Department of Justice

STATEMENT

OF

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BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

CONSTITUTIONAL ISSUES SURROUNDING
FEDERAL EMPLOYEE DRUG TESTING

ON

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Mr. Chairman and Members of the Committee--

I appreciate the opportunity to be here to discuss certain legal and constitutional issues surrounding an effective employee drug testing program.

Implementation of Drug Testing

The Federal government is just one of an increasing number of employers who have recognized a need to create an environment of zero tolerance for drug use by drug testing employees.

Because of the high rate of illegal drug abuse in our society and its debilitating effects on the workforce, both public and private employers are increasingly instituting drug testing programs to deter employee's use of illegal drugs. In private industry, approximately 30 percent of the Fortune 500 companies, including Ford Motor Company, IBM, Alcoa Aluminum, Lockheed, Boise Cascade and the New York Times have instituted testing programs using urinalysis for drug detection. Testing programs such as these have been enormously successful resulting in fewer-on-the-job accidents, increased productivity and improved employee morale. Consequently, their use is growing. Last year it was estimated that an additional 20 percent of Fortune 500 companies will institute drug testing programs within the next two years. The success of these programs gives us real

cause to hope that a carefully implemented program of drug testing can lead to real progress in the war on drugs.

The Administration's program, as set forth in Executive Order 12564, is designed to achieve not only a drug-free federal workplace, but also to serve as a model for similar programs in the private sector. The Executive Order requires agency heads to develop plans that must include a statement of agency policy, Employee Assistance Programs, supervisory training programs, and procedures to put drug users in contact with rehabilitation services. Drug testing is an effective and reliable diagnostic tool to be used along with other indicia of illegal drug use to identify drug users. Of course, an aggressive program of public education is continuing to warn of the dangers of illegal drug use. We must make clear that drug use by federal employees--whether on or off duty--is unacceptable conduct that will not be tolerated.

The Executive Order

Let me turn now to the specifics of the President's program to foster a drug-free workplace. The Executive Order, by its very nature, sets forth a general authorization for a drug testing program without specifying in great detail how such a program would be conducted. The implementing guidelines like those recently released by the Department of Health and Human Services regarding the confidentiality of drug test results, are

designed to afford protection to the individuals being tested without compromising the integrity of the program.

1. **Employees Covered by the Random Testing Requirement.** Under the President's Executive Order, random or uniform unannounced drug testing would apply only to certain employees, defined in section 7(d) by reference to five separate catagories. These would include law enforcement personnel, employees designated Special-Sensitive, Critical-Sensitive and Noncritical-Sensitive under federal personnel rules, all presidential appointees, all employees with a secret and top secret security clearances and any other employees whom that agency head determines hold positions "requiring a high degree of trust and confidence."

Because of the great number of employees who necessarily must hold a top secret or secret security clearance, that category alone would extend coverage to a substantial number of employees. However, the total number of persons falling into these categories is not an accurate measure of how many persons ultimately will be tested. As the Executive Order makes clear, the head of each agency will decide how many of the covered employees would actually be tested, based on the agency's mission, its employees' duties, the efficient use of agency resources and the danger to the public health and safety or national security that could result from the failure of an employee to adequately discharge the duties of his or her

position. Thus each agency head will exercise discretion in determining which employees will be tested.

In addition, the testing could take the form of random testing of only a fraction of covered employees each year. Our program is flexible--in that testing frequency can be adjusted based upon extent of drug use and degree of job sensitivity.

Of course, the head of each agency can order testing of any employee where there is reasonable suspicion of drug use, in the course of a safety investigation into an accident or unsafe practice, or as a follow-up to a rehabilitation program.

Also, voluntary testing programs will be set up for non-sensitive employees. Finally, the order authorizes any applicant for a federal job to be tested for illegal drug use.

2. **Reliability of Testing Procedures**. While the Committee has touched on the reliability issues with other witnesses during the April 9th hearing, it is useful to note that the Administration's program contains numerous safeguards to ensure reliability and fairness. First and foremost, the administration will not base any action on an initial test. Instead, following an initial positive test result indicating drug use, we would test the same sample using a second, much more reliable device, such as the gas chromatography/mass spectrometry (GC/MS) test. This test is somewhat more expensive than the initial screening, but, as the Office of Technology Assessment (OTA) has recognized, it is virtually 100% reliable. In fact, the Navy has been

conducting 1.8 million tests per year for 4 years straight with no false positives. Similarly, the Army has conducted 800,000 tests per year for 2 years with no false positives. I have attached a copy of a statement by Dr. Robert E. Willette discussing the effectiveness of these drug testing methods. For a more complete analysis of the accuracy and reliability of the various drug testing procedures, see the exhibits accompanying Dr. Willette's declaration in N.T.E.U. v. Reagan, No. 86-4058, (USDC E.D. LA., Defendant's Reply).

Moreover, the scientific and technical guidelines issued on February 13, 1987 by the Alcohol, Drug Abuse and Mental Health Administration of the Department of Health and Human Services would require that, before conducting a drug test, the agency shall inform the employee of the opportunity to submit medical documentation that may support a legitimate use of a particular drug. And all such information would be kept confidential. In addition, the order provides that employees may rebut a positive drug test by introducing other evidence that an employee has not used illegal drugs. The technical and scientific guidelines issued by the Department of Health and Human Services will ensure absolute integrity of our program.

Of course, there would be no way to detect a "false negative", short of performing the GC/MS in every case, which we do not see as cost-effective. However, we know from our experience in the military drug testing programs that a properly

run program only produces false negatives in 5% to 10% of the samples, an acceptable number.

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

In an attempt to minimize the intrusiveness of the required drug test, the administration's Executive Order and implementing guidelines provide that "[p]rocedures for providing urine specimens must allow individual's privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided." Although this might make it easier to adulterate a sample, it has been our experience under testing programs, that the mere fact that a test is required will ensure a significant deterrent effect on illegal drug use. We feel that with this single change, the program will be no more intrusive on an individuals privacy than an ordinary visit to the doctor.

4. **The Non-Punitive Nature of the President's Program**. Our program is premised on the President's strongly-held belief that

federal employees who are found to be using drugs should be offered a "helping hand" to end their illegal drug use. Each agency is required to establish Employee Assistance Programs to ensure an opportunity for counseling and rehabilitation, and to refer employees to counseling if found to be using illegal drugs. The sixty-day warning period prior to implementation of a drug testing program will allow casual users to cease and addicts to come forward and request treatment. Moreover, no disciplinary action is required for an employee who comes forward voluntarily and agrees to be tested, obtains counseling or rehabilitation, and refrains from illegal drug use in the future.

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

Testing pursuant to the Executive Order cannot be done to gather criminal evidence and agencies are not required to report the results of such testing.

5. **Procedural Protections**. Career employees in the civil service are protected by statute from preemptory dismissal or discipline by their superiors. Instead, due process protections included in the Civil Service Reform Act ensure them of the right to notice and opportunity to respond before any adverse personnel

action is taken and the right to an impartial adjudication of any subsequently filed appeal. None of these rights would be abrogated by the President's Executive Order, which expressly provides that "[a]ny action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act."

Constitutional Issues

Having outlined the President's program for fostering a drug-free workplace, I would like to turn now to the constitutional issues raised by the Order, and the use of drug testing generally. We are confident that Executive Order 12564 fully complies with all legal requirements.

The central constitutional issue of the litigation over drug testing is, of course, in what circumstances drug testing can be seen to violate the Fourth Amendment. At the level of the Courts of Appeals--that is, courts whose decisions have precedential value--all five Circuits that have addressed some aspect of the issue have upheld the constitutionality of drug testing. National Treasury Employees Union v. von Raab, No. 86-3833 (5th Cir. April 22, 1987); Mack v. United States, No. 86-6097 (2nd Cir. March 30, 1987); McDonell v. Hunter, No. 85-1919 (8th Cir. Jan. 12, 1987); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.) cert. denied, 107 S. Ct. 577 (1986); Division 241, Amalgamated

Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976). District court opinions now cover almost the complete range of analytical approaches to the Fourth Amendment issues raised by urinalysis. For example, though the lower court in NTEU v. von Raab 649 F.Supp. 380 (E.D.La. 1986), characterized urinalysis as "more intrusive than a search of the home," the Southern District of New York concluded that such testing was less intrusive than fingerprinting. Mack v. United States, 653 F. Supp. 70 (S.D.N.Y. 1986), aff'd, No. 86-6097 (2nd Cir. March 30, 1987). Recently, in National Treasury Employees Union v. Von Raab, No. 86-3833 (5th Cir. April 22, 1987), and in National Ass'n of Air Traffic Specialists v. Dole, No. A87-073 (D. Alaska March 27, 1987) two different courts found that urinalysis by the Customs Service of employees in sensitive positions and by the FAA of Air Traffic Specialists to be reasonable searches passing Fourth Amendment muster.

The Justice Department, charged with the responsibility of defending federal agencies in court, has been in the thick of much of the recent litigation. For example, we have argued in support of the constitutionality of the FAA's drug testing program for air traffic specialists. In that case we argued that the FAA's drug testing program did not violate the Fourth Amendment for two reasons: first, as a fitness for duty examination involving minimal intrusion into personal privacy it did not constitute a search within the meaning of the Fourth Amendment; and second, that, even if viewed as a search, the

extremely limited intrusion involved was outweighed by the strong public interest in safe air travel, rendering the search a reasonable one in full compliance with the Fourth Amendment.

Similarly, in the most recent circuit court decision on the drug testing issue, we argued in support of the constitutionality of the Customs Service's program of drug testing employees seeking sensitive positions. In that case, the court recognised that the Service need not predicate its drug screening on the grounds of probable cause or reasonable suspicion of employee drug use. Rather, the court held for the reasonableness of the Customs Service's drug testing program based on the strong Governmental interest in preserving the integrity and effectiveness of the Custom Service's mission. In its justification of the program, the court stated "[u]se of controlled substances by employees of the Customs Service may seriously frustrate the agency's efforts to enforce the drug laws" and "[l]ike other public agencies, the Customs Service has a strong interest in ensuring that its employees operate effectively." A copy of the court's opinion is appended to my testimony. As with the FAA decision, the Department views this holding as strong support for the President's drug testing program.

The President's program has been carefully designed to provide for random drug testing for employees in sensitive positions, and to limit any unnecessary intrusion into personal privacy. The government's general interests are recited in the

preamble of the order and include the successful accomplishment of agency missions, the need to maintain employee productivity and the protection of national security and public health and safety. By requiring testing only for employees who occupy sensitive positions, the Executive Order ensures that the government interest will be substantial in every instance. Individual privacy interests are accommodated, for example, by the provision of the Executive Order which ensures that individuals must be allowed to produce urine samples in private unless reasonably suspected of intending to alter the sample. Unobserved urine testing is no more intrusive than other devices routinely employed to test a federal employee's fitness for duty--including physical examinations, fingerprint checks or background investigations. Moreover, as noted above, the Executive Order contains an advance notice requirement, an opportunity to submit documentation to support legitimate medical use of drugs, and procedures to protect the confidentiality of those medical records, as well as test results.

Other Legal Issues

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

With respect to the first issue, we believe that a drug-free requirement for federal employees is reasonably related and furthers "the efficiency of the service" because illegal drug use --whether on or off duty--is inconsistent with the nature of public service, undermines public confidence in the government and entails unwarranted costs in terms of employee productivity. As I have noted, the Fifth Circuit decision in NTEU v. von Raab firmly supports this rationale. The Federal Circuit has also agreed in Saunders v. United States Postal Service, 801 F.2d 1328 (Fed. Cir. 1986). In that case, the court ruled that off-duty use and sale of cocaine automatically satisfied the nexus requirement stating "Egregious criminal conduct justifies a presumption that the required nexus has been met even when the drug offenses occurred off duty." More recently, the Merit Systems Protection Board in Kruger, et al. v. Department of Justice, (January 8, 1987), upheld disciplinary action taken against three Bureau of Prisons guards based on their off-duty use of marijuana. The board noted that "public perceptions of appellants' misconduct would impair the efficiency of the agency by undermining public confidence in it, thereby making it harder for the agency's other workers to perform their jobs effectively, even though the misconduct might not affect appellants' job performance." The seriousness of the danger cocaine presents to health and lives in America was recently underscored by Ninth Circuit Court of Appeals Judge Noonan in United States v. Alvarez, No. 83-5208 (9th Cir. Feb. 17, 1987).

The statutory issue arising from an application of the Civil Service Reform Act, is closely related to the Fourth Amendment balancing test question. As a general proposition, federal personnel law provides that adverse action can be taken against a covered federal employee "only for such cause as will promote the efficiency of the service." 5 U.S.C. §7513(a). The Civil Service Reform Act of 1978 further barred discrimination against any covered employee or applicant "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." 5 U.S.C. §2302(b)(10). Taken together, these two provisions are understood to require a "nexus" between employee misconduct for which severe sanctions may be imposed and the employee's performance of his job.[1]

Within these constraints, the President has broad authority to define conditions of employment. Under 5 U.S.C. §3301, the President may prescribe regulations for the admission of employees that "will best promote the efficiency of the service," as well as "ascertain the fitness of applicants" for employment. This authority is contained under 5 U.S.C. §7301 which explicitly recognizes the President's authority to prescribe "regulations for the conduct of employees in the executive branch." These

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

provisions afford the President broad discretion to define conditions of employment that will best promote the efficiency of the service. Undoubtedly, the imposition of a drug-free requirement for federal employees will further the efficiency of the service.

First, there is no logical reason why federal service which turns on public trust requires tolerance of on-going illegal behavior by public servants. As noted above, the courts have recognized that "where an employee's misconduct is contrary to the agency's mission, the agency need not present proof of a direct effect on the employee's job performance," Allred v. Department of Health and Human Services, 786 F.2d 1128, 1131 (Fed. Cir. 1986). Similarly, "Congress expressly permitted removal of employees whose actions might disrupt an agency's smooth functioning by creating suspicion, distrust, or a decline in public confidence." Borsari v. Federal Aviation Administration, 699 F.2d 106, 112 (2d Cir. 1983), cert. denied 464 U.S. 833 (1983). The illegal use of drugs by a federal employee--whether on or off duty--is inconsistent with the nature of public service and undermines the general confidence of the public in government. It also creates suspicion and distrust that is inimical to the cooperation among employees necessary for the efficient operation of an agency. See Wild v. United States Department of Housing and Urban Development, 692 F.2d 1129, 1133 (7th Cir. 1982).

Second, employee drug use imposes an extraordinary cost on the government in terms of the safety of the workplace and employee productivity. Studies by the National Institute on Drug Abuse document that employees who use drugs have three times the accident rate as non-users, double the rate of absenteeism, higher job turnover rates and cost three times as much in terms of medical benefits. These high costs provide a sufficient foundation for any requirement that federal employees abstain from the use of illegal drugs, and demonstrate that there is a clear nexus between drug abuse, employee productivity and the "efficiency of the service." I have attached to my statement, for inclusion in the record, the declarations of several leading experts in the area of drug use effects that clearly document this relationship.

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

Now let me turn briefly to the Rehabilitation Act, 29 U.S.C. §791, and its effect on the President's Executive Order. That Act prohibits discrimination against, and requires that select agencies take affirmative action to accommodate and, in effect, not discriminate against the handicapped. Current regulations include drug addiction as a handicapping condition. 29 C.F.R. §1613.702. The Executive Order contains provisions to ensure that an employee who is addicted to drugs will receive counseling

and therapy as required by the Rehabilitation Act. The level of accommodation provided is, we believe, adequate to satisfy the requirements of the Act.

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

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

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