to the tireless efforts of concerned parents, private sector organizations, schools, and State and Federal government.

We cannot afford to slacken in our efforts when nearly two-thirds of all American teenagers have used an illicit drug at least once before they finish high school. Especially disturbing is the level of cocaine use among teenagers and young adults in our country.

Cocaine is especially dangerous because people tend to underestimate its harmful effects. Cocaine must be recognized for what it is: a dangerous, addictive drug. Cocaine can kill: deaths from respiratory and cardiac arrest from cocaine overdose are increasing among all age groups. Recently there has been a frightening upsurge in the use of "crack," a form of cocaine that is smoked. "Crack" reaches the brain within seconds, producing a sudden and intense high and a fierce craving to use it again and again, a phenomenon that has been called "instant addiction."

The most effective weapon we have against drug abuse is to dry up demand by spreading knowledge about its ruinous effects. Across the country, individuals and organizations have discovered the power of united action. The "peer pressure" that so often has been used to snare the unwary into "experimenting" with drugs is now being used to build resistance. Youth-led groups are in the forefront of our national crusade to rid our country of this evil. The vigorous action of parents, religious and community leaders, teachers, doctors, counselors, and young people themselves with their commitment of time, energy, and love, has been an inspiration to all of us. Public education media campaigns have also been effective in motivating people to "Just Say No." A major portion of the Federal drug abuse prevention effort is directed toward continued research into the deleterious effects of drugs and getting this information out to those who can use it most effectively.

Our society at every level must develop an absolute intolerance for illegal drugs. Everyone has a part to play in this crusade: parents, teachers, health care professionals, youth workers, and celebrities in entertainment, sports, and other fields. All America must speak with one voice. We must

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(OVER)

teach our young people to say "no" to the degradation of drugs and "yes" to the bright promise of a drug-free America. This is a battle for liberty from the enslavement of drug addiction. We can win. We must win. With God's help and a united people, we shall win.

The Congress, by Senate Joint Resolutions 354 and 386, has designated the week of October 5 through October 11, 1986, as "National Drug Abuse Education and Prevention Week," and October 6, 1986, as "National Drug Abuse Education Day," and authorized and requested the President to issue a proclamation in observance of these events.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the week of October 5 through October 11, 1986, as National Drug Abuse Education and Prevention Week, and October 6, 1986, as National Drug Abuse Education Day. I call upon the people of the United States to participate in drug abuse education and prevention programs in their communities. I encourage parents and children to talk and work together to prevent drug abuse in the family and to dedicate themselves to the goal of a drug-free America.

IN WITNESS WHEREOF, I have hereunto set my hand this sixth day of October, in the year of our Lord nineteen hundred and eighty-six, and of the Independence of the United States of America the two hundred and eleventh.

RONALD REAGAN

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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

October 6, 1986

REMARKS BY THE PRESIDENT
AT KICKOFF CEREMONY FOR
NATIONAL DRUG ABUSE EDUCATION
AND PREVENTION WEEK

Rose Garden

10:50 A.M. EDT

THE PRESIDENT: Well, it's good to see all of you here today as we kick off National Drug Abuse Education and Prevention Week. On March 6, 1981 in my second press conference as President, I said that to be effective in stopping illegal drugs, we had to focus on the user. And today, our national crusade against the use of illegal drugs is gaining a powerful momentum.

All of you who have stood at the front lines in our fight against drug abuse for the past several years have watched our numbers growing. Thousands have come forward and volunteered; many are here today. The commitment that each of you brings to our nation and our future is a powerful force for good that no one should underestimate.

The will of the American people is being heard. We will no longer watch as illegal drugs infiltrate our schools, invade our factories and terrorize our citizens. We will no longer tolerate this insidious evil threatening our values and undercutting our institutions.

Parents across the nation have led the way in an unyielding attack on drug abuse. Aggressive corporate and school measures to end drug abuse have met with strong support from workers, students and the community. The media has focused its spotlight on the issue, and the private sector is pitching in to raise awareness across our nation to the perils of drug abuse. Most importantly, our young people, encouraged by a growing public outcry and their own strength of conviction, are forming peer support groups in opposition to drug use.

The expansive efforts by all levels of government, by the business community, by civic and social organizations and most importantly, by concerned individuals, are making a difference. After five years of aggressive enforcement, and a massive public awareness campaign, public attitudes are clearly against the use of illegal drugs, and drug awareness is at an all-time high.

A new understanding is evident: drug abuse is not a private matter. Using illegal drugs is unacceptable behavior. And the costs are paid by all of society. There's still much to be done. Misconceptions and misunderstanding still exist. There are those who will still debate

whether marijuana is dangerous, or whether cocaine can kill, or whether illegal drugs are really a threat to our nation. But increasing numbers of individuals are looking at the facts and the facts are simply not debatable -- illegal drugs are deadly.

We are on the right track. Slowly the wall of denial is crumbling down, and we've come to the time when the American people are willing to make it clear that illegal drug use will no longer be tolerated.

I'm proud to say that, from the early days of our administration, Nancy's been involved in a personal crusade to end drug abuse by children. She set the tone for the national crusade against drug abuse when she said, "There is no moral middle ground. Indifference is not an option. We want you to help us create an outspoken intolerance for drug use." Did I get it right? (Laughter.)

THE FIRST LADY: Yes. You got it right.

THE PRESIDENT: Earlier today, I signed a proclamation designating the week of October 5th through October 11th as National Drug Abuse Education and Prevention Week and today, October 6th, 1986, as National Drug Abuse Education Day. I'm calling on each American to seek every opportunity to educate yourself and others about drug abuse, to be strong in your intolerance of illegal drug use and firm in your commitment to a drug-free America.

We must show our intolerance for illegal drugs. And it's only by being tough that we can be compassionate, that we can reach out to the user and force him to quit using. It's only by being tough that we can say to the potential user, do not ever start.

As we begin National Drug Abuse Education and Prevention Week, the federal government is also entering into the spirit of the national crusade for a drug-free America by working toward a drug-free workplace. I'm forwarding a memorandum to the head of all executive departments and agencies, along with my personal communication to each and every Executive Branch employee, calling upon them to take a leading role in eliminating the use of illegal drugs. And this includes doing all in their power to increase public awareness and prevention of drug abuse.

I strongly believe that if this battle is to be won -- and it must be won -- each and every one of us has to become aware of the tremendous cost of illegal drugs and then take a stand and get involved.

Our stand may be as simple as not tolerating illegal drug use at a party, or as complex as implementing a strong drug-free policy for a major corporation. Both approaches are effective and both are essential.

When we all come together, united and committed, then those who are killing America and terrorizing it with slow but sure chemical destruction, will see that they are up against the mightiest force for good that we know -- the compassionate, but firm resolve of the American people. And then, they will have no dark alleyways to hide in.

So, the week has started and the crusade is on and -- thank you and God bless you all. (Applause.) Thank you.

Q Mr. President, is Mrs. Reagan going to Iceland?

Q Are you going to Iceland?

Q Is Mrs. Reagan going to Iceland?

THE PRESIDENT: No.

MORE

THE FIRST LADY: No.

Q Why not? (Laughter.)

Q Mrs. Gorbachev will be there.

Q The women are interested in the topics of the summit, are they not?

Q How do you feel, Mrs. Reagan?

THE FIRST LADY: Fine, thank you.

END

10:56 A.M. EDT

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

October 6, 1986

October 4, 1986

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Federal Initiatives for a Drug-Free America

In furtherance of our policy against drug abuse, I have approved several initiatives that require the support and commitment of all department and agency heads and their senior staff members.

One of our goals is a drug-free workplace in the Federal government, in State and local governments, and in private companies, including those that contract with the government. To help achieve this goal, you should:

- o Develop a plan in accordance with Section 2 of Executive Order 12564, which I signed on September 15, 1986. Your plan should consider the rights of the government, the employee, and the public, addressing special concerns posed by employment that involves national security or public health and safety. It should include steps, as outlined in the Executive Order, for expanding drug abuse awareness and prevention among Federal employees; for identifying employees, and applicants for employment, who use illegal drugs; and for assisting and, as necessary, disciplining such employees who use illegal drugs.
- o Make each employee aware of the health, economic, and social costs of illegal drug use, assist employees in recognizing and combatting illegal drug use in the workplace and in homes and communities, and ensure that each employee is aware that unauthorized possession of a controlled substance is a crime.
- o Encourage your counterpart leaders in State and local governments to free their workplaces from illegal drug use.

To assist you, the Secretary of Health and Human Services and the Director of the Office of Personnel Management will provide information about the effects of drug abuse, guidelines for drug testing and treatment, training of supervisory personnel, and technical assistance in support of Employee Assistance Programs. The Attorney General will be prepared to render legal assistance.

The Secretary of Health and Human Services will establish a "Drug-free Workplace Helpline" to answer questions government and private sector organizations may have about drug abuse.

The Secretary of Labor will work with labor leaders to promote our goal of drug-free workplaces, develop and disseminate a "what works" booklet on Workplaces Without Drugs, and make available a team of experts to assist management and unions in establishing drug prevention programs.

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(OVER)

Another of our goals is drug-free schools. To achieve this goal:

- o The Secretary of Education, as national advocate for drug-free schools, will work with educators, parents, students, and others to ensure that everything possible is done to protect our children from the dangers of illegal drugs. The Secretary of Education will disseminate drug-related educational materials such as the booklet Schools Without Drugs.
- o The Attorney General and the Secretary of Education will work together to ensure that local law enforcement officials and school authorities cooperate in discouraging illegal drug use and in prosecuting the so-called "school yard laws" against distribution or manufacture of drugs around school property.
- o The Secretary of Defense and the Secretary of Education will work together to develop a model drug prevention program in Department of Defense schools.

Since rehabilitation of illegal drug users is a cornerstone of our policy, another goal is expansion of drug treatment and research. To achieve this:

- o The Secretary of Health and Human Services will take the lead in encouraging States and communities to develop programs to treat specific drug-related health problems. This will be achieved by seeking an emergency expansion of services in facilities that treat drug-related health problems, and by establishing community systems development projects.
- o The Secretary of Health and Human Services will also expand research in health-related areas such as drug testing, and bolster medical and health prevention programs by establishing a Center for Substance Abuse Prevention.
- o The Secretary of Health and Human Services and the Director of the Office of Personnel Management will provide appropriate information and technical assistance to department and agency heads regarding rehabilitative services for Federal employees.

We also have as a goal to increase public awareness and prevention of drug abuse. To achieve this goal, I hope you will:

- o Encourage all citizens and private sector organizations to develop and participate in drug abuse awareness and prevention campaigns, such as "Just Say No."
- o Encourage corporations, service organizations, and the media with which you interact to stimulate development of innovative community-based prevention programs and to develop prevention programs within their organizations.

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- o Provide leadership to ensure that Americans have access to accurate and effective information about illegal drugs and strategies for getting drugs out of their homes, schools, workplaces, communities, and the Nation. The proposed Center for Substance Abuse Prevention, in the Department of Health and Human Services, will provide a toll-free number for technical assistance and referrals and will manage a speakers' bureau on illegal drug use prevention.

The Secretary of Housing and Urban Development will take the lead in an effort to reduce the level of illegal drug activity in public housing authorities, and will work with the Secretary of Health and Human Services, the Secretary of Labor, and the Attorney General to achieve drug-free housing developments.

The Secretary of Transportation will take the lead in an effort to ensure safe transportation of people and goods, and will work with the Secretary of Health and Human Services, the Secretary of Education, and the Attorney General to promote regulatory changes, drug-testing, prevention, and education leading to a drug-free transportation system.

I have enclosed a personal message for Executive Branch employees about our new drug abuse initiatives. Please ensure that each employee in your organization receives a copy, and feel free to communicate an additional personal message of your own.

You should institute actions on the above initiatives immediately, using existing resources or reallocating resources where necessary. I will ask for periodic progress reports through the Domestic Policy Council to ensure that we are moving toward our goal of a drug-free America.

RONALD REAGAN

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WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

O - OUTGOING

H - INTERNAL

I - INCOMING

Date Correspondence Received (YY/MM/DD) 1 1



Name of Correspondent: David Chew

MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: Memorandum for Department Heads Re: Federal Drug Initiatives

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>cuhall</u>	ORIGINATOR	<u>86109130</u>		<u>C</u>	<u>8610101</u>
	Referral Note:	<u>for PGW signature</u>			
<u>cuat28</u>	<u>D</u>	<u>86109130</u>		<u>C</u>	<u>8610101</u>
	Referral Note:	<u>5pm</u>			
<u>cuwall</u>	<u>S</u>	<u>8610101</u>		<u>C</u>	<u>8610101</u>
	Referral Note:	<u>Oct 1 86 PGW memo to Ralph Platon</u>			
		<u>1 1</u>			<u>1 1</u>
	Referral Note:				
		<u>1 1</u>			<u>1 1</u>
	Referral Note:				

ACTION CODES:

- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure

- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:

- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:

- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
 Send all routing updates to Central Reference (Room 75, OEOB).
 Always return completed correspondence record to Central Files.
 Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

THE WHITE HOUSE

WASHINGTON

October 1, 1986

MEMORANDUM FOR RALPH C. BLEDSOE
SPECIAL ASSISTANT TO THE PRESIDENT FOR POLICY
DEVELOPMENT

FROM: PETER J. WALLISON **ORIGINAL SIGNED BY PJW**
COUNSEL TO THE PRESIDENT

SUBJECT: Revised Memorandum for Department Heads Re:
Federal Drug Initiatives

Counsel's office has reviewed the above-referenced memorandum
and has no objections or comments.

PJW:RMK:dnh 10/1/86

cc: PJWallison✓
RMKruger
chron.

THE WHITE HOUSE

WASHINGTON

October 1, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: ROBERT M. KRUGER *RMK*

SUBJECT: Revised Memorandum for Department Heads Re:
Federal Drug Initiatives

I have reviewed the above-referenced memorandum and recommend that it be approved. The edits I indicated on Monday afternoon's draft have been incorporated.

A memorandum to Ralph Bledsoe is attached for your review and signature.

Attachment

WHITE HOUSE STAFFING MEMORANDUM

DATE: 9/30/86 ACTION/CONCURRENCE/COMMENT DUE BY: 10/1/86

SUBJECT: MEMORANDUM FOR DEPARTMENT HEADS RE: FEDERAL DRUG INITIATIVES

	ACTION FYI			ACTION FYI	
VICE PRESIDENT	<input type="checkbox"/>	<input type="checkbox"/>	MILLER - ADMIN.	<input checked="" type="checkbox"/>	<input type="checkbox"/>
REGAN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	POINDEXTER	<input checked="" type="checkbox"/>	<input type="checkbox"/>
MILLER - OMB	<input checked="" type="checkbox"/>	<input type="checkbox"/>	RYAN	<input type="checkbox"/>	<input type="checkbox"/>
BALL	<input checked="" type="checkbox"/>	<input type="checkbox"/>	SPEAKES	<input type="checkbox"/>	<input checked="" type="checkbox"/>
BARBOUR	<input type="checkbox"/>	<input type="checkbox"/>	SPRINKEL	<input type="checkbox"/>	<input type="checkbox"/>
BUCHANAN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	SVAHN	<input checked="" type="checkbox"/>	<input type="checkbox"/>
CHEW	<input type="checkbox"/> P	<input checked="" type="checkbox"/> SS	THOMAS	<input checked="" type="checkbox"/>	<input type="checkbox"/>
DANIELS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	TUTTLE	<input type="checkbox"/>	<input type="checkbox"/>
HENKEL	<input type="checkbox"/>	<input type="checkbox"/>	WALLISON	<input checked="" type="checkbox"/>	<input type="checkbox"/>
KING	<input type="checkbox"/>	<input type="checkbox"/>	TURNER	<input checked="" type="checkbox"/>	<input type="checkbox"/>
KINGON	<input type="checkbox"/>	<input checked="" type="checkbox"/>	CLERK	<input type="checkbox"/>	<input checked="" type="checkbox"/>
MASENG	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>

REMARKS: Please provide any comments/recommendations on the attached memorandum directly to Ralph Bledsoe (x6640) by close of business Wednesday, October 1st, with an info copy to my office. Thank you.

RESPONSE:

THE WHITE HOUSE

WASHINGTON

September 30, 1986

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Federal Initiatives for a Drug-Free America

In furtherance of our policy against drug abuse, I have approved several initiatives which require the support and commitment of all department and agency heads and their senior staff members.

One of our goals is a drug-free workplace in the Federal government, in states and local governments, and in private companies, including those that contract with the government. To help achieve this goal, you should:

- o Develop a plan in accordance with Section 2 of Executive Order 12564, which I signed on September 15, 1986. Your plan, as prescribed by the Executive Order, should consider the rights of the government, the employee, and the public, addressing the special concerns posed by employment which involves national security or public health and safety. It should include steps for expanding drug abuse awareness and prevention among Federal employees, identifying and rehabilitating employees who use illegal drugs, and preventing the hiring of people who use illegal drugs.
- o Make each employee aware of the health, economic, and social costs of illegal drug use, assist employees in recognizing and combatting illegal drug use in the workplace and in homes and communities, and ensure that each employee is aware that unauthorized possession of a controlled substance is a crime.
- o Encourage your counterpart leaders in state and local governments to free their workplaces from illegal drug use.

To assist you, the Secretary of Health and Human Services and the Director of the Office of Personnel Management will provide information about the effects of drug abuse; guidelines for drug testing and treatment; training of supervisory personnel; and technical assistance in support of Employee Assistance Programs.

The Secretary of Health and Human Services will establish a "Drug-free Workplace Helpline" to answer questions government and private sector organizations may have about drug abuse.

The Secretary of Labor will work with labor leaders to promote our goal of drug-free workplaces; develop and disseminate a "what works" booklet on Workplaces Without Drugs; and make available a team of experts to assist management and unions in establishing drug prevention programs.

Another of our goals is drug-free schools. To achieve this goal:

- o The Secretary of Education, as national advocate for drug-free schools, will work with educators, parents, students, and others to ensure that everything possible is done to protect our children from the dangers of illegal drugs, and will disseminate drug-related educational materials such as the booklet Schools Without Drugs.
- o The Attorney General and the Secretary of Education will work together to ensure that local law enforcement officials and school authorities cooperate in discouraging illegal drug use, and in prosecuting the so-called "schoolyard laws" against distribution or manufacture of drugs around school property.
- o The Secretary of Defense and the Secretary of Education will work together to develop a model drug prevention program in Department of Defense schools.

Since rehabilitation of illegal drug users is a cornerstone of our policy, another goal is expansion of drug treatment and research. To achieve this:

- o The Secretary of Health and Human Services will take the lead in encouraging states and communities to develop programs to treat specific drug-related health problems, by seeking an emergency expansion of services in facilities that treat drug-related health problems, and by establishing community systems development projects.
- o The Secretary of Health and Human Services will also expand research in health-related areas such as drug testing, and bolster medical and health programs aimed at prevention, by establishing a Center for Substance Abuse Prevention.
- o The Secretary of Health and Human Services and the Director of the Office of Personnel Management will provide appropriate information and technical assistance to department and agency heads regarding rehabilitative services for Federal employees.

We also have as a goal to increase public awareness and prevention of drug abuse. To achieve this goal, I hope you will:

- o Encourage all citizens and private sector organizations to develop and participate in drug abuse awareness and prevention campaigns, such as "Just Say No".
- o Encourage corporations, service organizations and the media with which you interact to stimulate development of innovative community-based prevention programs and to develop prevention programs within their organizations.

- o Provide leadership to ensure that Americans have access to accurate and effective information about illegal drugs and strategies for getting drugs out of their homes, schools, workplaces, communities and the nation. The proposed Center for Substance Abuse Prevention, in the Department of Health and Human Services, will provide a toll-free number for technical assistance and referrals, and will manage a speakers' bureau on illegal drug use prevention.

The Secretary of Housing and Urban Development will take the lead in an effort to reduce the level of illegal drug activity in public housing authorities. He will work with the Secretary of Health and Human Services, the Secretary of Labor and the Attorney General to achieve drug-free housing in housing developments.

I have enclosed a personal message for Executive Branch employees about our new drug abuse initiatives. Please ensure that each employee in your organization receives a copy, and feel free to communicate an additional personal message of your own.

You should institute actions on the above initiatives immediately, using existing resources where possible. I will ask for periodic progress reports through the Domestic Policy Council to ensure that we are moving toward our goal of a drug-free America.

For the Drug Policy
Program 10/86 - 1/87
vault file

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DRUG PREVENTION LITIGATION REPORT



ISSUE 9
OCTOBER 6, 1987

U.S. Department of Justice
Civil Division

Executive Summary

D.C. District Court Finds DOT's Drug Testing Plan Fully Constitutional.

President Reagan's Executive Order for a Drug-Free Workplace won an important challenge on September 30, 1987, when Judge Gesell of the U.S. District Court for the District of Columbia upheld the Department of Transportation's (DOT) drug testing program as constitutional, denying plaintiffs motion for a preliminary injunction and granting the government's motion for summary judgment.

The decision marks the first time a court has addressed the issue of drug testing under Executive Order 12564, 51 Fed. Reg. 32889 (1986). Although earlier victories, including NTEU v. von Raab, 816 F.2d 170 (5th Cir. 1987), petition for cert. filed, 55 U.S.L.W. 1879 (June 1, 1987), found that drug testing without individualized suspicion is reasonable under the fourth amendment, this ruling specifically resolves the same issue with regard to the President's Executive Order. Judge Gesell found that the program "reflects a high degree of concern for employee privacy interests and * * * is carefully tailored to assure a minimum of intrusion."

Although many of the employees subject to random testing under the DOT plan hold safety-related positions, such as air traffic controllers, aviation inspectors, and aircraft mechanics, the court also upheld random testing for several new job classifications: nurses, electronic technicians and fire fighters. Consistent with the von Raab decision, the court also upheld random testing for armed law enforcement officers and personnel with "top secret" security clearances.

The opinion forcefully vindicates the United States's position that those who use illegal drugs are not necessarily "handicapped" under the Rehabilitation Act, 29 U.S.C. §701. The court dismissed the Rehabilitation Act argument in a footnote as "not significant" and went on to emphasize that "[e]ven if a drug user is considered handicapped, freedom from drug effects is a proper standard governing critical jobs."

Finally, the court rejected all of AFGE's core arguments. AFGE claimed: (1) that the true purpose of testing was law enforcement, not safety and security; (2) that testing was ineffective; and (3) that recent drug use does not show job impairment. Judge Gesell concluded that these arguments were "not supported in the factual record."

A copy of the AFGE v. Dole, 87-1815 (D.D.C. September 30, 1987) opinion is attached. AFGE is expected to appeal the ruling.

Drug Testing of Public Employees Still Alive in New York.

Earlier this year, New York state's highest court appeared to have stalled efforts to institute drug testing without individualized suspicion of New York state employees. Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 517 N.Y.S.2d 456 (1987), held that probationary teachers could not be tested as a condition of receiving tenure in the absence of reasonable suspicion. However, an intermediate appeals court recently held that applicant testing for subway conductors of the New York Transit Authority is fully constitutional in In Re Dozier v. New York City, Slip Op. 2319E, App.Div. 2d, (1987). Further exceptions are expected to be carved out of the Patchogue ruling.

Tennessee Valley Authority Drug Testing Upheld

In a highly publicized case involving reasonable suspicion testing of TVA employees, a Tennessee federal district court upheld disciplinary sanctions against those employees who tested positive.

President's Federal Drug Testing Program Moving Forward

Substantial progress has been made toward establishing the federal drug testing program in the wake of legislative requirements imposed last summer. Specifically, a Model Drug-Free Workplace Plan was developed and presented at a government-wide three day conference in Charlottesville, Virginia on September 14-16 and the HHS Scientific and Technical Guidelines

were published in the Federal Register on August 14, 1987, 52 Fed. Reg. 30638 (1987).

From the interest generated by nearly 200 high-level executive branch attendees, it appears that most agencies will meet the deadline of October 15, 1987 to submit their agency plans for final review. Copies of the Model Plan may be obtained by contacting Nanette R. Everson, Special Counsel to the Assistant Attorney General, Department of Justice, Room 3611, 10th and Constitution Ave., N.W., Washington, D.C. 20530 or by calling (202) 633-1258.

Justice Department Issues Own Drug-Free Workplace Plan

On September 25, 1987, Attorney General Edwin Meese III signed the Department of Justice Drug-Free Workplace Plan to implement President Reagan's Executive Order in the Department of Justice. The Plan is effective immediately for four Justice components, the Federal Bureau of Investigation, the Bureau of Prisons, the Drug Enforcement Administration, and the Immigration and Naturalization Service. The Department's remaining Offices, Boards and Litigating Divisions as well as the U.S. Marshals may proceed later in the year in accordance with certain legislative requirements.

Highlights

Decisions - Federal Participation

Page

- o District court upholds reasonable suspicion testing by TVA 1

- o District court upholds post-accident and reasonable suspicion testing against postal employee 1

Decisions - No Federal Involvement

- o Eleventh Circuit upholds reasonable suspicion testing of firefighter 2

- o District court strikes down random testing of prison guards; Motion for new trial pending 2

- o District court strikes down random testing of bus drivers 3

- o New York intermediate court upholds applicant testing for subway conductors 3

Decisions - Federal Participation

- o Smith v. White, Slip Ops. Civ-1-87-187, Civ-1-87-193 (E.D. Tenn. Aug. 11, 1987).

Upholding reasonable suspicion testing by the Tennessee Valley Authority (TVA), the court emphasized that, "[t]he governmental interest in having a drug free work force to protect and operate the most vital areas of a nuclear power plant is patently obvious." Leaving open the issue of whether suspicion must be individualized, the court found that the search of the employees was "reasonable both in its inception and in its scope," and that, "any privacy interests the plaintiffs may have had here are outweighed by the governmental need to insure a drug free security force at a nuclear power plant."

- o Cobbs v. Tisch, Slip Op. 87-0295-R (E.D. Va. Sept. 23, 1987).

Upholding reasonable suspicion and post-accident testing of a U.S. Postal Service employee without notice and without a prior policy established. The employee had sustained 12 on-the-job injuries in an eleven-year period. The court did not address the Fourth Amendment issue.

Decisions - No Federal Involvement

- o Everett v. Napper, 825 F.2d 341 (11th Cir. 1987).

Upholding the policy of reasonable suspicion testing against a firefighter who refused to submit to testing, the court found that, "the Bureau of Fire Services has a strong and legitimate interest in protecting the public safety and welfare by insuring that its employees are fit to perform their duties. Drug use among firefighters could affect fitness and performance thereby threatening the safety and welfare of the community."

- o Taylor v. Hardiman, Slip Op. 86 C 7179 (N.D. Ill. Sept. 22, 1987).

Striking down unannounced annual testing of prison guards and other correction employees as violative of the fourth amendment. The court found that relatively few employees were drug users, that a positive test did not show job impairment, that chronic users could avoid detection, and that less invasive procedures were available to detect drug use.

o Amalgamated Transit Union v. Sunline Transit Agency, Slip Op. CV 86-8270 Rg(Gx) (C.D. Cal. July 7, 1987).

Striking down a random drug testing program of bus drivers and maintenance workers as "unreasonable" under the Fourth Amendment. The court noted that the Agency "only employs 50 people and this small group can be monitored by a less draconian program than presented here." However, the court noted that it "can conceive of certain mass-transit settings where mandatory drug and alcohol testing would be reasonable under a more generalized quantum of proof."

o In Re Dozier v. New York City, Slip Op. 2319E, App.Div. 2d, (1987).

Three applicants for subway conductors were denied employment by the New York City Transit Authority after testing positive for illegal drugs during their physical exam. They challenged the testing on substantive due process grounds under the fourteenth amendment, arguing that the tests did not show they were impaired, and that the testing was done without proper notice.

Upholding the testing as reasonable because sufficient notice of drug testing was given, the court concluded that, "[d]rug testing done as part of a routine or required medical examination for new applicants does not implicate the same considerations of intrusiveness, intimidation or embarrassment as drug testing of employees on the job."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFO-CIO, ET AL.,

Plaintiffs,

v.

ELIZABETH H. DOLE,
Secretary, Department of
Transportation,

Defendant.

Civil Action No. 87-1815

FILED

SEP 30 1987

JAMES F. DAVEY, Clerk

MEMORANDUM

This is a suit to enjoin the Department of Transportation ("DOT") from continuing to carry out its random drug testing plan¹ developed under authority of Executive Order 12,564 captioned "Drug-Free Federal Workplace." Exec. Order No. 12,564, 3 C.F.R. 224 (1987). Plaintiff ("AFGE") is a labor union representing certain employees subject to the DOT plan which was announced June 29, 1987, and went into effect September 8, 1987.

DOT has moved for summary judgment and in opposing, AFGE has moved for a preliminary injunction, which in turn is opposed by DOT. Extensive papers have been filed and all issues were fully argued.²

¹"Drug-Free Departmental Workplace," U.S. Dep't of Transportation, June 29, 1987.

² The chronology of this litigation is as follows: AFGE filed the complaint on July 7, 1987 and DOT promptly filed an answer on July 15, 1987. On July 30, DOT moved for summary

The DOT plan under attack here supplements other DOT drug programs for testing certain employees at time of employment and at intervals scheduled well in advance by providing for random urinalysis testing of certain employees in sensitive positions.³ Only employees having critical jobs and falling in Category I are subject to this random testing. These employees are in jobs concerned with public health, safety, national security, and law enforcement; jobs which involve duties calling for the highest degree of trust and confidence. Each critical position subject to random testing is supported by a written justification statement describing why the job is critical and what would happen if an incumbent used illegal drugs. These justifications

judgment and AFGE obtained an extension to respond by August 21, with DOT subsequently replying on August 31.

On August 6, AFGE was advised that if a motion for preliminary injunction were to be filed it could in the Court's absence be heard by the motions judge before Labor Day. AFGE did not file its motion for preliminary injunction until August 21, when responding to defendant's motion for summary judgment. DOT promptly responded in opposition on August 31, and AFGE replied on September 11. Oral argument was heard on Monday, September 14, 1987.

³ Employees in these positions are chosen for random testing through haphazard neutral computer selection. At varying times "from month to month" a list of employees to be tested is randomly selected. Declaration of Melissa J. Allen, Deputy Assistant Secretary for Administration of the Dept. of Transportation, Defendant's Exhibit J at para. 12. All employees subject to random testing have an equal statistical chance to be chosen for each testing list without regard to previous selections. Id. This type of testing is unannounced and could occur on any scheduled workday, apparently once a month, although the number to be involved is not clear from the record. See "Drug-Free Departmental Workplace," U.S. Dep't of Transportation, ch. III, § 4, p. III-2, June 29, 1987.

are subject to review and are monitored by an Assistant Secretary. Jobs from GS-4 to GS-14 and equivalents are covered, thus including both union and non-union supervisory employees.

Ninety-four percent of the employees covered hold aviation-related positions such as air traffic controllers, electronic technicians, aviation safety inspectors and aircraft mechanics. In addition, fire fighters, nurses, railroad safety inspectors, armed law enforcement officers and "top secret" security clearance personnel are among those subject to random testing. Testing is under considerate procedures reflecting regard for personal privacy.⁴ No criminal use will be made of the results and no discipline other than an offer of rehabilitation service will occur if a first-time random urinalysis test is positive.⁵ All disciplinary actions that may occur upon further testing are subject to the Civil Service Reform Act of 1978. 5 U.S.C. § 1201

⁴ The Department testing plan is in strict accordance with the mandatory policies and procedures outlined in the "Scientific and Technical Guidelines for Drug Testing Programs" issued by the Alcohol, Drug Abuse and Mental Health Administration, Department of Health and Human Services, on February 13, 1987 (changed language July 20, 1987). ___ Fed. Reg ___ (1987).

⁵ Before any official action is taken, positive test results are first reported to the Medical Review Officer ("MRO"). The MRO, in turn, contacts the employee and gives him or her the opportunity to explain the test results as well as reviewing medical records submitted by the employee or any other relevant biomedical factors necessary to determine whether there is a legitimate medical explanation for the positive result. If the MRO determines that a legitimate medical explanation exists, the test results may be reported as negative. Thus, for example, an employee who uses a spouse's prescription medication without medical consultation for a similar ailment and tests positive would be given the opportunity to provide a legitimate medical explanation for the test results.

et seq. (1982 & Supp. III 1985).

To support its sweeping facial challenge to DOT's random drug testing plan, AFGE relies primarily on the Fourth Amendment to the Constitution,⁶ asserting that under the facts and circumstances shown by the affidavits and materials filed, random testing constitutes an unreasonable search.⁷ Elaborating, the Union points, among other things, to the admitted lack of probable cause, the lack of indisputable evidence that drug use always impairs employee performance, the lack of results procured in other non-random testing and the excessive intrusion upon privacy which arbitrarily results.

⁶ The nonconstitutional claims are not significant. Even if a drug user is considered handicapped, freedom from drug effects is a proper standard governing critical jobs. See Heron v. McGuire, 803 F.2d 67 (2nd Cir. 1986) (per curiam). This has long been accepted in these critical jobs with few exceptions and, accepting the agency's expert's view that drug use will injure job performance, there is nothing arbitrary or unreasonable in pursuing a drug-free workplace for such employees through random testing. Moreover, the tests are scientifically pointed to current drug usage (i.e., use within several days or hours prior to testing) and do not offend The Drug Abuse Office and Treatment Act. 42 U.S.C. § 290ee-1(c)(1) (Supp. III 1985). Under the test laid down by this Circuit, probable cause is not required where a governmental employee's drug usage might endanger public health or safety and criminal sanctions following a positive test are not contemplated. See Nat'l Fed'n of Fed. Employees v. Weinberger, 818 F.2d 935, 942-43 & n.12 (D.C. Cir. 1987).

⁷ There were no formal rule-making proceedings since the plan involves an internal personnel policy and AFGE has undertaken no formal discovery. See 5 U.S.C. § 553 (a)(2) (1982) (notice of proposed rulemaking shall be published "except to the extent that is involved - . . . (2) a matter relating to agency management or personnel . . ."); Stewart v. Smith, 673 F.2d 485 (D.C. Cir. 1982).

The Court clearly has jurisdiction to consider this constitutional challenge. There is no question that mandatory random urine testing is a search within the meaning of the Fourth Amendment under the controlling law of this Circuit, as the guiding precedent, Nat'l Fed'n of Fed'l Employees v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987), makes clear. However, the Amendment only prohibits "unreasonable" searches, and accordingly the focus of the drug testing case, like other Fourth Amendment testing cases, is factual, requiring the Court to balance factors bearing on reasonableness.⁸

National Federation of Federal Employees v. Weinberger, 818 F.2d 935 (D.C. Cir. 1987), deals with a urinalysis drug testing program involving civilian employees of the Department of Defense. The Court emphasized that the balancing function concerns the "employees' reasonable expectations of privacy" considered against the "'government's interest in the efficient and proper operations of the work place.'" Id. at 942 (citations omitted).

As to the employees' privacy expectations, relevant factors include the nature and quality of the intrusion or search and whether employees have had reasonable advance notice and, of course, familiarity with testing safeguards and procedures of the

⁸ See, e.g., Nat'l Employees Treasury Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987); McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Local 1812, American Fed'n of Gov't Employees v. Dep't of State, 622 F.Supp. 50 (D.D.C. 1987).

plan after its effective date. In this situation 60 days' advance notice was given. Moreover, most employees subject to the random testing have had their urine tested for drug use at various times during their employment at scheduled intervals. The random testing is obviously somewhat more intrusive than the scheduled testing since it occurs in the midst of a day's work, and necessarily focuses special attention on a particular employee whose name crops up through chance computer selection.⁹ Testing itself is discreet and private.

On the other side of the balance the Court must consider issues raised in the litigation which go to the government's justification for its random testing plan. These involve: considering whether the search was justified at its inception, whether there are reasonable grounds to suspect work related drug use will be uncovered, whether those subjected to the test, generally speaking, are only those who in fact occupy critical positions affecting safety and security and whether use of illegal drugs is likely to impair a critical employee's work efficiency.

AFGE contends:

(1) that the true purpose of the testing is law enforcement, not safety and security;

⁹ This possible "shock" aspect can be minimized if the random, nonspecific nature of the testing is explained clearly at the time it occurs, emphasizing the lack of specific cause both to the employee selected and others in the workplace who become aware of the testing.

(2) that based on past experience the testing will not prove productive;

(3) that many subjected to random testing are not, in fact, in critical jobs; and

(4) that recent drug use, medically speaking, cannot necessarily be shown to affect employment efficiency.

These positions are not supported in the factual record before the Court insofar as they may have legal relevance to the challenged testing personnel policy announced. They are considered seriatim below:

(i) No ulterior motive was established. DOT simply realized that illegal drug use has not been eliminated by criminal law enforcement and felt an obligation to protect public safety and to gain confidence for its programs. Tests are not used for criminal law enforcement purposes.

(ii) The fact that testing after substantial advance notice has not resulted in many positive urine samples bears little or no relationship to what may occur from random testing. The prospect of a random test may well itself be prophylactic and scheduled testing gives no measure of the random programs effectiveness.

(iii) AFGE presented no proof in support of its claim that noncritical jobs are involved. The three examples used by plaintiff in its brief proved fully justified within the

program.¹⁰

(iv) DOT presented proof that drug use, at the level sought by testing generally impairs the normal functioning of employees.

Thus, on balance, the preponderance of the proof supports the reasonableness of the random plan. DOT's duty to assure the integrity of its sensitive aviation and other critical jobs and to protect the public safety is undisputed. The plan reflects a high degree of concern for employee privacy interests and is carefully tailored to assure a minimum of intrusion. The plan must be sustained against this generalized facial attack.

¹⁰ AFGE cites, in cursory fashion, three examples in its brief of positions within Category I it claims are not safety or security sensitive -- mail van operator, Federal Railroad Administration Hazardous Material Inspector and FAA aircraft mechanic. Affidavits from Operating Element heads who must file job category justification statements effectively refute these contentions. Hazardous materials inspectors are "exposed to poisonous, explosive, and highly flammable commodities that could be leaking from rail cars or containers, or suddenly ignited by improper handling." Declaration of Melissa J. Allen, Deputy Assistant Secretary for Administration of the Department of Transportation, Defendant's Exhibit J at para. 11(d). Aircraft mechanics in the Department's Coast Guard and FAA perform a variety of tasks involving the installation, inspection and maintenance of aviation equipment and "failure to perform properly any of these duties could result in an aircraft crash." Id. at para. 11(e). Finally, as to the motor vehicle operators in the Department, all operators are subject to background investigations and have either a "Top Secret" or "Secret" security clearance. Declaration of Gary McCullough, Deputy Chief, Personal Property Division, Office of Administrative Services and Property Management, Defendant's Exhibit N at para. 4. These drivers perform tasks including: transportation of visiting foreign dignitaries and key DOT officials, carrying classified documents and driving shuttle buses -- all either safety or security related duties. Id.

There is no proof of any results from a single random test under the plan or indeed that one has occurred. The written justification for each job in the critical category was not produced by either side. Thus the broad facial challenge to the entire plan has come to the Court in an incomplete and untested context. Given the sparse record and perhaps premature nature of the attack, the Court's conclusion leaves open the way for a later, more specific challenge clearly directed to a job category or to the beneficial or ineffective nature of the random program after its effectiveness can be measured by ample experience.

In view of the limited form in which this matter has been presented and to guarantee more informed review should a more specific, discrete claim be later advanced to some aspect of the plan as it develops, the Secretary shall maintain full records of each random test and subsequent personnel actions taken and it will be highly advisable to develop more precise procedures for informing any individual selected for a random test while safeguarding the employee against any possibility of misunderstanding in his immediate work place as to the circumstances under which the particular employee has been singled out.

AFGE has failed to support its challenge to the random drug testing plan or to demonstrate that the individual plaintiffs should be exempted by reason of the nature of their duties. The random urine drug testing plan is reasonable on its face and must be sustained at this stage. Summary judgment is granted for the

Secretary and AFGE's motion for preliminary junction is denied. The complaint is dismissed. An appropriate Order is filed herewith.


UNITED STATES DISTRICT JUDGE

September 30, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
Plaintiffs,

v.

ELIZABETH H. DOLE, Secretary
DEPARTMENT OF TRANSPORTATION,
Defendant.

Civil Action No. 87-1815

FILED

SEP 30 1987

JAMES F. DAVEY, Clerk

ORDER

Upon consideration of plaintiffs' motion for preliminary injunction and defendant's motion for summary judgment, the responses thereto and the entire record, and for the reasons set forth in the Court's Memorandum filed this day, it is hereby

ORDERED that defendant's motion for summary judgment is granted; and it is further

ORDERED that to facilitate any subsequent factual challenge to any aspect of the random testing, the Court directs that the Department of Transportation maintain full records of each random test and any subsequent personnel actions taken as a result of such testing pending further Order of the Court; and it is further

ORDERED that plaintiffs' motion for preliminary injunction is denied.


UNITED STATES DISTRICT JUDGE

September 30 , 1987.