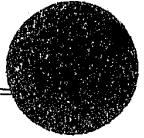


DRUG TESTING FEDERAL EMPLOYEES



HEARING
BEFORE THE
SUBCOMMITTEE ON HUMAN RESOURCES
OF THE
COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES
NINETY-NINTH CONGRESS

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ACQUISITIONS

DRUG TESTING FEDERAL EMPLOYEES

TUESDAY, MARCH 18, 1986

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HUMAN RESOURCES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:30 a.m., in room 311, Cannon House Office Building, Hon. Gary L. Ackerman (chairman of the subcommittee) presiding.

Mr. ACKERMAN. The subcommittee will come to order.

Today the Subcommittee on Human Resources will receive testimony on the recent recommendation of the President's Commission on Organized Crime that all Federal employees, including contract employees, be tested for the use of illegal drugs.

I commend the Commission's objective of purging this society of drug abuse, which, no doubt, destroys countless lives. I hope that the President will adopt those recommendations which advocate stricter enforcement of existing drug laws, increased drug education in our schools, and greater funding of enforcement agencies.

But the fight against drug abuse must stay within the limits of common sense as well as the law. The Commission's recommendation for universal drug testing of Federal employees raises serious practical as well as constitutional questions, which we want to explore this morning.

One concern is the accuracy of drug tests. Experts tell me that a person can register positive for opium after eating poppyseed rolls. Last year the Centers for Disease Control surveyed 13 private laboratories which tested for barbiturates, amphetamines, methadone, cocaine, codeine, and morphine. As reported in the Journal of the American Medical Association, that survey found that the laboratories suffered from what they called serious shortcomings in quality control, lacked common operating standards, and had error rates as high as 69 percent.

Inaccurate tests have the potential to ruin a worker's career. The Defense Department, the largest agency to employ drug screening, recently had to reconsider punitive actions taken against 70,000 soldiers who had been disciplined on drug charges, because their drug tests had been faulty. During one court proceeding, the head of an Air Force laboratory in Texas testified that the lab had reported many "false positives" because lab technicians had used the laboratory oven to heat tacos for lunch, and the test mistook taco grease for marijuana residue. That laboratory was proven to have reported up to 5 percent false positives. If the same error rate to

the screening of all Federal employees was applied, up to 140,000 workers would have been falsely accused of being drug abusers.

Even if the tests were 100 percent accurate, which does not seem to be the case, the results of the tests depend on the ability of the testers. There are documented cases where specimens have been mixed up and mislabeled, or the specimens have been contaminated. In fact, one Army lab mishandled 97 percent of the specimens it was testing for marijuana, with the result that its findings were "not scientifically or legally supportable."

The Commission stated that the Federal Government should, in its own words, "provide the example of the unacceptability of drug use," and it urged that all levels of government, as well as private employers, should begin drug testing. We can safely assure that this administration will be vigilant in the discipline of suspected drug abusers. Unfortunately, this enthusiasm will inevitably subject innocent employees to terminations, grade reductions, fines, loss of security clearance, and possibly even imprisonment.

I am also concerned that universal drug screening of Federal employees would be an unconstitutional invasion of an employee's privacy. The tests can be a humiliating experience. Present Defense Department regulations require that urine samples must be "collected under the direct observation of a designated individual of the same sex." Which of us wants to undergo that indignity? In addition, the drug tests would be conducted without probable cause. They would require an individual to prove his or her innocence, contrary to the traditional principle that one is presumed innocent until proven guilty.

Similarly, the recommendation raises questions about the traditional confidentiality of medical records. Urinalysis can be used to identify a variety of medical conditions, including urinary tract infections, epilepsy, venereal disease, and pregnancy.

It is not unreasonable to fear that the Federal Government, at some future time, could become Big Brother and use urinalysis as a means of developing secret, or not so secret, medical and social files on everyone in the Federal employ.

There are many issues concerning universal drug screening. How accurate are the tests? How costly are they, and who would pay for them? Do drug tests compromise an employee's constitutional right to privacy? And would the tests really have a significant impact on accomplishing the stated goals of the President's Commission, reducing the demand for drugs as a means of stopping organized crime?

We are pleased to have with us today as our first witness the distinguished chairman of the Subcommittee on Civil and Constitutional Rights, Congressman Don Edwards of California. We are especially honored because there isn't any greater expert on the meaning of the U.S. Constitution than Chairman Edwards. The country and certainly the world would be a much better place if Don Edwards were Attorney General or, better yet, Chief Justice of the Supreme Court.

Welcome, Congressman.

Mr. EDWARDS. Thank you very much, Mr. Chairman. I haven't been offered that job recently.

STATEMENT OF HON. DON EDWARDS, A U.S. REPRESENTATIVE
FROM THE STATE OF CALIFORNIA

Mr. EDWARDS. I think your subcommittee and you should be complimented, Mr. Chairman, in having these very important hearings. Let me also compliment you on a very excellent opening statement. It certainly sets the scene for this important subject.

We all understand, as you pointed out in your opening statement, that drug related crime is a very serious matter. We must pursue a solution vigorously but, even more importantly, this must be done with respect for fundamental constitutional principles. Mandatory drug testing does have serious constitutional problems. Our Constitution provides that a person is presumed innocent until proven guilty. Yet, the President's Commission turns this presumption of innocence on its head by requiring Federal employees to prove their innocence before even being suspected of committing a crime.

The fourth amendment of the Constitution guarantees the right to be secure in one's person against unreasonable searches and seizures. If they want to search your body or your office or your house, they have to get a search warrant with probable cause and describe what they are after. It is clear that a urinalysis test is a search and seizure under the fourth amendment of the Constitution, whether or not it is in the criminal context.

Perhaps it's too early to say exactly how courts are going to rule on the constitutionality of mandatory drug testing of government employees. There are some cases out there now, and some are on appeal. But it seems clear that the courts are going to hold that mandatory tests are unconstitutional unless there is reasonable suspicion that the individual is using drugs, and the reasonable suspicion must be based on objective facts.

Now, in certain occupations, such as police, or air traffic controllers, where safety is an issue, the rule can be different. Here, periodic drug testing may very well be permissible on a general basis or on a less than probable cause basis.

Mr. Chairman, it has been argued that tests in other job categories are constitutional because they are a condition of employment. Well, this is the old and discredited theory that, since nobody has a right to go to work for the Government, the Government can impose any restrictions it wants on its employees. Well, we could say the same thing about going into public housing or attending a State college. The unconstitutionality of this rather ridiculous rule has been recently reaffirmed by the Supreme Court. The Court has held that you can't take away from an individual his constitutional rights just so that he can work for the Government.

Now, the President's Commission went further in absurdity in recommending that all employees of private companies doing business with the Government be subjected to mandatory testing. Well, that includes almost every major corporation in America. So, as a condition to get a job in our country, you have to submit to mandatory drug testing. This is repugnant in a free country. Our need to get a job is very important. It is key to our livelihoods and to the support of our families. And you shouldn't use this pressure to force the surrender of a fundamental constitutional right.

The Government does have to face up to the drug problem in this country, but it has to be resolved in a constitutional manner. A constitutional manner would be to use the probable cause standard, which would allow the Government to test an employee as soon as the Government has probable cause to believe that the employee is using drugs and that use is interfering with his or her job.

In closing, Mr. Chairman, the administration once again is trying to do something on the cheap. As usual, the Federal employee is going to be the loser. Espionage is very serious, so the President orders widespread random polygraphing of Government workers. Some people use FTS phones for personal calls, so OMB develops a plan to monitor calls of all employees. And now the Presidential Commission finds that it is very difficult to catch drug traffickers, so it proposes a blanket testing of all employees, innocent or guilty.

It is a dark idea, that you can't trust anybody. It indicates a surveillance mentality and a wholesale contempt for constitutional rights.

That completes my statement, Mr. Chairman. I would like my full statement to be made a part of the record.

Mr. ACKERMAN. Thank you very much.

Without objection, your complete statement is entered into the record.

[Statement of Hon. Don Edwards follows:]

STATEMENT OF THE HONORABLE DON EDWARDS, CHAIRMAN
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

before the
SUBCOMMITTEE ON HUMAN RESOURCES

March 18, 1986

Mr. Chairman and members of the Subcommittee, it is a pleasure to appear before you today to comment on the Administration's proposal for drug testing of federal employees.

My objections to drug testing are the same as my objections to polygraphing: both tests can be inaccurate; both tests, when made mandatory, violate fundamental constitutional guarantees; and in both cases the proposal to use the tests implies a disturbing lack of trust in the integrity and responsibility of government employees.

I will leave to the side a central, unanswered question raised by the Presidential Commission's proposal: What will be done with the results of these tests? Will a single "failure" be grounds for dismissal or denial of employment? These important issues deserve your consideration, but I would like to focus on the constitutional principles that apply here. Also I would like to touch upon what this proposal says about the Administration's view of the American people.

Fighting crime -- particularly drug related crime -- is a major challenge of the 80's. But there is always an important distinction between the decision to pursue a problem vigorously and the choice of the means by which to do so. Whether the issue is espionage, or terrorism, or drugs, we have an obligation to preserve our fundamental constitutional liberties.

Primary among these liberties are the presumption of innocence and the Fourth Amendment right to be secure in one's person against unreasonable searches and seizures. Together with other principles in the Bill of Rights, these safeguards give rise to the right of privacy.

Under our system, contrary to the beliefs of the Attorney General, a person is presumed innocent until proven guilty. Yet the proposal of the President's Commission turns the presumption of innocence on its head, requiring employees to prove their innocence before they are even suspected of having committed a crime.

The presumption of innocence, I believe, is not limited to the criminal procedure question of who bears the burden of proof. It relates as well to the broader relationship in our society between the individual and the state. I find it ironic that an Administration elected on a promise of getting the government off the backs of the people would embrace a proposal that involves supervising their bodily functions.

It is clear under the cases that a urinalysis test is a search and seizure within the meaning of the Fourth Amendment. Division 241 Amalgamated Transit Union v. Susex, 538 F 2d 1264 (7th Cir.), cert. denied, 42a U.S. 1029 (1976); McDonnell v. Hunter, 612 F. Supp. 1122 (D.C. Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985). It is also clear that the Fourth Amendment applies to all governmental searches and seizures, whether or not they occur in the criminal context. Id.

It is perhaps too early to predict a trend in the law regarding the constitutionality of mandatory drug testing for government employees. The cases are only now beginning to be brought and many decisions are on appeal. Yet it seems that the courts will hold mandatory drugtests of government employees unconstitutional unless there is a reasonable suspicion, based on objective facts, that the individual being tested is using drugs. Only in certain occupations, such as police or air traffic controllers, where safety is an issue, may periodic drug testing be permissible on a general basis or on less than probable cause. For example, Federal Railroad Administration rules have gone into effect requiring urine and blood testing after accidents or when supervisory personnel have a reasonable suspicion that an employee is under the influence of or impaired by drugs or alcohol.

It has been argued that drug tests are constitutional because they are a condition of employment. This is the old, and now thoroughly discredited theory that since no one has a right to work for the government, the government is free to impose whatever restrictions it wants on its employees. By the same token, no one has a right to go to a state university, so all students at state schools be tested, and no one has the right to live in public housing, so all public housing tenants can be tested.

Fortunately, this right-privilege distinction has been repudiated. With respect to employment, in Connick v. Myers, 461 U.S. 138, 147 (1983), the Supreme Court recently reaffirmed that it had a "responsibility...to ensure that citizens are not deprived of fundamental rights of virtue of working for the government."

The absurdity of the argument that testing should be made a condition of employment is highlighted by the sweep of the Presidential Commission's proposal. Not only all government employees, but all employees of private companies having contracts with the government are included in the proposal. Today, that includes almost every major employer. The Commission's proposal thus becomes the following: as a condition of employment in our society, you must submit to mandatory drug testing. I find that repugnant. The need of all of us to support ourselves and our families should never be used to force the surrender of fundamental rights.

To be sure, Mr. Chairman, the government has an interest in promoting the efficiency of the services it provides through its employees. That interest is fully protected, I believe, by a probable cause standard, which would allow the government to test its employees as soon as it had probable cause to believe that an individual was using illegal drugs and that use was interfering with job performance.

I also note that Judge Kaufman, the Commission's chairman, used another argument in support of this testing: Drug tests, he claims, are no more intrusive than requiring people to walk through airport metal detectors. In fact, of course, drug tests are considerably more intrusive than metal detectors. But Judge Kaufman's comment says more against his proposal than he could have realized. If persons of good will--and Judge Kaufman is certainly one--will cite metal detectors at airports as a precedent for urinalysis in the workplace, what will they cite urinalysis as a precedent for? The Judge's comment illustrates how every little erosion of our civil liberties leads to another every little intrusion lowers society's "expectation of privacy." If liberties can be lost by increments, then surely this latest challenge must be resisted.

In closing, let me say that once again the Administration is trying to do something on the cheap. As is so often the case, the federal civil servant is the loser. Keeping track of the hundreds or thousands of KGB and Soviet-bloc intelligence agents in this country is difficult, so the President orders widespread, random polygraphing of government employees. Some people use their FTS phones for personal calls, so the OMB develops plans to monitor the telephone use of all employees. Now, a Presidential Commission concludes that it is dangerous and difficult to catch drug traffickers, so it proposes blanket testing of employees. This is the dark side of the current Administration. It suggests that underneath the confident rhetoric is a basic assumption that you can't trust anybody. The result is a surveillance mentality, an investigative approach to a variety of problems. I believe we should place our reliance not on electronic devices or chemical analyses, but on the integrity of the American people.

Thank you again for asking me to testify today.

Mr. ACKERMAN. I thank you for that very, very powerful and complete contribution to the hearing.

Mr. EDWARDS. Thank you.

Mr. ACKERMAN. We are equally pleased this morning to have with us the Congresswoman from Colorado, Hon. Pat Schroeder, who is the chairwoman of the Subcommittee on Civil Service, and a longtime leader in all of the privacy issues that have come before this Congress and a fighter for the dignity of women as well as for men.

Congresswoman Schroeder.

**STATEMENT OF HON. PATRICIA SCHROEDER, A U.S.
REPRESENTATIVE FROM THE STATE OF COLORADO**

Ms. SCHROEDER. Thank you very much, Congressman Ackerman.

I'm delighted that you are addressing the recommendation of the President's Commission on Organized Crime that all Federal workers be subject to drug testing. Usually, I'm inclined to ignore such foolish proposals. When the proposal is made by a Presidential Commission, however, it is endowed with more credibility than it deserves. So, this hearing should be useful to deflate this proposal.

Giving every Federal worker a urine test once a year would cost about \$100 million for the tests alone. For this sum, we could hire 4,000 new FBI agents with \$25,000 a year salaries. Which expenditure do you think would be more likely to reduce crime?

The Subcommittee on Civil Service, which I chair, recently sent a questionnaire to 76 Federal agencies and departments asking about their policies on testing civilian employees for drug or alcohol use. Preliminary results indicate that three out of four Federal agencies do not require their employees to undergo urinalysis testing, nor do they plan to begin such a program.

Agencies that do test their employees vary greatly in when and why urinalysis is done. Some agencies use it to screen potential employees, or transferees from other departments, while others have random testing of current employees. Some limit the use of urinalysis to accident investigations; others use it to try to preempt blackmail attempts.

But the Commission's recommendation would apply to all Federal employees, from stenographers to Cabinet secretaries. What did the Commission see as the goal of a universal testing program?

I think I know what the Commission—or at least the one or two members of the Commission who saw the final report before it was issued—thought it might do: Wipe out the drug trade.

Put in the best light, their reasoning went something like this:

First, organized crime is a serious problem.

Second, organized crime makes a lot of money by importing and selling illegal drugs. Never mind that the mob also makes money by loan sharking, shakedowns, tax evasion, and labor racketeering.

Third, traditional law enforcement, which involves tracking down criminals and proving criminal conduct, has been notoriously ineffective in dealing with drugs.

Fourth, an alternative means of stopping the flow of drugs is needed to end the demand for drugs.

Fifth, traditional law enforcement has been notoriously ineffective at stopping drug use.

Sixth, depriving drug users of employment will presumably dry up demand for drugs.

Seventh, it would be too much to impose employment restrictions on all of society. But we can make Federal employees an example by subjecting them to drug tests.

Conclusion: Testing Federal employees for drugs will stop organized crime.

Frankly, I think anyone who finds this logic persuasive ought to be a prime candidate for drug testing.

What else could drug testing accomplish? Some have suggested urinalysis to improve the efficiency and on-the-job performance of Federal workers. But, if that is the reason for the proposal, why did the Commission not recommend testing for off-duty use of the two most addictive and destructive drugs known to society—alcohol and tobacco? Alcoholism has ruined the careers and families of hundreds of thousands of Americans. As for smoking, the Surgeon General has documented that cigarette smoking results in greater illness and use of sick leave. If our goal is to regulate off-duty conduct which could hurt performance, alcohol and tobacco would be prime candidates. I, however, along with most Americans, would find such restrictions abhorrent.

Are we trying to identify employees who are intoxicated on the job? Urinalysis cannot show intoxication. Indeed, it usually takes 6 hours after use before urinalysis can pick up marijuana smoking. Urinalysis only picks up recent, prior use of certain drugs. Most agencies do not test for alcohol, and none have reported using blood tests for drug screening. Coworkers and supervisors can observe intoxication far better and faster than can urinalysis.

Maybe the purpose of urinalysis is to reduce the size of the work force by making Federal employment less attractive to skilled and talented individuals. The Government is already finding it difficult to recruit for key positions because Federal pay and benefits have fallen far behind those of the private sector. It is hard to imagine anything more intrusive, offensive, and discouraging than being required to urinate in a bottle every few months to test for drugs. For an electrical engineer trying to decide whether to take a Government or private sector job, that may be the deciding factor.

There is a strong public policy, recognized by law, that no worker can be punished for off-duty conduct unless there is a clear connection between that conduct and on-the-job performance. Such a connection surely exists between off-duty drug use and carrying a firearm or controlling air traffic, and several agencies already require urinalysis of their employees engaged in functions involving life and death. It's much more difficult to presume a connection between weekend marijuana use and a Government job as a stenographer.

Even when urinalysis is performed carefully, with solid chain of custody procedures and constant quality controls, it is only really effective in determining prior use of marijuana since that drug leaves a high residue in the body. When testing for cocaine, amphetamines, barbiturates, and PCP, certain foods and over-the-counter drugs can produce a false reading.

While urinalysis produces relatively few false positives, it produces enormous numbers of false negatives—up to 60 percent in some cases. If we start relying on urinalysis, instead of solid performance measurement, we will be stuck with many intoxicated workers. In this way, urinalysis can actually make the Federal Government less drug free.

There are other problems. For accurate analysis by the EMIT method, the urine samples must be refrigerated at certain temperatures. Yet, standard operating procedure of certain agencies includes mailing the samples to labs. Last I heard, no postal trucks were refrigerated.

And urinalysis is not cheap. The relatively cheap drugstore urinalysis kits are as likely to find recent use of Contac as recent use of marijuana. Even a standard radioimmunoassay test, which, by the way, costs the Army \$21.55 per sample and the Air Force \$29.70 per sample, may produce 20 to 30 percent false negatives. To eliminate false positives requires a special gas chromatography/mass spectrometry analysis which can cost up to \$80 a test. Wouldn't these dollars be better spent fighting organized crime?

The National Commission on Organized Crime lost sight of its charge when it recommended that all Federal employees be subject to drug tests. Its recommendation is an embarrassment to all who are concerned about an efficient and effective Federal work force. It reflects a basic ignorance of Government management, civil liberties, and drug-testing technology.

Mr. ACKERMAN. I would like to thank you, Congresswoman Schroeder, for your very excellent and all-encompassing testimony. I thank both of you for being with us this morning and invite either or both of you to join us here on the subcommittee.

Our next witness will be Mr. Rodney G. Smith, who is the Deputy Executive Director of the President's Commission on Organized Crime.

Mr. Smith, would you please join us?

I would like to welcome you to the subcommittee.

Mr. Smith, before we begin, we would, on the subcommittee, like to make sure that you are not personally in any way supporting organized crime. While I might ordinarily have sworn you in to that effect, I think that a specimen is probably worth a thousand oaths. Therefore, the Chair would like to require you to go into the men's room under the direct observation of a male member of the staff to urinate in this specimen bottle. The committee will then send your urine specimen to a lab that is waiting to analyze it.

Ms. ROWAN. As a member of the Commission, Mr. Ackerman—my name is Barbara Rowan—I think that these hearings were supposed to be serious matters, not humorous matters.

Mr. ACKERMAN. This is a—

Ms. ROWAN. And I think if we can have Mr. Smith, as a member of the staff, if you have any probable cause or reasonable suspicion to believe that his urine needs to be tested, then I think you have appropriate procedures to—

Mr. ACKERMAN. I think—

Ms. ROWAN. This is an inappropriate procedure and an inappropriate forum.

Mr. ACKERMAN. I think, madam, that your statement points out exactly what this hearing is trying to determine. This is a very serious matter. My understanding of the report is that there does not have to be any reasonable suspicion, and that it is a testing of any and all public Federal workers.

Ms. ROWAN. Well——

Mr. ACKERMAN. I do understand that you are not a Federal employee and, therefore, we will exempt you from this proceeding; but the Chair would like to have Mr. Smith participate in the program that his report has touted.

Ms. ROWAN. If you will listen to Mr. Smith's testimony and listen to the language of the report, I believe you will understand that we know how to spell the word mandatory; there is no word mandatory in that report. This is a consensus document produced by 18 unpaid citizens appointed by the President to examine the phenomenon of organized crime——

Mr. ACKERMAN. Well, unpaid people can smoke funny stuff, too.

Ms. ROWAN. Unpaid people who do not, I beg to differ with you, smoke anything or use anything of that kind.

Mr. ACKERMAN. Well, there are millions of Federal employees as well that do not smoke funny stuff or take drugs of any kind as well.

Ms. ROWAN. The language of the recommendation——

Mr. ACKERMAN. Excuse me. Mr. Smith, would you please accommodate us with a specimen of your urine?

Mr. SMITH. In your letter to me inviting me to come and testify on the matter of drug screening of Federal employees, this, of course, was not mentioned. But it does bring out a very important point that I wish to make in my statement.

Mr. ACKERMAN. Can I ask if there are warnings given to Federal employees as to when their urine will be tested?

Mr. SMITH. Mr. Chairman, this is a matter that I propose to address in my testimony. I think it would be to the benefit of the subcommittee as well as those in attendance here to explore the matter.

Mr. ACKERMAN. We would like to do that, but I would just like to know if you are refusing to accommodate the subcommittee by supplying us and the laboratory with a specimen of your urine?

Ms. ROWAN. Absolutely not, absolutely not.

Mr. ACKERMAN. I thank you. You have very eloquently proven the point that we have set out to prove.

You can continue.

STATEMENT OF RODNEY G. SMITH, DEPUTY EXECUTIVE DIRECTOR, PRESIDENT'S COMMISSION ON ORGANIZED CRIME, ACCOMPANIED BY BARBARA ANN ROWAN, ATTORNEY, COMMISSIONER, PRESIDENT'S COMMISSION ON ORGANIZED CRIME

Mr. SMITH. Mr. Chairman and members of the subcommittee, I thank you for your invitation to appear on behalf of the President's Commission on Organized Crime here today.

I can't say that I am delighted by this initial reception, but it does serve to point up a very, very serious issue which I think deserves exploration before this subcommittee.

As I am sure you are aware, the Commission was constituted by the President and directed by him to prepare over a period of some 32 months, ending on March 31, a complete account of organized crime in America. The President's mandate included a direction to provide him with "recommendations concerning appropriate administrative and legislative improvements and improvements in the administration of justice."

The Commission has pursued its responsibility by holding seven public hearings during the life of the Commission on topics as diverse as money laundering, drug trafficking, gambling, and labor-management racketeering. We have also issued a series of reports summarizing our findings, with more to follow.

One recent report, which I believe is of the most direct interest here today, deals with organized crime and drug trafficking. In its more than 450 pages, supported by an appendix of almost equal size, which I have here, the report presents and supports the Commission's conclusion that drug trafficking is the single most serious organized crime problem in America today; indeed, in the world. It stands alone among criminal enterprises in its impact on our citizens, our families, our communities, and our national life.

Unlike any other criminal activity, it directly threatens other sovereign governments. Education, public health, workplace productivity, entertainment, amateur and professional sports, the integrity of public officials—almost every aspect of American life—has felt the corrosive sting of the illegal drug trade. In our own Federal law enforcement community, the two most recent cases of compromise and corruption of prosecutors have been the result of the drug trade in one way or another. In the debate over appropriate responses, we have heard none which does not acknowledge the gravity of the problem confronting us.

Our report makes almost 70 specific recommendations covering every area of available response to the threat posed by illegal drug trafficking. Those recommendations were not confined to the topics ordinarily associated with law enforcement approaches or what the Commission refers to as supply-reduction strategies. The necessity for such tactics is acknowledged in our report, and indeed a good deal is said there in the way of suggestions for improvement. The report goes beyond these traditional law enforcement subjects, however, because the Commission has embraced a fundamental premise: Law enforcement alone can do no more than hold the line against the drug invasion as long as demand for drugs continues at its present voracious level.

Recognizing drug trafficking is at its heart a financial enterprise, the Commission has confronted the individual drug consumer with his role as the ultimate financier of the drug plague. The Commission's view is summarized in the very first recommendation presented in the report:

The ultimate goal of the Nation's drug policy is the effective suppression of drug abuse in the United States. While efforts to reduce the supply of drugs in this country, such as interdiction and source country crop controls, indirectly advance this goal, efforts to reduce the demand for drugs can make a more direct contribution. For this reason, the Nation's drug policy must emphasize more strongly efforts to reduce the demand for drugs.

Our report follows on that theme with more than a dozen specific recommendations concerning measures to reduce the drug demand. These recommendations, like all other in our report, are based upon the Commission's view of the depth and severity of the problem of drug abuse in our society, which our report describes as a national crisis. Our demand reduction proposals include a number of approaches, including private sector initiatives, drug awareness programs in early school years, prohibition of paraphernalia sales, and sentencing provisions which stress drug rehabilitation.

We also call upon the Federal Government to put into effect specific policy statements and guidelines expressing the total unacceptability of drug use, including suitable drug testing. And I emphasize suitable, not indiscriminate, not universal, not mandatory, all of which have been used here this morning and which were used in an effort to embarrass me—but suitable drug testing. That's the topic of immediate interest in this hearing. The words universal, mandatory, blanket are not to be found in this report, absolutely not.

Every time drug testing is mentioned, the modifier suitable or appropriate is found there. We are well aware of the interests that have to be balanced in determining the reasonableness, the suitability of drug testing. These are very serious matters. I know that this subcommittee is aware of those matters, many of them, to the extent that they affect the civil service and workplace standards, and so on. It is a natural area, the legitimate jurisdictional area of interest of this subcommittee.

What I want to bring to your attention is that as an organized crime commission, we have found a problem that is of such scope and enormity that it is a problem for us, it is a problem for you, and it is a problem for almost every institution in American life.

By making our recommendation for suitable drug testing, the Commission sought to recognize the value of such testing in those areas where it has already been tried, as has been acknowledged here this morning, both in and out of the Government. Some testing applications were also explored in the course of one of our public hearings. In raising the subject, of course, the Commission is aware of the sensitivity of the entire area and the great number of issues it includes. Those issues have been debated within the Commission with a small number holding varying points of view on the issue. Thus, in a report intended to generate debate and deliberation, you will not find in any of our recommendations for drug testing those terms without the word suitable or appropriate.

Although we are confident that there continues to be an essential role for drug testing as a key component of demand reduction, the inclusion of those adjectives was intended to convey the need for careful consideration of such issues as reliability, standards of administration, privacy, and employee morale. To the extent that we intended to promote debate, the response to our report in recent days is certainly a measure of success.

As sincerely as we seek and appreciate debate, however, it is imperative that none of us forget the overriding concern here: The national crisis of drug abuse, and the critical role of individual demand in financing that crisis. Mischaracterizing the Commis-

sion's position distracts from that vital issue and does this conscientious body an injustice.

Commissioner Rowan has a few opening remarks, and then we would be happy to answer any questions you might have.

Ms. ROWAN. Mr. Ackerman and Ms. Schroeder, the fact that drug use is epidemic in the United States today is contained in a statement of the United States Congress in legislation creating the National Drug Enforcement Policy Board. That policy board is primarily focusing on the enforcement aspects of the drug trade. The Commission in its examination determined that we needed to create a pincer movement which would have a demand reduction concomitant. What we are looking at is eradication or source country control. We are looking at interdiction at the borders. We are looking at intelligence collection and analysis. We are looking at domestic law enforcement efforts. We are looking at education. And we are looking at refraining from use of narcotic drugs.

This Commission, as I told you before, is a body of 18 unpaid citizens who come from various walks of life. We have Mr., or rather, Dean Eugene Methvin of the Readers Digest, who has been a crusading editor against the pernicious effect of organized crime on labor; Dean McBride from California, who was an inspector general in the Department of Labor here; Charles Rogovin, who is a professor of law at Temple University and a former assistant district attorney. We have Mr. Phillip Manual, who came from the Senate investigating committee; Justin Dintino and Jess Brewer and Frances Sclafani and Theresa Wunsche, who are all active law enforcement people. Mr. Miller is a D.A. from California; and Ms. Corrigan is an assistant district attorney from California. You have Mr. Skinner, who is a private practitioner in Chicago of law; he is also a former United States attorney.

I am in private practice in Virginia. I am a former assistant United States attorney.

You have judges on our Commission. You even have Congressmen on our Commission.

All of us agreed that the use of narcotics, the glamorizing of the drug culture, the life style tolerance, and the ignorance of the American public on the subject of drug use was totally unacceptable. One of almost 70 suggestions involved suitable, appropriate drug testing in situations clearly—and I refer you to page 452 and page 454 of our recommendations, where appropriate and suitable you will find used repeatedly.

There is no such thing, the Commission felt, as responsible drug use. It is illegal. There is no such thing as responsible homicide, and that is exactly what this drug use is doing to this Nation.

The Drug Enforcement Administration and many other Federal agencies have begun wonderful programs to educate the public. What we are suggesting is that each of these agencies needs to take a look at their entire program and to consider as a part of their entire program whether or not appropriate, suitable drug testing for Federal employees, for private sector employees, needs to be included as part of their program.

We really do appreciate the opportunity to attempt to set the record straight, and I hope that the Chairman will consider withdrawing his request to Mr. Smith.

Mr. ACKERMAN. Thank you very much.

Mr. SMITH, should you be the first Federal employee fired for refusing to subject yourself to a urinalysis under the recommendations of this panel?

Mr. SMITH. Well, Mr. Chairman, if you have found in our report, which I am sure you have read at length, any recommendation that any employee, Federal Government or otherwise, be fired on the basis of a positive test, I should like you to point it out to me. This report is replete with prevention, education, and rehabilitation. Our interest in restoring the public health and the productivity of the American worker who has a drug problem is all through this report. You will not find a recommendation that anyone be fired.

Mr. ACKERMAN. What would you—

Mr. SMITH. Let me make it clear that there is nowhere in the report the assumption, nor should anyone misread one into it, that the Federal work force is somehow particularly suspect of drug abuse, far from it. I am a Federal employee, and I am proud to have been a Federal employee and prosecutor and in other capacities for some years. Based on my personal experience, I expect that the Government work force is statistically in a much better position than the population at large.

Nevertheless, I do know that Government employees in many cases perform particularly delicate, responsible, sensitive positions upon which the public safety and the national interest frequently depend. In that regard, it may be reasonable to require a test.

Mr. ACKERMAN. Aren't you saying "all" agency heads, not just sensitive agencies?

Mr. SMITH. Yes, we have—

Mr. ACKERMAN. "All" meaning each and every agency regardless of whether they deal with sensitive matters or not?

Mr. SMITH. We have said that every Government agency should consider guidelines including suitable drug testing. I am not an expert on the civil service by any means. I don't know which agencies may have a few employees in sensitive positions or indeed what the standard of sensitivity may be for the imposition of such tests. That's why we are in a position, Mr. Chairman, merely to make recommendations for debate so that each manager, each agency head among the Federal work force of, I think, almost 3 million people can make those determinations reasonably.

What I do know, Mr. Chairman, is that the Government work force includes many thousands of people, some of whom I know personally, who put their lives on the line every day in the performance of their official responsibilities in the fight against drugs. Some of them lose those lives. Enrique Camareno was killed horribly in Mexico. The bullets that killed him, I believe, were financed by the drug trade. We spend \$110 billion. That's the entire income of the drug traffickers. That's where it comes from. That's the money they use to buy the bullets and the bombs that kill Federal employees.

Mr. ACKERMAN. And you're saying that having employees of the Federal Government urinate in a bottle could have saved his life?

Mr. SMITH. I am saying that, indirectly, if we have a suitable drug testing program imposed wherever it makes sense, that that

will reduce the demand for drugs. That will cut off the income to many of these drug traffickers who are among the most vicious organized crime people in the world. And if we had an effective demand reduction program 3 or 4 years ago, yes, Enrique Camarero might be alive today. It's sure worth the chance.

Mr. ACKERMAN. It sounds almost like Andy Rooney telling us that if we eliminate the victims we wouldn't have the crimes.

Mr. SMITH. I'm not sure what that means, Mr. Chairman.

Mr. ACKERMAN. The people who are addicted to drugs, I presume, are victims.

Mr. SMITH. Not in my opinion. What are they victims of, their own criminal and heedless self-indulgence?

Ms. ROWAN. What the Commission—

Mr. ACKERMAN. People who are addicted to drugs are not victims of drug abuse, Mr. Smith?

Mr. SMITH. That term has been used—

Mr. ACKERMAN. We have 11 States in this Nation representing over one-third of the population of our country in which marijuana is not a crime.

Ms. ROWAN. The Commission, I think—

Mr. ACKERMAN. How do you address that?

Ms. ROWAN. Well, I think the commissioners address that by saying that they were unequivocally opposed to the decriminalization of any narcotic drug, including dangerous drugs such as marijuana.

Mr. ACKERMAN. But the Commission—

Ms. ROWAN. The point is—

Mr. ACKERMAN. The commissioners might be against it, but it's still up to individual States to pass legislation as to whether or not the possession or use of certain amounts of marijuana will be criminalized or decriminalized.

Ms. ROWAN. This Commission has no power whatsoever to suggest to individual States or to the Federal Government or the Congress what specific legislation should be placed in effect, sir. The only thing we have done—

Mr. ACKERMAN. But have you not recommended to individual States that they make marijuana a crime?

Ms. ROWAN. We have, because that is our feeling. But that is entirely up to the States to do whatever they want with that.

Mr. ACKERMAN. Well, of course it is.

Mr. SMITH. Our specific recommendation, Mr. Chairman, is that the States reconsider their recent acts in light of available data currently.

Mr. ACKERMAN. Mr. Smith, let me ask you, what would you do with a Federal employee who refused to submit to a urinalysis?

Mr. SMITH. It would depend on the circumstances.

Mr. ACKERMAN. Would you put on his permanent record that he refused to undergo drug testing and make that an indelible part of his career, wherever he would go for employment, for somebody to be able to look at that?

Mr. SMITH. Mr. Chairman, the answer to that question, like the answer to many others, would depend on the reasonableness of the program under which the employee was expected to take that drug test.

Mr. ACKERMAN. Let's say the program was a random one, selecting one out of every 38 Federal employees on any given Thursday.

Mr. SMITH. In what particular profession, under what particular circumstances? Air traffic controllers, for example?

Mr. ACKERMAN. In any particular profession: members of Presidential commissions, people who deliver the mail, and people who operate the elevators over at General Services, as well as air traffic controllers.

Mr. SMITH. If the determination had been made after suitable deliberation, after reasonable deliberation that drug testing were appropriate for that particular profession in light of the responsibilities of the people in that profession, the responsibilities to the public, and so on—

Mr. ACKERMAN. Can I ask you a question right there on that point? Are we trying to protect the public against people who are not functioning properly in their professional roles? Is it not the mandate of your Commission to weed out organized crime? Aren't you trying to stop the sale of illegal drugs? And isn't it true that, if you yourself as a member of a Presidential commission buys \$1,000 worth of drugs, that you are contributing the same \$1,000 worth to organized crime that an air traffic controller might?

Mr. SMITH. That's absolutely right, Mr. Chairman.

Mr. ACKERMAN. So, why would you exempt yourself from the indignity that you choose to impose upon others?

Mr. SMITH. I am not suggesting that I be exempted if it's found to be a reasonable testing program in a—

Mr. ACKERMAN. Well, urinalysis is evidently one of the preeminent testing programs to make a determination as to whether or not somebody has been using drugs for the past 30 or so days. And you have chosen to exempt yourself from that process.

Mr. SMITH. I have not chosen to exempt myself from any process. I have said—

Mr. ACKERMAN. I see an empty jar in front of you.

Mr. SMITH. I have said, Mr. Chairman, if I am subject to a reasonable program that has been arrived at after deliberation and is not some performance for the media, not some cheap stunt, which I must say is one of the cheapest tricks I have ever seen—and I came from the Hill—that if I am subject as a Government employee in my position of responsibility to a reasonably designed and administered drug testing program, based on my responsibility and assessment of the public interest, then, yes, my refusal to do so should be recorded.

Now, let me clear up one confusion. There are two ends to be served here. One is peculiarly within your jurisdiction. That is workplace safety, productivity, and so on. The other is cutting off the demand for drugs. An effective, reasonable drug screening program can serve both interests. It will serve yours more directly, but it will serve mine only slightly less directly and in a very important way. We are in a battle for our lives in the criminal justice end, Mr. Chairman.

Mr. ACKERMAN. I still don't understand why you would exempt certain professions within the Federal employ from drug testing and why it's a cheap trick to ask you to subject yourself to something that some agency head under guidelines that you're asking

him or her to formulate would be required to subject a Federal employee to.

Ms. ROWAN. Those guidelines have not yet been formulated for this Organized Crime Commission, as far as I know, nor for the Congress as far as I know. When those guidelines are formulated and when they have been tested by the body which formulates them and whoever else wishes to test them, then I think it is perfectly reasonable to submit both Congressmen, their staffs, members of Presidential commissions, anyone, to drug testing, with the proviso that it is appropriate and suitable and necessary.

Mr. ACKERMAN. What does that mean?

Ms. ROWAN. That is something that we raised so that—

Mr. ACKERMAN. Would it not be purposeful to make a determination whether or not people testifying here are supporting organized crime by their drug habits?

Ms. ROWAN. If there is a program to determine that and we are part of that—

Mr. ACKERMAN. Well, we just initiated a program here this morning.

Ms. ROWAN. Mr. Ackerman, you came here this morning in order to protect the rights, I assume, of Government employees from some horrendous suggestion by the President's Commission on Organized Crime. I think that your most recent statement indicates that you are willing to fail to protect the rights of the citizens of the country against some horrendous undertaking by Mr. Ackerman, chairman of the committee.

Mr. ACKERMAN. I think that the lack of willingness of the Commission to subject themselves to the same horrendous indignities that you would require of people who are giving the fruits of their labor to their country to refuse to do what you would have them do is indicative of the fact that it is neither dignified, that it is of little consequence, that it is embarrassing, and that there is no real impact on organized crime.

Mr. SMITH. Mr. Chairman, if in our report you find at any point the suggestion by this Commission that Federal employees of long-standing or new employees—I happen to be of long standing—should be invited by letter to supply a deliberative body with information, thus lured before TV cameras and with no warning whatever, presented with this kind of stunt, if you think that that is somewhere in our report, then you are sadly mistaken, sir.

We are involved in a very serious matter here, a very serious matter, that has to be and will be deliberated seriously and, I think, with good effect in coming months. If you think that we have this kind of thing in mind in this report, then you are mistaken.

Mr. ACKERMAN. What do you have in mind? I mean, we weren't expecting you to deliver that sample before the cameras. And probably more relieved than you was the staff member who had been appointed to make the observation, as would be required under these guidelines. What do you have in mind? Could you share with us what you do have in mind?

Mr. SMITH. What we have in mind is what is contained in the report presented to the President, made public, and provided to as many members of Congress as we had copies to provide. And there

will be more available soon. That is that, where it is suitable in the Government work force and elsewhere, where it is appropriate, that drug testing be considered.

Mr. ACKERMAN. Congresswoman Schroeder.

Ms. SCHROEDER. I think that that is our frustration. I am reading the report, page 452. It says the President should direct the heads of all Federal agencies to formulate immediately clear policy statements, including suitable drug testing programs, et cetera. It says State and local governments should do the same, that Government contractors should not get awards unless they do the same. Yet don't define suitable.

I mean, I hear you going both ways. The Civil Service Subcommittee, which I Chair, did a survey of Federal agencies and found out that in agencies with extraordinary safety and sensitivity concerns—all the things that you professed when he asked for the sample—drug testing of certain employees is already being done.

So, I don't see how you can say the recommendation isn't blanket. You don't define suitable. You're saying all agencies, saying all contractors, saying State and local. And there is nothing in here about the rights of Federal employees to say: I don't think I want to do that today, or I don't think my job falls under that category.

So, I really don't think this is a trick. I think it is a demonstration of how it's easy to write a recommendation like this, but when you really think about how you apply it and what it costs, you wonder what it is you are getting into.

Your mission was to deal with organized crime, and sale of drugs. I assume from this paragraph I read that you want to dry up the people who are buying drugs. That may be the way to get at organized crime, really. Your job wasn't to look at the efficiency of the Federal Government and those kinds of things.

Ms. ROWAN. Absolutely correct.

Ms. SCHROEDER. Because, we have looked at that.

So, on that basis, you're talking about looking at everybody, because everybody would be a potential user.

Ms. ROWAN. Everyone who uses drugs supplies the coffers of organized crime. That is absolutely correct.

Ms. SCHROEDER. That's right.

Ms. ROWAN. Obviously our mandate was not simply to look at drug use in the United States. It was to look at anything which promoted and supported what we understand to be organized crime in the United States.

Ms. SCHROEDER. And that's why I think, taking what you have said and what your mandate was and reading this paragraph, I don't see how you can protest and say no, we weren't talking about blanket testing, it was more selective; it was more sensitive.

I mean, we should probably test everybody in the room. They could all be potential users, you know.

Ms. ROWAN. That's true.

Ms. SCHROEDER. And you would be drying up sources, and we could then post the names.

What concerns us is the evidence that the testing isn't that accurate, the evidence of how expensive it is, and, you know, why couldn't those resources be used more to combat organized crime directly? I mean, are we giving up on the FBI being able to do any-

thing about it? Are we giving up on all the things that we have passed here, repeal of posse comitatus, and so forth? Are we giving up on that?

Mr. SMITH. I'm sorry, I didn't catch your last——

Ms. ROWAN. Are we giving up on it.

Ms. SCHROEDER. Are you giving up on that? Do you think this is the best way to spend \$100 million?

Mr. SMITH. No, I'm sorry, before that. I think you suggested that we had proposed the repeal of posse comitatus?

Ms. SCHROEDER. No, no, no.

Mr. SMITH. No, we haven't done that.

Ms. SCHROEDER. No, when Congress did——

Mr. SMITH. No, we absolutely didn't do that.

Ms. SCHROEDER. But you are saying that this is the best way to spend \$100 million? You are also saying you don't want to be subject to the test because you think you're different, but I don't see how this recommendation says you're different. It says anybody could use drugs, and nobody can say: hey, you don't have to test me, I'm clean.

If you do that, then you probably never find the users.

That's your point, Mr. Chairman?

Mr. ACKERMAN. Precisely.

Mr. SMITH. Mrs. Schroeder, as I said in my opening statement, this Commission had approximately 30 months to conduct its investigation and to prepare its report to the President. On every aspect of organized crime in America, the sources of income, its membership, the uses to which its income was put, and those steps both legislative and administrative which might be taken in response.

Ms. SCHROEDER. Did you find them in the Federal Government? Have they infiltrated the Federal Government?

Mr. SMITH. No; I said that, I think, in my opening statement. There is nothing to suggest that the Federal work force is a particularly suspect group in terms of drug use.

My point is this. Two and a half years ago, we arrived on the scene with no enabling legislation, no staff, not even any furniture, a single typewriter. We had 2½ years to staff up, seek and obtain passage of our enabling legislation, and prepare reports for the President and ultimately for the public on this variety of topics. We tried to do as conscientious a job as possible in recognizing the issues that had to be dealt with.

In 2½ years, that's as far as we can go. We did not include in a recommendation that goes to a very complex and sensitive and highly charged issue like drug testing, any language to go beyond our observation that demand reduction was essential. And drug testing does seem to have worked in demand reduction, both inside and outside the Government. And it can work.

We know that there are very, very sensitive, lengthy and emotional debates that have to be held over what is reasonable, what is suitable, what circumstances require it, what circumstances don't. Believe me, if we had another year of our lives in the Commission to pursue such issues and to be of greater help, we would very much like to be. Unfortunately, we don't have that. We have to leave it to those of you who carry on.

But that's why terms like suitability are suggested at this point, because they embrace the consensus of what we are trying to get across, that demand reduction is the key and one that we haven't spent enough time with, and at the same time preserving the debate over what is——

Mr. ACKERMAN. Would the gentlewoman yield?

Ms. SCHROEDER. Yes.

I just wanted to say the problem with your argument is that you don't define suitable drug testing. Do you mean the type of tests you use or the person you go after. I mean, when you read this as a lawyer, I think it's very clear that what you are saying isn't quite accurate.

I am sorry, Mr. Chairman. I have taken too much time. I have to get on to my own hearing.

Mr. ACKERMAN. Thank you very much for your participation.

On that point that you made, that the Commission has come to a consensus, could you enlighten the committee? I know that Ms. Rowan, in her opening statement read us a list of the very distinguished members of the Commission and their roles and functions. Could you tell us which of those members of the Commission saw the language that you refer to as a consensus and saw a final draft of your report?

Ms. ROWAN. I don't think Mr. Smith can tell you that, because the report was sent out across the country to the various Commissioners. There is no way for Mr. Smith to know who actually read and digested and who did not. Most of us called back or visited the Commission offices to give the Commission staff our views, requesting clarification of certain items, requesting changes in language of certain items. It was the Commission's staff's job to harmonize those 18 differing views.

Mr. ACKERMAN. Let me ask you that a little bit more directly if I can, Ms. Rowan.

Was the drug language in the report that you sent out to the members of the Commission?

Ms. ROWAN. Can you answer that?

Mr. SMITH. Yes, Mr. Chairman. I can tell you that the consensus was absolute as to the utility and value of drug testing within the Government and out as a demand reduction technique.

As I said, in order to embrace——

Mr. ACKERMAN. Not the question.

Mr. SMITH. There are varying points of view on the Commission as regards when circumstances are reasonable. That's when the suitable language was put in.

Ms. ROWAN. And appropriate.

Mr. ACKERMAN. Not the question. The question was: Was the drug language included in the Commission report when it was sent out to the members of the Commission?

Mr. SMITH. Yes. Language concerning the adoption of drug testing both in the Government and out of the Government was in the draft sent to the Commissioners. That's correct.

Ms. ROWAN. What evolved——

Mr. ACKERMAN. The language that we see in the Commission's report, was that language seen by the members of the Commission?

Ms. ROWAN. I think it is fair to say to you that all of the members of the Commission did not see that language because—and here is what they did not see. They did not see the words “suitable and appropriate,” because those words came from the consensus process which we have discussed with you, commissioners calling in to staff saying: this is too harsh; this is too difficult; we’ve got to modify this; this is not in accord with my views, therefore make it suitable or make it appropriate, which gives room for anyone who receives the report to discuss what is appropriate, what is suitable, and what is wise.

Mr. ACKERMAN. The Washington Post reports on March 6 the following: Eugene Methvin—he’s one of the people you listed as being on the Commission—

Ms. ROWAN. That’s correct.

Mr. ACKERMAN [continuing]. Another member of the Commission, and a senior editor of Readers Digest said he also learned of the recommendation by reading newspaper accounts. Quote: “I didn’t see it, nor did I know it was coming,” Methvin said, adding that he still has not been able to obtain a final copy of the Commission report that bears his name.

This was after the report was released by the Commission.

This is the New York Times, which reports on March 7 the following: “But the vice chairman, Samuel K. Skinner, said the complaints some other Commission members raised about this were much ado about nothing.”

And he goes on further to say: the Commission members saw about 99 percent of the report before it was raised, he said, referring to the first draft. The rest, he said, “was relatively insignificant changes, with one exception. That exception was the added language on drug testing.”

Ms. ROWAN. Are you trying to demonstrate that the staff snuck something in on the Commission? Is that what you’re trying to say?

Mr. ACKERMAN. What does this sound like to you?

Ms. ROWAN. Well, it sounds like members of the Commission responding to the reports in the press, all of which have talked about mandatory blanket drug testing for everyone.

Mr. ACKERMAN. No, this—

Ms. ROWAN. And that is not what the report talks about.

Mr. ACKERMAN. This is not how I am reading what I’m reading in the reports. It’s not they’re responding to what’s in the press. It’s members of the Commission responding to the fact that a report that bears their name was not run by them, and they knew nothing of this language nor saw the language nor the report before it was issued.

Your characterization of it being snuck by the members of the Commission are your words. I’m just reading, unless you can tell me that these people are misrepresenting and they did indeed see it or that both the Washington Post and the New York Times are reporting inaccurately.

Ms. ROWAN. I wouldn’t presume to comment on the accuracy of either the New York Times or the Washington Post.

What I can say is that the final draft, subject to the comments of 18 commissioners, was sent to those 18 commissioners. We all

called back with our comments, our modifications, our requests for clarification. And those were included by the staff in that final report.

Mr. ACKERMAN. Two out of the two members of the Commission that were quoted in the press said that this language was not in it when they saw it. How do you address that?

Ms. ROWAN. I can't address that. I have no idea what they truly said. I have no idea what was truly in their minds. And both of those commissioners, I think if you spoke to them today, would indicate to you that they are in favor of some form of appropriate and suitable drug testing and that they were in accord with that recommendation of the Commission.

Mr. ACKERMAN. Do they all have a definition of suitable and appropriate?

Ms. ROWAN. Absolutely not, absolutely not.

Mr. SMITH. As I said in my opening statement, Mr. Chairman, there are varying points of view. This is a very serious debate and a very complex one. Even the courts disagree on what is a reasonable standard. So, among 18 distinguished Americans, of course there will be varying points of view. But on the need and utility for drug testing as a general concept, there is a consensus on that.

Mr. ACKERMAN. Let's presume that all of these agency heads formulate policies, any old kind of policies, and they go about testing Federal employees. They come up with a number of people who, first of all, refuse to be tested. What happens to those people who refuse to be tested?

Then let's take the people who go along with being tested. Do the test results become an attachment to their medical records or to their personnel records?

Let's take the first question first.

Mr. SMITH. We haven't dealt with either one of those questions in our report, Mr. Chairman. As I tried to make clear to Mrs. Schroeder and as you have made clear earlier today, I think, we are not the commission on employment standards or on civil service standards. These questions have to be resolved by those who have the day-to-day operational responsibility for these programs. All we can do is make recommendations based on what we know as to the utility in the fight against organized crime for which drug trafficking is the major source of income. That is our area of expertise.

We are trying to bring the need to your attention.

Mr. ACKERMAN. Would your recommendation—I mean, what happens if you have people who test positively, the tests indicating, for whatever the value of that test is, that these people did indeed use drugs? I think somewhere in the report it said that 25 million Americans have used cocaine; and 5 to 6 million are regular users. What happens if you find some kind of large percentage or proportional percentage within the Federal employ? What happens when you fire all these people, if you do that? Do they then resort to a life of street crime, or do they just give up drugs?

Mr. SMITH. I think I said a few minutes ago, as clearly as I could, but it bears repeating, you will not find the suggestion or recommendation that any Federal employee be fired, in this report.

Mr. ACKERMAN. What do you do with them?

Mr. SMITH. Our entire thrust is toward rehabilitation and return to good health and productivity. I think those are interests that we share, Mr. Chairman.

Mr. ACKERMAN. I didn't see anything that the President direct all agency heads to institute programs on drug education within their agency for these people.

Mr. SMITH. No; what we said as regards the President's direction is that guidelines be promulgated. We didn't say what should be in those guidelines. You will have to read through the report to see what we think those guidelines would ideally include. And they would certainly include a primary emphasis on rehabilitation and, for those who already have a problem—

Mr. ACKERMAN. You're asking for guidelines on the testing.

Mr. SMITH. No.

Mr. ACKERMAN. What happens once you identify possible or probable drug users?

Mr. SMITH. Mr. Chairman, as a former marine, I think that the Marine Corps' program is an ideal one. They have an extremely reliable program. It has succeeded in reducing drug positive tests among their enlisted personnel from 47 to 7.7 percent in a period of about 5 years. The model of their program, as I understand it, or at least an observation that has been made, is that their intent is to get drugs out of the Marine Corps, not marines out of the Marine Corps. And that is our view of the civil service as well.

As I say, I am a Government employee. I am going to be subject to anything that comes as a result of these recommendations. Of course, I expect to see reliability, fair administration, and an emphasis on returning me to the work force if I have a problem.

Mr. ACKERMAN. Marines on drugs, are they permitted to still function in the Marines?

Mr. SMITH. I believe that—I am not familiar with the details of the program, but I think that, as long as they are in some kind of prevention treatment program, that is what they are doing until they are certified as fit for return to duty. But I can't swear to that. I don't know the details.

Mr. ACKERMAN. I agree with you that the program is probably great and excellent, as well as you do, but I wish we knew more about it.

Ms. ROWAN. Hopefully, what the stimulation of discussion—

Mr. ACKERMAN. Would you continue all of these Federal employees that you found on drugs in the Federal employ and continue paying them their full salary?

Mr. SMITH. Absolutely, if—I am speaking hypothetically. I can't answer that as a representative of the Commission because these are not questions that have been deliberated. But as I say, the thrust is prevention, education, rehabilitation. If it were up to me to design the program, of course we would, of course we would.

Ms. ROWAN. Some of this, I imagine, will be part of contract negotiations with some people who are under contract with the Federal Government. And it's the kind of discussion out of which will evolve a guideline which is what we suggest that agency heads implement, which includes the possibility of suitable drug testing.

Mr. ACKERMAN. It's my understanding that the medical plans of Federal employees only pay for prescription drugs. What do you do

once people are found to be addicted to a drug? Does the Federal Government then supply that drug as part of the employee's wage-benefit package inasmuch as you would like to see that person continue in the Federal employ?

Mr. SMITH. I think, Mr. Chairman, what I have tried to make clear is that effective rehabilitation and return as a productive employee is the goal of the program. Whatever program is designed to accomplish that goal is not something that I am prepared to testify about. I come from a criminal justice background as prosecutor. I am not a drug treatment specialist.

If you are saying, is the Government going to get into the business of purchasing illicit narcotics and continuing people on some kind of heroin maintenance program, is that your question?

Mr. ACKERMAN. No. I want to know what you are going to do with these people. You seem to address just identifying them. I think different agencies may come up with different answers. What was the intent of the Commission so far as rooting out organized crime and supporting organized crime? What do you do with these people once you have now labeled them?

Mr. SMITH. What you do is try to get them in an effective rehabilitation program that gets them off drugs, accomplishes the purpose that is within your jurisdiction, that is, returning a fully fit, productive Federal employee to the work force, and accomplishes our end of cutting off him as a source of income for organized crime.

Mr. ACKERMAN. So, you would take no punitive actions?

Mr. SMITH. We have proposed no punitive action.

Mr. ACKERMAN. Would you object to any agency imposing punitive actions?

Mr. SMITH. I'm sorry?

Mr. ACKERMAN. Would you object to an agency imposing punitive actions? Would you object if somebody was a drug abuser within the Federal employ and they were up for promotion, should that person be promoted? Has the Commission addressed any of these?

Mr. SMITH. No.

Mr. ACKERMAN. Thank you both very much for appearing before us.

We are now privileged to hear from Mr. Kenneth Blaylock, the president of the American Federation of Government Employees.

Thank you very much for once again appearing before our subcommittee.

**STATEMENT OF KENNETH T. BLAYLOCK, NATIONAL PRESIDENT,
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES [AFL-
CIO]**

Mr. BLAYLOCK. Thank you very much, Mr. Chairman.

I do not appear here in support of the recommendations, obviously.

Representing some 700,000 Federal workers, I appreciate your concern in this serious matter and also the opportunity to present those views of the workers.

I will make an effort to summarize my statement and ask that the entire statement be entered into the record.

Mr. ACKERMAN. That is appreciated. Without objection, your entire statement will be part of the record.

Mr. BLAYLOCK. You know, Mr. Chairman, I have come to the conclusion that this report only singles Federal workers out to the extent that again the Federal work force would be used as the role model or so-called set the pace so that this program of Government interference in Americans' lives could be extended to the entire work force in the country.

If you read the report, you notice they recommend first that all Federal agencies develop such a program. Then they recommend that all contractors doing business with the Federal Government have such a program, then their suppliers. And at that point you are reaching pretty deep into the American society.

The report also goes farther and recommends that all private sector employers consider—at that point they say consider—such a program.

You know, Mr. Chairman, there used to be a time when conservatives had principles that we disagreed with in many cases over the role of Government in a society such as ours and the dangers of economic power in a democratic society, but at least we understood where they were coming from. But now we face an administration that is parading under a conservative banner which seems ready to sacrifice any conservative principle for the sake of some momentary P.R. or political advantage. We have seen this administration sacrifice the principle of separation of church and state for a simplistic stance in favor of prayer in school. We have seen them sacrifice the principle of individual choice for the Government-dictated morality of banning abortion. We have seen the principle of national sovereignty subverted in order to back Somoza thugs known as Contras.

Now we see the culmination of this cynical fear mongering in lieu of principles to endorse the witch hunt mentality of universal drug testing.

We obviously oppose drugs at the worksite, whether it be Federal or whether it be private sector. We know the human misery caused by the improper use of drugs. We as a union have worked for many years trying to get the Federal Government to adopt good preventive programs. We can show you case after case where we have tried to negotiate programs that did go to prevention, did go to education, did go to rehabilitation. But we are always faced, Mr. Chairman, with the argument on the other side of the table that that costs money and we don't have money.

The very issue that you were just asking the previous witnesses about in regard to certain members of the Commission, knowing whether or not this provision requiring the mandatory testing of drugs was in that report, I notice that a couple of the lame excuses as to why they did not notify all members was, well, you know, money was very tight and we didn't have enough money to bring the Commission back together.

Well, Mr. Chairman, one of the real problems here is the cost of drug testing. Since this Commission report came out, we have had opportunity to interface with a lot of people around the issue. We are told that in the process—and we have gone to a couple of medical authorities to get some background—that the initial test is

simply like an \$11 item. But that's just a general test. Then to follow up on that test, a minimum would be 20 percent of the population that is being tested, the first test runs about \$75 to try to isolate the drug. And then it can go double and triple that.

When you look at 2.5 million Federal workers, you look at another 3 million contract workers, Mr. Chairman; you are beginning to talk in the terms of hundreds of millions of dollars. I ask you, is that going to happen in the Government? And I would say no. What happens, the same thing that is happening in the private sector. If they fail on the first test, they go out the door. I notice that the previous witness would not answer that question. What happens if they don't take the test? You know and I know what happens if they don't take the test. They go out the door. And yes, it is on their record.

Even if it's not on their record, what is the first question an employer asks a potential employee: Where did you work last? And so he left the Federal Government because he would not take a drug test. Yes; it will follow them through the rest of their lives.

As I said earlier, we have worked and will continue to work with concerned people to restore and bolster drug prevention and interdiction funding. However, we do not compromise a fundamental constitutional principle of privacy and freedom from arbitrary search and seizure for the sake of McCarthy-like witch hunt.

Again, Mr. Chairman, our experience in the Federal Government is that the Federal employee generally is singled out to so-called set the pace. If you recall back in the Carter days when he tried his guidelines with the private sector, it was mandatory in the Federal sector. We were told we had to set the pace for the rest of the country. If you will recall, Mr. Chairman, when we went into the depression-recession right after 1981. Again, Federal workers become the scapegoat or the ones that had to set the pace.

When you couple this report with Mr. Meese's response to our question of constitutionality, Mr. Meese says Federal workers consented when they signed on as Federal workers. Well, Mr. Chairman, I have a copy of a 171 form, which is an application for hire. Maybe we should start this program at the very top of the Justice Department because they obviously hallucinate over there. Nowhere in this thing do I see where Federal workers consent to this type of search and seizure.

Judging from what has been happening in this area, we apparently have a real problem in the credibility of the testing processes themselves. You have cited some of those examples in your statement when you opened up the meeting this morning, some of the DOD and military testing, where we had like 70,000 troops. Just appearing recently on a talk show out of New York, we had a lady there from the private sector who had faced the same problem out of Georgia with a private sector employer. Many workers are being put out the door where this has happened.

Let me tell you what I am coming to realize is behind this, Mr. Chairman. This is a whole new industry. If we can set the pace with Government by requiring mandatory testing, I am telling you that professional people in the scientific community, in the academic community, and from the legal community are coming out of the woodwork. There are consultant firms and phone wires buzzing

across this country right now like you would not believe, as to the money that can be made. Of course, to start with, you look at the hundreds of millions of dollars involved in the Federal program.

Then if we can get the private sector employees to go along, you have started a whole new industry. Then when you get into the challenges as to whether people had any reasonable shot or not, and you look at the money that is to be made for the law firms around this country—and we find the same ones who can argue it on both sides of the fence. Mr. Chairman, the bottom line is, we think a program like this, without reasonable cause, has no place in our society. We think it sure has no place at the Federal work-site.

We recognize that the drug problem in this country is serious. We stand ready in the fight to resolve that problem. But we stand just as ready to fight for the basic principle of human dignity, constitutional rights, and the lack of an employer's control over employees, whether it be Government or private sector, in their dignity as humans and their standing in a democratic society.

Let me again thank you very much for the opportunity to appear here in representation of Federal workers.

[Statement of Kenneth Blaylock follows.]

STATEMENT BY

KENNETH T. BLAYLOCK
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

My name is Kenneth T. Blaylock. I am the National President of the American Federation of Government Employees, AFL-CIO. We represent 700,000 federal workers across the country.

We are pleased to appear here today to testify on a frightening proposal to drug test all federal workers, and we want to express our appreciation to the chair for holding this timely hearing. We hope this hearing receives attention outside the federal employee community. This proposal should concern all workers because if you can do this to federal employees, you can do it to every one else. Under this scenario, federal employees would be tested first, closely followed by contractor employees and their suppliers. With this precedent, all employees would be vulnerable to this intrusion.

There used to be a time when conservatives had principles. We disagreed with them over the role of government in society and the dangers of economic power to a democratic society, but at least we understood the principle on which their philosophy rested. Henry David Thoreau succinctly summarized this philosophy saying, "The government which governs least, governs best".

But now we face an Administration parading under a conservative banner which seems ready to sacrifice any conservative principle for the sake of a momentary P.R. advantage. We have seen this Administration sacrifice the principle of separation of church and state for a simplistic stance in favor of prayer in the school; we have seen them

sacrifice the principle of individual choice for the government dictated morality of banning abortions; and we have seen the principle of national sovereignty subverted in order to back Somoza thugs known as "contras".

Now we see the culmination of this cynical fear mongering in lieu of principle to endorse the witch hunt mentality of universal drug testing of federal employees.

Let's put one issue to rest. AFGE and the members of AFGE detest drugs. We detest the harm that drugs cause to individuals and society. We hate the criminals that prey upon the weak and susceptible for the sake of "the profits" of the drug trade. We stand ready to enlist all federal workers and their families to put a halt to the illegal drug trade. AFGE has long sought to negotiate strong drug and alcohol treatment programs. We have developed model contract language to address our concerns. The Code of Federal Regulations (792.101-105) a mandated by Public Law 91-616 establishes as policy the need to "offer appropriate prevention, treatment and rehabilitation programs and services". Yet all too often we see "paper programs" with no money or skilled personnel to back them up and effectively deal with this problem.

As a matter of fact, we have difficulty in understanding why a universal drug testing program which at the minimum would conservatively cost \$54 million [\$11 per initial screening with an experience factor of 20 percent testing positive, and \$75 for follow up tests (cost estimates derived from Roche Medical

Services)] is being proposed while at the same time the Administration is proposing cuts (according to the President's FY 1987 Budget Appendix) to the account in Customs, which is involved in drug interdiction, by \$14 million and 1,547 personnel. The initial \$54 million cost would go to over \$100 million if the testing were extended to the contractor work force.

We will work with all people concerned with drugs in our society to restore and bolster drug prevention and interdiction funding. However, what AFGE will not do is compromise the fundamental, constitutional principles of privacy and freedom from arbitrary search and seizure for the sake of a McCarthy-like witch hunt. We refuse to be stampeded into acquiescing to a program which is morally repugnant and repulsive to a free society.

Let's step back and recognize exactly what we are talking about. The proposal is to single out 2 million of the nation's 113 million work force and tell them once or twice a year that they will be mandated, forced at threat of job loss, to go to a secure area and urinate publically--that is, in front of a witness. (Without the public urination, drug users inevitably will smuggle in a "clean" urine sample.) If that person (as many people are) is on a prescription drug, they will have to go through the secondary anxiety of the follow-up testing. All of this with no guarantee that the greatest substance abuse in the work force will be addressed at all--alcohol abuse.

Let us note that the previous cost estimates are not the total cost which will be borne by the government for this program. In addition, the cost of the public witness must be factored in; the lost work time must be added. Even if the tests are 99.5 percent accurate at the second level of tests, the federal government would have 200 misdiagnoses. Aside from the injustice to those 200, the federal government would be liable for penalties from those 200 employees. Judging from the Texas court case which awarded \$200,000 to a former employee who was falsely accused of illegal drug use, this would generate an additional cost of \$40 million plus legal costs. Of course, the human side cannot be neglected. What happens to those individuals who have their careers and lives ruined because of errors in the testing process or mistakes in processing the results? This has happened. The army has discharged servicemen, ending their military careers and thereby prejudicing private employers from hiring these individuals. Then they found out the tests were flawed.

It should be noted that press reports allege 20 percent of all of DOD Compuchem tests were off the mark by 20 percent or more of their readings of quality control samples in 26 percent of all 1984-1985 test batches.

Yet, even given these fiscal concerns, this should not be the consideration which decides this issue. Even if there is no cost to the entire testing process, and even if the tests are 100 percent accurate, should an employer, even the federal

government--without overwhelming need because of the nature of the job or reasonable cause--subject their entire work force to such an invasion of privacy as a condition for holding a job and earning a living?

For AFGE the answer is a clear "no". For those who answer "yes", they should recognize what a slippery slope they are on. Lie detector tests on any legal or moral issue as a condition of employment--as a condition of life--become feasible and consistent. All the legal and constitutional protections against arbitrary use of governmental power against individuals become waived to the economic power of the employer over the employee.

The Fourth Amendment to the Constitution protects an individual's reasonable expectations of privacy from unreasonable intrusions by the state. In determining whether an individual has reasonable expectation of privacy and whether the governmental intrusions are reasonable, courts have generally weighed the need to search or seize against the invasion such action entails (the so-called "balance test"). Even where the public interest clearly weighs in favor of such drug testing (for example, police officers), the courts have held that "there must be a reasonable objective basis to suspect that a urinalysis will produce evidence of an illegal drug use" (Turner et. al. v. Fraternal Order of Police, et. al., No. 88-1213, November 13, 1985). In a similar case, involving bus drivers, the court upheld drug testing, but only when bus drivers were

involved in a serious accident or two supervisory employees concurred that the employee was likely under the influence of intoxicating liquors or narcotics.

Now, I ask you how can the federal government meet this "need" standard in drug testing a GS-4 clerk typist in the Census Bureau. What issues of public safety, or public interest, will the federal government bring to bear to show that this clerk typist should be deprived of the constitutional protections enjoyed by a normal U.S. citizen? We are sure they cannot.

AFGE knows of no full scale, crisis level drug problem within the federal government. We would like to see documentation of what type of drug problem exists. Additionally, there is no evidence that Federal employees have a greater problem than other groups of workers. In fact, there is evidence to the contrary in that there are only a handful of cases each year involving illegal drug use.

However, after hearing Attorney General Meese's endorsement of this proposal, we are concerned about the potential use of hallucinogenics at the Justice Department.

Even given the facts, we are not reassured that this proposal will die a deserved death. We are fearful because there has been a long-term, gradual erosion of worker rights for federal employees as compared to the rest of the civilian work force.

Unlike other workers, federal employees are:

- Denied full political participation in our democratic society;
- Denied the option of an agency shop;
- Denied the fundamental right to strike;
- Subjected to polygraph tests in great numbers (the recent House legislation on polygraphs continues this separation);
- Subjected to arbitrary performance appraisal systems;
- Denied a "property" right to their earned retirement; and
- Subjected to invasion of privacy by computerized data banks.

We are greatly concerned that there are some people in this Administration who believe it is in their interest to separate federal employees from the rest of the work force, to create a second class work force stripped of fundamental rights of citizenship, politically neutered, and thus subjected to political manipulation and ideological conformity.

We hope this committee will help AFGE assert that a federal employee is not a second class citizen, that he or she deserves the full scope of rights granted to other workers in our society.

Thank you.

Mr. ACKERMAN. Thank you very much, Mr. Blaylock, for your statement, the complete text of which is in the record.

We do appreciate once again your being here with us this morning.

Mr. BLAYLOCK. Thank you very much, sir.

Mr. ACKERMAN. We will now hear from Mr. James Peirce, the president of the National Federation of Federal Employees.

STATEMENT OF JAMES PEIRCE, PRESIDENT, THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES, ACCOMPANIED BY CLINTON WOLCOTT

Mr. PEIRCE. Thank you, Mr. Chairman.

I have on my right Clint Wolcott, one of our staff attorneys, who was instrumental in the court action we have taken of drug testing in one of our Army units.

Mr. ACKERMAN. Welcome.

Mr. PEIRCE. Mr. Chairman, I am pleased to appear before the subcommittee today to present our views on the proposal of the President's Commission on Organized Crime to perform drug testing of all Federal workers. While the proposal has yet to be implemented, it still represents a serious threat to the rights of Federal employees. Already, the Department of the Army has made changes to its alcohol and drug abuse prevention and control program which would incorporate the mandatory urinalysis of Federal civilian workers to detect the presence of drugs and alcohol.

Drug testing is the most insulting proposal to emerge from the Reagan administration's Federal employee policies since it planned to require workers to submit to polygraph examinations. In fact, it smacks of a police state. Lie detector tests, urinalysis tests, where does the administration go next? NFFE is currently seeking a preliminary injunction blocking the implementation of the DOD and the Department of the Army regulations authorizing random testing of selected categories of employees. I commend the subcommittee for your prompt attention to what could become a serious invasion of worker privacy and denial of constitutional rights. NFFE looks forward to working with you to prevent any infringement of the rights of Federal workers.

NFFE objects strongly to the administration's proposal. First, we do not believe that drug testing is necessary because the Federal Government has never indicated that drug abuse is widespread or on the increase among its workers. In fact, the Department of Defense has found exactly the opposite. In an article on DOD's urinalysis policy for civilians in the June 3, 1985, issue of the Federal Times, DOD acknowledged that the problem of drug use among civilians is very small. Nor have any of the other executive departments even mentioned drug use among their employees. By recommending universal drug testing, the Commission has raised the specter of widespread drug abuse within the Federal work force. Such rampant drug usage simply does not exist, and the Commission has performed an enormous disservice to the American public and to all Federal employees by suggesting that it does.

There is no reasonable explanation for undertaking such a controversial program as drug testing when no real problem has been

identified. Policies already exist within the Federal Government for handling problems of on-duty drug abuse. Few Federal workers are willing or able to tolerate working with a coworker who is under the influence of a controlled substance. Current Government policies and procedures provide sufficient guidelines for dealing with on-duty drug abuse among employees.

The Reagan administration proposal completely and unnecessarily expands the tracking of drug abuse among Federal workers. Under the Commission's proposal, workers could be subjected to random and periodic urinalysis testing whether or not drug abuse is suspected. Such testing would be the ultimate invasion of the employee's privacy and, in all likelihood, constitutes an unreasonable search and seizure without sufficient proof or cause, a violation of the fourth amendment to the Constitution.

Most Federal workers voice resentment toward a program that would force them to offer up their bodily fluids for inspection. Worse still is the Army's proposal which actually would require another person to be present while the employee provides the sample. Just as invasive, employees who take prescribed medicines would be forced to inform their supervisors, so that any prescribed drugs would be noted during the testing of the sample.

We can think of many instances in which an employee would prefer to keep his or her medical history private. For example, a worker under the care of a psychiatrist would likely prefer not to divulge use of antidepressants or other psychiatric drugs. An employee being treated for heart disease might prefer not to alert a supervisor to the illness, because a supervisor might determine that he or she would be unable to handle a more stressful job assignment or promotion. Yet the universal drug testing proposal would automatically render such information available to a supervisor.

Moreover, urinalysis testing is notoriously unreliable. Manufacturers of the urinalysis testing devices even acknowledge that a 5-percent error rate exists. The Government could easily find itself accusing far more innocent employees of substance abuse than the number of actual abusers. If the Federal Government tested 2.8 million employees, 140,000 could be accused and disciplined unjustly. The Department of Defense has already experienced widespread false positive results with its screening of active duty military personnel. And many private sector workers who have been victimized by false positive test results are filing law suits for wrongful discharge. Clearly, such an inaccurate test should not be allowed to ruin the working and personal lives of innocent civilian Federal employees.

Perhaps the most absurd defense of mandatory urinalysis of civilian employees is the Department of Defense's claim that such testing is necessary to establish parity between civilian employees and military employees who have been subject to this type of testing for the last 3 years. We adamantly disagree that civilian employees should be subject to such an invasion of privacy merely because the military finds it necessary to subject its uniformed members to such an invasion. Simply because the military finds it necessary to scrutinize its active duty personnel due to a perceived

controlled substance problem is no reason to impose the same type of illegal scrutiny upon a different group of employees.

If such testing were indeed put into effect, the Federal Government should have to prove nexus or a connection between off-duty use of substances and the performance of work. Urinalysis testing can detect controlled substances within 2 weeks of use. There is no connection between an employee's off-duty use of these substances and the on-duty danger to employees or Federal property any more than there is a connection between an Air Force general's drinking four martinis on a Saturday night and reporting for duty at 7 a.m. Monday morning. Because there is often no proven nexus between off-duty substance use and an individual's employment, positive results on a test should not be the basis for disciplinary action, even with subsequent testing.

The sole use of positive urinalysis as the reason to terminate or remove an employee violates one of the basic purposes of the nexus requirement, "to minimize unjustified government intrusion into the private activities of Federal employees." Clearly, we believe that the proposed testing program is an invasion of an employee's privacy.

Mr. Chairman, the drug testing proposed by the Commission will do untold damage to the morale of the Federal work force, which is already at an all-time low. Apparently it is not enough that the pay and benefits of Federal workers are dramatically lower than their private sector counterparts and that employees are constantly threatened with contracting out, safety and health hazards, and budget cuts to their agencies. Now the Commission has decided that a further humiliation is necessary.

Aside from the obvious considerations of privacy and constitutional rights, the proposal is simply bad management. Entire groups of employees should not be humiliated simply because occasional instances of on-duty drug use occur. Such instances should continue to be handled on an individual basis.

Our final concern is that the Department of the Army's change clearly states that the drug testing of civilian employees is not negotiable with recognized labor organizations because it involves the Army's internal security practices within the meaning of 5 U.S.C. 7106(a)(1). We adamantly disagree. Such testing falls within the scope of working conditions of Federal employees and thus is negotiable.

Mr. Chairman, one of the most important merit principles upon which Federal personnel management is based requires,

All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management, with proper regard for their privacy and constitutional rights.

Implementation of the urinalysis proposal, mandatory drug testing, would clearly violate this principle. NFFE, its members, and its bargaining unit employees do not condone the use of controlled substances. We cannot, however, condone the testing program's gross violation of the privacy of our members and the intrusion on their rights to work freely within a free society. It is tantamount to a witch hunt, and we will not stand for it.

I would like to add that Mr. Smith, in his testimony, indicated the Commission did not have enough time to adequately do the job, so to speak. I would submit then that the report should not be held valid for any action. If there is insufficient time and they couldn't arrive at concrete solutions and so forth, then it should not have been made.

He also indicated that he thought, and he held up as an example of an appropriate drug testing program, that of the Marine Corps. Yet he stated very soon thereafter that he was unaware of the specifics of the program. I have a little problem with that. If it's so good, why didn't he know the specifics?

His cohort also indicated that she felt that this should be an item for negotiations. That I agree with; the rest of it, I don't.

Mr. Chairman, we urge you and the members of the subcommittee to quickly introduce legislation which would prevent the implementation of the administration's mandatory drug testing proposal.

Again we commend you for your prompt attention to this issue. We look forward to working with you to stop this flagrant violation of the rights of Federal employees.

Thank you, Mr. Chairman.

Mr. ACKERMAN. Mr. Peirce, thank you very, very much for your testimony as well as your observations.

Could I ask you to wait for 4 minutes while the committee goes over to vote?

Mr. PEIRCE. You surely can.

Mr. ACKERMAN. We will suspend for 4 minutes.

[Recess]

Mr. ACKERMAN. The committee will come back to order.

Mr. Peirce, thank you very much for your statement. We also take note and commend you on the suit that you have filed.

I understand the Department of the Army regulations call for what they say is a temporary personnel action, even if an employee tests positive during the initial EMIT screening. Can you explain the Federation's objection to this policy?

Mr. PEIRCE. I would like for my attorney, Mr. Wolcott, to address that. He is thoroughly involved with the Army's situation.

Mr. WOLCOTT. I think this is one of the serious problems with the Army's proposal that they have actually implemented. They are talking about the taking of the field tests, which, as has been noted, are extremely inaccurate, and then transferring someone out of their job, taking away their access to information prior to their being any confirmation. They are going to identify people as drug abusers when it is clear that a large group of those people will come up positive anyway. So, I think that there is absolutely no reason for that kind of action being taken.

I might also like to point out that some of the concerns that were raised. It was said: well, you know, the President's Commission report is very provisional; these will have to be worked out. Many of those same things are being done by the Army right now. Their regulations do provide for removing people from service for refusing to take the test. They do provide for discipline for positive tests. And they provide that there be no negotiations.

Mr. ACKERMAN. They provide no negotiations?

Mr. WOLCOTT. They provide that there will be no negotiations with labor organizations. That is what the Army's regulations say.

Mr. ACKERMAN. What type of discipline do they mete out?

Mr. WOLCOTT. The regulations are not specific. It simply says that a confirmed positive test may be used for discipline or for drug abuse treatment. But it is very clear that activities are authorized to use it for discipline.

Mr. ACKERMAN. Are people indeed disciplined, or can they be severed from service?

Mr. WOLCOTT. Well, they would follow the normal civil service procedures, I assume. The question of whether that actually would happen, whether that would be the discipline that would happen is not entirely clear. The main point is that the unconstitutional search and seizure has already taken place. These people's rights have already been violated.

We don't know how each activity throughout the country will implement these. We have received reports from employees that seem to indicate that their local activities are saying: once we start this testing, we are going to be just disciplining people. But we don't know specifically what is going to happen yet.

Mr. ACKERMAN. Could these people rise up in righteous indignation and claim that it was a cheap trick to be tested one day when they came in to work, and get away with that?

Mr. WOLCOTT. One of the basic principles of labor relations is that, when a problem comes up with a direct order on the worksite, the employee is supposed to comply with the order and then grieve it later; so, no. I am not sure if, you know, subsequently finding that it was unconstitutional would help the employee or not, but they would certainly subject themselves to a lot of danger. And telling the supervisor it was a cheap trick wouldn't suffice.

Mr. ACKERMAN. Thank you both very much for being here with us this morning.

Mr. PEIRCE. Thank you, Mr. Chairman.

Mr. ACKERMAN. The committee would be pleased right now to hear from Mr. Robert Tobias, who is the president of the National Treasury Employees Union.

Mr. Tobias, welcome once again before our subcommittee.

STATEMENT OF ROBERT M. TOBIAS, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. TOBIAS. Thank you very much, Mr. Chairman.

We really very much appreciate your active interest in this very serious problem of proposing to test Federal employees for drugs. I believe it is disgraceful that once again this administration has put the finger on the Federal civilian worker. Federal employees are already attacked virtually every day by this administration, and now the administration is accusing them of being drug abusers.

It is time this administration stopped using Federal employees as a scapegoat for its failed policy of stopping drugs from coming into this country and instead support the people who dedicate their lives to public service.

I firmly believe the drug-testing program proposed by the Commission on Organized Crime is unwarranted, unwise, unjust, and in

most cases illegal and contrary to existing Federal regulations. It is basically unwarranted because there is absolutely no documented need from any agency, from the Commission or any other place. There is not one scintilla of evidence of need to support the conclusions that were drawn.

It is unwise because of the cost. There are currently 2.9 million Federal employees, including the postal workers. Each test that is worth anything is going to cost between \$90 and \$100. Therefore, a single test of all Federal workers on an annual basis will cost between \$265 million and \$295 million. That's a whole lot of money. Now, this is at the same time—this administration is considering this kind of a proposal when at the same time it is proposing to the Congress that it cut \$31 million from the U.S. Customs Service and 771 persons who are responsible for drug interdiction.

So, on the one hand, they are willing to spend \$260 or \$290 million to test Federal employees and cut the agency that is empowered by this Congress to interdict drugs. I think this is a very silly policy. It certainly camouflages the real intent of this administration.

The proposed program, I believe, is also unjust because of the 29,500 to 150,000 employees who would be falsely accused of using drugs. The accuracy rate of these tests is somewhere between 95 and 99 percent, and some say as low as 75 percent. But taking the highest accuracy test, some 30,000 people would be falsely accused. We would have people who would be individuals who would be destroyed. Their careers would be destroyed. It doesn't seem to me to make sense that we would have people fired from their jobs for eating bagels with poppyseeds that test positive for morphine.

I also believe that such actions may very well violate the constitutional right to privacy. The Federal Government must demonstrate a compelling state interest to counterbalance an employee's right to privacy. In this situation an employee's right to privacy must be balanced against the Commission's desire that Federal employees set a proper example: hardly the stuff which justifies snuffing out constitutional rights.

I also believe that such an action violates other existing statutes and regulations; 5 U.S.C. 2302(b)(10) prohibits discrimination on the basis of conduct which does not adversely affect the employee's performance or the performance of others; and 5 CFR 339 does not allow medical examinations envisioned by this program.

So, in summary, Mr. Chairman, I believe the implementation of the Commission's recommendation would be unjust, fiscally irresponsible, and contrary to basic law and regulation.

Again I want to thank you for your interest and to commend you for your interest. I would hope that what would follow would be legislation which would prohibit this very unwise recommendation from going into effect.

[Statement of Robert Tobias follows:]

ROBERT M. TOBIAS
PRESIDENT
NATIONAL TREASURY EMPLOYEES UNION

Thank you Mr. Chairman and other distinguished members of the House Subcommittee on Human Resources for this opportunity to respond to the President's Commission on Organized Crime's recommendation that all federal civilian workers be subject to drug testing. My name is Robert M. Tobias, President of the National Treasury Employees Union. NTEU is the exclusive representative for approximately 120,000 federal civilian employees located across the continental United States, Alaska, Hawaii and Puerto Rico.

Before I get into the text of my presentation, I would like to make a personal comment on the Commission's recommendation. I think its disgraceful that once again this Administration either directly or through a surrogate has put the finger on the federal civilian worker. Federal employees already are severely underpaid and live under constant threats to their job security. Now the Reagan Administration is accusing them of being drug abusers! It is time for this Administration to stop using the federal employee as a scapegoat for its failed policies, and to support, rather than undermine the people who dedicate their lives to public service!

It is NTEU's position that a drug testing program of federal civilian workers as proposed by the Commission on Organized Crime is unwarranted, unwise, unjust and, in most cases, illegal and contrary to federal regulations. The drug testing program is unwarranted because there is nothing that I

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am aware which establishes there is excessive drug usage within the federal civilian workforce. Specifically, there are no substantiated assertions that federal civilian employees are guilty of excessive absenteeism due to drug use, or that there has been a precipitous drop in performance on the job due to drugs. Even the Commission, which targeted federal employees in its report, did so only as a means of serving as ". . . an example of the unacceptability of drug use." ^{1/}

A comprehensive drug testing program as suggested by the Commission would be unwise because of the prohibitive cost of implementation. According to the Federal Personnel Guide, on Employment Pay and Benefits there are 2,950,199 ^{2/} federal civilian employees. Mr. Claude Buller, President of Compu Chem, a company that performs more than 250,000 drug tests for the military each year, has stated that the cost of a highly reliable screening test would cost about \$90.00 to \$100.00 a person. ^{3/} As a result, the cost of conducting a single screening test for drugs for all federal civilian workers would cost the taxpayers between \$295,019,900.00 and \$265,517,910.00.

Furthermore, because the body expells the testable elements of marijuana and other drugs, employees would have to be tested periodically to determine if they are using drugs. For

- ^{1/} See President's Commission on Organized Crime report, p. 419.
^{2/} Federal Personnel Guide, Employment Pay and Benefits, by Federal Personnel Publications (Ed. 1986) at p. 132.
^{3/} Washington Times, March 10, 1986.

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example, the main ingredient in marijuana stays in a person's system for only up to 30 days according to a report in the Washington Times, (March 10, 1986). As a result, even assuming the test is 100% accurate (and no test claims to be 100% accurate), it would cost around three billion dollars a year to conduct a valid testing program for marijuana.

Clearly, the expenditure of such a sum merely to serve as an example to the American public that drugs are unacceptable is fiscally irresponsible. If the Reagan Administration is serious about the spread of illegal drugs, the almost 300 million dollars needed to fund a single drug test would be better spent on hiring hundreds of new U.S. Customs officers to interdict those drugs before they cross our borders.

The drug testing program is unjust because it stigmatizes an entire workforce already beleaguered and belittled by the Reagan Administration. By merely proposing such a program the President's committee is telling the American public that vast segments of the federal civilian workforce are immature and irresponsible enough to show up for work while under the influence of drugs.

The injustice of implementing the proposed drug testing program unfortunately does not end with insulting and undermining confidence in federal employees. Due to the unreliability of the tests to accurately distinguish between drug users and non-users many tested employees will be falsely accused of using drugs.

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According to representatives of the testing companies themselves, the best tests conducted by trained personnel are only 99%, ^{4/} or 95% ^{5/} (depending on which company is quoted) accurate which means that a single test of all federal civilian employees will result in a minimum of 29,501 to 147,505 ^{6/} employees being falsely accused of using drugs. Obviously, if the test is conducted more than once, a much greater number of employees will be falsely branded as drug users.

While a test that results in false positives for a minimum of almost 30,000 employees is itself unacceptable, many doctors believe the testing companies' estimates of accuracy are grossly overstated, so a much greater number of employees will likely be harmed. Dr. David Greenblatt, Chief of clinical pharmacology at Tufts New England Medical Center is quoted in the New York Times as stating that "False positives can range up to 25 percent or higher", concluding that "The test is essentially worthless." ^{7/}

As this subcommittee deliberates the issue of the reliability of drug testing it must not lose sight of the fact that lives have been destroyed when drug testing has proved to

^{4/} Washington Times, March 10, 1986.

^{5/} New York Times, February 24, 1985, sec. 3, p. F17.

^{6/} The figures 29,501 and 147,505 represent 1% and 5% respectively of the 2,950,199 federal civilian workers.

^{7/} New York Times, February 24, 1985, sec. 3, p. F17. The test identified as "worthless" was the most common test used to determine the presence of byproducts of marijuana, cocaine and amphetamines in urine.

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be inaccurate. It is not a question of statistics, whether a 99%, 95% or 75% accuracy rate is tolerable. Real people are irreparably harmed when mistakes are made and even a single error is tragic. Implementation of a program that even under the best of circumstances will ruin almost 30,000 lives is inexcusable.

Unfortunately, time will not permit me to go into detail into the thousands of individual stories behind the thousands of occasions where drug testing has been improperly conducted, resulting in false accusations. However, I would like to take the time to relate a single story involving two U.S. Navy interns who were branded as morphine users pursuant to a drug test. The doctors were forced to participate in a drug-screening program, providing periodic urine samples, which again indicated they were using morphine. A few weeks after a hearing before an administrative panel (which acquitted the doctors despite the evidence), the Navy issued a report which stated that poppy seeds taken in normal dietary use had been found to test positive for morphine. It was not coincidental that both doctors favored bagels topped with poppy seeds sold in the hospital cafeteria. 8/

While not all of the stories behind the drug testing errors have the element of humor the above story has, they are equally compelling and even more devastating in cases where

8/ Los Angeles Times, September 16, 1984, section 1, p. 3.

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people were wrongfully disciplined. The U.S. military services, which have used drug testing for years, have experienced numerous errors both in the mechanics of the tests used and in the procedures used by the testing personnel.

In June, 1984 U.S. Army officials announced that they were trying to locate 60,000 to 70,000 soldiers to notify them of their rights to appeal disciplinary actions because of problems in documentation of evidence, and that probably a majority of 9,099 people discharged in 1982 and 1983 for drug and alcohol abuse were implicated by dubious evidence. ^{9/} The U.S. Air Force about the same time announced that they were reviewing action against 3,400 people who tested positive between April, 1982 and November 1983. ^{10/} Finally, in 1983 U.S. Navy officials threw out more than 1,800 disciplinary actions because of administrative problems. ^{11/} It was reported in December, 1985 that the Army and Air Force did, in fact overturn disciplinary actions against 1,621 people and are considering another 2,817. Disciplines voided by the Pentagon included discharges, bars to re-enlistment, fines, demotions and job reclassifications. ^{12/}

The reason for citing the statistics of the military fiasco is not to suggest that every drug testing program will be conducted in such an incompetent and cavalier fashion, but to buttress my suggestion that any drug testing program that

^{9/} Ibid.

^{10/} Ibid.

^{11/} Ibid.

^{12/} New York Times, December 16, 1985, p. A16.

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attempts to test literally millions of people will error. And when errors occur real people are unjustly injured. Dr. Robert V. Blanke, professor of pathology at Virginia Commonwealth University, who reviewed tests conducted by the Army, stated "Even in the best run laboratory, errors will occur, particularly administrative errors. . . " 13/

I also believe that if challenged in a court of law the Commission's recommendation could well be found to violate the employees' right to privacy, as guaranteed in the Fourth Amendment. The Fourth Amendment protects an individual's reasonable expectation of privacy from unreasonable intrusions by the state.

There is no question that there is a reasonable and legitimate expectation of privacy in one's person. The taking of blood from the body has been found by the United States Supreme Court to be a search and seizure within the meaning of the Fourth Amendment, 14/ and the governmental taking of urine has been found by several courts to be a seizure within the meaning of the Fourth Amendment. 15/ To determine if the invasion

13/ Washington Post, April 27, 1984, p. A21.

14/ Schmerber v. California, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834 (1966).

15/ Division 24, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976); McDonald v. Hunter, 512 F. Supp. 1122, 1127 (D.C. Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); Storms v. Couahlin, 600 Supp. 1214, 1217-18 (S.D. N.Y. 1984).

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is an unreasonable intrusion on one's privacy, a court must balance the interests of the public against the interests of the individual. ^{16/} Because one's right to avoid unreasonable intrusion by the federal government is protected by a specific provision of the Bill of Rights, the government must demonstrate a "compelling state interest" to justify the drug testing. ^{17/} This is balanced against the employee's expectation of privacy.

The two competing interests being balanced in this instance are the commission's desire to set a proper example for the American public vs. the employee's expectation of privacy. I believe the federal civilian workers' interests are paramount. As a result, I believe that if tested in the courts, the commission's recommendation would be held to be unconstitutional.

Finally, the subcommittee should keep in mind that the federal civilian workers' work environment is heavily regulated. As a result, any broad mandate such as that suggested by the Commission will be impacted by numerous federal regulations. For instance, current regulations restrict an agency's ability to legally conduct a medical examination (see 5 C.F.R. 339). Not only would an agency be acting outside its scope of authority in ordering a medical

^{16/} Division 241 Amalgamated Transit Union, *supra*, at 1265.

^{17/} Elrod v. Burns, 427 U.S. 347, 362-363, 96 S. Ct. 2673, 2684 (1976).

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examination as suggested by the Commission, but the agency would also be obligated to adhere to certain due process procedures not considered.

If the Commission is suggesting that being drug free is necessary to continue to qualify for one's position, that appears to be contrary to 5 C.F.R. 338 which grants only the Office of Personnel Management the authority to determine minimum qualifications for a position.

The Privacy Act would necessitate the establishment of a system of records, preceded by advance publication in the Federal Register. And any implementing agency would certainly have an obligation to bargain with the appropriate exclusive representative(s), and permit a representative to be present during any investigation.

Finally, a drug testing program could easily result in numerous prohibited personnel practices throughout the federal government. 5 USC Section 2302(b)(10) prohibits discrimination on the basis of conduct which does not adversely affect the employee's performance, or the performance of others (except for convictions of a crime).

In summary, I believe that implementation of the Commission's recommendation would be unjust, fiscally unsound and contrary to law and government-wide regulations. I recommend that the Subcommittee reject the drug testing program.

Mr. ACKERMAN. You are saying you would support legislation, were it introduced, that would prohibit the drug testing of Federal employees?

Mr. TOBIAS. Certainly the recommendation that has been put forth by this Commission, we certainly would, with pleasure.

Mr. ACKERMAN. Should there be some tests that should be allowed to continue? Should we exempt from that prohibition air traffic controllers, that have been mentioned today, among others?

Mr. TOBIAS. I think that there was a decision by the Supreme Court about 6 months ago that had to do with engineers on the railroad. The Supreme Court allowed for that kind of testing because the regulations were very narrow and very specifically drawn and showed that there was a probable cause before the testing was to take place, that it had some problem with the public safety. And I certainly don't have any problem with drug testing under the narrow defined regulations that were allowed by the Supreme Court. But that's not what the recommendation is this Commission is making.

Mr. ACKERMAN. Thank you very much for your testimony. We appreciate your being here with us this morning.

Mr. TOBIAS. Thank you, Mr. Chairman.

Mr. ACKERMAN. The committee will now hear from Dr. William W. Manders, whom we regard as an expert witness. He is the former chief of toxicology of the Armed Forces Institute of Pathology. Doctor, welcome.

We will invite you, if you wish, to submit your entire statement for the record and comment or present those parts of it you would like to present to us orally.

Mr. MANDERS. That will be fine, Mr. Chairman.

STATEMENT OF WILLIAM W. MANDERS, Ph.D., FORMER CHIEF OF TOXICOLOGY OF THE ARMED FORCES INSTITUTE OF PATHOLOGY

Mr. MANDERS. I consider it an honor to be invited here before this subcommittee.

As stated, I have had considerable experience with the military program. At certain times, I have been outspoken. I am very acutely aware of how to conduct proper drug testing.

I have a background in the program, when testing was sort of a screening procedure with very little effort paid to confirmation. And at that time individuals were just referred to counseling and rehab.

The Carlucci memo, however, in December 1981 stated that urine could be used for forensic purposes. This in turn sort of indicated that the current methodology that was used by the military at that time, being confirmation by gas liquid chromatography, was grossly inadequate. However, that method was still used.

You alluded to the tacos. The tacos were actually producing reading from grease or a type of lipophilic material, lipid material, which was coming off the column at the same time that the known chemical was supposed to come off.

Mr. ACKERMAN. People eating tacos, would they test positively?

Mr. MANDERS. No; that is negative, because the grease or the lipid would be digested and metabolized; and you should not find any of the taco lipid in the urine specimens.

Mr. ACKERMAN. What about the poppyseeds?

Mr. MANDERS. Well, the poppyseeds, that's real.

Mr. ACKERMAN. That's real?

Mr. MANDERS. That is correct. In other words, you would come up positive for morphine from poppyseeds, which still had some residual morphine present in them.

Mr. ACKERMAN. Those of us who did eat bagels with poppyseeds and onions and scallions and other toxic material would have cause for a class action?

Mr. MANDERS. I would think very possibly so, and could have been eliminated from the military because they may have denied ever using heroin or morphine or codeine; yet, when it appeared in their urine, they really had no explanation.

Mr. ACKERMAN. Are there any other foods that would indicate positively as though one were possibly using drugs?

Mr. MANDERS. Well, if you utilize gas chromatography/mass spectrometry, with that instrument you identify the chemical at its molecular level. There it is highly unlikely and probably borders on the absolute of identifying a foreign compound. Now, all compounds have their specific chemical nature. It's true that you can eat marijuana. Now, granted, most people smoke it, but you can have it fed to you inadvertently; and you could undergo a drug test and show positive for use of marijuana.

Mr. ACKERMAN. How expensive are these tests that you are referring to?

Mr. MANDERS. Excuse me?

Mr. ACKERMAN. How expensive, the cost of administering a test?

Mr. MANDERS. Screening tests run probably in the area of about \$10, \$11, \$12, depending on how many drugs you screen for when you do a mass screening. Specific analyses by mass spectrometry would run probably somewhere, with a large contract, in the area of \$30, \$35. So, a specimen could be screened and tested for under \$50.

Mr. ACKERMAN. Under \$50.

Mr. MANDERS. That is using the most sophisticated of techniques.

Mr. ACKERMAN. How long do these substances remain testable once they are induced into the body?

Mr. MANDERS. It all depends on the individual. Individuals that put out acid urines are going to possibly retain drugs that are also acidic. Those that put out basic-type urines, depending upon your diet, could very well cleanse themselves quite readily of any drugs or drug metabolites. However, some drugs are lipophilic, like marijuana, which can stay around in your body tissues for a considerable amount of time. And we might say that a heavy user who stopped using could possibly be detectable for up to 30 days. Now, when I say detectable, that is at very trace levels. If you establish certain cutoff levels, say you establish a 100-nanogram cutoff level, this individual probably would fall off below the 100, somewhere on a time basis of approximately 5 days, somewhere in that period, give or take.

Of course, the other situation is that some of the laboratories that are testing, military laboratories especially, claim to cut off at a 100, yet—

Mr. ACKERMAN. A hundred what?

Mr. MANDERS. One hundred nanograms, being a certain level for a cutoff. You set your standards at 100 and then say, anything at or above that level we'll go ahead and confirm.

Currently the military laboratories have reduced that level in many instances 15 to 40 percent. So, they could be looking at something at 60 nanograms. They could possibly be looking at an area that could be due to passive inhalation.

Mr. ACKERMAN. Let me just understand what you are saying then as far as time is concerned. You would be able to test in most people, or they would test clean after 5 days, in some people you would be able to tell up to 30 days?

Mr. MANDERS. That is correct, depending on the individual. Depending on the urine output, fluid intake, some individuals could possibly smoke a marijuana cigarette and not be detectable at the 100 nanogram level.

Mr. ACKERMAN. Can one draw the conclusion that, in order to make these tests accurate, you would probably have to test everybody every 30 or so days?

Mr. MANDERS. No. That wouldn't be the method of testing. The greatest thing important about testing is that the specimen be collected under a chain of custody to insure that its integrity is maintained.

Mr. ACKERMAN. If people knew when the test was being administered—

Mr. MANDERS. People that knew when tests were being administered, depending on the drug that they were abusing, could very well within 3 or 4 days have themselves in a situation where they would not be detected.

Generally speaking, those that use marijuana, the highest level will arise in your urine as a metabolite at approximately 4 hours after exposure.

Repeated exposures, however, give you higher levels or give the individual a higher level. So, if someone smoked one joint, they may reach a 100 level in 24 hours. The second day if they smoked another joint, their level the second day may be approximately 150 nanograms. So, it's sort of accumulating in the body system. As the body eliminates it, it decreases very slowly.

Mr. ACKERMAN. If I came in to work and found that they were testing on a particular day, could I possibly spike my boss's coffee so that he tested positive?

Mr. MANDERS. Well, I don't know about coffee. You could probably spike his cough syrup or some of the other foods which he may like to eat. A chocolate drink probably could be spiked with some hash oil. He would probably come up positive in 4 hours or thereabouts.

The situation is, it is reported in the literature where one individual was given 5 milligrams of hash oil, and that individual felt no pharmacological effects from the hash oil. Yet, his urine attained a level of 210 nanograms, which would be declared a relatively strong positive. It would be twice the cutoff level.

Mr. ACKERMAN. Do you think that the testing of large-scale numbers of Federal employees has any validity? Are there other ways to go about this?

Mr. MANDERS. Well, that pertains back to my personal opinions and not scientific, but it would seem to me that probable cause always is a good reason to go ahead and test individuals for drugs. It is also very beneficial to our society to test those individuals who may be involved in the personal safety of the American people.

Mr. ACKERMAN. But random testing of every agency by all agency heads?

Mr. MANDERS. Well, as I pointed out before this hearing today, I don't know what is to be accomplished by random testing?

Mr. ACKERMAN. Doctor, thank you very much.

Mr. MANDERS. Thank you.

[Statement of William Manders follows:]

18 March 1986

Testimony before Subcommittee on Human Resources
U.S. House of Representatives
Committee on Post Office and Civil Service
Washington, DC

I am a retired U.S. Air Force Colonel with over 15 years of experience in management, research and quality control in drug testing. As a former Chief of the Division of Toxicology at the Armed Forces Institute of Pathology, I was directly involved in the establishment of the Department of Defense (DoD) quality control program for the military drug testing laboratories. I have observed the evolution of drug testing in the military from its inception, when positive results were used to identify individuals for counselling or referral to rehabilitation programs, to today, when a positive result can be used to administratively discharge or court martial an individual. I have also witnessed the change in drug detection methodology from a system of screening by thin layer chromatography with confirmation by gas chromatography to the present screening by immunoassay and identification by gas chromatography/mass spectrometry (GC/MS). I have authored and coauthored articles on radioimmunoassay, gas chromatography and gas chromatography/mass spectrometry as they are used in drug testing. Currently, I am Laboratory Director and Consultant in Forensic Toxicology of an independent forensic drug testing laboratory. From my experience with military drug testing, I have noted a number of problem areas which must be addressed in establishing a credible large-scale drug testing program.

First, since the results from a urinalysis test may be used to take some sort of action against an individual, the urine specimen must be collected and treated as a forensic specimen. This means that the specimen must be collected, handled, stored and shipped to the laboratory using chain of custody procedures. This insures that the specimen remains under someone's control from the time it is collected until it is shipped to the testing laboratory and prevents the integrity or identity of the specimen from being compromised. In my involvement with military administrative boards and courts martial as an expert witness, it has been my experience that chain of custody of a specimen has been questioned in almost every case and approximately 20% of the cases have been dismissed because of chain of custody problems.

Another problem area concerns selecting which drugs are to be tested and what analytical procedures should be used. When large numbers of specimens must be screened, immunoassay methods are usually used to differentiate between positive and negative specimens. These immunological methods are relatively inexpensive and allow large specimen throughput. However, immunoassays do have the potential to cross react with other non-drug substances in the urine and produce a false positive result. Because of this drawback, positive results from immunoassays should only be considered "presumptive positives", and they should be confirmed by some other chemical method. The use of immunoassay tests to identify the presence of a drug in an individual's urine is unacceptable in the forensic community.

In addition to selecting which drugs and methods are to be used for testing, a determination has to be made as to how much drug must be present in a specimen before it is called positive, i.e. what is the cutoff. In determining the cutoff for a drug, it is necessary to consider what analytical procedures and instrumentation will be used and what, if any, meaning does the cutoff level have. Today it is possible to measure drugs such as tetrahydrocannabinol or marijuana at the subnanogram level; however, the significance of levels this low is questionable when they may be obtained by passive exposure to marijuana smoke. In addition, it is important that the laboratory actually test to that cutoff level once it has been established. I have recently seen evidence where one branch of the military is utilizing screening cutoffs which vary from 15 to 40% below those which have been established by directive.

The second most important step in drug testing is the confirmation or chemical identification of the drug of interest. In all military laboratories and many commercial laboratories this second test is accomplished using GC/MS. This is a test which is physically and chemically different than the immunoassays, but it requires extensive specimen preparation and the use of sophisticated, expensive instruments. Its advantage is that it identifies a drug at the molecular level, and, used properly, it yields a highly accurate drug identification. At the recent meeting of the American Academy of Forensic Sciences which I attended in New Orleans, the Toxicology Section passed a resolution recommending that all forensic drug identifications be done by GC/MS.

After a specimen has been screened for drugs and the presence of any drug has been confirmed, there is the question concerning the reliability of the laboratory result. How do we know if the result is true and accurate? Reliability in a laboratory can best be established by monitoring laboratory performance through internal and external quality control programs and laboratory inspections. The internal quality control program involves inserting both known positive and negative specimens into the daily workload so that they are unknown to the technicians. Results from these internal quality controls can be used by the Laboratory Director to monitor daily laboratory performance and flag potential problems. This internal program must be run by an individual who reports only to the Laboratory Director.

The external quality control program should consist of both open and blind specimens which are prepared and submitted by an outside organization having no affiliation with the laboratory. In the open program, specimens are sent directly to the laboratory, and the results from these specimens reflect the best possible performance of that laboratory. The blind specimens, submitted unknown to the laboratory as patient specimens, indicate the real performance of the laboratory. An April 1985 article in the Journal of the American Medical Association cited a Centers for Disease Control (CDC) study by Hansen and others which reviewed a proficiency program consisting of both blind and open specimens. The authors reported the following conclusions: "These blind tests indicate that (1) greater care is taken with known evaluation samples than routine samples, (2) laboratories are often unable to detect drugs at concentrations called for in their contracts, and (3) the observed underreporting of drugs may threaten the treatment process." While a treatment program may not be a part of most drug testing, unreliable laboratory results will certainly destroy the credibility of a program.

A final measure of laboratory reliability depends on the independent inspection of the laboratory on at least a quarterly basis to verify that the laboratory follows its written scientific and forensic operating procedures. I have recently reviewed data from a laboratory in which the standard procedures required that all internal controls be within specific acceptable limits before any results could be reported. In data which was submitted as evidence in a court-martial, the cutoff control was analyzed three times and failed to meet the established criteria of acceptability each time; yet, results from that group of specimens were still reported.

I have pointed out a number of potential problem areas which must be addressed when initiating a large-scale drug testing program. In most cases, the only evidence of drug abuse will be a positive result from a laboratory. In order to be sure that this result is reliable, the specimen must be collected and handled using strict chain of custody procedures, and the testing must be done by a reputable laboratory which uses internal chain of custody procedures. In addition, the cutoff level for specific drugs must be determined by the sensitivity of the analytical procedures selected for testing and should preclude identification of individuals who may be passively exposed to drugs. Finally, both internal and external quality control programs as well as an inspection program are necessary to monitor laboratory performance. This is not an easy task, and it may require the designation of a government agency such as the CDC to provide this type of program with the authority to enforce certification and decertification of testing laboratories.

In closing, I would like to propose that, in any drug testing program where the result from a single urine specimen is the only evidence of drug abuse, a second positive result from a urine collected at another time be required before any action is initiated against an individual. This would allow for a breathing period during which time anyone whose specimen reported positive would be made aware of their exposure to a drug and be counselled on the consequences of having a second positive specimen.

William W. Manders, Ph.D.
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Mr. ACKERMAN. The subcommittee will now hear from Mr. Allan Adler, the chief legislative counsel of the American Civil Liberties Union.

Welcome, Mr. Adler.

**STATEMENT OF ALLAN ADLER, CHIEF LEGISLATIVE COUNSEL,
AMERICAN CIVIL LIBERTIES UNION**

Mr. ADLER. Thank you, Mr. Chairman.

I would like to submit my statement for the record. Most of what I had intended to say about the constitutional issues involved has been, I think, adequately briefed by Congressman Edwards and some of the other witnesses here. I agree in general with their statements.

I would just like to address four points that came up in testimony of some of the previous witnesses.

One is that I kept hearing the spokespeople for the Commission lament that the press continues to dwell on what is not in the report and that they don't understand where the press comes by its notion that the "suitable" or "appropriate" testing program recommended by the Commission could in some way be interpreted as requiring mandatory, universal, or indiscriminate testing.

I think that's the fault of the Commission. The Commission didn't come to this issue in a vacuum. Over the past 3 years, there has been a growing fad—because that's the only thing you can call it—for drug testing through urinalysis in both the private workplace and in certain departments of the Federal Government. The FAA, the Postal Service, and the Nuclear Regulatory Commission do it to some degree. As you know, the military has been doing it with respect to service people for over 5 years. They have recently gotten the go-ahead, at least with respect to the Army, to apply test requirements to certain categories of civilian employees.

So, this issue did not arise in a vacuum. The Commission members, who are so indignant over the response from the public, the press, and the Congress to this particular proposal are somewhat disingenuous. If the Commission had done its homework, it would have examined the drug-testing phenomenon as it has grown over the past 2 or 3 years. It would have recognized that there are many areas of legal, practical, policy, and ethical problems in this area, and it would have been better prepared to present its proposal to Congress and to do a better service for the public and the White House.

At the same time, I have noted that a number of people, including Congressman Edwards, who argue on constitutional grounds that drug testing must be based upon a finding of probable cause to test, tend to be willing to carve out from that probable cause requirement too quickly, in my view, a number of professions on the grounds that they more directly affect the health and safety of the public and may therefore be entitled to less constitutional protection with respect to drug-testing programs than other fields of employment.

One of the important elements of constitutional analysis under fourth amendment doctrine, that was not mentioned earlier, is the principle that "reasonableness" is the touchstone of the fourth

amendment's protection against unreasonable searches and seizures. The question with respect to some professions, like pilots and air traffic controllers, is not simply whether or not we can risk waiting for the manifestation of objective behavior or signs of job impairment that would constitute probable cause to test them but whether in fact there are other less intrusive and more directly relevant means than urinalysis drug testing to determine whether or not there may in fact be a risk due to problems with drugs or alcohol.

I have spoken to a number of people who have suggested that there are many professions where simple neurophysiological examinations, which involve checking to see if eye pupils are dilated, if the eyes are glazed, and the kinds of simple physical tests of reflexes and motor skills that are done when an individual takes a crack to the head and a doctor wants to determine on a simple initial level whether or not there is a danger of a concussion, can all be utilized, going far short of the intrusiveness and the degrading testing of urinalysis while providing more directly relevant information to determine whether or not there is a likelihood that someone may be impaired in the performance of their job due to the influence of controlled substances.

The third point I wanted to make was that there is a great danger in challenging this kind of a recommendation primarily on the argument that the tests are unreliable. The tests themselves are not unreliable if in fact they are performed in controlled laboratory situations. But, as they would be implemented in a large program, that would generally not be the case.

The danger, though, is that, as some of the Commission spokespersons have said, there will eventually be technology that will be sufficiently reliable and accurate to satisfy even the most vocal critics of drug testing and we may be led to ignore the danger of drug testing in light of impressive technical capabilities. There are values at stake here—the arguments made about the fourth amendment clearly present them—that argue for rejection of large-scale testing even if we have the technological capability to do reliable tests.

The final point I would like to make is that what you, Mr. Chairman, suggested earlier to Ms. Rowan is a very important point that has to continue to be emphasized. You asked her, "What does the Commission have in mind? What do you mean by suitable and appropriate?" It's imperative that Congress continue to ask that question.

You will note that, in the press conference held the day after the Commission's recommendations were made public, Attorney General Meese stated he did not think any legislative action was necessary in order to implement these programs in a number of agencies. That same position was asserted when the administration proposed lifetime secrecy agreements for over 100,000 senior officials in the Federal Government. It was also asserted when the administration proposed to expand its reliance on polygraphs. In each instance, those plans would have been carried through, unwisely and unproductively and in violation of the rights of many people, had not Congress stepped in.

That is why it is quite important that you have had this hearing today and that Congress continues to monitor this issue.

Mr. ACKERMAN. Thank you very, very much for appearing before us and for your very cogent and well thought out statement.

[The statement of Mr. Adler follows:]

STATEMENT OF ALLAN ROBERT ADLER, LEGISLATIVE COUNSEL, AMERICAN CIVIL
LIBERTIES UNION

Mr. Chairman and Members of the Subcommittee:

On behalf of the American Civil Liberties Union, I want to thank you for the invitation to appear here today to briefly discuss the drug testing recommendations of the President's Commission on Organized Crime.

For two weeks now, the nation has been caught up in a highly-publicized crossfire of speculation and debate concerning the Commission's urgent call for the initiation of "suitable drug testing programs" by all federal agencies and contractors and, at least impliedly, by all state and local governments and other private employers as well.

While much of the speculation has focused on the likely characteristics of the contemplated drug testing programs and the numbers of individuals who might possibly be subjected to them, the debate has generally centered on the importance of the program in combatting organized crime and on the legal issue of whether employment drug testing through government-compelled urinalysis constitutes an impermissible invasion of privacy and an unreasonable search & seizure under the Fourth Amendment to the Constitution.

Statements by various Commission spokesmen and Attorney General Edwin Meese have echoed repeatedly the asserted need for employee drug testing, but have addressed the practical and constitutional implications of such programs in only the most perfunctory and superficial manner.

At a press briefing on March 4, for example, Judge Irving Kaufman, chairman of the Commission on Organized Crime, and

Attorney General Meese both summarily rejected the validity of any constitutional objection to the proposed drug testing plan -- which apparently would require random and periodic testing of current employees as well as preemployment screening of prospective employees. According to Judge Kaufman, such drug testing programs would be no less permissible than certain other Government intrusions on privacy, including the requirement that individuals pass through metal detectors at airports and in many government buildings. Mr. Meese, agreeing with Judge Kaufman's comments, argued further that he could not see any Fourth Amendment problems with such programs, simply because the testing would be "something the employee consents to as a condition" of employment.

Such casual dismissals of the Fourth Amendment interest at stake are greatly dismaying. The ACLU believes that a thoughtful examination of compulsory urinalysis drug testing, illuminated by the principles of Fourth Amendment protection for legitimate expectations of privacy against unreasonable searches and seizures by the government, will demonstrate that the Commission's recommendation is a blatantly unconstitutional proposal which could force tens of millions of American workers who are not legitimately suspected of wrong-doing to submit without justification to degrading and intrusive searches of their bodies and risk the adverse consequences of being labeled as a "drug abuser" based on the results of tests that are widely known for their unreliability.

Briefly stated, our argument is as follows:

First, there can be little doubt that compulsory urine tests, like blood tests, involve the forced extraction of bodily fluids - albeit by different means - and implicate the same Fourth amendment interests in protecting human dignity and privacy found to be at stake in Schmerber v. California, 384 U.S. 757, 767 (1966). See, e.g., Tucker v. Dickey, 613 F. Supp. 1124, 1127-27 (W.D. Wis. 1985); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (D. Iowa 1985); Shoemaker v. Handel, 608 F. Supp 1151 (D.N.J. 1985); Allen v. City of Marietta, 601 F. Supp. 482 (N.D.Ga. 1985); Storms v. Coughlin, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984).

Probable cause, or at least some quantum of individualized suspicion, is usually a prerequisite to a constitutional search. U.S. v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976). In the context of drug testing in the work place, the Fourth Amendment allows the government to demand from an employee a urine specimen for compulsory urinalysis "only on the basis on a reasonable suspicion based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances". McDonell, 612 F. Supp. at 1130; Division 241, Amalgamated Transit Union (AFL-CIO) v. Snsocy, 538 F. 2d 1264, 1267 (7th Cir. 1976). The Schmerber court recognized that a "search" involving forced extraction of bodily fluids is more intrusive than the more traditional searches of clothing or possessions, and held that because of its greater intrusiveness

"[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid [such searches] on the mere chance that desired evidence might be obtained." 384 U.S. at 767-770. In other words, the Court required a higher showing of cause -- "a clear indication that in fact such evidence will be found" -- before permitting such a search. *Id.* at 770.

In addition to probable cause, the Fourth Amendment requires that compulsory urinalysis, like any other search within its ambit, must be reasonable within the totality of the circumstances surrounding it. "[Reasonableness] is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider 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).

Government as employer, rather than law enforcer, cannot reasonably justify compulsory drug testing through urinalysis on the grounds that it is a necessary step in combatting organized crime, but only on the grounds that it is necessary to confirm a reasonable suspicion based on observed behavior or other objective indications of an employee's impaired job performance believed to stem from drug abuse. Such testing, when required as a blanket condition of employment and not as a result of individualized suspicion of impairment due to drug abuse, does not provide a probable cause basis justifying a compulsory search

of bodily fluid. Such testing is not related to job performance or safety considerations in the work place and therefore does not further any legitimate interests as government as employer.

Moreover, drug testing by urinalysis cannot establish that employees are impaired at the time of testing or on the job, or that job performance has been detrimentally by prior substances. Regarding the unreliability of the commonly used EMIT test, See, e.g., McBay Dubowski & Finkle, Urine Testing for Marijuana Use, 249 Journal of the American Medical Association 881 (Feb. 18, 1983); Morgan, Problems of Mass Urine Screening for Misused Drugs, Journal of Psychoactive Drugs (Oct. - Dec. 1984). An interesting anecdotal experience reported in the Clinical Chemistry News exemplifies the unreliability of urinalysis. Arthur J. McBay, chief toxicologist at the University of North Carolina, asked a group of 120 forensic scientists gathered in Cincinnati, Ohio: "Is there anybody in the audience who would submit urine for cannabinoid testing if his career, reputation, freedom or livelihood depended on it?" Not a single hand went up. Fackelmenn, Marijuana Immunoassays: A Question of Confirmation, Clinical Chemistry News (Dec. 1983).

Finally, compulsory urinalysis testing is embarrassing, degrading and an affront to the human dignity of the innocent individual who is forced to prove that he or she is not a drug abuser. "... Urinalyses are entitled to the same level of scrutiny accorded body cavity searches. It may, perhaps, be debated whether one type of Schmerber, 384 U.S. at 770 [86 S.Ct. at 1835], more than the other, but the difference is a matter of degree, not kind. Both are degrading. It is this basic offense to human dignity, rather than any particular style of causing offense, which sets this type of search apart from traditional types. Tucker v. Dickey, 613 F. Supp. 1124, 1129-30 (D.Wis. 1985), quoting Storms v. Coughlin, 600 F. Supp. 1214, 1218-20 (S.D. N.Y. 1984).

Mr. ACKERMAN. I think it is also important for us to recognize the arguments of both public safety and probable cause, sort of mask the mandate that the Commission had. The mandate of the Commission was to address organized crime; not, although it is a very important topic, whether or not surgeons in the military were under the influence of drugs or whether airline pilots were endangering the public safety, but the impact of public employees and employees of cities, municipalities, and States, people within the private sector as they started to encroach upon, in this report, whether or not all of those people should be tested for drugs because indeed that could be contributing to the coffers of organized crime.

I think it raises very serious questions as to whether or not you require the entire work force of our country, both Federal and otherwise, to tinkle on a given Tuesday and think you're going to make a serious impact in organized crime in our country.

Mr. ADLER. I would also just add that people are being overly simplistic if they believe that the Government can readily and clearly switch its hats as employer on the one hand and law enforcement officer on the other. I think that it is quite clear that the issues here are mixed in a way that challenges the rights of individuals and that we should not in any way rely upon the assertion made by the Commission that, while, on the one hand they are seeking to address the problem of organized crime, on the other hand they really have the health and safety of Federal employees at heart.

Mr. ACKERMAN. The point is very, very well taken.

Thank you for appearing.

The committee stands adjourned.

[Whereupon, at 12:45 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

[The following statements were received for the record:]

STATEMENT BY REP. MICHAEL D. BARNES, CHAIRMAN
FEDERAL GOVERNMENT SERVICE TASK FORCE
OPPOSING THE RECOMMENDATION OF
THE PRESIDENT'S COMMISSION ON ORGANIZED CRIME
TO TEST ALL FEDERAL EMPLOYEES FOR EVIDENCE OF DRUG USE
BEFORE THE SUBCOMMITTEE ON HUMAN RESOURCES

March 18, 1986

Mr. Chairman, when government tries to solve terrible problems with desperate measures the results can be absurd. We must combat drug abuse, no one feels more strongly about that than I do, but we must do it intelligently and safely.

As Chairman of the Federal Government Service Task Force, I believe it is wrong to treat each and every Federal employee as though he or she suffered from drug abuse. Our society reserves this level of individual monitoring for those who have forfeited their civil rights. A jury of peers convicts such individuals of criminal offenses. This proposal presumes Federal workers widely use drugs. That assumption and the powers the Commission's recommendation would grant jeopardizes the fundamental relationship of the individual to society.

The policy also presupposes a basic dishonesty in the Federal workplace that does not correspond to reality. Federal workers are in many instances even more productive than their private sector counterparts. Under the most unfavorable circumstances in recent years they have continued to work with skill and dedication.

We must not substitute the so-called mechanics of prevention for the hard work which is required to create a work environment in which drugs have no place. At a time when officials at the Department of Labor and the Office of Management and Budget have at long last begun to stress the benefits and importance of "humanizing the workplace" and involving employees as full participants in decisionmaking, the Commission recommends a policy that challenges the integrity of public servants and asks them to work under a cloud of suspicion.

These proposals always seem to come at us out of the blue, without any context, without any understanding of the management considerations involved, and without any concern for the people the policy will harm. When will this administration realize that you can't continually reduce pay, RIF staff, trim retirement and health benefits, and treat the world's single most important workforce with contempt and disdain.

Now we have a proposal that says we ought to spend tens if not hundreds of millions of dollars in the teeth of Gramm-Rudman to drive home the point that Federal workers are second class citizens. Why should they stand for this, Mr. Chairman? The tragedy for our nation is that they will not. They will leave.

I recognize there is a school of thought that argues that private

employers ought to have the right, as a condition of employment, to require their employees to submit to urinalyses. In many American firms, such practice has become odious reality. A worker who comes to work may be required to submit to a polygraph or a urinalysis. We run the risk of turning the American workplace into a prison, Mr. Chairman, and the Federal role ought to be to oppose such practices vehemently and concertedly.

A subsidiary management issue is the matter of the accuracy of these tests. Even if we could justify using urinalyses widely in the workplace, given the proposal's inherent flaws, the evidence we have from the military's application of selective drug screening reveals an administrative nightmare of inaccurately labeled, switched or contaminated specimens. When we talk about running a program of this kind, of managing millions of specimens and subjecting the careers of public servants to the vagaries of the process, the Commission's recommendation becomes even more untenable.

Let's declare total war on drugs, by all means, but not by totally annihilating our reason. Those who press us to spend \$15 to \$200 dollars--and the latter is what anything approaching a reliable drug test really costs--would better apply those resources to efforts such as helping adults and school children for whom drugs are a serious problem to confront the disease within themselves and master it. The Federal government can and does apply its resources to upgrading management supervision of the workplace which includes the responsibility to spot and deal with instances of substance abuse.

I look forward to working with you and your Subcommittee on this critically important issue, Mr. Chairman. As always, I appreciate the opportunity to testify on a matter of concern to all of us.

STATEMENT OF THE HONORABLE E. CLAY SHAW, JR.
BEFORE THE HUMAN RESOURCES SUBCOMMITTEE OF
THE HOUSE POST OFFICE & CIVIL SERVICE COMMITTEE
MARCH 18, 1986

Mr. Chairman, I am pleased to have the opportunity to submit my views on the subject of drug testing. This is an issue of immense importance for both the American public and the individuals who have the privilege of working in the federal government. The President's Commission on Organized Crime has recently released its report and it takes note of the fact that illegal narcotics trafficking constitutes the source of an estimated \$110 billion in annual profits for that sector of our society that institutionalizes crime as a way of life.

The President's Commission makes a number of recommendations to deal with organized crime and its ugliest of practices--illegal narcotics smuggling. The Commission recognized that "the ultimate goal of our drug policy is the effective suppression of drug abuse." The Commission found that the most effective way to improve U.S. drug enforcement efforts would be to focus more emphasis on the demand side of the equation. It is in this context that the Commission chose to recommend that, and I quote, "the heads of all Federal agencies...formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs expressing the utter unacceptability of drug abuse by federal employees."

I have always been one to put this nation's best foot forward with regard to law enforcement efforts to interdict supplies. But the fact of the matter is that our best efforts continue to net only 5-15% of the supply of these imported drugs on an annual basis. That makes these efforts very worthwhile but that still leaves us a long way from the fulfillment of our goal--which is to demonstrate that any and all illegal drug usage is simply unacceptable.

There are some who will argue that there is a huge gulf between our inability to effectively curtail the supply of drugs and a program of drug testing for federal employees. They would raise all kinds of concerns from personal privacy to the accuracy of urinalysis procedures. These concerns are well taken and they weigh heavily with me because I am a lawyer by training but they miss an essential point. We are losing the war on drugs and unless we come up with a coordinated strategy which includes attacking this problem from both the demand and supply sides, we will continue to lose.

The Drug Enforcement Administration has estimated that almost 20% of the U.S. work force uses controlled substance drugs resulting in losses of up to \$50 billion annually in the workplace. Nearly one quarter of the total U.S. population has used marijuana and we now operate in a climate where several states have effectively decriminalized the use of marijuana. Every single day, 5,000 Americans try cocaine for the first time.

We are not dealing here with a question of guilt before innocence. We are talking basic survival. The business community clearly realizes this and that's why fully one-fourth of the Fortune 500 companies employ drug testing on a regular basis. The President of a Louisiana offshore drilling company found that urinalysis tests came up positive for 28-32% of the workers in his company's offshore drilling rigs. Our military, which has had a drug testing program in effect since 1982, believes that marijuana use has dropped by two-thirds over the last several years.

I am not in favor of any procedure which amounts to a wholesale forfeiture of constitutional rights. I think the Commission's emphasis here was entirely proper. They called for "suitable" drug testing to be accompanied by clear policy guidelines for final implementation of such policies. It seems to me that the drug testing recommendation of the Commission is reasonably flexible. Unfortunately, this was not the conclusion of the New York Times which said in its editorial of March 8, 1986 that the Commission had "embarrassed itself with an ill-considered proposal to test workers for drug abuse..." This is the same New York Times that admits to testing potential employees for drug use as part of a pre-employment physical examination. They don't hire individuals who test positive but then they don't bother to tell these prospective employees that they are being tested for drugs either.

I have taken legislative action which I view as totally consistent with the Commission's recommendations. I, and the members of my congressional staff, have volunteered to take drug tests. I did this with full appreciation of how it might be viewed by others. My staff understands that the measures I have proposed are not an automatic expression of suspicion about their activities. My bill, H.Res. 394, will make it possible for such tests to be treated as an official expense of the House. I intend for federal officials, especially in the Congress, to lead by example and I am particularly proud that my employees see the wisdom of such a policy of leadership.

I am also working to introduce legislation which would require drug testing for federal employees who have security clearances. I commend the Commission for its work and it is my hope to follow a reasonably flexible path on legislation to allow for "suitable" drug testing. Sometimes the burden of leadership constitutes an awesome responsibility. We must win the war on drugs. To do that, we need to pay particular attention to the demand side of the equation. I want the people of this country to know that those who serve them are drug free. Anything less is simply unacceptable.

N.L.R.B. PROFESSIONAL ASSOCIATION

1717 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D. C. 20570

8-10-1

Subcommittee on Human Resources
 Room 511, Annex 1
 Cannon House Office Building
 Washington, D.C. 20515

March 24, 1986

Re: Drug testing of federal employees.

To the Members Of the Subcommittee:

The National Labor Relations Board Professional Association appreciates this opportunity to be heard on the subject of drug testing. The NLRBPA represents the attorneys working at the NLRB's Washington headquarters. In our work enforcing the federal labor laws, we are made all too well aware of the various ways in which employees can be surveilled, humiliated, and impugned. And as federal employees ourselves, we are of course concerned for our own rights, including our fundamental rights of privacy and dignity.

Accordingly, we object in the strongest terms to the Administration's proposal that all federal employees be subjected to drug testing and wish to add our voice of opposition to those that have previously been heard by this subcommittee. We are deeply troubled by this overbroad and hysterical response to a problem that has been alleged but not proven, and we fear that federal employees are being looked upon as the first subjects of a practice that would then be extended into the private sector.

Apart from what we deem the ethical repugnance of the proposal, we also oppose it on purely practical grounds. There is no evidence of widespread drug abuse in the federal sector. Isolated instances may well exist. When they do, an employee's problem will be hard to hide from co-workers and supervisors, and will manifest itself in her or his job performance. The problem may then be treated through counselling and, should counselling fail to remedy the problem, disciplinary action may be due. Our own agency makes good use of the Civilian Employee Assistance Program. Employees may go voluntarily to the EAP, or may be referred to the EAP by a supervisor. The employee's problem is assessed, the employee is referred to the most appropriate counselling service, and there is follow-up. As opposed to this inexpensive, problem-specific, and effective program, the Administration's proposal would be expensive, disproportionate, and of little value to the employees who do need assistance. Prior testimony by AFGE and NFFE has already pointed out the exorbitant costs of the proposed program and the very real, very present danger that vast numbers of employees could be incorrectly accused of drug abuse and unjustly disciplined.

Thus, we consider the Administration's proposal to be an offensive and ill-conceived beast. We certainly do not condone conduct that poses a threat to public safety or impairs the government's ability to serve the public good, but nor can we condone this unwarranted affront to the rights of our members and of employees generally.

Thank you,

William Mascioli
 William Mascioli, on behalf
 of the NLRBPA

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