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DRUG TESTING OF FEDERAL EMPLOYEES

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON HUMAN RESOURCES

OF THE

COMMITTEE ON POST OFFICE AND CIVIL SERVICE HOUSE OF REPRESENTATIVES

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DRUG TESTING OF FEDERAL EMPLOYEES

TUESDAY, APRIL 7, 1987

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

The subcommittee met, pursuant to call, at 9:30 a.m., in room 311, Cannon House Office Building, Hon. Gerry Sikorski (chairman of the subcommittee) presiding.

Mr. SIKORSKI. This is a hearing before the Subcommittee on Human Resources of the Committee on Post Office and Civil Service.

Under Rule 10 of the House, this subcommittee is charged with the responsibility to examine and oversee the deployment of the Federal human resources generally and specifically, among other things, rights of privacy for Federal employees.

Today the subcommittee will examine the current status of the Administration's efforts to implement Executive Order 12564 mandating the establishment of an agency program to drug test Federal employees and the development of employee assistance programs (EAP's).

This is the first Congressional hearing on the Office of Personnel Management's drug testing regulations issued in November 1986 and the Health and Human Services scientific and technical guidelines issued in February of this year.

Together these regulations and guidelines comprise the procedural and legal structure through which the Administration plans to drug test the Federal work force.

I commend the Administration's objective of purging our society of drug abuse. It destroys careers and families and lives. It costs society billions of dollars in lost productivity and undermines our basic values as a society.

And that's why we are all concerned about drug abuse.

For ten years of public life I have been an advocate of stricter enforcement of existing drug laws, greater support for enforcement agencies, increased drug education awareness programs, and increased support for rehabilitation and employee assistance programs.

But I am troubled by the Administration's insistence on the urine testing of Federal employees as the crucial starting point for a modern crusade to rid our country of the evils of drugs.

Considering the older nature of the Federal work force, the regulations we have before us today smack of a quick fix.

Last summer, we had a big "Miami Vice" media deal on drugs. The first blockade of the New York harbor since 1812, a two thousand mile cocaine curtain along the Mexican border, and widespread drug testing as a public relations response to a very serious and complex human and social problem.

The easy target became the Federal work force.

We are here today to better understand the OPM regulations and HHS guidelines issued pursuant to the President's Executive Order and the Omnibus Drug Law of 1986.

We're going to find out what they actually mean, their costs, their progress, and their controversies.

Their constitutionality is still an open question. Just a week ago the Supreme Court issued its ruling in the area of Federal employee Fourth Amendment rights, stating public employees have a, quote, "reasonable expectation of privacy" in their offices.

Now, while the issue of constitutionality will ultimately be decided by the courts, there are several other practical but no less thorny issues regarding the drug testing regulations. They too will be examined in our hearing room this morning.

The accuracy of drug tests is a major concern of public and private sector groups alike and heretofore not sufficiently addressed.

Study after study has shown that there are real inconsistencies in operating standards which have caused error rates as high as sixty-nine percent in urine testing.

Even assuming a zero percent error rate in test procedures, the results of the tests depend on the ability of the human testers. And some testers have not tested out.

For example, the Administration's massive and ambitious drug testing program is only in its infancy, and we have already seen critical drug tests in a major investigation flawed.

The Department of Transportation, which appears to be way ahead of other agencies, last week announced that the test results from the Conrail crew involved in the January fatal train wreck had been flawed by procedural irregularities. This was after the world had been treated to loud and supposedly conclusive and, I might say, damning statements about the test results.

Apparently the lab goofed. And this was the main drug testing lab for all rail and airline accidents. Now the DOT is not sure about the validity of past tests at this lab.

If the main lab makes mistakes, how many other labs are botching drug tests? How many dollars do these mistakes cost? How do you measure the blow to morale caused by faulty urinalysis test results? And, most important, how many careers, families, and lives are to be ruined by flawed tests?

Today, the subcommittee will hear from one such victim. Sandra Thomson is a research biologist at the Aberdeen Proving Grounds in Maryland.

It took Army officials twenty-one days to inform Sandra that her initially positive test came up negative on the second test.

Because of her own doubts about the reliability of the test, she had a test done at a local hospital the same day, which turned up negative as well.

In the days of raging deficits and the bite of Gramm-Rudman, we have to ask how much does this program cost, to the Government,

its employees and to taxpayers? Where will the funding come from?

The Administration has contended that the program will cost only fifty-six million dollars for the first year. We are going to examine that number and the numbers for subsequent years very carefully.

Moreover, what are the hidden costs?

The initial round of so-called immunoassay screens, the so-called inexpensive tests, alone may cost upwards of thirty-five million dollars. And this is only a very rough estimate because many agency heads have yet to decide who will be tested and for which drugs.

What about rehabilitation costs? which can range from two hundred and fifty to several thousand dollars per person.

What is the effect on the Federal employees health benefit program?

How much is the Administration willing to spend on an employee for rehabilitation, and how much does a firing cost?

We want to know the total cost in funding, and lost work time, and human dignity in the testing of over one million Federal employees in order to catch a few drug abusers.

Is the Administration playing the teacher and the Federal work force of the fourth grade class, with the teacher making everyone put chewing gum on their noses because one student blew a bubble in class?

Finally, the President has said he prefers a voluntary program in which Federal employees won't lose their jobs and there won't be punishment, a, quote, "helping hand."

The Executive Order and press statements stressed employee assistance, counselling, and rehabilitation. And that's good.

But the guidelines that we have before use can be viewed as significantly more punitive than that language.

It appears there is some confusion regarding the President's intent. Or is there a calculated diversion in substance from the high-sounding and righteous political rhetoric?

Today, we will review a potential bright spot in the picture, the employee assistance programs, the EAP's.

They were mandated on an agency-by-agency basis for the prevention, treatment, and rehabilitation of drug abuse and alcoholism among Federal employees.

The Omnibus Drug Enforcement, Education, and Control Act, the Omnibus Drug Act of 1986, requires the Office of Personnel Management to report to Congress this month on the status of agency EAP's. And we will inquire as to costs, funding, utilization rates, training, confidentiality, and recommended legislative changes.

The drug issue is real. It's complex. It's costly. And it's important enough to require real action.

But Congress cannot allow anyone to willy-nilly expose over a million drug-free Federal employees to unnecessary, inaccurate, and unconstitutional harrassment through urine testing for a quick and dirty fix to our country's drug absue problems.

We must have public debate and careful deliberation in order to arrive at a reasonable and responsible answer to the questions

about drug testing that remain to be answered. And this hearing is part of that process.

Representative Morella.

Mrs. MORELLA. Thank you.

Mr. Chairman, the Administration's proposal to institute a Government-wide drug testing program has, indeed, raised many questions, particularly, as might be expected, among Federal employees.

As one who represents a district with a large number of Government workers, I want to take this opportunity to personally thank you for responding as you have to my request for setting up this meeting and conducting it, a matter of such importance to my constituents.

The Administration is proposing to test the drug abuse, not only for all employees in jobs that affect national security or public safety, but also those who are in positions which the Government considers sensitive.

As I read the President's directive of September 15th, 1986, this includes not only employees with access to classified information, but computer operators and people who work with financial data also.

Each agency head is given the discretion to decide whether testing will be comprehensive or at random and which jobs will be subjected to testing.

I firmly support drug testing for Government employees who hold jobs that directly affect national security or public safety or where probable cause has been demonstrated.

However, the Administration's proposal, if fully implemented, would, as I understand it, make over half of our nation's two million Federal workers subject to drug testing under its own criteria.

I'm at a loss to understand why so many Federal jobs should be subject to such massive testing, testing that may well be inaccurate as well as expensive. And I am concerned as well by the proposal to grant agency heads such wide latitude.

The President's directive strictly prohibits managers from selecting positions for drug testing in order to get particular individuals. And that sounds good. But, overall, the guidelines for defining which jobs should be subject to testing are too vague and should not be determined by subjective decisions.

While there is no question that some action is in the public interest, I believe that we must tread very carefully.

If the Administration remains intent on going ahead with this program, I strongly urge that before any guidelines or definitions are implemented Congress have an opportunity to closely review them.

We're not considering some obscure regulations to address some marginal problem. We're examining proposals that not only affect the people involved, but could very well become models to be followed at other levels of government and in the private sector.

The Administration proposal, as I understand it now, has the potential of holding more than one million Federal workers hostage to the abusive behavior of a few. It is not the best way to deal with problems of drug abuse.

I look forward to learning a great deal from this hearing.

Thank you, Mr. Chairman.

Mr. SIKORSKI. Thank you.

Does Congressman McCloskey have an opening statement?

Mr. MCCLOSKEY. No statement.

Mr. SIKORSKI. Thank you.

Our first witness will be Congressman Steny Hoyer of Maryland.

Congressman Hoyer has been a long-time ally of Federal employees.

He's Chairman of the Task Force on Federal Government Service and a member of the Appropriations Committee.

He was the author of an amendment recently passed by the Appropriation Committee to block the use of supplemental 1987 funds to pay for these drug testings, which he'll be talking about this morning.

Thank you for taking the lead in this important issue and for being with us this morning.

STATEMENT OF HON. STENY HOYER, REPRESENTATIVE FROM MARYLAND

Mr. HOYER. Thank you, Mr. Chairman.

Mr. Sikorski, Mrs. Morella, and Mr. McCloskey, I very much thank this committee for——

Mr. SIKORSKI. It sounds like a good law firm.

Mr. HOYER. That's right. And we hope that you will press the advocacy of what we believe to be an appropriate position on this issue, once we all decide what the appropriate position is.

And I think that's one of the reasons this committee's hearings are so important.

Mr. Chairman, I appreciate the opportunity to testify before this subcommittee on this important issue.

As you are aware, I offered an amendment, as you have stated, to the supplemental appropriation bill now pending in the Senate—or pending in the House still. Hopefully, it will be on the floor soon after we return from our recess.

And that provision would essentially suspend the President's Executive Order. This order mandated, as you know, random drug testing for employees in, quote, sensitive positions.

It was my belief in offering the amendment that the issue was entirely too complex and too far-reaching in its impact to rush in to a mandatory governmentwide policy. Rather, such an issue requires Congressional scrutiny and consensus building, the activity that this committee is now about.

Further, the clear constitutional questions demand that the courts be allowed to review the Fourth Amendment ban on unreasonable searches and the Fifth Amendment's ban on self-incrimination.

You have spoken of one of the recent court cases that the Supreme Court has come down with, clearly recognizing the Fourth Amendment rights of Federal employees, even on site, notwithstanding the fact that they also found that, in that instance, there was available to employers the ability to, for government purposes, look at items which otherwise could not be investigated perhaps in a private sector context or a nonemployer context.

I'm glad that the committee responsible for authorizing legislation in this area is moving quickly to examine in greater detail the President's program and to begin the process of consensus building necessary for an effective governmentwide policy.

For myself, there are many unanswered questions. And I look forward to the results of this and other hearings to assist in the formulation of a sensible, constitutional drug testing approach.

Therefore, I come before you not with evidence in defense of a specific position, but rather with the questions which I believe are important and critical in this consensus building process.

First. We must ask is there a problem? I know that there is a national drug problem. But I have seen no data that indicates that there is widespread drug abuse among the Federal service. In fact, I do not believe that that's the case.

However, as a subsidiary issue, it may be legitimate to ask if there are positions that should be tested regardless of whether there is an identified problem. This gets to the President's requiring testing of, quote, sensitive employees, close quote.

All of you have mentioned the definition of sensitive employees.

It is my belief, after reviewing the Executive order and the OPM guidelines that regardless of your position on this issue their definition is entirely too broad and unreasonable.

It has been reported in the press that OPM's definition would encompass 1.1 million Federal workers.

I will add that Connie Horner, in her testimony before the Treasury, Postal Subcommittee of the Appropriations Committee, on which I serve, did not believe that there would be that many employees once this process was completed.

Nevertheless, that appears to be the ambit that would be covered by the guidelines.

Based on the OPM regulations, however, I think one could argue that almost every Federal worker could fall within the definition. I refer to the regulations which include within the definition of sensitive any employee—and I quote—who has been granted access to classified information or may be granted access to classified information.

This broad conditional statement would make eligible for drug testing almost double the hundred and ninety-two thousand civilian employees who currently hold security clearances.

I also believe, Mr. Chairman, that the subcommittee should be concerned about catchall clauses which are added to the OPM regulation's definition of sensitive employees. This clause would include in the random drug testing program all employees who an agency head determines performs—and I quote—other functions requiring a high degree of trust and confidence.

There is no employee in my office, Mr. Chairman, who doesn't fulfill that definition.

The broad authority is ripe for abuse and discriminatory implementation.

Apart from these problems with the OPM regulations and the Executive Order, and returning to the original question of whether there are positions which necessitate drug testing, I believe the subcommittee should carefully examine the issue of whether there

are positions where the public health or safety could be immediately jeopardized by employee drug use.

There may well be positions, Mr. Chairman, where it would be reasonable as a condition of employment to perform random and carefully monitored drug tests.

I would quickly add, however, that assumes that the court finds that such random drug testing, absent any cause, probably or otherwise, is constitutional.

Clearly, whatever position we take will ultimately be determined by the answer to that question.

But some positions may be so critical to public safety that to wait to test after the fact, i.e., a major loss of life, would be negligence on the part of the Government.

Now, depending on the outcome of the response to the question of who should be tested is the question of what to do with the testing information. And I think this is a critical issue and a disparity between the President and the Office of Personnel Management and the Justice Department.

Regarding the OPM regulations, I strongly disagree with their position that an employee may be discharged upon a first offense.

Both the President and the Executive Order make clear that employees should be allowed to participate in a rehabilitation program and retain his or her position as long as the employee refrains from drug use in the future.

This is a critical element in the compulsion of this testing, not only as it relates to employee morale, but also as it relates to the constitutionality, it seems to me, of such testing.

The OPM regulations, however, are clear that removal is an option of—and I quote—first resort. This should never be the case in my opinion.

If the employee holds a job where the drug use poses a threat to the public health or safety, then that employee should be reassigned pending the outcome of such rehabilitation.

Only if an employee refuses rehabilitation and/or continues to use drugs should the option of termination be considered in a first occurrence.

There are, Mr. Chairman, many subsidiary questions. Some which I would urge the subcommittee to investigate would be the cost of testing, which the chairman has referred to, and the cost of rehabilitation programs. Others would be the accuracy, which you have also referred to, of drug testing programs, and whether it is possible to develop a process which is accurate and yet does not unduly violate the employee's right to privacy.

Hopefully, you're hearing today and further hearings on this subject can respond fully to these and other controversial areas.

The largest question, which I believe impedes any progress in this area, is the role of the Department of Justice in the Federal employee drug testing program.

I can see no legitimate role, Mr. Chairman, for the Justice Department.

It is clear that the intent of the Executive Order is for management and health rehabilitation purposes, not criminal prosecution.

Yet the order does not mandate that information cannot be used for criminal prosecution.

Again, I suggest a critical question as to the constitutionality of the compulsion of the mandatory testing.

Rather, it says—and I quote again—agencies are not required to report to the Attorney General for investigation or prosecution. That is not to say they won't, but they are simply not required to.

This is too important an issue, in my opinion, to allow for discretion or witch hunts by agencies or the Office of the Attorney General.

The Executive Order should not proceed until this issue can be cleared up.

I might say, with respect to the Attorney General, I was disheartened, as I'm sure you were, Mr. Chairman, when the Attorney General, in talking about the issue of testing, in effect said that no employee has a right to take drugs and, therefore, they shouldn't object to mandatory testing for drugs in light of the fact that they had no right to take the drugs in the first place legally.

Obviously, that theory, carried to its logical conclusion, would mean that the Federal Government could search any of our homes at any time it felt without probable cause, as is required by the Constitution, on the theory that we have no right to have illegal drugs in our home. And, therefore, because we have no right to have such drugs in our home, the Government is perfectly authorized to search our homes at any time to make sure that we don't have.

Well, obviously, our founding fathers said that no king nor our government should have that authority. The government must have probable cause. That is one of the linchpins of our freedoms. Governments must not be allowed to intrude into our lives without cause. And that's the linchpin of both the Fourth and the Fifth Amendments.

And it's critical for us in the Congress to protect that not only for all the American public, but in particular with respect to our employees, who have been under assault from all different kinds of directions. And this is but another one of those assaults which imposes upon them a burden to which others are not subjected.

In any event, Mr. Chairman, the subcommittee should take every step it can to deny the Justice Department any role in the drug testing program for Federal employees.

Whatever the outcome of these many questions, drug testing of Federal employees should solely be an issue for the Office of Personnel Management and the Department of Health and Human Resource.

Mr. Chairman, I would like to submit a letter I sent to Connie Horner regarding some of these questions and her response for the record and the subcommittee's information. I believe they will be helpful to you as you move forward in this controversial area.

I would also add, Mr. Chairman, that Chairman Whitten and Chairman Roybal, the Chairmen of the Post Office and Postal, Treasury Subcommittee of the Appropriations Committee, sent a letter to Mrs. Horner and asked her not to proceed to implement the provisions of the Executive Order pending further determinations of the Congress of the United States.

Obviously, if the supplemental appropriations passes and is signed by the President or we pass it over his failure to sign, any

sums in that supplemental at least may not be used to implement the Executive Order.

Again, I commend you, Mr. Chairman and the committee for holding these hearings and for your efforts to ensure that Federal employees continue to be treated fairly, legally, constitutionally, which is the minimum they would expect.

Thank you, sir.

Mr. SIKORSKI. Thank you.

The correspondence you referred to will be placed in the record.

[The letters follow:]

STENY H. HOYER
5TH DISTRICT, MARYLAND

DEMOCRATIC STEERING AND POLICY COMMITTEE

CO-CHAIRMAN
COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Congress of the United States
House of Representatives
Washington, DC 20515

APPROPRIATIONS COMMITTEE

TREASURY, POSTAL SERVICE, GENERAL GOVERNMENT

LABOR, HEALTH AND HUMAN SERVICES, EDUCATION

DISTRICT OF COLUMBIA

December 17, 1986

The Honorable Connie Horner
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Dear Ms. Horner,

I am writing to express my strong opposition to the guidelines your Office recently issued regarding drug testing for Federal employees and to the Executive Order issued by the President, requiring drug testing for Federal employees in "sensitive positions."

First, the Executive Order invades the basic privacy of the Federal worker. It presumes the existence of a drug problem among these workers, which has never been shown to be the case. Second, by defining "sensitive positions" so broadly that it could be construed to encompass nearly every Federal worker, the Executive Order creates a dragnet approach which mandates searches and seizures without probable cause or reasonable suspicion. Finally, the Order fails to recognize that all drug testing procedures result in false positives. By allowing action to be taken against employees on the results of a single drug test, which could be false, the employee's rights of due process are savaged.

Because of these concerns, the Executive Order has had a serious negative impact on employee morale. The Executive Order however, is not nearly as negative as the guidelines issued by your Office, which appear to ignore what little safeguards there were in the Order.

Specifically, the Executive Order clearly provides that disciplinary action shall not be required of employees who after a positive test, obtain counseling or rehabilitation and thereafter refrain from using illegal drugs. Further, it is clear that agencies shall initiate action to remove employees who are found to use illegal drugs only if they refuse such rehabilitation and do not refrain from using illegal drugs.

The OPM guidelines however, state that "Upon the first confirmed determination that an employee uses illegal drugs, there are a range of disciplinary actions available to an agency, from a written reprimand to removal." This directly contradicts the President's clear intention that neither disciplinary action nor removal shall be used against employees who, after a first test, pursue rehabilitation and refrain from further illegal drug use.

I plan to review this matter in full during OPM's FY 88 appropriation hearing before the Appropriations Subcommittee on Treasury, Postal Service and General Government. I will be working closely with my colleagues to develop a fairer and more rational approach to drug testing for postions where the public health and safety are in jeopardy. For the interim however, I would recommend clarifying the above discrepancy between the Executive Order and the guidelines regarding disciplinary actions.

I look forward to working with you to resolve Congress' many differences on this issue.

With kindest regards, I am

Sincerely yours,

STENY H HOYER

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515

January 22, 1987

The Honorable Constance Horner
Director, Office of Personnel Management
1900 E Street, NW
Washington, D.C. 20415

Dear Ms. Horner:

We are writing to ask that you seriously reconsider the recently issued guidance to federal agencies on the implementation of Executive Order 12564, entitled "Drug-Free Federal Workplace." Emerging issues raised by pending litigation, we are sure you agree, have cast substantial doubt on the legal parameters of proposals to test federal employees for drug abuse. Indeed, the program instituted by the U.S. Customs Service has been held to be violative of the Fourth and Fifth Amendments to the Constitution.

The issuance of the guidance opened the way for federal agencies to begin to establish drug testing programs that we now know would face serious constitutional and other legal challenges. It seems to us imperative that precipitous actions in reliance on that guidance be forestalled. Rather, agencies must be encouraged to take the time necessary to plan and develop appropriate programs that are consistent with Constitutional restraints. At a minimum, implementation of any broad-based drug-testing program ought to be held in abeyance until the courts finally decide the legality of the underlying executive order and of the guidance itself. It would seem wise to delay action until existing programs, such as the Customs Service's are fully litigated, so that drug testing procedures could be devised with the benefit of further judicial explication of the Constitutional barriers to implementation of such programs.

To act otherwise would be irresponsible and could only lead to the frustration of the underlying policy goal: a drug-free federal workplace. Scarce federal resources should simply not be squandered on instituting programs of questionable legality that invite costly litigation. The sensitivity of the issues requires also that drug testing not unduly disrupt the workplace, or demoralize the vast majority of law-abiding and faithful civil servants that comprise the federal workforce.

We urge you to issue additional guidance to the agencies addressing the concerns we have raised, and that you advise them to delay acting on the guidance until at least its legality and that of Executive Order 12564 is determined.

Sincerely,

JAMIE L. WHITTEN
Chairman, Appropriations Committee

EDWARD R. ROYBAL
Chairman, Subcommittee on Treasury,
Postal Service, and General Government

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

Office of the Director

The Honorable Steny H. Hoyer
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Hoyer:

This responds to your letter dated December 17, 1986, concerning the President's Executive Order 12564, Drug-Free Federal Workplace, and the guidance issued by the Office of Personnel Management (OPM) on the implementation of that Order (Federal Personnel Manual (FPM) Letter 792-16). While you raised several concerns about the Executive Order, you raised only one objection to the guidelines. As the Director of OPM, I issued guidelines on the implementation of the Executive Order. Rather than addressing all of the concerns you have raised about the Executive Order, I will limit my response to your objection to the OPM guidelines.

You note that the guidelines state that there are a range of disciplinary actions available to an agency based upon a first confirmed determination that an employee uses illegal drugs. You then state that that provision of the guidelines conflicts with the President's intention that neither disciplinary action nor removal shall be used against employees who, after a first test, pursue rehabilitation and refrain from further illegal drug use.

I believe that OPM's guidelines address the President's strongly held conviction that rehabilitation is an extremely important part of the overall initiative. The President issued the Executive Order which further outlined his intentions. Chief among the several aspects of the program as enunciated in the Executive Order and as discussed in the OPM guidelines is the opportunity afforded Federal employees for counseling and referral for treatment or rehabilitation. Federal agencies are instructed to strengthen their Employee Assistance Programs to meet this need. In addition, the Executive Order requires additional drug awareness programs and supervisory training on drug abuse. The OPM guidelines reflect these approaches to the drug abuse problem with major emphasis on treatment and rehabilitation. Attached to the guidelines is a Model Employee Assistance Program, a list of current operating drug abuse treatment consortia, and list of treatment facility directories for agencies to use. The Executive Order also includes a discussion of the disciplinary aspects of his initiative. Sections 5(b) and 5(d) of that Executive Order make available disciplinary

actions, already available under existing law and regulation, to the agencies for use in certain situations involving employees found to use illegal drugs.

The guidelines follow the President's Executive Order in their provisions allowing agencies a broad range of disciplinary options for illegal drug use based on one confirmed positive test result. While the guidelines' overall intent and expression is for Federal managers to provide a helping hand to Federal employees with a drug abuse problem, agencies' inherent discretion to take action against employees who engage in misconduct was recognized by the President in the Executive Order and is further explained in the OPM guidelines.

In some instances, disciplinary action, up to and including removal, based upon an initial confirmed positive test result may be warranted. Some agencies in unique circumstances (for instance, the FBI or Secret Service) may be faced with no realistic alternative for some of their employees but to remove them for misconduct, no matter whether that misconduct involves illegal drugs, violence, or other activities. We do not expect this situation to arise often, nor do we expect such discretion to be unfairly applied. Additionally, an employee will always have available the protections of the Civil Service Reform Act for the review of any possible abuse of such discretion by an agency.

In conclusion, I must reiterate that I believe that the guidelines are fully consistent with the President's expressed intentions for establishing a drug-free Federal workplace. The President has determined that the cornerstone of his initiative to rid the Federal workplace of illegal drug use is the provision of an opportunity for Federal employees with a drug abuse problem to get help in beating that problem.

Both the Executive Order and the guidelines address the President's comprehensive education and assistance effort in a complementary fashion. However, the President also recognized that illegal drug use by Federal employees is contrary to the efficiency of the service. The guidelines set out the options available to Federal managers and supervisors in assisting employees who need help and in disciplining those who are unwilling or unable to respond to that assistance.

I do not believe that there is any discrepancy between the Executive Order and the OPM guidelines regarding disciplinary actions. Consequently, I do not believe that

it is necessary to take any action to clarify the guidelines on this subject. However, I appreciate your interest in both the Executive Order and the OPM guidelines on this important initiative. I, too, look forward to working with the Congress on the issues surrounding the elimination of illegal drug use from the Federal workplace.

Cordially yours,

Constance Horner

Constance Horner
Director

Mr. SIKORSKI. One thing you mentioned triggered a thought in my mind. We're going to hear from the Office of Personnel Management next. But in their statement they make reference to the Section 6(b) of the Executive Order. The Department of Justice has responsibility for consulting with each agency on the implementation of the order.

And it seemed, through inference, to move responsibility, from OPM over to the Department of Justice, which raises even greater concerns than the orders on their face.

You have that concern.

Mr. HOYER. I agree, Mr. Chairman, which is why, of course, I included that in my statement.

Mr. SIKORSKI. Yes.

Mr. HOYER. It seems to me, if the intent, as the President seemed to imply in his Executive Order and in his statement which attended the issuance of the Executive Order, if the intent is to rehabilitate, that is certainly a worthwhile intent.

But if it is, the Justice Department doesn't play a role in that. If the focus is not criminal, if the focus is not punitive, then the Justice Department and Mr. Attorney General Meese need play no role.

The Department of Health, as it relates to the whole issue of testing, Dr. McDonald's office, who has also coordinated the White House's efforts out of the White House and also is Director of NIDA, are involved. And the Office of Personnel Management clearly is involved as the agency that oversees Federal personnel policies.

However, the Justice Department has no direct role in that other than, perhaps, to advise on the constitutionality of whatever processes are involved. But in the implementation of the order they should have no role.

Mr. SIKORSKI. Not only those who are skeptical of the drug testing program should be concerned about that growing relationship, but those who are strong proponents of the drug testing program should be concerned with the movement of the program towards the Department of Justice. This might trigger a whole host of Miranda warnings and rights that would certainly eliminate any chance for a drug testing program, even in some very narrow areas, to succeed.

So, it should be a joint concern.

Mr. HOYER. I agree with that, Mr. Chairman.

And, Mr. Chairman, let me say something on drug testing. I said this facetiously in another capacity.

I also serve on the Labor, Health, Human Services, and Education Subcommittee of the Appropriations Committee, which, of course, has Health and Human Services under the ambit of its appropriating authority.

And I discussed this with Dr. McDonald. The most abused drug in this nation by everybody's definition and observation is alcohol. None of the tests proposed will test for alcohol.

I somewhat, but only somewhat, facetiously suggested that there be a post-lunch breathalyzer test for everybody. Because there is no doubt that when we talk about drugs in this context we exclude the most abused drug in this nation. The drug that undermines

families, that undermines work performance, that undermines the health of human beings more than perhaps all the other drugs combined, but certainly more than any individual drug combined.

And we ought to keep that in mind as we pursue this because there seems to be a double standard imposed here.

Mr. SIKORSKI. Absolutely. In my ten years in public life and raised in a family with alcoholism, it is clear that alcohol pervades every family, if not immediate, a little further removed.

It pervades every occupation. It knows the educated and the uneducated, the poor and not poor, and every strata of society.

And when I talk to employees, public employees, whether they're state, or local, or Federal, that issue of alcoholism is of much greater concern in the workplace than the issue of other drugs being abused.

And you represent many Federal employees. I presume that's been your experience as well.

Mr. HOYER. Yes.

Mr. SIKORSKI. Mrs. Morella.

Mrs. MORELLA. Thank you.

Steny, I just want to thank you for what you did on the Appropriations Committee in terms of the amendment to hold back on implementing the program in the supplemental budget.

And I know that you and I had some of the same reservations when we first heard about the procedures, in terms of how implementation was going to take place.

My assumption is that we are going to hear more about that from OPM. But that's another facet that deserves to be looked into.

Thank you for testifying today.

Mr. HOYER. Thank you.

Let me, if I might respond, first of all, congratulate Congresswoman Morella for her interest in this, and attention in this, and service, of course, on your subcommittee, Mr. Chairman.

Let me say that I appreciate your comment on the provision that was included in the supplemental appropriation bill.

If you will the report language—and I am sure, Mr. Chairman, you have that, the committee has that—you will note that the committee did not take a position with respect to either the rules, regulations, or the ultimate questions involved.

What it said was that it is a very controversial area on which there are many legitimate questions that ought to be pursued and are of sufficient importance and magnitude that the Congress ought to be itself involved in reviewing those issues because of their importance. And there are basic questions involved with respect to the constitutionality on personnel policies.

This need not be a confrontational process.

I think OPM—I've spent some time talking with Dr. McDonald. I've spent some time talking to OPM. I think all of us together realize that the substance abuse, alcohol and drugs, is a problem. And we all want to solve that. We all want to provide.

And I think your statement at the opening was appropriate. The rehabilitation programs that have come out of this and are being focussed on are appropriate and postive aspects of this interest.

And to the extent that we can free not only the Federal workplace, but the entire place, as you said, Mr. Chairman, in your opening statement, of drugs and substance abuse we will have America forward.

And, so, we're united I think in that objective. So, it ought not to be perceived that because some of us have concerns about—legitimate concerns about constitutionality that we aren't equally committed with the Administration in achieving greater educational awareness of the harmful effects of substance abuse and to rehabilitating those who have fallen prey to such abuse.

Mr. SIKORSKI. Thank you very much.

Mr. HOYER. Thank you, Mr. Chairman.

Mr. SIKORSKI. At this point, I'm going to ask that the statement of Congressman Ackerman be placed in the record without objection.

[The statement of Mr. Ackerman follows:]

ONE HUNDREDTH CONGRESS

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STATEMENT

Rep. Gary L. Ackerman, Chairman
Subcommittee on Compensation and Employee Benefits
House Post Office and Civil Service Committee

before the Subcommittee on Human Resources
April 7, 1987

Mr. Chairman, my statement will be brief, because the arguments against mandatory drug-testing of Federal employees are easily-stated.

During the 99th Congress, when I chaired the Subcommittee on Human Resources, we conducted three hearings on drug testing. I think those hearings amply demonstrated that drug tests are unnecessary, inaccurate, prohibitively expensive, and unconstitutional.

First, there is simply no evidence of drug abuse among Federal employees. During our hearings, no one -- absolutely no one -- could present any evidence that public employees are using drugs. The tragic Conrail accident last January is now cited by some as proof that we need preventive screening. But I hasten to point out that the engineer and brakeman were not Federal employees; and serious questions have recently been raised about the accuracy of reports that evidence of drug use was found among their remains.

Second, drug tests are often wrong. The Office of Technology Assessment presented expert testimony that urinalysis screenings have an inaccuracy rate of 5 to 20 percent. In some cases, it is much worse than that. An investigation of one Army laboratory found that 97 percent of its test results were "not scientifically or legally supportable". Inaccuracies can result from human error in the handling of specimens, as well as chemical cross-reactions with everyday medicines and common food such as poppyseed rolls. If we required one million workers to take a test which is even 95% accurate -- and that's being optimistic -- at least 50,000 of them would be falsely branded as drug abusers.

Third, the cost of drug testing is prohibitive. The most accurate test costs about $100. Testing one million workers just once would cost $100 million -- money which will go to medical laboratories, and the manufacturers of blue dye and little plastic cups. That money would be better spent on drug education in the workplace and in our schools, and on the interdiction of drugs at our borders, programs which, in fact, the new Reagan budget proposes to cut.

Fourth, and most important, the President's Executive Order violates the Constitution's prohibition against "unreasonable searches and seizures" by the government. Many Federal courts have already ruled against random urine tests for precisely that reason. Just last week, the Supreme Court issued a decision in which all nine Justices acknowledged that public employees have a "reasonable expectation of privacy" in their places of employment. I am optimistic that the Court would rule in favor of the pending suit, filed by public employee unions, challenging the constitutionality of the Administration's drug-testing program.

American citizens do not give up their constitutional rights when they choose a career in public service. Drug tests would reverse our society's traditional presumption that everyone is innocent until proven guilty. In addition, drug tests are an enormous invasion of privacy; they can be used to identify a variety of conditions -- including urinary tract infections, epilepsy, venereal disease, and pregnancy -- which are, simply, nobody else's business.

As I warned last fall, the hysteria over drug testing is spawning a whole new industry in America -- the sale of "clean" urine samples for $50 to $100. What all this means is that the only thing which drug-testing will do is to brand the innocent as drug-abusers, while letting the guilty, if there are any, sneak by.

For all of these reasons, I have introduced H.R. 280, to require that drug tests conform with the Fourth Amendment. Specifically, drug tests would have to be based on "reasonable suspicion", by two supervisors, that a particular employee's job performance is impaired because of the use of illegal drugs. Drug tests are appropriate in those instances, but their use should be carefully circumscribed. Job impairment can be revealed through more accurate, and less intrusive, techniques, such as physical tests of reflexes and motor skills. We should put greater emphasis on training supervisors and managers to spot problems before they arise.

Mr. Chairman, I believe that the Administration's drug testing program was really an election-year gimmick designed to deceive the American people into believing that the Administration was serious about doing something about drug abuse. In fact, all that it was doing was wasting money and trampling on the rights of Federal employees. I hope that your Subcommittee will take early and favorable action on legislation to put an end to this dangerous charade.

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Mr. SIKORSKI. Our next witness is Mr. Hugh Hewitt, who is General Counsel of the Office of Personnel Management.

The subcommittee would like to thank Mr. Hewitt for filling in for the Director of the Office of Personnel Management Mrs. Constance Horner.

The subcommittee was informed yesterday morning that she would not be able to testify because of longstanding family commitments, which I certainly respect. She also promised that she would be here at our next hearing as we delve deeper into the issues that are raised in this more general hearing.

I'd like to also note that the subcommittee received the Office of Personnel Management's prepared testimony at six o'clock last night, although they were invited to testify almost two weeks ago and everyone else made the time limits. In fact, everyone else made the limit of last week for the statements.

I just want to note that I understand the problems and I'm sympathetic to them, but we're going to insist on a little bit better response in terms of the statements.

Mr. Hewitt, I thank you for coming. And we will give you an opportunity to present your statement. I think it's about five minutes.

We're going to try to keep statements to about five minutes. And if you can assist in that, we'll let you go.

STATEMENT OF HUGH HEWITT, GENERAL COUNSEL, OFFICE OF PERSONNEL MANAGEMENT

Mr. HEWITT. Thank you, Mr. Chairman.

Mr. SIKORSKI. Thank you.

Mr. HEWITT. And I'd like to thank the committee for the opportunity to come up today and to talk about the program, and to relay the Director's sincere regrets that she couldn't be with you this morning.

I would like to submit my statement for the record so that we can move on to answering as many questions as you have with the note that we welcome oversight because, with particular regard to this program, we find that the more we explain, and the more understanding of our program we gain, the more appreciative even our critics are of the care that went into its design, and the caution that is going into its implementation.

It is a good program and we are proud of it.

I do regret the delay with the testimony. But we are dealing with something of a moving target here, at least in the constitutional area. And I wanted to make sure that it reflected accurately the state of the law as we understand it.

Some of these court opinions are lengthy and quite detailed. And I do believe the statement reflects our best understanding of the program's genesis and its current status.

That having been said and with the statement submitted for the record, I would be happy to try and answer any questions that you have.

[The statement of Mr. Hewitt follows:]

STATEMENT OF

HUGH HEWITT, GENERAL COUNSEL
OFFICE OF PERSONNEL MANAGEMENT

before

SUBCOMMITTEE ON HUMAN RESOURCES
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
U.S. HOUSE OF REPRESENTATIVES

ON

THE STATUS OF FEDERAL AGENCY DRUG TESTING PROGRAMS

APRIL 7, 1987

Thank you for this opportunity to present the views of the Office of Personnel Management on the status of the Administration's efforts to implement the President's initiative to ensure a drug-free Federal workplace as a part of his overall effort to rid the American society of the use of illegal drugs.

As the President said in a memorandum for all Executive Branch employees shortly after issuing the Executive Order and initiating other activities to control illegal drug use, "[o]ur intention is not to punish users of illegal drugs, but to help rehabilitate them. When you see colleagues or friends struggling with a drug problem, encourage them to seek help from your Employee Assistance Program or from some other organization or person skilled in drug counseling and treatment. Together we can send a message that illegal drug use in every office, shop, and laboratory simply will not be tolerated. The combined efforts of all of us will made it easier for Federal as well as private sector employees to 'Just Say No'."

When he outlined his program, the President indicated that he wanted to emphasize compassion, the extension of a helping hand, and rehabilitation of employees suffering from a problem with drugs. He also stated that continued illegal drug use after an opportunity for rehabilitation would not be tolerated.

It is important for Federal employees to join with other sectors of the American workforce in working to reject drug use and in becoming drug-free. The American public has a right to expect work being done on its behalf -- especially in matters concerning national security, health and safety -- to be conducted by officials and employees who are responsible and not under the influence of illegal drugs.

Your letter of invitation requested that OPM address the development of its guidelines for establishing a drug-free Federal workplace, agency efforts to establish drug testing programs, agency Employee Assistance Programs and training for Employee Assistance Program staff, and any OPM proposals for legislation in this area. Each item is addressed briefly below.

Guideline Development

Executive Order 12564 was issued on September 15, 1986, and provides that OPM shall issue government-wide guidance on the implementation of the order and that the Secretary of Health and Human Services shall issue guidance on the technical aspects of the tests themselves. OPM guidelines were issued on November 28, 1986, as Federal Personnel Manual (FPM) letter 792-16.

It was important that the guidelines be consistent with the Executive Order. Therefore, Director Constance Horner gathered an interdisciplinary team of top

OPM technical, policy, and legal advisers to draft them. In the course of developing the guidelines, we consulted closely with the Attorney General, who found them to be legally acceptable and a correct interpretation of the President's policy, as enunciated in the Executive Order. In addition, we worked closely with the Department of Health and Human Services on ensuring that our guidelines complement their scientific and technical guidelines. The Secretary of Health and Human Services issued those guidelines on February 16, 1987. As we crafted the guidelines, we were well aware of the need to develop guidance which met the President's desire that the testing program be fair and balanced, that it protect individual privacy, and that anyone found to be using illegal drugs be treated with compassion and offered assistance in recovery.

Status of Implementation Efforts

OPM has a long-standing responsibility in assisting agencies in extending a helping hand to employees through Employee Assistance Program. As agencies develop programs to establish a drug-free workplace, they have been and will continue to consult with OPM on the use of their Employee Assistance Programs.

Under section 6(b) of the Executive Order, the Department of Justice has responsibility for consulting with each agency on the implementation of the Order. The Executive Order does not establish any coordinative role for OPM. However, OPM has been providing technical advice and assistance to agencies as they develop their programs.

I can report that agencies are identifying which sensitive positions to designate for testing and working to establish the framework for the implementation of their internal drug testing programs. Given the fact that agencies must provide 60 days advance general notice of testing, it is unlikely that any agency will begin testing under the Executive Order until sometime this summer. Some agencies, like the Army and the Department of Transportation, already have in place programs to test some of their employees for illegal drug use. These programs were in existence prior to the issuance of the Executive Order.

Education and Training

Given the President's expressed interest in seeing that Federal employees with a drug abuse problem are assisted, it is very important to educate them about drug abuse and to train their supervisors in effectively dealing with drug abuse in the workplace. All Federal agencies are training their supervisors and managers on how to deal with employees who have a work performance or behavior problem that may relate to alcohol or drug abuse. This training includes instruction on identification of performance and conduct problems, referral of employees to the Employee Assistance Program, when leave is appropriately used for employee treatment, and how to take any personnel actions that may be necessary. As a result of the Anti-Drug Abuse Act and the Executive Order, a number of agencies are planning to enhance their supervisor and manager training to include instruction on the recognition of alcohol and drug abuse symptoms. Some intend to incorporate this instruction into training programs on the agency's drug testing program.

As part of our responsibilities under the Executive Order, we have developed a supervisory training program on the drug-free Federal workplace initiative that will

be available later this spring. In addition, OPM is developing training packages for use by agencies in their internal training programs and is providing technical advice and assistance to agencies as they develop those training programs. A model program for use in conjunction with the drug-free workplace initiative is attached to the OPM guidelines.

The American Federation of Government Employees, the National Association of Government Employees, the National Federation of Federal Employees, the National Treasury Employees Union, the Senior Executives Association, the Federal Managers Association, and OPM jointly produced a poster announcing that they were "United Against Substance Abuse." Director Constance Horner and the presidents of those employee organizations signed the poster. We are confident that all parties will continue to search for ways to cooperate in this important drug abuse education effort.

Employee Assistance Programs

Ever since the enactment of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 and the Drug Abuse Office and Treatment Act of 1972, Federal agencies and departments have been authorized to establish and maintain appropriate prevention, treatment, and rehabilitation programs and services for substance abuse among Federal employees. These programs were established in recognition of the need for the Federal government, as an employer, to assist its employees with drug abuse, alcohol abuse, and alcoholism.

All Federal departments and agencies are required by the Anti-Drug Abuse Act of 1986 to develop and maintain appropriate prevention, treatment, and

rehabilitation programs and services for drug abuse, alcohol abuse, and alcoholism among civilian employees. Agency Employee Assistance Programs are based upon these laws. Executive Order 12564 also recognized the Employee Assistance Programs as a means of assisting employees with drug abuse problems.

Agency Employee Assistance Program administrators and counselors vary in qualifications and experience. About three quarters of them have experience or advanced academic qualifications directly related to alcohol and drug abuse program functions. Advanced degrees are in the areas of mental health, counseling or psychology. Some of these counselors are also nurses or medical doctors. The remaining one quarter have received on-the-job training supplemented by special training.

OPM evaluations of agencies' programs through on-site visits and analyses of annual report submissions reflect that counselors are qualified to identify employees' primary personal problems (including alcohol and drug abuse), refer them for appropriate treatment, and assist in their rehabilitation and return to satisfactory performance. While there does not appear to be a need for standard qualifications requirements, there is a need to insure that EAP officials obtain the best training available.

Agencies enroll their Employee Assistance Program officials who are newly appointed or are in need of refresher training in OPM's four day course on "Administering the Employee Counseling Services Program" which is offered three times each year. These courses are continuously revised to include the latest information and concerns related to alcohol and drug abuse.

In fiscal year 1985, $11.8 million was spent by the Executive Branch for these programs. In fiscal year 1986, that figure had risen to $15.5 million. It must be noted that this is the total figure for the provision of all counseling program functions including alcohol and drug abuse counseling.

OPM compiles fiscal year statistics from information provided by the Federal departments and agencies. In FY 86, 13,167 employees were counseled through Employee Assistance Programs for alcohol abuse. Of these, 8,187 employees were rehabilitated and returned to duty; 1,975 were not. Agencies reported that there were 3,005 employees still being counseled who had enrolled during FY 86.

In FY 86, Employee Assistance Programs handled 3,690 new employee drug abuse cases. These cases involve abuse of either legal or illegal drugs. Of these, 2,111 employees were rehabilitated and returned to duty; 706 were not. Agencies reported that there were 873 employees still being counseled who enrolled in FY 86.

The percentage of Federal civilian employees counseled for drug abuse during FY 86 was .16 of one percent, continuing a small, but steady, increase since FY 80. Agencies range in percentages from 0% to .89%.

OPM on-site evaluations have found that many employees with the financial resources to do so or applicable health insurance coverage elect to utilize private counselors rather than EAPs.

OPM is required by the Omnibus Drug Enforcement, Education and Control Act of 1986 to report to the Congress annually on drug and alcohol abuse programs in the

Federal government. The first report is due to the Congress no later then April 27, 1987 which is six months after enactment of the Omnibus Act.

Last summer, OPM negotiated with all of the Federal Employee Health Benefits Program carriers for increased coverage of treatment and rehabilitation of substance abusers for last year's open season. With few exceptions, the carriers increased their coverage of substance abuse care. In order to facilitate decision-making by Federal employees during last year's open season, OPM included a new subcategory of substance abuse care benefits in each carrier brochure's summary of benefits. Last fall, OPM also published a "Guide to Substance Abuse Treatment Benefits Under the FEHBP for 1987" that provided a comprehensive summary of the pertinent benefits available from all of the carriers. That guide was distributed to all Federal agency personnel offices.

Legislative Proposals

OPM sees no need for legislation in this area at the present time.

I am very pleased to have had this opportunity to present OPM's views on the drug testing and employee assistance programs and to provide some information about the program that may prove helpful to you. I'd be pleased to answer any questions that the Committee may have.

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Mr. SIKORSKI. Thank you.

Let's go through the Office of Personnel Management's guidelines. You have those before you.

As I was looking them over some questions naturally came to mind I will ask those first and then do a little cleanup at the end with outstanding questions that were raised.

In the purpose section 1(b), the statement is made that the use of illegal drugs by Federal employees, whether on or off the job, cannot be tolerated. Employees who use illegal drugs have three to four times more accidents while at work.

I'm wondering what kind of data does OPM on Federal employee drug abuse.

Mr. HEWITT. We do not have hard data. We are compiling the record to support the report in April.

We do not have statistical data on Federal employees that is exhaustive.

We have, I think, very significant data that has been generated by the operation of those programs that predate the Executive order, that reflect that we have a problem, at least in some areas.

I believe that this comment refers to statistical analyses of the entire work force in the United States.

I'd be happy to submit for the record where that——

Mr. SIKORSKI. So, when it says employees, this would be all employees, private or public sector employees.

Mr. HEWITT. That's correct, Mr. Chairman.

Mr. SIKORSKI. I got the impression that we were talking about public sector employees.

I would guess there would be some demographic differences. The public employee, the Federal work force, is older than the work force generally. And I would expect, if my understanding of the use of say cocaine and marijuana from the studies is accurate, then you would expect that there would be less abuse for those two substances, PHP and other substances like that, than in the general work force.

Mr. HEWITT. I couldn't answer that because I'm not certain of the demographics.

But I could note that we are putting into place a program that is intended to persevere for a number of decades. And as we see the Federal work force, perhaps, at this point, if you take a static photograph of it, it is older than the general population. But it will change. And what we are witnessing is a rolling into the Federal work force of younger people who have grown up in a different milieu than perhaps our older people.

So, if it is not as significant a problem today, and I'm not sure that it isn't, I think that we can expect that it will eventually mirror completely the work force at large.

Mr. SIKORSKI. So, there's no data on that statement.

How many have drug problems—we don't have data on how many Federal employees as a percentage, or a good guess, or a rough estimate on drug abuse.

Mr. HEWITT. In 1986, there were over three thousand self-referrals of employees with substance abuse problems, drugs specifically, to the employee assistance programs.

That is perhaps an iceberg tip because it does require a commitment to seek help for people to refer themselves to the EAP.

Mr. SIKORSKI. How about alcohol?

Mr. HEWITT. I don't have that in front of me, Mr. Chairman.

Mr. SIKORSKI. Significantly greater than the——

Mr. HEWITT. It is in here. It is not significantly greater. It is perhaps twice as many. I remember seeing the figure.

Mr. SIKORSKI. I'm talking about the general problem of abuse, substance abuse, the alcohol versus the nonalcohol drug abuse. It's significantly higher for alcohol abuse.

Mr. HEWITT. Okay.

I think that is reflected in our EAP statistics, but I couldn't say for certain.

Mr. SIKORSKI. Well, looking down at agency responsibilities in 2(a). The head of each Executive agency shall develop a plan for achieving the objective of a drug free workplace with due consideration of the rights of Government and the employee.

How many agencies have developed such a plan?

Mr. HEWITT. There have yet to be implemented any post-Executive Order plans.

Mr. SIKORSKI. Okay.

Let me back up. How many agencies are effected by this, by the Executive Order, and by these guidelines?;

Mr. HEWITT. Every agency in the Executive Branch.

Mr. SIKORSKI. And what are we talking about in terms of numbers?

Mr. HEWITT. I don't know offhand how many agencies we have if you start including things like the Pennsylvania Avenue Development Corporation. All of the major cabinet agencies, all of the subcabinet agencies, right down to different smaller groups, but I don't know offhand.

I would be glad to submit that.

Mr. SIKORSKI. Bruce?

Mr. HEWITT. Eighty major agencies.

Mr. SIKORSKI. Eighty major agencies and a few hundred other agencies.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. Which are also responsible, under this order, to come up with a plan, right?

Mr. HEWITT. Yes, they are.

Mr. SIKORSKI. And it's your testimony that none have developed a plan under this, under the order, and under these guidelines.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. Some have previous drug and alcohol plans.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. One was the Army?

Mr. HEWITT. Yes, they did. Theirs was implemented.

Mr. SIKORSKI. One was DOT?

Mr. HEWITT. The Department of Transportation, FAA, had a prior existing plan.

Mr. SIKORSKI. Any others?

Mr. HEWITT. The DEA, the Federal Bureau of Investigation, the Central Intelligence Agency. I believe that is what I know of for certain.

Mr. SIKORSKI. We've got DEA, FBI, CIA, Army, DOT, FAA.
Mr. HEWITT. That's correct.
Mr. SIKORSKI. OK.
The war hasn't been won yet. In fact, the first battle hasn't been fought.
Mr. HEWITT. No, it hasn't.
I should add the Customs Service to that as well.
Mr. SIKORSKI. Treasury, Customs.
I had other questions in terms of the plans, the statement of policy.
You have not seen the statements of policy from the various agencies because they haven't developed the plans.
Mr. HEWITT. We would not see them in any event.
Mr. SIKORSKI. Why not? They're your work force.
Mr. HEWITT. The coordinating responsibility for drug plans is placed squarely on the agency head. He is to operate under our guidelines and the HHS guidelines. But the President has placed responsibility for the implementation and development of the agency-by-agency plans on the agency head, not on OPM.
Mr. SIKORSKI. You said he or she is to operate under your guidelines. How do you know whether he or she is operating under your guidelines if you don't know what their plans are?
Mr. HEWITT. We are relying on two things. One, the fact that the President has asked his agency heads to do this and we expect that they will comply. And, two, the plans must be submitted to the Attorney General for review of a constitutional nature, a legal nature, prior to implementation.
Mr. SIKORSKI. Well, looking at the plans, there's a statement of policy regarding their expectations of drug use. I would guess that's not a constitutional question—although there might be some ramifications.
Supervisory training is part of the plan and has to be in there. Self-referral. Those aren't constitutional issues. So, those wouldn't be reviewed by the Department of Justice, the Attorney General.
And then your reliance on the notion that these agency heads would do it because the President said they should.
Mr. HEWITT. Well, actually, Mr. Chairman, because it is a program ordered by the Executive order, and the Executive order incorporates OPM guidance and HHS guidance, the Attorney General will have the authority to effectively examine any program for major gaps.
But I do believe the reliance is on our trust and confidence in agency heads. I think that's a well placed reliance.
Mr. SIKORSKI. I sense that those who are concerned about widespread random drug testing in the Federal work force shouldn't be too concerned if what you are saying is accurate because there's likely to be no follow-up, no compliance.
If it does, it would come in the form of Department of Justice, which raises a specter. You were here when Congressman Hoyer raised that question in that discussion we had. Does that bother you? You're General Counsel for OPM.
Mr. HEWITT. It doesn't bother me. I have a great deal of confidence in the Department of Justice doing their review duty. I also have a lot of confidence in the fact that we've designed what we

think is a constitutional and a very careful system that protects and preserves employee rights; it doesn't attempt to alter any expression of employee rights.

If an employee believes that it has departed in a significant fashion, he'll have his entire panoply of rights to challenge that program.

But I do have confidence in the Department of Justice review. And I have confidence in the agency heads.

Mr. SIKORSKI. And what have they given you so far?

Mr. HEWITT. They don't. Mr. Chairman, they do not give us anything.

Mr. SIKORSKI. What have they produced so far?

Mr. HEWITT. I don't know. I can't speak to what the agencies have thus far put into action.

The HHS guidelines came down only in February. I think it speaks to the caution and the care with which the programs are being implemented that no one has rushed out and established a drug testing program yet.

In fact, as the HHS representative will tell you, the linchpin now is certification of laboratories to make sure that testing is completely accurate.

And until such time as laboratories are certified and agencies can make use of them, I don't think you will see a drug testing program.

Mr. SIKORSKI. What's the Office of Personnel Management's mission?

Mr. HEWITT. We have a number of different missions. Our first and primary mission on the Executive Order was to outline the parameters on drug testing.

Mr. SIKORSKI. No. No. Not on this. Generally, what's your mission? Why are you in existence?

Mr. HEWITT. Oversight of Federal work force policies.

Mr. SIKORSKI. You oversee the policies affecting the Federal work force.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. Including their privacy rights?

Mr. HEWITT. We do take care to watch that record systems are put into place and adequately maintained. That's one.

Mr. SIKORSKI. Make sure that they are functioning efficiently and safely?

Mr. HEWITT. Yes.

Mr. SIKORSKI. And you were called upon to issue these guidelines because of that.

Mr. HEWITT. Because of our experience with the Federal work force, yes.

Mr. SIKORSKI. I would expect, therefore, and the President, the White House is going to expect that you will be a source of information on this.

But you seem to push away any responsibility for data gathering to assess compliance.

Mr. HEWITT. I hope I have not created that impression.

We will be gathering data by Congressional mandate for reports on the EAP's.

Mr. SIKORSKI. I understand. The first report is due April 27th.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. And you, in your statement, give a preliminary kind of summary report of that. And thus far nothing has happened.

Mr. HEWITT. Well, the EAP's are up and running. And they are very, very good. But the baseline data that we need to gauge for future efforts on the success of the EAP's will be provided by the end-of-April report.

Mr. SIKORSKI. We don't have any plans yet.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. Therefore, no statement of policy, no statement with regard to supervisory training to assist in identifying and addressing illegal drug use by agency employees, no provision for self-referral, no provision for identifying illegal drug users.

Agencies shall ensure, going further, that the drug testing programs in existence as of last mid-September are brought into conformance.

Have those agencies that have drug programs—CIA; FBI; DEA; the DOT, FAA component; and Customs at Treasury—come into compliance with the Executive Order and these guidelines?

Mr. HEWITT. It is impossible to come into compliance until such time as the laboratories have been certified by HHS, at which point all the pieces of the puzzle——

Mr. SIKORSKI. Wait a minute.

I understand that part. But how about with OPM guidelines outside of the testing—the actual testing labs?

Mr. HEWITT. I'm confident that at the time that the program, is in place with all of its components is in place, that they will conform.

Mr. SIKORSKI. I respect your confidence. But as of this date none of these agencies have a plan with a mission or statement or statement of policy, with provision for supervisory training, self-referral provision, self-identification provision.

Mr. HEWITT. Of the eighty major agencies, I don't know which ones are closer or further away from implementation yet.

Mr. SIKORSKI. I'm talking about the plans that were in existence at the time of the Executive Order.

Mr. HEWITT. I don't know whether or not they have had to make any changes.

Mr. SIKORSKI. OPM hasn't reviewed the programs of the Customs or FAA?

Mr. HEWITT. We don't have that responsibility to review.

Mr. SIKORSKI. And you don't know anything about those?

Mr. HEWITT. We know that the Customs program has been litigated in New Orleans. We know that the FAA's program was litigated just recently in Anchorage, Alaska, and that it was the decision of the judge in Anchorage not to issue a TRO to employees being tested under the FAA's plan because it was constitutional and sound.

They have many similarities with OPM's guidelines. As to whether or not they will have to take any conforming action, I just can't tell because the last building block is not yet in place.

Mr. SIKORSKI. How about your drug testing program at OPM?

Mr. HEWITT. It is not yet ready to be implemented because we do not have an HHS certified laboratory.

The Director and her major advisors are working on it and giving it the kind of care, and attention, and specificity, and caution that reflects a commonsense approach to drug testing.

We think it will be a very defensible, easy to understand system when it is in fact ready to be unveiled.

Mr. SIKORSKI. Which will be when?

Mr. HEWITT. I can't say with certainty. We are taking our time.

Mr. SIKORSKI. How about uncertainty? Give me a month.

Mr. HEWITT. I can't do that because I don't know.

Mr. SIKORSKI. Give me a quarter year.

Mr. HEWITT. I think it will be done by the middle of summer.

Mr. SIKORSKI. OK. Thank you.

Looking at point three, agency drug testing programs. How many agencies have established programs to test for the use of illegal drugs?

Mr. HEWITT. We go back to the FAA.

Mr. SIKORSKI. Yes.

Mr. HEWITT. Department of the Army.

Mr. SIKORSKI. Those.

Mr. HEWITT. Yes.

Mr. SIKORSKI. And no more? Has the term employee in a sensitive position as designed here, how many? How many are we talking about?

Mr. HEWITT. I believe Congressman Hoyer accurately stated the figure that the outside figure of the broadest pool would be about 1.1 million.

It is our belief that nowhere near that number of employees will eventually end up in testing designated positions.

Mr. SIKORSKI. Why are you nowhere near that number? I mean there aren't any plans. You know the universe. And you assume for practical needs that it's going to be smaller.

Mr. HEWITT. No, not for practical needs but because of the commonsense approach.

Mr. SIKORSKI. Common sense is related to practical needs it seems to me.

Mr. HEWITT. Well, it also relates to agency mission and the sensitivity of the position, judgements that are inherently within the agency head's discretion.

Mr. SIKORSKI. And the money available to test?

Mr. HEWITT. Well, I do not believe that the money available to test will drive the program. I believe the program will drive the necessary budget expenditure.

Mr. SIKORSKI. Well, we'll see about that.

But an employee in a position that an agency head designates special sensitive, critical sensitive, noncritical sensitive, under Chapter 731, or an employee in a position that an agency head designates as sensitive in Executive Order 10450, employee has been granted access to classified information or may be granted access to classified information, law enforcement officers, other positions that the agency head determines involve law enforcement, national security, protection of life and property, public health or safety, all drivers, all food handlers could arguably come, or other functions

requiring a high degree of trust and confidence are in there, and individuals serving under Presidential appointment.

Now, that's the universe. And it's about 1.5 million?

Mr. HEWITT. 1.1 million, actually.

Mr. SIKORSKI. I'm sorry; 1.1 million.

And individuals serving under Presidential appointments, that's all the cabinet officers?

Mr. HEWITT. That's correct.

Mr. SIKORSKI. And everyone else the President appoints?

Mr. HEWITT. That's correct.

Mr. SIKORSKI. Now, to be a Presidential appointment, does that need to be triggered by Senate approval?

Mr. HEWITT. Yes. It's PAS.

Mr. SIKORSKI. So, everyone that the President appoints that is approved by the Senate would be under this testing?

Mr. HEWITT. Under a sensitive position. That means he's within in the pool. That does not necessarily mean that he will be tested.

Mr. SIKORSKI. Are these people going to be tested when they apply?

Mr. HEWITT. People applying for positions that have been testing-designated positions, the second cut—what you have been describing is the first cut, the universe.

Mr. SIKORSKI. I know. I'm jumping.

Mr. HEWITT. The second cut, testing-designated positions, after the agencies have put their programs into place, applicants for those positions can and may be tested. And, in fact, an agency may make a determination to test all applications for pool positions.

It is up to the head of the agency to determine whether or not that makes sense.

Mr. SIKORSKI. I got the impression, reading the Attorney General's statements, the President's statements, your guidelines, and the HHS regulations, that there was strong encouragement to drug test every applicant into the sensitive positions.

Mr. HEWITT. There is encouragement for agency heads to look and see if that is necessary.

Mr. SIKORSKI. I think I had a different reading. There was strong encouragement to test every applicant. And there was encouragement to look at who should be tested on a random basis already in Federal service.

Mr. HEWITT. There's encouragement to the agency head to put together his program as he sees it best serves the agency mission.

It may, in fact, serve the agency mission to test every applicant.

Mr. SIKORSKI. Do you know if any Presidential appointment applicants—people who are pending in front of the Senate now—that haven't been approved have been drug tested?

Mr. HEWITT. I don't believe that any of those would have been drug tested.

There is as yet no drug testing program under the Executive Order that's been implemented.

Mr. SIKORSKI. The White House is responsible for doing its own drug program?

Mr. HEWITT. Yes, sir.

Mr. SIKORSKI. Okay. Who would? Who is responsible there?

Mr. HEWITT. I don't know offhand.

Mr. SIKORSKI. Well, who is the agency head?

Mr. HEWITT. Well, the President is. But whether or not he will designate that to his Counsel I don't know.

Mr. SIKORSKI. So, you don't know what agency head at the White House is in charge of drafting this plan and initiating the drug testing program.

Mr. HEWITT. No, I don't.

Mr. SIKORSKI. And we're seven months from the Executive Order stating a national crisis.

Mr. HEWITT. Well, I think that the crisis is aptly stated. I think it is a crisis. But balanced against that crisis is a very careful approach to this problem, Mr. Chairman, an approach that I think reflects your concerns.

We're trying to infuse it with commonsense. We're trying to infuse it with caution and concern for employee rights.

Mr. SIKORSKI. And I think that's meritorious, and I think that's a good idea.

I'm just trying to measure the crisis rhetoric that we heard last summer with the performance that's come down. And it's always important to look at things close to home. And I'm asking what the White House had done on drug testing programs.

Mr. HEWITT. I don't believe that the rhetoric with which the initiatives were launched is diminished by the fact that we are now taking a good deal of time to make sure the program is carefully crafted.

We have moved quickly. I have never seen an agency move as quickly as Director Horner had OPM move when it came time to draft these guidelines. We did it in two months. For as comprehensive a program as this, that was a maximum effort, enlisting the aid of people throughout the building and the experts in their field.

So, it is the maximum speed balanced against the need to make sure that what we are doing is carefully crafted and constitutional.

Mr. SIKORSKI. Okay. I understand that. But we're talking about the first step, and that's designating—looking at the universe of sensitive positions, and then making a determination on as to who will be tested in that pool.

And I haven't seen any movement in some of these agencies. In your agency, you're talking about this summer, which would be an acceptable time frame.

And I am asking about the White House.

Mr. HEWITT. I believe our agency is illustrative of this. I can't speak to what the other agencies are doing, but I can talk about OPM's approach to it.

Mr. SIKORSKI. Your agency is a lot easier than most of the other agencies in terms of sensitive positions wouldn't it?

Mr. HEWITT. I can't really compare. I don't know, sir.

Mr. SIKORSKI. They're all unique. You are dealing with privacy, and confidential personnel information.

Mr. HEWITT. But what I want to stress is that we have been—and I think this is the reason you do not hear much from the agencies yet—very careful not to alarm anyone needlessly, to drop position descriptions into the hopper and to talk about, well, maybe we should test these positions or test these other positions, because, again, concern for employees' rights and morale dictates that we be

careful and that we keep it as confidential as possible to avoid unnecessary alarm.

The guidelines provide for a sixty-day notice of a testing program and for a thirty-day notice, a specific notice, to the employees who will be tested.

We don't see that there's any reason to alarm people before the arrival of those individual events as to the scope of testing or who may or may not be tested.

We are doing it carefully.

Mr. SIKORSKI. However, when we shift over to the new applications, there's a different set of concerns there. None of these apply.

Mr. HEWITT. Well, again, that will be whether or not applicants will be tested. It will be part of this broad-scale determination.

It doesn't make much sense to design a program backwards forwards or forwards backwards but comprehensively.

And we cannot test them until labs are certified. So, again, there is really no need to rush until we have got all the components in place.

I'm glad the agencies are taking their time to be as careful as possible, forgoing the publicity of who's going to be first, so that they may be doing it correctly.

Mr. SIKORSKI. In the determinations it said the head of the agency has discretion and that determinations should be based on the nature of the mission, employee duties, efficient use of agency resources—and that includes the cost of these tests—the danger that could result from the failure of an employee to discharge his or her duties adequately, and the rest. And this includes everyone from those who have access to the most classified national security data to public health and safety to privacy, confidential, confidentiality of public data on people's lives.

And we have no designations thus far, no determinations thus far.

Mr. HEWITT. Again, Mr. Chairman, the easy ones are probably already made in the minds of the agency heads. I mean it will be obvious that some people must be included in any commonsense approach to testing.

It is the scope of the program that I am sure is providing people with cause to pause and carefully examine how broad the scope is going to be.

Mr. SIKORSKI. Well, let's go. Common sense. How about people who work at the Department of Energy's nuclear production facilities?

Most people in this country don't know that our nuclear warheads are produced by the Department of Energy and not by the Department of Defense. And up until they are placed in an actual missile, or warhead, or a weapons system they are under the jurisdiction of the Department of Energy.

Would these people be a natural assumption to be tested?

Mr. HEWITT. Well, you have identified why it is taking agency heads time to carefully craft their programs, because they're going to have to look at their agency.

Mr. SIKORSKI. No. Mr. Hewitt, you just told me that the easy determinations have already been made in people's minds. I'm asking is that one of those easy determinations.

Mr. HEWITT. Well, that wouldn't be for me to say.

Mr. SIKORSKI. But it is for you to say that there have been easy determinations made.

Mr. HEWITT. I believe what I tried to point out to you, Mr. Chairman, is that some agency heads may very well know who they have to test that will make sense, but that they are taking their time in expanding the program.

Whether or not the Secretary of Energy believes that warhead manufacturing employees ought to be in the program is for the Secretary of Energy to say, not for me.

We do call attention in our guidelines, the next paragraph down, to the need for taking particular care to examine employees who work with explosive, toxic, radioactive, or other dangerous materials.

Mr. SIKORSKI. That's why I came up with the example.

When selecting testing-designated positions, agencies should ensure that the selection process does not result in arbitrary, capricious, or discriminatory selections. What are those?

Mr. HEWITT. I think the last line of that paragraph is illustrative of that:

"Agencies are absolutely prohibited from selecting positions for drug testing on the basis of a desire to test particular individual employees."

One of our primary concerns—that's why it is so emphatically stated there—is that this drug testing program is directed at positions and not at people. We believe that directing it at people would be counterproductive.

Mr. SIKORSKI. So that you don't get a whistle-blower or a troublemaker, or someone whose hair the agency head doesn't like.

Mr. HEWITT. And if an employee has, in fact, been the subject of a discriminatory selection, this will serve as his basis for pursuing grievance procedures.

Mr. SIKORSKI. Okay.

Jumping down to B there, under 3, voluntary testing. How many agency heads have established programs for voluntary employee drug testing?

Mr. HEWITT. That is a component of the comprehensive program. As I've said, no comprehensive program has been implemented yet, so no voluntary testing has yet been implemented.

Mr. SIKORSKI. Well, you don't have to wait for that.

Mr. HEWITT. Well, we want to ensure that those people who volunteer will be subject to the same laboratory protections, at a minimum, as people who are randomly selected.

So, it will not make sense to have a voluntary program until such time that we have the labs that are certified to be completely accurate.

The damage done due to a false positive by a volunteer employee would be just as devastating as one to someone selected through the random procedure.

Mr. SIKORSKI. In the CIA, and the FBI, and the DEA, and the DOT, FAA, and the Treasury, Customs are all aware with regard to the sanctity of their testing program?

Mr. HEWITT. I can't speak to the agency programs, Mr. Chairman. I don't know. But the one that we're designing to replace those is very sensitive to those concerns.

Mr. SIKORSKI. Those programs are okay to go along. And you don't have cause to question their testing procedures?

Mr. HEWITT. No. I don't have any individual complaints nor do I know very much about them other than that they exist. The Army program started in February of 1986. It tested sixty-two hundred people. There have been no false positives under that. What they turn up is, I think, very significant. We find fifteen aviation mechanics with a drug problem. We find a hand grenade assembler with a drug problem through their random testing.

I think what that shows is that you can achieve the kind of goal that we're looking for, a drug-free workplace.

Mr. SIKORSKI. We're going to have a woman in a few minutes who was in the Army and had a false positive. You said that there weren't any false positives in the Army.

Mr. HEWITT. I think that we should pay very close attention to what we mean by a false positive.

Mr. SIKORSKI. Oh.

Mr. HEWITT. We do not doubt that a first test of a urine sample may occasionally be misleading. But the second test—and I think the HHS representative can speak to this—the chromatography and the spectrometry assure one hundred percent accuracy.

She may have, in fact, been alerted wrongly. And I want to point out that our guidelines provide that no one will be informed of the results, no supervisor, no medical review officer, no one in the agency, of the first test of the sample. The system kicks in only if it's been confirmed by the much more deliberate and much more exhaustive test that attends the second test.

Mr. SIKORSKI. Okay.

You don't have any voluntary testing, based on the fact that there have been no certified labs, even though there are labs up and running and program up and running that were pre-September 15th of last year.

Mr. HEWITT. I do not know if those agency programs that are already in place provide for voluntary testing.

Mr. SIKORSKI. Okay.

But the point is you don't have voluntary testing because you don't have certified labs. My point is there are certified labs that are operating for these other testing programs.

Mr. HEWITT. They're not certified under the very rigorous HHS standards that will call for internal controls, quality testing, quality control.

Mr. SIKORSKI. But you're not aware of those already existing programs coming into conformance with your guidelines and HHS regulations, which are very tight, and very important, and very carefully drawn, and protective of rights?

Mr. HEWITT. They can't conform until HHS's standards are finished. They're not finished.

Mr. SIKORSKI. The certification process.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. I have questions with regard to the reasonable suspicion testing, but again we haven't reached that point because there are no plans and there are no programs, right?

Mr. HEWITT. Well, the reasonable suspicion standard, as articulated in the guidelines, is drawn from a series of Court of Appeals decisions dating back to 1972, governing administrative searches.

We believe that they are quite defensible and very carefully crafted and drawn.

Mr. SIKORSKI. And we expect that each plan will pick up those?

Mr. HEWITT. Yes, sir.

Mr. SIKORSKI. But we're not sure whether they are going to because that's not your role?

Mr. HEWITT. We are sure that they are going to because we have confidence in the agency heads to conform to the guidance.

Mr. SIKORSKI. But you're not going to be sure of it, other than a belief that these people are very talented, and very efficient, and very dedicated, and the President has ordered them to do it.

Mr. HEWITT. I'm sure that agency heads will obey the President's order.

Mr. SIKORSKI. You are sure?

Mr. HEWITT. Yes.

Mr. SIKORSKI. But you can't point to any proof?

Mr. HEWITT. I will not have proof, no.

Mr. SIKORSKI. You will not have proof, just your opinion.

Mr. HEWITT. An opinion as an Administration official that we all do what the President tells us to do.

Mr. SIKORSKI. And you're in the same situation.

Mr. HEWITT. That's correct. And I know how we are implementing it.

Mr. SIKORSKI. Okay. "Specific condition testing." Again, we are not there. "Follow-up testing." We are not there. "Applicant testing." I touched on this briefly before. We're not there yet either because of no plans, no plans have been done. We're still in the process. We're doing this carefully. And no labs have been certified.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. How about dollar signs attached to this?

Mr. HEWITT. We have estimates on the average cost per individual tested. Those range from twenty to twenty-five dollars per test. And they include not only all those people tested in the first instance, but those also tested for the second time to confirm an initial showing of positive.

So, between twenty and twenty-five dollars per test is our initial estimate.

Mr. SIKORSKI. And you don't have an initial estimate in terms of the universe? Twenty or twenty-five dollars times what?

Mr. HEWITT. No, I don't, because the universe is dependent upon the application of the agency programs.

Mr. SIKORSKI. But there's been a supplemental request made?

Mr. HEWITT. I don't know whether or not there has been, Mr. Chairman.

Mr. SIKORSKI. Well, I've seen numbers in terms of fifty-six million dollars in the cost for the first year of the program.

Mr. HEWITT. Right.

Mr. SIKORSKI. How did we get that number?

Mr. HEWITT. I really don't know. I'd be glad to submit that for the record if that number is an OPM generated number, an explanation of it.

That is not an OPM number. We don't have a way of predicting it.

Mr. SIKORSKI. I'm told it's am OMB number.

Mr. HEWITT. That's what my deputy just told me.

Mr. SIKORSKI. I could read lips.

This money that's going to pay for the testing and the implementation of the program doesn't come out of a special pot that's set up in your office or Ed Meese's office or some other place?

Mr. HEWITT. No. It's to come out of salaries and expenses in the agency.

Mr. SIKORSKI. In the agency.

Mr. HEWITT. The S and E line. That's correct.

Mr. SIKORSKI. Those numbers are already in the President's proposed budget?

Mr. HEWITT. That's correct.

Mr. SIKORSKI. And those numbers took in to consideration this drug testing program?

Mr. HEWITT. I couldn't say for certain, if it's an OMB generated number, I assume that the Office of Management and Budget took that into consideration when they were preparing the President's budget.

Mr. SIKORSKI. Did you? Do you have in the OPM budget a set aside amount of money for the implementation of your new drug program for fiscal year 1988?

Mr. HEWITT. We do not have a line item dedicated to the implementation.

Mr. SIKORSKI. All right.

Mr. HEWITT. I do not know what it is. We have an amount for our employee assistance plan. We have an idea of how much that's going to cost.

Mr. SIKORSKI. OK.

Mr. HEWITT. But it's awfully hard to set aside money or to find the money without knowing how broad the testing program is going to be.

Mr. SIKORSKI. Well, I am trying to look. And I understand that. And you don't know what the certified labs are going to cost either when it comes down to it, if they're going to be as tight and as carefully restricted.

But you're coming up to mid-summer, maybe late summer, with your plan. And it's going to be in operation in fiscal year 1988.

What are you going to have to pay for that in fiscal year 1988?

Mr. HEWITT. We think that we will be able to find the money within the agency to take care of it, because it's part of the mission of the agency if we're testing someone. It means it's part of the mission. We'll be able to find the money to afford that portion of the mission.

Mr. SIKORSKI. Well, you don't do anything that's not part of the mission.

Mr. HEWITT. I'm tieing it up as drug testing relates to the agency.

Mr. SIKORSKI. Yes.

Mr. HEWITT. It's a predicate that it has to be under the Executive order, that it's a part of the mission of the agency to make sure that you have a drug-free work force in these positions.

Mr. SIKORSKI. Everything you do is part of your mission.

Mr. HEWITT. That's right.

Mr. SIKORSKI. Everything every agency does is part of the mission.

Mr. HEWITT. That's right.

Mr. SIKORSKI. But I'm told this is not a loaves and fishes kind of situation with regards to missions.

EPA tells us in the Health and Environment Subcommittee all the time that they have a tremendous range of missions, responsibilities under their mission, and they don't have the resources.

And at the Department of Justice, everyone has made the same statement with regards to something.

You're telling me you're going to take it out of the pot of money there just because it's part of the mission.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. And I'm saying everything you do is part of the mission.

Either we're giving you too much money now or you're going to take it from something that is already being done.

Mr. HEWITT. Well, every time that Congress addresses a new addition to our mission, for instance, our new reporting requirements on the EAP's, we have to juggle our resources. We do it all the time.

Mr. SIKORSKI. Well, this is an Executive Order here.

Mr. HEWITT. I agree.

Mr. SIKORSKI. Okay.

Mr. HEWITT. But the point is the same, that the mission changes, and you have to address those things which are a priority.

EAP's have now become a priority.

In our six hundred installation visits over the course of the next fiscal year, we will be paying particular attention to how the EAP's are implementing the President's program. And we feel confident that, although we have to juggle resources, that we will be able to fulfill that mission and we will be able to implement our drug testing program with what has been given to us.

Mr. SIKORSKI. Well, it will be interesting to see what is up and running next year at this time with that kind of preparation and plan for funding. "Sixty-day notice" you already mentioned.

Is there any conflict with the Executive Order under 4(a)(3)? Any agency may take action as described in part 3(c) of this letter without reference to the sixty-day notice requirement.

I guess I'll ask you that question for the record.

In reading the Executive Order, and this, I came up with an apparent conflict.

Mr. HEWITT. I'll respond to that or the record.

[The information follows:]

There is no conflict between section 4a(3) of the OPM guidelines and the Executive Order with regard to the provision of a sixty day notice. Section 4(a) of the Executive Order states: "[a]gencies may take action under section 3(c) of this Order without reference to the 60-day notice period." Section 3(c) of the Order authorizes agencies to test employees for illegal drug use when there is a reasonable suspicion

of illegal drug use, in an examination regarding an accident or unsafe practice, or as part of a follow-up to counseling or rehabilitation. Section 4a(3) of the OPM guidelines simply restates those provisions of the Executive Order that allow agencies to test for illegal drug use in those limited circumstances without reference to the sixty day notice requirement.

Mr. SIKORSKI. Before I ask you to answer a few questions on your statement, I'll turn over to Congresswoman Morella, and then return on the EAP's.

In the preparation of your guidelines you have technical policy and legal advisors. Did you have drug people, science people, medical people?

Mr. HEWITT. For OPM guidelines, no.

We do have people who are in charge of employee systems and oversight. And as part of their duties they have supervisory oversight roles on the EAP's. So, we are very conversant with the EAP's.

Mr. SIKORSKI. I'm going to defer questions on education and the EAP's until after Congresswoman Morella. She may might want to get into that as well.

Thank you.

Mrs. MORELLA. Thank you, Mr. Chairman.

You really got put through the paces by the Chairman. I think he asked most of the questions that all of us may have had, but, you know, I still have some great concerns. Mr. Hewitt, as General Counsel, you really want to make sure that litigation is not going to be too imminent.

And I can see from your point of view the real difficulty of this idea of letting the agency head determine sensitive positions. I know there are some guidelines here, but almost anybody can fall into those guidelines. And, then, of course, the admission over and over again that it could be more than one half of the Federal work force, the 1.1 million.

Can't you see litigation resulting? Can't you see enormous problems with administration?

I guess I see this as an administrative nightmare. You're going to have to give a sixty-day notice. The agency is going to have to determine what is sensitive.

It is going to be absolutely objective. But how objective can you be when you have an agency head saying these are the sensitive positions; someone might have access to material that is confidential.

So, then you've got to give notice. Then you have got to go through the random testing, which might be through Social Security number, it might be through letter of the alphabet, it might be through, I guess, when they started working, who knows, any number of options for who is going to be picked for the random one.

Then you have got to go through the procedure of the monitoring.

Now, I am thinking not only the mass administrative problem, but also the personnel that you're going to need. I mean who is going to be the one assigned to do the monitoring? Is that going to be the agency head that's going to have to keep doing that?

You're talking about the possibility, maybe not the probability, but the possibility of 1.1 million people.

I just think that I'm surprised it's not more streamlined in terms of guidelines for starting off with a brand new program that has some validity in some instances, but is so broad that, I think you lose the credibility when you come out with something—I'm not directing this just to you, but it's in general from the reading that I've done and the discussions—to come out with something like this plan.

People begin to question whether it can be done at all, even with people in high security places or with probable cause.

You then have the possible litigation for invasion of privacy. And then the cost, twenty-five dollars or twenty per test. And I know we're going to hear about the validity of tests, which has always been a concern of mine, particularly in light of the television programs that we saw that demonstrated that substances that were sent in the urine to laboratories were pointed out to be inaccurate—I think a hundred percent inaccurate, others eighty percent inaccurate.

In light of that, I know we'll hear about the accuracy, and I think that's important.

To be accurate, again, requires extra money. And when you put all this together this is going to be a monumental amount of money. And you say we're going to find a way to pay for it. We've got the specter of Gramm-Rudman-Hollings. And it's just not making that much sense.

And, so, I question the administration, the need for a more specific definition for testing that would really hone in on probable cause and high security positions.

So, I see it as a real difficulty. Do you want to comment?

Mr. HEWITT. Congresswoman, you have articulated a number of concerns that were very much on Director Horner's mind when she set about this task, and on the President's mind.

It would have perhaps been tempting to do the slapdash drug testing program that would have been small and inexpensive. However, when we decided to design a program, we did it. We turned it into the Cadillac of programs when it came to employee protection and employee rights, because we felt that we had to do that to preserve the morale of Federal employees and their expectation of good governance. We did that.

It is more expensive than a stripped down version. But, the expense comes from the protections that we've built into the system, protections we take very seriously, that Director Horner takes very seriously.

It is going to take some time to make it administratively feasible.

Again, the question is, it would be nice to come, six months after the President's Executive Order, and say it's up and running. We could only have done that at the expense of the caution that we are infusing into this system to take care of employee rights.

It is a difficult position not to be able to answer with certainty now what we will be able to answer with certainty in six months.

As to the expense, it is an expensive program. The problem, however, is an enormous one, as everyone who has testified this morning or made statements from the committee has recognized.

I don't know what kind of value we can put on finding the public health and safety worker who is endangering the public that we find through drug testing and get in to rehabilitation. I don't know what we're saving in that respect.

But the President has made the determination, and the Executive Branch is carrying it out, that it is worth the cost. It is a high enough priority of our mission to find and rehabilitate these people and to protect the public health and safety.

It's a tough calculation. But it's one that we had to make in light of the enormity of the problem, and one that we're implementing slowly to protect the employees and the public.

Mrs. MORELLA. Well, what is our role in it? We can talk about the budgetary constraints, withholding, strings attached. We can talk about a specific piece of legislation. Beyond that, as it stands right now, what is the responsibility and the authority of Congress in the procedures and regulations?

Mr. HEWITT. Well, I think that this committee is exercising a very appropriate and a very welcome role from the Executive Branch's perspective.

We enjoy an extended conversation, one that brings out the details, that allows us to talk about the design and the care that went into this system.

Oversight I think is appropriate. We welcome it.

The Director, as I mentioned, is sorry she can't be here, but she's already conversed with two Appropriations Committees on this subject. We respond to Congressional inquiries.

It keeps the Executive Branch honest, that you know. And for your constituents and just for the public interest at large you're doing your job to make sure that what we're about is a well-designed, carefully crafted system. I think that's the appropriate role.

We're designing a system, and it might be the best argument that Congress keep abreast of the system and see how it turns out. What are we working with?

It's not going to be 1.1 million people. It's going to be a commonsense approach.

Then to take a look at the final product. And I think you will be surprised, and I think many of our critics will be converted to what has been true from the outset, that we're designing a careful system, one that will be effective, protect the public interest, but at no injury to employee rights or morale.

Mrs. MORELLA. As a result of this hearing, if this subcommittee submits recommendations to you for what we deem to be critical improvements, what will happen to them?

Mr. HEWITT. We would take those, study them, make recommendations.

But on some of the letters that we have received asking why we don't stop the program, the Executive Branch is subject to the President's direction. It's a matter of law. He's issued his Executive Order. We have to implement it.

We can tinker with our guidance. We can look at it. But we think we have a good system.

And I would urge you to think about laws or supplemental language or recommendations, and wait until you see what we've

come up with. Because I think it may turn out to be solutions that are in search of a problem.

I think you will be impressed with how this operates.

Mrs. MORELLA. In the meantime, I guess what I'm saying is that you would listen?

Mr. HEWITT. Oh, I always listen. Yes.

Mrs. MORELLA. You would act on the basis of listening if it seems valid?

Mr. HEWITT. Yes.

Mrs. MORELLA. Okay.

Because we can air all of this, and some strong feelings, and have some illumination but if we don't do something after that it's going to be futile.

So, I take you at your word that we will have some impact on procedures.

I also just want to compliment you on the fact that I read here that you are doing some training with regard to helping the agency heads identify people who have substance abuses and alcohol abusers. That kind of training program is always good.

Mr. HEWITT. One of our major efforts in training is to develop a comprehensive module to train supervisors on how to detect and refer employees to the help that they need.

Mrs. MORELLA. We talk about the Executive Branch, the Legislative Branch. I think you're bringing the Judicial Branch into some of these regulations.

Thank you.

Thank you, Mr. Chairman.

Mr. SIKORSKI. Thank you very much.

We're going to get into the privacy issues, the tinkling and the toilet issues, with HHS. I take it from their regulations that's going to be their concern.

But on page seven of your guidelines you do talk about privacy in drug testing in the first paragraph there.

You say, if an employee or applicant to be tested requests privacy, the sample shall be provided in the restroom stall or similar enclosure so that an employee is not being viewed while providing the sample.

Mr. HEWITT. The HHS guidelines supersede that.

Mr. SIKORSKI. Okay.

So, it's not a matter of request?

Mr. HEWITT. No, it is not.

Mr. SIKORSKI. Okay.

Then there are controls in the test areas, bags, luggage, coats, station a testing official in the restroom, examine the sample, and the rest.

We talked earlier about who's covered by this.

Are military employees covered?

Mr. HEWITT. Civilian employees would be.

Mr. SIKORSKI. Only civilian employees are covered.

Mr. HEWITT. Correct.

Mr. SIKORSKI. How about contract employees?

Mr. HEWITT. No, they are not.

Mr. SIKORSKI. Let me raise a question. I sit on the Oversight and Investigation Subcommittee of Energy and Commerce. And the

first few months I was here we had a closed door meeting. And we've had a couple since. And there were a couple before with regards to the security at the Department of Energy's sites throughout this country where they produce our hydrogen nuclear warheads, and all phases of that.

It affects Star Wars. It affects our entire nuclear stockpile and our nuclear weaponry.

Those programs are quite sensitive. They're quite personal because if any of the reactors or any of the other mechanics at these plants went awry there could be serious public health effects for wide, wide distances.

They are subject to incredible potential opportunity for terrorists, who either want to steal or to hold them hostage or do both.

If one site, for example, is shut down, our entire warhead production and a weapon system or several weapons systems could be shut down if just one facility were affected by either an accident or an incident.

Much of this is public. A lot of this is still classified.

I raise that because many of those facilities have contract employees in them. All of them, our entire nuclear production component for the security of this country, are secured by contract security operations, some of which have been subject to incredible lapses of security, and some stupidity.

We had one facility where the officers, security officers, couldn't fire their guns except upon approval by the head office, the corporate office. And the problems get worse.

I raised that because this is clearly one of those areas where everyone will agree that you can't have drugs, not only for national security purposes, but for health and safety purposes, not only for the people that work there, but the people in the surrounding communities.

Now, they aren't covered by this great effort.

Mr. HEWITT. Well, I think that goes back to one of the original reasons for the President's program.

In this area, the Federal Government has a leadership role.

Mr. SIKORSKI. That's bull. Wait a minute.

They're not covered.

Mr. HEWITT. But I believe, despite your description of it, there is merit to the idea that if the Government shows how you do——

Mr. SIKORSKI. They're paid by taxpayer money.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. These people are employees. They are contract employees of the Federal Government.

They're doing some of the most sensitive work.

Mr. HEWITT. That's right.

Mr. SIKORSKI. And you believe that somehow this is going to trickle down to them, that somehow, without direct action of this Government, they're going to pick up these.

We're going to have a secretary in some dusty file area in the bowels of some bureaucracy tested perhaps, and yet the guards at the most sensitive nuclear weapons production facility are not.

Mr. HEWITT. I think the juxtaposition of the secretary and the guard diverts us from the real issue.

And I agree with you that contractor testing is a serious issue.

Mr. SIKORSKI. That situation is a real situation.

It might not be a nice thing to face, but that is a real situation. I'm not overstating the case.

Mr. HEWITT. Someone who is maybe in a dusty environment or something may, in fact, be a sensitive employee with access to the very same technical guidance that the security guard has.

But getting back to your original statement, I agree with you that contractor testing is a very serious issue.

But, again, the question of what we should do about them is under review by the Administration. Hopefully, the leadership that we've established in this area will prompt private firms and, at the same time, if the need remains, if we review our system, we have not ruled out doing that. We just have not yet made a decision.

Mr. SIKORSKI. This Administration wants to increase contracting out.

Earlier, when I raised a specter of an older work force, that is, by and large, beyond the prime age area for abuse of the drugs that are going to be tested—not alcohol, but the drugs that are going to be tested under this program—you said, we're going to have a younger and younger work force as we look to the future.

Is a younger work force contracting out?

Who's in charge of looking at the contracting out in this Administration for drug testing?

Mr. HEWITT. That has been discussed within the Administration. And it is a decision that it is up to the agencies, to determine the appropriateness of extending their program.

Mr. SIKORSKI. But doesn't OPM have a position?

Mr. HEWITT. The contractor on employees are not OPM employees.

Mr. SIKORSKI. You're tasked with the fair, and equitable, and reasonable supervision and treatment of Federal employees.

Mr. HEWITT. That's correct.

Mr. SIKORSKI. How is it fair that many of them, who are in questionable positions of sensitivity, or say not in a national security position at all, not in classified information position at all, could be in a public health and safety situation, who arguably may be tested, or are going to be tested under this massive crusade against drugs. However, those in the most sensitive area, because they are functions performed by contracted out services, are not going to be tested?

Mr. HEWITT. The efficacy of that equation, I don't think it is really there. What we are trying to design is a position sensitivity program, one that will focus on the position being tested, not relative across the Government, but upon its impact on the agency mission and the sensitivity of that.

Mr. SIKORSKI. And Federal employees are going to get the threat of removal or some other discipline because of the drug testing program, but these other people aren't even going to be tested, and the discipline question doesn't arise. And you don't think there's a fairness issue there.

Mr. HEWITT. It is not an issue within the scope of OPM's responsibility for these guidelines.

Mr. SIKORSKI. Isn't your mission to make sure that we have a happy, and healthy, and functioning, and efficient work force? Or

maybe I'm too optimistic about your advocacy for the Federal work force.

Mr. HEWITT. I don't think you overstated it. That is our mission.

Mr. SIKORSKI. Okay.

Isn't that subject of some contest if your people, whatever the numbers, are subject to random drug testing, whereas people that are performing some of the most sensitive and dangerous jobs in this country, for the Federal Government, for the taxpayers of this country, aren't required to go through the same hoops?

Mr. HEWITT. I've got to resist that analogy because it places the Federal employee in a very dangerous situation, because then it may stand to reason that we ought to have as intrusive a system or as broad a system as any private employer does. I don't know that these people are not. In the agency, in the situation, facilities you're talking about, I don't know that they are not now tested, that all of them are now tested.

Mr. SIKORSKI. It doesn't revert to that. You have used the argument here. You have treated the argument the Administration has, that Ed Meese has, and everyone else has that where people in extremely sensitive positions, doing extremely important work for the taxpayers, should stand as a model and for the purpose of Federal employees' protection, and the protection of the health, safety, and national security of the country, of the public, they will be randomly drug tested.

They will be, many of them, tested as they apply, before they are hired, then randomly drug tested after that.

Yet, those who, without argument, do the some of the most sensitive national security and health and safety area functions for the taxpayers of the country are left scot-free.

And you don't see any equity issue in there. You don't see any morale issue in there. You don't see any reversion to the original argument that we've got to do this drug testing. Sure, it's nice to have a drug free society. But we've got to do it to protect the public health, safety, and national security of this country.

That's your argument. And that's an argument that I think has almost unanimous support within Congress and within the general public.

I'm simply pointing out you don't cover the field.

There's a laundry list of violations and drug abuse—and it's public record—at these facilities. And yet you don't seem to be bothered with it.

At the March 1986 hearing of the Energy and Commerce Subcommittee on Oversight and Investigation, the Assistant Secretary of Energy for Defense Programs stated that the DOE was in the process of establishing a human reliability program, which would include drug testing and drug abuse programs.

One year later, this program is not yet in operation.

The DOE contract personnel guard some of the most highly sensitive and dangerous nuclear weapons production facilities. And, yet, there have been several instances of drug use by these security personnel.

Serious drug problems have been reported at the Y-12 Plant in Oak Ridge, Tennessee. Drug problems have also been identified at Hanford and Savannah River.

Certainly the Government should first worry about the employees who are guarding our nation's vital interest before we devote substantial resources to testing secretaries and others with desk jobs whose possible impairment does not so immediately jeopardize our national security and the safety of millions of Americans.

Mr. HEWITT. Again, I don't want to disagree with the importance of those employees you are talking about.

But the better must not become the enemy of the good in this instance.

You're talking about a discrete work force, the Federal work force, with a whole different system of legal concerns, legal authorities. We had to design a constitutionally sound basis.

Mr. HEWITT. I think that we do have to treat the Federal work force as distinct, Mr. Chairman, for the simple reason that once you allow the comparison to be made the other comparison rears its head, which is some firms in the private sector that do the very kind of work you're talking about test everybody, in the door and through the work force.

I don't know that we want to have that as our model or that we should begin to set up the Federal work place as a mirror of everything on the outside.

Mr. SIKORSKI. I'm talking about treating people who work for the taxpayers of the country the same, especially those who are doing these extremely sensitive jobs.

Mr. HEWITT. There is a significant legal and, I would argue, operational distinction between contracting employees and Federal employees.

Mr. SIKORSKI. That's the biggest bunch of baloney I've heard in about four and a half years on the Hill here.

You know, that's fine for an answer, but it doesn't answer the serious problem.

I assume I'm sincere about raising this issue. And if you sat in on these hearings, you would have trouble sleeping at night, understanding the security, the slapstick security that we have around these facilities in days of high concern for terrorism, as well as just the likelihood that when human beings do something there is a chance that there might be an accident.

You wouldn't find that distinction, if there is one there, of great import in looking at the security around these facilities.

And you and I know that these people wouldn't be there if the Government of the United States didn't hire them to be there.

And we, acting as the contracting party, have a right to establish guidelines by which these people operate. And one of those guidelines can damn well be some drug testing.

Mr. HEWITT. And I do not mean to doubt your sincerity. I agree with you.

But I want to repeat. The better must not become the enemy of the good.

Mr. SIKORSKI. I've always believed that the better must not be the enemy of the good.

Mr. HEWITT. Okay.

Well, our program is not the entire answer for the country. It is the answer for the Federal work force. And that is what we designed it for.

The issue is on the table within the administration. It receives continuing consideration. But we just want to proceed one step at a time.

Mr. SIKORSKI. Who in the Administration is in charge of looking at this application of drug testing to contract employees?

Mr. HEWITT. I believe that it is up to the agencies to make that determination. But I know that the issue has been discussed in a number of forums ranging from the Domestic Policy Council to other different forums.

Mr. SIKORSKI. So, who should we ask to testify here to respond for the Administration on the issue?

Mr. HEWITT. The contracting out of sensitive positions and their need to be tested could be addressed to any number of different people. The Secretary of Energy would be an excellent person.

Mr. SIKORSKI. I understand that. But it's not unique to the Department of Energy.

Mr. HEWITT. But because of the variety of problems that contracting out presents, it takes a lot more time, but it has to be addressed serially, according to the agency and the agency mission.

Mr. SIKORSKI. Well, I understand.

[The following information was furnished:]

The President's coordinator of all Federal programs concerning drug abuse is the Director of the White House Drug Policy Office, Dr. Ian Macdonald. Dr. Macdonald and Mr. Richard Willard, Assistant Attorney General for the Civil Division of the Department of Justice, are examining the question of testing Government contractor employees for illegal drug use.

Mr. SIKORSKI. If you're going to treat the Federal work force as a whole and issue major press statements and major initiatives with regards to their treatment, then break it down, honestly break it down and try to use discretion in making determinations on the specific problems there, why isn't there someone, using the same argumentation for this Federal work force crusade on random urine testing, looking at the issue from the national picture in contract employees?

Mr. HEWITT. Well, it seems to me that it is being addressed in some forums.

Mr. SIKORSKI. I think it's because the Federal work force is easy prey for people wanting to do something.

And I'm pointing out that these contract employees of the taxpayers, whose money comes from the same pot, who are doing sensitive work, should have the same kind of scrutiny, the same kind of concern within the Administration.

And I'd like to know who that person is or where we can trigger that kind of interest.

Mr. HEWITT. I think it has to be done an agency-by-agency basis.

The concern you've articulated is one that is unique to the Department of Energy.

Mr. SIKORSKI. Why should contracting out be done on an agency-by-agency basis, but the thrust of and the initiative for the Federal work force is done across the board?

Mr. HEWITT. We have not departed too much from that ethic. We have designed broad guidelines. And we have committed discretion in——

Mr. SIKORSKI. You're absolutely right. And I am not arguing that. But there is a top of the pyramid on the Federal work force. That's why we are here. Where's the top of the pyramid for the Federal work force that's not part of the civil service?

Mr. HEWITT. I think what you might be running in to is the reality of the great deal of variety when you're dealing with contracting out.

Mr. SIKORSKI. No. I'm running in to the reality of philosophy.

There's a bunch of people who think contracting out is God's greatest gift. And this is part of their ideology. And they're not willing to apply the same kinds of concerns that they're ready to apply to the Federal work force because they've been bumping on them for a long time to contract out employees.

And, secondly, there's an unwillingness to recognize the security problems associated with contracting out the security facilities. We've beaten them.

I would ask that you localize, for the subcommittee's purposes, someone—and I'm sure it will be outside of OPM—to request to be here to talk about the contracting out situation, especially in national security areas.

Employee assistance programs. You talk about, on page four of your statement, all Federal agencies are training their supervisors and managers on how to deal with employees who have a work performance or behavior problem that may relate to alcohol or drug abuse.

What's the basis for that statement?

Mr. HEWITT. The basis for that statement is that we offer, three times a year, a course—and we intend to beef this up—to train employee assistance administrators for those programs.

At the same time, we are developing, and it's very close to being launched, the supervisory training. We've already done the demonstration project. We used the unions to help develop that. We used outside experts, the best medicine has to offer, on how to identify and refer employees who are in trouble with drugs.

We will be launching that. We will be offering it intensively.

The interest in the work force is immense. We think it will be one of our most subscribed courses of training.

Mr. SIKORSKI. I'm not critical of you or what you're trying to do with the resources you have.

You have to understand, though, I read these statements for a full value. And it says all Federal agencies are training their supervisors and managers on how to deal with employees who have a work performance or behavior problem that may relate to alcohol or drug abuse.

I asked you what the basis is for that statement of fact.

Mr. HEWITT. Well, that's our employee assistance programs. They have been in place for twelve years.

One of the jobs of the EAP Administrator is to make sure that he goes to the agency, that he offers this kind of training. And OPM performs the oversight of this. And we are happy with the way that it has gone.

We recognize that the demands are probably going to increase. And we are training the administrators on a more frequest basis.

Mr. SIKORSKI. This is the old program that has been in existence——

Mr. HEWITT. Since 1976.

Mr. SIKORSKI. In every agency.

Mr. HEWITT. Yes, sir.

Mr. SIKORSKI. I'm going to ask the HHS person how many supervisors are at HHS later on.

How many supervisors are at the Department of Education?

Mr. HEWITT. I don't know.

Mr. SIKORSKI. Hundreds?

Mr. HEWITT. I don't even have a clue.

Mr. SIKORSKI. What agency are you familiar with?

Mr. HEWITT. Well, OPM has a work force of about five thousand. I would wager we have five hundred supervisors.

Mr. SIKORSKI. That's a guess.

Mr. HEWITT. I could be wrong.

Mr. SIKORSKI. And have they been trained?

Mr. HEWITT. Over the course of many years, I believe they have, just like with our ethics training component.

We work through our building on a revolving schedule. I believe we train them. I believe everyone knows where the EAP is.

We offer intensive sorts of help courses.

Mr. SIKORSKI. I don't think that the facts bear out that statement of fact. But I would ask you to supply us for the record the basis for that statement, and the numbers that are attached to it in terms of supervisors and managers that exist in the Federal work force, and the numbers that have been trained in, say, the last five years, the last two years, and the numbers that have been trained since the President's Executive Order of last September, and any other.

Mr. HEWITT. Certainly.

[The information follows:]

As of October 31, 1985, there were 248,372 supervisors and managers in the Federal work force. In fiscal year 1986, 5,785 supervisors and managers took advantage of OPM-provided training in which this type of training was given. OPM does not have numbers of employees trained by individual agencies. Thus, the number of supervisors and managers attending agency-sponsored training in this area is not included in this figure.

Mr. SIKORSKI. You talk about a supervisor training program that's coming up later this spring.

Mr. HEWITT. Yes. That's the new one. That is the new one that is not for EAP Administrators, but is for supervisors to recognize drug abuse.

Mr. SIKORSKI. And that will be on-line——

Mr. HEWITT. Very shortly I would imagine, within the month, because the module has already been done. It has been tested out.

Mr. SIKORSKI. How many people are going to be in that program?

Mr. HEWITT. We will offer it to fit demand. We expect demand to be very high because of the expressions of interest we have had in it thus far. We will run until it's—we will continue to run it for years. I doubt it will ever go out of our inventory of training courses.

Mr. SIKORSKI. No. Because of new training.

But we have probably over a hundred thousand supervisors in the Federal work force, probably sufficiently more than that. How many? And how many dollars are going to be in this program?

Mr. HEWITT. Well, the training programs are reimbursable by the agency.

Mr. SIKORSKI. Yes.

Mr. HEWITT. So, OPM does not have to put up the money for it, other than development costs, which we have already sunk into the program.

We can offer it as much as demand requires. It is simply with any training program you have a lead-in development time, you have a testing time, and then you go in to full implementation. And demand drives the offering of it. And we expect a large demand. We will meet it.

Mr. SIKORSKI. A large demand like——

Mr. HEWITT. Well, I cannot predict. We have expressions of interest from a number of agencies.

Mr. SIKORSKI. Okay.

Mr. HEWITT. They want to send their supervisors for it.

Mr. SIKORSKI. Would you put some numbers on that?

Mr. HEWITT. I'd like to do that for the record.

[The information follows:]

Twenty-seven sessions of the new two-day course for supervisors and managers on establishing a drug-free Federal workplace have already been requested through OPM's regional training centers. This number of sessions demonstrates substantial interest on the part of the agencies in sending their supervisors and managers to this course.

Mr. SIKORSKI. Okay.

I commend you for your poster initiative with the various unions and the managers association and others on the employee assistance program.

I thought on education and training that initiative was different.

You have, under '70 and '72 laws, the employee assistance programs for—and I quote from your record—appropriate prevention, treatment, and rehabilitation of Federal workers in all the departments and agencies.

You state in your statement—that some of these programs are very good and some are quite dormant.

Mr. HEWITT. I don't know which ones would be on the latter.

We do, as I mentioned to you, have a new initiative at OPM, that in our six hundred annual installation visits the status of the EA program has been bumped to the top.

We are going to look intensively at that in the coming years to make sure that they are all excellent. We're going to encourage consortia arrangements among smaller agencies that might not have the facilities to establish a full-fledged EAP that a major agency would.

Mr. SIKORSKI. For the record, when you talk about agency employee assistant program administrators and counselors, you say three-quarters of them have experience. Would you give us the universe, how many numbers we're talking about? And then you talk about on-site visits and annual report submissions. Could you give us numbers for those as well?

[The information follows:]

Program administrators.—In the aggregate, Federal agencies employ approximately 90 EAP Program Administrators. Some of these administrators perform their EAP jobs as collateral duties in conjunction with their official positions as personnel officials, employee health services managers, etc.

Counselors.—Federal agencies reported to OPM that they utilized approximately 940 staff years in conducting their EAP's in fiscal year 1986. Included in this number are the staff years devoted to program administration as described above. In addition, these staff years represent counseling, administrative/clerical support, and program coordination services provided in support of EAP programs. The vast majority of these staff years were devoted to counseling services, although we do not have a specific breakdown available.

Evaluations of EAP programs.—In fiscal year 1986, OPM conducted on-site evaluations of the scope and effectiveness of employee assistance programs in nine different Federal agencies.

OPM is currently developing an on-site evaluation mechanism for EAP programs which will become a component of OPM's ongoing, installation-based, personnel management evaluation program. This component will be field tested in late fiscal year 1987 and used to gather and evaluate information on 500 to 600 agency installations in fiscal year 1988.

Analyses of annual report submissions.—In fiscal year 1986 OPM reviewed annual report submissions from 90 Federal agencies.

Mr. SIKORSKI. You have a four-day course on administering the employee counselling services program.

In fiscal year 1985 you spent 11.8 million. In fiscal year 1986, 15.5 million. You didn't. The entire Executive Branch did, all these agencies in this employee assistance program. And that equals the sixty-some million dollars the OMB is talking about for one year of testing.

Mr. HEWITT. I am not certain if that fifteen million is included in that sixty million figure.

Mr. SIKORSKI. No, it's not included.

Mr. HEWITT. I don't know.

Mr. SIKORSKI. I'm just trying to compare apples and oranges.

We have 15.5 million in fiscal year 1986 for the entire Executive Branch employee assistance program for alcohol and drug abuse before the big media blitz last summer. I expect that it will be around that, maybe some more for counselling. We hope that it will be some more.

But that compares to about sixty million dollars, for it's about a four to one ratio for drug testing.

Mr. HEWITT. To make a completely accurate comparison, though, Mr. Chairman, you would have to take into account the things we have done with FEHB to ensure that rehabilitation benefits are included among health benefits, something that we insisted upon with our carriers last year and which we successfully negotiated with a number of them, including the largest one, Blue Cross/Blue Shield.

So, to successfully do that, you'd have to see the reciprocal effects of what OPM has done to assure the care and assistance.

The EAP's are a referral service and a guidance service.

We are providing for the helping hand in the private sector by demanding in our contracts with our largest carriers that they offer a benefit to employees for rehabilitation.

Mr. SIKORSKI. The EAP is the extension of the helping hand. The counselling, that is triggered either through EAP or, more likely, through the health employee benefit plan package program, is the actual helping hand.

Mr. HEWITT. They're one and the same.

Mr. SIKORSKI. My point is that it's going to cost us sixty-some million dollars minimum to urine test compared to fifteen million to refer and counsel.

Mr. HEWITT. But without the latter we'll never get them to the former.

Mr. SIKORSKI. That's not true. You have 13,167 employees who are counselled in fiscal year 1986 for alcohol abuse.

Mr. HEWITT. Well, I'm speaking in terms of the drug abusers, those who would not self-select, who will be identified by random drug testing.

I think it is a certainty that they would not otherwise have volunteered until the crisis became so unmanageable that perhaps treatment was far more difficult.

Mr. SIKORSKI. It's growing late.

As I read this through very carefully, I had more and more and more questions and some of which I shared with you. I have others. And we will ask OPM to respond to them.

Again, thank you.

Connie, do you have any questions?

Mrs. MORELLA. Thank you very much.

You certainly have had a gruelling situation here.

Mr. SIKORSKI. Yes.

Mrs. MORELLA. We appreciate your candor and willingness to work with us.

Mr. SIKORSKI. Yes. Thank you.

Mr. HEWITT. Thank you both.

Mr. SIKORSKI. We will expect that we will see more of OPM as we go through this process. Thank you, Mr. Hewitt.

Mr. HEWITT. Thank you.

Mr. SIKORSKI. Our next witness is Dr. Michael Walsh from the Department of Health and Human Services.

Dr. Walsh is the Director of the Office of Workplace Initiatives at the National Institute on Drug Abuse.

Dr. Walsh is one of the main authors of the Department of Health and Human Services' scientific and technical guidelines for agency drug testing programs and has spent over twenty years examining the effects of drug use on job performance for the Federal Government.

STATEMENT OF J. MICHAEL WALSH, DIRECTOR, OFFICE OF WORKPLACE INITIATIVES, NATIONAL INSTITUTE ON DRUG ABUSE

Dr. WALSH. What I would like to do is to excerpt from my formal testimony and try to hit the main points in around five minutes' time, if that is all right.

Mr. SIKORSKI. Good.

You benefit from the clock. We will be much quicker with you. Thank you.

Dr. WALSH. All right.

Mr. Chairman and members of the subcommittee, I am Dr. Michael Walsh, Director of the Office of Workplace Initiatives, National Institute on Drug Abuse.

We are grateful to the subcommittee for this opportunity to discuss the Department of Health and Human Services' technical and scientific guidelines for agency drug testing programs which were developed in accordance with the Executive Order 12564 issued by the President on September 15th, 1986.

I'd like to note here that the basic purpose of the Federal drug program is to help substance abusing employees to enter into treatment, provide them with the assistance that they need, and to get them back on the job.

We want to get employees who use drugs to stop, and we want to encourage other employees to avoid the dangers of drug abuse.

Clearly, drug testing in the Federal work force is a sensitive area of endeavor, which follows a course strewn with difficult questions of medicine, human relations, law, science, and ethics.

The Department of Health and Human Services has attempted to address the many issues involved. Frankly, the guidelines underwent numerous revisions in an attempt to strike a balance between the rights and responsibilities of the Federal Government with the reasonable expectations of privacy and confidentiality that every Federal employee deserves.

We at HHS feel that we have met the goals set out by the President and the Secretary of Health and Human Services to develop reasonable and appropriate procedures which respect the individual rights and civil liberties of all Federal employees.

The guidelines prescribe procedures under which urine specimens are taken at a designated collection site without observation.

The collection procedure is similar to what we all have experienced in any physical examination or in a visit to our personal physician's office.

In order to follow the intent of the Executive Order, that is, allowing individual privacy while providing a specimen and maintaining the integrity of the specimen collection process, the HHS guidelines require that precautionary measures be taken to prevent substitution, dilution, or adulteration of specimens.

The guidelines require a two-step process in analyzing urine for abused drugs. First, an initial screening test is used to separate the truly negative specimens from those that appear to be positive. Secondly, the guidelines require a confirmatory assay whenever the initial screen is positive.

When two different assays that operate on different chemical principles both give a positive result, the possibility that a cross reacting substance or a methodological problem could have created the positive result is virtually eliminated.

Specimens found negative on the initial screen are reported as negative and are discarded.

Specimens found positive on the initial screen but negative on the confirmation assay are reported as negative and are discarded.

Only specimens that test positive on both the screen and confirmation assays are reported out as positive.

Much of the criticism and concern regarding the accuracy and reliability of drug testing in fact reflects the intrinsic limitations of the initial screening assays. Any diagnostic screening technique, by definition, requires a more specific assessment before treatment is initiated.

Concerns about cross-reacting substances, that is, legal substances that produce a positive result on a screen, have principally been a problem for programs where action is taken on the basis of the initial screening test and there is no confirmation test.

As Dr. Miike of the Congressional Office of Technology Assessment has testified previously before this committee, and I quote, "There are intrinsic limitations for drug screening tests, and errors are inevitable from other substances in the urine and from laboratory performance errors, especially in mass screening programs. However, when positive results from the initial screen tests are confirmed with a more specific test, such as the gas chromatograpy/mass spectrometry method, the results are highly reliable and difficult to dispute."

The HHS guidelines for laboratory analysis procedures are quite rigorous. There are comprehensive requirements for internal and external quality control procedures, laboratory accreditation, and external proficiency testing.

The procedures that have been specified in the Technical and Scientific Guidelines for Federal Drug Testing Programs are appropriate and reasonable and include many safeguards to ensure the high level of accuracy and reliability which is required for this Federal drug testing program.

An essential part of the entire program is the final review of the results.

A positive laboratory test, even a confirmed positive test, does not automatically identify an employee or an applicant as an illegal drug user.

The guidelines require that agencies must employ a licensed physician with knowledge of substance abuse disorders to review and interpret confirmed positive test results obtained through the agency's testing program prior to the transmission of those results to the agency.

In conducting the review, the medical review officer, which is what we call this individual, will contact the employee who yields a confirmed positive result and afford that employee the opportunity, in a confidential medical setting, to offer alternate medical explanations for the positive test result.

This physician is required to review all medical records that the employee chooses to make available when a confirmed positive test could have resulted from legally prescribed medication.

Should any question arise as to the veracity of the laboratory result, the medical review officer is authorized to order a reanalysis of the original specimen.

If the medical review officer determines a legitimate medical explanation for the postive test result, no further action will be taken.

In summary, in developing the Technical and Scientific Guidelines for Federal Drug Testing Programs, the Department of Health and Human Services has made every effort to protect the rights of Federal employees while carrying out the Executive Order of the President.

Mr. Chairman, that concludes my remarks. I would be happy to answer any questions that you or the members of the committee may have.

[The statement of Mr. Walsh follows:]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Alcohol, Drug Abuse, and
Mental Health Administration
Rockville MD 20857

For Release Only Upon Delivery

STATEMENT

BY

J. MICHAEL WALSH, Ph.D.

DIRECTOR, OFFICE OF WORKPLACE INITIATIVES

NATIONAL INSTITUTE ON DRUG ABUSE

BEFORE THE

SUBCOMMITTEE ON HUMAN RESOURCES

OF THE COMMITTEE ON POST OFFICE AND CIVIL SERVICE

U.S. HOUSE OF REPRESENTATIVES

ON

THE TECHNICAL ASPECTS OF DRUG TESTING

CANNON BUILDING--ROOM 311

9:30 A.M.

TUESDAY, APRIL 7, 1987

76-899 O - 87 - 3

Mr. Chairman and members of the Subcommittee, I am Dr. Michael Walsh, Director of the Office of Workplace Initiatives, National Institute on Drug Abuse. We are grateful to the Subcommittee for this opportunity to discuss the Department of Health and Human Services' (HHS) technical and scientific guidelines for agency drug testing programs, developed in accordance with Executive Order No. 12564 that was issued by the President on September 15, 1986. In addition to ordering the development of technical and scientific guidelines for agency drug testing programs, the Executive Order directed that such programs insure individual privacy of employees in the implementation of such programs and that HHS assure the accuracy and reliability of the procedures and the laboratory techniques.

Let me note here that the basic purpose of the Federal Drug Program is to help substance abusing employees to enter into treatment, provide them with the assistance they need, and get them back on the job. We want to get employees who use drugs to stop, and we want to encourage other employees to avoid the dangers of drug abuse.

The Secretary of HHS requested that the Alcohol, Drug Abuse and Mental Health Administration and, specifically, the National Institute on Drug Abuse, draft these guidelines. The Secretary further directed that the guidelines be reasonable and appropriate and that adequate safeguards be provided for both employees and the agency. Therefore, from the outset, the goal of the Department of Health and Human Services was to develop policies and procedures which would require that Federal Agency drug testing programs must be conducted with the highest regard for protecting employee rights.

Development of the Guidelines

The National Institute on Drug Abuse convened a taskforce involving all levels of the Department of Health and Human Services to draft the initial version of the guidelines. This draft was reviewed by the Public Health Service and recommendations were made by the other Health Agencies including: the Food and Drug Administration, the National Institutes of Health, the Health Resources and Services Administration, and the Centers for Disease Control. Subsequent review at the Department level incorporated recommendations from other Departmental Agencies. In addition to input from all levels within the Department of Health and Human Services, the development effort was coordinated with the Department of Justice, Department of Defense, Office of Personnel Management, and the White House Office of Drug Abuse Policy.

Clearly, drug testing in the Federal workforce is a sensitive area of endeavor which follows a course strewn with difficult questions of medicine, human relations, law, science, and ethics. The Department of Health and Human Services has addressed the many issues involved. These guidelines underwent numerous revisions in an attempt to strike a balance between the rights and responsibilities of the Federal government with the reasonable expectations of privacy and confidentiality that every Federal employee deserves.

We at HHS feel that we have met the goals set out by the President and the Secretary, Health and Human Services to develop reasonable and appropriate procedures which respect the individual rights and civil liberties of all Federal employees.

Technical Aspects of Drug Testing

The HHS guidelines prescribe procedures under which each urine specimen is taken in a designated collection room without observation. The collection procedure is similar to what we all have experienced in any physical examination, or visit to our personal physician's office.
Practical experience with drug testing has shown that specimen collection is the most vulnerable part of any drug testing program. Difficulties with chain of custody procedures frequently occur at the point of collection. It is absolutely essential to be able to document that the specimen in question came from the Federal employee identified on the label and the supporting documents. In addition, for any drug detection program to be credible, precautions must be taken to assure that a fresh urine specimen is collected that has not been substituted, adulterated, or diluted with any liquid.

The best method of assuring the chain of custody and preventing specimen substitution or adulteration is observation of the specimen collection. Witnessed collection is the method that the Department of Defense has used exclusively since the inception of its drug testing program in 1981, and it is widely used in the private sector by many of the largest corporations in America. Executive Order No. 12564 requires that procedures must allow individual privacy unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

In order to follow the intent of the Executive Order, that is, allowing individual privacy while providing a specimen, while maintaining the integrity

of the specimen collection process, the HHS Guidelines require that two precautionary measures be taken to prevent substitution, dilution or adulteration of specimens: 1) that bluing agents be placed in the toilet tanks and in the bowl so that the reservoir of water remains blue and that there be no other source of water in the enclosure where urination occurs. This precaution is taken to prevent the dilution of the specimen by collecting water from the toilet itself and adding it to the specimen. The dye in the water would change the specimen color and specimen dilution can be easily detected. Past experience with drug treatment centers indicate that drug abusers will use the toilet water to dilute their specimen to avoid detection of their drug use. 2) Immediately after collection, the collection site personnel are required to measure the temperature of the specimen. Human urine normally has a temperature which is quite close to body temperature, varying from it only a by maximum of a few degrees. Specimens outside this temperature range give rise to reasonable suspicion that adulteration or substitution has occurred.

Dr. Bowen has stated that in his view, "These guidelines provide the greatest possible privacy for the individual, consistency in testing procedures, security for specimens, and accuracy in laboratory results."

Laboratory Analysis Procedures

The HHS Guidelines require a two step process in analyzing urine for abused drugs. An initial screening test separates the truly negative specimens from those that appear to be positive. The guidelines require a confirmatory assay

whenever the initial screen is positive. When two different assays that operate on different chemical principles both give a positive result, the possibility that a "cross reacting" substance or a methodological problem could have created a positive result is eliminated.

The HHS Guidelines require that an immunoassay test approved by the Food and Drug Administration be used as the initial screening assay, and that the confirmation of an initial positive be accomplished by the gas chromatography/mass spectrometry (GC/MS) method. Specimens found negative on the screen are reported as negative and are discarded. Specimens found positive on the screen and negative on confirmation are reported as negative and are discarded. Only specimens that test positive on both the screen and confirmation assays are reported as positive. Specimens confirmed positive shall be retained and placed in properly secured long-term frozen storage for at least 365 days. Within this 365 day period, an agency may request that the laboratory retain the specimen for an additional period of time. This ensures that the urine specimen will be available for a possible retest during any administrative or disciplinary proceeding.

Most of the concern and criticism regarding the accuracy and reliability of drug testing, in fact, reflects the intrinsic limitations of the initial screening assays. Any diagnostic screening technique, by definition, requires a more specific assessment before treatment is initiated. Concerns about cross-reacting substances, that is, legal substances that produce a positive result on a screen, have principally been a problem for programs where action is taken on the basis of an initial screening test and there is no

confirmation test. As Dr. Miike, from the Congressional Office of Technology Assessment, has testified previously before this committee, "There are intrinsic limitations for drug screening tests and errors are inevitable from other substances in the urine and from laboratory performance errors, especially in mass screening programs. However, when positive results from the screening tests are confirmed with a specific test, such as, GC/MS the results are highly reliable and difficult to dispute."

It is the position of the Department of Health and Human Services that positive urinalysis results should always be confirmed by an alternate method from that used for the initial screen, and at this time the GC/MS method is the only authorized technique.

The guidelines for laboratory analysis procedures are quite rigorous. There are comprehensive requirements for internal and external quality control procedures, laboratory accreditation, and external proficiency testing. The procedures that have been specified in the Technical and Scientific Guidelines for Federal Drug Testing Programs are appropriate and reasonable and include many safeguards to ensure the high level of accuracy and reliability required for the Federal testing program.

Reporting and Review of Test Results

An essential part of the drug testing program is the final review of the results. A positive laboratory test result does not automatically identify an employee or an applicant as an illegal drug user. The guidelines require that

agencies must employ a licensed physician with knowledge of substance abuse disorders. The role of this "Medical Review Officer" is to review and interpret confirmed positive test results obtained through the Agency's testing program. This individual will serve as the interface between the laboratory and the agency administrative personnel. In conducting the review, the Medical Review Officer (MRO) will contact the employee who yields a confirmed positive result and afford the employee the opportunity in a confidential medical setting to offer alternate medical explanations for the positive test result. The MRO is required to review all medical records that the employee chooses to make available when a confirmed positive test could have resulted from legally prescribed medication. Should any question arise as to the veracity of the laboratory result, the MRO is authorized to order a reanalysis of the original specimen. If the MRO determines a legitimate medical explanation for the positive test result, no further action will be taken. If the MRO verifies the laboratory assessment that illicit drug use has occurred the case will be referred, as determined by agency policy, to the employee assistance program or administrative office for disposition.

In summary, in developing the Technical and Scientific Guidelines for Federal Drug Testing Programs, the Department of Health and Human Services has made every effort to protect the rights of Federal employees while carrying out the Executive Order of the President.

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Mr. SIKORSKI. Thank you.

I'd like you to refer to your guidelines. Who came up with the toilet bluing business?

Mr. WALSH. As I mentioned in my statement, there are two precautionary measures that need to be taken to prevent substitution, dilution, or adulteration of the specimens. These were developed to adhere to the President's request that specimens be collected in private, and that the individual Federal employee, unless there was some basis for suspicion that that employee was going to try and subvert the process, be allowed to go into a bathroom, and close the door, and provide the specimen in private.

In order to protect the integrity of the system, based on our long-term experience with drug treatment programs, we put in two precautionary measures into the guidelines. First, that a dye be placed in the toilet—blue specifically, because it is already very readily available for toilets. One of the ways to easily subvert the system is, when providing a specimen, to scoop up clear water out of the bowl, which would dilute the amount of concentration of the drug in the volume of specimen that is being provided.

The amounts of drug being detected in these specimens are very, very small. And by diluting the specimen in half, you can avoid detection.

The purpose of the dye was simply to color the water so that if an employee provides a green or purple colored urine specimen that would constitute grounds for reasonable suspicion that the specimen has been tampered with.

Mr. SIKORSKI. Either that or they're from a different solar system.

Mr. WALSH. Yes.

Mr. SIKORSKI. Doesn't the temperature test do the same thing?

If a specimen was diluted to any extent, it would be a different temperature, unless you have heated urine bowls.

Mr. WALSH. Well, I suppose that an individual could sit in the lavatory long enough, holding the specimen in his or her hands, to bring it up to within the range within which we've specified in the guidelines as a secondary precaution to be taken.

Typically, this is what methadone treatment programs have used over the last twenty years. It is certainly noninvasive and relatively inexpensive to put in a package dye.

Mr. SIKORSKI. We heard a little discussion earlier—you were here—on the distinctions.

Certainly not people on the methadone program are the same, the same people we're talking about here in the Federal work force for random testing.

I mean you've got a voluntary program of drug abusers who have signed up for a program. And it's a monitoring, usually at some compulsion associated with a criminal charge and a lot different here.

Maybe it's a distinction without any difference. But I wouldn't look for parallels, especially in the random testing of the Federal work force, with people in a Methadone program and their circumstances for being there.

You are going to test for, at minimum, marijuana and amphetamines?

Mr. WALSH. Cocaine.

Mr. SIKORSKI. Cocaine. And maybe opiates, amphetamines, and PCP?

Mr. WALSH. That's correct.

Mr. SIKORSKI. Why not alcohol?

Mr. WALSH. The decision not to include alcohol in this program was based on a number of issues. Principally, at the time the Executive Order was issued, in the interim, and when these guidelines were being developed, many health related organizations, the Epilepsy Foundation, Diabetese Foundation, and many mental health organizations petitioned the Federal Government to be very cautious about ensuring that the collection of body fluids could not be misused in making employment decisions based on other health-related disorders.

So, in a conscious effort, the Executive Order limited testing to only those drugs covered in Schedule I or II of the Controlled Substances Act. Alcohol is not included there.

Mr. SIKORSKI. But did the epilepsy or the diabetic groups request that you not test for alcohol?

Mr. WALSH. No, sir. I believe the decision was made—however it was not one I actively participated in—based on the sole purpose of the Executive Order, which is to target the illicit use of illegal substances.

Mr. SIKORSKI. Everything I've seen in the President's statement and everything else talks about drug and alcohol.

And certainly the numbers are much greater with alcohol in terms of abuse, in terms of dollars, in terms of efficiency, in terms of families, in terms of economics, society, whatever. They're all stacked up against alcohol, right?

Mr. WALSH. Alcohol is a significant public health problem, that's correct.

Mr. SIKORSKI. It's the number one drug of abuse is it not?

Mr. WALSH. I would say it's certainly far out in front, yes, sir.

Mr. SIKORSKI. Is it expensive, more expensive to test for alcohol besides marijuana and cocaine?

Mr. WALSH. The use of a breathalyzer to detect blood alcohol concentration is relatively inexpensive and noninvasive.

Mr. SIKORSKI. But on these urine tests, if you threw in alcohol, does it evaporate or is it——

Mr. WALSH. No. You can detect alcohol in urine.

Mr. SIKORSKI. But is it more expensive?

Mr. WALSH. It would add a small additional cost.

Each different drug that you test for would essentially add a small additional cost, because each class of drugs that you test for is a separate test.

Mr. SIKORSKI. I'm not trying to make light of it. But there is a real potential in alcohol abuse among everyone in society, and among Presidential appointments and others who are making these decisions. And I think that if we are going to do these random tests, if this is what we have come to, and if we're going to test in areas that there's some agreement in extreme national security, public health and safety, and rationalize the expenditure of money and resources for this purpose, then it seems to me the number one drug for abuse should be in the test as well.

Mr. WALSH. That's a very reasonable position. It was our task at the Department of Health and Human Services, to develop guidelines to implement the Executive Order, which did not include alcohol.

Mr. SIKORSKI. Ed Meese drinks. Ronald Reagan drinks. I see him toasting all the time. Most of our society drinks. And the numbers are horrendous if you look at drinking compared to other drugs in costs, damage across the board, yet the people who made the decision to get about this drug crusade eliminated the one drug that they themselves use.

On the issue of privacy, you talked about people going into this restroom, and closing the door, and the rest of it.

You're going to have people in the restroom, and they will be able to go into a stall, is that correct?

Mr. WALSH. The guidelines require that the agency designate a place, which would include a collection site person, the equipment, and forms, and so forth.

Mr. SIKORSKI. If the collection site is a public restroom, then they have to have those.

What other kind of situation would there be?

Mr. WALSH. What you were reading about would be an exceptional case. If you were unable to get to the official collection site in a situation such as an accident investigation, or for some reason there was a requirement to obtain a specimen immediately, then you would follow those requirements.

However, in my estimation, at most official collection sites, they would have a normal bathroom facility, where there would be a closed door, and the collection site person would be outside.

Mr. SIKORSKI. But most of those would have a sink in them.

Mr. WALSH. The guidelines also require that there be no access to any other water other than the dyed water in the bowl. That's essential to the collection process.

Mr. SIKORSKI. You're talking about expenditures of some money to set up these collection sites.

Mr. WALSH. I think within the Washington area there could be relatively few sites to handle most of the Federal employees who may be tested.

Mr. SIKORSKI. You mean they're going to travel? If you work at HHS, you're going to have to go some other place—or if you work for FDA out in Rockville, you're going to drive some place else?

Mr. WALSH. Well, for example, in Rockville we have six thousand employees in that building. It would be likely that there would be one official collection site somewhere, either in——

Mr. SIKORSKI. And that collection site, under your regulations, is going to take some work to construct. I mean we're not going to use any room. We're going to have a room without anything else, except probably a toilet.

Mr. WALSH. That's correct.

Mr. SIKORSKI. We'll have to have a toilet for some means of excess. Since you can't have another source of water in that room you're going to have to shut off the plumbing or do something else.

Mr. WALSH. Yes.

Mr. SIKORSKI. So, there is some money attached to that.

As I understand the situation, you're going to have someone in these rooms. Are these people—a male in a men's room and a female in a woman's room—going to be trained? Are there any guidelines with regards to the taking of those samples?

Mr. WALSH. We are developing guidelines to train collection site persons.

Mr. SIKORSKI. Okay.

What about sterile containers?

Mr. WALSH. Basically, in terms of the equipment involved, we are borrowing from much of the technical aspects of the DOD drug program, since they've been in place for almost six years now.

There are specimen containers that are available under GSA schedule, which would be appropriate for use in this program.

Mr. SIKORSKI. But not sterile? I've been told that to prevent bacterial contamination, which can lead to test errors, especially in screening tests, you have to have sterile containers.

Mr. WALSH. Most of the containers that I have seen are sterile. They're in plastic bags. And unless the lid is off, the inside of the container is sterile.

Mr. SIKORSKI. Is that the kind you're going to use? Are they sterilized or are they just in plastic bags?

Mr. WALSH. They are processed in a sterile procedure I believe. According to the label, they are sterile.

Mr. SIKORSKI. Well, as I understand, then, these people are going to take the sample from the person. The person goes into one of these stalls, provides the sample, and finishes the job, arranges the clothes, hands the sample to the taker or the site person. That site person then goes in and flushes the toilet and then checks to make sure that there's sixty milliliters of sample. Then the site person must immediately take the temperature of the specimen to make sure it's a regular temperature. Right? Then they take the temperature. They check the color and any signs of contaminants. Right?

Mr. WALSH. Well, the only time a collection site person would actually go into the bathroom or the stall and flush the toilet would again be in the exceptional case where an official collection site was not used.

That would not be necessary in an official collection site.

Mr. SIKORSKI. Why do you flush the toilet in a public restroom site and not in a private site?

Mr. WALSH. Well, if you've got your toilet with the dye in it in the back so that even when you flush it the new water entering is also dyed, you don't need to take that precaution. Whereas, in a toilet facility that has not been appropriately prepared, when you flush you get clean water, which could easily be scooped up in the specimen cup.

Mr. SIKORSKI. I assume you wouldn't use a public restroom unless you had the blue dye in the water.

Mr. WALSH. Item seven, in the procedures section, which I think you're referring to was written to cover unusual situations.

Mr. SIKORSKI. Where does the individual wash his or her hands?

Mr. WALSH. The procedures require that there be a place in the official collection facility to wash their hands, both before and after providing a specimen.

Mr. SIKORSKI. I didn't see that in there. Maybe I missed it. Maybe you can point that out for the record where the guidelines state this process.

Certainly, from a public health standpoint, it's important to do it.

How about the person who is taking the sample and seals it? How does that person keep from contaminating the samples? Are they instructed to wash their hands?

Mr. WALSH. It's most likely, in an official capacity, where an individual would be processing many specimens over the period of a day, that they would wear surgical gloves.

Mr. SIKORSKI. Do they take them off every time? How do you keep one sample from contaminating another another sample by the glove?

As I understand, these samples can get contaminated very easily. And if someone handles the test at the lab or the test site, and there's some kind of drug or foreign matter present it can contaminate a sample. Or, am I wrong?

Mr. WALSH. I don't have an answer.

Mr. SIKORSKI. Maybe you should answer that for the record.

[The information follows:]

There is virtually no possibility of "contaminating" a specimen by the person putting on the seals on the specimen containers, unless the contamination is intentional (purposely adding a drug to the specimen). The minute quantity of drug which might be on the skin surface of a drug user, even if he or she put their fingers directly into the specimen would not create a sufficiently concentrated specimen to appear positive on a urine screen.

Surgical gloves and related precautions are to keep the urine off the processor's hand to reduce the possibility of any infection which might be transferred by contact with the urine.

Mr. SIKORSKI. What happens in the shipping? Can the sample change its nature based on temperature or anything else?

Mr. WALSH. Urine is a hardy specimen and does not need to be refrigerated, and can actually sit around for quite some time unrefrigerated.

However, over a long period of time without refrigeration, some of the metabolites of drugs would begin to degrade and disappear from the urine.

Mr. SIKORSKI. You have this language and so does the Office of Personnel Management about unusual erratic behavior.

Has anyone tried to put that into words?

Mr. WALSH. Specific words? Again, we were trying to deal with general——

Mr. SIKORSKI. I'll take you over to the floor of the House and we'll see unusual behavior.

Mr. WALSH. I think, certainly, if a balloon or a condom full of urine rolled out from under the stall, that would constitute unusual behavior.

If you subscribe to magazines like High Times or other drug culture magazines, there are often articles on how to beat the boss' drug tests which offer advice on drinking herbal teas or a quart of pickle juice to change the pH of your urine, as well as ways to obtain clean urine samples.

Mr. SIKORSKI. A whole new economy is growing. Two new economies, the testing economy and the dumbfound the test economy.

Mr. WALSH. I think, frankly, that we acknowledge there are people that are going to be able to beat this system.

Again, in trying to strike a balance between what is fair, and reasonable, and appropriate in terms of these procedures, we could not go to the extremes that might be required to catch those few individuals who will attempt to subvert the system.

Mr. SIKORSKI. Can you beat the system by changing from cocaine or marijuana to alcohol?

Mr. WALSH. By stopping the use of marijuana and cocaine and beginning to drink?

Mr. SIKORSKI. Yes.

Mr. WALSH. Is that what you are saying?

Mr. SIKORSKI. Yes.

Mr. WALSH. Certainly.

Mr. SIKORSKI. You can beat it.

And if you can, you can move from marijuana to some other substitute? Do you have a background in these drugs?

Mr. WALSH. Yes, sir.

Mr. SIKORSKI. Do you have to give notice to people of what drugs are going to be tested for?

Mr. WALSH. Not necessarily.

We have authorized agencies to test for these five classes of drugs. We require only that agencies test for marijuana and cocaine.

Mr. SIKORSKI. Okay.

Mr. WALSH. Essentially, we have recommended that agencies only include drugs in their test batteries where they assume there is a reasonable prevalence of that drug in the area.

Mr. SIKORSKI. My question is—and I ask you for an honest answer—does that set up incentives to move to some other drug that's not tested for that might be more addictive, might be more diabolical?

Mr. WALSH. That's certainly possible.

Mr. SIKORSKI. These specimens are supposed to be tested within five working days, is that right?

Mr. WALSH. That's correct.

Mr. SIKORSKI. The laboratories must comply with applicable provisions of any state licensure requirements.

You have this certification process. Have you certified any labs yet?

Mr. WALSH. At this point, we have authorized agencies who wish to begin immediately to use labs that are certified by the Department of Defense until the HHS certification program is in place.

We anticipate the program to be in place by the end of August. The certification process, however, will take several months in terms of actually performing on-site visits to the laboratory and then processing several rounds of proficiency testing.

Mr. SIKORSKI. You read the articles. It's not a new issue for you. The Department of Transportation last week disclosed that positive drug test results from Conrail crew involved in January's fatal Amtrak train crash were flawed by, quote, procedural irregularities, unquote, which to me, after reading that article—and that's all I know about it—seems to be a very light word for what happened.

It was a Keystone Cops kind of routine in terms of what happened, who tested what, and unsigned statements saying that there were no positives.

At the same time, there were public statements being issued with regards to the test results that as a result of these tests, the Federal Railway Administration stopped using the Civil Aeromedical Institute in Oklahoma, supposedly one of the most credible labs in the country, to analyze urine and blood samples.

The mass drug testing program hasn't even begun, and already we have some problems.

Will your guidelines, however rigorous, prevent these kinds of lab screw-ups from occurring in multiples as the testing program grows?

Mr. WALSH. Well, I think we're certainly going to minimize them to an absolute as low a level as technologically possible.

I think one of the issues here is that there is a significant difference in terms of the kind of testing that is being done under this program and typical clinical laboratory testing.

Mr. SIKORSKI. What?

Mr. WALSH. The FAA's lab is not a certified lab for urinalysis testing. I think, typically, in their accident investigations, they look at a piece of liver, the heart, and some brain, as well as blood and urine. And then they take the data from all those organs and tissue and can come up with a reasonable estimate of what actually occurred.

I think that there is a concern that many laboratories see that there's money to be made in this area and are beginning to convert and offer services for urinalysis testing. However, a significant amount of experience and expertise is required to do this job properly.

The medical review officer in our program is really the critical aspect of the whole program. Because no matter how good your laboratory is, no matter how good your technical procedure is, or how expensive the equipment that you have is, when you have humans typing labels on bottles and transforming computer data and numbers from one roster to the other, errors can occur.

I think this point is essential. The laboratory really does not make the assessment. The laboratory talks about whether or not there is a presence of drug in the urine. If it's an amphetamine, it has to be the medical review officer that determines whether that's a legally prescribed amphetamine or whether illegal drug use has occurred.

Mr. SIKORSKI. You talk about five working days of receipt of the specimen. The medical review officer gets the report.

It took twenty days for Sandra Thomson's confirmatory results to be reported to her. Is there some requirement that it be done faster?

Mr. WALSH. Absolutely. That would not be permitted under this program.

Mr. SIKORSKI. And you're going to test. HHS is in charge of accreditation, right?

Mr. WALSH. That's correct.

Mr. SIKORSKI. That's your job, and only your job.

On the subject of the medical review officers, we have eighty major agencies and hundreds of other little agencies that are also charged under the Executive Order to come up with these programs.

And as I remember your statement, you talk about the medical review officers being a key component. Do you have a list of medical review officers for the most important agencies?

Mr. WALSH. We are currently developing a handbook for medical review officers, which is being written by an expert in the treatment of substance abuse disorders who has a long history of treating impaired health professionals, as well as executives and blue-collar workers.

In terms of the medical review officers for each of the agencies, there is no list.

We met with representatives of about sixty agencies last week at the General Services Administration to discuss the development of a consortium to try and pool the resources of the agencies to have a single medical officer who would service several agencies, as well as having perhaps a single laboratory contract to accommodate many agencies.

The smaller agencies could buy into the contract.

Mr. SIKORSKI. This is a big deal. The medical review officer acts as Solomon in terms of a positive and medical explanation.

Mr. WALSH. He's really an ombudsman between the laboratory, the agency, and the employee. It is a very important role.

Mr. SIKORSKI. Is it going to be a medical person?

Mr. WALSH. Yes, sir. A licensed physician who has some training in substance abuse disorders.

Mr. SIKORSKI. And how about for these other agencies, these subagencies? They're going to have to go into a consortia, too, right?

Mr. WALSH. I think that makes a lot of sense in terms of the reducing of the overall cost of this program to a minimum.

Mr. SIKORSKI. You have model language for contract RFP's, request for proposals, for these collection sites, specimens, and to do the testing.

You mean you're going to have these people come in? They're going to be from outside and be contracted out employees?

Mr. WALSH. For the laboratory assays?

Mr. SIKORSKI. No. To come in and——

Mr. WALSH. The collection site folks?

Mr. SIKORSKI. Yes.

Mr. WALSH. Essentially, again, in trying to establish broad direction for the entire Federal Government, which is no small task when you begin to talk to the different agencies and the logistical problems that they have,——

Mr. SIKORSKI. And their unique circumstances.

Mr. WALSH. What we tried to do was provide guidance in terms of how to secure the services that you would need.

Many agencies will use the Federal Employee Health Benefit's units to do some of the work for them. Other agencies will include the collection process in their laboratory contract and have the laboratory personnel actually come on site at certain times to do testing.

Mr. SIKORSKI. Who's going to be testing the testers?

Mr. WALSH. In terms of the——
Mr. SIKORSKI. Drug use.
Mr. WALSH. Which testers?
Mr. SIKORSKI. Were you here during our previous discussion?
Mr. WALSH. Yes, sir. Do you mean the contract personnel?
Mr. SIKORSKI. Contract and noncontract.
As I understand, a little bit of an illicit drug which contaminates a specimen that's being analyzed, can make dramatic differences in the results of the test.
Mr. WALSH. As Mr. Hewitt mentioned, there have been discussions at the highest levels in terms of whether or not contract employees should be required to have drug testing programs in place before they do business with the Government.
At this time, the decision has been made not to have a blanket requirement for all contractors with the Federal Government.
Mr. SIKORSKI. How about for the people that are going to contract in this program to do testing of other people?
Mr. WALSH. Well, as Mr. Hewitt mentioned, the decision has been left to each agency where it is reasonable and appropriate. And, clearly, this is what it comes down to in terms of the constitutional issue.
It should be in all new contracts where appropriate.
Mr. SIKORSKI. I don't buy that from your perspective.
You're talking about accrediting these labs. If it's good for the goose, it's good for the gander. These are the people that are making the tests.
And, some have suggested that heavy breath and other things can change the nature of the specimen.
Are these labs going to have their people randomly tested by some other lab that's randomly tested, by some other lab that's randomly tested, by——
Mr. WALSH. We have not required that in the guidelines.
Mr. SIKORSKI. Are the MRO's going to get randomly tested?
Mr. WALSH. It would seem to me that that would be reasonable.
Mr. SIKORSKI. But it is not in the guidelines.
Mr. WALSH. It is not specified in the guidelines, that's correct.
Mr. SIKORSKI. Regarding the people who do the collection at the sites, there's no compulsion in these guidelines that they be tested either.
Mr. WALSH. That's correct.
Mr. SIKORSKI. Are these guidelines written in stone? Are you going to look at that issue?
Mr. WALSH. Oh, no. Actually, these are not written in stone. We have instructed agencies, essentially, to put them in a loose-leaf binder, because we intend to update them routinely as this program begins to develop and many of the problems begin to surface. We certainly will be amending and changing these guidelines as necessary.
Mr. SIKORSKI. Are you going to look at the issue of contract development employees involved in the random testing? Not the issue I talked with OPM about. I'm talking about the people that are actually contracted out in the testing process.
Mr. WALSH. I would certainly refer that issue to the Department level and/or the White House Office of Drug Abuse Policy.

Mr. SIKORSKI. There are other issues. We're going to look at this later in terms of other kinds of tests.

Where's the money going to come for these tests, and setting up the program?

Mr. WALSH. It is my understanding that the money is going to be coming out of the operational administrative funds.

Mr. SIKORSKI. And how about your program, the accreditation program? Where is that money coming from?

Mr. WALSH. The initial accreditation program will come out of our contract research funds this first year.

The development of the accreditation standards has been underway for more than a year and a half. We have been working with many of the national certifying organizations that currently certify laboratories for other laboratory services.

They have commented on our draft guidelines, and it is apparent that at least one, maybe more, of the national organizations will adopt standards very similar and offer certification for urinalysis testing for drugs through their certification program.

If they matched our standards, we would certainly recognize their certification process.

Mr. SIKORSKI. You have a whole range of important services in the Alcohol, Drug Abuse, and Mental Health Administration at HHS. And the money for this accreditation process is being taken out of the money that you received, and there are no additional monies going in to this.

Mr. WALSH. Not at this time. Our main purpose is to develop a self-sustaining program, where the individual laboratories will annually pay a certification fee to be certified, which would cover the cost of operating the entire program.

Mr. SIKORSKI. And then they'll charge the other agencies?

Mr. WALSH. Clearly, it gets passed on to the customer.

Mr. SIKORSKI. What is the current status of HHS's drug testing program.

Mr. WALSH. The policy is under development at this time.

Mr. SIKORSKI. Are you responsible for that?

Mr. WALSH. No, sir, I am not.

Mr. SIKORSKI. Do you have an MRO over there?

Mr. WALSH. I am not aware if one has been identified at this time.

Mr. SIKORSKI. When is your plan coming down? Do you know?

Mr. WALSH. I am not certain of the timetable.

Mr. SIKORSKI. Who's in charge of that?

Mr. WALSH. The Assistant Secretary for Personnel Administration has been designated.

Mr. SIKORSKI. Have you been consulted on the HHS's program?

Mr. WALSH. Yes, sir.

Mr. SIKORSKI. What sort of employee assistance program does HHS have?

Mr. WALSH. HHS has a number of contract programs all over the country.

We in Rockville have our own in-house program, which is staffed by medical officers and personnel of the Public Health Service, commissioned officers.

The Health Resources and Services Administration, I might add, have just recently issued, approximately eight weeks ago, standards for accreditation of employee assistance programs. And all vendors of employee assistance programs now must meet those standards in order to do business with the Federal Government.

Mr. SIKORSKI. Do you have anything you want to add?

Mr. WALSH. Well, I think, basically, that this is a very difficult issue.

We're very pleased that this committee has been willing to invite us here and to listen with an open mind on this issue.

We are trying very hard to implement the President's drug abuse initiative and achieve the goal of a drug-free Federal work force.

And I think, frankly, in my own experience over the past five years of dealing with many of the largest corporations in America, that the workplace programs probably are the best prospect that we have for turning around drug abuse in this country. But, clearly, if they're going to be effective they have to be done intelligently. And that is what we are striving to do.

Mr. SIKORSKI. And a major component of that is awareness, counselling, treatment, and rehabilitation.

Thank you very much.

Mr. WALSH. Thank you.

Mr. SIKORSKI. Our next witness is Ken Blaylock, who has served as President of the American Federation of Government Employees for almost twenty years. And during this time he has been a forceful and highly effective leader and advocate for the more than seven hundred thousand employees AFGE represents.

The subcommittee thanks you for being here this morning to discuss this important issue.

And as we learn, and we learned this morning, the thing is not without some controversy or a host of legitimate questions.

Good morning, Ken.

STATEMENT OF KENNETH BLAYLOCK, PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO)

Mr. BLAYLOCK. Good morning, Mr. Chairman.

I have with me this morning my general counsel, Mark Roth.

On behalf of hundreds of thousands of Federal employees, let me express my appreciation for your serious investigation of this whole proposal on drug testing of Federal employees that's before us.

We are a bit bewildered by the sudden obsession, bordering on hysteria, with the drug problem at the Federal workplace.

For years, Mr. Chairman, we've trained our officers and stewards regarding employees with substance abuse problems. And for years our locals have attempted to negotiate strong drug and alcohol treatment programs for Federal workers.

After years of unrecognized struggle on the real battlefield of substance abuse, our local leaders now find that their employer, in a blaze of publicity, has decided to purge illegal drug use from the lives of Government employees by the use of broad scale drug testing.

They have watched with not a little cynicism the political use of this issue, as leading political figures parade their urine samples before rolling cameras.

Their cynicism is justified because this program is not a reasoned response to a real problem.

Often, in discussing the Administration's drug testing program, the unreliability of the tests and the cost of the programs are cited as reasons for opposing the Administration's program.

Although we agree that no program of this scale can be run one hundred percent accurate and this program will be very expensive and waste very scarce resources, we do not address these issues in our testimony here today.

But even if the testing was one hundred percent accurate and was cost free we would oppose the program for other reasons.

First, Mr. Chairman, Federal employees are American citizens, and they don't leave their constitutional rights at the door when they hire on to be Federal employees.

In determining whether an individual has a reasonable expectation of privacy and whether the governmental intrusion are reasonable, courts have generally weighed the need to search or seize against the invasion such actions entail, the co-called balance test.

It's our position, in agreement with the courts, that random, without cause drug searching of Government employees cannot meet this test.

They violate employees' reasonable expectation of privacy and are therefore unconstitutional.

Our submitted statement fully develops this argument and cites key court decisions.

It's degrading to innocent employees.

Mr. Chairman, your predecessor, Representative Gary Ackerman, graphically made this point last year, when he asked Rodney Smith, who was the Executive or Deputy Director of the President's Commission on Organized Crime, in this room, to undergo a drug test as part of the committee hearing.

Mr. Smith refused that morning. And when he was asked why, basically it was because it was embarrassing to him and it was degrading to him. And that's probably the only point that we agreed on with Mr. Smith.

It sets a precedent of employers intruding on the private lives of their employees and raises a specter of Government as a Big Brother.

Employers in a free society cannot and should not seek to regulate the lives of their employees off the job unless such off-the-job behavior affects employees' abilities to do their job.

The Government in a free society cannot and should not be allowed to violate the sanctity of an individual's body without cause or reason.

And I guess most of all, Mr. Chairman, we oppose these regulations and this whole policy because it is irrelevant to resolving the real drug problem in our country.

The demand for illegal drugs is intertwined with poverty, joblessness, disillusionment. And the ready supply of illegal drugs is tied to profits and organized crime.

Since neither demand nor supply are easily addressed, the easy answer is to address something else, namely, Federal employee drug use.

The hypocritical nature of this substitution is highlighted by the Administration's efforts to slice some nine hundred million dollars from the anti-drug programs authorized by Congress and signed by the President in last year's Anti-Drug Abuse Act of 1986.

So, while adopting a multi-million dollar program for wide-scale drug testing of government employees, where there is no evidence that a major problem really exists, money is cut from law enforcement, drug abuse treatment services, educational programs, and interdiction efforts.

We think, Mr. Chairman, it's time to get on with the business of addressing the real problem of the drug problem in this country and abandon this side show of Federal employee drug testing as so-called setting the pace for the public again.

In final, this proposed program hinders the actual rehabilitation program in Government.

And I noticed, Mr. Chairman, this morning previous witnesses stated that we are now establishing standards for real employee assistance program in Government.

I would point out that's fourteen years after the laws were passed and we were supposed to start the programs.

A fundamental problem with the Administration's program is the issue of confidentiality and the independence of the employee assistance program.

In talking with our locals with a history of successful drug abuse programs working in cooperation with the agency, they stressed that the employee assistance program must be perceived by the employees as existing to help them resolve their problems. It cannot be seen as existing to help the employer deal with problem employees. If it is, then the employees will not participate.

The success also depends on a strong need for confidentiality and a separation from adverse personnel actions.

All of you read these regulations closely. You notice, immediately after they talk about the testing process and also the reasonable test, they immediately state in those regulations that agencies will file the results of those tests in an adverse action file on the employee.

So, right up front it is tied to a job action against that worker. And I would say to you that no employee is going to voluntarily participate in a program of that nature.

The OPM regulation section 3(e) invalidates the confidentiality and the independence of the employee assistance program. This provision encourages agency heads to mandate unannounced follow-up drug testing of all participants in an employee assistance program for drug reasons.

If follow-up testing reveals drug use, such employees would be subject to immediate dismissal.

Again, Mr. Chairman, nobody is going to participate voluntarily in a program of that nature. Because self-identification as an illegal drug user now also carries with it under the Executive Order the likelihood of follow-up testing and subsequent firing, such employees are much less likely to voluntarily come forward.

We hope this committee will not only oppose the Administration's unwise and ill-conceived program, but will take a positive role in improving our understandings and actions of substance abuse problems.

We would like to see our Government setting the pace and really resolving the problem of this country. Their approach, Mr. Chairman, is not the way to do it.

We went through our files prior to this hearing and could come up with only, really, three examples of effective employee assistance programs operating throughout Government.

As you well know, we represent employees in sixty-seven agencies of Government. We found that in the Kansas City Social Security Payment Center we have a cooperative program with local management and outside assistance involved in a real employee assistance program that apparently is a very, very effective program.

We find GSA in Florida a very well operated program. Again all three players or parties playing an aggressive role.

And we find that Local 12, which is the headquarters local, Department of Labor, here in Washington, D.C., has a very effective program, Mr. Chairman.

Beyond that, with a search of about a week of staff, it was very hard for us to come up with a program that we could recommend to this committee that are really working.

But a lot of those programs—three things are happening. What we need is serious cooperation between union and management to give the program credibility, and there's joint effort there all the way through. We think that's very necessary.

Now, Mr. Chairman, in the normal scheme of things—and, as you said, I've been in this town a long time—generally, regulations of this significance are being considered by the Office of Personnel Management. They generally contact the unions. And we sit down and talk them through. Because it is going to take everybody to make this program work.

In this case, we had no contact by OPM. There was no consultation. There was no input. In fact, labor relations people at OPM who normally deal with the union didn't even know about this letter going out.

We hope that the chairman and the committee does find out the origin of these regulations.

Mr. SIKORSKI. Is there someone from OPM still here today? No? They all left.

Mr. BLAYLOCK. I can understand that.

Mr. SIKORSKI. I can understand it, too, but I think they'll be back.

Mr. BLAYLOCK. I'll just make one closing comment.

We have provided for the committee a copy of model contract language we provide to all of our locals, our national bargaining councils, for proposed language for a drug and alcohol assistance program.

And, as I said, over the years we have attempted to negotiate this type of language in our contracts. And for most cases we either hit resistance of nonnegotiability or placid resistance, where it's impossible to get the agency to set down in a cooperative or in a

collective bargaining atmosphere and negotiate this kind of language and install that kind of program.

The three examples I gave you is where we do have this kind of language in effect and obviously addressing the problem.

Mr. Chairman, that would conclude my summary of my statement. And I would be glad to try to answer any questions that you may have.

[The statement of Mr. Blaylock follows:]

STATEMENT BY

KENNETH T. BLAYLOCK
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
(AFL-CIO)

My name is Kenneth T. Blaylock. I am the National President of the American Federation of Government Employees, AFL-CIO. We represent 700,000 government workers across this country, thousands of whom are threatened by the widescale drug testing program proposed by the Administration.

Our local officers are a bit bewildered by the sudden obsession, bordering on hysteria, with the "drug problem" at federal workplaces. For years, we have trained our officers and stewards regarding employees with substance abuse problems: how to convince these employees to seek counseling, rehabilitation, and treatment; how to work closely with supervisors and other management officials to help them to have a better understanding of the employees and their problems; how to assist employees in obtaining time off for meetings, counseling, and outside programs; and how to relieve job-related stress. For years, our locals have negotiated strong drug and alcohol treatment programs.

After years of unrecognized struggle on the real battlefield of substance abuse, our local leaders now find that their employer, in a blaze of publicity, has decided to purge illegal drug use from the lives of government employees by the use of broad scale drug testing.

They have watched with not a little cynicism the political use of this issue as leading political figures parade their urine samples before rolling cameras.

Their cynicism is justified. This program is not a reasoned response to a real problem. The demand for illegal drugs is intertwined with poverty, joblessness, and disillusionment. The ready supply of illegal drugs is tied to profits and organized crime. Since neither demand nor supply are easily addressed, the facile answer is to address something else--namely, federal employee drug use.

This is a political magician's act played before the electorate, with President Reagan cast as Doug Henning, creating the illusion of a disappearing national drug problem via the slight of hand of federal employee drug testing.

The hypocritical nature of this substitution is highlighted by the Administration's effort to slice some $900 million from the anti-drug programs authorized by Congress and signed by the President in last year's Anti-Drug Abuse Act of 1986 (according to the staff House Budget Committee's analysis of the President's FY 1988 Budget.) So while adopting a multi-million dollar program for wide-scale drug testing of government employees (where there is no evidence that a major problem exists), money is cut from law enforcement, drug abuse treatment services, education programs, and interdiction efforts.

The committee has asked AFGE to address the "policy aspects" of the Administration's drug testing regulations. The President, in his Executive Order, gave six basic policy justifications for the wide-scale drug testing of federal employees. In principle, we agree with the rationale offered,

however the Executive Order doesn't adhere to those principles and neither does the Administration with its subsequent actions. None of these justifications can be shown to be compatible with the Administration's previous or subsequent actions. They fail the tests of rationality and consistency.

Reason No. 1: "Concern...with the well-being of its employees."

For years, our locals have been struggling to help employees with substance abuse problems (primarily alcohol, but illegal drugs, as well.) They have struggled with Employee Assistance Programs (EAP), which most often were "paper programs" which had little money and too few skilled personnel to be effective. They have seen the good EAPs downgraded to where many are now only referral services. They have struggled within the labor-management system to avoid punitive disciplinary actions and see these individuals through until they could get back on their feet. They have worked with counselors to get employees release time when supervisors are reluctant to grant such time. Often they have had to go outside the agencies to line up appropriate treatment and rehabilitation programs to help these individuals.

Since the Executive Order, little, if anything, has changed. Agencies have not been granted additional money or staff to improve EAPs. In none of the regulations are managers given guidance on the reintegration of an employee who has finished treatment back into the worksite. In none of the

regulations is there any recognition of the worksite environment as a potential contributing factor to the substance abuse. And although the new regulations require agencies to include unions in training and orientation programs on drug abuse, none of the locals my staff has spoken to have been involved in such training.

Reason No. 2: "The successful accomplishment of agency missions, and the need to maintain employee productivity."

Yes, there are a small number of employees with a substance abuse problem--but the number has not gotten proportionately larger. The President's Commission on Organized Crime (Kaufman Report) and OPM recognize that there is not a major drug problem in the federal sector. Even the OPM regulation states: "There is no reason to believe that there is a greater incidence of illegal drug use in the federal workplace than in the private workforce." In almost all cases, drug abuse can't be cited as a major problem in agency effectiveness. Indeed, substance abuse is dwarfed by the morale problems created by inferior pay, anti-employee rhetoric, meanspirited management by political appointees, a convoluted labor-management system, and work speedups from budget cuts. These are the factors hindering productivity and agency effectiveness, not "substance abuse".

Reason No. 3: "The federal government, as the largest employer in the nation, can and should show the way."

We have argued for six years that the government should be the "ideal employer" and show the way in labor-management

relations, pay and benefits, etc. We find it disingenious that the Administration would flatly and uniformly reject this reasoning on all these issues only to resurrect it here.

But more fundamentally, this conception of an ideal employer is one with which we disagree. Employers in a free society cannot and should not seek to regulate the lives of employees off the job, unless such off the job behavior effects the employees' abilities to do their jobs.

Indeed, to suggest otherwise conjures up frightening Orwellian visions which are antithetical to a free society.

Reason No. 4: "Profits from illegal drugs, on or off duty, provide the single greatest source of income for organized crime."

Here we will defer to the reasoning of Representative Patricia Schroeder before this committee last year:

> "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 abuse.
>
> "Sixth, depriving drug users of employment will presumably dry up demands 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."

Reason No. 5: "The possibility of coercion, influence, and irresponsible action."

There has been a spate of "spy cases" brought forth in recent years, and to our knowledge not a single one of them were connected to illegal drug use. We know of no instance where a federal employee's illicit drug use has caused him or her to betray their country. We hope the subcommittee will ask the Administration to come forward if such cases do exist.

Reason No. 6: "The use of illegal drugs, on or off duty, by federal employees is inconsistent with the special trust placed in such employees as servants of the people."

Aside from the good sounding rhetoric, we are not sure what this means. "Trust" usually means an assumption of good will and intent. Random drug testing implies exactly the opposite. Employees are not trusted and must prove their innocence.

Furthermore, government employees, by and large, take pride in their work and pride in the mission of their agencies, but such pride is inconsistent with the meaning of "servant". The government as an institution, but not the government worker, is

the servant of the public. Drug testing demeans the pride employees take in their work and implies that such employees are "servants".

As can be seen, the Administration's policy justifications for this program cannot withstand critical scrutiny.

We hope this committee will act to protect the Fourth Amendment rights of government employees by barring widescale drug testing.

The fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures, shall not be violated...."

The essential purpose of the Fourth Amendment is to "impose a standard of reasonableness upon the exercise of discretion by government officials" in order to "safeguard the privacy and security of individuals against arbitrary invasions of government officials." (Delaware v. Prouse, 440 U.S. 648, 653-54 (1974): Camara v. Municipal Court, 387 U.S. 523, 528 (1987).) Clearly, the collection and analysis of a person's bodily fluids is a "search" within the ambit of the Fourth amendment. (Schmerber v. California, 384 U.S. 757 (1966).)

Although, the Fourth Amendment does not outlaw all searches, it does require that all searches be "reasonable." (New Jersey v. TLO, U.S., 105 S.Ct. 733, 743 (1985).) The "reasonableness" of a particular search is established by the use of balancing test between the need of governmental interest

for the search, weighed against the invasion of the search into personal privacy. (Bell v. Wolfish, 441 U.S.520, 559 (1979).)

The degree of intrusion engendered by any search must be viewed in the context of the individual's legitimate expectation of privacy. The test for determing when an expectation of privacy is "legitimate" is found in Katz v. United States, 389 U.S. 347, 361 (1967), where the Supreme Court held:

> "(T)here is a twofold requirement, first that a person have exhibited and actual (subjective) expectation of privacy and, second, that the expectation be one that is prepared to be recognized as 'reasonable'"

The courts have routinely held that persons have a legitimate expection of privacy in the contents of their bodily fluids and that expectation overrides the government interest in requiring a random drug test. (American Federation of Government Employees v. Weinberger, CV. 486-353, slip op. (S.D. Georgia Dec. 2, 1986); Nat'l Treasury Employees Union v. Von Raab, Civ. No. 86-3522, slip op. (E.D. La. Nov. 14, 1986); Lovvorn, et al, v. City of Chattanooga, No. Civ. 1-186-389, slip op. (E.D. Tenn. Nov. 13, 1986).)

Equally well settled is the current trend to allow drug testing when facts lead to the reasonable belief that a specific person is currently under the influence of drugs, that is drug testing "for cause" as opposed to "random" testing. (Division

214, Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1976); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. App. 1985).)

Several recent cases have allowed random drug tests which lack individualized suspicion. (McDonell v. Hunter, No. 85-1919, slip op. (8th Cir. Jan. 12, 1987); Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986).) But, these cases can be distinguished from random testing in the federal government by the fact that both cases involved either a closely and pervasively regulated industry, such as horse racing (Shoemaker, supra), or internal prison security (McDonnel, supra); both areas having reduced expectations of privacy than normal government employment.

It is AFGE's postion, in agreement with the Courts, that random (i.e., without cause) drug searches of government employees violates employee's reasonable expectations of privacy and are therefore unconstitutional under the Fourth Amendment.

Aside from the policy and legal issues of the Adminstration's drug testing program, there are a set of practical problems with the Administration's plan. Perhaps most glaring is the lack of any recognition of the linkage between drug and alcohol abuse. All of the locals I have talked to told me that the number of alcohol abuse cases dwarfs the number of drug abuse cases.

Furthermore, they have told me that they expect that with the advent of drug testing there would be some substitution of

alcohol for drugs. Economists speak of "complementary goods" as goods which are easily substituted for one another, like butter and margarine. When the price of one complementary good (butter) goes up, demand for the other (margarine) increases. Illegal drugs and alcohol abuse are complementary drugs. By dramatically increasing the "price" of illegal drugs, the substance abuser inevitably will switch to the "now" cheaper substance--alcohol.

This same principle also applies to testing for select drugs rather than the full range of illegal drugs. For example, if it becomes known that the agency is only testing for cocaine and marijuana (which are the only two drugs required to be identified in the testing by the OPM regulations) one would expect substance abusers to switch to other drugs, such as "downers" or "uppers". This "loophole" could be closed, but it would add to the cost of the program.

Another fundamental problem with the Administration's program is the issue of confidentiality and the independence of the EAP. In talking with AFGE locals with a history of successful drug abuse programs working in cooperation with their agency, they stressed that the EAP must be perceived by the employees as existing to help them solve their problems. It cannot be seen as existing to help the employer "deal" with problem employees. Thus, successful EAPs have a strong need for confidentiality and a separation from adverse personnel actions. Otherwise, employees will avoid EAPs like the plague.

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The OPM regulations (Section 3e) invalidates the confidentiality and independence of the EAP. This provision encourges agency heads to mandate unannounced follow-up drug testing to all participants in EAPs for drug reasons. If follow-up testing reveals drug use, such employees would be subject to dismissal.

Because self-identification as an illegal drug user now also carries with it, under the Executive Order, the likelihood of follow-up testing and subsequent firing, such employees are less likely to voluntarily come forward.

Prior to the Executive Order, our locals often acted to encourage and refer employees with a substance abuse problem to the agency's EAP. Our locals are now much more reluctant to make such a referral because it might contradict their duty to protect such employees from adverse personnel actions. Indeed, some locals are advising employees with substance abuse problems to avoid EAPs and seek outside help.

Finally, we doubt whether even the stringent HHS guidelines will avoid the resourceful employee who is detemined to subvert the test. The Baltimore Sun (Tuesday, March 31) reports on a booming new company called Insurine Labs which sells guaranteed "clean" urine for $19.95 per sample. Although the HHS guidelines require temperature testing, we suspect that handwarmers or some such contrivance will avoid this detection.

If such practices become wide-spread we hope the committee will ask OPM if they are willing to take the next logical, degrading step--public urination.

Often in discussing the Adminstration's drug testing program, the unrealiablity of the tests and the cost of the program are cited as reasons for opposing the Administration's program. Although we agree no program of this scale can be 100 percent accurate, and that this program will be very expensive and will waste resources, we have not addressed these issues here because we do not feel that these are the grounds upon which the program should be opposed. Even if the testing was 100 percent accurate and was cost free, this program should be halted for much more important reasons:

1. It is unconstitutional;
2. It degrades innocent employees;
3. It sets the precedent of employers intruding on the private lives of their employees;
4. It raises the spectre of Government as Big Brother;
5. It is irrelevant to solving the real drug problem of our country; and
6. It hinders the actual rehabilitation programs in the government.

We hope this committee will not only oppose the Administration's unwise and ill-conceived program, but will take a positive role in improving our understanding and action on substance abuse problems.

In particular, the committee could help identify the scope of the problem by seeking answers to such questions as:

- What proportion of employees in EAPs are drug abusers? What proportion are alcohol abusers?
- What percentage of disciplinary actions are related to drug abuse? What percentage alcohol abuse?
- Is successful rehabilitation of substance abusers likely on the first treatment or does it take recurrent treatment?
- How do managers perceive the substance abuse problem (i.e., is it a "major" or "minor" problem)?
- Are there particular work environments which are accompanied by higher than normal substance abuse by the employees?

In addition, the committee, through hearings such as these, can keep OPM on notice that they must do everything in their power to sensitize government managers to the problem. Managers must recognize EAPs; they must cooperate with Employee Assistance Counselors; they must make reasonable accommodation for an employee seeking rehabilitation, and they must respect the need for confidentiality. They must do all of these things if employees with substance abuse problems are to be helped.

Finally, we hope the members of this committee will support H.R.280, introduced by Gary Ackerman (D-NY), which addresses vital areas in the drug testing field and will provide much needed Congressional direction in this area.

Thank you.

SUGGESTED GUIDELINES FOR LABOR MANAGEMENT AGREEMENT ON EMPLOYEE ASSISTANCE AND COUNSELING PROGRAM

In recent years, the problems of alcoholism, drug abuse, and medical behavorial problems have been rapidly increasing throughout the federal workforce. Public Law 96-180 amended the "Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970" to include the abuse of other legal and illegal drugs. The Office of Personnel Management concurrently issued FPM Letter 792 "Federal Employees Health and Counseling Program." This letter covers alcoholism, drug abuse, and medical behavorial problems. These medical behavorial problems may be caused by alcoholism, drug abuse, personal, financial, marital, family, legal problems, etc. This suggested contract language is written to show a joint effort by the union and the employer to provide advice, guidance, counseling, and referral for troubled employees and their families as well as providing protection for the rights and privacy of the bargaining unit employees.

FPM Letter 792 has broadly expanded the responsibilities of the employer to assure that troubled employees receive the proper counseling, treatment, etc. This letter and all of its supplements emphasize joint participation by the union and the employer. We suggest that locals when preparing contract proposals, review these letters to enable you to have a better understanding of OPM's position and intent to have working programs throughout the federal sector.

Any satisfactory understanding involving unions and management on the problems of alcoholism, drug abuse, or medical behavior should have several basic inclusions:

(1) There should be a joint policy statement on the subject issued by the union and the employer.

(2) A joint committee of equal membership from the union and management should be set up to implement this statement and the program. If the program is activity-wide it might be well to have an activity-wide committee with additional committees to function at lower levels.

(3) In order to insure that the program is successful, it must have a clear positive objective--that is to provide treatment and rehabilitation of the employee who is an alcoholic, user of drugs or one who has a medical behavior problem--not to eliminate him from the employment rolls.

(4) Specific caution is needed to avoid setting up a detection mechanism, which, in the course of developing facts to confront the alcoholic, drug user, or employee with medical behavior problem, also makes it possible to entrap other employees who are not in any way affected with these problems. Some sources have urged "secret documentation" or daily "log-keeping" of mistakes, improper behavior, bad work day, etc. This should not be a part of any agreement or understanding.

(5) A check of all the facilities, services, and assistance that are available from the employer and within the area should be made to insure:

(a) that all Federal sick leave benefits and medical facilities are available to those employees who participate in the program;

(b) that services, assistance and facilities within the community may also be used;

(c) that proper steps are undertaken to bring these items under (a) and (b) up to a satisfactory level if they are not presently so;

(d) that family members of troubled employees who have volunteered for the assistance and counseling program receive guidance, counseling, etc. to enable them to better cope and understand the employee and his/her problem as well as aiding the family member in helping the employee to recover.

With these aforementioned points in mind, a contract clause or a union-management joint understanding on alcoholism and/or drug abuse might contain the following language.

Section 1. The union and the employer jointly recognize alcoholism and drug abuse as illnesses which are treatable. In addition, the parties recognize that personal, financial, marital, family, and legal problems, etc. may also create medical behavorial problems.

Section 2. Each of these problems may cause poor attendance and unsatisfactory performance on the job. It is recognized that each problem has its own identity and will be treated as such.

Section 3. The parties agree to establish a joint Employee Assistance and Counseling Program. This program is established to provide counseling and assistance to employees who are confronted with one or more of these problems. This program will provide a procedure to deal fairly and effectively with these problems while also properly recognizing the employee's right to privacy. The parties are definitely concerned with each employee's safety, health, and morale. This joint effort is to help employees who have problems caused by personal difficulties to control the conditions themselves.

Section 4. Employees who suffer from any one of these problems may have an adverse impact on their co-workers. In order to provide a better understanding of these problems, all employees will receive a basic training course in the Employee Assistance and Counseling Program.

Section 5 Any employee who participates in this program will be entitled to all of the rights and benefits provided to other employees who are sick, in addition to specific services and assistance which this program will provide.

Section 6. To better coordinate and implement the Employee Assistance and Counseling Program, the parties agree to form a joint committee consisting

of an equal number of union and employer members. One member shall serve as chairman of the committee. This office shall be rotated on an annual basis between the union and the employer.

Section 7. It is the responsibility of the joint committee to:

(a) consider all cases that are referred and review cases that are in process;

(b) develop and promote educational information on the Employee Assistance and Counseling Program, working with other agencies within the community who can assist in making the program more effective and make recommendations for program improvement;

(c) review the effectiveness of the program periodically, see that reasonable uniformity is maintained;

(d) establish subcommittees when necessary and assist them with their problems on an as-needed basis;

(e) check and report on the nearest qualified counseling and diagnostic facilities and/or sources that are available, and the nearest suitable medical, hospital, rehabilitation facilities and employer facilities;

(f) approve all training programs;

(g) continue to seek means to improve the overall program, utilizing education, new developments and techniques, and assistance from agencies;

(h) engage in other activities that will be beneficial to this program;

(i) approve the selection of any professionals such as

medical personnel and counselors who are involved in the program. Where available, select rehabilitated employees as counselors. The committee shall assure that these counselors will receive comprehensive training in each of these problem areas. If training is not available onsite, the employer will provide the necessary means to assure that the training is received; and

(j) assure that all documentation and files of each employee in the program are maintained separate from all other records.

Section 8. The earlier that employee's problems relating to alcoholism, drug abuse, and mental illnesses can be identified, the more favorable are the chances for a satisfactory solution.

Section 9. When a supervisor, through daily job contact observes that an employee is experiencing difficulties in maintaining his job performance, he will discuss the apparent difficulties with the employee. If the employee is unable to correct his job performance difficulties through his own efforts, the supervisor will notify the appropriate union representative and then arrange to offer the employee confidential assistance and services that are available as outlined in the following procedures.

Section 10. The focus of corrective interviews is restricted to the issue of job performance. Opinions or judgments on employees with alcoholism, medical-behavorial problems, or other drug use are prohibited. It must be re-emphasized that all referrals must be made on objective and factual bases rather than on any unsupported assumptions or judgments of the

supervisor.

Section 11. The employee shall be afforded the right to have the appropriate union representative(s) present at each such interview. In all instances, the union representatives(s) shall be notified that such an interview is scheduled.

Section 12. If, following this discussion it is felt by the supervisor, the employee or his representative that the matter should be brought directly before the joint review committee the committee chairman shall arrange a meeting as expeditiously as possible.

At the meeting with the committee and the employee, these steps should be taken:

(a) give the employee a clear, positive statement pointing out all the evidence which indicates that a job performance deficiency is involved.

(b) Explain the function of the joint program and the benefits available in detail.

(c) Emphasize that help for the existing problem is covered under the problem and handled on a confidential basis.

(d) Remind the employee that unless his problem is identified and corrected, he is subject to existing penalties for unsatisfactory job performance and attendance. The employee may elect to have his/her union representative present when meeting with the committee.

Section 13. (a) Employees who agreed to counseling, medical treat-

ment, rehabilitation treatment, etc. shall not be subject to disciplinary and/or adverse actions so long as they remain in the program and are sincerely trying to be cured. These services will be provided at the employer's expense.

(b) Family members of employees who have agreed to counseling, medical treatment, rehabilitation treatment, etc. shall receive guidance, counseling, etc. to aid them in coping and understanding the employee in the treatment and recovery process.

Section 14. In the event an employee refuses counseling, medical treatment, rehabilitation treatment, etc. after the discussion with the supervisor and/or the joint committee as spelled out in Section 11, above, diposition of the matter will proceed under the existing collective bargaining contract agreement between the union and the employer.

Section 15. It shall be the policy of the employer to inform any employee subject to discharge or discipline, of his rights to a review before this committee. The committee will determine if the source of his problem falls within the corrective and treatment procedures offered by the program, and his right to process any discipline or discharge actions through the appropriate appeals procedure or the negotiated grievance procedure.

Section 16. It is recognized that supervisors, union representatives, and committee members are not professional diagnosticians in the field of alcoholism, drug abuse or mental health. Neither are they medical experts. However, the committee will select and approve the qualified physicians, therapists or personnel of other treatment resources and facilities whose recommendations for needed treatment and rehabilitation services will be followed.

Mr. SIKORSKI. I thank you.

In your summary, you answered the questions that were raised to me as I read over your statement before.

The model will be put in the record as part of your full statement without objection.

And you have had difficulty putting staff into researching where the EAP's are around the country.

We had testimony from OPM that, by definition, every agency had an EAP. And in reality, it's your testimony that very few have EAP's and very few of those that are functioning are functioning as they're intended to be, employee assistance programs where there's a cooperative effort to make people aware and to provide assistance to employees who are having difficulty in and around drug and alcohol abuse.

Mr. BLAYLOCK. Mr. Chairman, I hope that you follow up with the OPM witnesses with very specific information.

We'd like to know where those well-working programs are too.

Mr. SIKORSKI. We will ask them specifically where these EAP's are.

Mr. BLAYLOCK. If I could make a comment on the cooperation. Even now the current regulation, you know, requires the agencies to set up training programs for supervisors, managers. And also the current regulation, the one we are addressing, requires union involvement in those training programs.

As of last night, as we inquired around the country with our bargaining councils, our vice presidents, we could not find one place where the agency had involved our union in training on this so-called new program that they've come up with all at once.

So, there's just a total lack of involvement or cooperation out there. And I would say to you and to the agencies, you know, the program is not going to work unless they do involve the union.

Mr. SIKORSKI. You commented earlier that there is language that deals with consultation with you on matters such as drug testing, and EAP's, and the rest. And you thus far have not been consulted.

Mr. BLAYLOCK. No, sir. That was the point I was just making, is that we checked with our locals around the country.

This training program is now going on. We can't find one place where management has involved our local officers or stewards in those training programs that OPM is now so proud—that they claim is going on out there.

We do find there is training going on out there for supervisors and managers. We find that. But to this day we have yet to find one of our locals where they have come forward and involved the union in that training at the workshops.

Mr. SIKORSKI. But it says, "the Office of"—I'm reading Mr. Hewitt's testimony in this—"The Office of Personnel Management, in longstanding responsibility in assisting agencies and extending a helping hand to employees through employee assistance programs, and under the old laws and the new order and law, have a responsibility."

And he said that all Federal agencies are training their supervisors and managers on how to deal with employees who have a work performance or behavior problem that may relate to alcohol or drug abuse.

And you say that's news to you, to your local people, to your stewards and others.

Mr. BLAYLOCK. Yes, sir.

And I'll just point to the facts. I mean they tell you they're now developing standards for those kind of programs.

Mr. SIKORSKI. Yes.

Mr. BLAYLOCK. Hell, they don't even have the programs. They don't have the standard out there, let alone the program.

Mr. SIKORSKI. And he said all Federal departments and agencies are required by the Anti-Drug Abuse Act of 1986 to develop and maintain appropriate prevention, treatment, and rehabilitation programs.

And the agency employee assistance programs were embraced by the Executive Order of the President last September. And they are all there functioning. And that three-quarters of the administrators and counsellors in these programs have experience or advanced academic qualifications related directly to alcohol and drug abuse program functions.

That's all news to you, too?

Mr. BLAYLOCK. If it's at the administrator level, Mr. Chairman, it's a long way from the work site.

Mr. SIKORSKI. Yes.

Well, I've asked for the numbers. And it will be interesting to get them.

Did you hear our discussion about contract employees?

Mr. BLAYLOCK. Yes, sir.

Mr. SIKORSKI. What's your position with regards to drug testing of these contract employees?

Mr. BLAYLOCK. Well, I'm not going to sit here and say contract employees ought to be tested too. There's no more of a requirement. We've made this argument many times, Mr. Chairman, that, for so many different reasons, Federal workers, have a serious pay problem at the Federal work site today. Yet, the Federal workers can't strike.

Federal workers are Hatched. They can't participate in the political process. Yet they can turn that right around, turn that job over to a contractor, doing the same job, whether it's sweeping floors or fixing airplanes, it don't matter, all of once, you know, they can negotiate, they can strike, and they can participate in the political process.

So, you know, if the rationale is there, then I agree with your statement to the previous witness. It makes no difference. It's taxpayers' dollars that's paying for that.

We think the restrictions are ludicrous to start with.

But I notice in these OPM regulations also there's three places in there there's obviously an intent to contract out this program of testing Federal employees. It's mentioned three times in this OPM letter that, you know, that itself will go on contract, which I think is another element that the Congress should really look in to.

Mr. SIKORSKI. Yes.

Mr. BLAYLOCK. This whole idea of drug testing is a whole new industry, Mr. Chairman. And, you know, whether it's the pathologist, whether it's the people setting up the new labs that are going up all over the country now, or, you can get a test, your mom and dad

kit, test yourself kit, test your own employees kit, and none of them say anything about addressing the drug problem in this country. They all talk about increasing productivity.

I looked at a 1920 newspaper heading here about six months ago. And it said "Federal Government Declares War On Drugs." So, we've had drug problems in this country a long time.

As you point out, alcohol is a more serious problem. But we've got along without drug testing, you know, all this time. Our Government is two hundred years old. And, to me, we need to be paying more attention to really beginning to resolve the drug problem in the country than we do setting an example with a political publicity flare. And that's all we see it is. And we just see the Federal workers being made a scapegoat again.

Mr. SIKORSKI. It is a confusing time to live. It's an exciting time as well.

But I know all this talk about urine testing causes people to stop and reflect about the times that have changed. But, as you point out, in the 1920's there was the war on drugs then. And I'm sure we will see it recycled as well.

Do you have anything additional you want to add?

Mr. BLAYLOCK. No, sir.

Mr. SIKORSKI. I thank you. You've answered all our questions for now. We might have a couple more that we will submit to you later.

Mr. BLAYLOCK. Thanks again for your concern, Mr. Chairman.

Mr. SIKORSKI. Thank you.

Our next witness is Mr. James Peirce, President of the National Federation of Federal Employees.

Mr. Peirce is accompanied by Sandra Thomson, a research biologist at the Army's Research Center at Aberdeen Proving Ground in Maryland.

Ms. Thomson will share with the subcommittee her expert thoughts on the OPM and HHS regulations, her nightmarish experience resulting from her false positive drug test.

I welcome you both and thank you for your willingness to be here and your continued advocacy for your people.

STATEMENT OF JAMES PEIRCE, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, ACCOMPANIED BY SANDRA THOMSON, RESEARCH BIOLOGIST, ABERDEEN PROVING GROUND

Mr. PEIRCE. Thank you, Mr. Chairman.

I also have Bruce Heppen, who is an NFFE attorney, with me.

I'm pleased to appear before the subcommittee today to present our views on the recent implementation of the President's Executive Order and the Department of Army's drug testing program.

Since I last appeared before the subcommittee to discuss our position on the issues, many events have occurred which have served to strengthen our opposition to random urinalysis of civilian workers.

I commend the subcommittee for its attention to the ongoing problems with drug testing of Federal workers, and I look forward

to working with you to prevent the infringement of the rights of these workers.

Mr. Chairman, I'd like to really not even summarize, since Dr. Thomson I think has a statement that probably would be very enlighting to you.

I would like to have her make a couple of observations relative to what has already been said, and that way maybe I won't be quite so redundant.

I think I heard the OPM representative indicate that there was a philosophy that the civil service of the Federal Government should be a leader. That's my recollection of what he said. And, in essence, by going ahead with this drug testing program others were going to follow.

I wish they would apply that philosophy to pay and benefits.

By the same token, from what I've heard this morning, it makes me feel more and more that there literally is no justice or prevailing privacy as far as the current Executive Order or regulations are concerned.

So, therefore, we would urge the members of the committee to move quickly to pass H.R. 280, the bill introduced by Congressman Gary Ackerman to ban drug testing except in cases of reasonable suspicion of drug use based on job impairment.

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

I will conclude my statement with that. I would like to turn this over to Dr. Thomson.

Mr. SIKORSKI. Thank you.

Your entire statement will be made a part of the record.

I've looked at it, and it's very helpful to us. We thank you for putting the time and effort into it.

[The statement of Mr. Peirce follows:]

STATEMENT OF JAMES PEIRCE, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

I am pleased to appear before the Subcommittee today to present our views on the recent implementation of the President's Executive Order and the Department of Army's drug testing program. Since I last appeared before the Subcommittee to discuss our position on the issue, many events have occurred which have served to strengthen our opposition to random urinalysis of civilian workers. I commend the Subcommittee for its attention to the ongoing problems with drug testing of Federal workers, and I look forward to working with you to prevent the infringement of the rights of these employees.

I am accompanied by Sandra Thompson, Ph.D., member of NFFE Local 178 and a research biologist at Aberdeen Proving Ground, Maryland. She will discuss her experience with the Army's program and her analysis of the OPM and HHS regulations.

Let me begin by discussing our initial lawsuit to block the testing of employees at Aberdeen. In April, 1986 NFFE instituted suit in District Court seeking to enjoin the Army from implementing a program of random urinalysis of 10,000 civilian employees. The action alleged violations of the 4th Amendment protection from unreasonable searches and seizures, constitutional right of privacy, due process, the Administrative Procedure Act and the Drug Abuse Office and Treatment Act. We asserted that any testing without a reasonable, objective basis for suspicion violates the Fourth Amendment. The District Court for D.C. dismissed the lawsuit for lack of jurisdiction. Issues of both jurisdiction and the merits were briefed and argued and are awaiting a decision by the D.C. Circuit. NFFE is also a party to a lawsuit before the U.S. District Court in New Orleans, attacking the Executive Order and implementing regulations.

Second, I would like to reaffirm our opposition to random drug testing on constitutional grounds. Under the Executive Order and the Department of Army's program, workers are subjected to random and periodic urinalysis whether or not drug abuse is suspected. This testing is the ultimate invasion of a worker's privacy and also violates the Fourth Amendments prohibition against unreasonable searches and seizures. We believe that for the average employee, testing may be authorized only where there is probable cause of job impairment resulting from drug use. However, employees in safety sensitive or law enforcement positions may be tested under the lower standard of "reasonable suspicion" of job impairment resulting from drug use. A finding of either probable cause or reasonable suspicion must be based on objective evidence.

Third, we do not believe that drug testing is necessary because the Federal Government has shown no evidence 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 the Defense Department's urinalysis policy for civilians in the June 3, 1985 issue of The Federal Times, the Department acknowledged that the problem of drug abuse among civilians is "very small." Nor have any of the other Executive Departments even mentioned drug use among their employees since then.

Furthermore, Federal workers do not fit the accepted "profile" of drug abusers, who are most often young, single, hold temporary jobs and have considerable disposable income. Federal employees, on the other hand, are generally mature, more likely to be married, hold career jobs in which they have invested several years and, because of recent pay caps and freezes, unlikely to have the extra funds to purchase drugs.

Fourth, we oppose drug testing because 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 co-worker who is under the influence of a controlled substance. However, if such a situation exists, managers should offer drug abuse counseling to an employee before taking any disciplinary action. Under existing procedures, Federal supervisors have been able to identify employees with alcohol or drug problems and have referred them for treatment. Drug and alcohol abuse must be recognized for the illness that it is. Treatment can be extremely effective for many workers suffering from such abuse, and agencies can avoid expensive separation and retraining costs by first providing drug abuse treatment to affected workers.

Mr. Chairman, the Executive Order presented the lofty goal of offering drug users a helping hand. But as is so often the case with this Administration, the reality of implementation has set in. The guidelines by OPM and the HHS regulations have emphasized the punitive aspects of drug testing to the near exclusion of concern for employee welfare. The Order specifically requires that Employee Assistance Programs (EAPs) emphasize counseling. Yet the plan designed by OPM almost completely ignores this requirement. The Model EAP (attachment 6 to FPM Letter 792-16) explicitly provides that the EAP counselor will refer an employee to someone else for counseling.

Clearly, under OPM's plans, the only counseling an agency will provide a worker is a periodic test to ensure that he or she is still on the wagon (attachment 6, Section 8.a., 8.c.). OPM's interpretation of the Executive Order thus transforms the EAPs into mere referral services and quasi-parole boards, hardly the quality rehabilitation programs envisioned by the Order.

Particularly disturbing is OPM's disdain for employee privacy, which is theoretically protected by the Executive Order. OPM explicitly requires that upon referral to an EAP, an employee must sign a form waiving his Privacy Act rights and giving his supervisor access to all his rehabilitation records (Attachment 6, Section 8.c.). Failure to execute the form could be considered failure to obtain or successfully complete counseling and therefore could be a basis for removal (Section 5.d. of the FPM Letter 792-16).

The HHS regulations offer no better assurance of quality testing. Under the regulations, the first link in the chain of custody is the person in charge at the collection site. The regulation proscribes no standards or qualifications for that person, despite the fact that he or she performs critical functions conducting observations of the employees, establishing a chain of custody, and taking the temperature of the urine samples. Thus, the first link is extremely weak, and there is substantial likelihood that inexperienced collection site personnel will taint the whole procedure.

In addition, the HHS regulations are no better than the OPM guidelines in protecting privacy. Employees will be carefully monitored as they empty their bladders, in the presence of a monitor or collection site person. Although the employee will not be under direct visual observation, the monitor is to stand outside the stall and listen for "normal" sounds of urination. Moreover, the monitor will require the employee to remove all "unnecessary" outergarments, leaving it to the monitor to decide what is unnecessary. Perhaps the most farcical requirement is that the monitor is to record carefully any "unusual behavior." I submit, Mr. Chairman, that most of us would behave in an unusual manner if we were placed under custody to provide a urine sample.

Furthermore, the monitor is required to add a bluing agent to the toilet tank, presumably to discourage adulteration of the sample. This seems ludicrous since the employee knows that his or her sample will be tested for temperature, and the water in the bowl is probably 30°- 50° Fahrenheit below 98.8°. The regulations are almost as insulting as the drug test itself. Not only does the Administration seem to believe that Federal employees are drug abusers; they are assumed to be liars and cheaters as well.

Most Federal workers strongly resent a program that forces them to offer up their bodily fluids for inspection. Just as invasive, however, is the fact that workers who take prescribed medicines are now forced for their own protection 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 anti-depressants or other psychiatric drugs. An employee being treated for heart disease might prefer not to alert a supervisor to the illness, because the employee might then be turned down for a more stressful job assignment or promotion. In addition, women may be forced to reveal that they are menstuating as this is a known basis for false positives. Yet despite an employee's reasonable desire for privacy, the Executive Order and the Army's program force employees to divulge this information to supervisors. But if such information is not provided, false positives will occur with alarming frequency.

Another critical argument against drug testing is that 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 result in a positive test for controlled substances up to four weeks after use. However, such tests only detect the presence of such substances, not intoxication or any on-the-job impairment. There is no more connection between an employee's off-duty use of these substances and the on-duty danger to employees or Federal property than there is a connection between an Air Force General's drinking four martinis on a Saturday night and reporting for duty at 7:00 Monday morning. Because there is no demonstrable "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 use of positive urinalysis as the sole 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." Doe v. Hampton 566 F.2d 265 (1977). Clearly, we believe that the testing program is an invasion of an employee's privacy.

NFFE is also extremely concerned about the cost of the drug testing proposal. The Department of Defense spent $48 million in fiscal year 1985 for three million urinalyses for active duty personnel.

A conservative estimate for the cost of conducting drug testing for the civilian Federal workforce is $40 million. This amount for implementing the Executive Order is prohibitive. Surely, Mr. Chairman, during this time of severe budget cuts, which are threatening to minimize public service, disable or eliminate entire agencies, the Administration should be able to spend such a large amount of money in more productive ways.

Mr. Chairman, the President's Executive Order has done untold damage to the morale of the Federal workforce, which was already at an all-time low prior to the Order. 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. Now the Administration has decided that further humiliation is necessary.

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

Our final concern is that the Department of Army's program 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. Should the Administration also assert that drug-testing government-wide is not negotiable, we will pursue every legal avenue available.

Mr. Chairman, one of the most important merit principles on which Federal personnel management is based requires that "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" (Title 5, U.S.C. §2301(b)(2)). The Administration's urinalysis program clearly violates 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 continue to oppose it in Congress, in the courts, and at the bargaining table.

We urge you and the members of the Subcommittee to move quickly to pass H.R. 280, the bill introduced by Congressman Gary Ackerman to ban drug testing except in cases of reasonable suspicion of drug use based on job impairment. Again, we commend you for your attention to this issue, and we look forward to working with you to stop this flagrant violation of the rights of Federal employees.

That concludes my statement. I will be happy to answer any questions.

Mr. SIKORSKI. Ms. Thomson.

STATEMENT OF SANDRA THOMSON

Ms. THOMSON. Thank you.

Good afternoon, Mr. Chairman and committee members.

As a toxicologist at Aberdeen Proving Ground, I am one victim of a false positive test. And there were others. And I fear there will be many more like me if the Executive Order and the Army's program are not blocked.

Let me just briefly describe to you what has happened to me.

Last year, I was selected for random drug testing based upon my job description. Without probable cause, in spite of an excellent safety record, work performance records, we were required to sign consent forms.

We had a ninety-day consideration period to sign their pseudo-voluntary consent form.

In spite of numerous questions that we asked, adequate information was never provided. As the deadline approached, I and my fellow workers signed consent forms with the caveat that it was obtained under duress. We were threatened with the loss of our Federal employment.

Several weeks later, my number came up, and I was called to give a sample.

For the first time in my life, while being escorted to the restroom, stripped of my belongings, I was made to feel guilty for no reason. And, now, I had to prove my innocence.

I cannot describe for you the torment that put me through.

Under direct observation, I urinated.

I was not allowed to witness the test, although I asked. I was allowed to wait for results.

I was then told I was positive for marijuana.

I immediately asked if I could be retested because I don't smoke and I've never touched pot. I was told it would be at least ten days before their confirmation test would clear me or confirm me.

Having no faith in the system that I had seen, I took annual leave and went out and had myself tested, at my own expense, at two local hospitals, and had my results in hand within twenty-four hours. The tests were negative for all controlled substances.

I then began to look at the Aberdeen Proving Ground drug testing program and learned they had no local standard operating procedures, no local procedures, no signed-off regulations. It was being operated by a seat-of-the-pants fashion, loose-leaf notebook, if you will.

The chief of staff told me, "We will fix it as we go."

As a toxicologist, I can tell you I have much stricter guidelines for testing rodents and guineau pigs on that post.

It was twenty-one days later before I was finally cleared in the eyes of the Army. I cannot describe for you the tension, the agony that my family and I went through for those three weeks.

And the sloppiness of the program was reaffirmed when I finally received those results in the mail. To my horror, not only were my results contained in what I received in the mail, but also the results of four other people.

I then began a long struggle with the Army in which I sought redress through their grievance procedures. Eventually, my grievance complaints were dismissed because, according to the Army, a grievance must be filed within fifteen days of the event. As you recall, it was twenty-one days before they confirmed my test. So, how could I possibly file within their fifteen-day period? I have since sought to get redress within the court system of this country.

I have reviewed the OPM and HHS guidelines and find them as bad, if not worse, than the Army's.

Please do not subject my fellow Federal employees to these needless and unconstitutional procedures. If performance is the issue, there are better ways of addressing that than an unconstitutional drug test.

I thank you for your time and consideration and would be happy to answer any questions.

[The statement of Ms. Thomson follows:]

STATEMENT BY

SANDRA THOMSON, Ph.D. RESEARCH BIOLOGIST

LOCAL 178, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

My name is Sandra Thomson. I am a Ph.D. research biologist specializing in toxicology. At the present time I conduct studies at the Army's Chemical Research, Development and Engineering Center, Aberdeen Proving Ground, Maryland on chemical hazards that may be encountered by our soldiers. I am also a member of the National Federation of Federal Employees Local 178. Briefly I would like to describe my experience with the employee drug test program at my installation.

On March 13, 1986, I was notified of my selection for the Civilian Urinalysis Program (CUP) at Aberdeen's Edgewood Area and given 90 days to sign a form giving my consent to being tested for drug use on a random basis. Imposition of these tests was not based upon any prior reasonable suspicion of individual wrong-doing or any general problem at the Center. Instead the tests were applied to all those working in certain job categories. I was further told that failure to consent would result in revocation of the clearances needed for my career advancement and reassignment. Possible demotion, or dismissal could follow.

Before signing the consent form that abrogated our rights, my fellow employees and I were given an orientation session by Carol Bruce, Chief of Edgewood's Alcohol and Drug Control

Office. The session consisted of a brief explanation of the program, a short demonstration of the field test unit and the distribution of some material supplied by its manufacturer. Little information on the laboratory test methods was provided in spite of the fact that many members of the audience were professionals and technicians who work with chemical procedures on a daily basis. Many members of the audience, including myself, asked questions on technical matters, administrative procedure, methodology, system reliability, and personnel policy. All were greeted with an adversarial reaction and few answers. The supervisors in my organization attended a similar briefing with similar results.

At the deadline for signing the consent form, my professional opinion was that the amount of technical information given was still insufficient to instill confidence in the testing procedures, especially in its protections against false positives. However, faced with the possible loss of my clearances, I did sign the consent form. I clearly noted my objections on the form (as did several of my coworkers), indicating that I was agreeing to be tested only under duress, with the threat of losing my job.

A short time later, my colleagues and I drafted a list of questions in writing on June 24, 1986, to Ms. T. Walz,

Program Administrator for the Army Armaments, Munitions and Chemical Command, my center's parent organization. We followed up the list of questions with telephone requests for a response. Answers were promised; none ever arrived.

On July 31, 1986, I was summoned to give a sample. Upon arrival I was given a cup from an open, unsealed container. With the witness, Ms. L. Wheattley, observing, I filled the container. The cup was then labelled with my taped on social security number, sealed and given to a technician. At no time did anyone ask if I was taking any kind of medication. I asked if I could watch my sample's field test, but was told that this was not allowed because "the social security numbers on other samples were visible in the laboratory and my seeing them would violate the Privacy Act."

I was permitted to wait in the hallway for the results of my test. It was positive for cannabis (marijuana) on two repeats of the field test on the same sample. I asked the person handling the testing if I could be retested and was told that the existing sample would be sent to Fort Meade, North Carolina for confirmation. However, results from that test would not be available for ten to fifteen days.

Having little information on the nature and quality of the confirmation testing procedure and little faith in what I

had seen of the field test, I took the advice of both the person in charge and my attorney, took leave and underwent a complete drug screen test at two different hospitals. They employed the rigorous procedures for sterile sample taking, direct labelling, handling, and testing which are used in acquiring evidence for courtroom use. Both tests were negative for all controlled substances, both returned results within twenty-four hours and both were performed at my expense.

Clearly, one of my primary concerns was that despite the fact that I asked for information regarding the procedures of the test, its reliability, and the consequences of various results several times before I signed the consent form, I never received it. Just as importantly, however, Army Regulation 600-85 requires that local commanders establish procedures and insure compliance with that regulation. When I asked to see the local implementing regulations and standard operating procedures, I was given drafts and told that these were in a "state of change, but were being used until procedures were finalized."

In my subsequent conversation with Lieutenant Colonel Kolch, Chemical Research, Development and Engineering Center Chief of Staff, I was told that no final procedures had been approved and that they were sorting out the procedures as they went. Clearly, the Aberdeen drug testing program was

being carried out in an improvised, seat-of-the-pants fashion. As a toxicologist, I can tell you that such liberties are never tolerated in any clinical setting, even in work with small laboratory animals. To put it bluntly, we do not test rats the way I was tested for drug use. I submit that procedures involving human subjects in which their careers and reputations are at stake are as deserving of at least as much supervision and control as those carried out on guinea pigs.

Beyond the lack of local regulatory and procedural controls we met other problems. Army regulations require that all urine specimens will be shipped so that they will arrive at the confirming laboratory no later than three days after the sample is taken and that the laboratory will transmit the results within five duty days after receipt. In my case the lab report showed that my sample arrived at the laboratory seven days after my test and that the results were reported to my managers eleven days later. I was not informed until two days beyond that. Apparently, protracted delays, during which samples may be subject to chemical change, contamination or mishandling, are the rule.

While my sample and results languished, I existed under a cloud of suspicion and was subject to at least a temporary suspension at any time. I suffered a near total disruption to my professional performance, family life, and sleep.

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Eight days of this hell would have been enough, but twenty was beyond all reason and regulation.

Perhaps the most telling moment came for me when I received my final test results, which Army regulations say must be marked "FOR OFFICIAL USE ONLY" and be transmitted with the utmost privacy and discretion. Imagine my shock to find a ROUTINE-UNCLASSIFIED message containing not only my results, but also those of four other individuals identified by social security number. If you recall the care taken to protect the social security numbers attached to urine samples when I asked to see my field test, you will understand why I find it scandalous to permit their disclosure when juxtaposed to vastly more important results.

It is worthy of comment that the others' results that I was handed bore the notation: CANCELLED UPON RECEIPT, ENTRY ON CHAIN OF CUSTODY BUT BO BOTTLE. This meant that the contractor had received the paperwork on the sample, but the accompanying urine was missing. Further investigation revealed that this and other recordkeeping/sample handling problems were not uncommon in the contractor's dealings with the originating laboratory.

One of the worst aspects of the experience was the manner in which my colleagues and I were treated when we attempted to question the procedures employed in the drug testing

program. Frequently we were told that we had nothing to fear from the test if we did not use drugs, with the implication being that if we questioned the program we must be drug abusers. One of my co-workers was prevented from asking questions about the testing procedure after she provided her sample. The person in charge said that the ninety days prior to signing the consent form had provided plenty of time for her to ask questions. You will recall that when we asked many questions, we received almost no answers. My co-worker was admonished, "You gave up your rights, now you play by our rules." She was distinctly told, "If you don't use drugs, you don't have a problem (with the test). If you use drugs, you do have a problem. Now do you have a problem?" My colleagues and I do not feel that we deserve to be treated in such an insulting manner.

Another co-worker, Dr. Steve Christesen, had an experience that in many ways was more wrenching than mine. He too was the victim of a false positive, but his clearance was temporarily suspended and he was physically removed from his laboratory. Instantly word of his "drug involvement" spread. Although he was completely exonerated locally within a few days, the experience was painful at best, especially when he learned that the reason cited for his test's problem was that the air conditioner in the drug test lab was not working.

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Although my confirmatory test eventually showed that my sample was negative for all drugs, the anxiety created by the faulty testing procedures, inadequate information, and delyed results created an enormous hardship for myself and my family. I will probably never know what caused my false positive. Experts have told me that the type of test that I was subjected to could be thrown off by my menstrual condition, over-the-counter drugs, accidental contamination or a variety of other factors.

Once cleared, I next began a struggle with Aberdeen's command for an explanation, redress, and some improvements. My first step was to complain to the local Inspector General. The major outcome of that effort appears to have been a change of test site to a facility that a survey by our Center's own biochemical test experts branded woefully deficient. In addition, the test procedures were modified so that now it is impossible to find out any test results until long after it is too late to have yourself tested. Throughout my dealings with command, they gave the impression that I, and not the program, was considered to be the problem. This contrasted sharply with the support and trust given me by my colleagues and technical managers - a confidence which I will always cherish.

I next filed an agency grievance. Army grievance regulations provide that I shall have access to all records

relevant to my problem. Verbal and written requests for information from the record and followups were ignored. Finally I had to resort to the Freedom of Information Act (at considerable expense) to get data concerning my own case.

Recently I learned that my grievance was rejected without any investigation by the US Army Civilian Appellate Review Agency in Columbia, MD. The reason given was that my grievance wasn't filed within 15 days of the event, meaning the drug test. The fact that my results took twenty days to reach me, that I was denied access to vital records for weeks following the event, and that many grieved conditions (such as the lack of Center regulations) persist make the Army's grievance system seem self-serving and farcical. I have since turned to the courts to stave off a repeat of my test experience.

With regard to the recent regulations promulgated by the Office of Personnel Management, apart from my fundamental objection to the nature of this search, I consider them as punitive and subject to most of the same shortcomings found in the Army's effort. I particularly object to the proposed consent to the release of test information that must be signed prior to the administration of the test. It appears to be a before-the-fact confession. There also appears to be little room for due process that would allow the employee

to enter evidence in his own behalf like the kind of drug test results that I obtained at the local hospitals. Indeed, in this entire drug test regimen, the employee is not confronted with any accusation or evidence against him until it is much too late to acquire evidence in his own behalf. His metabolism destroys his ability to clear himself.

Turning now to the Health and Human Services guidelines, it is my professional opinion that they are seriously flawed. Again, many of the Army program's problems are revisited. Notable is the lack of sterile containers needed to prevent bacterial contamination which can induce errors, especially in the screening tests. The overall matter of collection site personnel troubles me. Who are these people to be and what will be their training? In the CUP program, coworkers were drafted into this thankless task under threat of insubordination charges. Their levels of attentiveness, competence, and objectivity at performing this vital role were highly variable. In the new program, their role is to be expanded to include actual measurements of color, temperature, and signs of contaminants. There are other apparent shortcomings, such as security during transportation, labelling, and the retention of screening tests of the unreliable type that led to my difficulties.

In summary, I would like to reiterate my opposition both in principle and practice to the past and proposed programs. If the object of this program is to assess impairment, then the scientific literature clearly shows that it will not work. At best it will only indicate possible past exposure. It would be far better to look into bolstering the first line of abuse control - supervisor cognizance of his employee's actions. This might be supplemented in the most critical positions by non-invasive, job-tailored performance tests. At least then one could have reasonable cause to take steps and deal with the full spectrum of employee frailty: alcohol, mental or emotional upset, and physical distress as well as drugs.

Thank you very much. I will be happy to answer any questions.

Mr. SIKORSKI. Thank you.

No standard operating procedures?

Ms. THOMSON. No. They had a number of draft procedures, which they kept changing and adjusting as they went.

Mr. SIKORSKI. Who does the drug testing?

Ms. THOMSON. The Army conducts the drug tests.

Mr. SIKORSKI. Themselves?

Ms. THOMSON. Yes, they do.

Mr. SIKORSKI. And who did it on you?

Ms. THOMSON. They had a field test of the immuno assay, which was conducted on post.

The EAP office, those who head the drug assistance program were also in charge of the drug testing program. To me, that was a definite conflict of interest. The testers were also the helpers.

Mr. SIKORSKI. They were the tug and the pull into the program.

As soon as you reach out your hand, they pull you in to the drug test.

Ms. THOMSON. Absolutely.

And I would also like to point out something which didn't come up during the OPM discussion. But, on page eight of the OPM letter, 792–16, paragraph 6, "consent obtained prior to the test itself." Consequently, refusal to consent to release of this information will be considered a refusal to take the test.

Mr. SIKORSKI. Right.

Ms. THOMSON. So, in your now new OPM guidelines, they are asking you to sign a confession, to be able to turn over your drug testing information to them.

Mr. SIKORSKI. Right. You have to consent before a test can be taken.

Ms. THOMSON. That's correct. Otherwise you are considered a refusal.

Mr. SIKORSKI. And if you don't consent, it's subject to disciplinary action, including removal.

Ms. THOMSON. Absolutely.

Mr. SIKORSKI. So, there is no uncoerced consent.

If you don't want to work for the Federal Government, then you don't have to give your consent.

Ms. THOMSON. That's correct.

Mr. SIKORSKI. I see there is someone from HHS here. Right? And no one from OPM?

This is the model that was referred to repeatedly by the HHS and OPM people as being the model for drug testing that we're going to embrace in the new initiative; a system where you have a loose-leaf notebook. This kind of system is referred to generally as a model which we are going to now try to replicate.

I assume, from looking at what HHS has done, many of the things that you were concerned with would be eliminated if they follow the HHS model.

Has the Army revised its program to come into compliance with the President's Executive Order of last September?

Ms. THOMSON. They have not entirely. They say they will now not directly observe.

Mr. SIKORSKI. Was it last August or July you were tested?

Ms. THOMSON. We started in June. And it had to be completed by the start of the new fiscal year because they had quotas they had to meet.

We were always told they were behind on their quotas. They had to meet their quotas. They had to be at the forefront to make sure that they had all.

There were eight hundred and forty-five of us scheduled in these jobs that needed to be tested before the start of the fiscal year. And they started to run behind as they ran into problems. And then as the end of September approached they just rushed through everybody to hurry up and get them tested to meet their quotas.

The change that I see that they have made is, if they continue testing—right now there is a temporary restraining order based on court action—that there will no longer be direct observation. They will go along with that.

We had what was called knee-to-knee observation. Fellow employees of mine——

Mr. SIKORSKI. What kind of observation?

Ms. THOMSON. Knee-to-knee. When I was observed, the observer was allowed to stand outside the open door and watch me pee. And that observer was a Federal fellow worker.

And if you refused to be what they called a BTM, a biochemical test monitor, then you would be cited for insubordination. So, there was coersion there also.

But that's the way it was.

After the problem with the false positives—myself and another co-worker, Dr. Steve Christesen, whose story I enclosed in the testimony, also came up positive, and, by the way, he was physically removed from working in the laboratory until his was cleared up—they then decided they would do what's called knee-to-knee observation.

A secretary friend of mine was literally knee-to-knee with her observer in the restroom, in the john.

Mr. SIKORSKI. And her observer was of the same sex?

Ms. THOMSON. Yes.

Mr. SIKORSKI. Well, did you hear OPM's response when I raised the issue.

The first statement was that there wasn't a false positive in the whole Army program.

Ms. THOMSON. Well, obviously he hasn't been tested.

Mr. SIKORSKI. Yes.

Ms. THOMSON. I was handed a piece of paper from a machine that is not a hundred percent accurate that said positive for marijuana.

Mr. SIKORSKI. And then I said you had a false positive.

He said, well, not in the confirmatory test. And that's true. But you had twenty-one days of agony. You lost your ability to challenge the process.

Ms. THOMSON. That's correct. Because you never face your accusers. There's no place in these guidelines or in the Army regs where you can introduce evidence on your own behalf.

At no time was I able to introduce, and still haven't to this day, my test results.

If that test—and I had no reason not to suspect that there may have been an error, where the positive calibrator could have accidently been piped into my sample—I would have had a spiked sample.

Mr. SIKORSKI. As I understand, the HHS regulations require that those specimens be preserved, if they are positive, for a lengthy period of time. Is that correct?

Ms. THOMSON. But the point is, the day you are tested, your body, if you have drugs in it, is continually metabolizing. If you wait three weeks, the evidence is gone. The time for retest is immediately.

That's why I left work and went out and got tested to have my own evidence.

Mr. SIKORSKI. They tested the same sample again—which is the best kind of a retest, the same sample—and if it comes up negative, then it's proof that the——

Ms. THOMSON. Well, they retested mine twice, and it was positive twice. But there could be reasons as to why one sample could come up positive on it in——

Mr. SIKORSKI. So, the error rates are incredible. They're overturning these testing procedures. They're overturning chain of custody. They're overturning conclusions left and right based on legitimate analysis of a more perfect science. What's the status of your lawsuit?

Ms. THOMSON. Right now we have a preliminary injunction. It's still undergoing litigation. We have pending a permanent injunction.

Mr. SIKORSKI. Have you on your work, in your daily work schedule, have you been treated differently?

Ms. THOMSON. No. My immediate supervisors have been very supportive and wonderful.

Mr. SIKORSKI. So, you want to commend those people?

Ms. THOMSON. Yes, I certainly do.

Mr. SIKORSKI. Okay.

Ms. THOMSON. The technical management at CRDC has been very supportive.

Mr. SIKORSKI. There's an attempt by HHS, as I see it, to clean up the system and to eliminate some of the challenges or bases for challenging and to be somewhat responsive or sensitive to the human situation involved in drug testing.

They are attempting to respond to your previous situation—the knee-to-knee occurrence. But you can't fully respond to the process of maintaining human dignity in our urine test situation.

Ms. THOMSON. The indignity of the situation was that my constitutional rights were violated. There was no probable cause to test me.

The very week that my number came up to be tested was the week that I was honored in an award ceremony for outstanding performance, given a quality step increase, my five hundred hour accumulated leave for not abusing sick leave. And, yet, they were testing me for drug abuse.

Mr. SIKORSKI. You get the certificate and the specimen——

Ms. THOMSON. Signed by the general himself.

Mr. SIKORSKI. And the specimen cup, unsigned, at the same time. There is just no way of eliminating the human mass.

The human indignity in this process of random testing, assuming what I talked about in my opening statement—the teacher coming into the room, and one person blows a bubble, so everyone's got to put gum on their nose, or one person acts up while the teacher is facing the blackboard, and everyone has to stay after school. Also, you're dealing with body fluids and you're dealing with a very personal function. It makes it impossible, no matter how sensitive HHS is to eliminate the dignity factor. And what's on black and white in paper is much different from what in reality occurs at that site, that contracted-out site specimen collector is taking the specimen.

You can't eliminate those problems can you?

Ms. THOMSON. No.

There is also the long chain of custody. The route that my sample took went from Edgewood to Aberdeen, by mail to Fort Meade. Fort Meade, by the way, is awash in urine. Colonel Durrell, who was deputy commander, told me, at the time, they have more samples than they can possibly handle.

It is subcontracted out to Compuchem, North Carolina, which is where it was tested at Raleigh. Then the results wound their way back. That's why it took twenty-one days.

Mr. SIKORSKI. Why don't you go through that again?

You went from your body into a specimen cup, into a bag in some kind of transportation.

Ms. THOMSON. That was transported to Aberdeen because it's under the aegis of the commander at Aberdeen. There are two areas of Aberdeen Proving Ground.

It is then packaged up with other samples, mailed.

Mr. SIKORSKI. Oh, it's not packaged before it gets over there.

Ms. THOMSON. Well, it's in a container. And then it's packaged to be mailed, mailed to Fort Meade, where Fort Meade then subcontracts theirs out to Compuchem in North Carolina.

Mr. SIKORSKI. And they're awash in these urine tests?

Ms. THOMSON. Yes.

Mr. SIKORSKI. At Fort Meade?

Ms. THOMSON. They've been testing all of the military as well as the start of the civilians. All of this takes time.

Mr. SIKORSKI. And back.

Ms. THOMSON. And back.

And we have to assume that the chain of custody is maintained.

Mr. SIKORSKI. What are you suing for?

Ms. THOMSON. Constitutional rights.

Mr. SIKORSKI. For violation of constitutional rights?

Ms. THOMSON. Yes, sir.

Mr. SIKORSKI. Are you seeking damages?

Ms. THOMSON. No monetary damages.

Mr. SIKORSKI. Are you joined by other plaintiffs?

Ms. THOMSON. A fellow employee, a pipefitter.

Mr. SIKORSKI. And is that in Federal Court? In what district?

Ms. THOMSON. Yes. It's in Baltimore.

And I really would not like to discuss the case too much, on the advice of my attorneys, because it is in litigation.

Mr. SIKORSKI. Okay. And at this point there is the TRO?

Ms. THOMSON. Yes. We have a preliminary injunction, which is actually a step beyond that.

Mr. SIKORSKI. How about the Inspector General's Office at the Department of Army? Did you talk to them?

Ms. THOMSON. Yes. As I tried in the intervening days, the twenty-one days, to find out what would happen, I did go to the Inspector General with the information that I had gained in these draft documents, citing that here we have all of these very tight regulations surrounding toxicity testing of rodents for the Army, and yet they're testing me without anywhere near the strict guidelines. And they did agree, you know, that——

Mr. SIKORSKI. Wait. Let me back up. You test rats?

Ms. THOMSON. Yes, sir.

Mr. SIKORSKI. For the Army? And what are the kinds of guidelines and standards, procedures that you employ?

Ms. THOMSON. Our procedures are very strict, in accordance with FDA, EPA good laboratory practice guidelines. We have "signed-off, approved" standard operating procedures.

Our animal use protocols go before a committee headed by a veterinarian to make sure that we are using state-of-the-art procedures, that they are needed.

The commander has to sign off on every single study that is done to make sure that it is required, and necessary, and meets all of the requirements for good laboratory practice.

Mr. SIKORSKI. So, the rats get better fare than employees.

Ms. THOMSON. They certainly did in this case.

Mr. SIKORSKI. And you have a Ph.D.?

Ms. THOMSON. Yes, sir.

Mr. SIKORSKI. Which took how long?

Ms. THOMSON. Eight years of college.

Mr. SIKORSKI. Are you in classified work?

Ms. THOMSON. Yes. I am an inhalation toxicologist. We test a number of chemicals that are of interest to the Army. We are concerned with protecting the soldiers from health hazards from those materials.

Mr. SIKORSKI. You're not involved in chemical——

Ms. THOMSON. Yes, we are. That is one of the job categories.

Mr. SIKORSKI. Okay.

You are an example of an employee with an extensive background who never had problems—disciplinary problems, or things like that, always a credible employee, did a credit to the work, got awarded a certificate for outstanding work the same week you were asked to take a urine test, went through the indignity of that, and then found out the machine made a mistake, but had to live through three weeks of hell before you were cleared.

And that kind of situation can only grow exponentially as these random drug tests grow exponentially within our Federal work force.

Ms. THOMSON. I would expect so.

Mr. SIKORSKI. In fact, with the programs that haven't been on as long, with people that are new, with businesses and lab test businesses that are new to the process, we can expect that there will be even bigger problems in starting up the new system than in the

current system, which is pointed to as a model by many who are charged with coming up with a new system.

Dr. Thomson, you've been a real help to the subcommittee. I hope and expect a lot of people will be made aware of your testimony, your situation.

Thank you very much. Did you take annual leave to get here?

Ms. THOMSON. Yes, I did.

Mr. SIKORSKI. I commend your superiors for handling you with respect, even though you saw something wrong and wanted to right it, for continuing to protect your rights and deal with you in a dignified way. They should be commended as well.

Ms. Lois Williams is the Director of Litigation for the National Treasury Employees Union. Last, but certainly not least.

Ms. Williams has led the NTEU's successful charge to challenge the Federal employee drug testing in the courts. And she's here to inform the subcommittee of her efforts in this respect.

I thank you for coming and staying with us.

STATEMENT OF LOIS WILLIAMS, DIRECTOR OF LITIGATION, NATIONAL TREASURY EMPLOYEES UNION

Ms. WILLIAMS. I appreciate the opportunity to be here.

As you say, NTEU has been a vigorous opponent of this Administration's attempt to require employees to submit to this kind of drug testing.

We have two important cases pending. The first has been mentioned, against the Customs Service. That's currently on appeal by the Government to the Fifth Circuit, where we could get a decision any day in that case.

The second is a challenge to the President's Executive Order, which has been much discussed today, and its implementing regulations. That case, we're filing a huge brief tomorrow in that case.

We will be arguing April 30th in the District Court.

Mr. SIKORSKI. The District Court here in Washington?

Ms. WILLIAMS. No, in New Orleans.

Mr. SIKORSKI. In New Orleans.

Ms. WILLIAMS. The same court.

Mr. SIKORSKI. That's right.

Ms. WILLIAMS. The same District Court that decided the Customs case.

Mr. SIKORSKI. Is that a single judge then?

Ms. WILLIAMS. Yes, it is.

Mr. SIKORSKI. Okay. No magistrate? A real judge?

Ms. WILLIAMS. No, no. No. This is cross motions for summary judgement, although we have developed some extensive record in the case.

And perhaps I could just mention that the more we look at this problem the more we see how little is known about it.

And you don't have to be a research scientist to see how inadequate the data is on which anybody relies.

We were tempted to take pictures of ourselves holding the evidence that the Government was able to submit, the studies that have been done to date. They can fit on the palm of your hand. There just is nothing now.

Mr. SIKORSKI. If I could interrupt you.

Ms. WILLIAMS. Surely.

Mr. SIKORSKI. I think we found that out this morning.

Ms. WILLIAMS. Yes.

Mr. SIKORSKI. There's no data base. There are statements made with regard to drug use in the Federal work force that aren't supported by studies.

Ms. WILLIAMS. Yes.

Mr. SIKORSKI. And they point to extrapolation from work force studies which we aren't aware of either. They didn't specify those.

Then you ask for specifics. You ask for numbers. You ask for dollar signs and calendar dates. And there is none of that. But there is a wishful assumption away of the problem.

People are doing these things because, by definition, they're required to do these things.

People are going to do things because, by definition, they've been ordered by the President to do these things.

And the more questions that are asked this morning, as you are aware, the more questions need to be asked because there are no answers.

Ms. WILLIAMS. Exactly.

Mr. SIKORSKI. And you found the same thing in your litigation?

Ms. WILLIAMS. Yes. And I will be happy to supply the committee with some of that information if it wishes.

We have a number of exhibits attached to our brief. And some of that we found very helpful.

Mr. SIKORSKI. Okay.

Ms. WILLIAMS. In fact, there's very little known about the private sector drug use in the workplace.

I think it's astonishing that we're taking major actions of any sort based on this kind of knowledge.

The President's own Executive Order says it costs the Government billions of dollars in productivity, billions of dollars is what he said.

The only study we can find is a perfectly respectable study for what it purports to do. The Research Trianagle Institute, to which I've referred in my testimony, it studies productivity measured only in terms of income.

Now, that may be sound economics, but it doesn't tell us anything about what it costs an employer whose employees may use drugs. It doesn't tell us anything about that.

It only measures—this is the only thing this study does. And I tell you this because this is the best there is. It takes a sample of people who admit to marijuana use for thirty consecutive days at some time in their lives. And it finds that they, today, make less money than their counterparts who do not make such an admission. That is all. No cause and effect. No study of motivation. The obvious question is, perhaps a heavy marijuana user at one time is motivated to seek other kinds of employment, employment that isn't so remunerative.

The obvious answer to that problem would be to raise the salaries of Federal employees.

But I think that it's absurd to suggest that this productivity figure has anything to do with what it's costing the Government as an employer to deal with the drug problem among its employees.

In fact, there just isn't any evidence of any drug problem. I'm a lawyer. We have to talk about the standard which must be met in order to undertake a search, which this is. There's no question it is a search.

We're talking about a known population, our own employees. They have accumulated a work record. They perform on the job. It's not an unknown quanity. It's not as though we were writing on a blank slate.

We have people—as the witness you just heard—with excellent work records, who have never given their employers any reason to believe that they use drugs at all. And for them the standard ought to be much higher, I think, to require them to undergo any search. Probable cause is an absolute necessity, I believe.

Reasonable suspicion, as I think the subcommittee will appreciate, is already a significant concession to the public interest in ferretting out drug abuse. It's already a significant concession.

And a supervisor who says, you look a little sleepy to me today, I think maybe you've got a problem, let's go down to the tester—you can see the obvious potentials for abuse even in the reasonable suspicion standards, which, under the Executive Order and the regulations, would apply to every Federal employee. Every Federal employee. Forget sensitive. Okay.

Mr. SIKORSKI. It's important to make that distinction.

There's the sensitive area which we have been focusing on.

Ms. WILLIAMS. Yes.

And I think these terms are fairly loosely used. And it is extremely important to keep in mind that for the normal citizen, probable cause is paramount. Now, that's the minimum.

There are some searches, which even with the most probable cause, can't be justified, as the Supreme Court has told us.

I think I need not go into the horrors about intrusion on privacy. I think, perhaps, in any event, we'd be singing to the choir here. I wish the preacher would listen a little bit more.

Mr. SIKORSKI. The preachers have been busy these days.

Ms. WILLIAMS. Indeed they have. Indeed they have.

The medical officer has been mentioned and all the protections involved. But please do not overlook that there are many employees who take drugs that are on these lists by doctors' prescriptions for medical conditions. And there is no way that they can preserve any privacy in that matter. That will be revealed by the test. That's not a false positive. That's a true positive that has to be then explained. And that will be revealed. And one will have to justify why one takes codeine, demerol, tincture of opium. Even marijuana is used in chemotherapy these days. All of those conditions, which otherwise could not be inquired in to unless they are clearly job related, will have to be revealed and a record made. And we have no assurances of what will happen to that record.

And there are reasons in our society why such medical factors are entitled to privacy. That privacy is abandoned here.

Now, I'd like to just make a couple of points, and then I'd be happy to answer any questions, about what is constitutionally, legally, practically wrong with this program.

Obviously, to evaluate the constitutional question, you have to ask whether these intrusive means are necessary to solve a real problem. And much has been said this morning about the lack of evidence about a real problem.

But let's not forget the first and foremost difficulty, which is that these tests, even if they were one hundred percent accurate, do not measure in any sense of the word impairment on the job. And nobody makes that claim even. I mean even the Justice Department, the enemy we love to hate, doesn't claim that there's any relationship between a positive test result and job impairment.

Mr. SIKORSKI. No. They make the argument that Federal employees should have respect for Federal laws.

Ms. WILLIAMS. Absolutely.

Mr. SIKORSKI. And that's sufficient in itself.

Ms. WILLIAMS. That's right. And that's the legal leg they stand on.

Now, that, it seems to me, is clearly the law enforcement function of the Government and not the employer function of the Government. But it also suggests that the Civil Service Reform Act, which requires—not just the act, but the Constitution and cases existing before the statute was passed—that in order to take an action against an employee you have to show a clear relationship between off-duty conduct and impairment on the job.

It seems to me it very clearly contemplates performance impairment. And we have many, many decided cases in which persons convicted of crime have been found not unfit for Federal employment, depending on the circumstances.

And I am told that the use of marijuana is not normally an indictable offense anyway. It's an illicit activity, certainly. But it is not something that normally would incur prosecution.

Mr. SIKORSKI. If I could again interrupt on that point.

Ms. WILLIAMS. Surely.

Mr. SIKORSKI. There is no nexus, you argue, between the violation of the law on drug use and the performance at work. To remove without that nexus would be questionable.

Ms. WILLIAMS. It would violate the statute at least, if not the due process clause of the Constitution.

Mr. SIKORSKI. As I understand, the Department of Justice has sent to Congress legislation or made a request that that problem be eliminated by statute. Is it?

Ms. WILLIAMS. The statutory problem would be eliminated. In my opinion, there would still be a due process question.

Mr. SIKORSKI. The due process question this whole discussion triggers is a criminal procedure type of scrutiny that would be a very heavy burden for each of these agencies, and especially the smaller agencies, to bear.

Ms. WILLIAMS. Not to mention the employees and their represenatives.

The cost to society is enormous. And we're prepared, obviously, to litigate every one of those questionable cases. We have to do that. But what a waste. What a waste it is.

Now, of course, they're not required to turn over any evidence obtained for prosecution, but neither are they forbidden.

And, as I think you suggested earlier, Mr. Chairman, there is probably an encouragement anyway to let people believe that that will happen.

Mr. SIKORSKI. The potential bright spot in this is these employee assistance programs. Dr. Thomson testified that it was the employee assistance program, which supposedly assists Federal employees who have or may be concerned about drug problems, that the point agency for the actual random testing.

Ms. WILLIAMS. Right.

Mr. SIKORSKI. And at some point there's going to be a triggering of Miranda rights and specific criminal due process rights that would be well nigh impossible for most agencies on this local basis to carry.

Ms. WILLIAMS. Yes. No question about that.

The cost to employee morale is immeasurable. Already, I think, at an all time low.

Mr. SIKORSKI. And it changes the management-employee function dramatically, too. Because it becomes a cop and assumed robber kind of situation as opposed to a partnership, at least in theory.

Ms. WILLIAMS. Clearly. I think that point was well made this morning that this whole program is destructive of efforts in the employment assistance area.

We don't have any hard evidence either. But anecdotal evidence certainly suggests those programs have fallen in to disrepair and disrepute to the extent they did exist.

People are certainly afraid to enroll themselves in them these days. I don't think there is any question about that.

And it's logical. Because remember one of the things that gives rise to suspicion, allowing test after test, every hour on the hour, is the admission that there ever was a problem.

So, one positive test is, by itself, grounds for the next test. So, all you have to do is be enrolled in a program to incur this possibility.

And every employee assistance counsellor will tell you that that will destroy the program. Because occasional falling off the wagon happens. And it does not mean that the program is not succeeding.

But a second positive test, in that circumstance, remember, requires dismissal.

Mr. SIKORSKI. Right.

Ms. WILLIAMS. You can't survive that.

So, the whole thing, I think, is seen for the sham it is.

Mr. SIKORSKI. Say this program goes for twenty years, and someone has a positive this year, goes through treatment program, and twenty years from now has a positive, does that count as your second confirmed——

Ms. WILLIAMS. Well, the guidelines do not suggest that there is any statute of limitations—that would operate that would operate. I think that that couldn't stand up obviously.

Mr. SIKORSKI. May I? There, I'm going to ask a few questions?

Ms. WILLIAMS. Sure.

Mr. SIKORSKI. And then you can add whatever you like at the end and complete if you can.

The Customs program has been going on for some time, the testing program?

Ms. WILLIAMS. Well, it was begun last summer.

Mr. SIKORSKI. Before the Executive Order?

Ms. WILLIAMS. Yes. It preexisted the Executive Order.

It was halted as a result of our lawsuit in November.

Mr. SIKORSKI. Have they attempted to conform with the new guidelines and regulations?

Ms. WILLIAMS. Well, I think nothing is being done now, but, at least we are not aware of it.

We did negotiate fully on the procedures that would be involved.

The thing I don't know, whether anything has been done on the certification of the laboratory procedures.

In general, I will say that the procedures for the testing are very, very similar to the HHS guidelines.

And, of course, in our litigation we have assumed all of the safeguards. We have assumed that it is going to be conducted in the most careful way possible, with the best technology possible. And we're prepared to litigate any situation where that's not so.

Mr. SIKORSKI. Amtrak, court martials—There are a whole host of cases around the country where that assumption, with errors up to sixty-nine percent are reported.You can't make that assumption.

But even assuming that the tests are going to be done up to a very high standard——

Ms. WILLIAMS. Right. Even in that circumstance, we say it can't. It's unconstitutional. And that's what the court found.

But this program, the Customs program, I forget, I think they were testing about fifty people a week for about six months, something like that.

Mr. SIKORSKI. For the two drugs, or wider?

Ms. WILLIAMS. No. They tested for all five drugs.

Mr. SIKORSKI. But not alcohol?

Ms. WILLIAMS. Oh, no.

I think you're quite right. The specter of that is too frightening for too many people. Although the evidence we have looked at, the data we have looked at, show not only that much more is known about alcohol abuse, and that it is a much, much more serious problem, but that it's much easier to test for. In both these situations, let's not overlook the possibility of simple observation with the human eye.

Mr. SIKORSKI. Yes.

Ms. WILLIAMS. Tests, urine tests or blood tests, in the workplace, are frequently completely unnecessary.

And if there are performance problems, the Government has the full range of remedies now to deal with those problems.

Normally, anybody who is not operating a safety switch somewhere that is going to affect hundreds of thousands of people somehow impaired on the job, not performing, mental acuity suffering, that person is fired. That's what happens. You don't inquire into why necessarily.

And the way it should work, I think, is if the person said wait a minute, you can't fire me, I have a drug problem; then is when you get referred for an employee assistance program if not before that point.

Mr. SIKORSKI. Are your employees Customs agents?

Ms. WILLIAMS. Well, Customs inspectors were a prime target. But it was not limited to people who handled drugs, which Customs inspectors do, or carry guns, which they do, or have any other impact on public safety.

Mr. SIKORSKI. People inspect bags as they come in.

Ms. WILLIAMS. Yes.

Mr. SIKORSKI. People inspect fruit and vegetables and——

Ms. WILLIAMS. Sure. But there are also noninspectors who were covered. There were lawyers covered, for example. There were clerical employees. There were cafeteria workers in the Commissioner's cafeteria I believe. Sensitive employees.

Mr. SIKORSKI. How about the Commissioner?

Ms. WILLIAMS. The Commissioner, yes. He was one of the first volunteers. He happily did so, and most managers in the Customs Service.

Mr. SIKORSKI. How about contracting out the tests? The Customs must contract out for some tests, you know, like assay tests and other things.

Ms. WILLIAMS. The tests were all conducted by—as far as I know—private contractors. Yes.

Mr. SIKORSKI. Okay.

That's a question, too.

Ms. WILLIAMS. Yes.

Mr. SIKORSKI. All this drug testing was contracted out.

Ms. WILLIAMS. Right.

Mr. SIKORSKI. But Customs Service also contracts out part of their traditional day-to-day duties do they not?

Ms. WILLIAMS. Oh. Laboratory analysis.

Mr. SIKORSKI. Yes.

Ms. WILLIAMS. Yes, I believe some of that is done under contract.

Mr. SIKORSKI. But these people weren't tested for drugs.

Ms. WILLIAMS. No. I think that the focus I have heard on that this morning is very helpful. Because it seems to me the reason—one obvious reason why this isn't required is I think they know they couldn't get away with it constitutionally.

Mr. SIKORSKI. Right.

Ms. WILLIAMS. I mean, they think they have an argument against employees that will vitiate the constitutional right. But I think they wouldn't dare try to impose it on people who aren't technically employees, no matter that they are paid by taxpayer funds.

Now, of course, there are a great many things you can require of contractors, certainly. And I don't know whether that would pass muster or not. But I don't think they want to get in to that hornet's nest.

I don't think they care really.

If there's anything that's come out clearly in all of this, and certainly our research bears it out, it is that this was first, and foremost, and probably exclusively a political statement.

Mr. SIKORSKI. And Federal employees are easy targets.

Ms. WILLIAMS. Absolutely. They are the handiest. They are the handiest of targets.

The argument that the Federal employer should be able to do what any private employer can do, who is unconstrained by the Constitution, is absurd, because the entire mix, the entire balance is different in the Federal Government.

We may have a constitutional right with respect to our employer. But there are many, many things we can't do because the Government is our employer, not the least of which is bargain over this whole matter. And if it's abhorrent enough to strike, we can't do that.

Mr. SIKORSKI. And if the politicians who have spoke eloquently or at least loudly about the need to do these things were sincere, they would start in their own agencies.

The White House could have their own program. They didn't have to wait for Customs or for other people to go ahead. And they could have it now.

Ms. WILLIAMS. Absolutely.

Mr. SIKORSKI. There are labs around that could do the job, the job that they seem to want done.

Maybe things would have been different if Ollie North and Bud McFarlane and Fawn Hall and others were tested in their national security roles.

Ms. WILLIAMS. Well, that's an interesting proposition.

Mr. SIKORSKI. That's why it is reserved for 1:20 in the afternoon.

Ms. WILLIAMS. I do think that they might well encounter the response that Secretary Shultz gave when he was asked to submit to a lie detector test. And he was mightily and properly outraged. And that's the normal human response to this matter.

Mr. SIKORSKI. And the deputy of the commission that made the recommendation that we have this testing had a similar response to the thought.

Ms. WILLIAMS. Yes.

You know, in order to avert an obvious air piracy problem, we're willing to walk through a magnetometer. We're willing to do that to enter this building, where there is a dramatic threat, something to go on, a reason to believe that a problem could occur that would endanger a lot of people, and where the intrusion is minimal. That's obviously no comparison to what's going on here.

This is a far more dramatic intrusion for no excuse whatever.

I have never really seen such a demoralizing, debilitating, destructive program aimed at employees. And I was a Federal employee for a long time.

I would be quitting if I were faced with this problem today.

I think the President should probably follow his own advice, which is, if it's not broken, don't fix it.

Mr. SIKORSKI. Just say no.

Ms. WILLIAMS. That's right. Just say no.

Thank you.

[The statement of Ms. Williams follows:]

STATEMENT OF LOIS G. WILLIAMS, DIRECTOR OF LITIGATION,

NATIONAL TREASURY EMPLOYEES UNION

Thank you Mr. Chairman and other distinguished members of the House Subcommittee on Human Resources for this opportunity to discuss the President's proposal that federal civilian workers be subject in large numbers to drug testing. My name is Lois G. Williams, Director of Litigation for 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.

We do not appear today to argue that federal employees should have the right to use illegal drugs. We urge, rather, that there are constitutional limits on the government's investigation into the off-duty behavior of its employees. NTEU has consistently opposed both publicly and in court the efforts of this Administration to impose unwarranted, unwise, unconstitutional drug testing on federal employees. In the first important test of the Administration's program, the government has appealed from our successful challenge to the U.S. Customs Service's urinalysis program, and we are awaiting the Fifth Circuit's decision.[1/] The Customs Service, of course, chose to impose a costly program of employee urine testing, while simultaneously urging the

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1/ NTEU v. Von Raab, ___ F.Supp. ___ (E.D. La. 1986), appeal pending, No. 86-3833 (5th Cir.) (argued February 3, 1987).

Congress to cut dramatically the resources for interdicting illegal drugs at the nation's borders.[2/] This perverse approach is emblematic of this Administration's entire approach to the nation's drug problem--it fabricates a "problem" among federal employees; it pretends a solution; and, in so doing, it diverts both attention and resources from the real societal problem of drug abuse.

Our second case is a challenge to the President's broader program embodied in Executive Order 12564.[3/] That Order requires widespread urine testing across all sectors of the federal workforce, and imposes severe disciplinary penalties, including removal, against any employee who either objects to providing a urine sample for chemical analysis or whose urine sample is reported positive for specified illegal drugs. We are filing briefs in that case April 8, and it is scheduled for hearing on April 30.

Let me describe what federal employees are threatened

2/ The Administration's FY 1987 budget proposal would have cut the Customs budget and cut its personnel levels by 1500 positions. The FY 1988 proposal was for a cut nearly 1,000 below original 1986 levels, as well as a rescission of the 1987 authorization of increased staffing levels. See Budget of the United States Government, Fiscal Year 1988, pp. 1515 (personnel summary) II-69 (rescission proposal).

3/ NTEU, et al. v. Reagan et al., No. 86-4058 (E.D. La.).

with.[4/] Let us follow Mary Green, who has been ordered to report immediately to a specified "collection site" for a urine test. Mary has been a federal employee for 15 years, and is now secretary to a high level manager. Her position has been designated for random drug testing, but she has never given anyone reason to believe she uses drugs.

Upon reporting, she finds that "collection site" means bathroom. It is attended by a "collection site person," who is in the bathroom in order to scrutinize Mary's appearance and behavior while she urinates, to make sure she is really Mary Green, and to see that Mary does not adulterate or substitute her sample.

The collection site has been "secured" prior to Mary's arrival. Toilet bluing agents have been placed in the toilet tanks, and all other sources of water have been cut off. Mary is required to provide identification and surrender "unnecessary outer garments" and personal possessions. Failure to present proper identification would be duly noted. While Mary disrobes, the "collection site person" observes and would "note any unusual behavior or appearance." When Mary is ready to urinate, she will be

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4/ The description that follows contains only requirements enumerated in the HHS Guidelines, "Scientific and Technical Guidelines for Drug Testing Programs," Department of Health and Human Services, Feb. 13, 1987.

required to wash her hands. During this period, the monitor keeps her under scrutiny and assures she is out of range of any water supply, soap dispenser, or cleaning agents.

Mary is allowed to provide her urine specimen in the "privacy" of a stall or behind a partition, while the "collection site person" again notes "any unusual behavior." Had a public restroom been used, the collection site person would remain in the restroom (although outside the stall) while Mary "voids" into a specimen container. Had the agency had "reason to believe" that Mary might alter or substitute the specimen, the agency could order that the monitor directly watch Mary urinate, exposing her genitals and urinary stream to the monitor's view. Mary is instructed not to flush the toilet herself after she "voids"; the collection site person must flush the toilet.

After receiving the sample, the collection site person must confirm that Mary has provided a sufficient amount of urine. If she has not, she may be detained and required to drink additional liquid. Thereafter, Mary is allowed to wash her hands. The collector then checks the sample's temperature and "conducts an inspection" of its color and character for signs of adulteration. If the temperature falls outside a certain range, Mary must try again, this time under the direct observation of the monitor.

The monitor follows her instructions to "always attempt to have the container or specimen bottles within view before and after the individual has urinated, and before and after it is sealed." Chain of custody procedures must be followed to attempt to prevent switching and mislabelling of samples.

The urine sample is then subjected to laboratory analysis. If Mary has not used one of the specified illegal drugs (the specimen must be screened for at least marijuana and cocaine), she should have nothing further to fear, except for two things. First, though perhaps unlikely, laboratory errors can occur in chain of custody procedures or in contaminated glassware or the like. Only last week, the Department of Transportation announced that positive drug test results from the train crew involved in the highly publicized fatal wreck last January may have been flawed by "procedural irregularities " at the laboratory also used by the FAA and the Federal Railroad Administration.5/ Second, if Mary is one of the many who take one of the specified drugs under prescription, yet another invasion of privacy occurs. That drug will be detected and the medical condition will have to be revealed. Thus, legitimate use of codeine,

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5/ See John Lancaster, "Possible Flaws Found in Conrail Drug Tests," Washington Post (April 2, 1987).

morphine, tincture of opium, and others will have to be documented to the agency's satisfaction.

Does this sound like a medical examination? It should be no surprise that employees are offended by these tests. Nor should it be a surprise that we are prepared to litigate their constitutionality to the highest court, if necessary.

Our cases and the many other challenges to urine testing are grounded in the Fourth Amendment's protection against unreasonable search and seizure by the government. The Supreme Court just last week decisively rejected the Justice Department's argument that the Fourth Amendment does not protect government employees against unreasonable search and seizure by their employer. In the case of O'Connor v. Ortega, No. 85-530, decided March 31, 1987, all members of the Court agreed that the government employee retains a reasonable expectation of privacy even in his desk, office, and files. The Court recognized that even greater privacy is involved in the employee's belongings brought into the workplace. Necessarily, the highest of privacy expectation attaches to the employee's own body and bodily functions.

Since there can no longer be any question that the Fourth Amendment applies to government employee urine testing, then, the analysis must focus on whether the testing is "reasonable." The courts will balance the harm to privacy expectations against the necessity for the search. Our

position is that urine drug testing intrudes most heavily on an individual's sense of privacy and dignity. Against that considerable intrusion must be balanced the government's interest in and need to conduct the tests. It is undisputed that urine tests do not and cannot measure in any way worker impairment, intoxication, or on-the-job use. In addition, urine tests are expensive if properly conducted and fraught with the risk of devastating error, even when the most sophisticated technology is employed. Perhaps most important, as I will discuss more fully in a moment, there is no demonstrable problem of drug use among federal employees, nor any reason to believe that a drug problem exists. Therefore, urine testing cannot be said to be necessary to meet any reasonable goal; balanced against the profound invasion of privacy it represents, drug testing cannot meet the Fourth Amendment's reasonableness test.

Chemical surveillance of federal employees is an outrageous invasion of their privacy. It requires employees to urinate on demand under the close scrutiny of a stranger, to submit to chain of custody procedures usually reserved for criminals, to disclose confidential medical information, and to reveal, through laboratory analysis of their bodily waste, details of off the job activities during prior days or even weeks.

Why is this being asked of federal employees? How have they inspired their President's or their nation's distrust? What have they done to suggest that they should be the targets of this chemical surveillance? The answer is, nothing.

Our Constitution and our society tolerate some invasions of privacy when they are necessary to meet a known and serious danger that cannot be met in a non-intrusive way. We walk through magnetometers at airports, a relatively non-intrusive search, so as to prevent the known and dramatic danger of air piracy. We permit limited weapons searches of visitors and employees at prisons, because they are volatile situations where weapons and contraband are particularly dangerous, and the search directly abates the danger.

But this Administration has embarked on its drug testing crusade without any such justification. It has never bothered to examine the extent or the impact of illegal drug use by its employees. It purports to base its invasion of employee privacy and dignity on needs of workplace safety, efficiency, and productivity.[6/] However, it has never compiled evidence on workplace safety problems attributable to drug use; it has never attempted to analyze inefficiencies such as absenteeism or health costs attributable to drug

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6/ See E.O. 12564 Findings.

abuse; it has never studied loss of productivity owing to employee drug use. It simply asserts, and expects us to believe, that these problems exist.

In fact, our research in connection with our litigation shows that very little is known about drug abuse in the workplace. Alarming "statistics" have been widely circulated by the burgeoning drug testing industry. This immensely profitable industry has obviously benefited from the attention currently focused on the nation's serious law enforcement drug abuse problem.7/ However, that industry has offered no facts or research that assists in measuring any problem in the workplace, either private or public. Nor has such research been undertaken by others.

To illustrate, let us look briefly at the two studies most commonly relied upon in discussions about the drug

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7/ As media and public attention has increasingly focused on the law enforcement problem, so have the profits increased in those sectors of private industry promoting drug testing and/or drug treatment programs. See, Weisman, Adam Paul; "48 Hours on Crock Street: I Was A Drug Hype Junkie," The New Republic (October 6, 1986), pp. 14-17. Industry sources state that the drug testing industry's profits have tripled and quadrupled in the past two years. See Nell Henderson, "Drug Testing Industry Flourishes," Washington Post, June 30, 1986. Gerard A. Marini, President of "Diagnostic Dimensions," a subsidiary of Hoffman-LaRoche (purveyor of "RIA" drug testing kits), has boasted that he has "no doubt this is going to be big, big business." Chapman, Fern Schumer, "The Ruckus Over Medical Testing," Fortune Magazine (August 19, 1985), p. 60.

problem. The first is the National Institute of Drug Abuse Household Survey. The most recently published Household Survey, 1985, shows that there has been a steady decline in illegal drug use since the 1970's. The Survey certainly does not suggest, nor do we, that no law enforcement problem exists. But it clearly belies the argument that there is a new epidemic of drug use that requires dramatic new remedies in our work places.

Moreover, as the Comptroller General testified to this Subcommittee last fall, the Survey of drug abuse patterns in society will not justify imputing those patterns to the federal workforce. Drug abuse in the general population sharply declines after age 26. In that older population, 6.6 percent used marijuana, 1.2 percent cocaine, and less than one-half percent used hallucinogens or heroin. Ninety-four percent of the federal workforce is over 26, and the average age is 42. We agree with the Comptroller General that, given that profile, plus the screening processes and security clearances that precede federal employment, drug abuse among federal employees would be less--and we believe far less--than in the general population.[8/]

8/ Statement of William J. Anderson and Henry R. VanCleve, U.S. General Accounting Office, September 10, 1986.

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One of the President's most prominent "findings" in the Executive Order was that drug use "results in billions of dollars in lost productivity each year." The study most often cited for the estimate of productivity losses is the Research Triangle Institute's "Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness: 1980," June 1984. That study, however, tells us nothing about the cost to the government associated with employee drug use, nor does it claim to do so. It measures "productivity" solely in terms of income, and the only significant finding regarding drug abuse is the finding that lower income levels are to be found among persons who smoked marijuana for thirty consecutive days at some past period in their lives. The study admittedly can find no impact on income from current marijuana or other drug use. Therefore, if the study is sound, it merely says that one who at one time was a heavy marijuana user can expect to earn less than one who was not. The study itself acknowledges that it establishes no causal relationship between drug use and lower income, and does not measure such factors as motivation to seek higher paying jobs.

However appropriate it may be to measure productivity by income levels, it is clearly absurd to use that "productivity" figure to estimate the costs of current drug use for American employers. Presumably, such costs are not unmeasurable: absenteeism, health care costs, accident rate,

turnover rate, other inefficiencies, are objectively observable. They have simply not been studied, and that fact strongly suggests that no reason to study has shown itself. The Department of Health and Human Services was quite correct when it said in 1984:

> The fact is, very little is known about the complex relationship which undoubtedly exists between drug abuse, worker performance and productivity or the lack thereof, and how the work setting influences or is influenced by drug abuse.9/

There is simply no evidence to suggest that the government as employer is incurring any significant costs attributable to drug abuse among its employees.

Even if a problem exists, undetected, the government as employer has never tried to address it with more effective, less intrusive methods. Among the obvious possibilities are supervisory training to detect possible problems (never mandatory before the Executive Order), full commitment to Employee Assistance Programs, and simple reflex and other tests for actual impairment on the job.

In short, considering that urine tests do not measure impairment on the job; that there is no demonstrable problem

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9/ Drug Abuse and Drug Abuse Research, Triennial Report to Congress from the Secretary of Health and Human Services, 1984, at p. 26.

of drug abuse among federal employees, and no reason to believe that a new problem will arise; and that these tests are highly invasive of reasonable privacy expectations, they are unconstitutional when conducted without probable cause for most employees, and without at least individualized suspicion for highly sensitive positions directly affecting public safety. I turn now briefly to the problem of punishment for off-duty conduct and to the application of the probable cause or reasonable suspicion standards to the categories of employee in jeopardy under the President's program.

The centerpiece of the Administration's effort is "random and comprehensive" urine testing of current federal employees and applicants for employment. In addition, the Executive Order mandates specific disciplinary actions, including removal, that agencies must take in retribution against an employee who produces a "positive" urine sample or who is otherwise tagged as having used an illegal drug, whether on or off duty. This aspect of the Order, requiring agencies to punish and remove employees, without reference to their job performances, but instead on the basis of off duty conduct--even illegal conduct--violates current civil service law. That law forbids government actions against its employees based on their private activities, unless it can prove that the off duty conduct directly affects job

performance. To the extent that the Order purports by fiat conclusively to establish this statutorily required nexus whenever an employee is identified as a drug "user" under the new program, the Order violates both the statute and the due process clause.10/

The Executive Order and its implementing regulations direct and/or authorize agencies to require employees to undergo drug testing under at least four circumstances, all of which we contend violate the Fourth Amendment: first, random testing of "sensitive" employees; second, testing of any employee involved in an accident or unsafe practice, regardless of whether any suspicion of drug use by that employee exists; third, testing of any federal employee based on mere "reasonable suspicion" of illegal drug "use," whether on duty or off; fourth, testing of any applicant for any federal job as a condition of employment. Employees who

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10/ To complement his Executive Order, the President proposed that a "Drug-Free Federal Workplace Act of 1986" be enacted. Among other things, this Act would have amended the Civil Service Reform Act "to make clear that nothing in the Act would 'permit or require the employment of an applicant or employee' who uses illegal drugs." "Absent this change," the White House explained, "a drug-using employee might attempt to argue that his off duty drug use has no "nexus" or relationship to the performance on the job, and that under section 2302(b)(10) of Title 5, it would be a prohibited personnel practice to take disciplinary action against him." The "Drug-Free Federal Workplace Act," however, was never enacted.

refuse to submit to urinalysis where directed to do so will be punished with removal, and applicants who decline to produce a sample will be denied federal employment.

Regarding the first category, the Executive Order and its implementing regulations require agency heads to establish a program for random testing of employees in "sensitive" positions. The pool potentially subject to testing includes all employees currently classified as "sensitive," a very broad category indeed. It also includes other employees whom the agency head wishes to add to the pool, because he believes their positions involve "law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence." Current "sensitive" positions include, in many agencies, clericals, accountants, lawyers, paralegals, and many other positions that are clearly not related to public safety or the national security.

Although the Justice Department has refused to provide, in discovery, lists of positions currently designated as "sensitive," we believe that the very broad reach of the sensitive categories at IRS typifies all federal agencies. For example, at the Internal Revenue Service, all positions at grade GS-9 or equivalent, or above, are considered at least non-critical sensitive. These include

attorneys, law clerks, paralegals, real estate appraisers, computer technicians, and so on. Many clerical positions are "non-critical sensitive."

Under the OPM Directive, agency heads may choose not to test all "sensitive" employees in the pool. They may not, however, decide not to test any employees at all, even if they believe the workforce is completely drug free, that its performance is beyond reproach, or that other less intrusive alternatives can meet the agency's need equally well. In our view, the random testing of employees without any individualized suspicion of illegal drug use that directly affects job performance, cannot pass constitutional muster.

Second, any employee may be tested for illegal drug use in an examination regarding an accident or unsafe practice. While we have no quarrel with the government's authority to order a urine test where there is at least reasonable suspicion to believe an employee was impaired at the time of the accident or "unsafe practice," the mere fact of accident, without more (such as indication that it might have been due to human error on the part of particular employees) does not provide a constitutional justification for subjecting employees to urine testing.

The third category of testing established by the Order and regulations authorizes testing <u>any</u> federal employee without notice, upon "reasonable suspicion" to believe that

the employee "uses" illegal drugs. The President thus bestows upon agency heads, and by necessity government supervisors, the right to require a urine test of any employee without probable cause and without a warrant. The supervisor may order a urine test based on a mere suspicion that an employee has used illegal drugs, off duty or on. In fact, where reasonable suspicion of drug use exists, the OPM regulations authorize the agency to require particular employees to provide their urine samples under direct observation.11/

Even if it were constitutionally permissible to require employees in certain sensitive positions to submit to a urine test where reasonable suspicion exists that they are impaired on the job, it is unconstitutional to test non-sensitive employees on the basis of mere reasonable suspicion of illegal drug "use" either on, and certainly off, the job. It must be appreciated that the courts have permitted searches on less than probable cause (i.e., reasonable suspicion) only in very limited, highly dangerous situations. To abandon the probable cause requirement just because the subject is a federal employee is absolutely unjustified under the Constitution.

11/ See FPM Letter Section 4(g)(3)(a).

Finally, under the order and regulations, applicants for any federal position may be required to produce a urine sample. An agency may test all applicants or may test only those who apply for "testing designated positions." It may decide to insert a drug test into a physical examination, where one is required. In any case, agencies are not required to possess any particularized suspicion before testing applicants.

Here, too, testing applicants for evidence of drug use without particularized suspicion violates the Fourth Amendment. Applicant testing violates the Fourth Amendment because it is not based on individualized suspicion. Moreover, applicant testing is ineffective, in that a positive result can be avoided by simply abstaining from drug use for a few days. A test that is ineffective to meet the stated goal cannot be constitutional.

In sum, probable cause still remains the constitutional standard for searching the vast majority of federal employees. Employees in the most highly sensitive of positions may no doubt be searched on reasonable suspicion. However, the search must be for evidence that the employee is impaired in functioning in that highly sensitive position, and where the search is especially intrusive, as are urine tests, the justification must be correspondingly compelling.

The President's program fails on all counts. It is an attempt, once again, to make a political point at the expense of those closest at hand: the nation's public servants.

Mr. SIKORSKI. Thank you.

That concludes our hearing. We thank you and HHS for staying the route and we appreciate it.

We will see more of this issue as we go in, looking at the accuracy issue of these urine tests, and alternatives, and focus on the constitutional issues as well.

We have a lot of ground yet to cover. Not to mention all the questions that remain unanswered after this hearing today.

Thank you.

[Whereupon, at 1:22 p.m., the subcommittee was adjourned.]

DRUG TESTING OF FEDERAL EMPLOYEES

WEDNESDAY, MAY 20, 1987

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

The subcommittee met, pursuant to call, at 9:30 a.m., in room 311, Cannon House Office Building, Hon. Gerry Sikorski (chairman of the subcommittee) presiding.

Mr. SIKORSKI. Today the Subcommittee on Human Resources of the Committee on Post Office and Civil Service continues its oversight of drug testing of Federal employees.

Under Rule 10 of the House, this subcommittee is charged with the responsibility to examine and oversee deployment of Federal human resources generally, and specifically, among other things, the rights to privacy for Federal employees.

At the subcommittee's April 7 hearing, we examined the current status of the administration's efforts to implement Executive Order 12564 mandating the establishment of agency programs to drug test Federal employees and the development of employee assistance programs [EAPs].

We dissected the Office of Personnel Management's drug testing regulations issued in November of last year and the Health and Human Services's scientific and technical guidelines issued February of this year, which together comprise the procedural and legal structure through which the administration plans to test over one million so-called sensitive workers in the Federal work force.

Today's hearing will more closely examine the technical aspects of the administration's drug testing program. Our interest is not abstract. Just turn on the TV or look in the newspapers or periodicals. The subcommittee decided to increase the magnification of its microscope because the information from our earlier hearings shows the program has several serious flaws.

The administration's crusade to screen the Federal work force for evidence of drug use rests on the premise that widespread drug testing by urinalysis yields consistent, reliable results upon which personnel, civil and perhaps criminal action can be taken. But such urine tests are, in fact, fraught with limitations that can cause people to be falsely branded as drug users, to be disciplined, demoted, fired or to be referred for criminal prosecution.

We know that faulty laboratory equipment or procedures, as well as sloppy work by ill-trained technicians lead to erroneous test results. Even the gas chromatography/mass spectrometry, the GC/MS test, the most sensitive and accurate tool we've got for the

identification of miniscule amounts of chemicals in urine, and embraced as the confirmatory test in the administration's test plans is only as good as the initial sample taken, its chain of custody, and the technician operating the machine. Even with frequent lab quality control tests, many experts agree quality can vary from day to day and from one technician to the next.

Moreover, in the administration's attempt to construct something from their high and mighty election year rhetoric, they forgot to incorporate provisions essential for a fair, smooth and cost effective program. Conflicting provisions of the Civil Service Reform Act, Privacy Act and the Rehabilitation Act, along with the lack of program uniformity among agencies, and the lack of centralized oversight, may well leave this vaunted drug testing initiative as little more than a governmental Comet Kahoutek—and you might remember that in the 1970s, long on public relations and hype, but nonexistent to the naked eye.

The architects of the administration's drug testing program have been wholly unable to answer such critical questions as: who and in what numbers are to be tested? How much are these tests to cost? What is to happen regarding assistance and counseling, rehabilitation and disciplinary actions? When are the various agencies going to coordinate efforts? Who is responsible for centralized oversight for Federal agency drug testing? And what about the accuracy and reliability of urine tests themselves?

Our witnesses today will focus on these subjects, which need to be addressed before the Administration marches on. We have the General Accounting Office expert, the expert at the Office of Technology Assessment, two hands-on scientists, and a lawyer who is an expert on urinalysis litigation.

With that we will begin. Our first witness is L. Nye Stevens, Associate Director in the General Government Division of the General Accounting Office. The GAO has closely monitored the administration's drug testing efforts since the President issued his executive order mandating drug testing for Federal employees. Mr. Stevens will present the GAO's latest analysis of OPM's drug testing regulations and the HHS's scientific and technical guidelines.

He is accompanied by Richard Seldin and Tom Beall.

Good morning, gentlemen. Do you want to proceed with your testimony, Mr. Stevens? If you like, all of it will be placed in the record as you have submitted it, and you can summarize as you desire.

STATEMENT OF L. NYE STEVENS, ASSOCIATE DIRECTOR, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY TOM BEALL AND RICHARD SELDIN

Mr. STEVENS. Yes, Mr. Chairman. It is a rather long statement. So I have a shortened version that hits the high points and summarizes those in 5 minutes or so, if that is all right with you.

In analyzing OPM's guidelines for the government-wide implementation of the President's drug testing executive order and the technical and scientific guidelines that HHS has developed, we have some concerns about those, some of which you have just mentioned. Ours fall into four broad areas.

The first of these is the decentralized nature of the decisionmaking on drug testing and the implications of that decisionmaking for equitable treatment of employees in different agencies.

The second area is the broad one of employee rights.

A third one is a concern we have about the lack of any provision for long-term oversight or monitoring of the drug testing program on a governmentwide basis.

And then finally we will say a few words about program costs, if we may, and then my colleagues and I will respond to any questions you have.

We noted in our September testimony last year before this subcommittee that the definition of an employee in a sensitive position in the executive order was very broad, and it could be interpreted to cover a substantial part of the Federal work force. The OPM guidelines used the very same definition. They do not elaborate on it. They do not make it any more specific than it was in the executive order.

Furthermore, the guidelines allow the head of each agency to determine which positions within the agency should be designated as subject to testing, but they really do not provide any additional criteria to help an agency head make those decisions.

Naturally, with such a broad delegation and latitude, employees in different agencies holding very similar positions may be treated quite differently.

A similar problem arises with the HHS technical guidelines and their requirements for the testing of drugs. They require each agency to test for two drugs: marijuana and cocaine. They are also authorized, however, to test for opiates, amphetamines, PCP, and on approval, other unspecified drugs as well. Again very wide latitude is provided, but no rationale or criteria are given to agencies to make consistent choices.

It is hard to believe that some agencies will not screen for a broader variety of drugs than others.

There is also a great deal of latitude in these guidelines in the matter of discipline. Permissible actions after the first I will call it offense, for lack of a better word, the first finding, range from a written reprimand to dismissal. It is left up to agency discretion. There may arise the situation where a first-time violator is given a written reprimand in one agency, while another employee in the same situation in a different agency or conceivably even perhaps in the same agency is dismissed or is fired. There are no specific criteria to apply in determining the choice of which disciplinary action for an agency to take.

Now, in one respect the OPM guidelines seem to improve on the executive order in that we read them to preclude agencies from disclosing test results to the Attorney General without the employee's consent. The executive order had simply said that agencies are not required to report testing information to the Attorney General, but neither were they prohibited in the executive order. So we think the guidelines are an improvement, but there is a discrepancy now between them and the executive order.

The HHS guidelines specify agency and contractor records containing drug testing data will be a Privacy Act system of records. One exception to the nondisclosure restrictions of the Privacy Act

involves the routine use provision, which is defined as the use of a record for a purpose which is compatible with the purpose for which the data were originally collected, and that provision has been interpreted very broadly in the past by agencies.

For instance, it can authorize the disclosure of records to other agencies when related to the hiring of employees, security clearance matters, provision of benefits, and so forth.

The OPM guidelines also allow an agency great latitude in follow-up testing of employees during and after counseling or rehabilitation, but they do not say how long an employee in this category would be subject to retest. Some agencies might interpret that as providing no limit at all, and others may not have a retesting program at all.

The OPM guidelines are clear about the consequences of the second confirmed positive test, however, and that is mandatory dismissal, but they provide no discussion of any time limit or difference between the first and second confirmed test that would stay or mitigate the mandatory dismissal upon a second finding.

In the matter of laboratory testing, there is also a good deal of decentralization. There is no indication in the guidelines of the degree of error in proficiency testing or any other conditions or criteria that describe what is meant by unsatisfactory performance on the part of a laboratory operating under contract. The quality assurance standards used by each agency may very well vary, and since one lab may perform analyses for several agencies, it could create a situation where one agency considers the lab's performance satisfactory while another agency does not and stops using it.

Employee rights is the second area that we have some concerns about. Here it relates to the Civil Service Reform Act, and an important protection under civil service law is that with some exceptions, there is a requirement that an agency taking a disciplinary action demonstrate a nexus or a connection between the employee's off-duty conduct and his job performance. That requirement is not mentioned here, only that an employee have a confirmed positive test as the basis for action.

Depending on the employee's position, drug test results alone may not be sufficient to sustain a disciplinary action under the law, and we expect a good deal of litigation on this point.

Perhaps our number one concern I will come to now, and that is the lack of oversight. The very wide latitude given to agencies would not be of such concern to us, except that there is no provision in these guidelines for centralized oversight or monitoring of the drug testing program governmentwide. I think you saw this, Mr. Chairman, in the April hearings when the General Counsel with OPM was here and more or less said that there were a lot of questions that you were asking him that could not be answered by anybody in the executive branch, that these were matters essentially left up to individual agencies.

At present there is a diffusion of program responsibilities among OPM, HHS and the Department of Justice, and it raises the question: who will be checking to see how well the program is working across government?

Also, there is no requirement, I might add, for each agency to monitor or evaluate its own program by itself.

I will skip briefly over the matter of program costs, and just say that the wide latitude, discretion, decentralization that is allowed to individual agencies, is going to continue to make it difficult for us or anybody else just to estimate the costs of the program until all of these agencies have made the decisions that they are going to have to make down the line.

In summary, Mr. Chairman, we recognize the importance of providing each agency with sufficient flexibility to implement a testing program that is responsive to individual needs and resources, but in our opinion, a more detailed set of standards than those provided in the OPM and HHS guidelines will be necessary to insure that a sound, consistent and defensible set of programs is implemented throughout the government, and this is particularly true in view of the fact that the guidelines do not provide any mechanism or procedure for oversight, review or monitoring of the agency drug testing programs once they are underway.

That concludes the prepared comments I have, sir, and we will respond to any questions you would like to pose.

[The prepared statement of L. Nye Stevens follows:]

STATEMENT OF L. NYE STEVENS, ASSOCIATE DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Subcommittee, it is a pleasure to appear before you today to comment on the Office of Personnel Management's (OPM) guidelines for establishing a drug-free Federal workplace and the Health and Human Services' (HHS) companion technical guidelines concerning the operation of drug testing programs.

Executive Order 12564 requires that the head of each Executive agency establish a program to test employees for the use of illegal drugs. As directed by the Order, OPM issued guidelines on November 28, 1986, which are intended to provide governmentwide guidance on the implementation of the Executive Order. Also pursuant to the Executive Order, HHS issued scientific and technical guidelines on February 13, 1987. While these guidelines provide further instruction concerning the implementation of the Executive Order, we are concerned that they do not address in sufficient detail, or at all, certain aspects of how the testing programs will operate. Specifically, we have four areas of concern:

-- programs may not be uniform since agency interpretation of some requirements in the guidelines may vary considerably and thus similarly situated employees may not be assured similar treatment;

-- employee rights are not fully addressed;

-- no provision exists for continuing, centralized oversight; and

-- how much the program will cost continues to be unknown.

Guidelines provide wide latitude to agencies

We testified before this Subcommittee in September of last year that the definition of "employee in a sensitive position" in the Executive Order was very broad and could be interpreted to cover a substantial part of the federal workforce.[1] The OPM guidelines provide further procedural directions for identifying employees in sensitive positions to be tested, but the definition of "employee in a sensitive position" is the same as that in the Executive Order. Furthermore, the guidelines allow the head of each agency to determine from those sensitive positions for which randomized testing is authorized, which positions should be subject to testing. Thus, it is possible that employees in one agency will be identified as holding designated positions but not employees in another agency holding similar positions with similar responsibilities.

Equity and fairness seem to dictate that if federal employees are to be subject to drug testing programs, such programs should be structured so that uniform criteria are consistently applied to all federal workers. The OPM and HHS guidelines, however, provide wide latitude to agencies and could result in notable differences between agency programs.

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[1] In our comments there and in earlier comments on H.R. 4636 (99th Cong., 2nd Sess. (1986)) we addressed certain constitutional problems about the drug testing programs provided for. Consistent with your request, we have not again addressed those issues here.

The HHS guidelines specify that, at a minimum, each agency shall test for marijuana and cocaine. The agencies are also authorized to test for opiates, amphetamines, PCP, and can seek authority from HHS to test for other drugs as well. The selection of these three drugs as well as others to test for, however, is up to each agency. How are agencies to make this determination? Neither the OPM nor HHS guidelines provide any rationale, criteria, or procedure for determining what other drugs should be screened, or not screened.

An agency decision not to test for certain drugs of abuse may inhibit the goal of having a drug-free workplace. Employees may be free of those targeted drugs but not necessarily others. It can also create a situation where employees in some agencies might be screened for use of a broader variety of drugs of abuse than employees in other agencies.

The guidelines direct agencies to discipline the employee who has a confirmed positive drug test. The OPM guidelines cite a specific list of disciplinary actions that an agency may take upon the first confirmed determination that an employee uses illegal drugs. Such actions range in severity from reprimanding the employee in writing to removing the employee from federal service. The guidelines note that agencies have discretion in determining which actions to take. Again, there may arise a situation where an employee with a first time, confirmed, positive test for a particular drug is given a written reprimand in one agency, while another employee in the same situation in a different agency, or

perhaps even in the same agency, is dismissed. The OPM guidelines do not preclude this, nor do they discuss any specific criteria to apply in determining the choice of which disciplinary action to take except that the disciplinary measures must be consistent with the Civil Service Reform Act.

The Executive Order provides that drug testing shall not be performed under the Order for the purpose of gathering evidence for use in criminal proceedings and that agencies are not required to report testing information to the Attorney General. It might be interpreted, however, that agencies are not prohibited from disclosing test results to the Attorney General. On the other hand, the OPM guidelines seem to preclude agencies from disclosing test results to the Attorney General absent consent of a tested employee. We think the limitation in the guidelines sound; however, we note the discrepancy.

The guidelines provide several significant controls over employee records, and specify conditions under which written consent of the employee is required for disclosure of individual drug test results and treatment/rehabilitation records. The HHS guidelines specify that agency and contractor records containing drug testing data on employees will be a Privacy Act system of records. The guidelines do not provide any details as to how the maintenance of these record systems will affect confidentiality.

A system of records is defined by the Privacy Act as any group of records under the control of an agency from which information is retrieved by an individual's name or some identifying number. The

nor do they note any conditions or criteria that specifically describe what is meant by unsatisfactory performance.

Conceivably, labs that perform poorly on proficiency tests may still continue testing operations while they take corrective actions. If quality assurance functions are to be conducted by each agency as the guidelines indicate, then standards for lab review and criteria for revocation of accreditation may vary. Since one lab may perform analyses for several agencies, it could create a situation where one agency considers the lab's performance satisfactory while another agency does not.

The guidelines also provide that should a false positive error occur on a blind proficiency test, retesting of all specimens submitted to that lab for the period of 2 weeks prior to the detected error and 2 weeks after is required. This situation, however, is not specifically identified as constituting unsatisfactory performance. There is also no indication in the guidelines as to why individuals tested 15 or more days before or after the false positive do not need to be retested. If the interval between proficiency tests were 30 days, for example, and the last proficiency test showed a false positive, only those specimens in the prior 14 days would be retested. Those specimens, especially those with positive results, tested during the initial 16 days would not be retested, although they too might have been subject to a false positive result.

Employee rights and protections

Both the OPM and HHS guidelines contain provisions regarding protection of employees' rights. The OPM guidelines specify that employees are to be provided with a notice that test results will be handled with maximum respect for individual confidentiality, consistent with safety and security. The guidelines also instruct the agencies to provide employees with notice (1) that they may submit supplemental medical documentation to support legitimate use of a specific drug, and (2) that counseling and rehabilitative services will be made available. However, questions about employee rights and protections remain.

While the OPM guidelines cite the Civil Service Reform Act, there is no detailed discussion of employee rights under this law. An important protection under the law is, with some exceptions, the need for an agency taking a disciplinary action to demonstrate a nexus or connection between the employee's off-duty conduct and job performance. The guidelines do not require that such a nexus be established before taking disciplinary action, only that the employee have a confirmed positive test. Depending on the position held by an employee, drug test results alone may not be sufficient to sustain a disciplinary action.

Agencies are also not given any information concerning the implementation of the guidelines in relation to the Rehabilitation Act of 1973 as amended which generally includes a drug abuser as a handicapped individual. Under this act, employees may, under certain conditions, be protected from adverse actions such as

act restricts disclosure by federal agencies of personally identifiable information, unless the record subject consents or unless the records fall under one of 12 exceptions. One exception to this rule involves the "routine use" provision, defined as the use of a record for a purpose which is compatible with the purpose for which the record was collected.

Routine use notices are of particular concern with regard to confidentiality of records because some agencies have developed broad routine use justifications that permit extensive disclosure. Consequently, even though the OPM and HHS guidelines limit disclosure of test results, other disclosures might be made pursuant to routine uses established with the Privacy Act systems of records. For example, a common routine use established by some agencies is to authorize disclosure of records to other agencies when related to the hiring of employees, issuance of security clearances, or other benefits.

Another exception in the Privacy Act is that which allows disclosure to agencies for a civil or criminal law enforcement activity. Although neither the Executive Order nor the guidelines specifically allow for disclosure on this basis, there is no mention in either about how the Privacy Act would affect these restrictions.

The OPM guidelines also indicate that an agency may require follow-up testing on a confirmed drug-using employee during or after counseling or rehabilitation. Depending on how each agency chooses to implement this testing component, employees undergoing

or completing treatment in some agencies may be targeted for additional tests while in other agencies this may not be the case. It is also unclear how long an employee in this category would be subject to retesting on this basis. Would the employee be subject to unlimited retesting over the span of a 30-year career?

The OPM guidelines are clear about the consequences of a second confirmed positive test--dismissal. There is no discussion of any time limit between a first and second confirmed positive test that would stay this mandatory dismissal. An employee who tested negative for several years would be dismissed on the occurrence of a second confirmed positive test. There is no instruction in the guidelines specifically prohibiting or authorizing agencies to establish a time limit in which two confirmed positive tests constitutes a basis for dismissal. If the interval between tests was substantial, an adverse action based on the second test might conflict with the Civil Sevice Reform Act.

The HHS guidelines provide extensive specification of the collection and test procedures to be followed by agencies in testing employees for drugs. They also provide some description of the lab quality control procedures to be followed. The guidelines note that any unsatisfactory blind proficiency testing result must be investigated by the agency and corrective actions must be taken. Unsatisfactory performance on proficiency test samples is sufficient cause for lab accreditation to be revoked. The HHS guidelines do not, however, specify what degree of error (false positives or false negatives) would be considered unsatisfactory,

discharge unless the agency can show impairment of the employee's job performance. Applicants, otherwise qualified for a position, but refused employment solely on the basis of a positive drug test may have a valid claim under this act. There is also no instruction to agencies that employees should be informed about relevant provisions of the Rehabilitation Act.

The Executive Order states that positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs and the guidelines refer to Civil Service Reform Act protections. Nevertheless, the guidelines do not instruct agencies to inform employees of procedures to challenge or rebut other aspects of the testing program such as the disciplinary actions. The guidelines are silent on such matters as applicant or employee right to access administrative or laboratory records, proficiency test results, or other material that may bear upon a challenge to test results.

Lack of oversight

The OPM/HHS guidelines do not provide for centralized oversight of employee drug testing governmentwide. Such an oversight responsibility could help ensure that all employees are treated equitably, that agencies comply with the respective guidelines, and that any needed modifications to either the guidelines or program operations are identified and implemented. At present, there is a diffusion of program responsiblities among

OPM, HHS, and the Department of Justice.

Also, there is no mechanism established in the guidelines for the continued, independent monitoring of each agency's drug testing program. While agencies and labs are directed by the guidelines to collect and maintain certain statistics about the drug testing program, there is no requirement that an agency evaluate its program. If such a requirement were added, criteria should be specified for assessing program effectiveness or efficiency.

Program costs

Finally, on the question of program costs, the OPM/HHS guidelines provide some insight into the elements that might be included in estimating the cost of drug testing programs. In addition to the costs associated with the actual testing activities as detailed in the HHS guidelines (e.g., specimen collection, lab testing, review by a medical officer), the guidelines indicate that activities such as employee rehabilitation and counseling, personnel actions, and supervisor training are also cost elements associated with the program. The wide latitude provided to agency heads in implementing an employee drug testing program, however, makes it difficult to estimate the costs of these programs until the number of employees to be tested as well as the drugs to be tested for is known.

Mr. Chairman, these are some of the concerns or questions not addressed by the OPM/HHS guidelines -- matters that, in accordance

with the Order, each agency head will need to address. We recognize the importance of providing each agency with sufficient flexibility to implement a testing program that is responsive to its individual needs and resources. However, in our opinion a more detailed set of standards than those provided in the guidelines will be necessary to ensure that a sound, consistent, and defensible set of programs are implemented governmentwide. This is particularly true in view of the fact that the guidelines do not provide any mechanism or procedure for oversight or review of the agency drug testing programs once they are implemented. Even with adequate oversight and review, we believe the emphasis in this program should be to take every precaution to make sure it is done right the first time.

This concludes my prepared comments. I would be happy to answer any questions you may have.

Mr. SIKORSKI. Gentlemen, the subcommittee wants to thank you for your continued activities and expertise in this area. You have been, once again, helpful in providing a thoughtful analysis. You were helpful last year when the subcommittee was chaired by Mr. Ackerman, and we thank you for your continued assistance.

Let me summarize your testimony to begin with. You concluded that there are four areas of concern. The first one was that the programs may not be uniform from agency to agency. Due to major areas of interpretation and definitional ambiguity, similarly situated employees may very well be treated differently in terms of the initial testing, in terms of what they will be tested for, and in terms of what will happen if there is a confirmation of drug use.

Your second area of concern was in employee rights generally which have not been fully addressed.

The third area is the lack of centralized oversight for this program. We saw this in our last hearing.

And finally there is a big, gaping question mark at the end as to what this program is going to cost.

Mr. STEVENS. Yes, sir. Those are certainly the four areas that we think are the most notable.

Mr. SIKORSKI. Let me focus a little bit on the definition of a "sensitive employee". We know that no agenices have not defined this group of employes yet. I think OPM is going forward with their program and has some draft definitions for their agency, and I presume others are struggling with that as well, but we still do not know what a "sensitive person" is. We know the other people that are put into this category for random, involuntary drug testing—Presidential appointments and a few others—but the "sensitive person," which is the biggest category, still is not defined.

Mr. STEVENS. That is correct, Mr. Chairman, and a great deal of discretion is left to the individual agency to determine that. OPM may very well come up with a set of guidelines for its own use. Then another agency would be, resulting in the fact that a person with a position at OPM very similar to a position, say, at the Department of Transportation might be treated quite differently.

Mr. SIKORSKI. Well, we know they have to test for marijuana and cocaine.

Mr. STEVENS. Yes, sir.

Mr. SIKORSKI. They can test for opiates, amphetamines, PCP, and can get authority from HHS to test for other drugs. The biggest question mark in terms of the perspective of the Federal employee is what is going to happen if there is a positive test result in terms of discipline. The executive order of the President and the speeches surrounding the initiative, talk about a "helping hand," and about the positive aspects of a drug-free work place. The guidelines that have come out, however focus more on use—on the job and off the job—and the punitive aspects of a confirmatory test. Employees can be reprimanded. They can be removed, and that is purely up to the discretion of the agency head.

Mr. STEVENS. Yes, sir. We read the guidelines that came out as having a good deal more emphasis, and it is mostly a matter of tone, I think, but a good deal more emphasis on discipline, the fist as opposed to the velvet glove, and whereas the executive order, I

think, had emphasized more strongly the rehabilitative and constructive aspects of drug intervention.

Mr. SIKORSKI. Thank you.

Let me focus on the privacy issues. In your testimony you mentioned Privacy Act concerns. Under that Act, Federal agencies are restricted from disclosing certain personal information about an employee unless the employee consents to its release or unless the information falls under one of 12 exceptions. One of these exceptions is a routine use exception. The logical question is: can agencies easily establish this routine use by their use of it, and therefore remove any effective restraints of voluntary consent?

Mr. STEVENS. Yes. I might ask my colleagues to help me on this.

Mr. SIKORSKI. Who is the lawyer in your group?

Mr. STEVENS. Mr. Seldin is the lawyer.

One of the groups I head is our privacy area of interest within GAO, and we have looked broadly, not within the drug testing context, but in other systems of records under the Privacy Act, and we have determined that the routine use provision, which allows agencies to use data for purposes that are called "compatible with the purpose" that it was originally collected for, has been very broadly interpreted, and is the basis, for instance, for most of the computer matching programs that go on. In our opinion, the fact that it will be a Privacy Act system of records under the HHS guidelines is not a very great restriction at all because of the breadth with which that routine use provision has been interpreted.

Mr. SIKORSKI. When someone stands up and mouths the words "the use of this information will be under the Privacy Act, will be wholly in compliance with the Privacy Act," Any one listening to that should not take any comfort in it because the Privacy Act has some major exceptions. One is compatible use and routine use.

Who is the expert on that here?

Mr. STEVENS. Mr. Beall probably knows as much as anybody.

Mr. BEALL. I do not believe you should take any particular confidence that the records will not be disclosed under the Privacy Act routine use exception. There is also another exemption in the Privacy Act that allows release of records as well as a routine use in hiring practices.

Mr. SIKORSKI. Which would be the big fear, I would guess, assuming there is no criminal referral prosecution that comes out of it. The big fear would be that this would be routinely passed on to future employers.

Mr. BEALL. It is possible that that might happen. The guidelines are more rhetorical than procedural in terms of assuring the maintenance of the employee records of drug testing results.

Mr. SIKORSKI. Here again, there should be one policy as a rule in the Federal Government for the use of these records. There is reason to leave each agency to do what it pleases.

Mr. STEVENS. We would agree with that, sir.

Mr. SIKORSKI. And you made a statement that the issue of referral to the law enforcement people for criminal action or potential criminal action was cleared up in the OPM regulations. Let me backtrack for a moment.

As I recall, the President's order states specifically in Section 5, H, "Agencies are not required to report to the Attorney General

for investigation or prosecution any information, allegation or evidence relating to violations of Title 21 of the USC received as a result of the operation of drug testing programs established pursuant to the order."

Mr. STEVENS. They are not required, but they may.

Mr. SIKORSKI. Yes. Now, you said there was something in the OPM guidelines that softens that.

Mr. STEVENS. Yes. We read those as they do not refer specifically to the Department of Justice, but they do refer to disclosure to other agencies and seem to prohibit it, except with the consent of the tester.

Mr. SIKORSKI. Where is that? That is Section 5, Personnel Actions? I think it is important. I do not want to delay the subcommittee, but I think it is important that we understand that interpretation because if the President's executive order states that they are not prohibited from referring it to the Attorney General——

Mr. SELDIN. Excuse me. Section 4(f) is the section that deals with confidentiality of test results, and the way we read that section, that information, test results, could not be submitted to the Attorney General.

Mr. SIKORSKI. It lists the agencies it can be submitted to and does not include the Department of Justice.

Mr. SELDIN. And then there is a general provision that is Subsection 5, which states, "Neither drug test results nor drug use treatment or rehabilitation records may be otherwise disclosed by agencies without the consent of the employee." Of course, if you have consent of the employee, then there would not be a problem.

Mr. SIKORSKI. You have been in contact with the people at OPM who drafted these regulations and stand to interpret them as well as people at the Attorney General's office?

Mr. STEVENS. We have certainly reviewed the testimony of the General Counsel here before the subcommittee.

Mr. SIKORSKI. Have they stated this to anyone? They did not tell us in the subcommittee that that was the case.

Mr. STEVENS. No, not to me.

Mr. SIKORSKI. I think that needs to be clarified with the executive order hanging over the regulation.

Another bothersome item is that in both the OPM guidelines and in the executive order, guess who is supposed to be the individual in charge under Section 6(b)? "The Attorney General shall render legal advice regarding the implementation of this order and shall be consulted with regard to all guidelines, regulations and policies proposed to be adopted pursuant to this order."

According to the Office of Personnel Management, in their testimony at the last hearing, it is the Attorney General who is charged with the overall centralized oversight, if there is to be any.

Mr. STEVENS. The guidelines themselves did not make a provision for any centralized oversight or monitoring, and we think that is a long term problem.

Mr. SIKORSKI. Yes, especially in the area of privacy if the executive order says you are not precluded from giving this information to the Attorney General, and the Attorney General is charged with the last say-so on these matters.

Mr. STEVENS. There are some discrepancies between the two documents, no question.

Mr. SIKORSKI. There is no guarantee of equitability or equity in the proposed drug testing program.

Mr. STEVENS. There is no guarantee, certainly. The possibility exists of very different treatment of employees, depending on where they happen to be situated.

Mr. SIKORSKI. Let me at this point then turn to Congresswoman Morella.

Did you have an opening statement you wanted to give at this point?

Ms. MORELLA. Thank you, Mr. Chairman. I do not have one planned, but certainly the fact that I am here indicates that I commend the chairman of the subcommittee for holding drug testing hearing number two, because we have had a lot of questions that were posed, some that were answered, which led to the substantial confirmation of the need for the amendment on the appropriations bill to make sure that money was withheld from implementing the guidelines because they are frought with controversy.

We have had questions with regard to the criteria, the cost, the accuracy, the invasion of privacy. Now as I scan your testimony, I see even more questions arising, such as what drugs will be tested. I did not realize that there was not the opportunity or the latitude to make sure that all of these drugs might well be tested, but rather, you say cocaine and marijuana, and there is no opportunity or no plan to test for any of the other illegal drugs. I had never even thought about that.

Also, the uniformity of penalties, there is none. We have sentencing guidelines for criminals, but we have no kind of uniformity with regard to penalties in this situation. And even the uniformity or lack of uniformity of the privacy situation is not evident. So you are posing some additional questions that I had not even thought about specifically, and I appreciate and would like very much not only the questions posed, but if there are any solutions that you could offer to us that we can suggest.

Mr. STEVENS. The basic problem, Congresswoman Morella, in our opinion, is that there is such a great degree of decentralization of decisionmaking and latitude in the area of drug testing. For instance, the guidelines do require testing for two drugs, marijuana and cocaine, but the rest is entirely permissive. Agencies can, if they want, but they do not have to, and we have very little indication of what agency heads actually want to do.

Ms. MORELLA. That defeats the purpose, does it not, in essence?

Mr. STEVENS. Certainly, if the purpose is uniformity and equitable treatment across government, I would say that purpose is threatened, and in the area of discipline, as well. A great deal of discretion is left to individual managers, agency heads, and a person even within the same agency, but certainly across agencies, can expect for a first time offense the possibility he or she will be treated very differently depending on where he or she sits.

Ms. MORELLA. Maybe, Mr. Chairman, it would also be appropriate at some point for you to, in writing, even indicate not only these questions, but if you have some suggestions that we can also

peruse and look at in terms of how one can change this type of infraction.

Mr. STEVENS. That is a very good suggestion, and we will continue to work with the staff.

Ms. MORELLA. Thank you.

Mr. SIKORSKI. I know you prepared a host of answers to a whole host of potential questions, many of which Congresswoman Morella pointed out. If you could in that context that she has suggested, please point out the problems with testable employees, who is going to be included, point out the problems with the testing procedures and the whole HHS guidelines with regard to these blind proficiency tests, and point out the need for safeguards to insure that employees are not harassed through this process.

We talked about the Privacy Act issues as well, and in the release of information, we have not focused much on the HHS guidelines, but the whole issue of what is unsatisfactory performance and how it is open to interpretation to be applied one way for one lab and a different way for another lab. Your testimony very well draws that out.

Maybe, if you want to, you can emphasize that once again. You talked about what drugs would be tested.

Just one last question. We are going to have to vote, and then I would like to let you go and come back and start with OTA, but you focused on an area of the Rehabilitation Act of 1973, as amended, which generally includes a drug abuser as a person who is protected as a handicapped individual. Under this act, as you testify, employees may under certain conditions be protected from adverse actions, such as discharge, unless the agency can show the nexus, the impairment of the employee's job performance connection, between the drug use and the job performance. Therefore, applicants otherwise qualified for the position but refused employment solely on the basis of a positive drug test may have a valid claim under the Rehabilitation Act of 1973. There is no instruction to agencies, and employees should be informed about relevant provisions of the Rehabilitation Act.

I take it, Mr. Beall, you are the expert on the Rehabilitation Act.

Mr. BEALL. We share that expertise.

Mr. SIKORSKI. You are all the experts.

It is a real problem, is it not?

Mr. SELDIN. It is a problem, and it relates also to the problem involving the Civil Service Reform Act and the nexus connection that is usually needed to have a disciplinary proceeding against an employee. There are various provisions in the Rehabilitation Act that protect handicapped employees, including drug users. However, if it can be shown that the drug user's abuse of drugs will have a negative effect on work, then that particular individual is not protected.

However, if that showing cannot be demonstrated, then the drug user is protected as a handicapped employee under various provisions of the Rehabilitation Act.

As a general matter, when disciplining a federal employee, the Civil Service Reform Act requires a showing of connection between the misconduct—in this instance, it would be the drug use—and

the impairment of service, the work. The courts are somewhat at odds on this issue.

In many situations it is true that the fact of drug use itself may presumptively show that nexus. However, in circumstances where that has been held, there have been other circumstances as well. For example, in one instance, someone was an air traffic controller. In other instance, someone was a Customs Service employee who was involved in drug interdiction activities. In another instance there was a computer programmer who had access to classified information.

However, in other cases, the courts have held that you cannot discipline an employee just on the basis of drug use alone.

In one case, an employee who was convicted of distributing LSD, but had a very good job record and was an employee that was not in a sensitive position could not be dismissed on the basis of drug use. Whether that is positive or negative I do not know, but the courts are in conflict about that, and the guidelines do not provide any nexus test for disciplinary procedures that can be applied.

Mr. SIKORSKI. This is a big issue. It needs to be resolved, and even if it is attempted in the guidelines, there are going to be some lawsuits. And if it is not resolved by the guidelines, there are going to be a huge number of lawsuits.

Also, you pointed out in your testimony that there is a failure to provide that certain information be given to employees who find themselves in the situation with a positive drug test result. They are not informed of how the Rehabilitation Act affects them. They are not informed of rights under the Civil Service laws. They are not informed as to whether they have access, and the OPM guidelines are silent on the issue of do they have a right to challenge these results by getting information with regards to the track record of the particular laboratory which did their test.

I am convinced, and we are going to hear from a lawyer later on, that a lawyer for those employees probably is due that access.

Mr. STEVENS. Yes, sir, we would certainly say so under the guidelines. It is further evidence that the executive order was a good deal more even-handed and helpful than the guidelines themselves, which do not address that question.

Mr. SIKORSKI. Anything in summary?

Mr. STEVENS. Just that our principal concern, sir, remains that there is no long term oversight or monitoring of this program. So as these problems do emerge throughout government, agency by agency, we do not see anybody in a position in the Executive Branch to take charge, to assess how they are doing, and to suggest improvements in an area that is bound to be heavily litigated.

Mr. SIKORSKI. I think the subcommittee is left having to get the President down here to tell us who is in charge of this drug testing program that is supposedly so important. We brought OPM in thinking that they were in charge, and they pointed fingers in other directions, and HHS did the same finger-pointing. We will have to bring the White House and the AG in and find out who is in charge because there are going to be questions as we go along.

Thank you again, gentlemen. You have been very helpful, and if you want to hit the high points that were missed in the questioning, that would be helpful to the subcommittee. Thank you.

Mr. STEVENS. Thank you, sir.

[Whereupon, a short recess was taken.]

Mr. SIKORSKI. Good morning, again.

Our next witness is Dr. Lawrence Miike, senior associate in the Health Program in the Office of Technology Assessment.

Dr. Miike is an outspoken authority on the accuracy and reliability of drug tests, and has been most helpful in providing Congress with very thoughtful and scientific analysis of drug testing technologies.

Good morning, Dr. Miike, and you may begin. Your entire testimony will be placed in the record. You can summarize, as you see fit.

STATEMENT OF LAWRENCE MIIKE, OFFICE OF TECHNOLOGY ASSESSMENT

Dr. MIIKE. Thank you, Mr. Chairman.

I have testified before on this issue before the subcommittee under your previous Chairman Ackerman on September 16, and on April 9 of this year, I testified in front of the Senate Judiciary Committee. I have attached my Senate Judiciary Committee testimony to my prepared testimony for today.

For my testimony today, I decided that I would focus more on the connection between the technical aspects of testing and the reasonableness issue as it relates to who should be tested and how accurate these tests are.

I should also say that I have training as a lawyer, although I do not practice. So even though I do not know the technical details of the law, I feel qualified to make some comments on the law.

Mr. SIKORSKI. I am a lawyer as well. Joe Cannon, the Speaker of the House for which this building was named, died, and his successor, we are told, was out campaigning in Missouri and was likening himself to Joe Cannon. He said he was raised in rural Missouri, and they applauded. He had gone to the big city of St. Louis and shown them what to do, and they applauded. He said he was a lawyer, and there was no applause. He turned to an aide and said, "What's up?" He said, "They don't like lawyers." He quickly amended his statement by saying, "But not a very good one."

So I know you are a good lawyer, and you did condition it by saying you do not practice that much, but with your legal training and the scientific background, you can help us out a lot, and we thank you for that.

Dr. MIIKE. I think that in terms of the reliability and accuracy of urine drug tests, when they are done properly they are very reliable and very accurate. Of course, the remaining issue is in practice how well the labs perform, and I think most of you know about the Channel 7 investigations about area labs, and there are really bad problems with error rates.

So in terms of any kind of drug testing program, some kind of outside testing of the testers themselves obviously has to be an important part. So in terms of the tests themselves, I have two main points, and then I want to talk about the reasonableness issue.

The first point is that in practice, especially in mass screening programs, errors are a much more real issue than in theoretical,

ideal situations. My previous testimony really focused on the ideal situation, but I do not think I need to get into the practical situation because I think everybody is aware of that now.

The second main point I want to make about the accuracy and reliability of these tests is that you cannot talk about how good these tests are without talking about what populations you are testing, and in my prepared testimony I have given you some examples in my tables after page 6 that shows you the relationship between sensitivity and specificity and how that relates to the predictive value of an initially positive test when it is applied to populations with different prevalences of drug use. I will go into some of that a little later on because I think that will give you a working approach on how to deal with this reasonableness issue, not only from the standpoint of what kinds of work force populations should be tested, but also what these programs would cost in the context of low incidence drug user populations, such as the Federal work force, which, I might add, the average age is 42.

On the reasonableness standpoint, I want to address two areas. One is the physical intrusion aspects, and the other is the reasonableness of applying it to populations, as I say, where there are different prevalences of drug use.

I think all would agree that the fundamental reason for instituting a screening program in the work force is to uncover drug abuse at the work site and its effect on worker performance. Then we get into profound disagreements about whether screening is also a good rationale to uncover off-duty activities, such as weekend recreational use of drugs, or whether mandatory screening programs in the work site are an appropriate means for detecting and deterring illegal behavior per se.

We all know that those are issues that we are profoundly disagreeing on, but I think everybody agrees that if there is a good rationale for mandatory screening, it is to make sure that drug abuse in the work site is not taking place. But from that standpoint, if you are talking about the techniques for screening, then blood tests are the best, because blood tests will show you use within hours. Urine tests get a little bit further away, because we are talking about days now, 1 to 3 days, and when we are talking about marijuana, I think the record is 79 days after last use, but usually 1 to 4 weeks.

I think that if you look at many of the kinds of screening programs that go on, people are aware of that, and they often give you a 30-day notice when screening is first initiated.

We will be hearing from the next witness, who will talk about hair analysis. That would be less physically intrusive than blood or urine screening, but in terms of behavior intrusion, I think it is profoundly intrusive in the sense that it can start tracking you back months and months and months, and I can imagine all of the federal work force coming shaved every day with no hair on their head or long hair disappearing even among women if hair becomes the way that one analyzes.

If we look at the urine screening program now, I am not too sure whether it is less intrusive than blood testing. Blood testing is intrusive in the sense that someone jabs a needle into your arm and, in essence, physically assaults you and takes your blood away. In

urine screening, when you look at the guidelines for collection procedures, there is a monitor in there. You are in a stall. Your water is blue. They check the temperature, all of those kinds of issues. If one does that, I would at least like the choice of red, white and blue water and be a little bit more patriotic than blue water.

My point on that is in trying to meet the requirements of chain of custody for the urine specimen and to make sure that people do not cheat, the very process of collecting urine now becomes, in my opinion, more intrusive than getting your arm stuck for blood. So I offer, not facetiously but fairly seriously, that if one would talk about using mandatory random screening tests, let's use the standard of blood tests. If you are going to do a mandatory screening, let's say who would be appropriate to do blood testing on, and then maybe that will sharpen the focus about whom we should be using mandatory screening on.

My second area is the reasonableness of these tests as applied to different populations, and for that purpose, I would just ask you to turn after page 6 of my testimony. There has been a lot of confusion on accuracy of tests, and we have all heard the notion of false positives and false negatives. In my prepared testimony I make an analogy to the use of the AIDS antibody screening tests among blood banks and among high risk populations, and the same issue really arises in that context.

Briefly, sensitivity really applies to the situation in which of all the known drug specimens, of all the urines that have drugs in them, how many will we pick up. So if you are talking about a 95 percent sensitivity, it is saying that out of 100 positive urines, you would find 95 and you would miss five, and the screening situation being such that confirmatory testing is only done on positive tests on the screen, the five that you miss that time you are going to miss forever. You are not going to pick them up again.

Specificity goes to the issue of all the urines that do not have drugs in them, how many are identified as having drugs in them, and that is the false positive issue.

Now, in my examples that I show you, you can have a 100 percent sensitive test and not make very much difference in the percent of the initial screens that are positive. For example, in my 2 percent prevalence example, if you assume 95 percent sensitivity, meaning that you would pick up 95 percent of the urines, you would pick up 19 out of 20 on my example or 2 percent out of 1,000. If you were at 100 percent sensitivity you would pick up 20 out of 20, but you see that that would only switch the predictive value from 16 percent to 17 percent.

In tables in my Senate testimony and in the following table in my prepared testimony, I give you a range of populations with different prevalences of drug use; 2, 5, 10, 25, 50 percent, and the predictive value of a positive screening test going from 16, 34, 51, 76, to 90 percent. Now, if we are dealing with random testing in the federal work force, my guess would be, and if I were a betting man, I would bet that prevalence it would be less than 10 percent and probably would be under 5 percent.

So if you take the very best tests available for screening, you are still going to get an initially positive rate of which less than 25 percent of them are going to be actually confirmed——

Mr. SIKORSKI. Before we get too far ahead, when I was reading this last night, it struck me that the percentage rate is not that great.

Dr. MIIKE. No.

Mr. SIKORSKI. For all of the ballyhoo about these accurate tests the percentage is not very good and the cost of identifying positive samples is incredibly high. If we assume away the inaccuracies, the potential problems in accurate testing—from the actual sample taking to the transportation, the labeling of the sample, contamination, and the problems with the tests assume that we have optimum testing procedures—even then we are going to end up with false positives. And according to the statistics in your statement, if you consider the false positives, we are going to be able to confirm only one-fourth of those false positive tests.

Dr. MIIKE. Yes, most likely.

Mr. SIKORSKI. So if we look at all of the positives that come out, we will be able to confirm one-fourth of those, and when we are done, we have spent a lot of money.

Dr. MIIKE. Yes. The money aspect comes in having to provide a confirmatory test, knowing that most of those that are positive on screening are going to end up falsely positive.

Mr. SIKORSKI. Assume that under the two percent, it is a question in urinalysis, and your guess was that the Federal work force probably has drug use of under 5 percent. It is an older population.

Dr. MIIKE. Of course it would be stratified among the different age groups.

Mr. SIKORSKI. Right—and job use, economic, social and the rest of it—but it is generally less than the general U.S. work force because it is demographically an older population and those demographics tell us that there is less drug use, not alcohol, but illegal drug use in older populations.

Now, under the 5 percent of samples contain drugs, what does the 34 percent mean?

Dr. MIIKE. What that means is of all the tests initially positive on the screens, only 34 percent will be confirmed with the confirmatory tests.

Mr. SIKORSKI. Of all the tests that come out positive, one-third of them will truly be confirmed, and we will get into a situation that action will be taken.

Dr. MIIKE. Yes.

Mr. SIKORSKI. And if it is 2 percent?

Dr. MIIKE. It is only 16 percent of the initially positives that would turn out to be truly positive.

Mr. SIKORSKI. So if the federal work force is close to the 2 percent of drug use situation, only 16 percent of those positive results will be confirmed as actual results, and the cost of getting down to that?

Dr. MIIKE. It is in the next column. You can see the comparative costs in that very same table. In other words, in the last column there it says that given all of the drug testing costs, what is the cost of finding one really positive case.

Mr. SIKORSKI. $1,000?

Dr. MIIKE. $1,036, versus if you had a 50-percent population of drug users, then it would be $76.

Of course, I am not talking about the total cost of the program. The total cost of the program would depend on how many people you test and how many people that you have to confirm also at the same time.

The last column is sort of a cost-effectiveness analysis. What are we getting for our bucks in testing?

Mr. SIKORSKI. So for every 1,000 people screened in the Federal work force, assuming the two percent prevalence of drug use, for each positive case found, it would be about $1,000?

Dr. MIIKE. Right. What I am saying in this is if you take a 2-percent prevalence drug use and you screen 1,000 people with the test sensitivity and specificity that I indicated, the total cost would be close to $20,000, and it sounds cheap when you say that the cost per person is only about $20, but when you figure out what the cost is of actually finding a truly positive, it comes out to be over $1,000.

So you can see that as the population that you test has higher drug use, obviously your testing would be much more efficient and much more cost effective, and that is what I mean by the reasonableness of the testing program as applied to populations of different drug use. So it is obviously a much more efficient system to test high drug user populations than to test low drug user populations, and it is a judgment call, I guess, about where you draw that line.

Now, let me mention some other things. I had hoped that I would have received the most recent military statistics on costs and incidences of testing. Since this is the Post Office and Civil Service Committee, maybe I should complain. I have not gotten it from the Pentagon although it was sent to me on Thursday.

Mr. SIKORSKI. They said it was sent on Thursday?

Dr. MIIKE. That is no problem here, because I can submit it for the record.

Mr. SIKORSKI. It is in the mail?

Dr. MIIKE. Yes. I have to say that I get letters from my mother in Hawaii quicker than that.

When we look at the 1985 military testing program, they had testing under two situations. One is random testing, and the other one is what you would call probable cause. They had three categories all lumped together. It is probable cause, command directed, and medical testing.

In the 1985 drug urinalysis program, in random testing—and remember this is the service population which is younger than the Federal work force—out of 2,044,309 people tested in the random program, they found 36,848 confirmed positives, a rate of about 1.8 percent, sort of what you would expect in the Federal work force. Remember this is a younger population.

In their random testing program, they tested 295,304 people and found 29,179 positive for a positive rate of about 10 percent. Now, that is a little surprising to me that in a probable cause, command directed, medical testing program, that only 10 percent of them are found to be positive.

So I am guessing that what happens in any kind of disciplinary hearing, proceedings or medical testing, they almost routinely now test for drug use.

My point on using the military statistics is that in their random testing program, they are only finding about 2 percent of drug use in that military population. Now, you have got to temper this by a couple of things.

One is that this is happening even though they know they are going to be tested. So what we are really talking about is probably drug users who were drug users who were drug users, but if you look at the statistics, they are heavily concentrated in the most recent recruits, the lowest enlisted population and the youngest people, and so it sort of mirrors the general population in that sense.

The other thing, too, is that the Army has a higher rate. So there are socio-economic factors and differences such as that, but I think this is an interesting lesson for testing for the federal work force.

Now, in terms of the cost of the military program, I think these numbers or the examples that I gave you in my prepared testimony are supported by the military. In the military's program there are costs per specimen. In the Army it was $16, in the Navy $23, in the Air Force $14. Now, that contrasts to my example of about $20, but the military does most of its testing in its own labs. So these costs are, I think, artificially low in the sense that they are not going to be the kinds of costs if I contracted with an outside lab.

Mr. SIKORSKI. Are there any agencies under the executive order and the guidelines looking at their own labs?

Dr. MIIKE. In the survey last year that was done by the Post Office and Civil Service Committee, it varies all over the place.

Mr. SIKORSKI. But now? We are almost a year later into the testing program.

Dr. MIIKE. All I can mention at this moment is the certification process that the National Institute of Drug Abuse was setting up, and I would guess that some agencies may contract with some of the military labs, but I do not think that any of the agencies has the capability to test on the mass basis as the military programs are. So I think what they are concentrating on is developing certification programs to qualify outside labs who would get on the list of contractors.

Mr. SIKORSKI. And are more expensive?

Dr. MIIKE. Most likely.

Mr. SIKORSKI. And how about testing the testers?

Dr. MIIKE. That is the main emphasis of the National Institute of Drug Abuse Program, to set up a program to test the testing labs that would be under contract.

Mr. SIKORSKI. I think from your testimony you underscored the need to do that.

Dr. MIIKE. Oh, yes.

Mr. SIKORSKI. So does GAO, that the test results are only as good as the testing, and these contractors need to have their own testers as clean as possible.

Dr. MIIKE. At the end of my April 9 testimony I attached an interesting bill in the California Legislature that tries to address that issue.

Mr. SIKORSKI. It was vetoed, was it not?

Dr. MIIKE. I was trying to check up on what was going on. I was not sure if the bill was going to pass, but as a legislative approach, I thought it was an interesting one.

Let me just end up by mentioning one other issue here; obviously, in testing the Federal work force, the tradeoff is that we offer rehabilitation services. So what would that cost?

The military has their costs identified, and what is interesting to me is that in the Army and the Navy, their testing costs are more than 50 percent of their total costs. In other words, they are spending more on their testing programs than they are spending on their rehabilitation programs. The Air Force is a little different. About 25 percent of the total cost of their program is on testing. So they spend a lot more proportionately on rehabilitation.

Now, of course, in terms of absolute total numbers the Army is much larger than the Air Force and the Navy is much larger than the Air Force, although the Navy tests for a much greater range of drugs than the Army does.

Mr. SIKORSKI. Even though the Army does not test for that great a range of drugs, their cost of testing is more then their cost of——

Dr. MIIKE. No. In the testing situation in 1985, the Army spent a little bit over $11 million, the Navy almost $34 million, and the Air Force about $2.5 million, but remember the Army tests only for marijuana and cocaine, and the Navy tests for about seven or eight substances.

Mr. SIKORSKI. The point is even though their costs are lower for testing because they are only testing for two drugs, they are still spending more on testing than they are on the counseling services and the rest of it.

Dr. MIIKE. Yes. I am not sure, but I think one of the reasons for that is marijuana positive people in terms of rehabilitation; I do not think rehabilitation is offered to the occasional marijuana user.

Mr. SIKORSKI. Let me ask you, in the areas associated with drug testing you talked about testing the testers, and you earlier mentioned the WGLA, Channel 7 experiment. They set up a fictitious courier company and sent a number of spiked urine samples to area drug testing labs for pre-employment screening. One sample was even dog urine. The results showed that the dog got the job, as well as at least 50 percent of the people associated with the spiked urine samples.

Dr. MIIKE. And Esther Peterson flunked after eating a poppy seed roll.

Mr. SIKORSKI. That will teach her. Those poppy seed rolls can really do you in.

Is this an acceptable false negative rate for a qualified lab?

Dr. MIIKE. Definitely not, and I believe many of the false negatives were at levels much higher than the lower limits of detection. So I think that was just sloppy work.

I should add also I talked to the reporter, Roberta Haskins, I believe, and she had an amusing story to relate, which was that she had not realized that male dogs do not just pee once. They go all over the place. So she had a hell of a time collecting it. What she was able to collect was a miniscule amount which she thought the lab would reject out of hand, but they tested it anyway.

Mr. SIKORSKI. Times have changed. When I was growing up in northern Minnesota, a urine test was whether you could write your name in the snow.

You laugh. Try writing Sikorski.

Are there any subjective measurements that must be made by the drug tester in the drug screen of the confirmatory test?

Dr. MIIKE. No. Well, one must always have to eyeball it, but what we are really talking about is a printout that you can see. It is sort of a time related and dose related thing.

The easiest analogy is to a fingerprint. That is quite different from the confirmatory test with the AIDS antibody test, for example, where a lab technician has to eyeball it. Even though it is a certain pattern, one still has to eyeball it. So the GC/MS test to me is a much better test than the Western blot test that is used to confirm the presence of antibodies to the AIDs virus.

Mr. SIKORSKI. Well, looking at the GC/MS and the confirmatory test, the more expensive thing, that is not 100 percent accurate either. Let's put it this way. It is not accurate for the poppy seed or these other things that show up. They are real positives, but they are not real drugs.

Dr. MIIKE. Yes. When you have the same thing from a different source, then, of course, you may not be able to tell.

Mr. SIKORSKI. You have two levels of problems. You have some over-the-counter drugs, Midol and so forth, which show up as controlled substances. That is wrong. That is a problem.

Then there are other substances like poppy seeds and tea that show up as controlled substances, and these tests pick things in a very sensitive way.

Dr. MIIKE.I would qualify that, however, by saying if need be a good GC/MS person could then fractionate.

Mr. SIKORSKI. You said "a good."

Dr. MIIKE. Yes. Routinely they would not do that, obviously. But when we are talking about something like marijuana or cocaine or morphine, et cetera, it is usually not one single excreted product. It is several metabolytes so that if one were real careful, I would guess that you could distinguish between metabolytes that came out of a poppy seed versus something that came out of an illegal drug. But in the usual course of a mass screening program where you are doing a whole lot of GC/MSs, I do not think that would be the case, but I think we have some witnesses that could answer that question after me.

Mr. SIKORSKI. We know that alcohol use and abuse is much more prevalent in society, and one would presume in the federal work force, than drug abuse, other drugs. Should we be testing our work force for alcohol abuse?

Dr. MIIKE. If you do it, I think you are going to have to do a breathalizer test or a blood test. It does not last very long in the urine.

If you ask me, if it is related to on-the-job abuse, I do not know. It is a good question.

Mr. SIKORSKI. The reason I asked it is that the focus of your testimony here today and much of the other testimony you have given, which you have attached, is that we are talking about job impairment. If you focus on job impairment, the best testing is for that

which is here and now, and not yesterday or 2 days ago or 2 months ago, and it should relate to the kind of job that is being performed.

If that is the case, then we should be focusing on the after lunch bunch.

Dr. MIIKE. I would answer that question in the following way. I would not put my resources in testing. I would put my resources in rehabilitation.

Mr. SIKORSKI. And I agree.

Thank you, Dr. Miike.

[The prepared statement of Dr. Lawrence Miike follows:]

TESTIMONY OF LAWRENCE MIIKE
OFFICE OF TECHNOLOGY ASSESSMENT
U.S. CONGRESS
BEFORE THE HOUSE COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON HUMAN RESOURCES

Accuracy and Reliability of Urine Drug Tests

May 20, 1987

I am Dr. Lawrence Miike, Senior Associate in the Health Program of the Office of Technology Assessment, and I am here today to comment on the accuracy and reliability of urine drug tests.

At hearings before this Subcommittee on September 16, 1986, and before the Senate Committee on the Judiciary on April 9, 1987, I provided detailed information on the accuracy and reliability of urine drug tests. My previous testimony to the Senate Judiciary Committee is attached, */ and I would be pleased to answer any questions the Subcommittee may have on the tests involved.

To summarize that previous testimony, existing urine drug screening tests are highly accurate and reliable, provided that: 1) initial positive results are confirmed by a separate test that is based on different physical and chemical principles from the initial screening test, and 2) appropriate laboratory procedures are used to conduct tests.

Confirmatory tests must be used to distinguish between positive screening results that are due to the presence of the drug in the urine specimen from positive screening results that are due to cross-reactivity of the drug test with other substances in the urine specimen, or to testing errors.

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*/ Not reprinted.

The most important technical issue at the moment is whether these tests are being performed properly. This is an especially crucial issue because: 1) there is more chance for error in mass testing, and 2) even a small error rate will represent large numbers of people. The initial focus of these concerns was on those persons who might be wrongly identified as drug users by the screening test. This situation can usually be avoided if confirmatory testing is done on all positive screening tests (there are exceptions, such as poppy seeds as a possible source of opiates). Because confirmatory testing is expensive, however, a high false positive rate on the initial test would result in a costly and inefficient testing program.

In fact, most erroneous results on the initial screening test represent "false negatives." Therefore, a substantial proportion of drug-containing urine specimens are being missed. Since these urine specimens are not identified as "presumptive positives" and subjected to confirmatory testing, if they are missed on the screening test, they will be missed altogether.

To minimize errors associated with testing, it is necessary to test the testers themselves. Such "proficiency testing" programs are conducted at several levels. Within the laboratory, laboratory management may slip in known test samples with actual specimens to see how well technicians perform when they do not know which specimens are test samples. At another level, tests of individual labs can be conducted by outside monitors. For example, several national organizations provide proficiency testing services for a fee, and recent results of two of these organizations were provided in my previous

testimony. The military also monitors its in-house and contract labs in this manner, and similar efforts have been developed for evaluating labs taking part in the Administration's drug screening initiative.

Information on the technical aspects of drug screening tests can be of help in determining the reasonableness of a drug screening program. In the following analysis, the "reasonableness" issue will be discussed in terms of a drug screening program's objectives and the types of employees who may be subjected to testing.

The primary purpose for instituting urine drug testing in the workplace is to deter drug use and thereby prevent untoward impact of drug abuse on worker safety and performance. The more worker performance affects the public safety, the greater the impetus for, and acceptance of, mandatory testing. This is the case, for example, in occupations affecting public transportation, and in particular, air travel. Other justifications for mandatory testing in the workplace are used, such as detecting and deterring drug abuse off the job but which may affect worker performance, and detecting and deterring behavior that is illegal. However, there is profound disagreement on the appropriateness of mandatory drug screening as a condition of employment as the means to meet these objectives.

The use of urine drug testing is already a compromise between available technologies and the objectives of screening programs. If the objective is to detect drug abuse at the workplace, blood drug tests would be the technological choice, because detectable drug levels in blood mean that the person tested has used the drug very recently, usually within a matter of

hours. But blood testing is considered too intrusive, and too costly. Moreover, except for alcohol, scientists have not been able to make good correlations between blood drug levels and degrees of impairment.

Urine testing is considered much less intrusive, but legal challenges and concerns have led to elaborate collection procedures designed to prevent cheating and to meet chain-of-custody requirements pertaining to legal evidence, which have themselves resulted in intrusions on a person's privacy. Urine drug tests, while less physically intrusive than blood drug tests, are arguably more intrusive to many persons than blood tests, because, frankly speaking, you have to urinate on demand in the presence of a person whose sole purpose is to see that you do not cheat. Moreover, urine drug tests are more intrusive than blood tests in the sense that they can "look back" further in time and are less related to the problem of drug abuse in the workplace. Urine drug tests, because they are less physically intrusive than blood tests and because they are relatively cheap, would be more widely applied than blood testing even if blood testing was an acceptable screening procedure. Thus, the tradeoff between blood versus urine testing is that, because urine testing is considered less physically intrusive, it has been applied to a much larger population than would be the case if blood testing were conducted. But the "reasonableness" question has not been settled, and the physical intrusion necessary under collection protocols and the longer "window" into past behavior that urine testing provides are currently being litigated.

I make these observations because hair analysis is being touted as a possible new screening technology that is less intrusive than urine testing. However, this method will uncover drug use that is even less correlated to

recent use than urine testing. In fact, it is claimed that one can track month-to-month use, roughly corresponding to 1-1.3 centimeters of hair growth per month. I can envision legitimate uses for this new technology; for example, monitoring patients on long-term prescription drugs, and in the illegal drug area, monitoring drug abuse clinic clients, prisoners, and parolees. Perhaps it could also replace urine testing among other populations in which some type of mandatory testing is accepted; for example, as a cost-effective alternative for the military's extensive drug testing program. However, I believe that it would be a mistake to judge the appropriateness of hair analysis by its less intrusive collection method as compared to urine collection.

The foregoing analysis discussed "reasonableness" in terms of the physical intrusion necessitated by the screening technologies and the extent to which the drug use uncovered is related to performance in the workplace. Let me now turn to the reasonableness issue in terms of the value of urine drug testing when identical tests are applied to populations with different patterns of drug use. We can assess reasonableness through the following questions. Among populations with different prevalences of drug use: 1) how many persons identified as "positive" on the screening test will actually turn out to be positive on the confirmatory test, and 2) how cost-effective is testing?

My previous testimony provides details regarding the concepts of the "sensitivity" and "specificity" of screening tests and the relationship of these test parameters to the issue of "false positives" and "false negatives" (see accompanying figure). Tables 3 and 4 in my previous testimony provide

examples of the percent of positives found on the screening test that are truly positive and the costs associated with identifying each truly positive urine specimen. The accompanying tables provide similar examples.

What these examples show is that for populations with drug use below 10 percent, less than half of the positive tests on initial screening will be confirmed. The "predictive value" of a positive test falls as the prevalence of drug use declines. For example, the predictive value of a positive screening test is only 34 percent when 5 percent of samples contain drugs. The predictive value falls to only 16 percent for specimens of which 2 percent actually contain drugs. My examples use a sensitivity of 95 percent (meaning that 5 percent of positive urines will test negative), but these findings hold even for tests of 100 percent sensitivity (for example, the 16 percent figure would only increase to 17 percent). The reason is that many non-drug users are subject to testing, and other substances in the urine specimen may react with the test ingredients (the "false positive" issue).

In fact, increasing the sensitivity of a screening test usually comes at the expense of a lower specificity. This occurs because as a test is calibrated to detect smaller and smaller amounts of a drug, the chances increase that the test ingredients will also react with other substances in the urine. This relationship between sensitivity and specificity is illustrated by the blood test for antibodies to the AIDS virus that is used to screen all blood donations. Because the intent is to detect all blood donations that contain antibodies to the AIDS virus (implying that the blood is infected with the AIDs virus), the lowest limit of detection (the test's "cutoff" point) has been deliberately set very low to eliminate the problem of

"false negatives." As a consequence, most of the initially positive blood donations will be "false positives" and will be found to be negative on confirmatory testing.

Confirmatory testing has mitigated, in large part, the problems inherent in using only screening tests to conclude that a urine specimen contained drugs. However, confirmatory testing has significantly increased the costs of drug screening programs.

The accompanying tables illustrate the relationships between sensitivity, specificity, the prevalence of drug use, the predictive value of drug screening tests, and the costs incurred in identifying one case of drug use correctly. For any population with a drug use prevalence of less than 10 percent, less than half of the positive tests on initial screening will be truly positive.

The cost-effectiveness of screening is illustrated by the fact that only 51 percent of the positive screening tests of a 10 percent drug user population will be confirmed, in contrast to the 90 percent confirmation rate of a 50 percent drug user population. This means that the cost of finding one truly positive urine specimen in the 10 percent drug user population is more than 3 times the cost of identifying one truly positive urine specimen in the 50 percent drug user population ($236 vs. $76). A screening program directed at a population with only 2 percent of its urine specimens containing drugs will cost more than 4 times as much as a screening program directed at a 10 percent drug user population ($1,036 vs. $236).

Conclusion

Urine drug screening tests are highly reliable and accurate when performed properly, and the focus of concern on the technical capabilities of current tests has shifted toward the performance of the testing laboratories and their personnel.

Urine drug screening is less physically intrusive than blood screening, but urine screening is also physically intrusive because of the chain-of-custody requirements that are needed to prevent cheating and to maintain the urine specimen and its testing results as legal evidence. Urine screening is more intrusive than blood screening in that it is less related to workplace drug use; positive blood tests reflect recent use measured in hours, while a positive urine test reflects use measured in days (in the case of marijuana, measured in weeks). Newer methods of screening, such as testing hair, may be less physically intrusive, but the results will be even less related to recent use. Hair analysis raises the issue as to whether physical discomfort, embarassment, and/or temporary psychic trauma--the byproducts of collecting blood or urine specimens--deserve more legal protection than delving into past behavior that is measured in months. Perhaps concerns over invasion of privacy should be reframed, and the test for screening should be: Under what circumstances would we agree that screening is appropriate, assuming that only blood testing was available?

The reasonableness of a drug screening program is not only related to the technical capabilities of the tests and the circumstances under which the specimens are collected, but also to the populations that are to be subjected to testing. Two measures that can be used to assess reasonableness are the percent of initially positive tests that will be confirmed (the predictive value), and the cost-effectiveness of screening populations with low drug use patterns.

Relationship Between Sensitivity, Specificity, Prevalence of Drug Use, Predictive Value of Drug Screening Tests, and Costs Incurred in Identifying One Case of Drug Use Correctly

Hypothetical Situation:

2,000 persons tested, 1,000 in each group:

1) First group with 2 percent with drug in urine.

2) Second group with 5 percent with drug in urine.

Screening test with:

a) 95 percent sensitivity

b) 90 percent specificity

Cost of testing:

a) Screening -- $15

b) Confirmation -- $40

What this example will illustrate is:

1) the predictive value of positive tests when applied to different populations of drug users; and

2) the costs incurred in identifying a drug user correctly when different populations of drug users are tested.

Screening Test	Drug in Urine: PRESENT	Drug in Urine: ABSENT
POSITIVE	A = True Positive	B = False Positive
NEGATIVE	C = False Negative	D = True Negative

Sensitivity = A/(A + C)

Specificity = D/(B + D)

Drug in Urine (2% prevalence)

Screening Test	PRESENT	ABSENT
POSITIVE	19	98
NEGATIVE	1	882

Percent of the time a positive screening test would be correct:

$$\frac{19}{(19 + 98)} = 16\%$$

Drug in Urine (5% prevalence)

Screening Test	PRESENT	ABSENT
POSITIVE	48	95
NEGATIVE	2	855

Percent of the time a positive screening test would be correct:

$$\frac{48}{(48 + 95)} = 34\%$$

In these examples, the predictive value of positive screening tests would only be 16% and 34%

2% Prevalence of Drug Use:		5% Prevalence of Drug Use:
Screening:	1,000 x $15 = $15,000	1,000 x $15 = $15,000
Confirmation:	117 x $40 = $4,680	143 x $40 = $5,720
Total Cost:	$19,680	$20,720
Cost per person tested:	$19.68	$20.72
Cost per each positive case found:	$19,680/19 = $1,036	$20,720/48 = $432

Relationship Between Prevalence of Drug Use and the Predictive Value of a Positive Screening Test

PREVALENCE OF DRUG USE	PREDICTIVE VALUE OF A POSITIVE SCREENING TEST**	COST TO IDENTIFY EACH POSITIVE URINE SPECIMEN+
2%	16%	$1,036
5%	34%	$432
10%	51%	$236
25%	76%	$116
50%	90%	$76

* Predictive value of a positive test = The likelihood that a positive test actually reflects the presence of drugs in urine

** Assumes a test sensitivity of 95% and specificity of 90%

+ Assumes cost of initial screening is $15.00 and confirmatory testing is $40.00

Mr. SIKORSKI. Our next witness is Dr. Werner Baumgartner, a biophysical research chemist in the Nuclear Medicine Department of the Wadsworth Veterans' Administration Hospital in Los Angeles. Dr. Baumgartner is also the scientific director of Ianus Foundation, a nonprofit research institute, and of the Psychemedics Corporation, a drug testing, publicly owned company.

In 1977, Dr. Baumgartner invented a hair analysis test for drug use detection to be used for solving the clinical problems in the treatment of drug addiction. Today Dr. Baumgartner presents his research on this radioimmunoassay of hair and its uses for detecting drug use in the work place.

I take it you are going to tell us whether blondes do have more fun. Dr. Baumgartner, it is a real pleasure. I have had a chance to meet you before and I am impressed with your work. It is nice to have a chance to meet you in a public forum and give you an opportunity to share your excellent expertise with us.

STATEMENT OF WERNER A. BAUMGARTNER, SCIENTIFIC DIRECTOR, IANUS FOUNDATION

Dr. BAUMGARTNER. Thank you very much, Mr. Chairman and members of the committee.

I would like to summarize our work by reading you briefly a written statement, and then I will be very happy to entertain all questions.

The drug testing technology that we developed in 1977 is based on the analysis of hair, which I believe will solve the major problems of urinalysis. This new technology, which was invented in our VA laboratory, is referred to as radioimmunoassay of hair, which is RIAH and happens to spell "hair" backward, one of those happy accidents.

It was originally developed for addressing some of the clinical problems encountered in the treatment of drug addiction. However, this test promises now to be particularly useful for legal proceedings, especially for protecting people against the faulty urinalysis results, particularly the false positives, as well as for screening personnel in positions of high responsibility, such as those affecting public safety, that is, positions for which there is a growing consensus that the adverse effects of drug addiction cannot be tolerated.

To assure public safety, we need to test such critical employees by methods which are evasion proof and error free. It can be readily demonstrated that urinalysis does not meet these requirements. For one, urinalysis can be easily evaded at a preemployment screening or at regularly scheduled physicals merely by the prewarned applicant abstaining from drug use a few days prior to the preemployment tests. Thus, although urinalysis can be provided at a relatively low cost, it is in no way cost effective since it fails in its primary objective, that is, guaranteeing the public drug free employees in positions of public safety.

Of course, it is generally recognized that urinalysis is not error free. Particularly bothersome are errors caused by mixed up or contaminated urine samples or those who have positive test results which arose from the ingestion of spiked food, drink or poppy seeds

since such evidential (i.e., nontechnical) false positives cannot be identified by the usual confirmation techniques.

Hair analysis, on the other hand, is essentially evasion proof and fail safe. It is evasion proof because hair provides a permanent record of a person's drug use over long periods of time, depending on the length of hair. Since head hair grows at approximately half an inch a month, say, a three inch long sample would provide a history of drug use of approximately 6 months.

By comparison, urinalysis has a narrow window of detection of only 2 to 3 days for most drugs. In the case of hair analysis, abstaining from drug use two to three days prior to a preemployment screening will not enable a drug user to evade detection.

Also, hair can be collected without embarrassment under close supervision, thereby avoiding evasive maneuvers used against urinalysis, such as substitution or adulteration of samples. Neither does excessive fluid intake prior to a test affect hair analysis.

If there is a concern about the validity of a particular hair analysis result, one can always repeat the analysis with a newly collected sample, one that is identical to the first sample. This is not possible with a urine sample.

Also, the other errors, such as poppy seed ingestion and specimen contamination do not affect hair analysis results. Thus, hair analysis is essentially fail safe, quite distinct from urinalysis.

One of the most important immediate applications of hair analysis, therefore, is as a confirmation test for disputed urinalysis results. By thus acting as a safety net, the strained relationships between employers and employees due to the fear of erroneous test results can be greatly reduced.

While it is easily demonstrated that hair analysis at the price of approximately $50 per substance analyzed is cost effective for screening employees in public safety positions, such costs in my opinion cannot be justified in the case of wide scale drug screening of noncritical employees. Of course, there are also legal and ethical objections to such wide scale testing.

Another major technical advantage of hair analysis is that it provides a quantitative measure of a person's drug use. That is, we can distinguish between heavy, medium, light or no use. Urinalysis, in contrast, can only tell you what drug is used, but not how much.

This is, of course, of considerable importance in monitoring rehabilitation patients since we can establish whether a person is improving, getting worse or staying the same. Therefore, we expect hair analysis to have a major impact on drug rehabilitation programs where objective evaluation of treatment outcome is a long overdue event.

As a final point on the difference between hair analysis and urinalysis, I would like to indicate that my statement should not be construed to be an attack on urinalysis per se. Actually the two tests are complementary. Urinalysis is best suited for short-term monitoring, that is, 2 to 3 days after a possible drug related event, and hair analysis for the screening of a small segment of critical personnel, and of course for clinical evaluation.

Hair analysis has been extensively field tested through numerous analyses on more than 700 human subjects. This involved stud-

ies with psychiatric patients, Navy personnel and in the courts. With a $200,000 research grant from the National Institute of Justice, the Ianus Foundation is currently doing a field study on probationers and parolees.

This completes my formal statement. I will be very happy to answer specific questions on our research.

[The prepared statement of Dr. Werner A. Baumgartner follows:]

Testimony of Werner A. Baumgartner, Ph.D.

Scientific Director, Ianus Foundation

INTRODUCTION

A new method of testing for drugs of abuse through the analysis of human hair was invented in 1977 in my V.A. laboratory and refined with the assistance of the Ianus Foundation over the past decade. The method known as radioimmunoassay of hair (RIAH) was developed primarily for addressing some of the clinical problems encountered in the treatment of drug addiction.

In recent years, however, a growing number of requests for assistance to people implicated by false positive urine tests has underscored the fact that hair analysis does not incur many of the technical, procedural, legal and ethical problems of urinalysis. Since the legal problems of urinalysis are by now well recognized, I will confine my presentation to a discussion of the RIAH method and how the major problems of urinalysis can be avoided by this new drug testing technology.

Technical Aspects of Hair Analysis

Figure 1 shows the biological basis for hair analysis, namely, the intimate contact between the venous/arterial blood supply and the hair synthesizing follicle. Thus drugs circulating in the blood stream are effectively transferred to and permanently embedded in the growing hair fiber. Hair analysis is carried out by releasing the entrapped drugs through chemical destruction of the hair fiber, then applying specially developed radioimmunoassay or gas chromatography/mass spectrometry procedures to the extract.

It is important to distinguish between hair analysis for drugs of abuse and the unproven clinical significance of nutritional hair analysis. In contrast to nutritional analysis, the diagnostic value of RIAH drug testing has been established by field studies involving numerous analyses on over 700 human subjects, including psychiatric patients, Navy personnel, and court cases. The Ianus Foundation is currently doing a $195,000 field study with the National Institute of Justice with federal probationers and parolees. The science of hair analysis for drug detection has been validated by independent laboratories in the U.S., Germany, Italy and Japan, using methodologies different from our own. The RIAH method has been applied to cocaine, morphine, heroin, marijuana, quaaludes and PCP.

A unique aspect of hair analysis is that it provides a quantitative measure of a person's drug use; i.e., we can distinguish between heavy, medium, light and no use (Fig. 2). This is in contrast to urinalysis which tells only what drug was used. Classification into categories of heavy,

medium and light use is particularly helpful with marijuana users, the only drug effectively detected by urinalysis in pre-employment screening. As there are an estimated 20 million marijuana users in the U.S., unemploying everyone who tests positive for marijuana use is obviously not a realistic policy, since the occasional weekend user does not pose the same threat to public safety as the heavy or chronic user.

Head hair grows at approximately 1.0-1.3 centimeters per month. Thus a 12-centimeter-long head hair provides a drug history of 9--12 months. Slower-growing body hair can extend this period up to several years. By cutting hair strands into suitably small sections (starting with the most recently grown hair near the scalp and moving progressively along the strand to older sections), one can by hair analysis obtain a read-out on the pattern of a person's past drug use. For example, the case depicted in Fig. 3 documents a person reducing her heroin intake from 14 bags per day down to 2 bags a day over a period of approximately 20 months. Such progress in the rehabilitation process cannot be documented by urinalysis, since this provides only non-quantitative information and, at best (i.e., in the absence of evasion), would have shown uniformly positive results for this patient.

The quantitative chronological data provided by RIAH can be of considerable importance for many other medical situations, as, for example, in determining the severity and duration of prenatal drug exposure through analysis of the mother's hair. Such objective, long-term information is critical to any medical study of the adverse effects of drug exposure on fetal and postnatal development. RIAH promises to have a major impact on this under-investigated field.

Resolution of the False Negative Problem* of Urinalysis by Hair Analysis

This wide window of detection, which ranges from months to years, makes hair analysis essentially evasion-proof. By contrast, most drugs can be detected in urine for only a few days after last use, thereby making urinalysis (except for marijuana) of little value for regularly scheduled tests such as pre-employment screening, since detection can easily be avoided by the forewarned individual merely by abstaining from drug use for a few days prior to the test. Other evasive maneuvers which create false negatives in urinalysis are flushing (excessive fluid intake), adulteration and substitution of specimens. These do not work with hair analysis since the 40 to 50 hair strands needed for hair analysis can be readily obtained under close supervision without embarrassment. Thus, evasion-proof drug testing

*Drug user who tests negative

by hair analysis can be effectively applied to personnel in highly sensitive positions at regularly scheduled annual physicals, thereby avoiding 4th Amendment problems, while at the same time effectively addressing the safety concerns of the public.

Hair can be conveniently shipped and indefinitely stored without refrigeration; thus the integrity of the specimen is not jeopardized by environmental conditions. For instance, a historical hair sample, that of the poet John Keats who took an opium derivative as a pain killer, allowed us to demonstrate drug use 150 years after the event.

The low detection efficiency of urinalysis can be augmented, but this only by frequent (legally troublesome) random testing. But even here the efficacy of detecting drug use is not satisfactory for most highly sensitive positions since random testing is too infrequently performed. Furthermore, many evasive maneuvers still can be applied.

The problems with random urine testing are well known in the criminal justice system where parolees and probationers are tested randomly as often as six times per month. It is precisely because evasion is still possible under these circumstances that the National Institute of Justice is comparing the effectiveness of hair analysis to urinalysis for drug monitoring and diagnosis in probation and parole settings. (See National Institute of Justice Report, March/April, 1987, pg. 3 - Attached).

Being unaware of the serious false negative problem of urinalysis caused by these deficiencies, the public is lulled into a false sense of security. One can therefore readily agree with the opinion expressed by Lois Williams (Director Litigation, National Treasury Employee Union) that "a test which is ineffective in meeting its stated goals (i.e., urinalysis) cannot be constitutional."

Resolution of the False Positive* Problem of Urinalysis by Hair Analysis

The other side of the coin is the false positive problem of urinalysis. Its causes are partly technical, operational and economic. As time does not permit me to go into the many technical details of this problem, I will restrict myself to some general remarks before focusing on the most troublesome problem of urinalysis; i.e., the occurrence of false positives which cannot be identified by

*Non-users who test positive

GC/MS confirmation. This problem can only be recognized by hair analysis.

First of all, concerning the economics of drug testing, I would like to express my concern of how the current price war between urinalysis drug testing laboratories could affect the quality of the offered testing services. For example, one of this country's largest testing laboratories is offering a screen of a panel of 6 illicit drugs for $27. Included in this price are GC/MS confirmation, chain of custody procedures, and a commitment of defending the results in court. In contrast to this, ($27.), the same laboratory offers the analysis of one commonly used pharmaceutical agent (Digoxin) for the standard fee of between $20-$30 depending on volume. What is significant is that the technical complexity and the cost of reagents and labor for the digoxin test is equal to ONE (not six) illicit drug screens. Furthermore the digoxin test requires no GC/MS confirmation, no chain of custody, and is essentially free of any legal consequences. Now laboratories may provide these drug screens as a public service, or recoup their losses in some way, but the fact remains that this low price, when taken on a nationwide basis, must inevitably lead to a deterioration in the overall quality of such testing. As I will show below, a drop from 100% accuracy to one no lower than 95% will result in a most unfavorable risk/benefit ratio, so as to preclude wide-scale urinalysis testing of a population (i.e., without cause). Another example to support this point is that forensic laboratories have to charge at least five to ten times the amount for their drug testing services in order to achieve a level of quality acceptable for presentation in the courts.

On the technical side, there are numerous reasons why urine testing cannot be made anywhere near fail-safe and this in spite of the fact that a GC/MS confirmation test is being performed on samples which gave a positive result by the screening test. I am afraid that the public has been given the impression that confirmation testing by the more expensive and technically more complex GC/MS procedure makes drug testing fail-safe. This is not the case, for there are a number of technical or procedural reasons why even GC/MS analysis can be in error.

What is true, however, is that the overall error rate of testing is reduced when two independent tests are performed. In particular, GC/MS confirmation addresses the possibility of a false positive screening result due to immunological cross reactivity. But this does not guarantee against the occurrence of technical or procedural errors during GC/MS analysis. Also, because of their small number, even the inclusion of control samples provides no guarantee against a low error rate.

But unfortunately these are by no means the only reasons for false positives by GC/MS. Through hair analysis we were able to demonstrate an essentially new class of false positives. These may be called evidential false positives as distinct from technical false positives. Examples of such cases are the inadvertent (or in some cases even the advertent) contamination or mixup of urine specimens at the collection site or in the laboratory. These samples obviously will test positive by both the initial screen and by the GC/MS confirmation technique, even though the individual may not be a drug user.

There are numerous ways that contamination of specimens can occur, particularly in the case of cocaine, since this drug is so ubiquitously present in society (e.g., cocaine contamination of our currency). By touching certain objects handled by both drug users and non-users (e.g., doorknobs, etc.), traces of drugs may be transferred to the hands of the non-user, and from there to the urine specimen by handling the inside of the lid of the collection jar. There cocaine breaks down readily into the metabolite benzoyl ecgonine--the substance measured in the GC/MS confirmation test.

Hair analysis does not suffer from such contamination problems since hair is thoroughly cleansed before analysis. And of course, we can always get a new, identical hair sample if there is any claim of a specimen mixup or breach in the chain of custody. This makes hair analysis essentially fail-safe in contrast to urinalysis, since a fresh, identical urine specimen cannot be obtained at a later date.

Another, even more likely occurrence is the contamination of urine specimens in the laboratory by a drug-using chemist through the handling of certain types of equipment used in drug testing (e.g., pipet tips, etc.). This possibility is further enhanced by the paradoxical fact that most drug testing laboratories do not test their personnel for drug use. And even if laboratories did such testing, they would do it too infrequently, and by the readily evaded, false negative prone, urine test. By the time a drug-using chemist is identified by urinalysis, many evidential false positives could have been generated. Thus the testing of the testers by essentially evasion-proof hair analysis should in my opinion be the first step in any drug testing program. In any case, many positive urinalysis results can be challenged in court on the basis of the ineffective screening of laboratory personnel.

Another possible source of evidential false positives is through the inadvertent ingestion of drinks or food which had been spiked with drugs. A $120-billion illicit drug trafficking industry may well go to such lengths in order to discredit a particular urinalysis testing program. Whether

an actual occurrence or not, such a scenario is a powerful legal defense, known as the "brownie defense."

While GC/MS analysis of urine specimens cannot identify contaminated specimens and inadvertent exposures, hair analysis can identify such occurrences. This can be achieved simply by looking for evidence of drug use in different sections of hair corresponding to different periods of time. One-time inadvertent exposure would only show up at a particular point in the hair strand and persons with contaminated urine specimens would yield negative hair results.

A slightly different problem is a false evidential positive resulting from the ingestion of poppy seeds. (An amount equaling those in three bagels appears to be sufficient.) Unlike in urine, the morphine present in poppy seeds as used in food does not accumulate in hair in sufficiently high quantities to generate a false evidential positive result. This incidentally, is also true for other substances capable of interfering in the initial screen through immunological cross reactions.

It should be noted that the various scenarios cited above are not hypothetical cases but occurrences which we were able to demonstrate through hair analysis. During the past year we have already been able to vindicate people who had been accused by such false evidential positives. Most recently, this occurred in a court martial of a Marine, in spite of the fact that the urinalysis for cocaine had been performed by the Navy, the undisputed leader in urinalysis testing. (See attachment.)

Now my criticisms of personnel screening programs based on urine (or blood) analysis should not be construed to be an attack on urinalysis per se. Urinalysis and blood analysis are fine tests in themselves when applied in their proper setting. There is no competition between urinalysis (blood analysis) and hair analysis or for that matter with electroencephalographic testing. (i.e., by the Veritas instrument). Rather, these different tests are complimentary and not competing technologies. Thus, electroencephalographic testing provides information about impairment at the time of an accusation, whereas urinalysis is best suited for demonstrating drug use within the immediate past (e.g., post-accident testing). Hair analysis provides an evasion-proof, quantitative historic overview of drug use and is thus the test of choice for medical diagnosis and the screening of personnel in highly sensitive positions.

Being a more complex test than urinalysis, hair analysis will cost approximately $50 per substance analyzed. It is, therefore, unlikely that hair analysis will be used for mass screening purposes. Of course, wide-scale drug

screening even by a fail-safe and efficient detection method such as hair analysis is also precluded by legal and ethical considerations. In my judgment, hair analysis can readily be justified for medical purposes, in testing for cause, in the courts, in the criminal justice system (probation/parole), or for screening personnel in positions affecting pubic safety.

The problems of urinalysis which make it unsuitable for mass drug screening can be summarized by one general population statistical argument. To illustrate this argument, let us assume that if on a nationwide basis urinalysis could achieve a 95% accuracy rate and were able to identify 5% of the population as drug users (an unrealistically high figure because of the many possible evasive maneuvers and narrow window of detection), then out of every 100 people tested, we would accuse 5 innocent people for every 5 drug users correctly identified. In my judgment, such situations result in quite an unfavorable risk/benefit ratio. A similar argument was recently made by Dr. George Lundberg, the editor of the Journal of the American Medical Association. (See JAMA, Dec. 1986, pg. 3001).

One has only to remember how adversely the tourist industry was affected by the far lower probability of a terrorist attack to recognize that the public will not tolerate even a low probability of casualties in the "war on drugs." Such casualties, of course, can be effectively eliminated if hair analysis were to be used as a confirmation test for disputed urinalysis results.

With such a "safety net" in place, the stressed relationships between management and apprehensive employees could be greatly reduced. The ability of employees to now prove their innocence in court through hair analysis, and thus win expensive damage suits, should stimulate management into providing such a safety net while they are in the process of rethinking their drug testing policies. However, even with a "safety net" in place, urinalysis still poses a threat to the public by being unable to meet its primary objective, i.e., guaranteeing the drug-free status of that small segment of the work force for which drug testing can be justified--those in positions affecting public safety.

The many problems of urinalysis have led me to abandon my own initial support for wide-scale drug screening at the workplace. I supported such policies initially because testing and the subsequent threat of unemployment seemed to be an effective means for addressing the demand side of the drug problem. But, then, it can even be argued that unemploying addicted individuals has potentially serious drawbacks, since this would tend to turn such people to crime in order to support their drug habits--particularly drug dealing. Closing the vicious cycle in such a manner results in a further escalation of the drug problem.

Thus the choices that we are left with at the demand side of the problem appear to be education and rehabilitation. In particular, we need to focus on more effective and more economical means for rehabilitation. Critical to such advances in drug abuse rehabilitation are improvements in diagnosis, patient monitoring, and objective evaluations of treatment outcome. Hair analysis appears uniquely suited for these purposes. Unfortunately, rehabilitation workers have been singularly reluctant in adopting objective chemical testing for evaluating and monitoring of their patients. However, perhaps the time for change has come. Darly Kosloski, A.C.S.W., in his article, "HMO and PPO: Future Trends in Addiction Healthcare (U.S. Journal of Drug and Alcohol Dependency, April, 1987) urges behavioral health professionals "to become better evaluators, screeners, and diagnosticians," and "more truly objective and uncompromising in (patient) assessments." He urges the development of programs which force "therapists to be more accountable for treatment, planning, and progress." The pressures imposed by DRG's, HMO's and PPO's on the behavioral health care industry provide the means for achieving these long overdue improvements. I urge Congress to be active in facilitating these new opportunities in rehabilitation, for drug testing in the medical setting can easily be justified in view of the obvious benefits to the patient and to the nation.

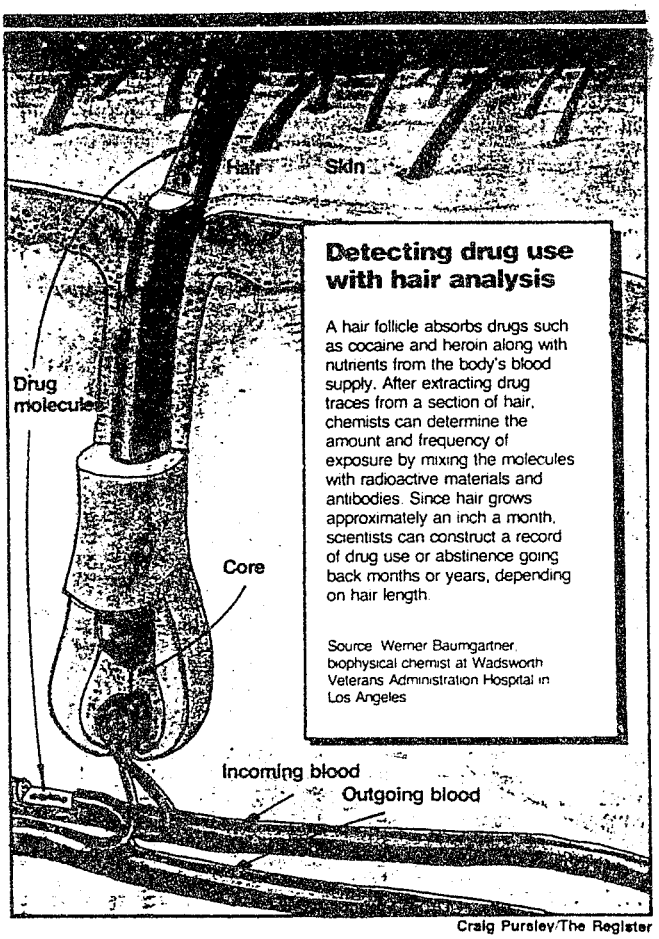

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Figure 1: Note: hair grows approximately one half-inch per month, not one inch per month as stated above.

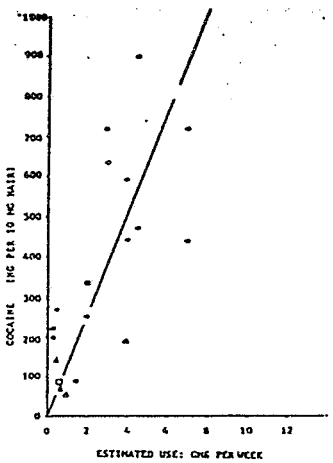


FIG. 2 : Correlation between self-reported drug use and drug content of hair. Scatter in data is due to inaccuracies in self-reporting.

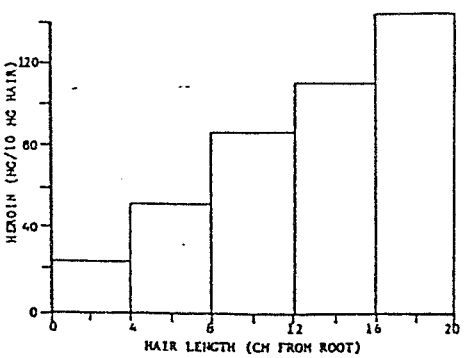


FIG. 3: Distribution of heroin along a strand of hair of a person using 14 bags per day of heroin 20 months ago, reducing use to 2 bags per day within the last 4 months.

UNITED STATES MARINE CORPS
Legal Services Support Team "E"
Legal Service Support Section
1st Force Service Support Group, FMFPac
Camp Pendleton, California 92055-5702

15 April 1987

W. A. Baumgartner. Ph.D.
Nuclear Medicine
Veteran's Administration
V.A. Medical Center West Los Angeles
Wilshire & Sawtelle Boulevards
Los Angeles, CA 90073

Re: United States v. LCpl Steven M. Piccolo, U.S.M.C.

Dear Dr. Baumgartner:

This letter is to thank you for the assistance that you rendered in the court-martial of my client LCpl Piccolo, which was tried here at Camp Pendleton, California on 6 Febraury and 6 March 1987.

As you recall, LCpl Piccolo was wrongly accused by the Navy urinalysis program of using cocaine.

After interviewing several witnesses who all stated unequivocally that LCpl Piccolo was not a drug user, I contacted you and requested that you analyze a sample of his hair. Your analysis showed that there was no cocaine present in the hair, which confirmed my investigation. I then prepared to go trial and contest the case.

The prosecution proceeded under the theory that their urinalysis program was infallible. The chief prosecution witness testifed that his lab performed approximatley 600,000 urinalyses per year. He further testified that although neither he nor any of the other workers in his lab could specifically remember the urine sample submitted by LCpl Piccolo, that it must have been done properly, because the system does not make mistakes.

The system was described as roughly the following. A urinalysis was conducted. LCpl Piccolo was one of the many Marines who lined up outside the restroom near the company office and who went in two at a time to fill a specimen bottle with urine.

The bottles are made of plastic with a screw on metal cap. It is necessary to hold the cap in one hand while urinating into the bottle. This procedure was not performed in a clinical setting, and there were plenty of opportunities for particulate contamination of the specimen.

Testimony, of the First Sergeant, in fact established that there were 6 known drug users in the unit at the time of the urinalysis, from which contamination might have occured.

The cap was placed back on the bottle by LCpl Piccolo and it was placed in a box next to other bottles. The bottles were not sealed in any manner.

The box was eventually sealed and shipped off to the drug lab.

Testimony at trial elicited the facts that the Navy Drug lab which performed these tests, is staffed primarily with civilians. That the civilians are never tested for drug use. That security was lax. And that there was no uniformity in the packaging of urine samples.

In short there were plenty of opportunities for either deliberate or inadvertant particulate contamination.

The First Sergeant further testified, that the 6 known drug users that worked and lived in the immediate vicinity of LCpl Piccolo, did not like him. They disliked him because he was such a squared-away Marine. They thought that he was a "Narc".

In other words, he would have been the perfect target for an act of subterfuge.

At trial, witness after witness took the stand to testify that LCpl Piccolo had good military character, was not the type of person to use drugs and that he was trustworthy and honest. When asked if they would believe LCpl Piccolo under oath, the witnesses to a man replied yes.

LCpl Piccolo took the stand and testified that he has never used cocaine.

You greatly assisted me in the preparation of this case. You also testified as an expert, to the possibilities of particulate contamination and how that could give a false positive reading.

Ideally the analysis of hair should be used as a safety net. We won this trial, with your help, but the important point is that we should never have been forced into trial.

LCpl Piccolo maintained his innocence, this innocence was proven scientifically and also in a court of law. However, even though he won at trial, he also lost to an extent. He was forced to put his name and reputation on the line. His unit deployed to Okinawa, Japan, yet he was forced to remain back here at Camp Pendleton awaiting his trial. While we all pay lip service to the phrase innocent until proven guilty, the reality is that once you are accused of drug use everyone assumes that you are guilty. LCpl Piccolo had to bear this stigma as well as the ordeal of a trial. The shame is that his prosecution was an exercise in futility.

Prior to the beginning of the trial, I informed the Commanding Officer that LCpl Piccolo had come up clean on a hair analysis and asked him to withdraw the charges. Unfortunately, the Commanding Officer had not heard of hair analysis. He had received briefings on urinalyisis and proceeded with that in which he had been trained.

The system currently has some buffers built into it, which is a recognition that out of 600,000 samples, there might be an occasional mistake made. Hair analysis can serve as a final safety net.

As a defense counsel I have seen countless urinalysis cases. Since the hair analysis has been made available, LCpl Piccolo is the only one who wanted to be

tested. In other words the innocent can be vindicated by it, while the guilty will not subject themselves to it.

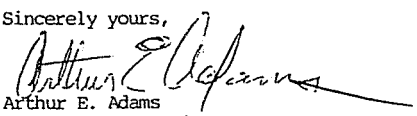
Hair analysis can serve as a safety net against mistake and it can also serve as a safety net against subterfuge.

Today we are more and more vulnerable to subterfuge. It is not inconceivable to imagine a disenchanted subordinate or some outside agent spiking the food or drink of an American serviceman. That serviceman would then be removed from his job and either punished or discharged. Hair analysis can show that a person is not a low level user, and that showing can uncover the cases that involve subterfuge.

I again wish to thank you for your help.

I also intend to use hair analysis as a prosecutor. It offers great promise, when there is a problem with a urinalysis chain of custody or with a person who has been evading urinalysis testing.

Sincerely yours,



Arthur E. Adams
Captain, U.S. Marine Corps

Statement about Technical Aspects of Hair Analysis

Linus Pauling
Linus Pauling Institute of Science and Medicine
440 Page Mill Road, Palo Alto, California 94306

I am at present Research Professor in the Linus Pauling Institute of Science and Medicine. I have served as Professor of Chemistry in the California Institute of Technology, University of California in Berkeley and San Diego, Oxford University, and Stanford University, where I am now Professor Emeritus.

I have received many awards for my contributions to chemistry, including the Nobel Prize in Chemistry for 1954, the National Academy of Sciences (U.S.A.) Medal in Chemical Sciences, the Davy Medal of the Royal Society of London, the Medal of the City of Paris, the Lomonosov Medal of the U.S.S.R. Academy of Sciences, and several medals and prizes of the American Chemical Society: the ACS Award in Pure Chemistry (1931), the Priestley Medal, the Nichols Medal, the Theodore William Richards Medal, the J. Willard Gibbs Medal, the Gilbert Newton Lewis Medal, the Linus Pauling Medal, and the ACS Award in Chemical Education (1987).

I have had several decades of experience in the field of quantitative chemical analysis. This experience has included work on urinalysis by the methods of gas chromatography

and mass spectrometry. I have also done much work in the field of immunochemistry, but I have not had experience with radioimmunoassay methods, although I am familiar with them.

It is my opinion that the radioimmunoassay of hair (RIAH), which was invented by Dr. Werner A. Baumgartner and his associates in 1977, has very great value for the study of the amount of drugs in the human body. It is, I believe, far more reliable than urinalysis. A sample of hair can be washed and cleaned before it is analyzed, so that the possibility of contamination is greatly reduced, compared with that for a sample of urine. Reasonably reliable quantitative determinations of the amount of a substance in the body can be obtained by analysis of the hair. By analysis of segments of a sample of hair at different distances from the root, the amount of the substance present in the body at the time that the sample was obtained and a earlier times, weeks or months earlier, can be determined. A check on the analysis can be made by use of another sample, even taken at a later date, with use of the rate at which hair grows, about ½ inch per month for hair of the human head.

For these and other reasons it is my opinion that radioimmunoassay of hair is a far more preferable method of studying drugs in the human body than urinalysis.

Linus Pauling

11 May 1987

Mr. SIKORSKI. Thank you, Dr. Baumgartner.

First of all, in looking over your testimony as submitted, there are a couple of points where I think right away the hair analysis would be helpful.

You talk about a price war looming for people competing for these urinalysis test contracts. You talk on page 4 of the attachment of laboratories, one of the country's largest testing laboratories offering a screen of a panel of six illicit drugs for $27, which would include the GC/MS confirmation test, chain of custody procedures, and a commitment of defending the results in court.

You also make a point that in contrast to this $27, the same laboratory offers an analysis of one commonly used pharmaceutical agent for the standard fee of between $20 and $30, depending on its volume, and that includes no confirmation test with GC/MS (Gas chromatography/mass spectrometry) or chain of custody or defense in a court.

So you conclude now laboratories may provide these drug screens as a public service or recoup their losses in some way, but the fact remains that this low price, when taken on a nationwide basis must inevitably lead to a deterioration in the overall quality of such testing. You stand by those comments?

Dr. BAUMGARTNER. Yes. I have discussed this problem with some of the major laboratories, and they certainly feel there is no way that they can offer such a service on an economic basis and survive if they were not involved in some other business.

I believe that quality and price are related, and of course, in a forensic laboratory tests of the same kind that have to stand up in court are offered at at least 5 to 10 times the price. So I think it is a crucial point.

Mr. SIKORSKI. I think it is, too, and that is why I wanted to raise it, and I thank you.

The second point that you raised, page 7 of your attachment, you said that if on a nationwide basis urinalysis could achieve a 95 percent accuracy rate, similar to Dr. Miike's hypothetical example, then one would incorrectly identify 5 percent of the population as drug users. It is an unrealistically high figure, incidentally, because of the many possible ways to evade and the narrow window of detection. Then out of every 100 people tested, we would accuse five innocent people for every five drug users correctly identified.

We have a risk/benefit ratio then of 5 to 5, an unacceptable level in your opinion, and mine as well, and you have others, such as Dr. George Lundberg of the Journal of American Medical Association, who have confirmed this risk/benefit ratio or innocent/guilt ratio.

Dr. BAUMGARTNER. Yes. It is a risk/benefit ratio that is totally unacceptable. We are looking, as Dr. Miike pointed out, for a needle in the haystack. That is the problem.

Mr. SIKORSKI. But every time we pick up a needle, we really have a piece of hay. For every needle we find, we have an innocent individual.

Dr. BAUMGARTNER. That is right, and the impression has been given that GC/MS protects against all possibilities of false positives, and this is totally, absolutely incorrect. Our experience over the years has shown repeatedly that innocent people have been implicated by false positives that have been monitored by the so-

called confirmation technique, and we have been wondering how this comes about, and of course, there are several answers for this. Of course, one is that even GC/MS can go wrong. It is well known by experts that there are ghost peaks which result from a previous sample having gone through and adhering to certain parts of the equipment, such as the septum, but more a likely cause of error is that the testers in laboratories are not tested, and this is quite different from testing laboratory proficiency. If you have a drug using chemist, there could be enough cocaine on the hands of such a person that by such a person handling a piece of equipment, generally called a pipette, you pick this thing up and then you go into the urine sample. That urine sample can become contaminated.

Mr. SIKORSKI. This is not hypothetical. You have experienced this in your own lab at one point?

Dr. BAUMGARTNER. Absolutely. As a matter of fact, a couple of weeks ago I was brought in to defend a Marine, a Lance Corporal, who was innocently accused, although the GC/MS confirmation test showed him to be positive, and we worked out a number of possibilities.

It is not only that such an occurrence (i.e. false positive) could have arisen in the laboratory, but these people do end up in strange places on Saturday nights, and people may actually engage in some kind of subversive activity (e.g. spike drinks). This fear is also shared by police undercover agents, and there are other scenarios of how you can get false positives.

If you handle equipment, if you are in the vicinity of drug users and you handle common equipment; even the door knobs may be containing traces of cocaine. Another person then touches this door knob, say, at the rest room facility where urines are being collected, and then you unscrew the urine jar, you put your finger on the inside, and if it is cocaine, for instance (which is, of course, widely dispersed and our currency is contaminated as we know) you put your finger on the inside of the lid and you screw it down, then you can get a contamination of the urine with cocaine; there it breaks down readily into benzoylecgonine, the metabolyte, which is then tested by GC/MS.

Mr. SIKORSKI. You mentioned in your attachment there are a lot of ways, cocaine contamination can occur, e.g., currency, door knobs, drug using chemists, the ingestion of food and drink that has been spiked with drugs, the so-called "brownie defense," ingestion of poppy seeds.

Dr. BAUMGARTNER. I should mention that hair analysis can distinguish between such occurrence because you can go back in time and see that the person has not been a drug user at all, and if it was a spiked drink, then it would show only up as a tiny little blip, in the hair and so on. So we won the acquittal of the Lance Corporal in the Marines, and I should remind you this Lance Corporal had been tested by the best urine testing laboratory in the country i.e. by one of the Navy laboratories.

Mr. SIKORSKI. And part of your attachment is a letter from the defense team that we have in the record.

Dr. BAUMGARTNER. That is right. That we have a safety net function is one of our primary objectives. Hair analysis should be applied as a safety net to protect the innocent in order to reduce the

stress between employer and employees which arises from drug testing policies.

Mr. SIKORSKI. Let me get into that quickly. Could you tell the subcommittee about the various field tests where hair analyses have been completed and are currently underway? You have field tests. You have a DOJ grant.

Dr. BAUMGARTNER. Right. We had a grant from the Navy to evaluate clients in their rehabilitation program. This was very useful.

I should also mention the point Dr. Miike made about hair being possibly more invasive. That is not so. In a preemployment test, we would only be measuring, say, the last 1 or 2 months of the hair. If a person has long hair, such as a woman, it may go back 3 or 4 years. We would not need to go that far back in time, but only as far as the last 2 months.

Mr. SIKORSKI. How do you do that? You just do not go any further back or the hair is not taken?

Dr. BAUMGARTNER. You would just simply cut a small section of hair.

Mr. SIKORSKI. You would just take the tip?

Dr. BAUMGARTNER. You would take 1 inch near the root, for instance, and so you would have a "window" of 2 months rather than, of course, 2 to 3 years.

Anybody that can abstain from drug use for 2 months, I think, is not an addict and is not a threat.

The same situation pertains to marijuana. I will get to your question in a second. With marijuana, we have 20 million marijuana users, and I would guess that a sizable fraction, maybe a quarter or so, at UCLA may be using marijuana. You cannot unemploy everybody that shows a positive for marijuana, but the person who smokes 5 to 10 joints a day certainly is a hazard to the public, particularly if the individuals flies a plane or drives a school bus and so on.

So with hair analysis, we can distinguish between the heavy, medium or light user or the nonusers, and I certainly think that we can easily pick up a person that smokes 5 to 10 joints and obviously is a hazard.

Concerning the field study, this was one of the field studies that we did with the Navy to get a retrospective record of a person's drug use. There is a lot of denial. We also did a field study with the noted forensic psychopharmacologist at UCLA, Dr. Siegel. Diminished capacity claims are a very important defense these days. You rob a bank, and just before you rob a bank, you take a little bit of cocaine. If you get caught, you claim that you are a compulsive user and could not help yourself, and instead of getting a long jail sentence, you are out there in a rehab program.

But with hair analysis, there you can go back in time and clearly establish whether somebody has been a heavy user or an occasional user. So there we are not dealing with an invasion of privacy issue.

In the Navy treatment program we wanted to know how heavy a person's drug use has been, whether they were heavily addicted people, therefore in a high-risk category, or whether they were just playing around and therefore could be easily rehabilitated. The same thing is true with the National Institute of Justice in their

field study parolees and probationers are tested randomly about six times a month, and even with such a stringent surveillance program, evasion is still readily achieved, by "flushing", substituting samples, and so on.

However hair analysis is essentially evasion proof.

Mr. SIKORSKI. You are proposing hair analysis at the end of the testing line?

Dr. BAUMGARTNER. Well, it becomes cost effective by simply testing such populations only every three months rather than six times a month.

Mr. SIKORSKI. In your conversation with me and in your statement, you are not supportive of wide scale testing, but only testing for specific purposes, safety, security kinds of situations. Is that correct?

Dr. BAUMGARTNER. Yes. I think it makes no sense to test your secretary. If she is ineffective because she is on drugs, that is easily established. You know, you simply remove her from her employment for incompetency. But if you are driving a school bus or flying planes, I do not think that you should take the risk of having a heavy drug user in control of public safety; and preemployment testing by urinalysis just does not identify these people.

Mr. SIKORSKI. Let me ask you on the hair test, have studies been done to determine the way that different factors, such as race, sex, diet, et cetera, might affect the growth rate of hair and the way in which it retains drugs or drug metabolytes?

Dr. BAUMGARTNER. Yes. We looked at those variables, and there are no major differences in growth rate and retention of drugs by hair.

Mr. SIKORSKI. Are there any factors that make a difference?

Dr. BAUMGARTNER. Not that we know at this point. You see, what we have done so far is we have correlated self reports with what shows up in hair, and of course, the variabilities in self-reporting are rather large: poor memory; in most cases people do not know what the purity of the drug was et cetera. So I am sure there will be subtle differences, but when it comes to subdividing people into heavy, medium and light users, into those categories, then we do not have a problem at all.

Mr. SIKORSKI. Is this anything like looking at rings on a tree?

Dr. BAUMGARTNER. It is a metaphor. Yes, that would be approximately similar.

Mr. SIKORSKI. How about bleaching, dying or otherwise treating the hair affecting the analysis or altering the amount of drug which would be detectable by hair analysis?

Dr. BAUMGARTNER. We have looked at these parameters, and there is no real way of escaping detection by applying these methods because it is easily identified, too, when hair has been so treated.

Mr. SIKORSKI. And you make a point in your statement, and the statement by Linus Pauling that is attached as well, you can wash and cleanse the hair to remove any contaminants before the testing, which, of course, cannot be done with urine.

Dr. BAUMGARTNER. Yes.

Mr. SIKORSKI. In some ways hair analysis is less intrusive than urinalysis or blood analysis. However, because hair analysis can trace an individual's history of past actions, it too is intrusive.

Dr. BAUMGARTNER. However, as an example, you can test the hair of a mother that will go back, you know, all three trimesters, nine months, to see what the severity, the quantity of drug exposure was, first, second and third trimester, and then to establish how that affected the fetal, as well as postnatal development of a child.

Mr. SIKORSKI. That is an interesting example because it seems to underscore what Dr. Miike was concerned with. There was unsuccessful prosecution, I believe, in California a few months ago for child abuse based on drug use during pregnancy. Is that an intrusive use of hair analysis, to go back and get proof?

Dr. BAUMGARTNER. Well, there are legal issues. Once drug use has been identified in the mother, at that point it is important for medical reasons to establish what the severity of the drug use has been. It is also important for the pediatricians to know that, and in some cases, of course, adoption agencies are also very interested to know whether this will be a handicapped child.

Mr. SIKORSKI. The controls would have to be on the use for which the analysis is made.

Dr. BAUMGARTNER. Yes.

Mr. SIKORSKI. The distinguished member of the full committee in the House and a valuable member of the subcommittee is here, and I know he is juggling, like all of us, three different schedules, and I want to recognize him for a statement and any questions he might have.

Mr. GILMAN. Thank you, Mr. Chairman, and I regret that we do have another hearing on at the same time that I am going to have to go to, and I want to thank the gentleman from Minnesota, our distinguished chairman, for holding this series of hearings on a very important issue.

As our Nation's largest employer, our Federal Government is going to have to take a leading role in the fight against drug abuse in the work place, and I know that many of our employers are very much concerned, particularly in sensitive positions. We have seen that no segment of our society is immune to the effects of drug or alcohol abuse, whether they be the rich or the poor, the suburban or the inner city, black or white. All have been touched by the effects of drug abuse one way or another.

However, even though strong measures are necessary to fight the debilitating problems, we are going to have to be cognizant of its impact on individual rights, and it is for that reason that your hearings are so important in this committee.

I commend you, Mr. Chairman, for examining this very contentious issue. I know that as a result of these hearings, we may be able to come out with some practical resolution of some problems confronting us as at the same time we try to make certain that we do whatever we can to rid our society of drug abuse, and particularly in areas where there are sensitive and safety considerations. Whether it be urinalysis or hair analysis or whatever we utilized, I hope that we can find a satisfactory resolution as we continue to do battle with this scourge on the society.

Thank you, Mr. Chairman, for permitting me to intervene at this time.

Mr. SIKORSKI. Thank you.

The gentleman from New York raises the concern eloquently and a lot more briefly than I did, and I commend you for doing that. I am going to make sure that the record is open so that if any member or the staffs desire to insert matters into the record or to question the witnesses, we will have some time yet to do that outside of the hearing.

Thank you.

Dr. Baumgartner, many drug testing experts support the potential of hair analysis, but they all say it is in development. Is that true?

Dr. BAUMGARTNER. No. We have been in this business now, not business, but in the research, for ten years. Relative to the deficiencies of urinalysis, we are ready to make a very important contribution, the most important contribution being to protect the innocent and, two, to apply hair analysis where it counts most, namely in rehabilitation. Detection is only the first step. Rehabilitation is, you know, the most important issue that I think confronts our nation with regard to drug use.

With rehabilitation we have the problem that there is a $40 billion drug rehab industry. Some people call it "the other drug business," and this industry needs to meet its obligations by developing more effective, objective measures of outcome, and hair analysis will be a very important tool in that area. This is why we have been around for ten years.

There is an example on the last page of my testimony. We have a graph where we see a person that has been on 16 bags of heroin/day. Twenty months ago she was in a rehab program, and in a step like fashion you can see a decrease of use to two bags/day during a 20-month period. If you had used urinalysis, you would, at best, if she had not evaded detection, just simply think that the person is continuing to use. You would only know that she is using, but you would not recognize that she is truly improving.

So that kind of information, I think, is vital to improving our rehabilitation programs and also to steer the public to programs that work and those that do not work.

Mr. SIKORSKI. That is an excellent point. Has hair analysis been approved by the FDA yet?

Dr. BAUMGARTNER. We do not need FDA approval since we are using the kits which are used for radioimmunoassay procedures of urine. We are simply applying it to a different specimen, and we have developed special extraction techniques.

Mr. SIKORSKI. This technique is interpretative, and the question then becomes: can you have enough highly trained individuals who can make the appropriate interpretations or are we setting ourselves up for another juncture for potential error?

Dr. BAUMGARTNER. Well, what we are doing now with the support of venture capital, we are setting up the Psychemedics Corporation, and there we will be training, of course, people to become experts in hair analysis. We also have a clinical program, and we will also be licensing the technology to any laboratory that wants to use the technology.

I should also complete your previous question. For legal purposes, we need to develop all of the confirmation techniques for hair analysis, such as GC/MS and that phase is now in progress. In the next couple of months we should have completed that work as well so that hair analysis will also be available for identifying drug users in these highly critical positions.

Mr. SIKORSKI. One of the criticisms of the testing program and some of the current tests surround the idea of designer drugs. We have known that cocaine and marijuana are the two that are going to be tested automatically. Others, drugs, such as barbiturates others could get approval for testing from HHS, but the point has been made that you can get around those with designer drugs.

Is hair analysis as easy to get around with designer drugs as urine analysis or do we not know?

Dr. BAUMGARTNER. As I said, all evasive maneuvers that I can think of that work for urinalysis do not work for hair analysis. We, currently, with hair analysis can measure PCP, heroine, morphine, marijuana, cocaine and quaaludes. The reason that the menu is so small is that it reflects the difficulty of obtaining the necessary funds over the last ten years. This is a general problem with any innovative, new science. There is an in-built bias in the funding agencies to support new work; this is another topic of discussion, and I do not want to get into that now.

But the "menu" we want to expand: we would like to go into, of course, monitoring for industrial pollutants, carcinogens, and also to monitor the compliance with psychoactive medication, such as antipsychotic agents, antidepressants, to establish whether people who are outside of psychiatric hospitals are safe to look after themselves. There has been, a case, a very well known case, where a person has ceased taking his antipsychotic agent and switched to a propsychotic agent, such as PCP, and in the process or, rather, as a consequence of this change ended up killing a number of people.

So there are many applications for hair analysis outside of the drug testing area.

Mr. SIKORSKI. Dr. Baumgartner, you have been, as the other witnesses have been, extremely helpful to the subcommittee, and we will have perhaps questions submitted to you. I think we went through the ones I had, but there might be others, and we ask that you submit the answers for the record and anything else that would be helpful for the record.

Again, thank you for your excellent testimony.

Dr. BAUMGARTNER. Thank you very much for your interest in our work.

Mr. SIKORSKI. Our next witness is Mark Waple, partner in the law firm of Hutchens and Waple. Mr. Waple is an expert in the area of drug testing litigation and has defended over 500 administrative and criminal urinalysis cases. Mr. Waple is here today, and we thank him for unselfishly sharing his expertise and time and resources with the subcommittee for the purposes of analyzing potential for litigation inherent in the administration's current drug testing program.

Mr. Waple, good morning. I know you flew in this morning. We thank you for your assistance.

STATEMENT OF MARK WAPLE, ESQ., HUTCHENS & WAPLE

Mr. WAPLE. Thanks for the invitation.

Mr. SIKORSKI. We have your testimony that will be placed in the record.

Would you care to summarize for us in any way you would like, and then we can get into some questions?

Mr. WAPLE. Yes, sir.

I would like to start by being certain that the written testimony that I have provided is really just a summary. When I received Congressman Sikorski's invitation last week, I was in the middle of picking a jury on a first degree murder case, and the judge let me go from North Carolina to come up here today. So this is really a brief summary. I did not mean it in any way as being really comprehensive, but there are some things in here that perhaps would help the committee.

For approximately 5 years now I have had the honor really of representing a considerable amount of U.S. Armed Forces personnel in the southeastern region of the United States, and they have been active duty Army, active duty Marine, Navy, Coast Guard and Air Force. As I put in the written testimony, their occupational specialties have ranged from an infantryman, nurses' military police, air traffic controllers, and physicians, and other professional people.

The drug testing laboratories that we have had some experience with have included Department of Defense drug testing laboratories, state and federal contract drug testing laboratories, commercial drug testing laboratories, and the severity of the adverse action that was being taken against these approximate four to 500 individuals ranged from the possibility of incarceration all the way down to letters of reprimand and loss of employment.

In nearly every case, the allegation was use of the controlled substance rather than the more traditional drug type offense, such as possession, sale, distribution or manufacture. Ninety-five percent of these cases, and these are estimates, the urine which eventually allegedly tested positive for a controlled substance was taken from the individual randomly rather than through a search warrant or the other traditional legal processes.

Only in a very few cases were the urine specimens taken as a result of a probable cause or a reasonable suspicion following a mishap, such as a vehicular accident. In other words, the vast majority of these cases were these individuals were required to provide a urine specimen because their Social Security account number was taken out of the hat.

In trying to prepare this information for you, I thought back and found that it was interesting at least to me that in approximately 90 percent of these cases, these were individuals who had never been tested positive for a controlled substance before and had, in fact, tested negative on many prior occasions. I indicate in the written testimony that most of these individuals had at least two or three prior negative test results.

Although I have not kept specific data over the past 5 years, it is my opinion that in at least 75 percent of all of these cases, and I am talking about 75 percent of approximately 500 cases, there were

legal or scientific irregularities which substantially affected the reliability of the allegation that the individual in question had, in fact, used a controlled substance.

So what I have done or what I have attempted to do for you is to identify some of the more commonly recurring legal or scientific irregularities which I have experienced. I have developed, quite frankly, a check list. Every time I sit down with a new case, I have about a 90-item check list that I go through with the toxicologist that I consult with as well as my clients.

Mr. SIKORSKI. Would you be willing to share that check list with the subcommittee?

Mr. WAPLE. I did not bring one with me.

Mr. SIKORSKI. Would you consider sharing it with us? I know it might be something that you consider part of your technique and expertise, but if you could protect it appropriately and share as best you can, the fact that there are 80 or 90 things is something that we should appreciate, and to the extent we can get those, it would be helpful.

Mr. WAPLE. Fine.

Mr. SIKORSKI. Thank you.

Mr. WAPLE. What I have attempted to do here is to take those 80 or 90, and that is 80 or 90 different legal, procedural or scientific or evidentiary problems, not all scientific problems by any means, and I have categorized them here in this talking paper and this written testimony into eight general problem areas.

The first is one which I understand is not before the committee today. That is whether the specimen was taken in a constitutionally permissible manner.

The second problem area is whether the test results were derived from nonspecific drug tests, such as the immunoassays and the EMITS.

The third general area is whether the test results were supported with the requisite supporting chain of custody.

Fourth is whether the testing techniques that were used in the individual's case were those techniques that have now been accepted in the American scientific community.

The fifth is where the test results contain supporting quality control data.

Sixth, whether the test results have been properly interpreted by a competent person.

Whether the test results have concentration levels consistent with either passive inhilation or passive or unknowing ingestion of the drug.

And, finally, whether the test results could be false positives.

Then I have listed some frequently recurring procedural problems that I thought were important at least to bring to your attention. I have had many cases, and this is just basics here, where the individual's Social Security number was completely wrong. That is obviously one of the first things we want to do. I have seen them transpose. I have seen Social Security account numbers of one individual attributed to another individual. That obviously creates serious problems with regards to the validity of the identification process.

There have been several cases where there are inconsistent test results between the field screening test, that is, the presumptive screening test, and the confirmatory test. Most of those confirmatory tests in the past 3 years have been by GC/MS rather than any other type of test, but the point I am making there is that in one urine specimen it would test negative and be confirmed positive.

Mr. SIKORSKI. Why would that happen? I thought negative tests were never screened again.

Mr. WAPLE. Procedurally that is what is supposed to happen. I have experienced cases where the supervisor made the determination to overrule that procedure. For example, the individual would test negative, but the supervisor takes the position that they have a strong suspicion that the screening test is wrong, send it forward and have it tested by the confirmatory test. It would be in those kinds of cases. It is basically a failure to follow the normal routine.

Because most of the urine specimens are collected and shipped, confusion in the mailing process, confusion with registration numbers has been a problem.

Item number four that I have listed in the written testimony I think is important because I see that it is partially addressed in the guidelines that were mailed to me to take a look at. It has been my experience that it is not uncommon for there to be a great deal of confusion concerning the quantity or the volume of the urine. My experience has been that 60 milliliters of urine is what is the desired volume. I see in the material I received it is the same.

Normally 60 milliliters of urine is the preferred amount, and in some cases the individual simply cannot provide that volume, and this creates confusion over what the proper disposition of that specimen is. That is to say: should the specimen be kept and the individual return later, which creates the problem of a specimen laying around without enough urine in it which could be contaminated, practical joke by another employee or someone could take place, or should the individual or that employee's specimen be destroyed and the employee be required to come back and provide a total 60 milliliter volume?

The confusion is to the disadvantage of the employee as well as the employer.

I have had several cases involving officer clients, aviators in particular, in my memory, where the specimen bottles were accidentally dropped, accidentally contaminated, dropped into a latrine, dropped on a bathroom floor, creating confusion in how the collection process is to take place thereafter.

I have experienced cases where there were discrepancies between the presumptive screening test, either the RIA, the EMIT and the GC/MS. For example, I have experienced cases where the individual's urine specimen would test positive for marijuana by the presumptive screen test, with a concentration level of, say, 150 nanograms per milliliter, and later test positive on the confirmatory test with a concentration of more than 150 nanograms per mil, and I think most of the toxicologists that I have consulted with and who assist me in our cases agree that the concentration levels should decrease as time passes through degradation, and what you have there is some disagreement between the presumptive test and the confirmatory test.

I have had tests reported out as positive where the internal quality controls at the drug testing laboratory have failed, obviously raising questions concerning the accuracy or the reliability of either the presumptive or confirmatory test.

I think Item 8 concerns me more than anything on this list. It has not been uncommon in my experience for a particular drug testing lab to fail to follow their own standard operating procedures for equipment maintenance, data interpretation regarding retention times, mass ratios, mean ratios, and instead, to substitute a judgment call that as positive test result is close enough. I am certainly familiar with the phrase "close enough for government work."

The point I am trying to make there is that when your requirements and your guidelines or if they are implemented, that the drug testing laboratories, whether they are government labs, military labs, contract, commercial labs, there seems to be a tendency to substitute judgment for requirements, and I am simply bringing that to your attention.

The ninth item has to do with the problem of the internal chain of custody within a drug testing laboratory. It has been my experience that internally, within the drug testing laboratory, particularly labs that are doing high-volume testing, that there is an inattention to detail and a tendency to rush everything up, and the internal chain of custody documents need to be looked at very, very carefully.

The tenth item I see has been addressed in the material that was sent to me. That is the problem of carryovers. I have had cases where carryover created a false positive, that is, created a specimen whose concentration level was higher than the cutoff.

It has also been my experience to have drug testing laboratories while they are reporting out positive drug tests to have an unsatisfactory external quality control. I think that the Armed Forces Institute of Pathology, and they have the same data that I have, could provide to you examples of anywhere from a zero correct identification rate up to a 100-percent correct identification rate for labs which were reporting out positive and negative test results.

Now, the correct identification rate has to do with how correctly the particular lab in question is identifying known purportedly blind, external quality controls.

Mr. SIKORSKI. It is amazing. In the literature they do a much better job when there is an open test or when they know there is going to be a test going on. They do not know which samples, and they do a very good job. The error rate goes down to like 10 percent as opposed to 50 percent when there are blind proficiency tests.

Mr. WAPLE. Correct. That has been my experience.

Mr. SIKORSKI. Much of the argumentation about the value of these tests would be eliminated if they treated all of the tests with the same care and degree that they treat those that they know have some control tests in them.

Mr. WAPLE. Yes, sir, absolutely.

Item No. 12 has to do again with chain of custody within a drug testing laboratory. I have had several cases where we were doing a lot of work with the same lab over and over and over again. So we began to collect the signature specimens of each person who rou-

tinely appeared in the chain of custody and would routinely take a look at the signatures, and after a while it became quite apparent that, say, the signature of John Doe in the Jones case was not the same signature as John Doe in the Mary Jane case, and when this was challenged either at an administrative proceeding or at a criminal prosecution, investigations were conducted and ultimately it was determined that the signatures were not genuine.

I then go on to summarize this, on page 7 I talk very briefly about the problem of false positive tests. The issue of false positives is an important issue. I have had at least a dozen cases where we were able to document that the positive test result was a false positive. There are different ways to define, of course, what a false positive is. I have tried to define it both ways in this paper. The first definition is to define a false positive as an unconfirmed positive when a reasonable attempt has been made to confirm the positive test result by using an analytical test different and at least as sensitive as the testing method reporting the positive in the first place.

Mr. SIKORSKI. Mr. Waple, could you hold on for a second?

Mr. WAPLE. Sure.

Mr. SIKORSKI. We are going to take a five minute recess, and I want to get into this. We will be back at 5 minutes to 12.

[Whereupon, a short recess was taken.]

Mr. SIKORSKI. I am sorry for the interruption.

You were going to talk about the false positives and false negatives.

Did you hear the earlier testimony of Dr. Miike? For every five people who are confirmed as drug users, we are going to pick up five innocent people who are confirmed as drug users, but do not use drugs. Did you hear that?

Mr. WAPLE. No, sir.

Mr. SIKORSKI. I guess that was not Dr. Miike. That was the testimony of Dr. Baumgartner earlier.

Mr. WAPLE. I do not think I was here.

Mr. SIKORSKI. Is that kind of analysis, a risk/benefit analysis, consistent with yours? He cited his own experience and the discussion by Dr. Lundburg, the editor of the Journal of American Medical Association, December of 1986. Is that consistent with what you have been experiencing?

Mr. WAPLE. The only thing I can say is that I have experienced, and quite frankly, it has been like pulling teeth out of the experts who testify from these various drug testing labs because the last thing in the world they want to do is to concede that an error has taken place because obviously it would subject their contract with the government to possible termination. The only thing I can say is that there is a tremendous reluctance to admit making an error in any drug testing laboratory.

Mr. SIKORSKI. Another issue that has been raised and perhaps you can confirm it for us is that the General Accounting Office's analysis of the regulations and guidelines proposed by the Office of Personnel Management and the Health and Human Services do not allow for or do not specify what rights employees who test positives have to the information on the lab, their error rate and all of

the rest of it, and clearly from your perspective that is absolutely essential if they are to defend themselves.

Mr. WAPLE. That is precisely one of the points that I noted when I reviewed the scientific and technical guidelines of the drug testing program. I imagine this is promulgated by the Department of Health and Human Services.

Mr. SIKORSKI. Do you have a date on that one?

Mr. WAPLE. I am looking at Alcohol, Drug Abuse and Mental Health, Administration.

Mr. SIKORSKI. That is HHS. You are right. There are two kinds of guidelines pursuant to the executive order. One was last November, the Office of Personnel Management, and the other is the Health and Human Services basically focusing on the issues that you have been focusing on.

Mr. WAPLE. Yes, sir. Well, the note that I made to myself if the question were asked was when it comes to reporting the positive test result, I saw no provision in the material I received for the Federal employee to have access to the drug test data and the data about how well that laboratory was performing with regards to its external quality control.

Mr. SIKORSKI. In fact, the GAO testifies that there is no definition of unsatisfactory performance by one of these labs in the guidelines; that, in fact, you can have unsatisfactory labs, that have been shown under blind proficiency tests to be doing incompetent work, still continuing to do incompetent work.

They testified that if they show up as doing unsatisfactory performances, all of the tests 15 days before and 15 days after are suspect and have to be confirmed. They raised the question about the people who were tested 16 or 17 days before or after the lab was deemed unsatisfactory.

This is a mighty big issue for you as an attorney who is challenging these.

Mr. WAPLE. Well, my experience has been that getting the information from the labs is like filing a Freedom of Information Act request. It is that difficult. It is that cumbersome, and usually the employee cannot get the data, and it should be provided to the person who is accused of alleged drug use.

Mr. SIKORSKI. If I can follow up on this for a second. Is it correct that Comp-U-Chem Lab in North Carolina is one of the military labs? Have you had any experience with them?

Mr. WAPLE. They are located in North Carolina, yes.

Mr. SIKORSKI. Do they do a lot of military tests?

Mr. WAPLE. Yes, sir.

Mr. SIKORSKI. As I understand it they are the only contracted out lab for the military, and the results or their tests are performed in-house.

Mr. WAPLE. I am not sure what that means. I know that that laboratory does the presumptive screen tests and all of the confirmatory tests in the same facility.

Mr. SIKORSKI. So they are the only lab that I am aware of that is approved for doing the lab accreditation.

Mr. WAPLE. I know they are subject to quality control measures by AFIP.

Mr. SIKORSKI. This Comp-U-Chem lab does a lot of the military stuff. They are located in North Carolina. They are the closest of any lab that we are aware of to approval, accreditation under the HHS guidelines that you have there before you. Have you had experiences in your practice with Comp-U-Chem that cast doubt as to the total reliability of their tests?

Mr. WAPLE. Well, I want to be completely honest. My experience has been, and I could almost identify every lab that I have dealt with, I have dealt with almost all of the DOD labs, Fort Meade, Tripler, Weisbaden. I have had considerable experience with Comp-U-Chem, Brooks Laboratory in Texas, the Center for Human Toxicology. So the answer to your question is I have had experiences, both positive and negative, with all of those labs, and I would not want to single Comp-U-Chem out for being better or worse than the others.

If I had a general statement to make I would have to say that getting data directly from that lab has been very difficult for the alleged drug user.

Mr. SIKORSKI. Have you been successful in your practice in overturning actions taken on the basis of tests performed by Comp-U-Chem?

Mr. WAPLE. Certainly.

Mr. SIKORSKI. The only reason we focus on Comp-U-Chem is that to our knowledge they are the closest to accreditation.

How many cases have you had with Comp-U-Chem that you have overturned their results?

Mr. WAPLE. Well, to the best of my recollection, we started seeing Comp-U-Chem cases in around the period of time that the Fort Meade lab for the Army was shut down for irregularities. My recollection is that we started seeing Comp-U-Chem cases on a regular basis in I want to say the 1983 timeframe, and how many cases we have been successful with I do not have an exact number.

Mr. SIKORSKI. More than five?

Mr. WAPLE. Oh, yes.

Mr. SIKORSKI. More than ten?

Mr. WAPLE. Yes.

Mr. SIKORSKI. Does anyone handle as many cases as you do?

Mr. WAPLE. I do not know. I have no idea.

Mr. SIKORSKI. You have handled over 500 of these?

Mr. WAPLE. I want to be sure that that figure is not misleading, too. That includes simply sitting down with someone at a table and discussing their problem.

Mr. SIKORSKI. Telling them they do not have a chance and they do have a chance, and here is what is involved if you want to challenge it and the rest of it.

Mr. WAPLE. Exactly, as well as administrative hearings and criminal prosecution. I have seen a trend with regard to criminal prosecutions. I do not know if this has any interpretive value for you at all, but the trend has clearly been away from criminal prosecutions within the Department of Defense, in my opinion, to the administrative process where the burden of proof is not proof beyond a reasonable doubt. It becomes the same burden of proof that I see identified in the materials sent to me, which is this preponderance of the evidence standard.

I think that is an important issue because my experience has been once an employee is identified as positive on a drug test, that individual is not still presumed innocent. That person is presumed guilty until that individual proves he is innocent, and that is a value judgment to be made, but it is a fact of life.

Mr. SIKORSKI. I am told that even if they are proven innocent through administrative or legal action, there still is a labeling process that has occurred with colleagues, with peers, with family, neighbors and others.

Mr. WAPLE. That is absolutely correct.

Of course, I would not mention names, but a case that illustrates that so well involved a military neurosurgeon whom I represented several years ago. His urine test came out positive for marijuana. It was later determined that or there was an administrative process issued to have him show cause why he should not be dismissed from the military. We challenged the validity of the drug test. It was a poor scientifically processed case. The administrative actions were stopped, but he has within the last year informed me that a prospective employer contacted the Department of the Army, and they informed this prospective employer that he was a drug abuser, and it has interfered with his ability to obtain gainful employment.

Mr. SIKORSKI. I thought those files were confidential.

Mr. WAPLE. I have found that that is not always the case. I see that the reference is made in the material to protection under the Privacy Act.

Mr. SIKORSKI. We had testimony from the GAO that the Privacy Act allows for routine use, compatible use kinds of exceptions, and also includes a provision about hiring practices which would be a big loophole to drive this kind of information forward, as it happened in the doctor's case that you were talking about.

Mr. WAPLE. Yes, sir.

Mr. SIKORSKI. So your experience has not been that this information has been treated confidentially at all as private?

Mr. WAPLE. Not at all. It is more frequent that other individuals where the employee is assigned in the same office or the same organization, sometimes they know before he knows or she knows that their test has come back positive.

Mr. SIKORSKI. You have had a chance to review the drug testing regulations. Do any of their provisions other than the ones we have talked about jump out at you as being ripe for litigation?

Mr. WAPLE. I made a few notes. Yes, sir. With regards to the collection procedures on page 4, I think that the individual who is collecting the specimen has the responsibility to note unusual behavior.

Mr. SIKORSKI. Yes.

Mr. WAPLE. I found that that is a very subjective matter and certainly very subject to possible abuse by another employee, for example.

The collection procedures outlined on page 6 talk about how urine specimens could be stored temporarily. My experience with temporary storage of the specimens has been fraught with disaster. I have seen people put them in closets.

Mr. SIKORSKI. Nothing is as permanent as something temporary.

Mr. WAPLE. Nothing, and the thought I had is perhaps there should not be any temporary storage at all.

On the bottom of page 7, the very last paragraph, very last sentence, "it is not necessary to send specimens by registered mail." I made a note in the margin, "Why not?" Certainly no harm can be done with that additional, although small safeguard, but it is something that might protect the individual.

At the top of page 8 under the paragraph entitled "Confirmatory Tests," I may have misread this, but as I read the end of that paragraph, it reads, "At this time gas chromotology/mass spectrometry is the only authorized confirmation method." I made a note in the margin to myself, "With how many ions?" How many ions are being monitored?

I have had cases where the individual was being accused of using drugs where they were only monitoring one ion, and I think there are many toxicologists who would testify that a single ion monitorization is not accepted in the American scientific community yet.

Mr. SIKORSKI. Is that a threshold problem? What should the ion be?

Mr. WAPLE. A minimum of three, I think, is what we are suggesting, if not full scale.

Mr. SIKORSKI. Because with a single ion you pick up all kinds of false positives; is that it?

Mr. WAPLE. It just does not give you enough identifying factors to be comfortable in the identification process.

Mr. SIKORSKI. So waiving the GC/MS confirmation test if it is not appropriate, if it is not done right, is no confirmation at all?

Mr. WAPLE. Yes, sir. In other words, what I am suggesting is if the requirements are confirmation by GC/MS, that perhaps it should be further specified monitoring not less than three ions if not full scale spectrum.

Mr. SIKORSKI. Okay.

Mr. WAPLE. At the top of page 9, the first partial paragraph where it reads, "Both internal and external blind proficiency test samples should appear as ordinary samples to laboratory personnel," I think the intent there is good, that is, that the lab personnel cannot identify the blind proficiency test. My experience has been they always put them in the same spot in the same rack so that they know where the sit sequentially, and though they may not be able to identify them, they know because of procedure where they sit in the tray so that they can identify them anyway. So you really do not have a blind proficiency test at all.

The suggestion would be that they be placed randomly.

Mr. SIKORSKI. Is there someone from Health and Human Services here?

[No response.]

Mr. Sikorski Okay.

Mr. WAPLE. On page 10, sir, I noted under reporting results, the small second paragraph under reporting results, it reads, "All records pertaining to a given urine specimen shall be retained 2 years." The question I had is does that include or will that include all negative test results. My feeling is that it should so that an employee can document the fact that they have had prior negative tests.

My experience has been that negative test results are not retained, and it simply provides a greater history for the employee in question.

At the top of page 11 under retesting specimens, I think I would like to make what I consider an important point. It provides for retesting, and my experience has been when we are talking about especially contract labs, where we are talking about millions of dollars involved in the contract, and particularly where the language of the contract says that unsatisfactory performance by the laboratory or false positives may be grounds for terminating the contract, that to have a retest done by that same laboratory necessarily requires that laboratory to admit if there truly was a false positive that it has made a mistake, which would jeopardize the contract itself.

I have never had the experience yet where a laboratory on a retest has admitted that their first test was inaccurate, and the thought I had and the marginal note I made to myself on the plane coming up this morning was that perhaps—and I know this would be an additional expense—but perhaps retesting should be done by a second, independent lab.

Mr. SIKORSKI. When does retesting occur? Is it when there has been a challenge or a confusion? You are not talking about confirmation testing?

Mr. WAPLE. No, sir. We are talking about a test that has been presumptively screened positive and confirmed positive, reported out positive, but challenged.

Mr. SIKORSKI. Okay. At that point then it does make sense to remove the sample, which is then almost an adverse party situation.

Mr. WAPLE. Yes, sir, and I noted somewhere in here where we talked about the medical reviewing officer's role. I believe it starts on page 15. There seems to be built into this program a review by a medical reviewing officer. Apparently this individual will evaluate the test results, examine or discuss the test result with the employee, make this determination, whether there is any possible explanation medically or otherwise, and he has this authority, among all of this other discretion——

Mr. SIKORSKI. A Solomon kind of situation.

Mr. WAPLE. Exactly.

Mr. SIKORSKI. And it is pointed to as a real major safety net or fail safe mechanism.

Mr. WAPLE. It appears to me or the point that I was going to make is that he obviously can require a retest, but if it goes back to that same lab that has its multimillion contract at stake, that lab is not going to admit that their first test was inaccurate, and that brings me back to the last point, which is perhaps it is worthwhile to consider whether retests should be conducted at the same lab that reported it out the first time.

On a positive note, on page 12 with regard to requirements of internal laboratory quality control, there is a provision which reads, "In addition, some of the quality control specimens will contain drug or metabolytes that are near the threshold cutoff levels." I think that is a very good internal/external quality control technique.

On page 13, under the title "Agency, External Laboratory Quality Control Procedures," at the bottom of that paragraph where it begins to read, "Should a false positive error occur on the blind proficiency test specimen," this is something you mentioned earlier, "retesting of all specimens submitted to that lab for the period 2 weeks before and 2 weeks after is required," but then it goes on and says, "Unsatisfactory performance on proficiency test samples is sufficient cause for the agency to revoke lab accreditation." I have never seen that happen because it seems to me what develops there is sort of an identification of the agency with their own lab, and if they have 60 or 100 outstanding or pending adverse administrative personnel actions, it is very doubtful that they are going to disqualify or revoke the laboratory accreditation. I just do not think it is realistic, and I do not think it will happen.

Mr. SIKORSKI. Obviously the accreditation process and the blind proficiency tests have to be done outside of the agency by some centralized Federal Government source, probably NIDA. The revocation process must be based on the facts from the blind proficiency tests, because you raised an issue that I never thought of, and of course, if I were representing any of the 50 people that had a pending challenge and the lab came through with a blind proficiency test, I would use that information. But if the agency took the action it should have, if it was sufficiently problematic, and revoked the accreditation, then they would be certainly casting question, a looming shadow, over the results that occurred prior to that and that led to the action against my client.

Mr. WAPLE. Yes, sir.

Mr. SIKORSKI. There is probably a prima facie case right there. So there is a big, big incentive not to revoke even when the labs are performing below standards.

Any other points? You have been very helpful.

Mr. WAPLE. Yes, sir. There are just a few things with regard to the material that was sent. I do not know if you are inquiring into this or not, and if you are not, I will leave it out, but with regard to the information from the Federal personnel manual——

Mr. SIKORSKI. Yes, that was done previously. We have kind of a joint custody of this baby, and the real paternity lies in the Attorney General's Office, but the adoptive parents or the custodian parents at this point are Office of Personnel Management and HHS.

Mr. WAPLE. Just very briefly with regard to that, because potential areas of litigation was the question, on I think page 3, this process talks about the manner in which individuals will be designated to provide urine specimens. I could not tell from the way it was drafted or written whether random testing was mandatory or was simply a guideline.

On the top of page 4 it begins or it appears that the intent is for it to be a random process.

Mr. SIKORSKI. I think on page 4, you are in reasonable suspicion testing.

Mr. WAPLE. Yes, sir.

Mr. SIKORSKI. There are two. There is random and comprehensive testing in sensitive positions, and they state all of those, although no agency has come forward with a definition of "sensitive persons" for their agency thus far, and one of the GAO criticisms

was that you can have someone in a similar position in one agency who is tested on an open, random testing, and another person similarly situated in a whole bunch of other agencies not.

Mr. WAPLE. Yes, and that basically was one of the points that I was going to make.

Mr. SIKORSKI. Then there is the voluntary testing for those who volunteer, and then there is the reasonable suspicion testing.

Mr. WAPLE. And in that area, sir, that is where I think there are going to be a lot of problems because the reasonable suspicion testing has listed there four or five activities that could give rise to a supervisor making the determination that there is reasonable suspicion. One that causes in my experience the greatest concern, and I have had experience with Subparagraph (d) there, "Identification provided either by reliable and credible sources or independently corroborated."

I would presume that all Federal employees are reliable. Therefore, any Federal employee could report to any supervisor that they suspect that another employee has used or abused drugs, and my experience has been there is a lot of internal problems with drug testing because there are personality conflicts within an office or an agency. There are petty jealousies. There are problems with promotions, those kinds of things, and to allow a drug specimen to be required from an employee simply because another employee has made a report seems to be frought with problems.

Mr. SIKORSKI. They have found in public health work dealing with sexually transmittable diseases that there are a whole host of problems when tracing sexual partners, and this kind of situation is abused all the time. All kinds of people show up, relatives, neighbors, coworkers, supervisors, bosses and others where they were falsified for a variety of purposes.

We have your testimony that you have found that to be the case here, but we also have a long history of public health work that that is the case.

I would have thought you would say two, pattern of abnormal conduct or erratic behavior, which is like art. It is subject to a matter of taste.

Mr. WAPLE. In that same vein, I think another grounds for reasonable suspicion is listed as arrest or conviction for a drug related offense. I have seen that abused in the past because if you rationalize long enough, any offense in violation of a state or Federal law could be a drug related offense. Even a traffic violation, erratic violation of a motor vehicle theoretically could be a drug related offense, in theory.

I do not know. I would assume that traffic violations, such as speeding or running a stop sign, would not be included, but it is unclear from the way it is written.

Mr. SIKORSKI. It is unclear also when the arrest—the conviction is one thing. Often you have conviction for careless driving, which is really a driving while under the influence, and I do not know if that is a drug related offense or not.

Any others?

Mr. WAPLE. No, sir. I think those are the highlights that I wanted to identify.

Mr. SIKORSKI. Mr. Waple, you have been extremely helpful to the subcommittee, and we look forward to using you as a resource in the future. I once again want to underscore your willingness to assist us unselfishly, and at some inconvenience to you and to the court. Thank the judge for his willingness to allow you to come, and I know everyone on all sides of this issue will benefit from your expertise that you have shared with us.

We will be continuing our relationship in the future, hopefully not at billable hours.

Mr. WAPLE. Thank you.

Mr. SIKORSKI. Thank you, Mr. Waple.

[The prepared statement follows:]

WRITTEN TESTIMONY OF MARK L. WAPLE, ESQUIRE
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON HUMAN RESOURCES OF THE COMMITTEE ON POST
OFFICE AND CIVIL SERVICE

May 20, 1987

At your request that I testify at this hearing to discuss from the legal perspective possible procedural problems associated with drug testing by urinalysis, the following written testimony is provided.

First it may be helpful to you to understand that since approximately 1982 my law firm in North Carolina has either provided office counseling or legal representation in various forums both administrative and criminal to nearly 500 clients who have been accused of using controlled substances as a result of positive drug testing by urinalysis. Most of these individuals have been active duty members of the Armed Forces of the United States to include the U.S. Coast Guard, U.S. Navy, U.S. Air Force, U.S. Marines and U.S. Army. Their occupational specialities have ranged from infantrymen to air traffic controllers to physicians. The drugs which were alleged to be involved in all of these cases were cocaine and marijuana. The drug testing laboratories which produced the positive test results have been military drug testing laboratories, commercial drug testing laboratories and state or federal contract drug testing laboratories. The severity of the adverse action initiated against these individuals has ranged from possible incarceration, loss of flight status, loss of security clearances, loss of continued employment, loss of specialized training, loss of hospital credentials, loss of rank and position as well as fines and pay

forfeitures. In nearly every case the allegation was use of a controlled substance rather than possession, sale, distribution or other more traditional drug offenses. In 95% of these cases the urine, which eventually allegedly tested positive for a controlled substance, was taken from the individual randomly rather than through a search warrant or other traditional legal process. Only in a very few cases were the urine specimens taken as a result of "probable cause" or "reasonable suspicion" or following a mishap such as a vehicle accident. Also, thinking back on this now, I think it is interesting that at least 90% of these cases involved individuals who had never been tested positive for a controlled substance before and, to the contrary, had tested negative on prior occasions at least two or three times. Although I have not kept specific data over the past five years, it is my opinion that in at least 75% of all of these cases there was a legal or scientifically irregularity which substantially affected the reliability of the allegation that the individual in question had in fact used a controlled substance.

It may be helpful for you to know some of the more commonly recurring legal or scientific irregularities which I have found in urine drug tests. Checklists which I frequently use in representing a client alleged to have a positive drug test includes between 80 and 90 items, any one of which could invalidate the scientific conclusion that a urine tested positive for a particular controlled substance for a particular individual. In general however, there are eight major areas where urinalysis

testing can be challenged. These areas are: (1) whether the urine specimen was taken in a constitutionally permissible manner; (2) whether the test results were derived from nonspecific drug tests; (3) whether the test results are supported with the requisite supporting chain of custody; (4) whether the testing techniques are those accepted in the American scientific community; (5) whether the test results contained supporting quality control data; (6) whether the tests results have been properly interpreted by a competent person; (7) whether the test results have concentration levels consistent with either "passive inhalation" or "passive ingestion" and (8) whether the test results are false-positives.

I understand from Congressman Sikorski's invitation that your interest today is largely related to possible procedural problems associated with drug testing rather than the constitutional questions related to drug testing. Therefore, the constitutional issues are not discussed here.

Typical procedural problems are listed below:

1. It has not been uncommon for an individual's social security account number or laboratory accession number to be incorrect, thus causing major problems with the validity of the identification of the specimen.

2. Frequently there are inconsistent results between a field screening test (a presumptive screen test) and the confirmatory test (GCMS). That is to say one test screened the urine negative and the second test resulted in a positive.

Clearly this creates doubt in the validity of one or both of the tests.

3. It is not uncommon for urine specimens to be shipped by mail with registration numbers lost or confused.

4. It is not uncommon for there to be confusion concerning the quantity or volume of urine to be collected from an individual. Normally 60 ml of urine is the preferred amount and in some cases the individual cannot provide that volume, thus creating confusion over the proper disposition of that specimen. That is to say, should the specimen be kept and the individual return later, or should it be destroyed until a complete specimen can later be provided.

5. Specimen bottles are accidently dropped and accidently contaminated. This also creates confusion in the collection process.

6. Frequently there are discrepancies between the presumptive screen test, either radio immunoassy or EMIT, and the confirmatory test, usually GCMS. For example, an individual's urine sample could test positive for marijuana by the presumptive screen test with a concentration level of 150 nanograms per milliliter and later test positive on the confirmatory test with a concentration of more than 150 nanograms per milliliter. Generally speaking most toxicologists would agree that the concentration level should decrease as time passes through degradation. This type of apparent discrepancy between the presumptive test and the confirmatory test raises questions concerning the validity of one or the other test.

7. It is not uncommon for internal quality controls to fail thus raising questions concerning the accuracy or reliability of either the presumptive screen test or the confirmatory test.

8. It has not been uncommon for the particular drug testing laboratory in question to have failed to follow their own standard operating procedures for equipment maintenance, data interpretation regarding retention times, mass ratios and mean ratios and instead to substitute a "judgment call" that the positive test result is "close enough."

9. Sometimes there are problems with the internal chain of custody within a drug testing laboratory. That is to say that once the specimen arrives at a drug testing laboratory all individuals who handle that specimen or any portion of that specimen do not appear in the drug testing laboratory's internal chain of custody. This of course violates the reason for and philosophy behind the requirement of a strict chain of custody.

10. Occasionally a drug testing laboratory has reported out a positive drug test as the result of what is referred to as the "carry over" problem. These are cases where a specimen with a very high concentration of a controlled substance "carries over" and contaminates the immediately succeeding specimen.

11. On occasion a particular drug testing laboratory will have unsatisfactory external quality control data and still be reporting out positive test results.

12. Although not frequently occurring, some cases have been processed through "high volume" drug testing laboratories and the

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signatures of individuals handling the specimens or portions of the specimens are not the true signatures of that individual.

The above listing is truly only a brief description of procedural or scientific irregularties that I have seen. I have taken depositions at laboratories where access to the chain of custody room was allowed without any need-to-access or proper documentation. On certain occasions, laboratory technicians have confirmed that they did not know how to properly use instruments and I have handled cases where civilian supervisors routinely signed reports of positive drug tests which had little, if any, scientific standards for such test results.

It has been my experience that one of the main hazards of high volume urine testing has to do with the problem of the integrity, safe keeping, and control of the urine specimen. Gaps in the continuity of the possession of the urine specimen cannot be filled in by any presumption of the performance of any official duty or correctness. Problems generally arise not only in insuring that the client's urine specimen was properly identified from the very moment the urine passes into the urine specimen collection bottle but all the way through and including delivery of the urine specimen bottle to the drug testing laboratory. In urinalysis cases, the chain of custody problem is particularly unique since not only are the drug testing laboratories usually at some distance from where the actual urine specimen was collected but the chain of custody issue is complicated further by the fact that a single urine specimen will frequently be subjected to multiple tests.

It is quite clear that false-positive test results for controlled substance in human urine have occurred and have been documented. The issue of false-positives must be further refined by evaluating the problem of false-positives as it exists with presumptive screen tests such as the RIA and EMIT and also the question of false-positives after testing by gas chromotography mass spectrometry. The occurrence of a false-positive is much more important than a false-negative to the individual. I prefer to define a false-positive as an unconfirmed positive when a reasonable attempt has been made to confirm the positive test result by using an analytical test different and at least as sensitive as the testing method reporting the positive in the first instance. False-positive results have also occurred even where the screen test have been confirmed by the scientifically favored confirmatory test (GCMS). I have obtained testimony from certain drug testing laboratories that at least one laboratory experienced five false-positive in the 1981-1984 time frame.

Outside of the question of unconfirmed positive test results there remains the issue of false-positive test results caused by improperly interpreted drug test information. Cases have occurred where the concentration of the controlled substance reported by the screening test was not within the sensitivity level of the screening test itself. We have also experienced cases where interfering substances in the gas chromatograms made proper scientific interpretation impossible. We have experienced cases where mass ratio evaluations on positive drug tests did not fall within accepted levels and where mass amount ratios also

failed to fall within acceptable limits. In some cases I have experienced positive test results where retention times of the characteristic ion peaks in GCMS testing did not fall within scientifically acceptable ranges.

Passive inhalation of marijuana smoke is an issue that frequently occurs in cases where concentration levels are low. Clearly, passive inhalation of marijuana can result in urinary excretion of detectable amounts of the cannabinoid material producing positive results by the enzyme multipled immunoassay technique. Obviously such factors as environment, duration of marijuana smoke exposure, time lapsed between exposure and urine excretion, and concentration levels of the marijuana metabolized become important.

Passive ingestion or the involuntary or unknowing consumption of a controlled substance such as marijuana or cocaine in food and drink is also an issue which has become important in these kinds of cases. This is true in particular cases where the individual suspects contamination of his food or drink by third parties. Toxicologist for both government and private institutions have testified in cases which I have handled which were adversarial in nature and have agreed that concentration levels of 4000 to 5000 ng/ml of the cocaine metabolite is consistent with unknowing consumption of cocaine placed in "Christmas punch." And, the same testimony has been taken in cases with concentration levels less than 140 ng/ml where marijuana had been cooked into food by third parties.

I hope that the information that I have provided to you will be useful as you address the possible procedural problems associated with drug testing by urinalysis. I apologize for the brevity of this written material and assure you that this is by no means a comprehensive or all including description of the procedural, legal and scientific problems that arise in drug testing by urinalysis. I will be more than willing to answer any of your questions.

BY _____

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May 20, 1987

Mr. SIKORSKI. Our last witness today is Dr. Stuart Bogema. Dr. Stuart Bogema is technical director of the Toxicology and Therapeutic Monitoring Lab of American Medical Laboratory in Fairfax, Virginia.

Dr. Bogema has been with the American Medical Lab since 1973 and has been the director of the Toxicology Lab since 1983. This lab is currently responsible for part of the preemployment drug testing and screening performed for the Federal Government.

Dr. Bogema, we have your testimony, and we will let you, since you are the cleanup batter today, do what you like. Your entire statement will be placed in the record. It is not that long. If you would like to go through it or touch on anything else that has been raised thus far, it is up to you.

STATEMENT OF STUART BOGEMA, TECHNICAL DIRECTOR, TOXICOLOGY AND THERAPEUTIC DRUG MONITORING LAB, AMERICAN MEDICAL LABORATORIES, INC.

Dr. BOGEMA. Thank you.

The statement that I left is very general. I did not have a lot of time to prepare that, and it is not very specific. Generally, it describes what American Medical Laboratories does. We are not a large volume drug testing laboratory. Drug testing is a small part of the work that we do in my laboratory. We are a general service, medical laboratory.

We do with cause and preemployment testing for some local industries, mostly public safety related industries. We do not have any contracts to do any Federal Government employee testing, and I am not here as an advocate of Federal Government employee testing. I am here primarily to answer questions and help shed some light on some of the technical issues involved in drug testing and primarily here to answer any questions that you may have.

[The prepared statement of Dr. Stuart Bogema follows:]

AMERICAN MEDICAL LABORATORIES, INC.
11091 Main Street, P.O. Box 188, Fairfax, Virginia 22030 / Telephone: (703) 691-9100

HOUSE HEARING STATEMENT FOR MAY 20, 1987

Stuart C. Bogema, Ph.D., Director of Toxicology and
Therapeutic Drug Monitoring Laboratory

American Medical Laboratories, Inc.®
11091 Main Street, Fairfax, Virginia 22030

American Medical Laboratories, Inc. (AML) is a licensed, full-service reference laboratory, operated and supervised by pathologists, and dedicated to providing the highest quality professional laboratory services available. It has been in operation since 1959 in the city of Fairfax, Virginia. AML's services encompass the fields of:

Radioimmunoassay
Immunopathology
Toxicology and Drug Abuse Testing
Therapeutic Drug Monitoring
Industrial Hygiene
Clinical Chemistry
Cytogenetics
Cytology
Histology
Microbiology
Virology
Hematology
Veterinary Pathology
Surgical and Anatomical Pathology

AML differs from the general clinical laboratory by offering a substantially broader range of professional and technical services. AML performs a comprehensive array of analytical procedures, utilizing sophisticated instrumentation and highly trained personnel to assure optimal reliability. The laboratory currently employs over 600 people; over 40% are technical and professional. Ninety-three percent of all technical personnel hold degrees in medicine, medical technology and other laboratory sciences. Technologists reponsible for test performance and supervision are certified by the American Society of Clinical Pathologists, American Association of Clinical Chemistry, American Society of Microbiology, American Society of Medical Technologists and the American Society of Cytology. All personnel performing testing in the Toxicology Laboratory are approved by the U.S. Department of Health and Human Services.

AML is accredited by the College of American Pathologists and licensed by the Centers for Disease Control. These both require regular inspections of the facilities and satisfactory completion of proficiency testing programs. The Toxicology Laboratory is also licensed by the state of Pennsylvania and participated in the National Institute on Drug Abuse proficiency testing pilot programs in 1986.

The Toxicology Laboratory has been performing the screening and confirmation of drugs for emergency toxicology purposes and for the detection of drug abuse for over fifteen years. We have been using gas chromatography-mass spectrometry (GC-MS) for the confirmation of drugs in biological fluids for over seven years. AML has offered documentation of the chain of custody of laboratory specimens for many years now. AML plans to meet the standards put forth by NIDA and the Department of Health and Human Services for drug testing. Modifications of some of our current procedures will be necessary to meet those standards. We will also seek accreditation by the NIDA sponsored National Laboratory Accreditation Program when the guidelines and program become available.

The Toxicology Laboratory of AML maintains a high level of accuracy in drug testing by:

1. Employing personnel extensively training and experienced in analytical toxicology:

   A. Director, with Ph.D. in pathology from the Medical College of Virginia and seven years experience in analytical toxicology.

   B. Technical Supervisor, Medical Technologist (ASCP) with twenty years experience in analytical toxicology.

   C. Two Bench Supervisors, Medical Technologists (ASCP), each with ten years experience in analytical toxicology.

   D. Research and Development Toxicologist, with M.S. in Clinical Chemistry and ten years experience in analytical toxicology.

   E. Four Senior Medical Technologists, each with at least six years experience in analytical toxicology.

   F. Thirteen Medical Technologists, each completely trained in analytical toxicology with experience ranging up to eight years. Initial training in toxicology lasts at least five months.

   G. Seven Medical Technicians who perform limited testing under direct supervision of Medical Technologists.

2. Using state-of-the-art instrumentation and procedures.

3. Assaying standards and controls with all patient specimens.

4. Participating in relevent proficiency testing programs.

5. Being monitored by a separate Quality Assurance Department.

6. Being inspected by CAP and the U.S. Department of Health and Human Services.

7. Retesting positive samples from a new aliquot from the original specimen container.

8. Using quantitative GC-MS assays for definitive determination of positive specimens.

9. Using multiple, unique numbers for identification of samples.

10. Storing frozen positive specimens for one year.

Mr. SIKORSKI. We thank you.

Let me go through a little bit of your testimony and at the same time ask questions that affect it. You have been here all the time, I know, and has anything been raised thus far that you would like to comment on? Do you feel driven by internal powers to comment either critically or positively?

Dr. BOGEMA. Well, I think the most critical issue with drug testing, particularly as it would involve random testing of persons like Federal employees, is in the collection of specimens and safeguards of the safety of those people.

One thing that was just mentioned by Mr. Waple was the fact that if one Federal employee can say that he suspects another Federal employee of using drugs, a person could also possibly contaminate the food or drink of that employee so that he will show up positive. That is one of my major concerns about it.

Mr. SIKORSKI. In the drug testing that you do, do your people take the tests? Are they the beginning part of it or does someone else take the tests, and you end up with the samples?

Dr. BOGEMA. We basically collect a very small percentage of the samples that we test. We cannot insure the integrity of samples because we do not collect the majority of them.

What we have to do, of course, is to protect and maintain the integrity and accuracy of the testing that we do.

Mr. SIKORSKI. Do you test your own employees?

Dr. BOGEMA. At this point we have not tested any of our employees in any of our departments within the laboratory.

Mr. SIKORSKI. How many drug tests does your lab conduct on a daily or weekly basis of the kind we are talking about?

Dr. BOGEMA. The kind that we are talking about, in the range of 20 to 40 a day.

Mr. SIKORSKI. And how many screening tests can a technician perform in an 8-hour day?

Dr. BOGEMA. It generally takes one medical technician most of the day to properly screen, say, 40 samples. There are other larger laboratories. I am sure that one person would screen a much larger number of specimens than that.

Mr. SIKORSKI. How about in the confirmatory tests? How long do those take?

Dr. BOGEMA. One medical technologist can, say, confirm by GC/MS up to maybe 25 to 30 specimens in an 8-hour day, and they will not be completed. They will be extracted, put on the GC/MS instrument, and they will continue to run for a number of hours after that person has finished their shift. They would be turned over or the work would be taken over by a second medical technologist.

Mr. SIKORSKI. There has been a lot of talk and some of the testimony we have not focused on yet, states we simply do not have the labs on line or potentially on line to do massive drug testing of Federal employees.

Dr. BOGEMA. I agree with that. Another major problem that I see in the whole drug testing field is the number of laboratories that have become involved in it in just the last year or so. These are laboratories that do not have the experience, do not have the personnel necessary to do it correctly, and in some cases, they do not have the instrumentation necessary to do it.

If they have gone out and purchased a gas chromatograph/mass spectrometer in the last 6 months, they will rush it into use with personnel who are not experienced in the use of the instrumentation, and they may not even have a scientific director who can oversee to insure that things are done correctly.

Mr. SIKORSKI. Testing the GC/MS machine or equipment is not easy. It is pretty intricate, is it not?

Dr. BOGEMA. It is the most sophisticated instrument in my laboratory, and I have a large array of different types of laboratory instrumentation. It takes experience; it takes training; it takes somebody with a good chemistry background; and it takes maintenance personnel.

Mr. SIKORSKI. It needs to be calibrated.

Dr. BOGEMA. That is right. It not only has to be calibrated every day, but it also has to have other periodic maintenance done to insure that what is called the source of the mass spectrometer is operating correctly, that the gas chromatography portion of the test is being done correctly. There has to be routine maintenance to insure that the instrument is running correctly, and then you have to have within every batch of samples that you run standards, controls, blanks, to insure that that particular test itself is running properly.

Mr. SIKORSKI. Do you end up in court?

Dr. BOGEMA. Yes, I do.

Mr. SIKORSKI. So you do have to testify either on one side or the other. You are an expert witness. You defend your techniques and also might be called to comment generally on what the standard is in the business.

Dr. BOGEMA. That is correct.

Mr. SIKORSKI. So you see that all the time. There are a whole bunch of junctures of errors, potential junctures for errors being made. Where is the biggest area of liability in the lab, in the collection process, in transportation, storage, shipment, or does that change?

Dr. BOGEMA. As Mr. Waple mentioned, he has a check list of 80 or 90 different items that he checks that start from the very beginning, from collection, all the way until the storage, interpretation of the information, et cetera. As you can see, there are a lot of things that have to be done properly. There has to be assurance that they are done properly.

I would say that it is mixed. It can be anywhere and everywhere.

Mr. SIKORSKI. What do you charge for your preemployment screening? Do you have a per test kind of charge or is it a contracted amount?

Dr. BOGEMA. I would say that generally the range or an estimated cost of a preemployment screen with GC/MS confirmation, the way that we do it, and we do do things somewhat differently than other laboratories; we always repeat the screens on a fresh sample from the original container; the mass spec, of course, is done on a sample from the original container so that we can go back and repeatedly check the identity of the specimen during the testing process. The cost for, say, 8 to 10 drugs or drug classes to be screened and then confirmed, the positives about the $30 to $45 from our

laboratory. There is an additional $10 charge for the chain of custody documentation.

Mr. SIKORSKI. So you are talking $40 or $45 as opposed to this $27 that was talked about in Dr. Baumgartner's testimony. You were here for his testimony?

Dr. BOGEMA. That is right. That is probably one reason why we are not a large scale drug testing laboratory.

Mr. SIKORSKI. But you heard Mr. Waple's comments about retesting on a challenged thing. It makes sense to me that the specimen go out of lab.

Dr. BOGEMA. That is right. We have sent specimens that we have screened and confirmed positive to the Center for Human Toxicology at the University of Utah, for instance, to have them recheck samples that we have done. We have rechecked samples from both the Navy and the Army in our laboratory.

Yes, I think that is very important, and that is really the purpose for saving the positive specimens frozen for at least a year.

There was one question that Mr. Waple raised. That was as far as saving negative samples. I do not feel that it is necessary to save the negative samples. I think saving the information from the testing that was done so that it would be available.

Mr. SIKORSKI. I think that is what he testified, saving the test results.

Dr. BOGEMA. Of course in a laboratory like ours, all results are saved for a long period of time. I cannot understand why they would not save negative results in the military testing.

Mr. SIKORSKI. Let me see if I can finish up here. You have your own internal proficiency program and guidelines because you are called up to defend those all the time.

Dr. BOGEMA. That is correct.

Mr. SIKORSKI. It seems to me, and maybe you have a different opinion, that it makes sense that if a lab does not meet the performance standards under the guidelines and they foul up and it shows on the proficiency testing, that they should not or that the revocation of that lab should not be made by the agency that has these pending matters, dependent upon the efficacy of that lab and the reputation of that lab, but instead should be done by some other group that is in charge of accreditation. Does that make sense?

Dr. BOGEMA. Yes, it does. Unfortunately, up to this point and continuing now is that there is no agency; there is no accreditation standards. The standards that have been printed are constantly being reviewed and redrafted. It seems like every month the NIDA standards or a new revision is sent out.

I think as soon as a good program can be put into place, it will be of great benefit not only to any potential Federal employees that are tested, but there is a lot of testing being done currently on non-Federal employees where there is no licensing, no accreditation, no assurance that the test results are accurate.

Mr. SIKORSKI. Your lab has an excellent track record in terms of accuracy I am told. I presume you are not going to contradict that here today.

Are standard drug testing procedures capable of detecting so-called designer drugs?

Dr. BOGEMA. Not standard techniques. There are no automated screening immunoassays for designer drugs like there are for marijuana, cocaine, PCP, et cetera. They can be detected, but you would have to specifically look for them.

Mr. SIKORSKI. Have you heard of Fentanyl?

Dr. BOGEMA. Yes.

Mr. SIKORSKI. What do people do when they take that?

Dr. BOGEMA. Well, Fentanyl is a synthetic narcotic, like morphine, except that the Fentanyls are anywhere from 1,000 to 5,000 times more potent than morphine or heroin, so that the amount that would be used is very, very small.

Mr. SIKORSKI. And the cost of this stuff is equivalent to what morphine would be or heroin would be?

Dr. BOGEMA. I would think so. Most of the Fentanyl use has been isolated to the west coast up to this time.

Mr. SIKORSKI. And hallucinogens would not show up on the standard test?

Dr. BOGEMA. There is a radioimmunoassay available for LSD now, but hallucinogens, such as Mushrooms or Mescalin, no, there is no routine screening technique for those.

Mr. SIKORSKI. And an individual who has ingested poppy seeds can sometimes test positive for morphine; is that correct?

Dr. BOGEMA. That is correct.

Mr. SIKORSKI. Can confirmatory tests distinguish between morphine from poppy seeds and morphine from that which has been ingested?

Dr. BOGEMA. Not always. In order to distinguish between morphine that is contained in poppy seeds and morphine that is the metabolite of heroin, you would have to look for other metabolites of heroin, such as acetylmorphine, which are not present in the poppy seeds, but in many cases I suspect that there will not be any acetylmorphine from heroin although there is morphine in the urine.

Mr. SIKORSKI. Acetylmorphine—is that the Tylenol set?

Dr. BOGEMA. No. morphine is a constituent of the poppy plant. It is the morphine that is removed from the poppy plant and then made into heroin by being acetylated, and then when heroin is injected into the body, it is rapidly deacetylated, and one of the metabolites of heroin is monoacetyl-morphine, and then when that is deacetylated, it forms morphine. So one way to determine whether or not the morphine is present is from heroin, which is to also look for the monoacetylmorphine, which may or may not be present.

Mr. SIKORSKI. One last question. Mr. Waple had this in his testimony, and we did not get into it, and I think Dr. Baumgartner did as well. Can marijuana smoke that has been passively inhaled result in a postive test result?

Dr. BOGEMA. Yes, it can.

Mr. SIKORSKI. And are there enzymes in certain people's urine which might cause false positives with certain testing procedures?

Dr. BOGEMA. Not that I am aware of now.

Mr. SIKORSKI. Did you hear anything else that you want to comment on?

Dr. BOGEMA. Very early in the testimony there was reference to the Channel 7, WJLA testing, the drug testing series of which

American Medical Laboratories was one of the laboratories that was tested. My feeling on that portion of that series was that there was a grave distortion of the facts, and I think that an attempt to sensationalize the issue, basically they chose to order tests which have a higher detection level or poor sensitivity for the drugs that they entered.

Mr. SIKORSKI. What did they test for?

Dr. BOGEMA. They tested for oxazepam, which is a metabolite of benzodazipine. They tested for canabanoids. They tested for cocaine. They tested for morphine, I believe.

Mr. SIKORSKI. Marijuana and cocaine would be appropriate.

Dr. BOGEMA. Well, what they did was they spiked the urine samples with levels of drugs below the detection levels of the tests that they requested to be done, even though we had informed them just days before they sent the samples of the proper tests to use. They chose to use the less sensitive test, in which case you are going to have what they call false negatives.

From all of the testing that was done, there were no false positives, but there were false negatives because the samples were spiked below the detection limits of the tests that they used.

Mr. SIKORSKI. Your lab did very well.

Dr. BOGEMA. Well, we did well compared to the other laboratories, but the way that the samples were sent out, it was a point where nobody could do very well.

Mr. SIKORSKI. Let's put it this way. You do preemployment screening. Say a guy came in or a test came in from a guy who wants a job at one of the companies you are screening for, and the level in the sample is equivalent to the level that they did in this test. Would that person be using that stuff?

Dr. BOGEMA. We would have detected those specimens if they had ordered the test that we recommended that they use for preemployment testing.

Mr. SIKORSKI. So they did not use your traditional preemployment testing procedures?

Dr. BOGEMA. That is correct. They used a test which was designed for monitoring drug abuse, known drug abusers, basically, where the levels of drug are expected to be higher. The cost of the test is about half of what it would have been because the techniques that are used are thin layer chromatography as opposed to immunoassay, and the test is just not as sensitive and is not applicable to preemployment testing where you want to catch somebody who has used drugs two or three days ago.

Mr. SIKORSKI. Is your standard preemployment test the standard in the industry?

Dr. BOGEMA. I would say yes.

Mr. SIKORSKI. So they not only used small amounts below the threshold, but they also caused to be used tests that are not the norm for preemployment screening?

Dr. BOGEMA. That is correct.

Mr. SIKORSKI. Okay. Anything else?

Dr. BOGEMA. No.

Mr. SIKORSKI. Well, I want to thank you, and I think the subcommittee has benefitted tremendously in this whole discussion on employee drug testing. The caliber of it has been increased by today's

testimony. Dr. Baumgartner, Dr. Bogema, Mr. Waple, Dr. Miike and Mr. Stevens, all have done excellent work, and the subcommittee is very appreciative.

Thank you for taking time off. I know you could be other places.

Dr. BOGEMA. You are welcome.

Mr. SIKORSKI. Thank you.

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

[The following statement and report were received for the record:]

PUBLIC EMPLOYEE DEPARTMENT
AFL-CIO

GERALD W. McENTEE, *President* KENNETH T. BLAYLOCK, *Secretary-Treasurer*

STATE/LOCAL DIVISION FEDERAL/POSTAL DIVISION

Executive Vice Presidents

Albert Shanker Angelo Fosco
John J. Sweeney Vincent R. Sombrotto

Al Bilik, *Executive Director* John Leyden, *Executive Director*

May 15, 1987

The Honorable Gerry Sikorski, Chairman
Subcommittee on Human Resources
Committee on Post Office and Civil Service
U.S. House of Representatives
122 Cannon House Office Bldg.
Washington, D. C. 20515

Dear Mr. Chairman:

The Subcommittee on Human Resources is currently considering the issue of drug testing of federal employees. The Public Employee Department (PED), AFL-CIO and its Federal/Postal Division includes 24 international unions representing nearly 1.5 million federal and postal employees throughout the nation. PED policy stands in firm opposition to all mandatory random drug testing programs and rejects the President's federal program under Executive Order 12564. We therefore request that this letter presenting our views be included in the record of your Subcommittee's hearings.

The U.S. Constitution protects against unreasonable searches and seizures and self-incrimination, guarantees freedoms of association and expression, and the right to due process of law. While court decisions on mandatory random drug testing have presented contradictory opinions, numerous challenges continue to move through the judicial process. We fully expect that, when the issue is raised before the U.S. Supreme Court, constitutional challenges to mandatory random drug testing will be upheld.

Beyond the constitutional issues, there are serious problems with the reliability of testing procedures. Many of the tests used to screen workers for drugs are extremely inaccurate, especially the ones that are used in volume. False-positives are 25 percent or higher for many of these tests, and the results of tests can be affected by the use of common substances such as cough syrup, caffiene and other common chemicals. In addition, many of the laboratories that perform drug tests also often have very high false-positive error rates. According to the Centers for Disease Control (CDC), some labs have false-positive error rates as high as 66 percent.

Mandatory random drug testing is a workers' rights issue. The rights of the overwhelming majority of employees who are drug-free, as well as the rights of a drug-abusing worker need to be considered in dealing with this issue. Drug abuse is an illness. Those suffering from this disease need treatment and not punishment. At the same time, addicted individuals can pose health and safety hazards on the job. The PED firmly believes that the collective bargaining process is the best means for reconciling these competing interests and developing effective and balanced programs.

Such programs are developed and implemented cooperatively by employers together with their workers. They are founded primarily upon education and prevention of addiction, they safeguard employee privacy and reject arbitrary and illegal searches, and they provide nonpunitive rehabilitation-oriented responses for those whose drug use has, in fact, impaired their job performance. Many PED affiliates have, through the collective bargaining process, already developed such cooperative programs. Our experiences show them to be fair as well as effective.

For all these reasons, we urge you to reject all mandatory random drug testing programs and to actively oppose Executive Order 12564. We thank you for your consideration of our views, presented on behalf of the 1.5 million federal and postal employees we represent.

Sincerely,

John F. Leyden
Executive Director
Federal/Postal Division

cc: Members, Subcommittee on
Human Resources

REPORT ON THE
FY 86
MILITARY DRUG AND ALCOHOL ABUSE PROGRAMS

PREPARED BY THE

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

FOR HEALTH AFFAIRS

April 1987

Report on the
FY 86 Military Drug and Alcohol Abuse Programs

INTRODUCTION

Department of Defense Directive 1010.3, Drug and Alcohol Abuse Reports, was reissued on 23 September 1985 and changed the information gathering requirements for the the Services' drug and alcohol programs. Additionally, during FY 86 there were changes in the format for the budget exhibit used by the Services to identify costs associated with various elements of the drug and alcohol abuse programs. Each Service was unable to implement all of these changes during FY 86. Comparison to FY 85 data will be made where possible. This report also includes Marine Corps figures that have been separated from those of the Navy.

FINANCIAL DATA

Table 1 presents the Service expenditures for the areas of biochemical testing, education, treatment (residential and nonresidential), training, evaluation, and personnel (military and civilian). The FY 86 budget exhibit lists personnel costs as a separate line item.

The total expenditure by the Military Services for their drug and alcohol abuse prevention programs during FY 86 was $214 million as compared to $172 million in FY 85. Forty-six percent of the total was spent on drug programs and 54 percent on alcohol programs. The increase in the Army expenditures accounted for essentially the entire $42 million increase. We believe that the accounting system implemented by the Army to track its expenditures has allowed it to provide more accurate figures.

The Services spent 52 percent of the drug program funds on biochemical testing. The figures were to include drug testing laboratory cost, field testing costs, civilian contract laboratory costs, and specimen shipping costs. Personnel costs were to be excluded. The Navy was unable to provide separate personnel costs but these were included in each functional category. The Army showed an unusually large expenditure in biochemical testing for alcohol and drugs in comparison to both FY 85 and FY 87. The reason for this large increase is that the FY 86 expenditure included the purchase of large numbers of breathalyzers and field test equipment which was purchased by local commanders as opposed to being budgeted through the Army drug and alcohol abuse prevention program.

The costs in the education category were to include those teaching and learning functions that indoctrinate, orient, or inform personnel about the Service's alcohol and drug abuse prevention programs and resources. A DoD Drug and Alcohol Abuse Working Group met on a monthly basis to review print and audiovisual materials commercially available for consideration

for joint-interest purchase requests. A total of 175 drug and alcohol audiovisuals were available in 1986 for use within the Services and DoD covering all audiovisual media such as films, videotapes, and slide sets.

The FY 86 figures for alcohol abuse were significantly different from the FY 85 figures. Since treatment is manpower intensive, most of the cost has been transferred to the personnel category. The FY 86 figures indicated that approximately 70 percent of the alcohol program costs were personnel costs, assuming that most of the Navy's treatment costs were actually personnel costs. The Services were tasked with furnishing OASD(HA) with the formula(s) they used in computing treatment costs; however, this information was not provided.

Training costs included those teaching and learning functions that develop or improve the competence of health care professionals and paraprofessionals and those Service personnel responsible for supervision or execution of alcohol and drug abuse prevention programs.

Evaluation costs included those associated with evaluation of drug and alcohol abuse programs by full-time individuals, Service implemented drug and alcohol abuse surveys that were either contracted out or conducted in-house, and any additional studies to develop new tests, prevention, or treatment protocols.

The man-year figures represent personnel investment expressed in full-time equivalents. They equate to an active duty man-year investment (Rate/1000) of 2.4, 2.8, 1.4, and 1.3 for the Army, Navy, Air Force, and Marine Corps, respectively, based on active duty strength as of 31 March 1986.

DRUG URINALYSIS TESTING PROGRAM

The drug urinalysis data submitted by the Services are given in Table 2. A total of 2.9 million specimens were tested by the nine military drug testing laboratories and two contract laboratories. Table 3 gives some field testing data. The Army was unable to provide an exact figure for its field testing program, although the estimate of 400,000 is believed to be accurate. When the laboratory and field test data are combined, the total number of specimens tested by the Services is 3.6 million specimens as compared to 2.7 million for FY 85.

During FY 86 the Army tested all specimens for two drugs (marijuana and cocaine) and additional drugs on a pulse basis or by request; the Navy tested all specimens for six drugs (marijuana, cocaine, amphetamines, barbiturates, phencyclidine, opiates); and the Air Force tested all specimens for marijuana, 60 percent for cocaine, and additional drugs on a pulse basis or by request.

The Services reported 92,653 total laboratory positives for FY 86 as compared to 78,624 for FY 85. This increase appears due to the increased amount of testing and not to an increase in abuse rates. Marijuana continues to be the most widely abused drug followed by cocaine. Since the number of specimens tested for each drug is not reported by all the Services, we cannot state positives as a percentage of specimens tested.

FIELD TESTING

Table 3 gives data related to the Services' field testing programs. The Army has increased its field testing program, the Navy and Marine Corps have maintained their programs at a constant level, while the Air Force does not conduct a field testing program.

The Army increased its field testing during FY 86 to permit local installations the opportunity to test more personnel since the capacity of its drug testing laboratories was unable to meet the requirements of the line commanders. The Army was unable to provide specific data regarding the number of random or PC/CD/M specimens or the number positive for each drug. The Navy has not stressed field testing since its laboratories are capable of handling the workload. The Marine Corps field tests 23 percent of the total specimens collected. All specimens field tested positive must be sent to a drug testing laboratory for both initial and confirmatory testing before any permanent action may be taken against a service member. The Services are responsible for ensuring that the field testing programs are conducted according to the requirements in DoD Directive 1010.1.

TREATMENT PROGRAMS

The treatment data provided by the Services indicate that most individuals identified for drug abuse are in the E1-E5 pay grade. This finding agrees with the figures in the 1985 worldwide survey. The level of funding for both nonresidential and residential rehabilitation programs remained relatively stable from FY85, though there are still major differences among Services observable from the figures.

The Navy (including the Marine Corps) increased its alcohol-related referrals to Awareness Education by 38 percent (39,900 to 54,900) while reducing its referrals to nonresidential (4,200 to 3,800) and residential (6,600 to 5,400) rehabilitation. As Table 4 reflects, the Navy refers significantly fewer personnel to nonresidential programs than the Army or the Air Force, but it refers many more people to residential programs. The Army referred only 709 people, or less than 0.1% of its active duty force, to residential treatment; the

Air Force referred 900, or 0.15%; the Navy's 4,197 residential referrals represent 0.7%; and the Marine Corps shows referrals of 1,549, 0.8% of its active duty force.

Dollar figures for personnel costs are reported differently by the Services and are aggregated where they are separately stated. It is not possible to derive such figures as costs per person for treatment, costs for nonresidential versus residential treatment either within or across Services, and similar measures. Some of these comparisons might provide valuable yardsticks for assessing relative effectiveness and for determining future policy, allocation of resources, and program strategies.

CONCLUSIONS

The data provided by the Services for FY 86 appear to be more accurate than those for FY 85 and the budget and man-year figures seem to be consistent for each of the Services' programs. However, there remains a concern that the Services are unable to collect data that can be used in evaluating many aspects of their programs or in making economically and programmatically effective decisions regarding drug and alcohol abuse prevention.

It would be helpful to Health Affairs, and it should be of value to the Services, to invest the necessary time and expertise in establishing a reporting capability with more detail and flexibility. This would allow for meaningful analysis both within and among Services, and would provide a beginning basis for more accurate and useful trend data. This will be one of the items to be examined by the DoD Ad Hoc Committee formed at Dr. Mayer's direction.

TABLE 1. FY 1986 FINANCIAL DATA (Dollars in Thousands)

DRUG ABUSE PROGRAMS

	ARMY	NAVY	AIR FORCE	MARINE CORPS
Biochem. Test.	18,588	30,540	2,492	775
Education	164	4,510	60	775
Treatment				108
Nonresidential	1,598	2,389	1,075	
Residential	36	3,062	39	
Training	56	1,622	160	91
Evaluation	218	2,138	20	
Personnel				
Military	5,351	*	6,723	4,941
Civilian	9,919	*	1,623	0
Total	35,930	44,261	12,192	6,690

ALCOHOL ABUSE PROGRAMS

Biochem. Test.	3,599	557	0	0
Education	383	6,181	90	158
Treatment				77
Nonresidential	3,728	2,013	3,263	
Residential	290	13,470	3,529	
Training	132	1,968	239	125
Evaluation	510	1,160	30	0
Personnel				
Military	12,500	*	34,059	1,491
Civilian	23,144	*	1,323	485
Total	44,286	25,349	42,533	2,336

MAN-YEARS

Biochem. Test.	182	NR	99	129
Treatment				72
Nonresidential	1,454	NR	661	
Residential	162	NR	73	
All Other Categories	93	NR	38	53
Total	1,891	1,613	871	254

Note: * Personnel costs included in each category; NR = Not Reported

TABLE 2. FY 1986 LABORATORY URINALYSIS TESTING DATA

SPECIMENS TESTED BY DRUG TESTING LABORATORIES (Number)

Service	Random	PC/CD/M	Total
Army			765,505
Navy	1,354,529	117,783	1,472,312
Air Force	176,030	31,834	207,864
Marine Corps			466,242

Laboratory Positives (Number)

RANDOM TESTING

Service	THC	Cocaine	Opiates	Amp	Barb	PCP
Army	16647	1600		50		
Navy	21891	6634	2322	1327	664	332
Air Force	2159	115	59	7		
Marine Corps	2293	595	197	122	33	24

PC/CD/M TESTING

Service	THC	Cocaine	Opiates	Amp	Barb	PCP
Army	17605	2040		47		
Navy	7806	2366	828	473	236	119
Air Force	2482	248	28	11	4	1
Marine Corps	880	343	11	40	5	9

Note: PC is Probable Cause
CD is Command-Directed
M is Medical

TABLE 3. FY 1986 FIELD TESTING URINALYSIS DATA

Specimens Field Tested (Number)

Service	Random	PC/CD/M	Total
Army			400,000
Navy	87,431	60,757	148,188
Air Force			0
Marine Corps	126,048	10,990	137,038

Field Test Positives (Number)

Random

Service	THC	Cocaine	Opiates	Amp	Barb	PCP
Army						
Navy	784	237	83	48	24	12
Air Force						
MC	1106	188	26	454	4	2

PC/CD/M

Service	THC	Cocaine	Opiates	Amp	Barb	PCP
Army						
Navy	1922	584	204	117	58	29
Air Force						
MC	212	74	6	140		2

Note: PC is Probable Cause
CD is Command-Directed
M is Medical

TABLE 4. FY 1986 ALCOHOL AND DRUG TREATMENT DATA

NEW CASES IDENTIFIED

Service	Awareness Education	Treatment Nonresidential	Treatment Residential
ALCOHOL TREATMENT PROGRAMS			
Army	7,202	18,285	658
Navy	50,533	2,196	4,010
Air Force	7,662	8,272	900
Marine Corps	4,409	1,627	1,386
DRUG TREATMENT PROGRAMS			
Army	4,660	7,498	51
Navy	6,091	814	187
Air Force	613	3,951	0
Marine Corps	1,706	519	163

RETURNED TO DUTY

ALCOHOL TREATMENT PROGRAMS			
Army	5,188	10,051	472
Navy	50,533	1,607	3,815
Air Force	7,662	6,388	900
Marine Corps	4,628	1,376	1,087
DRUG TREATMENT PROGRAMS			
Army	3,008	3,720	12
Navy	6,091	641	165
Air Force	613	750	0
Marine Corps	1,706	365	107

TABLE 5. COMPARISON OF PROGRAMS FOR FY 85 AND FY 86

Service	FY 85	FY 86
DRUG ABUSE PROGRAMS ($ in Thousands)		
Army	20,718	35,930
Navy/MC	49,466	50,511
Air Force	11,277	12,192
ALCOHOL ABUSE PROGRAMS ($ in Thousands)		
Army	21,427	44,286
Navy/MC	28,433	27,685
Air Force	40,409	42,533
MAN-YEARS		
Army	1,812	1,891
Navy/MC	1,985	1,867
Air Force	840	871
SPECIMENS TESTED BY DRUG TESTING LABORATORIES		
Army	692,149	765,505
Navy/MC	1,463,480	1,938,554
Air Force	183,984	207,864
SPECIMENS REPORTED POSITIVE		
Army	39,986	37,989
Navy/MC	29,695	49,550
Air Force	8,943	5,114
NONRESIDENTIAL/RESIDENTIAL ALCOHOL PROGRAMS (New Cases)		
Army	19,649	18,943
Navy/MC	10,800	9,219
Air Force	9,166	9,172
NONRESIDENTIAL/RESIDENTIAL DRUG PROGRAMS (New Cases)		
Army	8,315	7,549
Navy/MC	2,210	1,683
Air Force	5,315	3,951

Note: For this table the Navy/Marine Corps figures were combined since the FY 85 report did not give separate figures