



# Department of Justice

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ADDRESS

OF

THE HONORABLE ARNOLD I. BURNS  
DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

ANNUAL CONVENTION OF THE  
FEDERAL BAR ASSOCIATION

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I'm very pleased to have been invited to address you today. The Federal Bar Association's membership mix of attorneys employed by the federal government and private sector lawyers with substantial federal practices is a lot like my own career mixture. I started out as an Army JAG Corps lawyer, and joined the Department of Justice almost two years ago, but the three decades in between I spent in private practice. So, like many of you, I know from personal experience that the similarities between government and private attorneys are greater than their differences.

When I reflect on my prior incarnation as head of a 100-lawyer law firm with roughly a \$25 million annual budget and my present job as Deputy Attorney General where I assist the Attorney General in running what has been called the world's largest law firm, with roughly 70,000 people and an annual budget of over \$5 billion, I see my professional time continues to be spent in the same general areas of activity: litigating for clients, counselling, managing, selling programs (in this case to the public and to the Congress), developing policy priorities and working for the public good (in private practice this encompassed work for charitable and civic organizations).

Today is the day after the 200th birthday of the Constitution. It is, I think, appropriate to address a topic of very great concern to all of us: the constitutionality and legality of drug testing in the workplace, particularly the federal workplace.

I stand here to tell you that we have every reason to be concerned about the constitutionality of the federal drug testing program. It is a legitimate issue of keen importance not only to us as lawyers but to the nation as a whole. And I want to be among the first to tell you that I am adamantly opposed to any drug testing program of public employees around the country which does not pass constitutional muster. Because I, for one, do not believe that the United States Constitution is a document of convenience. As the Supreme Court said in 1983 in INS v. Chadha:

"The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but, ... we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted constraints spelled out in the Constitution."

In other words, sometimes the Constitution can be frustrating.

Parenthetically, I wish to note that, while our country is still a young one, we do hold the world's record for the longest number of years of any republican or democratic government under a written constitution in the history of the world. Have you heard the story of the man who walked into a public library and asked whether they had a copy of the French constitution. The librarian responded by saying, "No, we do not keep periodicals here."

Now, before turning to the issue of constitutionality of drug testing, let's spend a moment or two on the threshold question of whether drug testing of government employees is sound as a matter of policy.

The drug problem in our country is alarming. So we have declared a war on drugs. But to win that war, we must attack drugs on all fronts. Eradication, interdiction and enforcement alone can never solve the problem as long as narcotics trafficking remains a lucrative enterprise. It is lucrative because the American demand for illegal drugs makes it so. Therefore, out of necessity, we have chosen to employ strategies which address both the supply-side and the demand-side of the drug equation with equal fervor. And a key aspect of the drug demand reduction strategy is the judicious use of drug testing by employers.

Drug use pervades our workforce. Between 10% and 23% of all workers use dangerous illicit drugs on the job. Each month, one in twenty workers is under the influence of cocaine, and one in six is under the influence of marijuana. In a 1985 survey of callers to the 800-COCAINE hotline, for example, 75% said they used cocaine on the job, 69% said they regularly worked under its influence, and 25% said they used it at work daily. Surveyed about whether someone he or she worked with used illegal drugs at work, 1 in 4 factory workers, 1 in 10 full-time workers, and 1 in 20 office workers said they had such knowledge.

As one might guess, the costs are staggering. According to conservative estimates, drug use costs American industry nearly \$50 billion a year. Other estimates put the cost at \$1,000 per worker (including nonusers) per year. It amounts to a "chemical dependence" tax. Drug and alcohol-related costs include costs of absenteeism, lost productivity, defective goods, as well as accidents and related medical services.

The Federal Railroad Administration concluded that alcohol and drug use by employees played a necessary part in at least 48 railway accidents between 1975-84, causing 37 fatalities, 80 non-fatal injuries, and over \$34 million in damages. Indeed, the effects of employee drug use are of concern to the many other law-abiding employees. According to one survey, one in five employees say that drug usage in the workplace has seriously affected their organizations' ability to get the job done.

Employers are losing property because of drug use in the workforce. In comparison to nonusers, drug users are 3-4 times more likely to be injured in on-the-job accidents; are 2 1/2 times as absent from work; incur 3 times the average of sickness costs; are reported missing one or more days a month because of illness or injury 50% more often; "Skip work" two to three times as often simply because they "don't want to be there;" experience 7 times as many garnishments; are 5 times as likely to file workers compensation claims, are repeatedly involved in grievance procedures; and are more likely to steal company and co-worker

property to support drug habits, and to experience strained relations with fellow employees and those around them.

Why drug testing? Because now, for the first time in our nation's historic battle against drugs, employers have a foolproof means of ridding drug use from the workforce. People prize their jobs, evidently, more than they do the law. All other objections aside for the moment -- including the accuracy of drug testing, which even opponents now concede is foolproof -- drug testing works.

The military has reported startling results. Since implementing random testing, it has experienced a 67% across-the-board decrease in drug use, service-wide. In 1981, the Navy found that 48% of its enlisted men under 25 were using illegal drugs, but now, after six years of random testing, the current level is about 3%. Similarly, the Department of Defense found that drug use among junior enlisted personnel decreased from 50% to 10% after instituting drug testing for recent recruits, and, curiously enough, court-martials have been reduced by 47.39%.

The private sector has also discovered that testing dramatically deters use. Southern Pacific has reported that the number of rail accidents in which "human factors" played a part has dropped more than 60% and lost-time injuries have declined by 24% since drug screening was initiated. PG & E, for example, reported a 25% reduction in accidents, and a 40% decrease in serious injuries. In addition, Georgia Power found that its

accident rate dropped from 5.4 for every 200,000 man-hours in 1981 to .49 last year.

Striving for a drug-free America is one of the major goals of this Administration. An in-depth part of our program is the protection of the public and the increase in productivity by providing a drug-free workplace for every American. As the nation's single largest employer, the federal government is taking a leading role in ensuring that workers are not using illegal drugs. As part of that effort, the President signed an Executive Order (Executive Order 12564) authorizing drug testing for certain federal employees.

Is the federal program constitutional? Let me share with you its salient features:

1. Random testing applies only to law enforcement personnel, employees designated as sensitive under existing federal personnel rules, all presidential appointees, all employees with secret security clearances, and those employees holding positions "requiring a high degree of trust and confidence".
2. Additionally, testing of any employee will be permitted if there is a "reasonable suspicion" of drug use.
3. Non-covered employees can volunteer for testing.
4. Any applicant for a federal job can be tested.
5. No personnel action will be taken based only on the initial screening test. Following an initial positive test result indicating drug use, the same sample will be subjected to



more sophisticated tests such as the gas chromatography/mass spectrometry (GC/MS) test, which is virtually 100% reliable. (The Navy has conducted 1.8 million tests per year for four straight years with no false positives using this methodology.)

If the initial result is not confirmed by the second test, the test is reported as negative.

6. Before a drug test can be performed, the employee must be informed of the opportunity to submit, on a strictly confidential basis, medical documentation supporting the legitimate use of a particular drug or drugs. Employees may also rebut a positive drug test by introducing evidence of non-use of illegal drugs.

7. Urine specimens must be provided in absolute privacy without observation, unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided."

8. Employee Assistance Programs will be available to provide counseling and rehabilitation.

9. Agencies may elect to create a "safe harbor" for an employee who voluntarily comes forward and admits to illegal drug use, thereby avoiding the initiation of disciplinary action.

10. Testing cannot be conducted for the purpose of gathering criminal evidence.

11. Due process protections ensure notice and an opportunity to respond before any adverse personnel action is taken. The right to an appeal is guaranteed.

Now to the Constitution -- The question: Does the mandatory drug testing program I have described violate the Fourth Amendment protection "against unreasonable searches and seizures"? The answer: No.

The Fourth Amendment prohibits the government from conducting unreasonable searches and seizures of persons and property. The "reasonableness" of the search is judged in the context of an individual's reasonable expectation of privacy -- an expectation viewed objectively as being justifiable under the circumstances. Thus, what is reasonable depends on the particular facts and circumstances surrounding drug testing.

Airports have the right to inspect air travelers, persons entering a courthouse or federal installation may be subject to inspection; federal contractors may be required to consent to searches in order to get government business; and participants in AFDC programs may be required to submit to home visits by welfare workers.

Applicants to government and private employment routinely submit to fingerprint checks, full background investigations, polygraph questioning, and physical and medical examinations. Like these "searches," drug testing is merely one type of system of information gathering available to an employer.

As one court recently held, urinalysis is less intrusive than blood sampling or fingerprinting as it "calls for nothing more than a natural function performed by everyone several times a day -- the only difference being the collection of the sample

in a jar." Requiring persons to be drug free who work in law enforcement, public utilities, fire-fighting and other sensitive positions of high public safety and trust, is as legitimate as requiring pilots to have good vision or prison guards to satisfy minimal physical strength standards.

In contrast to criminal proceedings, which require a probable cause determination, or reasonable suspicion about a particular individual, drug testing is conducted primarily to assure "fitness for duty" and to protect public health and safety. Accordingly, these requirements do not come into play.

As the Supreme Court held in one recent Fourth Amendment case regarding an administrative inspection (of a junkyard), [New York v. Burger, 55 U.S.L.W. 4890 (U.S. June 19, 1987)]:

A warrantless inspection... is reasonable under the fourth amendment if: (1) there is a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the inspection is necessary to further the regulatory scheme; and (3) the inspection program, in terms of the regularity and certainty of its application, provides a constitutionally adequate substitute for a warrant -- that is, (a) it notifies the owners of the lawfulness and scope of the search, and (b) limits the discretion of the inspecting officers. The Court ruled that the government "can address a major social problem both by way of an administrative scheme and through penal sanctions."

Drug testing of public employees without individualized suspicion has withstood court challenges at the Court of Appeals level in the Third, Fifth, Seventh, Eighth, and District of Columbia Circuits. No court of appeals has decided to the contrary.

And, in what was last year's most highly publicized district court case, National Treasury and Employees Union (NTEU) v. Von Raab, the union challenge of Custom's mandatory testing without individualized suspicion of employee-applicants for positions in law enforcement, having access to classified information, or which involve carrying firearms, not only was rebuffed by the Fifth Circuit, but the Supreme Court voted 8 to 1 to deny the Union's request to halt the testing program. The Circuit court said the testing

"constituted a search within ... the fourth amendment, but because of the strong governmental interest in employing individuals for key positions in drug enforcement who themselves are not drug users ... it is reasonable and, therefore, is not unconstitutional."

In so deciding the court cited the view expressed by the Supreme Court that:

"The validity of each different kind of search must be assessed by balancing the social and government need for it against the risk that the search will itself undermine the social order by unduly invading personal rights of privacy. '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 ....'"

(Incidentally, the court also made short shrift of constitutional challenges based on the Fifth Amendment privilege against self-incrimination and the "penumbral" rights of privacy.)

The Supreme Court has also unanimously vacated a Ninth Circuit injunction which would have halted the Federal Railway Administration's post-accident testing program. In addition, the Court has let stand Third and Seventh Circuit decisions upholding random testing by refusing to grant the discretionary writ of certiorari.

So far mandatory drug testing at random has been upheld by appeals courts for job classifications which involve: employees with access to classified information, who carry firearms, or are involved in law enforcement (CA5); prison guards (CA8); military personnel (DC); and jockeys (CA3). In short, drug testing is but another example of a wide range of tests used to determine whether certain classes of employees are fit for duty.

You realize, of course, that the Fourth Amendment does not apply to private employers. In dismissing a suit by supervisory employees against Consolidated Freightways which had required them to submit to drug testing, the U.S. District Court for the Eastern District of Missouri ruled that the Fourth Amendment does not apply to private employers such as Consolidated Freightways, and stated that, in any case, the court "would be reluctant to

find that efforts to assure a drug-free environment contravened the public policy of the State of Missouri."

Perhaps the most celebrated private sector drug testing case occurred earlier this summer in the State of Texas before a liberal judge involving a suit by the American Civil Liberties Union against Minco Technology Labs, Inc. which had instituted a program of random testing for its 160 employees. Minco manufactures micro-chips and provides computer-related services for the space program and the military. In dismissing the suit on the grounds that random drug testing was not an unreasonable intrusion into the privacy rights of employees, the court noted that a drug-impaired employee can contaminate or damage a product that eventually is incorporated into a space shuttle or heart pacemaker, risking death to the user, and said: "Must a shuttle crash or a pacemaker fail before there is sufficient legal ground to conduct the tests that would help eliminate the problem? I think not."

In summary, I have no doubts about the sound constitutional grounding of the drug testing program being implemented under the executive order. I am convinced that it is constitutional because it was very carefully designed to protect both individuals' rights and the public interest. We think our program provides an excellent and constitutionally sound model for state and local governments and private employers to emulate.

The federal government is just one of an increasingly large number of employers trying to create a drug free work

environment. In private industry, approximately 40% of the Fortune 500 companies have instituted testing programs using urinalysis for drug detection, including: the Ford Motor Company, IBM, Alcoa Aluminum, Lockheed, Boise Cascade and -- interestingly enough in the light of media hostility to the idea -- a number of newspapers, including The New York Times. You know something must be working if even Rolling Stone magazine -- the rock and roll tabloid which once offered "roach clips" to new subscribers -- now has a policy allowing it to test staff members for drug use at its Fifth Avenue headquarters in New York City. Testing programs have been enormously successful resulting in fewer on-the-job accidents, increased productivity and improved employee morale. It is estimated that an additional 20% of the Fortune 500 companies will institute drug testing programs within the next two years.

In the final analysis, of course, testing is only one, albeit a powerful, demand reduction weapon in the arsenal we must bring to bear against drugs. Ultimately, winning the fight against drugs depends upon fostering a sense of personal responsibility in everyone using or tempted to start using illegal substances. As lawyers and public servants, I believe we have a special duty not only to uphold the Constitution but also to combat problems which threaten our national well-being. I urge you not just to support drug testing programs but to become actively involved in drug demand reduction activities in your agency, your community, and your local bar association.