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# DRUG TESTING FEDERAL EMPLOYEES
## (Part II)

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# HEARINGS

BEFORE THE

SUBCOMMITTEE ON HUMAN RESOURCES

OF THE

# COMMITTEE ON POST OFFICE AND CIVIL SERVICE HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

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SEPTEMBER 25, 1986

# DRUG TESTING OF FEDERAL EMPLOYEES

TUESDAY, SEPTEMBER 16, 1986

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

The subcommittee met, pursuant to call, at 1:05 p.m., in room 311, Cannon House Office Building, Hon. Gary L. Ackerman (chairman of the subcommittee) presiding.

Mr. ACKERMAN. The subcommittee will come to order.

Today the Subcommittee on Human Resources resumes its oversight hearings on proposals for drug testing Federal employees.

In March of this year, the subcommittee held a hearing on a recommendation by the President's Commission on Organized Crime that all agencies should establish a suitable drug testing program. The Commission did not answer crucial questions about the constitutionality of such tests, how they would be conducted, or what would happen to employees who tested positive.

Over the past several months, more specific proposals have been made regarding drug testing. Legislation has been introduced and referred to this subcommittee to drug-test all Federal employees, including contract employees, Members of Congress, and congressional staff, who have access to classified information.

Yesterday, the President signed an Executive order mandating drug testing for more than a million Federal employees, including those in sensitive positions, those with access to classified information, and other positions which agency heads determine involve law enforcement, public health and safety, or other functions requiring a high degree of trust or confidence.

Drug testing has captivated the imagination of the administration, much like loyalty oaths of the 1950's. We mustn't let administration amnesia erode our constitutional safeguards which have provided protections from Government abuses. No one doubts that drug abuse is a serious problem in our land. But drug testing hysteria will not solve that problem and may well create others.

Drug testing raises serious constitutional as well as practical problems. Most Federal courts which have considered the issue of drug testing public employees have found that tests such as urinalysis constitute search and seizure within the meaning of the fourth amendment.

In the few cases where courts have sustained urinalysis, they have done so only when there existed reasonable suspicion of drug use, or extraordinary circumstances.

Federal employees are already asked to make many sacrifices for their country. We must ask whether we want to strip them of one of the most fundamental rights—the right to privacy.

There are also practical problems with urinalysis. Error rates of 5 to 20 percent for initial screenings mean that drug tests will inevitably brand the innocent, forever, as drug users.

We know that harmless, everyday substances can register as something illegal. Over-the-counter pain relievers such as Advil and such as Nuprin can show up as marijuana, while diet pills and nasal decongestants can register as amphetamines.

In addition, the chain of custody of a specimen is subject to human error and, at any point, samples can be switched, mislabeled, or contaminated.

The simple truth is there is no evidence of drug abuse among Federal workers. The best measure we have is from Federal employees counseling programs through which employees seek help either voluntarily or at the direction of their supervisors.

The Office of Personnel Management recently reported that during fiscal 1984 only one-tenth of 1 percent of the 2.1 million Federal employees either sought or required counseling for drug abuse. Alcohol counseling was higher, but still only six-tenths of 1 percent of the work force.

OPM concluded that the educational program and the overall awareness of Federal employees about drug use and abuse is resulting in more employees receiving appropriate assistance.

Today we want to review yesterday's Executive order as well as the legislation before us. The Justice Department and the Office of Personnel Management have been invited to appear at a hearing on Thursday, September 25. We must have public debate and careful deliberation by Congress in order to arrive at reasonable and responsible answers to the questions raised about drug testing.

As a contribution to that debate, I am today introducing legislation which would restrict Federal employee drug testing to those instances where there is reasonable belief that a specific employee's performance is impaired because of the suspected influence of a controlled substance.

We would like to call as the first witnesses before the subcommittee, Congressman Don Edwards, of California, chairman of the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, and Congresswoman Pat Schroeder, of Colorado, chairwoman of the House Post Office and Civil Service Committee's Subcommittee on Civil Service.

Welcome to both of you. It is an honor for us to have you testify before the subcommittee once again, both of you. Begin, Congressman Edwards, if you will.

## STATEMENT OF HON. DON EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. EDWARDS. Thank you, Mr. Chairman. Your opening statement was so good and so well-founded and scholarly that I really think that what I am going to say is going to be a repeat of a lot of it but I think it is well worth saying.

I thought that when we visited you last time in March of this year that the issue had been laid to rest—partly because of the important hearings that you held, but apparently it is not. So I would like to comment on the President's order requiring mandatory drug testing for Federal employees.

The order violates three fundamental rights. No. 1, the right not to testify against yourself. Two, the right to be treated innocent until proven guilty. And, three, the right to be free from unreasonable governmental intrusions on privacy. I am confident that it will be held unconstitutional.

In March of this year, I outlined the principles of constitutional law, particularly under the fourth amendment, that apply in any government test program. I have attached to my testimony a recent article I wrote that sets them forth in greater detail. Briefly stated, they are as follows:

The fourth amendment to the Constitution prohibits unreasonble searches and seizures. The courts have been unanimous—unanimous, Mr. Chairman—in finding that mandatory taking of a urine sample is a search and seizure. The fourth amendment requires, before a search, that the Government have a well-founded belief that the particular individual to be searched is engaged in or is about to be engaged in wrongdoing. Across-the-board searches—door-to-door searches—are strictly forbidden.

Mr. Chairman, it is clear in light of these principles that the President's plan is unconstitutional for at least three reasons. First, because it allows the testing of an individual when there is no reason to believe that he or she is using drugs. The tests required by the President's order are the modern-day equivalent of door-to-door searches. They force a person to prove his or her innocence.

Such tests cannot be justified on the ground that they are a condition of employment. Government employees do not check their rights at the door of the office. The fourth amendment protects persons, not places. It makes no difference that the tests will be given to employees in sensitive positions. Here again, the courts have held that policemen, firemen, bus drivers, and others involved in positions involving the public safety can be tested only when there is reason to believe that they are engaged or have engaged in illegal conduct.

Second, the order is unconstitutional because it is overbroad. The term "sensitive" as defined in the President's order is nearly unlimited. The order covers not only all employees in positions that have been designated sensitive under the Federal Personnel Manual, but also all employees with clearances, all law enforcement officers, all Presidential appointees, and all employees in positions that involve law enforcement, national security, the protection of life and property, public health and safety, or other functions requiring a high degree of trust or confidence.

With a definition this broad, the order potentially covers all Federal employees. No court has ever upheld such a widespread program of testing.

Third, the order is unconstitutional because there has been no showing as a need for it. The fourth amendment requires a balancing between the Government's interest in conducting a search and

an individual's interest in preserving his or her privacy. To justify a search where an individual has a reasonable expectation of privacy, the Government must show a compelling need. Yet, there has been no showing—no showing at all—that Federal employees are particularly involved in drug use, and there has been no showing that the productivity and performance of Federal employees have been particularly affected by illegal drugs. Indeed, we are now finding that in our society as a whole illegal drug use is not increasing. On the contrary, overall use of illegal drugs is going down.

A draft report by the administration's own working group on drug abuse policy, prepared in support of the very order the President issued yesterday, states, and I quote the report, "The number of individuals who are using illegal drugs has stabilized in most categories and decreased in several. Most notably, high school seniors using marijuana on a daily basis has dropped from 1 in 14 in 1981 to 1 in 20 in 1984 and 1985."

Then on Saturday, a front page article in the New York Times reported that heroin use also has stopped growing. And, most amazingly, the most recent issue of Time magazine reports that statistics to be released later this month by the National Institute on Drug Abuse will show that cocaine use has peaked, while the use of other drugs is declining significantly.

In light of these statistics, it can hardly be contended that there is a compelling justification for a broadly drawn Executive order that would override the privacy rights of employees.

Mr. Chairman, this order shows that we have lost our sense of context. The drug issue is only one on a spectrum of concerns that affect workplace safety, productivity, and health. Alcohol is just as responsible for accidents, absenteeism, and reduced productivity. Tobacco produces just as many, if not more, deaths and illnesses and it is just as expensive to society in terms of medical payments, sick time, and premature deaths.

The President's order treats a single issue in splendid isolation, without any sense of proportion or need and without any attempt to explore and use less intrusive means. It cannot withstand constitutional scrutiny.

Thank you, Mr. Chairman.

Mr. ACKERMAN. Thank you very much for that wonderful statement and your article as well which, without objection, will be included into the record of the committee.

[The article by Mr. Edwards follows:]

LEGAL TIMES • SEPTEMBER 1, 1986

# COMMENTARY

## *Mandatory Workplace Drug Testing*

# Liberties Lost By Increments

BY DON EDWARDS

After successfully cutting the Coast Guard's drug interdiction budget and trying to cut the Custom Service's, the Reagan administration is responding to the growing tide of illegal drugs flooding our nation with a demand-side solution: workplace urine tests. Unfortunately, a recent Analysis article in *Legal Times* ("Drug Testing in the Workplace: A Clash of Rights," by outside contributors Thomas Donegan Jr. and Robert Angarola, Aug. 4, 1986, page 27) seriously understated the degree to which the Constitution's prohibition against generalized searches will protect at least government employees from the indignity of having their bodily functions supervised.

That article, citing an unpublished district court opinion, claimed that "devices currently in use for testing urine samples have been found accurate and reliable for identifying employees engaged in the use of illicit drugs." These words were obviously written before the President of the United States decided not to take his drug test as originally scheduled because, according to a White House statement, "medication administered in connection with the [President's urological] examination could cause an inaccurate result."

The President was wise to be cautious; any number of factors can affect the tests. The Navy, for example, has found that eating a poppy-seed roll can cause a positive finding for opiates. Such over-the-counter drugs as Advil and Nuprin have shown up as illegal drugs, according to the marketing director of a Chicago laboratory that conducts urine tests. Apparently because the pigment melanin chemically resembles an ingredient in marijuana, blacks may register "false positives"—indication of drugs when none were present—more frequently than whites.

Given these and other factors, including the varying skills and cares of the testers, it is not surprising that a recent Northwestern University study of one widely used test found 25 percent false positives. Two years ago, the Pentagon, which is often cited as having a successful drug-test program, had to reconsider punitive actions taken against 60,000 soldiers because their drug tests may have been faulty. Studies by the Centers for Disease Control found that false negatives were even more common.

Even if they were totally accurate, across-the-board drug tests for government employees would violate the Constitution because they ignore the Fourth Amendment's fundamental requirement that there be a particularized suspicion that the individual being searched is actually engaged in wrongdoing. Oddly, though, the [authors of the article in] *Legal Times* stated that "there is no explicit constitutional provision guaranteeing a right to privacy," as if to suggest that because the word "privacy" does not appear in the Constitution, there must be no constitutional protection for privacy. This is certainly not true in the search-and-seizure context. The Supreme Court clearly stated in *Schmerber v. California* that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."

Applying the Fourth Amendment, the courts have concluded almost unanimously that mandatory drug testing of government employees is unconstitutional in the absence of specific and articulable facts giv-

ing reason to believe that the particular employee is under the influence of drugs. As recently as Aug. 11, in *In re Patchogue-Medford Congress of Teachers v. Board of Education*, the New York state appellate division held that to compel a public-school teacher to undergo a urine test without reasonable suspicion that such teacher is a drug user is unconstitutional.

Even in occupations where safety is an issue, testing without cause is not permissible. For example, in the case of employees at a prison, a federal district court has held in *McDonell v. Hunter* that the Fourth Amendment allows a urine test "only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances." Similarly, Federal Railroad Administration rules allow urine and blood testing only after accidents

**Erosions of workplace privacy are multiplying almost daily.**

or when supervisors have a reasonable suspicion that an employee is under the influence of drugs or alcohol.

The *Legal Times* article suggested, however, that random testing of employees responsible for public safety is permissible in the absence of the particularized cause generally required under the Fourth Amendment for a search, citing *Allen v. City of Marietta*. In that case, city employees who regularly worked around high voltage wires were terminated when urine tests were positive. The court agreed that the tests were a search and seizure within the Fourth Amendment, but found them not unreasonable. It must be noted, however, that the tests were given to employees who had been observed using marijuana on the job by an informant planted in the electrical division by the city. Personal observation of drug use certainly constitutes particularized cause for a search."

Similarly, the Seventh Circuit's decision in *Div. 241, Amalgamated Transit Union v. Suscy* that bus drivers could be tested, also cited in the *Legal Times* article, applied only to drivers who had been involved in a serious accident or were suspected of being under the influence of narcotics. Even with respect to police and firefighters, courts have held, in *City of Palm Bay v. Bauman* and *Turner v. Fraternal Order of Police*, that random urine tests are constitutionally impermissible in the absence of an articulable basis for suspecting that the employee is using illegal drugs.

The courts have recognized only two areas in which mandatory, across-the-board urine tests may not be precluded by the Fourth Amendment: as part of an annual physical examination required of all employees and in pervasively regulated industries, such as horse racing.

The foregoing applies, of course, only to government urinalysis programs, since the Fourth Amendment applies only to searches and seizures by the government or by those acting under color of law. In the private sector, intrusions on privacy are not covered by the Constitution, and erosions of workplace privacy are multiplying almost daily. In the name of efficiency and safety, workers are being subjected not only to urine tests but also to polygraph tests, genetic screening, honesty tests and telephone-use monitoring. Workplace privacy, I believe, is a major civil liberties issue of the '80s. For private-sector employees, the answers lie in collective bargaining and legislation, informed by the principles of dignity and privacy embodied in the Constitution.

The headlong rush to workplace testing raises broader concerns about the erosion of civil liberties. Judge Irving Kaufman, chairman of the presidential commission that recommended drug tests for government employees, argued that drug tests are no more intrusive than requiring people to walk through airport metal detectors. In fact, of course, drug tests are considerably more intrusive than metal detectors. But Judge Kaufman's comment says more against drug testing than he probably realized. If metal detectors at airports are a precedent for urinalysis in the workplace, what will urinalysis be a precedent for? The judge's comment illustrates how every little erosion of our civil liberties leads to another, and every little intrusion lowers society's "expectation of privacy." If liberties can be lost by increments, surely this latest erosion must be resisted. □

*Rep. Edwards, D-Calif., is chairman of the Subcommittee on Civil and Constitutional Rights.*

Mr. ACKERMAN. Congresswoman Schroeder?

## STATEMENT OF HON. PAT SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mrs. SCHROEDER. Thank you also, Mr. Chairman. I would ask unanimous consent to put my statement in the record.

Mr. ACKERMAN. Without objection.

Mrs. SCHROEDER. I want to thank you for allowing us to be here again. I was at your last hearing where you called in the Director of the President's Commission on Crime, the one that started this ridiculous idea. The hearing was delayed because you thought it was a good idea if he had a drug test before he testified, and he didn't think that was such a good idea, even though he had proposed it for everybody else. I think that shows some of the hypocrisy in all of this.

When I heard about the Executive order, I immediately went to calculate what it is going to cost, because this is a government running very high debts. I sometimes think that we are doing a lot of this to distract people on the problems of the economy.

This proposal will cost $300 million a year, minimum. I don't think it is going to reduce drug abuse in our society, because I don't think there are many drug users in the Federal Government. There certainly is no evidence of that, and most Federal employees have trouble paying their mortgage, much less being into drugs.

Second, if you require drug tests and you do find a few users, you may make them permanently unemployable. You could even make a case that this might increase drug abuse and violent crimes related to drug abuse.

Yesterday, the White House said that it would cost $56 million to implement the Executive order. Well, let's look at it. The order talks about a minimum of 1.1 million employees in sensitive positions. By the time you add all the other classifications that Congressman Edwards mentioned, you get up to a universe of at least 1.35 million people, and that's over 64 percent of the work force. That's a lot of people.

The lab costs alone for testing those people, will be $36 million. Then look at the rehabilitation costs of the few who might test positive—a minimum of $1,200 per person or $132 million if 8 percent test positive and if you take the President at his word on rehabilitation. So far, the cost is $258 million.

Now, I don't even know how you figure out what it's going to cost for all the court challenges. But once one is successful, there are sure to be many more. And as my distinguished colleague from California points out, somebody is going to have a successful court case or all the prior decisions are going to have to be overturned.

Add the cost of supervisory and testing oversight officials—which could run to at least $7 million. You have got to have some kind of quality control, which is at least another $3 million. And then you are supposed to also be doing development, and education, and publications, and coming up with new policy—very easily we get to $300 million.

The President couldn't decide whether or not to test applicants. So he said that he would leave that decision to each agency head.

Well, again, let's look at the figures. The Federal Government hires 615,000 a year. If agencies decide to test every one of those people, they will spend $27 million just doing lab tests on applicants. Knowing that they won't have the obligation to follow through to find out if it was a false positive or not, agencies may falsely and permanently label a whole group of people as drug users.

But let's take this $300 million—which I think is probably low. Let's take the $300 million and see what else you could with that. Do you know, that for $300 million you could almost double the size of the Drug Enforcement Agency? That for $300 million you could hire another 10,000 law enforcement agents at a reasonable wage.

So my question is: Where do people want to put these precious resources? This money doesn't grow on trees. The debt we have is phenomenal already. Three hundred million dollars is a lot of money, and where do we want to put it? My choice would certainly be either increasing the FBI or the Drug Enforcement Agency. I am much more concerned about the pushers on the street and the people making money out of this than I am about the threat of Federal employees who use drugs.

Finally, I don't think the President has the authority to issue this Executive order. In the first place, every expenditure of Federal funds must be authorized. Now, I realize that during the feeding frenzy when the drug bill was on the floor last week, the House probably would have authorized spending $300 trillion to test people every 15 minutes. But it didn't, and there is no authorization on the books.

The President asserted that his authority to issue this order came from section 3301(2) of title 5, concerning fitness of applicants and section 7301 of title 5, and section 290ee-1 of title 42. That section talks about prevention, treatment and rehabilitation, and specifically prohibits removal based on prior drug use. None of these sections gives the President the right to set job standards that have no connection to the job.

The Executive order doesn't provide any authority to fire people who test positive, and yet, there's indications that's what they would like to do. If agencies meet the requirements of the Rehabilitation Act, it is very costly.

The administration has to be aware of those two laws—nexus and rehabilitation—because they are asking this committee to change those laws. As I read this committee's feeling, I don't think we are going to rush forward and change that.

I salute the chairman's bill because I think that's right. You can test if you have reason, like any other constitutional proposal.

I thought the idea of testing Federal employees was a dumb idea when the President's Commission on Organized Crime recommended it. It is a very costly idea and there are many ways we could spend the money much more efficiently. I don't think that there is proper authority for the President to order it. I think it has really become a war on the Constitution rather than a war on drugs and a war on Federal employees, who probably have the least usage of any group in America.

So I thank you for having these hearings and pointing out one more time that people should look beyond their instant reaction to drug testing and find out what it really entails, and ask if it is really a good idea and a good way to spend money.

[The statement of Mrs. Schroeder follows:]

Statement of Rep. Pat Schroeder
Before Subcommittee on Human Resources
On Drug Testing Executive Order
September 16, 1986

Mr. Chairman and Members of the Subcommittee:

The Executive order which the President issued yesterday on drug testing of Federal workers will cost in excess of $300 million a year. I assert this expenditure will not reduce the amount of drug abuse in society; indeed, because the effect of this order may be to render a sizeable group of Americans permanently unemployable, the President's action may well increase drug abuse and violent crimes related to drug abuse.

The White House yesterday said that this Executive order would cost $56 million to implement. Let me spend a moment to explain how ludicrous this figure is. The order says that all 1,100,000 employees in sensitive positions, as defined by OPM suitability regulations, plus everybody with clearances, anyone serving under a Presidential appointments, law enforcement officers, and others whose jobs involve law enforcement, national security, protection of life and property, public health or safety, or requiring a high degree of trust and confidence, must be tested. So, I figure the initial universe, excluding applicants, is in excess of 1,350,000 people or 64% of the entire Federal workforce.

For these people, the lab costs of testing will run at least $36 million a year. But, that part of the process is

a bargain. Rehabilitation of the few who test positive costs $1250 per person or $132 million if 8% test positive, a very low figure based on the experience so far. Trying to fire those who refuse to take the test or who test positive after rehabilitation is likely to cost another $90 million. So far, we have a cost of $258 million.

Add to this cost the lost worktime involved in getting samples: time lost for the employee, the supervisor, and the drug testing oversight official. This may run up to $7 million. Also, add in the obligatory quality control program, which has to run at least $3 million. And, finally, the cost of oversight, supervisory control, policy development, education, and publications will be significant. As you can see, the figure reaches $300 million before we test the first applicant.

The President was obviously unable to decide whether to test applicants and so he left the decision to agency heads. The Federal government hires 615,000 people a year. Obviously, the cost of the program with relation to applicants is less because we do not have to rehabilitate an applicant who tests positive. Still, I figure that testing, litigation, and Federal employee time for applicant testing runs about $45 per applicant. So, we could spend another $27 million testing applicants.

For $300 million, we could nearly double the size of the Drug Enforcement Administration. For $300 million, we

could hire another 10,000 law enforcement agents. What a tragedy it is that the President decided to waste this money on a public relations stunt.

I am not certain that the President has the authority to issue this Executive order. In the first place, every expenditure of Federal funds must be authorized. I do not know of any statutory authority to spend $300 million for drug testing. While, in the atmosphere of last week's feeding frenzy the House probably would have voted $300 trillion for hourly drug tests, the fact remains that there is no authorization on the books.

Secondly, the President asserted that his authority to issue the order came from section 3301(2) of title 5, concerning fitness of applicants, from section 7301 of title 5, which gives the President authority to issue regulations for the conduct of employees, and from section 290ee-1 of title 42, which deals with prevention, treatment, and rehabilitation, and which specifically prohibits removal based on prior drug use. None of these sections gives the President the power to set job standards which have no connection with the job. While a nexus between drug use and job performance can be proven or postulated in the case of certain jobs, it certainly cannot be assumed in the case of 64% of the jobs in the Federal government. So, for many of the jobs covered by the order, the President lacks the authority to require drug testing.

What this means is that numerous employees will refuse to take the test and will challenge the authority of their agencies to order them to take it. This litigation process will be unbelievably expensive. And, once the first court affirms the right of an employee to refuse the test, the refusal rate will jump.

Moreover, the Executive order does not provide any authority to fire employees who test positive. Nexus still has to be shown and the requirements of the Rehabilitation Act have to be met. The Administration is well aware of these problems because the proposed legislation would change these two laws. I think I am reading this Committee correctly in saying that there is no sentiment to eliminate these two important due process protections from law.

When the Presidential Commission on Organized Crime recommended drug testing for all Federal workers, I called the idea idiotic. Now that the President has issued an Executive order requiring testing of over half of all Federal employees, I suppose I should call the idea half-witted.

Thank you.

Mr. ACKERMAN. Thank you very, very much.

Let me ask you a question on one of the points that you made concerning the number of people that the Federal Government—I believe you said it was in excess of 600,000 people a year that the Federal Government hires.

If, indeed, we were to test all of those people, and if we operate under the assumption, looking at the numbers that we have seen floating around as far as the accuracy of these tests go, they vary anywhere from 80 to 95 percent accuracy, which means that the degree of inaccuracy is anywhere from 5 to 20 percent. If we just mathematically take an average between the 5 and the 20 percent inaccuracy and come up with 12½ percent, that would mean, in round numbers, of 600,000 people who apply for jobs with the Federal Government each year, that would mean approximately 72,000 or 73,000 of them would have on their job applications that their urinalysis indicated that they were taking drugs. These are false positives.

What happens if these people, therefore, are eliminated from the prospect of that job, the job is filled by somebody else. And these 72,000 people, who mathematically are going to be accused of taking drugs, then file appeals, or take second drug tests to prove that they are clean, do they then bounce 72,000 other people if they are otherwise found to be better qualified, with the exception of the drug test?

Mrs. SCHROEDER. Mr. Chairman, that's why my $300 million figure is such a phony one. If you consider false positives and the cost of firing people, and the cost of fighting legal challenges from people that you didn't allow to apply because they were falsely labeled as drug users and then figure out the court costs of all that, the $300 million may not even be close.

If the Federal Government falsely labels an applicant or employee as a drug user—falsely—that will be very costly. How are they ever going to get a job? Because everyone is going to say, have you ever been denied employment and why? You say, because I failed my urinalysis test and they said I was a drug user, however, I am not. Good luck! What employer is going to sign this guy up? Right?

So I think you would have to—I mean, to make the person whole, I think the Federal Government would have to then employ them if you proved it was a false positive. And that kind of dislocation and expense would be phenomenal. But if you didn't do it, there would be no remedy, really, no real remedy, for those people that got caught up in this panic.

Mr. ACKERMAN. Thank you.

Don, Pat indicated some comments that she had on what we call nexus—the connection between job-related and off-the-job activities, which presently exists in Federal law. Would you care to comment on whether or not you believe that that is being violated with this Presidential Executive order?

Mr. EDWARDS. Mr. Chairman, I did want to comment, though, on Congresswoman Schroeder's point that this program is going to cost at least $300 million. It struck me that that is 25 percent of the FBI's total appropriation. We have 9,000 FBI agents and only 2,000 DEA agents. The amount of money that is being spent on DEA agents is just a pittance—we don't have enough.

There are so many ways to get at this drug problem rather than this jerrybuilt idea that is outlined in the presidential order.

In answer to your question, it is a very clear law that you can't go on fishing expeditions and you can't test employees or job applicants for things that are not connected with the job. The testing must have a relationship to the duties that they are responsible for. That is very clear law.

Mr. ACKERMAN. Do either of you know of any instance, or any report, or any indicator that tells us or suggests to us, or even hints to us that there is a problem on the Federal work force with drugs? Any indication whatsoever?

Mrs. SCHROEDER. I have chaired the Civil Service Subcommittee for a long time, and no, I have never heard of that. There is no question that during the Vietnam era we heard incidents among the military when they were in Southeast Asia, and we have had some drug problems in the military. But as far as in the Federal civilian employment, never, never have we heard the slightest indication.

First of all, let me tell you, these people don't have attorneys that negotiate great salaries for them to come to work for the Federal Government. They haven't had pay raises in years. They are just not the group that you would be out there looking at to have that kind of money.

Mr. ACKERMAN. Are you aware of any memos from agency heads that indicate in any department within the Federal Government nationwide that there is a problem in any one agency?

Mr. EDWARDS. Mr. Chairman, none whatsoever in the work that we do in the subcommittee, which includes jurisdiction over the FBI, where we have a lot to do with spying and terrorism. There has never been any connection between the increase in spy arrests, anyway, and in espionage, or in terrorism, no connection at all with drugs.

Mrs. SCHROEDER. I have never seen anything on civil servants—any kind of memo anywhere, saying this is a big problem. Furthermore, if it were a big problem, I am sure that no one objects testing if you suspect someone is heavily using drugs. That is the law. I mean, that's the reasonable type of approach—your bill.

Mr. ACKERMAN. I thank both of you very, very much for your patience and a re-run of some of your thoughts on this matter.

Mrs. SCHROEDER. Thank you.

Mr. EDWARDS. Thank you.

Mr. ACKERMAN. If you would care to, you both are invited to sit up here with the subcommittee.

Mrs. SCHROEDER. Thank you very much, and thank you for having a cool head.

Mr. ACKERMAN. Thank you. The statement of Congressman Gilman will appear in the record at this point.

## STATEMENT OF HON. BENJAMIN GILMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. GILMAN. I want to thank the chairman, the gentleman from New York, Mr. Ackerman, for holding this important hearing today.

As the Nation's largest employer, the Federal Government must take the leading role in the fight against drug abuse in the workplace. We have seen that no segment of society is immune to effects of drug and alcohol abuse. Rich or poor, suburban or innercity, black or white—all have been touched by the effects of drug abuse in one way or another.

Last week, the House adopted the Postal Committee's recommendations to the omnibus drug bill. Our input into that bill addressed narcotic or alcohol abuse problems among Federal employees. Specifically, it directs the Office of Personnel Management to provide drug and alcohol prevention, treatment and rehabilitation services to Federal employees and their families. OPM must conduct education programs to inform Federal employees of the health hazards associated with alcohol and drug abuse, its symptoms and the availability of assistance. On the postal side, the bill makes the mailing of controlled substances a separate criminal offense. In addition, the bill directs OPM to establish a 3-year demonstration project to determine the feasibility and desirability of including certain benefits relating to treatment of drug and alcohol abuse among the benefits available under the Federal Employees Health Benefits Program.

Mr. Chairman, the recommendations that were adopted will deal with any drug or alcohol problems among Federal employees in an equitable and nonpunitive manner. Drug and alcohol abuse is prevalent throughout our society and strong measures are necessary to fight this debilitating problem. We must, however, stay cognizant of individual rights and refrain from imposing experimental measures on the Federal workforce which could stand to jeopardize the morale of our employees. I commend you, Mr. Chairman, for taking a good hard look at this issue of drug testing. Once we determine where we should proceed on this we can begin the final assault in the battle against drug and alcohol abuse in our society.

The Chair would like to call as our next witness, Congressman E. Clay Shaw, Jr., of Florida, whose bill, H.R. 4636, the committee does have before it today.

Congressman, welcome, and thank you very much for appearing before us today.

## STATEMENT OF HON. E. CLAY SHAW, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. SHAW. Thank you, Mr. Chairman. I am pleased and very much appreciate the opportunity to come before this committee and to perhaps give a little bit of a different slant as to the effectiveness of drug testing than the very able panel that just immediately preceded me.

Last January, I took a trip with the Select Committee on Narcotics Abuse and Control to Texas, Arizona, California, and Mexico City. During that trip, we focused on the losing battle of stopping illegal narcotics smuggling across the southwestern United States borders.

Some members of this committee, namely, Mr. Gilman, were also on that trip. Although the trip focused on interdiction efforts, many of the discussions that I had during this trip and upon my

return home centered on the supply side war and the new emphasis on the demand side effort.

The demand side is unquestionably the new front line, or the most popular new battle front, upon which to fight the drug problem. And for some of us, we have been in this fight for many years now. This new strategy is welcome relief for what to date has proven to be a losing battle. There are still many who believe that fighting the drug supply through interdiction remains the only real way to win the war on drugs. I am not one of those members.

I believe we must go after the supply and the demand side as vigorously as possible.

But let me say as a member who has worked hard in the Judiciary Committee and on the Crime Subcommittee to pass legislation and to correct laws and to toughen laws regarding illegal drugs, that we have wasted a lot of time and energy in the supply side war on ineffective proposals.

Over the last 6 years since I have been here, we have passed mediocre legislation, we have visited and revisited the same issues again and again with new and still newer solutions.

No solution was ever as effective or focused as it could have been. We always ended up watering down our ideas with questions—maybe this is too tough; maybe this is going to infringe on too many people's rights, the boatsmen, the pilot, the traveler, the citizen. That was the wrong approach. We failed. We tried so many things and nothing has worked.

The reality remains: nothing has worked, Mr. Chairman. Last week, the omnibus drug bill came to the floor in a whirlwind. Some good legislation was passed and a lot of unplanned, unstudied, unquestioned, hastily put together, legislation was precipitously passed on the floor. Two of my own bills passed—bills that I had worked on for months and years, and which I knew were thoroughly researched and questioned.

One of those bills was the drug dealer death penalty offered as an amendment by Mr. Gekas. It was hotly debated and it does remain quite controversial, but, Mr. Chairman, it did pass.

The death penalty provision, in my mind, represents the most severe strategy we can use in the supply side war.

Mr. Chairman, it was not necessary to get to that point on the floor last week. If we had found the backbone and the foresight to pass strong, effective and comprehensive measures 10 years, or even 6 years ago, regarding the supply side war, we would not be where we are today.

So now we face a new strategy, a new battlefield—the demand side. The focus has shifted to our own backyard, not to our neighbors. We hear a lot of strategy being discussed: new educational programs, new and more money for State and local participation, and others. I believe today that drug testing is the strong and effective and comprehensive answer to the demand side battle.

Yes, we must question it and study it, as some have done. And let's not lose sight of our objectives. We are going to infringe on some people's rights, and you are going to inconvenience some people. But you have to ask yourself the real question: Is elimination of drug use our real mission? And, if so, isn't drug testing the ultimate deterrent?

Back in March of this year, I announced to my own congressional staff that I intended to test them for drug abuse. I gave them 60 days notice and paid for the test myself out of my own pocket. It proved to be a simple, painless, and inexpensive procedure—and I might say one for which my staff rallied and became quite enthusiastic.

The company that implemented the test provided for a two-tier screening process and the opportunity for a retest if a positive result occurred. It was carried out on a purely voluntary basis and I was delighted with the results.

I did not instigate the test because I thought anyone on my staff had a drug abuse problem. I implemented the test to make a statement to the public and to the Government. We are at the forefront of this drug war. We cannot tolerate hypocrisy in our efforts, nor should we be intimidated to say to the public that we who are drafting the laws, which often infringe upon your rights, are not doing illegal drugs.

In April of this year, I introduced a bill—H.R. 4636—which will require the head of each Federal agency to implement a control substance testing program for those persons whose duties involve access to classified information. The bill also requested testing for Members of Congress and congressional staff who have access to classified information. This bill went nowhere.

Several weeks ago, I revised the bill, dropping any reference to the Congress, and adding Federal employees whose duty affect public safety, and attempted to offer it as an amendment to the omnibus drug bill. The Rules Committee denied me the opportunity to offer my amendment to the full House.

Yesterday, the President released his Executive order regarding drug testing. It provides, among other things, directives to the heads of Federal agencies to implement a control substance testing program. I applaud the President's order and intend to support it in any way that I can.

However, I wish that members of this subcommittee would keep in mind that the drug problem has been with us for decades and gets worse every day. An Executive order is a good step as far as it goes, but it is not a law. It is not an act of this Congress and it can dissolve almost as quickly as it was written.

I believe that the Congress is a body that needs to act, and I hope that one day we will do exactly that.

Mr. ACKERMAN. Thank you very, very much for your statement.

A couple of questions if I may, Congressman Shaw.

You began your statement by saying that nothing we have done in the war on drugs has worked so far, and cited that as a basic reason for your and others abandoning the exclusive supply-side approach.

We heard testimony a few minutes ago from one of our colleagues that the cost of drug testing is anywhere upward of $300 million a year, and that that would cover the cost of at least 10,000 agents.

Have we really had that kind of a commitment so far of spending upward of $300 million to put on 10,000 new agents? Would that make an impact if we had done that?

Mr. SHAW. Mr. Chairman, I would first dispute that figure. When we are talking about a drug testing program, the implementation of a drug testing program, it does not require the testing, retesting, regular testing, of all Federal employees. There is a screening procedure that is put into effect in most accepted drug testing programs as many of our newspapers and other large corporations have put into effect, and then retesting only as with cause, when there is a reason for suspicion.

I do not think that it would cost anywhere near that amount.

While we are on that, let me mention one other thing, Mr. Chairman. I am talking about Federal employees with access to classified information or whose job description can cause the loss of life or destruction of property.

Now, as far as the Federal employees who have classified status, that figure in itself is classified. Now, I know that the Washington Post ran one. Our office—my congressional office—has for a couple of weeks now been trying to determine exactly how many Federal employees come under that classification, and we have run up against a brick wall.

Now, I will certainly grant that the Washington Post might have better intelligence than a Member of Congress has, however, that is a classified figure and one that I do not have access to, and nor do you, Mr. Chairman.

Mr. ACKERMAN. Could you give us an indication—you mentioned the testing of your staff, if I could ask some questions about that.

What did it cost you?

Mr. SHAW. $10 per staff person.

Mr. ACKERMAN. $10 a staff person?

Did any of those persons have to be retested?

Mr. SHAW. No, sir.

Mr. ACKERMAN. Did they submit the urine sample in the presence of somebody else?

Mr. SHAW. No, it was done over in the House physician's office. They went into the restroom. It did not require that anybody be present.

Mr. ACKERMAN. When that happened, you had given them first 60 days notice prior to that.

Mr. SHAW. Yes, sir.

Mr. ACKERMAN. So that anybody who was taking drugs—and we presume, of course, nobody in your office has, is, does, or will—had 60 days notice prior to the test. I understand that the President's Executive order calls for 60 days notification for the implementation of the guidelines, but it is not intended to give somebody prior notice that they are going to be tested in 60 days.

In the testing of a specific office—yours in this instance—they had 60 days to clean themselves up, in which time, presumably, if one did take drugs, I think most, if not all of the drugs that would show up in urinalysis would be purged from the system before that.

Is that not accurate?

Mr. SHAW. That is correct. As a matter of fact, I think 30 days is sufficient time.

This is one of the things that is so misunderstood about drug testing. Any program that is set up in the workplace whose end result it is to catch somebody, or to punish that employee, is a

system which I would not endorse, nor do I think the President would endorse.

A system that is set into place as a deterrent, with plenty of warning to the people who are going to be involved in it to exactly what is going to happen—this type of program is the type of program that I believe we all should support. And this is the type of program that I do not think is anywhere near an unreasonable intrusion into anyone's privacy.

Mr. ACKERMAN. If I were taking drugs, and I was concerned about being tested, and I understood the program were set up as you set it up in your office—and as the President's order does as well, and contrary to the original report from the President's Commission on Organized Crime—that the sample, and the way you tested your office, is done in private, with the individual supplying the sample being present himself or herself and nobody else in the room.

Is that really a deterrent? Couldn't somebody, if they were taking drugs and didn't want to clean up their act for 60 days, very easily go out and get a vial, or couldn't some entrepreneur—and this, I assure you, is just eye wash for my contact lenses—but couldn't somebody go out and manufacture a small, disposable, even flushable, container, and couldn't somebody just go out and market clean urine samples and sell them for $2 apiece?

The cost of producing it is next to nothing and they could make millions of dollars in a whole industry. And all one would have to do is carry this around in their pocket waiting for the day that the boss comes in and says, "Into the john, John," and then just open this thing up and pour the contents into the sample glass, and then flush away the results.

Mr. SHAW. Mr. Chairman, I would point out two things with regard to that. One is the scenario that you had set up on a market did indeed happen involving some of the early testing with our servicemen. So, obviously, a urine examination or a urine sample that is taken outside the presence of whoever is taking the samples, is one that is subject to abuse. There is no question about that.

I would, however, say though, that if anybody came out of the bathroom with a cold urine sample, perhaps he should have an entire physical.

Mr. ACKERMAN. No, these things are pretty easy to warm up. [Laughter.]

Mr. SHAW. You would have to be awfully quick.

Mr. ACKERMAN. Well, some people under pressure take a little longer before their sample is forthcoming.

Mr. SHAW. I am sure we could come up with a whole line of straight lines on that one.

Mr. ACKERMAN. I am sure that we could. But, nonetheless, I think that this kind of a scenario, as simple as it is—just carrying around this—would simply compromise a test without any great degree of imagination or intelligence. I mean, one can do it himself or herself rather than even going out and buying one. But you could probably get laboratories that are going to make these certifiably free.

Mr. SHAW. Mr. Chairman, I do not set myself up as being an expert as to how a drug-testing program should be set up. In fact, I did not even, as far as my own staff is concerned—I left that up to the pharmaceutical company to administer it in the way they saw fit in cooperation with the House Physician's Office. So I don't take sides with regard to that.

I think that in some instances where you had a situation, a serious situation, which you may have had a situation like the air traffic controllers where there was a loss of life and property and you are going in to examine that individual, then I think precautions are very, very necessary. I think that they can be administered in both ways. I certainly recognize that.

I also recognize that privacy of an individual not wanting to give a sample in the presence of somebody else and the feeling that this would in some way be demeaning.

So I think what you have to do is set up the test itself with the security as required by the circumstances.

Now, in the situation with congressional staff—you know your staff as well as I know my staff. And I knew before I even warned them that I didn't have anybody using drugs on my staff. It wasn't showing up in their work. Their attendance at work and tardiness, certainly would indicate that I had no problems. But I wasn't looking for any security nor did I think for one moment that anyone would come in with the vial such as you just described to me. So the necessity for the extra precaution certainly was not there.

I think any program, when it is reasonably administered, would also carry that with it.

I also would like to point out something else: The complete confidentiality of such tests. That is absolutely necessary. Any Member of Congress who wants to do this to administer this test to his own staff, or I think any head of any agency who is administering it to the Federal employees, you have to have complete confidentiality. You cannot allow something like that to go on someone's work record—as Mrs. Schroeder just suggested.

I think a question on application.Have you ever been denied employment? I think anyone who has ever sent his résumé out for a job would have to answer that, yes, they were denied for employment. So I don't think you even see that on any job application. I certainly have not.

Mr. ACKERMAN. They would have to indicate what? I'm sorry.

Mr. SHAW. Indicate whether you have ever been refused employment.

I can remember when I graduated from law school—I sent my résumé and applied to several law firms. I didn't get hired by all of them—that's for certain.

Mr. ACKERMAN. What happens if somebody has an objection, whether we agree with it or not, on moral, legal, constitutional, or personal grounds, and refuses to take the test, somebody on your staff or my staff? And we put these guidelines in effect and we fire that person for refusing.

Do we make a notation on that person's record that they refused to submit to urinalysis?

Mr. SHAW. Absolutely not.

Mr. ACKERMAN. Well, then, if that person is dismissed from your staff and comes to work for me, how do I know that that person has a problem if I don't want to hire him? I mean, we could have thousands of people bouncing from office to office.

Mr. SHAW. What we are talking about is what the reason for the test is. If he goes over to your office and you are objecting to those tests and you never get it, and the question is not going to come up, I would suggest that that might be the right office for someone to go to.

But the question of it having been stated—and I don't mean any disrespect by that, Mr. Chairman—but I think the fact——

Mr. ACKERMAN. My staff understands. [Laughter.]

Mr. SHAW. I am not sitting here saying that all congressional staffs should be subject to drug testing. I think that is your decision to make in concert with your staff. It was my decision to make in concert with my staff. I had no holdouts so I did not have to face that problem. But, yes, I did think about it. And if someone did violently disagree with me on that, I had made up my own mind that probably what I would have done was suggest that perhaps in the next Congress that that was going to be a requirement of the office and he might start looking around.

I think that if that is a requirement of a job with a Federal agency, and a person applies for that job, if he is not willing to adhere to that requirement, then, obviously, he wouldn't get the job—and I see no problems with that.

Mr. ACKERMAN. Let me get away from the practical questions for a minute if I can, and I know that you have other engagements so we won't be long, and just touch on the constitutional question.

You don't believe in any way that it is an invasion of someone's privacy, or violative of the Constitution's provisions against illegal search and seizure, to invade somebody's body and snatch their body fluids for a test?

Mr. SHAW. I think that any physical you take is giong to involve an examination of someone's body.

Mr. ACKERMAN. Is this a medical examination or is it a Government investigation?

Mr. SHAW. I view this as just part in the same vein as any other medical examination.

Mr. ACKERMAN. OK, when there's a medical examination we usually have Government insurance that treats whatever illness the person has, and it is paid for in some way. I really haven't seen any programs in effect on this. This is a big problem that we are going to have to address.

In New York City alone, where I come from, we have kids who go to their guidance counselors and say, I am taking drugs of one kind or another; or it is discovered by the teacher, or other students, and everybody notices. There are three and four times as many kids waiting to get into programs that are completely filled because there are not enough Government funds available to treat them. These youngsters are waiting, 3, 4, 5, 6 months to get into programs, all the while using drugs and resorting to a life of crime.

How do we address that? Is there going to be money——

Mr. SHAW. The problem is we have not addressed that. And the problem is when that youngster or person seeks help from that

agency is the time when he is most vulnerable—most vulnerable—to rehabilitation, and that is the point where those spaces should be immediately available to them. When that person then is put out on the street and says you are going to have to wait 6 months—many of them don't live 6 months; there's a lot of crimes that are going to be created in those 6 months' period.

That is a national disgrace that we do not have those facilities readily available. I would agree with the chairman on that.

Mr. ACKERMAN. Congressman, thank you very much. We appreciate your tolerance and your good humor as well.

Mr. SHAW. I appreciate yours. Thank you, Mr. Chairman.

Mr. ACKERMAN. Thank you.

Congressman Burton?

Mr. BURTON. Thank you.

Is your program a voluntary program?

Mr. SHAW. It involves all my staff but it was voluntary and I didn't have to carry that any further.

Mr. BURTON. When you hire new personnel, do you intend to make it a requirement? I didn't get that from your testimony. Are you going to ask, if they would participate in a voluntary drug testing program?

Mr. SHAW. We have had one new employee in my office since March, that I recall, and it is our receptionist, and I did not discuss that with her.

Mr. BURTON. You did not?

Mr. SHAW. No; I did not.

One of the problems that you have, and I think when you get into the drug testing—and anyone who has made inquiry knows that it is not a recognized House expense. The question might be: Why would the Member pay for it himself, why not pay for it out of his campaign fund or pay for it out of the House office expense?

To this date, it is not an approved House office expense. And if everyone in your office is taking it, it is a function of the office, and the Ethics Committee will not allow you to use your campaign funds that way. So the only way that a Member at this point can have his office tested is out of his own pocket.

If I should see that somebody in my office had all of the indications of drug abuse, I would have a very close talk with them, which might involve retesting.

Mr. BURTON. Do you think we ought to consider this a legitimate expense of the office?

Mr. SHAW. I absolutely do. I absolutely do.

I would like to pursue one other thing, if I might—the chairman was questioning me a moment ago.

Let's take a question of whether this is part of a regular physical. I think the situation—I think most in line with those that would agree with me that drug testing is quite proper and should in fact be required, perhaps first you could look at such people as air traffic controllers.

I think we all know that someone's degree of alertness is certainly affected by the use of drugs. I think that is a given and everyone understands that. So I think that perhaps when you talk about making a drug test as part of a regular examination of an air traffic controller just the same as examining his eyesight and other

body functions—I think it fits in quite properly and it is exactly what we should be doing.

Now, somewhere you get out in the fringes, you can find some arguments. But I think the first thing you have to ask yourself: Are there instances where we should require testing? And that is the point that I would like to make.

Mr. ACKERMAN. Just so there is no confusion, if I might—the program in your office is voluntary, but the bill that you propose is mandatory.

Mr. SHAW. But what?

Mr. ACKERMAN. The bill before us that you proposed is mandatory.

Mr. SHAW. The bill I propose is mandatory for a drug testing program. I think that is important. I do not say that everyone has to be tested as they come in the door or when they should be tested. It just mandates a program for certain classification of Federal employees, which I might say, is a small fraction of the total employees of the Federal Government.

Mr. BURTON. Does your bill provide testing where sensitive information is transmitted within an office and a person is exposed to it? Would it be a mandatory program, or does it spell that out at all?

Mr. SHAW. H.R. 4636 does require that Members of Congress who have access to sensitive information and their staff members that have access to information undergo a drug testing program.

Mr. BURTON. A mandatory program?

Mr. SHAW. It would be mandatory.

It is mandatory that the program be put into effect. Now, how that program is going to be set up would be left to others.

Mr. BURTON. I think the military right now—requires physicals when people go into it and they require body fluids be tested?

I think the issue was raised awhile ago about constitutional rights. I remember when I went into the service. We had the draft at that time and everybody was subject to the draft. When we went in, we didn't have any choice as to whether or not they were going to extract body fluids from our being in order to test us for one thing or another.

I think there are various positions where people are hired, and they are mandated before they are employed to have these tests. Isn't that correct?

Mr. SHAW. Yes; but it could be argued as to what one's rights is when they are in the military.

Mr. BURTON. Positions where sensitive information is concerned, where possibly the national security interest of the United States are at risk.

When I first came to Congress, one of the things I heard in a meeting with some CIA people was we have a great many KGB agents in Washington, DC—possibly more KGB agents in this city than any city in the world, except for possibly Moscow. They are always looking for intelligence information they can use to help their government.

We just had a few major spy cases come to the fore in recent days and weeks—the *Zakharov* case is one in particular. Those people will prey upon anybody they can to get the information they

want. A person who is addicted to drugs or who is using drugs on a regular basis, I think would be a likely target for them, if they are in a sensitive position.

So I applaud your efforts to try to help in that particular area because I think there is a national security issue at stake here. We can't just close our eyes and say it doesn't exist.

I think people like you, Representative Shaw, and others, like the President, who have decided to make this a major issue, are to be applauded. I will do everything I can to support you.

Mr. SHAW. I appreciate that, Mr. Burton.

I would like to say that I cannot think of anything or any person more vulnerable than someone living on the salary of a Federal employee with a severe drug habit. I can't think of anybody who would be a greater risk to our national security and the secrets that he has under his control than that particular person.

We have reached a stage in this country where—and I said nothing is working early in my remarks—the drug problem is growing. Cocaine, crack—crack, which wasn't even with us a year ago—cocaine, which 6 years ago or 10 years ago, was a drug you rarely saw in law enforcement. It has grown immensely in popularity and it is immensely addictive.

We have to do something. We have to approach this from new ideas. To simply say that we are going to attack the demand side only through education doesn't make a whole lot of sense. If you go out and talk to seniors in a high school or other people in college and you ask them, are drugs good for you, or bad for you? You don't have to tell them they are bad for you—they simply know that.

Mr. ACKERMAN. I would, if I might, at this point, just like to take very strong exception to what I heard you say about Federal employees because of their low threshold of income, you could not think of anybody more susceptible to be involved in spying or espionage, or any of those things.

We have very many patriotic Americans who have a very low threshold of——

Mr. SHAW. Mr. Chairman, you are not taking exception to me at all, because I certainly was not meaning that to reflect upon the quality and caliber of our Federal employees.

Mr. ACKERMAN. We take that clarification.

Mr. SHAW. But——

Mr. ACKERMAN. But.

Mr. SHAW. I think that anybody in the workplace is going to be tempted to do something that is wrong if he can do it for money—and that is not just the Federal Government—but if he can do it for money if he has a drug habit. These people will not stop at anything—and whether it is robbing the 7-Eleven or whether it is selling something to the KGB, the situation: people are people, and people in those situations are vulnerable. And whether they are in the Federal work force or the private work force, or simply unemployed, they are all different, and the drug situation—they are all the same with regard to being tempted when they have a drug habit. And morals—the moral quality of these people seem to go out the window.

Mr. BURTON. Let me just make a case in point. I am on the Foreign Affairs Committee as well as this committee, and we have briefings which include some very sensitive material. Much of it is top secret. The people on my staff, many of them, have to be cleared for top secret to be even in the same room when we get a briefing on some of this information.

Now, if those people are involved with drugs. If they have a dependency on drugs, and they gain some information from these meetings, it seems to me they would be a likely target for KGB agents trying to get information for their country or to find out what the United States knows about a given subject.

So I think you are right on the money. I heard a little laughter going through the audience when we started talking about this. This is a very deadly, serious issue, as far as I am concerned, because there are national security concerns to be considered.

I think since we have drug usage here in Washington—and we know there are people in sensitive positions—it is logical, in the interest of national security, for us to have some kind of mandatory drug testing program for those who are exposed to sensitive material.

Once again, I applaud your efforts and the efforts of the President to try to get at this problem.

Mr. ACKERMAN. I am having some difficulty connecting the dots. Maybe you could help me.

Mr. SHAW. I will try to number them for you, Mr. Chairman.

Mr. ACKERMAN. Please do—in big numbers.

We agree that drugs are a no-no, and we agree that espionage and selling out your country is not a nice thing. The problem that I have is making the connection between that and Federal employees being drug tested.

The GAO has reported—and, without objection, I will submit the report for the record of the committee—that they have not seen any real instances of this drug problem involved in any of these espionage cases, or any of the spy cases that we are alluding to now. Perhaps you can enlighten us.

Do you know of any one instance that drugs were involved in the past 5 years with the 2.1 million Federal employees? Were drugs involved ever?

[The report follows:]

United States
General Accounting Office
Washington, D.C. 20548

Comptroller General
of the United States

B-223280

September 11, 1986

The Honorable William D. Ford
Chairman, Committee on Post
Office and Civil Service
House of Representatives

Dear Mr. Chairman:

Your letter of May 20, 1986, asked for our views on H.R. 4636--a bill to require controlled substance testing programs for federal employees and contractor personnel having access to classified information. Although the decision to establish these programs is a matter of policy for the Congress to decide, we cannot support enactment of the proposed legislation. The bill raises a constitutional problem and is vague in numerous respects. In addition, the potential benefits are unmeasurable while the estimated costs are significant.

Bill provisions

The bill would require the heads of congressional offices and agency heads to implement drug testing programs for themselves, their employees, and contractors whose duties involve access to classified information.

Under the bill, each Member of Congress, the employing authority for other congressional employees, and agency heads would be responsible for implementing a testing program for their employees having access to classified information. The bill defines "Member of Congress" as a (1) Senator, (2) Member of the House of Representatives, (3) Delegate to the House of Representatives, and (4) the Resident Commissioner from Puerto Rico. The definition of "congressional employee," referenced to 5 U.S.C. 2107, is

> (1) an employee of either House of Congress, of a committee of either House, or of a joint committee of the two Houses;
>
> (2) an elected officer of either House who is not a Member of Congress;
>
> (3) the Legislative Counsel of either House and an employee of his office;
>
> (4) a member of the Capitol Police;

(5) an employee of a Member of Congress if the pay of the employee is paid by the Secretary of the Senate or the Clerk of the House of Representatives;

(6) the Architect of the Capitol and an employee of the Architect of the Capitol;

(7) an employee of the Botanic Garden; and

(8) an employee of the Capitol Guide Service.

For the executive branch, the bill uses the Administrative Procedure Act definition of an agency: any (1) executive department, (2) military department, (3) government corporation, (4) government controlled corporation, (5) or other establishment in the executive branch of the government (including the Executive Office of the President), or (6) any independent regulatory agency.

Constitutional problem

The constitutional problem raised by H.R. 4636 is whether the controlled substances testing programs provided for would violate the Fourth Amendment to the United States Constitution which protects the privacy of individuals from invasion by unreasonable searches of the person and those places and things wherein an individual has a reasonable expectation of privacy. Terry v. Ohio, 392 U.S. 1,9 (1968); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985). Whether an individual has a reasonable expectation of privacy and whether governmental intrusions are reasonable are to be determined by balancing the claims of the public against the interests of the individual. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976).

Most courts that have considered the issue of drug testing of public employees have found that a urinalysis test constitutes either a search or a seizure within the meaning of the Fourth Amendment. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266-67 (7th Cir. 1976); Storms v. Coughlin, 600 F. Supp. 1214, 1217 (S.D.N.Y. 1984). Moreover, most courts have found that random testing violates the Fourth Amendment.

In McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), the Court found violative of the Fourth Amendment an Iowa Department of Corrections policy that subjected the Department's correctional institution employees to, among other things, urinalysis testing for drugs. The Court held that the Fourth Amendment allowed testing of urine only when there was reasonable suspicion based on specific objective facts and reasonable inferences drawn from the

facts that an employee was under the influence of a controlled substance. Id. at 1130. A similar decision was rendered in the United States District Court for the District of Columbia involving a school bus attendant. Jones v. McKenzie, 628 F. Supp. 1500 (D.C.D.C. 1986).

Furthermore, although a number of other courts have sustained urinalysis testing of public employees for drugs, they have done so only when there existed reasonable suspicion of drug use, or extraordinary circumstances justifying the test. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976) (Chicago Transit Authority required Transit Authority bus operators to submit to blood and urine tests either when they were suspected of using narcotics or alcohol or after being involved in a serious accident); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008-9 (D.C. Ct. App. 1985) (Police Department regulation allowing urinalysis testing of members of the police force when a Department official had a reasonable, objective basis to suspect that urinalysis would yield evidence of illegal drug use); Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D.Ga. 1985) (City required urinalysis tests of city employees who worked in the Electrical Distribution Division around high voltage wires and were observed smoking marijuana by an informant).

Although there have been several instances where courts have sustained random urinalysis testing for drugs, they have done so in situations involving military personnel, prisoners, and thoroughbred race horse jockeys. The decisions permitting such tests of military personnel emphasized both that (1) military personnel have a lesser expectation of privacy than civilian employees under the Fourth Amendment, and, thus, have not been accorded the same protections, and (2) incidence of drug abuse in the Armed Forces is extensive. Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); Committee for GI Rights v. Callaway, 518 F.2d 466, 476-77 (D.C. Cir. 1975); see Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. Ct. App. 1985). The decision permitting tests of prisoners emphasized that the constitutional rights of prisoners give way when in conflict with prison security needs. Storms v. Couglin, 600 F. Supp. 1214, 1218-19 (S.D.N.Y. 1984). In another instance a United States District Court sustained New Jersey State Racing Commission regulations providing for random urinalysis tests of jockeys at race tracks, Shoemaker v. Handel, 619 F. Supp. 1089, 1099-1102 (D.N.J. 1985). The Court specifically distinguished the McDonell case on the grounds that (1) horse racing was one of a special class of relatively unique industries that had been subject to pervasive and continuous state regulation; (2) jockeys were licensed by the state; and (3) the state had a vital interest in insuring that horse races were safely and honestly run, and that the public perceived them as such. Id. at 1102.

Consistent with the decided cases, it would not appear that the controlled substances testing programs authorized by H.R. 4636 meet

Fourth Amendment requirements. The bill does not provide a reasonable suspicion basis for the testing that most of the decided court cases have found is necessary. Although courts have sustained random urinalysis testing of military personnel and prisoners, they have done so where Fourth Amendment rights are diminished, and, also as regards military personnel where substantial drug abuse was shown. Arguably, the Shoemaker court's reasons for testing jockeys would not be inconsistent with the reasons for testing federal employees and Members of Congress and their staffs having access to classified information. However, although Shoemaker sustained regulations for random urinalysis testing, most other courts have supported urinalysis only where there existed reasonable suspicion of drug use. We also point out that we are not aware of any showing that there is a drug problem among the individuals to be tested under the bill.

In support of the bill, it has been suggested that accepting public employment under circumstances where random testing will be carried out operates as an implied consent[1] to the testing, and, thus allays any Fourth Amendment problems. Although there is minimal jurisprudence on this issue, what there is suggests that such consent would not render proper an otherwise improper search and seizure.

As a general matter, the Supreme Court has found it inherently coercive to give individuals a choice between exercising their constitutional rights or losing their jobs. Uniformed Sanitation Men Assn. Inc. v. Commissioner of Sanitation, 392 U.S. 280, 284-85 (1968); Garrity v. New Jersey, 385 U.S. 493, 496-500 (1967). In both instances, however, the constitutional right involved was the privilege against self-incrimination and not the Fourth Amendment.[2]

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[1]It is clear that consent to a search renders permissible under the Fourth Amendment what would not be permissible without a warrant. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). When consent is the justification for the search, the government bears the burden of demonstrating that it was freely and voluntarily given, and was not simply an acquiescence to a claim of lawful authority. United States v. Gomez-Diaz, 712 F.2d 949, 951 (5th Cir. 1983), cert. denied 104 S. Ct. 731 (1984).

[2]Nevertheless, in Garrity the Court relied on Boyd v. United States, 116 U.S. 616 (1886), where a statute offered the owners of certain goods an election between producing a document or forfeiting the goods. The Court found this choice to be a form of compulsion violative of both the Fourth and Fifth Amendments.

More particularly, only in McDonell, discussed above, has a federal court directly considered the consent issue in the context of random urinalysis testing of public employees for drugs though the consent given there was explicit: the employee had signed a form permitting searches of prison employees for security reasons at any time. The Court said that advance consent to future unreasonable searches was not a reasonable condition of employment. 612 F. Supp. at 1131. Since the court found the random urinalysis testing program to be unreasonable and therefore violative of the Fourth Amendment, signing of the consent form essentially was without effect.

In another instance in which an individual's right to visit a prison inmate was conditioned on her submitting to a strip search, a United State District Court held that submission to the search was not voluntary since consent was given under that inherently coercive circumstance. Cole v. Snow, 586 F. Supp. 655, 661 (D. Mass. 1984). Similarly, where a motorist driving through a national park was subjected to a roving stop by park police, a United States Court of Appeals denied that there had been an implied waiver of Fourth Amendment protections on the ground that government regulation of public parks was well known to the public. United States v. Munoz, 701 F.2d 1293, 1298-99 (9th Cir. 1983).

These cases suggest that consenting to random drug testing as a condition of employment would not satisfy Fourth Amendment requirements. Consent to the test arguably would be coercive and would not constitute an effective waiver of an otherwise impermissible search. This conclusion would appear more compelling when consent is merely implied than when directly given. At least when consent is directly given, an individual both has specifically agreed to the search and presumably would have had a better opportunity to consider the pros and cons of granting consent.

Nevertheless, there is at least one case that provides some support for the implied consent position. In United States v. Sihler, 562 F.2d 349, 350-51 (5th Cir. 1977), the United States Court of Appeals for the Fifth Circuit sustained a warrantless search of a prison employee as a reasonable security measure since the employee voluntarily accepted and continued an employment which he knew could subject him to random searches. In this case there was no written consent, but the employee had notice that prison employees would be subject to these searches. It should be pointed out, however, that though the court discounted this factor, the particular search was based on information from an informant that the employee would be bringing narcotics into the prison.

Vagueness of the bill

Aside from the constitutional problem, the bill is obscure in numerous respects. The bill is silent about the procedures for

administering and monitoring the drug testing programs. For example, the bill does not indicate what substances are to be tested and the frequency of the testing. Furthermore, the bill does not provide for a monitoring mechanism that would enhance the reliability of drug testing. In 1985, the Centers for Disease Control (CDC) published the results of a study evaluating the performance of 13 laboratories which served a total of 262 methadone treatment facilities by testing for six substances. Due to the error rate found, CDC concluded that drug treatment facilities should monitor the performance of their contract laboratories with quality-control samples.

The bill also does not assign responsibility for oversight. Such a single agency focal point would appear to be necessary to answer the many questions that organizations are likely to have on implementing such a program.

The bill does not address the actions agencies might take on individuals testing positively. Thus, the bill does not provide any guidance about how the offices and agencies implementing the drug testing programs would handle such consequences as revocation of security clearances, reassignment to non-sensitive areas, demotion, and termination of employment. Furthermore, the bill does not address the policy set forth in the Rehabilitation Act of 1970, as amended, and the Drug Abuse Office and Treatment Act of 1972, as amended. Pursuant to these acts, the Office of Personnel Management (OPM) states it is the policy of the federal government to offer appropriate prevention, treatment, and rehabilitation programs and services for federal civilian employees with drug problems and that short term counseling and/or referral is appropriate for these programs.

The bill also does not provide for due process protections for individuals adversely affected by actions taken by agencies. In a recent case involving the Merit System Protection Board's jurisdiction in a matter involving the revocation of a security clearance, the Board held that agencies need to provide (1) notice of the denial or revocation of a security clearance, (2) the reasons for the agencies' decisions, and (3) an opportunity for the employee to respond.

The bill does not define the term "controlled substance." Under current law, the Drug Enforcement Administration classifies more than 200 substances as controlled which are required to be under varying degrees of control over their production, distribution, prescribing, physical security, and record-keeping.[3] The

[3]A definition of controlled substances is provided in section 802 of Title 21 of the United States Code. That section refers to section 812 of the same title which sets forth five schedules of controlled substances and enumerates them.

Department of Defense's program for military personnel currently tests for six drugs and/or their metabolite(s): amphetamines, barbiturates, cannabinoids (marijuana), cocaine, opiates, and phencyclidine (PCP).

Benefits and costs

The potential benefits if the bill were enacted are not measurable. In all probability, a deterrent value would be established and some drug abusers identified and thus, national security better protected. In addition, similar to the objectives of a Department of Defense program, the health and fitness of employees might be enhanced to the benefit of agencies and U.S. citizens. It is difficult, however, to estimate the magnitude of such effects.

Complicating the measurement of effects is the fact that characteristics other than drug abuse may also have a bearing on individuals' trustworthiness. For example, recent news media accounts of espionage cases have focused attention on disclosures of national security information. These accounts have not shown that drug abuse was any more of a factor threatening national security than other characteristics. In addition, the Department of Defense directive on personnel security contains guidelines to assist in determining an individual's eligibility for employment, retention in sensitive duties, or access to classified information. The guidelines identify the following characteristics: financial irresponsibility, criminal conduct, connection to individuals residing in countries currently hostile to the United States, subversive activity, alcohol abuse, and security violations, in addition to drug abuse. The guidelines also identify factors and mitigating factors related to each characteristic which may be considered in determining whether to deny or revoke a clearance, but points out that each is to be an overall commonsense determination. Defense's policy is to subject individuals in selected positions to periodic reinvestigations on a 5-year recurring basis--another complicating factor in identifying the potential benefits of this bill.

The cost of controlled substance testing programs is more quantifiable. At the request of Representative Shaw who introduced the bill, the Congressional Budget Office (CBO) estimated the following costs:

| Fiscal year | Cost (in millions) |
|---|---|
| 1987 | $79 |
| 1988 | $84 |
| 1989 | $89 |
| 1990 | $94 |
| 1991 | $100 |

CBO estimated that about 4.5 million federal employees, military members, and contractor personnel have access to classified information and would be tested once a year for the presence of eight controlled substances. After an initial screening at a cost of $15, 5 percent would test positive and be given a second verification test that would cost $30.

The bill provides that the term classified information has the same meaning given that term by section 1 of the Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025. Consistent with this definition, the controlled substances testing programs would extend to civilian and military personnel having access to "confidential," "secret," and "top secret" information.

The number of individuals that CBO assumed have access to classified information appears to be reasonable. As of December 31, 1983,[4] the year for which we have the most complete data, about 4.2 million civilian, military, and contractor employees had confidential, secret, or top secret security clearances. Although less than CBO's, our figure is not current and does not include all personnel covered by the bill such as legislative branch employees.

CBO assumed that all 4.5 million individuals would be tested once a year since the bill is silent on this parameter, as CBO recognized. If organizations tested more or less frequently, the costs would obviously change. Also, the bill specifically states that military personnel are among those to be tested although it is not clear whether the bill envisioned that military personnel already subject to drug testing would also be tested under this program. According to a Defense official, each military service sets its own policy for determining who is subject to testing. Although Defense knows that all military personnel with security clearances are not presently tested, records do not exist specifying the numbers. As a result, we do not know the extent of potential duplication.

Since the substances to be identified by testing are not specified by the bill, CBO contacted laboratories to obtain information on the number of drugs for which testing is usually conducted. On the basis of this and other information, CBO assumed the programs called for by the bill would test for the presence of eight controlled substances which included the six in Defense's current program.

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[4]General Accounting Office testimony of Apr. 16, 1985, before the Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs.

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CBO's assumption of a two-step testing process is particularly appropriate. To greatly reduce the possibility that a cross reacting substance or a methodological problem could have created the positive test result, the National Institute on Drug Abuse advocates a two-step process using two different technologies. A Department of Defense official told us that Defense follows this two-step process for its ongoing drug testing program.

According to CBO, 10 percent typically test positive initially in tests conducted on people not having access to classified information. Since people having access to classified information have had background investigations, CBO assumed they would test positively less frequently and projected that 5 percent of those screened would test positive and the second test performed. CBO points out that the number of verification tests to be conducted, if any, is speculative since little is known about the use of controlled substances by individuals having access to classified information.

The CBO estimate appears to be a reasonable approximation of direct laboratory costs but does not include organizations' administrative costs. According to a Defense official, the Defense drug testing program for fiscal year 1985 tested about 2.3 million specimens at a cost of about $47 million--a figure which also does not include all administrative costs.

In summary, we cannot support enactment of the bill. We trust you will find our comments useful as your committee considers this proposal.

Sincerely yours,

Milton J. Socolar

for Charles A. Bowsher
Comptroller General
of the United States

Mr. SHAW. Mr. Chairman, the Federal employee is no better or no worse than the rest of the population of this country.

Mr. ACKERMAN. Should we test everybody?

Mr. SHAW. The entire population of this country is bombarded with access to drugs and the vulnerability of becoming addicted to drugs.

The amendment that I had offered through the omnibus drug bill last week would have actually extended drug testing to contractors whose employees have access to sensitive information.

We have had very few spy cases that we have really cracked, if you really want to look at the record. There's been a few lately that have been in the news and they have gained a lot of attention. However, I would say for every one that we have found that there's probably hundreds that we have not found in instances where secrets have been sold to foreign agents—whether it be by Federal employees or whether it be by defense contractors, or whether it be by somebody else in the private sector simply because of his job description he has access to this information.

I have seen the correspondence from the General Accounting Office that you refer to. I am not saying that mine is a perfect bill. I will say, though, Mr. Chairman, that I am quite grateful to you for having a hearing on this bill, as I think it is a situation that should be debated openly by this Congress.

I think that we can only solve these problems and learn more about finding new and better ways to attack this problem by talking about some of the solutions that have been thrown on the table. Mine is not a perfect solution. The President's is not a perfect solution. I know that.

But I do know, also, that there is a direct danger out there, that this country is under attack from the drug users and the drug abusers, and drug smugglers. I think that many people have said it before, and I certainly agree with it, I think that the—including the Chief Justice of the Supreme Court—but I think the greatest danger to the security of this country is not from outside this Nation, but from inside this Nation, and that is drug abuse.

We have got to come up with some solutions. I hope you find one that is better than the one I have suggested. I tell you, I would be the first to support you should you come up with that. But we have got to find the answer. We cannot leave to our children and future generations a drug-addicted nation. We cannot let the industrial giant that we are, with the jobs and the tremendous record of 200 years that we have disintegrate into drug abuse. That is exactly the direction that I am very fearful that we are headed.

I think this is a disastrous course that we are on and we must find a way out.

Mr. ACKERMAN. I thank you for the kind words. I do agree with you that drugs are a serious problem and I would like to associate myself with the remarks that you made about it being a tremendous problem that we have within our country.

But I think, for the purposes of the subcommittee, I would be much happier in being able to understand the legislation, if you could cite for me a single instance in which a Federal employee sold national secrets because of the use of drugs.

It seems to me that we are creating a hysteria based on several facts that we know, namely, that people do take drugs, that some people are spies. And you say that we haven't cracked many of the cases. We have cracked 100 percent of them that we see in the press, at least—perhaps we have cracked all of them, I don't know.

The question is, to draw an analogy and to jump to a conclusion because there is a problem, or two problems, and to say that the two problems are related and, therefore, Federal employees are selling secrets to enemies of our country because they are taking drugs—I am looking for the evidence. I would like to be enlightened on that.

Mr. SHAW. Mr. Chairman, perhaps for one moment you would like to travel down this road with me. You have a $30,000—let's take a $70,000 a year Congressman, who has a $50 or a $70,000 a year habit. Where is he going to get his money? Don't you think somebody who is in that situation is going to be more vulnerable than somebody who is not, to compromising his national security?

We know that they will knock over 7-Elevens. We know that household burglary is up a tremendous percentage because of those who will go out and steal to feed their habit. So somebody who will go into a house and burglarize the house for purpose of getting money to feed a drug habit, why wouldn't that same person steal secrets from the Federal Government and sell them in order to feed his drug habit?

Mr. ACKERMAN. I think it would probably be a lot cheaper to give those $70,000 Congressmen a $200,000 a year raise, then, than to go through this whole charade of testing the entire country for drugs.

Mr. SHAW. Obviously, you are not opposed this year, Mr. Chairman. [Laughter.]

Mr. BURTON. Mr. Chairman, if I might make a comment?

Mr. ACKERMAN. Congressman Burton?

Mr. BURTON. For the past 10 years we have seen on television, the movies, and on news reports, all kinds of examples of people who have been addicted to drugs. They have sold their bodies, they have sold their souls, they have sold anything to fulfill their habit.

Now, I think it is ludicrous to believe a person who is on the Hill or in a Federal agency, who is exposed to sensitive information and has that kind of a habit wouldn't do almost anything like anybody else to fulfill that habit. This would include selling sensitive information to the enemy if that is what it took to take care of that habit.

Now, granted, there may not be an example we can cite right now where it has happened. That doesn't mean it hasn't happened or might not happen in the future. So I think we do have a drug problem—everybody knows it. If sensitive information is involved, I think it is responsible for this Government to try to find out who has a drug habit and who might be subject to the kind of pressures we are talking about.

Mr. ACKERMAN. It seems to me a lot of time, energy, and national resources are going to be spent on an awful lot of speculation if nobody can cite one instance that one Federal employee sold national secrets. This seems to be creating a great tempest in a teapot, taking advantage of a growing whirlpool of hysteria about drugs, and drugs are a serious problem. But to create an entire pro-

gram over Federal employees selling secrets to the enemies of our Nation—show me, and I am with you, I will cosponsor your bill—one instance. I have yet to see it.

Mr. SHAW. Mr. Chairman, I think I may have a memo on its way to your office.

Mr. ACKERMAN. Thank you very much. We appreciate your being here.

Mr. SHAW. Thank you, Mr. Chairman.

Mr. ACKERMAN. We will call as our next witness Ms. Leslie Price, who is a former employee of the Georgia Power Co. Did you have somebody that you would like to sit with you? You may if you so choose.

Ms. PRICE. Thank you.

Mr. ACKERMAN. Ms. Price is accompanied, if I am correct, by Gene Guerrero of the Atlanta office of the ACLU.

Mr. GUERRERO. That's right.

Mr. ACKERMAN. Welcome to both of you to our subcommittee. Please relax and make yourself at home. You may begin your testimony when you are ready.

**STATEMENT OF LESLIE PRICE, FORMER EMPLOYEE OF GEORGIA POWER CO., ACCOMPANIED BY GENE GUERRERO, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA**

Ms. PRICE. Thank you. I appreciate your invitation to speak today.

A lot of what I have heard today around the drug testing has nothing to do with the real world and that's why I am here. I am going to let you know what it is really like out there.

Myself and four other people who were inspectors in quality control personnel on a nuclear powerplant, we all found that there were problems with the safety on the nuclear powerplant. We all, in different ways, took our concerns either to the Nuclear Regulatory Commission, to the onsite quality control people, to our supervisors, and we got no results.

Myself and my friend Susan Register took the information that we had found on some falsified documents to the Nuclear Regulatory Commission and were granted confidentiality but within a week our employer found out what we had done. And the drug policy that they had come up with sounded very reasonable. If you were called in on the hotline, which was a 1-800 number, and reported for using drugs on the job or off the job, you were to be observed by your supervisor for 2 weeks. At the end of that time, your supervisor had to have another supervisor agree with him something was wrong with your behavior before you would be tested.

After the company found out that we had turned them in, in my case, at 6:30 in the morning I was told that a call had just come in and that a quarter of seven I would go for a test, there would be no observance period.

I was taken to a hospital. I was taken into a small bathroom with a nurse. And after I had pulled down my pants, of course she had to look between my legs to make sure there was nothing there

to contaminate the test. The sample was just set on a cabinet in the emergency room and I have no idea what happened to it after that.

Eight days later I was told by the company that I had turned in, my test results were positive, but I could not see a copy of the test. I could not have a copy of the results.

I was fired for misconduct. They refused to put on my paper work that I had failed a drug test, I think because they didn't want to get in trouble with the NRC, although the inspectors that I worked with knew that the NRC stood for "nobody really cares" because we had tried to get them involved.

My best friend was taken to a small doctor's office. She couldn't give enough of a sample when she first tried so they told her to sit in the waiting room and drink liquids, while a safety person and a nurse stood there in the waiting room and talked about catheterizing her. And when she raised an objection, they didn't even acknowledge her. It's like she had no rights. If they wanted to do that to her, they would do it.

The first day she couldn't give enough. She was told she would have to come back the next day, which she did. The next day she was told to stand in the middle of a room with her pants down around her ankles, bend over at the waist with her legs bowed and her right arm extended in the air and tried to pee in a cup, while the nurse went around behind her and came very close to touching her.

This has very much affected my friend. She will never be the same. She can't go into a doctor's office now. And you wouldn't dare hand her a plastic bottle.

We tried to do what they asked, and they violated everything that they had said they would do.

Two other people involved refused to take the test. They were fired for trying to evade drug testing. At the same time, other people who were going in for tests were buying samples from the safety people who were escorting them, for $100 a shot, for a guaranteed, safe specimen.

Mr. ACKERMAN. These were the people who were assigned to watch you and make sure that the samples were not contaminated?

Ms. PRICE. Yes, for $100 they would guarantee you a good test.

Mr. ACKERMAN. They were selling you safe urine?

Ms. PRICE. Yes.

Several people who were fired for that were the safety people who accompanied people like myself and my friend to the doctor's office.

My friend couldn't give enough the first day. The second day they wanted her to stand on her head. She got to the point where she got hysterical and she got sick to her stomach. The nurse screamed at her she had not followed procedures, she was going to have to do it again. My friend said no, she was never going to do that again.

Mr. ACKERMAN. What happened to her?

Ms. PRICE. She was fired for insubordination for refusing to take the test the third day in a row.

This is what happens. It is not nice and it is not clinical. I got a call from a man who told me he was taken into his boss' office, and

seven strangers stood there, and they told him he was going to fill up a plastic cup in front of those seven people. He asked to be taken to a doctor's office, an emergency room, or a lab. They said no, because after you do this in front of these people, we are going to take your specimen and we are going to put it in that box over there and we are going to fly it out of State for analysis. He couldn't do it. It is very hard to urinate in front of strangers.

And this stuff about you can't go in there by yourself. You can do anything you want to that test. You could buy a High Times magazine today that will guarantee you a negative test. It's got something to do with either salt or Drano or vinegar. And for the price of that magazine they will tell you how to foil this test that you are going to force on people.

The test doesn't work. It is unreliable. It is used against people like me and my four friends who were concerned about safety violations on a nuclear powerplant. I feel a great responsibility because I am talking for a lot of people.

This is unfair. It is not right. You know it is not reliable. It is an invasion of privacy. And it is not as clinical as you put on here. It is not a nice procedure.

Mr. ACKERMAN. Ms. Price, we realize how difficult appearing here is for you. I want to commend you on your courage to say things that perhaps some people might think are a little indelicate, but, nonetheless, certainly have to be said if we are to avoid some of the things that happened to you and your friends will happen never again.

Could you tell us, just as background information, what was it you discovered at the plant?

Ms. PRICE. Back in the beginning of construction, they have soil compaction tests that had not been handled properly. They were done by unqualified people.

Mr. ACKERMAN. Could you just tell us what your job was at the plant?

Ms. PRICE. I was a quality control inspector. I worked with inspecting welding and rebarb basically.

Mr. ACKERMAN. Yes, please tell us.

Ms. PRICE. The end result of what they done wrong, was that the buildings were sinking at Plant Vogtle. They have already sank more than they are supposed to in 40 years, loaded with equipment, and under vibration. They are not loaded and they are not under vibration, but they have already gone past what they are projected to.

The plant was unsafe. We really had no choice but to tell.

Mr. ACKERMAN. Could you tell us why the company did not report that your test was positive and why they fired you?

Ms. PRICE. As far as I believe, they didn't fire me for a positive test result because if they had, the Nuclear Regulatory Commission might have made them go back and go over 3 years' worth of my work. This company doesn't go over anything they are not forced to go over.

Mr. ACKERMAN. The company that tested your urine sample, could you tell us what their relationship was, how they were found, or how they were chosen?

Ms. PRICE. This lab was set up by my company. It was certified by my company's electrical workers. They controlled the lab. They controlled the hospital. They controlled everything. In fact, they controlled the test results.

If I had honestly had a positive test, they would have at least showed it to me. I wasn't even given that. And for that I was ruined. Professionally, I was dead.

Mr. ACKERMAN. Congressman Burton?

Mr. BURTON. Thank you, Mr. Chairman.

Were you a member of a union down there?

Ms. PRICE. No.

Mr. BURTON. They don't have a union?

Ms. PRICE. They have unions but the unions were going along with the company. The company told them that if they didn't agree to the drug testing they would throw them off the site.

Mr. BURTON. They would throw the union off the site?

Ms. PRICE. That's right. It is a right-to-work State.

Mr. BURTON. I see.

Did they offer you a secondary test?

Ms. PRICE. No. I asked them for it and they laughed at me. I thought that was part of my rights—it was per their policy. And I said, OK, this one came up positive, I want another test result. I want to see. I told them, I said, when I take a second test, I will take part of the sample and I will take it to another lab. And, of course, they would not allow me to do that.

Mr. BURTON. I just want to make one comment. It sounds like to me—if all the facts are as you say they are—you were certainly treated unfairly. And that certainly isn't the approach we would like to take in trying to deal with this drug problem at the Federal level.

I hope this serves as an example of how you don't do it. People do have rights, and you are a perfect example of a violation of those rights.

I have no other questions, Mr. Chairman.

Ms. PRICE. My problem was we don't have any rights. I can't sue the company for that test and I can't sue them for firing me. There are no laws concerning the urinalysis test. I have no rights, and neither does anyone else.

Mr. BURTON. Let me ask your counsel there: Doesn't she have the right to go to court and to allege she was improperly fired?

Mr. GUERRERO. No, sir. Georgia is an employment at will State, and you really have no right.

Mr. BURTON. What is that again?

Mr. GUERRERO. An employment at will State.

Mr. BURTON. Employment at will. You mean a right-to-work State?

Mr. GUERRERO. Yes, sir. And the courts in Georgia, for example, recently upheld a company's right to fire somebody because they filed a workmen's compensation claim. So the courts allow no protection in Georgia, and many other States, I might add.

Ms. Price's complaint is not the only complaint we have received about these urinalysis being used to harass workers. We have had a number of persons—at this plant—who were fired because they were making safety complaints. In other companies, we have had

persons trying to get a union in who were fired through the urine test.

We have had complaints where the corporate policy is only for using urine tests if there is an actual problem—a reason to test somebody. But when it comes down to the actual implementation of that policy on the job site, they are used in a random way and people are fired at the first sign of a false positive.

We have had a number of people—both in Georgia Power plants and other companies—who, as soon as they get a positive test back, say, wait a minute, I don't do drugs, go as quick as they can, get a second and even a third test done, and the company still will not take them back—both Georgia Power and other companies.

Mr. BURTON. Let me, if I may follow up with a question.

The allegation you made is you cited an impropriety or a problem with the plant, and because of that, as a reprisal, you were given this drug test and it cost you your job. So that was the way they used to get rid of you for blowing the whistle on a problem at the plant.

Ms. PRICE. Yes. I had been called in——

Mr. BURTON. I think, Mr. Chairman, the Nuclear Regulatory Agency ought to investigate this.

Ms. PRICE. We have been trying to get them to look into this for a long time. This is not something new.

In answer to your question about them using it against me, during the summer of 1984, I was brought into the project manager's office and I was told that someone had called me in on the hotline and reported me for smoking marijuana on the job. They handed me a letter saying that I had been followed for 2 weeks and that I had done nothing on that job but my work. But the minute I turned my company in, within a week I was asked to be tested, because of an anonymous tip.

Mr. GUERRERO. The company claims that their drug testing program has made a big safety improvement in the construction of the plant. They fired dozens and dozens of people, not only whistleblowers, but other people, through these urine tests at Plant Vogtle. They say this is a nuclear job site; it is a dangerous construction site, and you have got to have it, and we are going to have drug testing.

I have an assessment here which I——

Mr. ACKERMAN. Is that because of public safety?

Mr. GUERRERO. For public safety and safety of the workers on the job.

I might add that the workers, Ms. Price and others, who came to us, want a drug-free work environment. They don't want a dangerous work site. Construction is a dangerous industry. They have no problem with action being taken if somebody is under the influence of anything on the job. That's what they told us. What they objected to was the random testing and the use of this hotline.

This recent assessment that was done of the Plant Vogtle on the drug program I would like to leave with you.

Mr. ACKERMAN. Without objection.

[The report was retained in subcommittee files.]

Mr. GUERRERO. They say in the report that they had a real problem with accidents on the construction site back in 1981. The na-

tional average at that time was 3.8 accidents per every 200,000 man-hours on a construction site. That is for all construction sites in the country. In 1981, they had 5.41. So they started a safety program and they say it is more than coincidence that these rates begin to come down when the company emphasized alcohol and drug prevention and expanded education, prevention, and testing efforts. And they list the rates for all the years.

In 1982, it went down to 2.09. In 1983, down to nine-tenths. In 1984, to 0.61, and 1985, to 0.49.

Mr. ACKERMAN. Those are accidents per thousand?

Mr. GUERRERO. Yes, accidents per 200,000 man-hours.

The drug testing program went in in May 1984. It started being used in large numbers in the fall of 1984. The accident rate fell one-tenth from 1984 to 1985. The way they actually improved safety at the plant was to do what any good company should do, and that is form joint union-management safety teams on the job and emphasize a safe work environment, in 1981 and 1982, some 3 and 4 years before they started drug testing. Drug testing had nothing to do with improving safety at that plant.

In fact, the same report says that, and I quote: "Historical and statistical data reviewed did not establish evidence of a drug problem."

So they have been treating their people like this. And the ratepayers in Georgia—every time they pay a light bill are paying for this—when in fact there was no drug problem at all at that construction site.

Mr. ACKERMAN. Do you have any indication or knowledge of what percentage of the drug tests administered were indicated or charged to be employee harassment for other reasons, not necessarily testing them because of a drug problem?

Ms. PRICE. From the amount of phone calls I have received, it is quite a few.

Mr. ACKERMAN. Quite a few?

Ms. PRICE. Quite a few. I don't have any numbers.

Mr. ACKERMAN. Quite a few, or quite few?

Ms. PRICE. Quite a few.

Mr. ACKERMAN. Quite a few.

Counsel, let me ask you one other question.

Are there complaints that you know of outside of this incidence in this plant in Georgia? Have you had any other experience on abuses of the drug testing program?

Mr. GUERRERO. We get complaints every week, several complaints each week from workers in Georgia who have been fired. The Southeast, I think, was hit early on with these drug testing programs. We have received a large number of complaints, and I get them from all walks of life.

I had a call this spring from a man who was doing work similar to what Leslie does, travels around and sort of troubleshoots, inspecting the problems on construction sites. He failed his drug test. He had passed them before in other places. He was fired. He is in very specialized work. He told me he was a born again Christian—doesn't use anything, no alcohol, no tobacco, nothing.

He went right out and got his own test done. It came back negative. They still wouldn't put him back on. The only thing he could

figure was that maybe—he uses Herbal Life products—and maybe something in that made a false positive.

The very next day, I read of testimony from a psychopharmacologist at UCLA who said that certain forms of herbal tea can cause false positives in these tests. I had to tell that guy, there's nothing you can do, it's tough. It is a private company and in Georgia and many other States, there is absolutely no restriction on them firing you through the use and abuse of these tests.

Mr. BURTON. May I ask a question?

Mr. ACKERMAN. Sure.

Mr. BURTON. Mr. Chairman, this is very interesting testimony. Was it Georgia Power & Light?

Mr. GUERRERO. Georgia Power, that's right.

Mr. BURTON. Could we ask Georgia Power to have somebody at a subsequent hearing come up and answer these allegations. I would like to hear what they have to say, how they respond to this.

Mr. ACKERMAN. That is an excellent suggestion, Congressman Burton. I think that we should make that the focus of an additional hearing. Perhaps that plant and other plants that we might learn of.

As I have learned, you are absolutely right about—I didn't want to pull out my whole bag of tricks—but herbal teas that I bought in the grocery store also can test you positive for the use of drugs. And people, not knowing how they can take a test or even suspecting that the results were skewed because of harassment reasons, could indeed test positive in fact because of the use of herbal tea or because they had a headache, or any number of other things. Nuprin and Advil will test you positive for marijuana.

So if you have a headache in the morning and you go down to the grocery—you don't even have to go to the drugstore—you go down to the grocery store and you get one of these headache compounds and you have some tea—the last one, I promise—or if you have a bagel, a roll with a hole in it, because you don't know what bagels are, that has poppy seeds—just for having a headache and having breakfast, you are going to test positive for heroin, cocaine, and marijuana.

Now, you try to fight that.

Mr. GUERRERO. I can't tell you how awful it is for these people. As I say, a lot of people have gone out and gotten their own tests done, come back negative, and the company still won't put them on.

The lab Georgia Power uses to do these tests, tests 12,000 samples every day—12,000 samples every day is the lab that does the tests for Georgia Power.

Mr. ACKERMAN. Any other questions?

Mr. BURTON. No, thank you, Mr. Chairman.

Mr. ACKERMAN. I thank both of you very much. We thank you especially, Leslie, for your courage in testifying in public. Good luck.

Ms. PRICE. Thank you.

Mr. ACKERMAN. Our next witness is Dr. Lawrence Miike, Senior Associate, Office of Technology Assessment's Health Program. Dr. Miike, please join us. Do you care to introduce your associate?

STATEMENT OF LAWRENCE MIIKE, SENIOR ASSOCIATE, HEALTH PROGRAM, OFFICE OF TECHNOLOGY ASSESSMENT, ACCOMPANIED BY DR. MARIA HEWITT, ANALYST, OTA

Dr. MIIKE. Thank you, Mr. Chairman. With me today from OTA is Dr. Maria Hewitt.

I would like to submit my prepared statement for the record and summarize my main points.

Mr. ACKERMAN. The committee would greatly appreciate that.

[The statement of Dr. Miike follows:]

TESTIMONY OF LAWRENCE MIIKE
OFFICE OF TECHNOLOGY ASSESSMENT
U.S. CONGRESS
BEFORE THE SUBCOMMITTEE ON HUMAN RESOURCES
OF THE HOUSE POST OFFICE AND CIVIL SERVICE COMMITTEE

Accuracy and Reliability of Urine Drug Tests

September 16, 1986

Thank you Mr. Chairman. I am Dr. Lawrence Miike, Senior Associate in the Health Program of the Office of Technology Assessment, and with me today from OTA is Maria Hewitt.

Last month, we were requested by your Subcommittee to evaluate the accuracy and reliability of urine drug tests because testing programs have been instituted by a number of Federal agencies and proposals have been made to expand testing to more or even all Federal agencies. We are therefore planning to hold a workshop on urine drug testing later this year, followed by a Technical Memorandum on the subject that will be delivered to your full Committee and to this Subcommittee. Today, I would like to address the accuracy and reliability of urine drug tests and to identify some of the related issues that will be explored further in our workshop and Technical Memorandum.

The Technologies

A distinction must be made between the accuracy and reliability of the testing techniques themselves and of the results of these tests in everyday use. This is the difference between "efficacy" and "effectiveness," or the probability of obtaining the degree of accuracy and reliability of which the tests are capable under ideal versus average or actual conditions of use. From this standpoint, the urine drug screening tests, coupled with

confirmatory testing, are highly efficacious; but there are legitimate concerns over their effectiveness, especially in mass testing programs.

The tests commonly used in urine drug screening programs are two types of immunoassays and thin layer chromatography (TLC). Immunoassays are based on antigen-antibody reactions, with the drug as the antigen. Thin layer chromatography (TLC) is in essence a way of separating substances by taking advantage of the relative rates in which different substances migrate through a solvent.

The antibodies that are used in the immunoassays are directed at specific drugs and are produced by injecting animals with the drug or the major metabolite of the drug if the drug itself is broken down (metabolized) before it is excreted in the urine. In addition to these antibodies, the test kits contain solutions of known quantities of the drug. In the EMIT, or enzyme multiplied immunoassay, the drug or its metabolite is linked to an enzyme. In the RIA or radioimmunoassay test, the drug or its metabolite is linked to radioactive iodine. The antibody solution is first mixed with the urine sample, then with the solution containing labeled drug. These tests are based on the drug in the urine competing with the enzyme-linked or radioactively labeled drug for the antibodies. Competition for the antibodies between the drug in the urine and the labeled drug is measurable and represents the amount of drug that is present in the urine sample. In the EMIT test, this is measured by the amount of turbidity (cloudiness) of the solution, which is caused by reaction of the enzyme with other substances in the testing solution. In the RIA test, the antigen-antibody complex is precipitated out of the solution, and the proportion of antibody bound to labeled versus unlabeled antigen (drug) is measured.

In the TLC test, substances are placed on special frosted glass slides or filter papers, which are then dipped in solutions in which the substances will dissolve (drugs in urine have to be extracted and concentrated first, and some may have to be modified to make them soluble). The solvent then moves through the substances and carries them up the slide/paper. Substances can be identified by the distance of migration in a given time interval and by their characteristic colors when sprayed with other substances and/or viewed under special lights.

Both immunoassays and TLC can be used to screen for multiple drugs. In the immunoassays, each screening test is for a specific drug, but automated testing systems enable a laboratory to quickly test for a number of drugs. With TLC, the presence of several drugs can be detected with each test, but the method is not automated as are the immunoassays, and results must be read by a technician.

The manufacturers' claims on the capabilities of the EMIT, RIA, and TLC testing methods are summarized in Table 1. These tests can detect extremely small amounts of drugs -- in billionths (nanograms) and even in trillionths (picograms) of a gram (there are 454 grams in one pound). As the lower limits of their detection capabilities are reached, however, questions can arise as to whether a drug is present or not. For example, Roche Diagnostic Systems [redacted] claims that its amphetamine RIA [redacted] test can detect the presence of amphetamines in as low a concentration as 5 nanograms/ml, but it provides a reference standard of 1000 [redacted] nanograms/ml as the cutoff point between a positive and a negative test.

How accurate are these tests? Here, we have to make a distinction between "sensitivity" and "specificity". Sensitivity refers to the degree to which a drug that is actually present in the specimen can be detected. Specificity refers to the degree to which a specific drug can be distinguished

from other substances in the specimen. Sensitivity is related to "false negatives", while specificity is related to "false positives".

A test that is 95 percent sensitive means, for example, that when 100 samples known to contain the drug are tested, 95 will test positive and 5 will test negative. This means that 5 percent of the samples will be false negatives. These false negatives often occur at drug levels at the lower limit of the test's detection capabilities.

On the other hand, a test that is 95 percent specific means, for example, that when 100 samples known not to contain the drug are tested, 95 will test negative and 5 will test positive. False positives therefore occur when the test says that the drug is present when in fact it is not present. False positives can occur from the idiosyncrasies associated with a particular test or, in the case of the immunoassays, from the presence of other drugs that may cross-react with the antibodies used in the test.

A manufacturer's recommended "cutoff level" between a positive and negative reading is based on the potential inconsistencies from test to test of measuring drug concentrations below that level, even though the test may generally measure lower concentrations of the drug. Many of the drugs that might cross-react with a particular test will give false positive readings below the cutoff point and so would not be read as positive if the laboratory uses the recommended cutoff point to distinguish between positive and negative results (see Table 1).

Sensitivity and specificity and their relationship to false positives and false negatives are summarized in Table 2. The essential point to remember is not to confuse false negatives with false positives when the general term "accuracy" is used, such as when a test is ascribed to have a "95 percent accuracy rate". The mistake is commonly made that this means 95 out

of 100 persons will be correctly identified as having the drug in their urines and that 5 out of 100 persons with drug-free urine will be falsely identified as having the drug in their urines. A "95 percent sensitivity rate" means that 5 percent of positive urines may not be detected (i.e., false negatives), and not that 5 percent of persons without the drug in his/her urine will erroneously test positive. False positives can occur from cross-reaction of the antibodies used in these tests with substances such as prescription drugs that are related antigenically with the drugs being tested, or from other substances in urine that might cause a positive reaction. For example, the enzymes used in the first generation of EMIT tests were replaced by others when it became apparent that some urines also contained these enzymes. False positives may also occur for unknown reasons.

How good must the evidence be that a drug identified through immunoassays or TLC is in fact the drug it is presumed to be? Here, the reason for which the testing is being conducted is crucial. For example, suppose a person is brought into a hospital emergency room and is suspected of suffering from a drug overdose. A TLC test might be performed to quickly screen for a number of drugs. If the TLC indicates that the substance is PCP, an EMIT or RIA for PCP could be performed next, and if that test is positive, the physician could proceed under the assumption that it is indeed a PCP overdose. Alternatively, EMIT or RIA testing could be done first, but these methods test for one drug at a time. This in itself is not a major problem, because these methods are automated, and tests for several drugs could be performed in a short amount of time. Confirmation could then be done with TLC. However, in the typical drug overdose case brought into an emergency room, the chances are better that the drug is a prescription drug, not one of the illegal drugs, so it is probably better to screen first with TLC and

confirm with EMIT or RIA, since TLC can screen simultaneously for a large number of drugs. (In reality, blood samples instead of urine samples would usually be taken in suspected overdoses, but testing methods are essentially the same.)

In contrast to the treatment of drug overdoses, TLC and even the two immunoassays are widely viewed as being insufficient as conclusive evidence of use in urinary drug detection programs. In the emergency room situation, a single patient is involved, and the probability that the drug has been identified correctly with 95 percent or more accuracy is good enough to assume that the correct drug has been identified. However, the mass screening situation is fundamentally different. For any one person, a positive screening test has the same degree of accuracy as in the emergency room situation, but when many, many people are tested, there have to be some persons who will be falsely identified as having drugs in their urine.

Confirmatory testing in essence takes the principles underlying the TLC test several steps further. In thin layer chromatography, substances are essentially separated by the different rates in which they are transported in a solvent. After a predetermined period of time, the process is stopped and the slide/paper is prepared for examination. The presence of drugs is determined by where a substance is found compared to the position of known drugs that have been run through the process at the same time (plus color changes that are characteristic with some drugs). Other, more sophisticated chromatographic methods use gas or liquid as the transporting medium and simply increase the distance to be travelled so that there is much better separation. In gas chromatography, for example, the suspected drug is converted into its gaseous form and pushed through a long glass column with helium gas. The time it takes to traverse the entire column and exit out the

far end is very specific (to one-hundredths of a second) for each drug. Furthermore, as the drug exits, it is bombarded by electrons that break up the drug, and these pieces are then analyzed by a mass spectrometer. Under proper conditions, a drug will always break up into the same parts, and the mass spectrometer will provide a readout of the various pieces by their weights and relative amounts. Thus, a gas chromatography/mass spectrometry (g.c./m.s.) machine: 1) identifies the precise time when a particular drug is expected to exit from the column, and 2) provides a characteristic "fingerprint" of a particular drug by the different masses of its component parts. The information-processing capabilities of a g.c./m.s. machine can be calibrated to display all of the component parts of a drug or concentrated on one or more components to provide more detailed information on those particular components. For example, in drug testing, the machine is usually calibrated to look for a particular drug and to concentrate on those components of the drug that are present in greatest concentrations.

A gas or liquid chromatograph can also be linked to two other methods of precisely identifying a drug (or any other substance, including metals). Light (e.g., in the infra-red spectrum) will be absorbed in characteristic patterns by the molecular groups comprising a particular drug, and each drug will also have a characteristic nuclear magnetic resonance (NMR, using the same principles underlying the medical uses of magnetic resonance imaging, or MRI). For example, all three methods, mass spectrometry, light absorption, and NMR, coupled with gas or liquid chromatography, are used by FDA to identify trace amounts of contaminants and residues in drugs, cosmetics, and color additives.

A gas or liquid chromatograph (usually with light as the detector at the end) could be used to screen for drugs by calibrating it so that it scans for all substances that come out of the chromatograph column (for example, see table 5). In practice, most tentative identifications are performed by immunoassays or TLC, and a g.c./m.s. machine is calibrated to look specifically for the suspected drug. This increases the sensitivity of the machine in detecting the specific drug but also means that the g.c./m.s. machine, when used for confirmatory testing, will not identify other drugs that might be present. Thus, separate g.c./m.s. tests must be performed for each drug whose presence has been indicated by the screening tests.

Earlier, I made the distinction between "efficacy" and "effectiveness," or the difference between conducting these screening and confirmatory tests under ideal versus average conditions of use. Let me now turn to some of the issues related to the use of these technologies under average conditions.

In order to obtain FDA approval to market a new test, a manufacturer provides evidence of its efficacy and safety. This testing is done very carefully and under proper conditions of use. Once the tests are marketed, however, the conditions of use can and will vary tremendously. This is particularly true for laboratory testing, and even more so for non-clinical testing such as drug screening.

The principal safeguards against incorrect laboratory testing are: 1) State licensing of clinical labs, 2) certification programs for labs and their personnel that are conducted by professional associations, and 3) proficiency testing. Certification programs may include specifying the minimal educational requirements for personnel working in labs and the protocols to be followed in testing. Proficiency testing consists of submitting samples of known content to labs to see how well they perform. Samples may be provided

so that the lab knows it is being tested, or mixed in with the usual specimens submitted to the lab so that the lab does not know when it is being tested. In general, labs perform better when they know they are being tested, which reinforces the assumption that more errors occur under average versus ideal conditions of use.

The extent and quality of laboratory regulation varies tremendously from State to State, and additionally, drug testing is not subject to as much regulation as clinical testing. It is quite easy to establish a drug testing laboratory with little or no monitoring by the State. The extent of regulation may also depend on the type of drug testing. For example, the RIA test, because it involves radioactive ingredients, is more regulated than is the EMIT test. Proficiency testing of labs that perform drug testing has found severe deficiencies in the past 10 years. Actually, most of the deficiencies have been in not being able to identify positive samples rather than in identifying negative samples as positive, although this is little comfort to persons concerned about the overall accuracy of testing. The error rates in these published reports may not be as severe now, but even modest error rates are of concern when these tests are being conducted on large numbers of people. The proficiency testing program established under the Clinical Laboratories Improvement Act of 1967 and conducted by the Centers for Disease Control will be discontinued after September 30, 1986. Furthermore, for a number of years CDC's principal involvement has been in clinical testing, not in proficiency testing of drug screening programs. Only a handful of States have such proficiency testing programs. Several professional associations offer proficiency testing, some manufacturers of the test kits offer a form of proficiency testing, some Federal agencies have their own proficiency testing programs, and an increasing number of private firms have gotten into the proficiency testing business.

Proficiency testing of clinical laboratories has been offered by five major programs; the American Association of Bioanalysts, (AAB), the College of American Pathologists (CAP), the American Society of Internal Medicine (ASIM), the American Association for Clinical Chemistry (AACC), and the Centers for Disease Control. However, proficiency testing of urinary drug screening is currently offered by only three professional associations, AAB, CAP, and AACC. The AAB's program is four years old, with approximately 300 participants, including clinical labs and testing programs in correctional institutions and probation offices that may not be conducted by trained laboratory personnel. The CAP program is two years old, also with approximately 300 participants, including many hospital clinical laboratories. The AACC program is two years old, with approximately 250 participants, largely labs in hospitals with over 200 beds. Table 3 summarizes the drugs that are included in the proficiency testing programs of AAB and CAP.

Recent results of AAB's proficiency testing program for urine drug testing are presented in Table 4, and those for CAP's program, in Table 5.

For a $145 yearly fee, the AAB sends two urine samples for each of the drugs identified in the table to ten reference labs and its approximately 300 participants four times a year. The ten reference labs have long-standing relationships with the Association and are used so that participants can compare their results not only against the overall performance of their fellow participants but also against what would be considered excellent labs. As mentioned above, the participants include clinical labs and testing programs in correctional institutions and probation offices that may not be conducted by trained laboratory personnel. Participants and the reference labs test these samples for the indicated drugs and report their results to the Association, who in turn informs them of their individual results, the

reference lab results, and the overall results of the participants. A variety of testing methods are used. Two of the reference labs use g.c./m.s., one uses TLC, and the rest use EMIT. Most of the participants use EMIT, and others use RIA, TLC, or g.c./m.s. Thus, the results summarized in Table 4 represent the gamut of testing methods and personnel and would be expected to show wide differences if disaggregated by the type of test used and the qualifications of the personnel performing the tests.

In Table 4, "Spike Level" refers to the amount of drug that is actually contained in the sample sent to the reference labs and participants. Percent "absent" refers to "true negatives," and percent "present" refers to true positives. Thus, "99% Absent" means that one percent of participants had "false positives" for that drug, and "93% Present" means that there were seven percent of participants who had "false negatives." False positives ranged from zero to four percent of participants. In many of the tests, one or two percent of participants had false positives, but none of the reference labs made a false positive error. False negatives ranged from one to 77 percent (cannabinoid testing in the first quarter of 1985) of participants, with most of the errors in the two to nine percent range. Even the reference labs made an occasional false negative error (see first quarter of 1985 and second quarter of 1986). False negatives by the reference labs occurred with drug levels at the lower limits of detection of the screening tests, and in each case, the participants' error rates were higher.

These results are based on urine samples that do not contain drugs that may cross react with the test reagents; e.g., there are no cold medicines in the samples that might give a "false positive" reading on the amphetamine test. Thus, the "false positive" rate of zero to four percent among AAB's participants represents intrinsic errors in the tests themselves and in

performing the tests. Since participants know they are being tested and which specific drug they are testing for, most of the errors are presumably due to the limitations of the tests themselves.

For a $224 fee, CAP also sends urine samples four times a year to its reference labs and participants. However, CAP sends three urine samples, each of which contains different combinations of drugs from its testing list (see Table 3 for the complete list), and participants reply with a list of drugs they believe are contained in each sample. Results are also reported according to the test method. Thus, CAP's participants must test the samples for many drugs, in contrast to AAB's participants, who test each sample for the presence or absence of a specific drug. Participants in both AAB's and CAP's programs, however, know they are being tested.

Selected results of the first quarter of 1985 in CAP's program are summarized in Table 5 (see notes accompanying the table for the full list of drugs that were tested in each of the three samples). Thin layer chromatography (TLC) was generally both less sensitive and less specific than the immunoassays (false positives were principally due to TLC -- see notes accompanying the table). Interestingly, participants did not do well with gas chromatography as the screening test for amphetamines. While radioimmunoassays were reported only for the cannabinoid test in the first quarter of 1985, it nevertheless was significantly less sensitive than either TLC or enzyme immunoassays at a 100 nanogm/ml concentration (64.3% vs. 83.3% and 85.0%, respectively). The RIA test is used in the military because of early problems with the EMIT test. In its analysis of these results, CAP noted that the previous year's sample contained cannabinoid at 200 nanogm/ml and that testing at the 100 nanogm/ml level decreased positive findings by almost 10 percent. CAP therefore suggested that the cutoff point should be

reconsidered "since some agencies such as the military use 100 nanogm/ml as the minimum as a basis for a presumptive positive."

In the military drug screening program, in which about 3 million persons are tested annually, the screening tests are said to be correct about 90 percent of the time. Since false negatives cannot be distinguished from true negatives without confirmatory testing of all negative urines, these results must reflect an initial false positive rate of about 10 percent. If we use the AAB's proficiency testing program's false positive rate of zero to four percent for comparison, more than half of the false positive results in the military's program could be due to cross reaction of the test reagents with prescription or over-the-counter drugs. Thus, a rough estimate of the causes of false positives on the screening tests would be that half, or approximately five percent of all urines that test positive, are due to limitations of the tests themselves, and half are due to the presence of substances that can cross react with the test reagents. The overall 10 percent false positive rate may include some portion of performance errors, but it could also be expected that performance errors would add to the 10 percent false positive rate. For example, counting false positives for both legal and illegal drugs, the CAP results from the first quarter of 1985 revealed 113 false positives among 317 participants for the first sample, and 58 false positives among 335 participants for the second sample (see table 5). Most of these false positive results, however, were due to TLC, not the immunoassays.

In sum, there are intrinsic limitations with the 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 g.c./m.s., the results are highly reliable and difficult to dispute. Errors in performing or interpreting the g.c./m.s. have occurred, but the principal area in which improvement is needed is in the performance of the initial screening tests, where the quality of the laboratories and the proficiency of laboratory personnel need to be constantly monitored.

Related Issues

Our preliminary assessment of drug testing technologies leads us to conclude that the following issues need further exploration. I will limit my comments to issues that arise directly from the technologies themselves.

The cutoff point between a positive and negative reading. Drug detection programs only distinguish between recent use and no use. People with very high levels of drugs in their urine will be treated the same as people who have levels of drugs in their urine that are barely detectable by the tests being used. The two immunoassays and the TLC test have different cutoff points, and this translates into situations where a person may test positive with one test, and negative with another. This is already a fact among the Federal agencies, as shown by the February 1986 survey of Federal agencies conducted by the Subcommittee on Civil Service. Furthermore, even at the cutoff points adopted for each type of test, there can be wide variations in results. The College of American Pathologists proficiency testing of cannabinoids, for example, showed positive identification with the RIA test of only 64 percent at the cutoff level currently used by the military.

Second, the g.c./m.s. confirmatory test is much more sensitive than any of the screening tests. Suppose the g.c./m.s. test confirms the presence of the suspected drug, but the quantity is below the cutoff point for the screening test? (This situation is not improbable, as screening tests can be

reported as positive even though the actual level of drug is below the cutoff point. See note accompanying table 5 for examples.) Should that be reported as a positive result? It is in fact positive, but other persons with equal amounts of the drug may not have been identified in the screening test (they would be "false negatives" and not subject to confirmatory testing). So again, persons in the identical situation would be treated differently.

Third, the sensitivity of screening tests is bound to improve, and the cutoff point will subsequently be lowered. I am reminded by the situation of the Delaney Clause in the U.S. Food, Drug, and Cosmetics Act, in which no amount of a carcinogen is allowed, and the regulatory dilemmas that arise as technology is able to detect smaller and smaller quantities. Again, should technology determine policy, with the cutoff point between positive and negative tests left up to the manufacturers and individual testing programs, or should policymakers be involved in determining how technology will be used?

The competing interests are simply stated. Placing the cutoff level between positive and negative results at the least amount of drug detectable will identify more recent drug users, but consistency in identification will suffer. Placing the cutoff level at a higher level will identify relatively fewer drug users, but testing consistency can be greatly improved.

Drugs that should be included in screening programs. The survey of Federal agencies also showed wide variations in the types of drugs that are being screened. The first question is whether prescription drugs should be included in screening programs. This is not an easy question to answer, as analgesics, sedatives, tranquilizers, and stimulants are among the abused drugs. On the other hand, their presence in urine is not ipso facto proof of abuse, and the potential of mislabeling persons is higher than with illicit drug use. Furthermore, there are still some social stigma associated with some diseases

such as epilepsy, and drug use by these persons could be revealed without their consent.

Second, should all illicit drugs be included, should users of different types of illicit drugs be treated differently, or should only those drugs that are expected to have higher percentages of positive testing be included? Table 6 summarizes recent drug use by teenagers, young adults, and older adults. Marijuana represents the overwhelming majority of drug use, with the rest of the illicit and legal drugs that are abused with much smaller percentages of use (note also the high relative rates of alcohol and tobacco use). Except for cigarettes and alcohol, drug use falls precipitously after age 25. The National Institute on Drug Abuse estimates that 80 - 85 percent of positive tests will be for marijuana, 5 - 10 percent for cocaine, and the rest due to other drugs.

In contrast, the February 1986 survey by the Subcommittee on the Civil Service revealed wide variations in the types of drugs that are screened. For example, the Army intended to test only for marijuana and cocaine; the Air Force, for marijuana, cocaine, PCP, opiates, amphetamines, and barbiturates; the Navy, for marijuana, cocaine, opiates, barbiturates, amphetamines, PCP, and LSD; the Department of Transportation's Federal Aviation Administration, for marijuana, cocaine, heroin, amphetamines, and PCP (but not barbiturates); the Department of the Treasury's Secret Service, for amphetamines, barbiturates, cocaine, various pain killers, opiates, quinine (probably because it is used to "cut" heroin), PCP, Quaalude (methaqualone), and tranquilizers (but not marijuana), while Treasury's Customs Service plans to test for amphetamines, marijuana, cocaine, opiates, and PCP (but not barbiturates).



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A total accounting of all Federal agencies that responded to the February 1986 survey would show much greater variations among the agencies. My guess is that some of these variations are based on the following reasons. The Air Force's and Customs Service's screening programs seem to be based on the six tests that are most readily available from manufacturers; while the Navy's program seems to be similarly based, with LSD to be added since that screening test has recently become available. The FAA's exclusion of barbiturates may be based on relatively common use of legal versions of these sedatives. The Army seems to have concentrated on the two most common drugs, marijuana and cocaine, that are expected to show up on drug screening. On the other hand, the Secret Service appears to be concentrating on the "harder" drugs in its exclusion of marijuana but its inclusion of more drugs to be tested (i.e., tranquilizers, Quaaludes, and quinine).

Costs of screening programs. The actual monetary costs of these programs has been an issue, with estimates ranging from average direct test costs of less than $15 dollars to over $100 dollars for each person screened. The Navy reportedly tests 1.8 million urine specimens with an RIA screening test and confirmation of positives with g.c./m.s. for $25 million per year, or approximately $13 dollars per specimen. However, the Navy has established its own Drug Screening Laboratories, which perform all testing. Among respondents to the February 1986 survey by the Subcommittee on the Civil Service who contracted for their testing, screening test costs ranged from $11 to $15 dollars, depending on the type of test and number of drugs tested. Confirmatory testing for one drug with g.c./m.s. cost an additional $20 to $65, depending on the specific drug being tested. The Congressional Budget Office, in its estimate of the costs associated with H.R. 4636, a bill that would require testing of persons in Federal agencies and in Congress who have

access to classified information, used a figure of $15 for initial screening of eight drugs and $30 for confirmatory testing. These costs were based on estimates provided to CBO by two drug test manufacturers, who based their estimate on the reduced costs of the tests that might accompany high volume use. (Currently, the EMIT kit manufacturer charges slightly more than $1 per individual drug test for prepackaged orders of 2,500 tests, with higher prices for smaller prepackaged orders.)

Total costs of these testing programs include more than the direct costs of the tests themselves. There are costs associated with collecting and shipping specimens, and with recordkeeping. Furthermore, because testing results are subject to legal challenge, the practice has been to treat urine specimens as though they were legal evidence, with chain-of-custody procedures routinely followed. These procedures could be adding significantly to the costs otherwise associated with medically-related diagnostic testing.

Because actions taken when a person is confirmed as a recent drug user include counselling and rehabilitation, these costs must be considered in addition to the costs associated with the testing program itself. There will also be litigation costs associated with the program.

Another cost issue is the number of persons who would be expected to test positive. This obviously depends on the characteristics of the work force. From table 6, it is clear that young adults have a higher rate of drug use, and according to the National Institute on Drug Abuse, in certain occupations 25 to 45 percent of job applicants (but not employees) have tested positive. On average, estimates are that screening of the workforce (to be distinguished from screening job applicants) would result in an initial positive rate of approximately 10 percent (this is not the percent who are impaired on the job, but the percent who had recently used drugs). Thus, the

direct costs of screening tests would have to be applied to the entire work force who would be tested, plus an additional 10 percent whose urine specimens would have to undergo confirmatory testing.

Tests that are positive on screening but negative on confirmatory testing. What is done with the results of tests that are positive on screening but negative on confirmatory testing? The consensus is being rapidly reached, if it has not already been reached, that confirmatory testing with g.c./m.s. must be performed before a worker is identified as a recent drug user. However, it is not unreasonable to expect that there will be a temptation to keep lists of initial but unconfirmed positives, perhaps as a list of "presumed users" to distinguish them from "confirmed users" and "confirmed nonusers." So safeguards must be developed to assure that only confirmed users are identified.

Experience of governmental and private sector testing programs.

A final issue we plan to explore at the workshop is the experience in both government and private industry with drug screening programs. Why were they instituted, who are tested, which drugs and why those, what are the results, have the programs met their objectives, what is done to persons found to use drugs, and what do rehabilitation and counselling programs consist of?

It is clear from this partial list of issues that analysis of drug screening programs warrant a series of wide-ranging questions. However, as we have been asked to focus on the accuracy and reliably of the tests themselves in a short period of time, I hope we can keep our workshop focused on the technology-related issues.

Mr. Chairman, this concludes my prepared testimony.

Table 1.-- Comparison of RIA, EMIT, and TLC

| TEST | Abuscreen | EMIT d.a.u. | TOXI-LAB |
|---|---|---|---|
| MANUFACTURER | Roche Diagnostics, Hoffman LaRoche | Syva | Analytical Systems, Marion Laboratories, Inc. |
| PRINCIPLE | Radioimmunoassay (RIA) | Enzyme immunoassay | Thin layer chromatography |
| DRUG/METABOLITE | Amphetamine/metabolites | Amphetamine, Methamphetamine | Amphetamine |
| LOWER LIMIT OF DETECTION | 5 ng/ml (high spec.) | | |
| CUT POINT | 1000 ng/ml | 300 ng/ml | 2000 ng/ml |
| CROSS REACTIVITY | result when 1000 ng/ml of drug present: | Conc. producing positive result | |
| | Phenylpropanolamine HCl= 0 (found in many OTC cold medications) | >1000 ng/ml* | 10000 ng/ml |
| | Methamphetamine HCl =45 (found in prescription diet medications) | <=1000 ng/ml | 4000 ng/ml |
| | Dopamine =12 (used in treatment of hemodynamic imbalances) | | |
| | Ephedrine (found in prescription asthma medications) | >1000 ng/ml* | |
| | Isoxsuprine (vasodilator) | >6000 ng/ml | |
| | Mephentermine (cardiovascular agent) | > 500 ng/ml | |
| | Nylidrin (vasodilator) | >2000 ng/ml | |
| | Phenmetrazine (found in prescription diet medications) | >1000 ng/ml | |
| | Phentermine (found in prescription diet medications) | > 500 ng/ml | |
| | | * Cross reactivity eliminated with EMIT Confirmation Kit | |
| DRUG/METABOLITE | Barbiturate/metabolites | Barbiturate/metabolites | Barbiturate/metabolites |
| LOWER LIMIT OF DETECTION | 5 ng/ml | | |
| CUT POINT | 200 ng secobarbital/ml | 300 ng secobarbital/ml | 1000 ng secobarbital/ml |
| CROSS REACTIVITY | none observed (3396 ng/ml phenobarbital produces positive result) | none observed (3000 ng/ml phenobarbital produces positive result) | (5000 ng/ml phenobarbital) |

| TEST | Abuscreen | EMIT d.a.u. | TOXI-LAB |
|---|---|---|---|
| MANUFACTURER | Roche Diagnostics, Hoffman LaRoche | Syva | Analytical Systems, Marion Laboratories, Inc. |
| DRUG/METABOLITE | Cannabinoids Tetrahydrocannabinol (THC) metabolite-11-nor-delta-9 -THC-9-carboxylic acid | Cannabinoids/metabolites | THC |
| LOWER LIMIT OF DETECTION | 5 ng/ml | 20 or 100 ng/ml | 25-50 ng/ml |
| CUT POINT(S) | 100 ng/ml | Highly specific to cannabinoids and cannabinoid metabolites | |
| CROSS REACTIVITY | Highly specific to cannabinoids and cannabinoid metabolites | | |
| | Ibuprofen (Advil™, Motrin™) reported to cross react | | |
| DRUG/METABOLITE | Cocaine metabolite benzoylecgonine | Cocaine metabolite benzoylecgonine | Cocaine metabolite benzoylecgonine |
| LOWER LIMIT OF DETECTION | 5 ng/ml | 300 ng/ml | 3000 ng/ml |
| CUT POINT | 300 ng/ml | none observed | |
| CROSS REACTIVITY | Cocaine and metabolites | | |
| DRUG/METABOLITE | Methaqualone | Methaqualone/metabolites Mecloqualone | not available |
| LOWER LIMIT OF DETECTION | 50 ng/ml | 300 ng/ml | |
| CUT POINT | 750 ng/ml | none observed | |
| CROSS REACTIVITY | none observed | | |
| DRUG/METABOLITE | Morphine | Opiates | Morphine |
| LOWER LIMIT OF DETECTION | 10 ng/ml | 300 ng/ml (morphine) | 3000 ng/ml |
| CUT POINT | 300 ng/ml | Conc. producing a positive result (ng/ml) | |
| CROSS REACTIVITY | Conc. producing a positive result (ng/ml) | | |
| | Codeine 222 | 1000 ng/ml | |
| | Dihydrocodeine bitartrate 1007 (found in prescription analgesics) | | |
| | Hydrocodone bitartrate 1634 (found in prescription antitussives) | 1000 ng/ml | |
| | Other compounds cross react at conc above 1000 ng/ml | Hydromorphone 3000 ng/ml (found in prescription antitussives) | |
| | | Levorphanol 3000 ng/ml (found in prescription analgesics) | |
| | | Oxycodone 50000 ng/ml (found in prescription analgesics) | |

| TEST | Abuscreen | EMIT d.a.u. | TOXI-LAB |
|---|---|---|---|
| MANUFACTURER | Roche Diagnostics, Hoffman LaRoche | Syva | Analytical Systems, Marion Laboratories, Inc. |
| DRUG/METABOLITE | Phencyclidine (PCP) metabolite (1-(1-phenylcyclo-hexyl)-4-hydroxypiperidine | PCP, analogues and metabolites | Phencyclidine (PCP) |
| LOWER LIMIT OF DETECTION | 2.5 ng/ml | | |
| CUT POINT | 25 ng PCP/ml | 75 ng/ml | 300 ng/ml |
| CROSS REACTIVITY | test result when 1000/10,000 ng/ml of the following present | none observed | |
| | Dextromethorphan -/9 (found in prescription cough medications) | | |
| | Diazepam -/6 (found in Valium™) | | |
| DRUG/METABOLITE | LSD | not available | not available |
| LOWER LIMIT OF DETECTION | .025 ng/ml | | |
| CUT POINT | .5 ng/ml | | |
| CROSS REACTIVITY | none observed | | |
| RECOMMENDED SPECIMEN TREATMENT | Urine specimens which cannot be analyzed within 8 hrs after voiding should be refrigerated at 2-8° C. to minimize the possibility of degradation of positive samples. | Freshly voided urine specimens should be used. If not analyzed immediately, samples may be stored refrigerated. Prolonged refrigerated storage exceeding 3 days, however may result in + samples with drug conc. at or near the low calibrator assaying as negative.<br><br>Sample should be within the pH range of 5.5 to 8.0.<br><br>For cannabinoid screen, if not analyzed after 24 hrs, freeze specimen. Samples should be at room temperature for testing. Samples positive for cannabinoids which are stored for prolonged periods in plastic containers, in direct sunlight, or at elevated temperatures may exhibit lower detectable levels. | |
| NOTES | Use of radiolabeled antigen limits use of test to labs licensed to handle radioactive material | Other available tests:<br>Benzodiazepine (e.g., Valium™, Librium™)<br>Methadone<br>Propoxyphene (Darvon™) | Analytical Systems offers 3-day initial training workshop and a 2-day advanced training workshop<br><br>Company also offers a proficiency testing service to subscribers.<br><br>Company user survey revealed that 95% of respondents found TOXI-LAB reliable, 93% were confident with results and 92% found it easy to use. |

Source: Information provided by the three manufacturers identified above.

Recent entries into drug testing include: Abbott Laboratories for cocaine, PCP, and barbiturates; and Diagnostic Products Corporation for cocaine and morphine. Additionally, American Drug Screens Inc. is marketing hometesting of marijuana, cocaine, PCP, amphetemines, barbiturates, and benzodiazepine; and Medical Diagnostics Inc. expects to market a Quick Test Drug Screen for on-site testing of morphine, cocuine, amphetamines, and PCP.

**Table 2: SENSITIVITY AND SPECIFICITY OF DRUG SCREENING**

| | | Drug in Urine | |
|---|---|---|---|
| | | Present | Absent |
| Screening Test | Positive | A=True Positive | B=False Positive |
| | Negative | C=False Negative | D=True Negative |

**Sensitivity: A/(A+C)**

**Specificity: D/(B+D)**

Table 3:
Urine Toxicology Proficiency Testing by the American Association of Bioanalysts and the College of American Pathologists

American Association of Bioanalysts:

Amphetamines
Barbiturates
Benzodiazepines
Cannabinoids
Cocaine metabolite
Methadone
Methaquolone
Opiates
Phencyclidine
Propoxyphene

College of American Pathologists

ALCOHOLS-VOLATILES:
- Acetone
- Ethanol
- Isopropanol
- Methanol

AMPHETAMINE GROUP:
- Amphetamine
- Methamphetamine
- Phenylpropanolamine

BARBITURATES:
- Amobarbital
- Butalbital
- Pentobarbital
- Phenobarbital
- Secobarbital

NON-BARBITURATE HYPNOTICS:
- Ethchlorvynol
- Glutethimide
- Methaqualone

BENZODIAZEPINES:
- Nordiazepam
- Oxazepam

NARCOTICS OTHER THAN OPIATES:
- Propoxyphene &/or metabolites

OPIATES-SYNTHETICS:
- Codeine
- Hydromorphone
- Methadone &/or metabolites
- Morphine

TRICYCLICS:
- Amitriptyline
- Amoxapine &/or metabolites
- Desipramine
- Doxepin &/or metabolite
- Loxapine
- Imipramine
- Nortriptyline

OTHER:
- Acetaminophen
- Benzoylecgonine
- Cannabinoids
- Chlorpheniramine
- Desmethyldoxepin
- Diphenhydramine
- Mesoridazine
- Pentazocine &/or metabolite
- Phencyclidine
- Phenothiazines
- Pyrilamine
- Quinine &/or metabolites
- Salicylate
- Thioridazine

Source: American Association of Bioanalysts; College of American Pathologists

TABLE 4:
PROFICIENCY TESTING FOR URINE DRUG SCREENING
CONDUCTED BY THE AMERICAN ASSOCIATION OF BIOANALYSTS

First Quarter 198[illegible]

| DRUG | VIAL | REFERENCE LABS | PARTICIPANTS | SPIKE LEVEL |
|---|---|---|---|---|
| AMPHETAMINE | A | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | B | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| BARBITURATE | A | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | B | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| BENZODIAZEPINE | A | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| | B | 10 OF 10 PRESENT | 93% PRESENT | 1000 NANOGM/ML |
| CANNABINOID | A | 6 OF 10 PRESENT | 24% PRESENT | 40 NANOGM/ML |
| | B | 6 OF 10 PRESENT | 23% PRESENT | 40 NANOGM/ML |
| COCAINE METABOLITE | A | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | B | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| METHADONE | A | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | B | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| METHAQUALONE | A | 10 OF 10 ABSENT | 97% ABSENT | 0 |
| | B | 10 OF 10 PRESENT | 92% PRESENT | 1500 NANOGM/ML |
| OPIATE | A | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | B | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| PHENCYCLIDINE | A | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | B | 10 OF 10 PRESENT | 93% PRESENT | 400 NANOGM/ML |
| PROPOXYPHENE | A | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| | B | 8 OF 10 PRESENT | 52% PRESENT | 1000 NANOGM/ML |

Source: American Association of Bioanalysts, Brownsville, TX.

TABLE 4:
PROFICIENCY TESTING FOR URINE DRUG SCREENING
CONDUCTED BY THE AMERICAN ASSOCIATION OF BIOANALYSTS (CONTINUED)

Second Quarter 1985

| DRUG | VIAL | REFERENCE LABS | PARTICIPANTS | SPIKE LEVEL |
|---|---|---|---|---|
| AMPHETAMINE | C | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | D | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| BARBITURATE | C | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | D | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| BENZODIAZEPINE | C | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | D | 10 OF 10 PRESENT | 96% PRESENT | DIAZEPAM 1000 NANOGM/ML |
| CANNABINOID | C | 10 OF 10 PRESENT | 98% PRESENT | 250 NANOGM/ML |
| | D | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| COCAINE METABOLITE | C | 10 OF 10 PRESENT | 96% PRESENT | 2000 NANOGM/ML BENZOYLECOGONINE |
| | D | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| METHADONE | C | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | D | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| METHAQUALONE | C | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | D | 10 OF 10 PRESENT | 84% PRESENT | 1000 NANOGM/ML |
| OPIATE | C | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | D | 10 OF 10 PRESENT | 95% PRESENT | MORPHINE 1000 NANOGM/ML |
| PHENCYCLIDINE | C | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| | D | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| PROPOXYPHENE | C | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | D | 10 OF 10 ABSENT | 98% ABSENT | 0 |

Source: American Association of Bioanalysts, Brownsville, TX.

TABLE 4:
PROFICIENCY TESTING FOR URINE DRUG SCREENING
CONDUCTED BY THE AMERICAN ASSOCIATION OF BIOANALYSTS (CONTINUED)

Third Quarter 1985

| DRUG | VIAL | REFERENCE LABS | PARTICIPANTS | SPIKE LEVEL |
|---|---|---|---|---|
| AMPHETAMINE | E | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | F | 10 OF 10 PRESENT | 98% PRESENT | 2500 NANOGM/ML |
| BARBITURATE | E | 10 OF 10 PRESENT | 97% PRESENT | 2500 NANOGM/ML SECOBARBITAL |
| | F | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| BENZODIAZEPINE | E | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | F | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| CANNABINOID | E | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | F | 10 OF 10 PRESENT | 98% PRESENT | 250 NANOGM/ML |
| COCAINE METABOLITE | E | 10 OF 10 PRESENT | 96% PRESENT | 2000 NANOGM/ML BENZOYLECOGONINE |
| | F | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| METHADONE | E | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | F | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| METHAQUALONE | E | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | F | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| OPIATE | E | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | F | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| PHENCYCLIDINE | E | 10 OF 10 PRESENT | 91% PRESENT | 200 NANOGM/ML |
| | F | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| PROPOXYPHENE | E | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | F | 10 OF 10 ABSENT | 100% ABSENT | 0 |

Source: American Association of Bioanalysts, Brownsville, TX.

TABLE 4:
PROFICIENCY TESTING FOR URINE DRUG SCREENING
CONDUCTED BY THE AMERICAN ASSOCIATION OF BIOANALYSTS (CONTINUED)

Fourth Quarter 1985

| DRUG | VIAL | REFERENCE LABS | PARTICIPANTS | SPIKE LEVEL |
|---|---|---|---|---|
| AMPHETAMINE | G | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | H | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| BARBITURATE | G | 10 OF 10 PRESENT | 99% PRESENT | 2500 NANOGM/ML SECOBARBITAL |
| | H | 10 OF 10 ABSENT | 97% ABSENT | 0 |
| BENZODIAZEPINE | G | 10 OF 10 PRESENT | 97% PRESENT | 1000 NANOGM/ML DIAZEPAM |
| | H | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| CANNABINOID | G | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | H | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| COCAINE METABOLITE | G | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | H | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| METHADONE | G | 10 OF 10 PRESENT | 94% PRESENT | 750 NANOGM/ML |
| | H | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| METHAQUALONE | G | 10 OF 10 ABSENT | 97% ABSENT | 0 |
| | H | 10 OF 10 ABSENT | 96% ABSENT | 0 |
| OPIATE | G | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | H | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| PHENCYCLIDINE | G | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| | H | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| PROPOXYPHENE | G | 10 OF 10 PRESENT | 91% PRESENT | 2500 NANOGM/ML |
| | H | 10 OF 10 ABSENT | 97% ABSENT | 0 |

Source: American Association of Bioanalysts, Brownsville, TX.

TABLE 4:
PROFICIENCY TESTING FOR URINE DRUG SCREENING
CONDUCTED BY THE AMERICAN ASSOCIATION OF BIOANALYSTS (CONTINUED)

First Quarter 1986

| DRUG | VIAL | REFERENCE LABS | PARTICIPANTS | SPIKE LEVEL |
|---|---|---|---|---|
| AMPHETAMINE | 1 | 10 OF 10 PRESENT | 99% PRESENT | 2500 NANOGM/ML |
| | 2 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| BARBITURATE | 1 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| BENZODIAZEPINE | 1 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| CANNABINOID | 1 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| COCAINE METABOLITE | 1 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 98% ABSENT | 0 |
| METHADONE | 1 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| METHAQU'ALONE | 1 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| OPIATE | 1 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| PHENCYCLIDINE | 1 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| PROPOXYPHENE | 1 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 100% ABSENT | 0 |

Source: American Association of Bioanalysts, Brownsville, TX.

TABLE 4:
PROFICIENCY TESTING FOR URINE DRUG SCREENING
CONDUCTED BY THE AMERICAN ASSOCIATION OF BIOANALYSTS (CONTINUED)

Second Quarter 1986

| DRUG | VIAL | REFERENCE LABS | PARTICIPANTS | SPIKE LEVEL |
|---|---|---|---|---|
| AMPHETAMINE | 1 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | 2 | 10 OF 10 PRESENT | 96% PRESENT | 2500 NANOGM/ML |
| BARBITURATE | 1 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| BENZODIAZEPINE | 1 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| CANNABINOID | 1 | 10 OF 10 PRESENT | 99% PRESENT | 250 NANOGM/ML |
| | 2 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| COCAINE METABOLITE | 1 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| METHADONE | 1 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | 2 | 10 OF 10 PRESENT | 97% PRESENT | 500 NANOGM/ML |
| METHAQUALONE | 1 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| OPIATE | 1 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| | 2 | 8 OF 10 PRESENT | 74% PRESENT | MORPHINE 400 NANOGM/ML |
| PHENCYCLIDINE | 1 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | 2 | 10 OF 10 ABSENT | 99% ABSENT | 0 |
| PROPOXYPHENE | 1 | 10 OF 10 ABSENT | 100% ABSENT | 0 |
| | 2 | 10 OF 10 PRESENT | 93% PRESENT | 2000 NANOGM/ML |

Source: American Association of Bioanalysts, Brownsville, TX.

Table 5:
Proficiency Testing for Urine Drug Screening
Conducted by the College of American Pathologists
(First Quarter, 1985)

Specimen #1:

| Drug | Primary Method | Referees | | Participants | |
|---|---|---|---|---|---|
| | | No. | % Present | No. | % Present |
| Benzodiazepines | Thin Layer Chrom. | 1 | 100 | 99 | 45.5 |
| (as oxazepam, | Enzyme Immunoassay | 4 | 100 | 202 | 98.5 |
| 2000 nanogm/ml) | ALL METHODS | | | 317 | 80.1 |
| Cannabinoids | Gas Chromatography | 1 | 100 | -- | -- |
| (100 nanogm/ml) | Thin Layer Chrom. | 1 | 100 | 24 | 83.3 |
| | Enzyme immunoassay | 2 | 100 | 180 | 85.0 |
| | Radioimmunoassay | 1 | 100 | 14 | 64.3 |
| | ALL METHODS | | | 228 | 82.9 |
| Phencyclidine | Gas Chromatography | 2 | 100 | 7 | 100.0 |
| (2000 nanogm/ml) | Thin Layer Chrom. | 4 | 100 | 200 | 89.0 |
| | Enzyme immunoassay | 1 | 100 | 96 | 100.0 |
| | ALL METHODS | | | 317 | 92.4 |

False Positive Identifications:

| Drug | No. of Participants |
|---|---|
| Amphetamine | 33 |
| Morphine | 18 |
| Quinine | 11 |
| Phenobarbital | 10 |
| Salicylates | 8 |
| Glutethimide | 7 |
| Hydromorphone | 7 |
| Chlorpheniramine | 5 |
| Methaqualone | 3 |
| Phenothiazines | 3 |
| Amoxapine | 2 |
| Doxepin | 2 |
| Acetone | 1 |
| Pentobarbital | 1 |
| Loxapine | 1 |
| Benzoylecgonine | 1 |
| TOTAL: | 113 (mainly by unverified TLC) |

Table 5: Proficiency Testing by CAP (cont'd.)

Specimen #2:

| Drug | Primary Method | Referees No. | Referees % Present | Participants No. | Participants % Present |
|---|---|---|---|---|---|
| Amphetamine Group (as amphetamine, 2000 nanogm/ml) | Gas Chromatography | 1 | 100 | 4 | 50.0 |
| | Thin Layer Chrom. | 3 | 100 | 156 | 96.2 |
| | Enzyme immunoassay | 2 | 100 | 137 | 100.0 |
| | ALL METHODS | | | 313 | 97.4 |
| Barbiturates (as Pentobarbital, 3000 nanogm/ml) | Gas Chromatography | 1 | 100 | 3 | 100.0 |
| | Thin Layer Chrom. | 3 | 100 | 172 | 95.3 |
| | Enzyme immunoassay | 2 | 100 | 143 | 98.6 |
| | ALL METHODS | | | 335 | 97.0 |
| Benzoylecgonine (5000 nanogm/ml) | Gas Chromatography | 1 | 100 | -- | -- |
| | Thin Layer Chrom. | 1 | 100 | 137 | 79.6 |
| | Enzyme immunoassay | 5 | 100 | 148 | 100.0 |
| | ALL METHODS | | | 297 | 89.9 |

False Positive Identifications

| Drug | No. of Participants |
|---|---|
| Morphine | 15 |
| Quinine | 9 |
| Salicylates | 8 |
| Hydromorphone | 6 |
| Chlorpheniramine | 5 |
| Phencyclidine | 4 |
| Amoxapine | 3 |
| Loxapine | 3 |
| Methaqualone | 2 |
| Methanol | 1 |
| Oxazepam | 1 |
| Phenothiazines | 1 |
| TOTAL: | 58 (mainly by unverified TLC) |

Table 5: Proficiency Testing by CAP (cont'd.)

Note: Specimen #1 contained phencyclidine, oxazepam, methanol, ethchlorvynol, and 11-nor-delta 9-THC-9-carboxylic acid. This table only summarizes the results with phencyclidine, oxazepam (as "benzodiazepines"), and 11-nor-delta 9-THC-9-carboxylic (as "cannabinoids"). Specimen #2 contained benzoylecgonine, pentobarbital, amphetamine, and ethanol. Results are summarized for benzoylecgonine, pentobarbital (as "barbiturates"), and amphetamine (as "amphetamine group"). Specimen #3 contained chlorpheniramine, loxapine, and amoxapine and its metabolite 8-hydroxyamoxapine. This was the first time these analytes were included in the proficiency tests and so the results with specimen #3 are not summarized here. Trace amounts of methamphetamine, amphetamine, cannabinoids, acetaminophen, phenypropanolamine, diphenhydramine, and codeine were present in both specimens, but at concentrations greatly below the minimum amounts listed on the report form and far below the sensitivity of most methods. As a result, there were a greater number of analytes than usual for which false positive identifications were common to all three specimens. False positives are mainly by unverified Thin Layer Chromatography. In specimen #1, some labs attempted to specifically identify oxazepam but might have falsely identified nordiazepam instead. Since both are benzodiazepines, the nine false positive identifications of nordiazepam are excluded from the table. A similar situation existed with specimen #2, in which labs could attempt to distinguish between "barbiturates" and the specific barbiturate, pentobarbital. Therefore, false positive identifications of secobarbital, amobarbital, and butalbital were also excluded from the list of false positives for specimen #2.

Source: "Urine Toxicology 1985 Survey," College of American Pathologists, Skokie, Illinois

**Table 6: Percent of Population Using Drugs in Past Month, 1972-1982**

| | Youth: age 12-17 | | | | | | Young Adults: age 18-25 | | | | | | Older Adults: age 26+ | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | '72 | '74 | '76 | '77 | '79 | '82 | '72 | '74 | '76 | '77 | '79 | '82 | '72 | '74 | '76 | '77 | '79 | '82 |
| Marijuana | 7.0 | 12.0 | 12.3 | 16.6 | 16.7 | 11.5 | 27.8 | 25.2 | 25.0 | 27.4 | 35.4 | 27.4 | 2.5 | 2.0 | 3.5 | 3.3 | 6.0 | 6.6 |
| Hallucinogens | 1.4 | 1.3 | .9 | 1.6 | 2.2 | 1.4 | NA | 2.5 | 1.1 | 2.0 | 4.4 | 1.7 | NA | ** | ** | ** | ** | ** |
| Cocaine | .6 | 1.0 | 1.0 | .8 | 1.4 | 1.6 | NA | 3.1 | 2.0 | 3.7 | 9.3 | 6.8 | NA | ** | ** | ** | .9 | 1.2 |
| Heroin | ** | ** | ** | ** | ** | ** | NA | ** | ** | ** | ** | ** | NA | ** | ** | ** | ** | ** |
| Nonmedical Use of: | | | | | | | | | | | | | | | | | | |
| Stimulants | NA | 1.0 | 1.2 | 1.3 | 1.2 | 2.6 | NA | 3.7 | 4.7 | 2.5 | 3.5 | 4.7 | NA | ** | ** | .6 | .5 | .6 |
| Sedatives | NA | 1.0 | NA | .8 | 1.1 | 1.3 | NA | 1.6 | 2.3 | 2.8 | 2.8 | 2.6 | NA | ** | .5 | ** | ** | ** |
| Tranquilizers | NA | 1.0 | 1.1 | .7 | .6 | .9 | NA | 1.2 | 2.6 | 2.4 | 2.1 | 1.6 | NA | ** | ** | ** | ** | ** |
| Analgesics | NA | NA | NA | NA | .6 | .7 | NA | NA | NA | NA | 1.0 | 1.0 | NA | NA | NA | NA | ** | ** |
| Any Nonmedical Use | NA | NA | NA | NA | 2.3 | 3.8 | NA | NA | NA | NA | 6.2 | 7.0 | NA | NA | NA | NA | 1.1 | 1.2 |
| Alcohol | NA | 34.0 | 32.4 | 31.2 | 37.2 | 26.9 | NA | 69.3 | 69.0 | 70.0 | 75.9 | 67.9 | NA | 54.5 | 56.0 | 54.9 | 61.3 | 56.7 |
| Cigarettes | NA | 25.0 | 23.4 | 22.3 | 12.1 | 14.7 | NA | 48.8 | 49.4 | 47.3 | 42.6 | 39.5 | NA | 39.1 | 38.4 | 38.7 | 36.9 | 34.6 |

** Less than one-half of 1 percent.

Source: National Household Survey on Drug Abuse, 1982. National Institute on Drug Abuse.

Dr. MIIKE. I also have a few visuals because I think we have heard a lot about how accurate these tests are and the relationship of that to individuals being identified falsely. I think that those relationships have to be made clear.

I also will give as an example how reliable these tests are when you conduct them in a random, mandatory type program where you have, say, maybe 10 percent of the population being tested with drugs in their urine versus a program under, say, reasonable suspicion or reasonable cause where, for example, you might expect there to be 50 percent who actually have drugs in their urine. I think these examples will show you the reason why the experts say that a initial screening test is not enough to make a positive determination that a person has a drug in their urine.

But before I do that, let me summarize my main points and after a quick summary of the technical data, I would like to spotlight some of the policy issues that arise out of the technical questions which, I think you will agree with me, should not be left up to technicians.

The test commonly used to screen for drugs in urine are two types of what are called immunoassays and something called TLC or thin layer chromatography. Basically, the immunoassays are really done by taking a specific drug, developing an antibody to it, and then as part of the reagents you have the antibody and the drug itself either labeled with an enzyme or labeled with radioactive iodine. The test essentially measures the competition between that specific drug in the urine versus the natural antibody-antigen reaction with the labeled drug.

So in terms of the immunoassays—and you have heard words like EMIT and RIA, or enzyme multiplied immunoassay tests, and a radioimmunoassay—those kinds of tests in essence are based, again, as I say, on an antigen-antibody reaction. And of course there are inherent limitations to these tests, because in these kinds of testing situations it is almost impossible to get 100 percent accuracy all of the time.

Besides the inherent limitations of the test, which the manufacturers may not be able to explain for a particular drug, we are talking generally about 6 to 30 or 40 different types of drugs, each of which would have an individual test for it.

In addition to that, you have all heard the problem of cross-reactions. For example, poppyseeds with the test for morphine; ibuprofen, which is in Advil and Motrin, with marijuana; et cetera, et cetera.

So that one set of tests is, as I say, called the immunoassays, the EMIT or the RIA test.

The other test, which is thin layer chromatography, has a really simple basis, and that's that different compounds will migrate at different rates of speed, depending on their particular properties. And that's really what thin layer chromatography does. You, in essence, take a frosted glass slide that looks like a frosted window pane, or you take a piece of filter paper that looks like a coffee filter paper. You put the substances along the bottom and you do certain things to them, and then you put them in a solution. And as the solvent runs up the paper it moves the different chemicals up at different rates of speed. And at any particular time you can

fix these things with different chemicals so they may show up in different colors, or you may look at them with, say, ultraviolet light, and they would have a particular color.

So in terms of the identification on the TLC test, what you are doing is seeing how far they migrate up and perhaps to look for color changes compared to, say, a known substance running alongside, so you can make comparisons.

The immunoassays, even though they are directed at one drug at one time, are highly automated, so you can test many at once. That's why you have heard about six tests being run for $15, or eight tests for $20, or those different kinds of figures.

The immunoassays are really automated. The manufacturers have suggested what they call a "cutoff point" between the lowest reading that would be read as positive and anything below that which would be read as negative, because with drug levels close to the lower limits of the sensitivity of the test, some samples might test positive and some of them might test negative.

So in essence, when you are doing a test such as this, you know that you are not going to get everybody in the first place. It is sort of like the Delaney clause in the Food, Drug, and Cosmetic Act. As technology gets better and better, you can identify smaller amounts in a solution, and obviously you can drop your cutoff point further down.

There is a very important point about the cutoff point that I want to make later on.

Now, those are the three screening tests. In terms of the confirmatory test, you've heard terms like GC/MS. That refers to gas chromatography/mass spectrometry. Gas chromatography in essence is a sophisticated way of separating substances by letting them travel a long distance. In a gas chromatography machine, the substance is turned into its gaseous form, is mixed with helium, and runs up a very thin, long glass coil. And at the very end, what they then do is bombard the sample, with electrons, which breaks up the substance into its pieces, and then you can look at it with what is called a mass spectrometer, and it would give a very characteristic fingerprint.

You can adjust your gas chromatography machine and the detection system at the end; and as an aside, the detection system can be mass spectrometry or how the compound absorbs certain kinds of light rays—ultraviolet, infrared or visible light; or even nuclear magnetic resonance, which is the basic principle for the new generation of x-ray machines called magnetic resonance imaging.

These are standard procedures used in industry and in FDA labs to identify specific substances.

So to make a long story short, gas chromatography/mass spectrometry is a very specific test.

What I would like to address at this point is how good are these screening tests—the immunoassays and the thin layer chromatography test?

Now, what I have as a little display is what I would say is the difference between what is called the sensitivity of a test versus the specificity of the test.

When we talk about the sensitivity of a test, we are really talking about, for example, if there are 100 urine specimens, each of

which has the drug in it and you are testing for that drug, what percent of them would you uncover? And that's the first column down. Is the drug in urine? Yes.

Is the drug test positive? Then it's a true positive.

If it's negative, it's a false negative.

And the sensitivity percentage—say, for example 95 percent—would mean that there would be 95 out of 100 true positives, and 5 which actually had the drug in it and would test negative.

Mr. ACKERMAN. Could you give us that number again?

Dr. MIIKE. OK. If you are talking about sensitivity—say 95 percent sensitivity—of 100 urine samples in which the drug is present, the test, will detect 95 out of the 100 and in it will miss 5.

Mr. ACKERMAN. In other words, if those were the numbers, there would be five people who were taking drugs who would escape detection?

Dr. MIIKE. Yes.

Now, most of these things happen at the lower limit of test sensitivity. For example, if the cutoff point is 100 nanograms of the marijuana metabolite, it is concentrations on that level that one might miss.

Now, with specificity, what we are talking about is that if we take 100 people without the drug in their urine, how many would test negative? For example, then we would be looking down the right column.

That's no drug in the urine. False positives would be the drug test saying that the drug is present. And true negatives are the drug test saying that there is no drug present.

So, for example, if you are talking about a test that's 90 percent specific, out of 100 urines that are tested, 10 would be identified as having the drug in there when it is not in there. And that can be due to, say, cross-reaction with your poppyseed example. OK?

So my main point—and bear with me because I am going to throw some numbers in here, and you are going to see the very vast differences that can pop up.

So, my main point here is not to confuse the accuracy of a test when people say it is 95 percent sensitive with the fact that most people assume that it therefore means 5 percent of people are falsely identified. That is not necessarily the case. These are two different questions.

At the Office of Technology Assessment we like to make a difference between what we call "efficacy" and "effectiveness." In other words, how good are these tests under ideal conditions and how good are these tests under average conditions?

In my prepared testimony in table 3, I list the specific drugs that are tested by two professional organizations that do what is called "proficiency testing," which is to test labs to see how accurate they do their tests.

In table 4, I give you the results of testing by the American Association of Bioanalysts, and in table 5, I give you the results of proficiency testing done by the College of American Pathologists.

Now, I need to explain these very carefully because in both of these programs—those numbers that you see in those two tables, 4 and 5—the people know they are being tested. There are some programs, for example, in the military, where they sneak samples in

among the regular samples, so that you don't know when you are being tested. But in these tables, you know you are being tested.

Now, in the American Association of Bioanalysts' figures, which are in table 4, what they are doing is giving you samples, and all you need to see is whether a specific drug is in the sample or not.

The College of American Pathologists' test is a little tougher. You know that there is a whole list of drugs that might be in there. You don't know which ones and you don't know how many. So you have to test that specimen and send back your results—and in that table I give you some examples about how correct the identifications are by the different methods that we mentioned. And also how many times they were wrong in identifying different types of drugs in the urine.

Now, to make this thing very concrete, let me just give you an example.

If you take 200 people and you are going to test them—and let us suppose that we are talking about a mandatory, random testing program and let's just pick a figure that 10 percent of the people tested would actually have drugs in their urine. Let's compare that to a reasonable cause or reasonable suspicion program where, for example, 50 percent of the people tested would have drugs in their urine.

Now, if we apply the same test to these two populations, let's take tests that are, in general, 95 percent sensitive, which means they will be able to identify 95 out of 100 positive urines correctly; and 90 percent specific, which means that they would misidentify 10 percent of people with negative urines. OK? And let's see what happens to these numbers.

On the left side is where the population really has 10 percent of the people with drugs in their urine. The right side is a population where 50 percent of the people have drugs in their urine.

Now, if we go down the left column we say, Drug: Yes. We know that in the population that's 10 percent positive with drugs in the urine, in a population of 200, it would be 20. But we know that this test will only pick up 95 percent of them, so you would pick up 19 out of 20.

In terms of the specificity, we know that out of the remaining 180 who do not have the drugs in their urine, at 90 percent specificity the test would falsely identify 18 of those people as having drugs in their urine.

Now, we compare that to a population with a drug in the urine at a 50 percent rate. And what we see then is that out of 100 people who have the drug in the urine, 95 would be found, 5 would be missed. Of the 100 who didn't have drugs in the urine, 10 would be misidentified.

Now if you then look across from left to right at the positives, it means that in the population where only 10 percent of the people actually had drugs in the urine, only 19 out of 37 positive screening tests would really be positive. In other words, your predictive value in that population, using the very same test, is 51 percent. So that 49 percent of those with positive screening tests would be falsely identified as having been positive for drugs in their urine.

Mr. ACKERMAN. You are saying that in a sample of people where 10 percent of them are actually using drug——

Dr. MIIKE. Who actually have the drug in their urine.

Mr. ACKERMAN. Or actually have the drug in their urine, that you will get 51 percent?

Mr. MIIKE. Fifty-one percent of the positive identifications by that test would be correct. The other 49 percent would not be.

Mr. ACKERMAN. So it's a crap shoot?

Dr. MIIKE. Yes.

However, if you pick a population that has a higher rate of drugs in the urine—and that's why I use the example of 50 percent—you can see that with the same test, you come out with a much better predictive value of 90 percent of those initially identified as positive will be positive.

This, I think, is the reason why the experts say that the screening tests are not good enough. And that if you want to put in a program that is good, then one must not just get by on the initial screening test but use a confirmatory test such as GC MS.

Mr. BURTON. May I interrupt?

Dr. MIIKE. Yes.

Mr. BURTON. We just had Congressman Clay Shaw come in and his staff all took the test and they all showed negative he said.

Now, if a Congressman had tests on his entire staff, you are saying it is very likely almost half of those tests would be inaccurate?

Dr. MIIKE. It depends, assuming that the congressional staff has a very low rate of actual drug users, yes.

Mr. BURTON. In other words, if all the staff was clean?

Dr. MIIKE. If all the staff was clean, then you would have—say, he had 2,000 people tested.

Mr. BURTON. Yes, and they were all clean.

Dr. MIIKE. And they were all clean.

Mr. BURTON. Yes.

Dr. MIIKE. You would have 200 people initially identified at the first test as being positive.

Mr. BURTON. So 10 percent, if they are all clean, would show up as positive.

Now, if you had a follow-up test the other test would make it pretty conclusive.

Dr. MIIKE. Right. If you use the GC MS test and it is used properly—which under proper controls is a very accurate test—then you would be able to say that none of those people——

Mr. BURTON. OK. So let's say that there were 100 people, and they were all clean, and the test was given. Ninety of those people would show clean, 10 would show not clean, but a follow-up test could prove they were in effect non-drug users?

Dr. MIIKE. Yes.

Mr. BURTON. So there is a way to do it?

Dr. MIIKE. Yes.

Mr. BURTON. But it requires probably more than one test in some cases?

Dr. MIIKE. Yes. Especially in these mass programs where there's obviously, as the previous witness said, a lab doing 12,000 tests a day—you can imagine even with a small operator error rate, which translates into fairly large absolute numbers.

So my point is simply that the screening test is not, by itself, enough evidence.

Mr. BURTON. In other words, if we set up a system to have everybody who is exposed to sensitive material tested. There would have to be a backup system to guarantee those people were getting a fair shake. Is that what you are saying?

Dr. MIIKE. Yes.

Mr. BURTON. But it could be worked out?

Dr. MIIKE. Yes.

Mr. BURTON. Thank you.

Mr. ACKERMAN. Could you share with us, if you have any knowledge, the relative costs of these two tests—the initial screening and the follow-up?

Mr. MIIKE. Yes. In my testimony I give some numbers. In the Subcommittee on the Civil Service's Survey of the Federal Agencies, I think that in terms of the first screening test—and, obviously, the actual prices would depend on whether you are using the EMIT or the RIA or the TLC—somewhere around $15 for, say, about a six-drug panel.

In terms of the confirmatory tests, they vary depending on the specific drug that one is testing for—and I think the range was somewhere between $20 or $25 to about $65. So that in general, one could say that the testing, including confirmatory testing, would probably be somewhere between $40 and $50 per person tested. Taking into consideration the volume that——

Mr. ACKERMAN. That's doing both tests, of course, would be around $50?

Dr. MIIKE. Yes.

Now, that's only the costs of the test themselves. What commonly is not included in the contracts with testing labs is the mailing costs. Remember, you want to get these samples fairly quickly. So I think that in some of the programs they might be sent by Federal Express or Express Mail.

And there are also the cost of the proficiency testing program to make sure these labs are doing it right.

The other cost factors have been identified by Congresswoman Schroeder, which is that in these kinds of programs you expect to be legally challenged in a fair amount of these.

So it is not like specimens for a doctor or a hospital—you have got to have this legal chain of command situation for it.

And then the other issue again is these tests are not being proposed as punitive measures, so one has to put in the cost of the rehabilitation programs.

Mr. ACKERMAN. But just the testing is going to cost?

Dr. MIIKE. The direct cost of the testing itself would be somewhere between $40 and $50 a person.

Mr. ACKERMAN. Between $40 and $50, plus handling?

Dr. MIIKE. Plus handling, right.

Mr. ACKERMAN. Please continue.

Dr. MIIKE. I just want to conclude by stating some of the issues that arise out of here now. I mentioned early on that the cutoff level is really dependent on how sensitive the tests are that the manufacturers make. Remember that at the cutoff level that we are talking about, the technology is not such that it will catch ev-

erybody who actually has drugs in the urine. It will catch people down to a certain level. There is going to be variability between tests on whether a test will be positive, say, at the very minimum levels.

So, what you are sacrificing by trying to catch as many people as possible is inconsistency at the lower levels.

Mr. ACKERMAN. Would you have to do the secondary test in order to catch some of the people who slipped through that probability in the first test?

Dr. MIIKE. No, no. Nobody gets caught of the people who slipped through the first time because cost-wise you are not going to test everybody again who were initially negative.

Mr. ACKERMAN. OK.

Give me again the number or the percentage of people that are going to slip through out of a hundred.

Dr. MIIKE. If we are talking about a test that's 95 percent sensitive——

Mr. ACKERMAN. Is that what most of them are?

Dr. MIIKE. I would say that as a general figure it is somewhere in there. But just remember, we are talking about tests for individual substances, and they may have different levels. One would say that if you accept the general sensitivity level of 95 percent, that means that 5 percent of the people would not be detected.

Mr. ACKERMAN. Five percent of the actual——

Dr. MIIKE. People who would actually have drugs in their urine.

Mr. ACKERMAN. Who are using drugs, they would just walk?

Dr. MIIKE. Yes.

Mr. ACKERMAN. If we would test them with that secondary test, would we catch them?

Dr. MIIKE. Yes, but remember, you would be not only testing that 5 percent, but everybody else who actually is negative. You see, you wouldn't be able to distinguish that 5 percent from the people who really don't have the drug in the urine.

So, in other words, it is uneconomical to do the confirmatory test on everybody who gets the screening test—then your costs would be astronomical.

Mr. BURTON. If I may, Mr. Chairman?

Mr. ACKERMAN. Please.

Mr. BURTON. Of course, the cost benefit ratio will depend on the importance of the particular position you are talking about. If you were talking about people who were dealing with extremely sensitive material, top secret information, $1,000 for an individual, as far as testing was concerned, might not be out of line because of their position.

I think it depends on what kind of position you are talking about, whether it is just a random employee or somebody in a very sensitive area.

Dr. MIIKE. Yes. Congressman, my point on this was that of the cost benefit ratio in terms of testing; random testing of a population where you know it won't have a fairly high level versus a reasonable cause testing. Of course, what you state is a different cost-benefit question about the kinds of people that you test.

Mr. BURTON. Thank you.

Mr. ACKERMAN. Doctor, on your second set of numbers, I think you are talking about a suspect population that has been identified or turned in by coworkers, or supervisors, or anybody else, calling a hotline type situation?

Dr. MIIKE. Yes.

Mr. ACKERMAN. And where indeed, we are guessing that half the time the accusation will be right and half the time it will be wrong.

Dr. MIIKE. Yes, I am just using that sort of representative numbers.

Mr. ACKERMAN. And in those instances, of those people who have been turned in, if we are making a mathematical guess as a jumping off point, that one-half of them will and one-half of them won't, your numbers indicate that 90 percent of the time they are going to test positive?

Dr. MIIKE. No. What I mean is that of all the positives that you would find in that population, 90 percent of them would be actually positive.

In the first instance, because we are dealing with a population that predominantly has no drug in their urine, the absolute numbers get fairly high of those who have been falsely identified.

Mr. ACKERMAN. Right.

Dr. MIIKE. So 51 and 90 percent of those who are positive are actually positive and not falsely positive.

Mr. ACKERMAN. Right.

Dr. MIIKE. As I said, the related issues that I list here are the issue of the cutoff point—the lower you set it, the more inconsistency you will have at those drug levels at the lowest level of the limit.

You can make these tests more consistent by raising the cutoff level but your tradeoff is that you are going to miss more people.

The second issue that I raise is what drugs do you want to test for? If you leave it up the agencies, I think a quick perusal of the Subcommittee on Civil Service's list of the types of drugs that the different agencies test for shows great variability. So that you may get fingered as a drug user in one program and not in another.

There is also the issue, which I guess the next witness will testify about, over whether we should include prescription drugs.

Then the issue of—which is a very touchy one—do we distinguish among the illicit drugs between hard drugs and soft drugs.

Another issue is the cost of the screening programs, which we have already talked about.

Then my last issue that I really think has raised my concern a little bit more now that I have listened to the previous witnesses is what is being done with the initial results on these screening tests. Even if we institute a confirmatory program where you use a confirmatory test, what should be done with those initial lists of people. Should we have lists of suspected users, confirmed nonusers, and confirmed users?

It seems to me that if we are talking about a screening program for a work force that has maybe 10 percent or less drug users, would it be unfair to keep a list of people who tested positive initially, because you know about one-half of them would not have the drug in their urine.

Mr. ACKERMAN. I am just curious. If I ate this bagel, how long would I test positive for?

Dr. MIIKE. That is a difficult question for me to answer. Let me just make a guess from my recollection.

We are talking here about a cross-reaction with opiates. That would depend on the amount that is in there and how quickly it gets cleared out of your system. I think in terms of the opiates, within 1 to 3 days they would pass out. And it would also depend on how much of the substance is in there and how much it cross-reacts with the opiate test.

So I would say that there is a possibility that you could test positive but it is not guaranteed that you would test positive. And that would be generally so with the other drugs. For example, cold capsules and the amphetamines, or the Ibuprofen, which is Motrin and Advil, with the Cannabinoids. There is a possibility of this.

The 30-day thing with the Cannabinoids also is a possibility. It is not a certainty that you would test within 30 days.

Maria tells me the bagel would have been missed.

Mr. ACKERMAN. I'm sorry.

Dr. HEWITT. Most screening test kits have set the cut points high enough so that that small a consumption of poppyseed would not be detected on the initial screening.

Mr. ACKERMAN. This bagel happens to have poppyseeds on both sides.

Thank you both very much for appearing and sharing your information with us today.

Our final witness is Mr. Richard Pollak, who is spokesperson for the Epilepsy Foundation of America. Welcome, Mr. Pollak, and please make yourself at home, and begin whenever you are ready.

## STATEMENT OF RICHARD POLLAK, ON BEHALF OF THE EPILEPSY FOUNDATION OF AMERICA

Mr. POLLAK. It is good to come down here from New York and see a bagel so prominently displayed in the committee room.

Mr. Chairman and members of the subcommittee:

Good afternoon. My name is Richard Pollak. On behalf of the Epilepsy Foundation of America, I appreciate this opportunity to appear before the subcommittee today. I would also like to personally thank you, Mr. Chairman, for your ongoing efforts to explore the implicataions arising from drug testing of employees and job applicants.

I have been asked by the Epilepsy Foundation of America to express its concern over the impact of drug testing of employees and job applicants on persons with epilepsy and others who take medication for health conditions. As a journalist and author I have worked with the foundation to expand public knowledge, understanding, and acceptance of epilepsy.

The issue of testing for drug use is of personal concern to me. I happen to have epilepsy and have been taking antiepileptic drugs every day of my adult life. I am also here today with a personal stake in what we are discussing.

The Epilepsy Foundation of America represents the interests of more than 2 million Americans who have epilepsy—1 out of every

100 people in the United States. More than half of those with epilepsy have achieved full seizure control and another 30 percent have obtained partial control through recent advances in diagnosis, treatment, and drug development.

Several of the leading antiepileptic drugs, however, have a barbiturate base and therefore will yield a positive finding in even the simplest urinalysis. Other medications such as Dilantin and Tegretol will be identified through the more sophisticated testing methods.

The foundation is concerned about the problem of drug abuse in society; drug abuse can cause seizures and even epilepsy in susceptible individuals. However, the foundation is also concerned about the adverse effect that drug testing may have on individuals.

It may unnecessarily and unjustifiably require disclosure of a health condition which may have no impact on the job performance of the individual.

It may inappropriately affect the individual's employment status through such disclosure.

It may affect the privacy and employment future of individuals through inappropriate and unregulated release of confidential medical records.

And it may be unreliable without appropriate confirmatory testing and may be subject to misinterpretations.

The increasing use of mandatory urine drug screening in the workplace is one approach to the devastating problem of drug abuse which raises as many problems as it seeks to cure.

Drug testing threatens much of the progress which has been made in furthering public understanding of epilepsy and other health conditions which require an individual to take prescriptive medications. It has special implications for many persons with epilepsy because depending upon the test used, various antiepileptic medications can be identified in an individual's urine. Our concerns are not based on theoretical possibilities, but rather on documentation of actual case histories of people with epilepsy.

The rise in drug testing poses significant problems beyond the fact that a false positive could inappropriately identify them as a user of cocaine or marijuana. Both EMIT and RIA testing methods will identify barbiturates such as phenobarbital and Myceline which are used in the control of seizures and tranquilizers such as Valium.

The TLC technique will also identify the antiepileptic medications Dilantin and Tegretol. Most labs will only report illegal or controlled drugs to employers unless asked to report every drug that appears on the screen. However, barbiturates and Valium will always be reported, and there are no controls over employers who wish to obtain the full results.

In addition, we have received reports that some employers may deliberately be testing for Dilantin in order to identify employees or job applicants with epilepsy.

Many people with epilepsy choose not to tell their employers that they have epilepsy because of a justifiable fear of employment discrimination. The vast majority of individuals with epilepsy have achieved seizure control. Their epilepsy is simply not an issue. It does not interfere with their dialy life either on or off the job.

Yet the Epilepsy Foundation and its affiliates continue to receive calls from persons with stories of employers who found out that they had epilepsy and who either fired them, or changed their responsibilities in such a way that the individual felt he or she was being pushed out of the job.

These individuals are now fearful that participation in such testing will force disclosure and possibly cause them to be subject to employment discrimination as well as a violation of their personal privacy.

While legal remedies exist for this kind of treatment, it is not uncommon for such cases to take 5 years or more to move through the administrative and judicial processes.

Unfortunately, as of 1985, 21 State laws permit preemployment inquiries which are unrelated to the applicant's abilities to perform the job in question. People with epilepsy are often faced with a difficult choice in filling out job applications. If they put epilepsy on their application there is a strong probability that they will be turned down without any consideration of their ability to perform the job.

If they do not reveal their epilepsy on the application they face the possibility of being fired for application falsification if their condition is discovered, again regardless of ability.

Other people with epilepsy are affected by drug testing at the preemployment stage. The individual's drug screen identifies him or her as taking barbiturates from the phenobarbital in his or her urine, he or she may be inappropriately labeled as a drug user and not offered the job.

The foundation is also concerned that fear of drug testing may cause individuals who anticipate being tested on the job to stop taking their medication, even if the particular drug they are taking would not normally show up on a drug screen.

Another concern to people with epilepsy is the issue of confidentiality once their employer receives the results of the drug tests. Current State statutes vary in coverage and only about a dozen of them specifically cover medical records maintained by employers. It is unclear as to what extent any of these statutes protect against disclosures within the company, even if they are protected against disclosure to the outside.

The danger also exists that an employee who has been tested will then apply for a new job and will have that medical information passed on to this prospective new employer as part of his or her job reference.

People with disabilities face discrimination in every facet of their lives—health care, insurance, housing, transportation, education, and most critically, employment. It is unfortunate that the use of drug testing has become as pervasive as it has without due consideration of all of its ramifications.

Drug testing is viewed as a way to assist individuals who are endangering their lives through the use of illegal drugs. It must not be permitted to destroy the lives of otherwise qualified persons who take prescriptive medication.

People with epilepsy frequently experience great difficulty obtaining and retaining employment. They are often denied jobs or

not trained for work they could do well and safely because of unreasonable fear of their seizures.

Educating employers, coworkers, and the general public and breaking down these barriers is the key to increased employment of people with epilepsy. This has proven to be a long and difficult process. Until understanding and acceptance of people with epilepsy becomes more widespread, it is crucial that the employment rights and opportunities are protected by effective, enforceable laws.

The Epilepsy Foundation of America strongly urges that if involuntary drug screening is going to be conducted in this country, that laws be passed carefully regulating such testing to protect the rights of persons who are taking medication for a legitimate medical purpose. These laws should, at a minimum, include provisions which would:

One, protect the confidentiality of the medical records of all individuals who are tested;

Two, prohibit employment discrimination in the private sector against persons with disabilities that are uncovered as a result of testing through Federal legislation, and by requiring that no testing may be done of job applicants until after they have been offered the job in question;

Three, protect individuals from the risk of being falsely identified as drug abusers by requiring in all circumstances that positive tests be confirmed, that all persons who are tested be given a copy of the complete test result in writing, and be given an opportunity to appeal any adverse employment decision based on such testing.

While drug testing may seem to offer a temporary hope, unless it is carefully regulated it is likely in the long run to exacerbate the underlying problems we face as individuals and as a society.

Again, Mr. Chairman, the Epilepsy Foundation of America appreciates this opportunity to convey our concerns on this important public policy issue.

I just have a couple of things I would like to add and then I would be happy to answer any questions.

I feel even more strongly personally than this statement would indicate. I think at bottom here we have a fundamental issue of invasion of privacy, one, and; two, we have a clear, in my view, issue of counterproductivity. The way to fight a serious drug problem, it seems to me, is at the source, not by spending millions upon millions of dollars to test people in a testing program that is obvious to anybody who looks at it for 20 seconds—totally inadequate, aside from the fact that it is an invasion of privacy.

[The statement of Mr. Pollak follows:]

STATEMENT BY RICHARD POLLAK ON BEHALF OF THE EPILEPSY FOUNDATION OF AMERICA

Good afternoon. My name is Richard Pollak. On behalf of the Epilepsy Foundation of America (EFA), I appreciate this opportunity to appear before the Subcommittee today. I would also like to personally thank you, Mr. Chairman, for your ongoing efforts to explore the implications arising from drug testing of employees and job applicants.

I have been asked by the Epilepsy Foundation of America to express its concerns over the impact of drug testing of employees and job applicants on persons with epilepsy and others who take medications for health conditions. As a journalist and author I have worked with the Foundation to expand public knowledge, understanding and acceptance of epilepsy.

Mr. Chairman, the issue of testing for drug use is of personal concern to me. I happen to have epilepsy and have been taking anti-epileptic drugs every day of my adult life. So I am also here today with a personal stake in what we are discussing.

The Epilepsy Foundation of America represents the interests of the more than two million Americans who have epilepsy - one out of every one hundred people. More than half of those with epilepsy have achieved full seizure control and another 30 percent have obtained partial control through recent advances in diagnosis, treatment and drug development. Several of the leading anti-epileptic drugs, however, have a barbiturate base and therefore will yield a positive finding in even the simplest urinalysis. Other medications such as phenytoin (Dilantin) and carbamazepine (Tegretol) will be identified through the more sophisticated testing methods.

The Foundation is concerned about the problem of drug abuse in society; drug abuse can cause seizures and even epilepsy in susceptible individuals. The Foundation is also concerned about the adverse effect that drug testing may have on individuals. Drug testing may:

- o Unnecessarily and unjustifiably require disclosure of a health condition which may have no impact on the job performance of the individual;

- o Inappropriately affect the individual's employment status through such disclosure;

- o Affect the privacy and employment future of individuals through inappropriate and unregulated release of confidential medical records; and

- o Be unreliable without appropriate confirmatory testing and may be subject to misinterpretations.

The increasing use of mandatory urine drug screening in the workplace is one approach to the devastating problem of drug abuse which raises as many problems as it seeks to cure.

There are many methods currently used for drug screening, including enzyme multiplied immunoassay (EMIT), radioimmunoassay (RIA), and thin-layer chromatography (TLC). As Committee members know, these tests vary widely in reliability. Any positive result should be confirmed through more specific

testing such as gas chromatography plus mass spectrometry whenever the test result will be used as the basis of an employment decision. Unfortunately, not all employers wish to pay for the more expensive confirmation tests especially when used to screen job applicants. As a result, some individuals are being unjustly accused of being drug abusers based on single urine tests. Others may be denied jobs without ever knowing that they have been wrongly identified as drug abusers.

Drug testing threatens much of the progress which has been made in furthering public understanding of epilepsy and other health conditions which require an individual to take prescriptive medications. It has special implications for many persons with epilepsy because depending upon the test used, various anti-epileptic medications can be identified in an individual's urine. Our concerns are not based on theoretical possibilities, but rather on documentation of actual case histories of people with epilepsy.

For persons with epilepsy, the rise in drug testing poses significant problems beyond the fact that a false positive could inappropriately identify them as a user of cocaine or marijuana. Both the EMIT and the RIA testing methods will identify barbiturates such as phenobarbital and primadone (Myceline) which are used in the control of seizures and tranquilizers such as benzodiazapam (Valium); the TLC technique will also identify the anti-epileptic medications phenytoin (Dilantin) and carbamazepine (Tegretol). Most labs will only report illegal or controlled drugs to employers unless asked to report every drug that appears on the screen. However, barbiturates and benzodiazapam (Valium) will always be reported, and there are no controls over employers who wish to obtain the full results. In addition, we have received reports that some employers may be deliberately testing for phenytoin (Dilantin) in order to identify employees or job applicants with epilepsy.

Many people with epilepsy choose not to tell their employers that they have epilepsy because of a justifiable fear of employment discrimination. The vast majority of individuals with epilepsy have achieved seizure control. Their epilepsy is simply not an issue. It does not interfere with their daily life either on or off the job.

Yet the Epilepsy Foundation and its affiliates continue to receive calls from persons with stories of employers who found out that they had epilepsy and who either fired them, or changed their responsibilities in such a way that the individual felt he or she was being pushed out of the job. These individuals are now fearful that participation in such testing will force disclosure and possibly cause them to be subject to employment discrimination as well as a violation of their personal privacy. Although in many states, legal remedies exist for this kind of treatment, these remedies do not usually provide quick relief and protracted litigation can be a serious hardship on the victim of discrimination. It is not uncommon for such cases to take five years or more to move through the administrative and judicial processes.

Unfortunately, as of 1985, 21 state laws currently permit pre-employment inquiries which are unrelated to the applicant's abilities to perform the job in question. People with epilepsy are often faced with a difficult choice in filling out job applications. If they put epilepsy on their application there is a strong probability that they will be turned down without any consideration of their ability to perform the job. If they do not reveal their epilepsy on the application they face the possibility of being fired for application falsification if their condition is discovered, again regardless of ability. The individual may also have to deal with the anxiety of knowing that information has been withheld, even if it is irrelevant to the person's qualifications.

Other people with epilepsy are affected by drug testing at the pre-employment stage. Although a pre-employment physical would produce information about a person's epilepsy, reports indicate that some employers are requiring a drug test without a physical at this stage. The individual applicant is then faced with telling the prospective employer s/he has epilepsy and hoping s/he is hired anyhow, or hoping that the drug screen used does not catch the particular medication s/he is taking. If the individual's drug screen identifies him/her as taking barbiturates from the phenobarbital in his urine, s/he may be inappropriately labeled as a drug user and not offered the job.

Assuming that disclosure of an individual's medical history is not otherwise required because of specific job requirements, the Foundation has always taken the position that it is up to the individual to make the decision about disclosure to his employer. This freedom of choice is clearly in jeopardy for those employees faced with mandatory drug testing. This may be further exacerbated if employers, as some are now doing, begin to require of job applicants a list of all medications they are taking.

The Foundation is also concerned that fear of drug testing may cause individuals who anticipate being tested on the job to stop taking their medication, even if the particular drug they are taking would not normally show up on a drug screen.

Another concern to people with epilepsy is the issue of <u>confidentiality</u> once their employer receives the results of the drug tests. At the present time, about 40 states have some form of statute regulating the dissemination of information about employees personnel records to third parties. These statutes vary in coverage and only about a dozen of them specifically cover

medical records maintained by employers. It is unclear to what extent any of these statutes protect against disclosure within the company, even if they protect against disclosure to the outside. The danger also exists that an employee who has been tested will then apply for a new job and will have that medical information passed on to this prospective employer as part of his or her job reference.

Unfortunately, for the vast majority of employees, the legal system provides little or no protection from drug screening. Although the Constitution protects against unreasonable search and seizure, and thus has been found to place limits on the scope of drug testing by government agencies such as school districts, corrections institutions, etc., it provides no protection against action by private employers. In the absence of a local statute or union agreement, private companies can pretty much do what they want at this time.

There are many problems facing America today. Drug abuse is one. Widespread discrimination against people with disabilities or chronic health conditions is another. People with disabilities face discrimination in every facet of their lives - health care, insurance, housing, transportation, education and most critically employment. It is unfortunate that the use of drug testing has become as pervasive as it has without due consideration of all of its ramifications. Drug testing is viewed as a way to assist individuals who are endangering their lives through the use of illegal drugs. It must not be permitted to destroy the lives of otherwise qualified persons who take prescriptive medication.

The primary statute protecting and advancing the employment rights of individual Americans is found in Title 7 of the Civil Rights Act of 1964. While this statute guarantees protection against discrimination on account of race, sex, religion and national origin, it omits disability or health condition.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against qualified people with disabilities by recipients of federal financial assistance. Its effectiveness has been severely restricted following the 1984 decision of the Supreme Court in Grove City College v. Bell. This decision has seriously narrowed the long-standing statutory definition of "recipient".

Whether protected by federal law or not, people with disabilities are entitled to employment. Jobs provide the income which the individual uses to secure the housing, transportation and health care which are essential to independent living.

People with epilepsy frequently experience great difficulty obtaining and retaining employment. They are often denied jobs or not trained for work they could do well and safely because of unreasonable fear of their seizures. Educating employers, co-workers, and the general public and breaking down these barriers is the key to increased employment of people with epilepsy. This has proven to be a long and difficult process. Until understanding and acceptance of people with epilepsy become more widespread, it is crucial that their employment rights and opportunities are protected by effective, enforceable laws.

The Epilepsy Foundation of America strongly urges that if involuntary drug screening is going to be conducted in this country, that laws be passed carefully regulating such testing to protect the rights of persons who are taking medication for a legitimate medical purpose. These laws should, at a minimum, include provisions which would

- o protect the confidentiality of the medical records of all individuals who are tested;

- o prohibit employment discrimination in the private sector against persons with disabilities that are uncovered as a result of testing through federal legislative, and by requiring that no testing may be done of job applicants until after they have been offered the job in question.

- o protect individuals from the risk of being falsely identified as drug abusers by requiring in all circumstances that positive tests be confirmed, that all persons who are tested be given a copy of the complete test result in writing, and be given an opportunity to appeal any adverse employment decision based on such testing.

In the heated debate over how to solve the nation's drug problem, it is tragic that the underlying reasons which compel people to use mind alternating substances such as illegal drugs and alcohol have received scant attention. The federal government, rather than leading the way through an expansion of counseling and treatment opportunities, has in fact retreated by reducing funds for community mental health services and by limiting employee mental health benefits.

It is not coincidental, Mr. Chairman, that public policy decisions parallel our own decision making process as individuals. We often choose to ignore early warnings that a problem is developing. Time passes until we can no longer avoid confronting the problem. Then we insist on taking whatever steps, however inappropriate or untested, which we hope will ameliorate the condition. While drug testing may seem to offer a temporary hope, unless it is carefully regulated, it is likely, in the long run, to exacerbate the underlying problems we face as individuals and as society.

Again, Mr. Chairman, the Epilepsy Foundation of America appreciates this opportunity to convey our concerns on this important public policy issue.

Mr. ACKERMAN. Thank you very much, Mr. Pollak, for your testimony and your comments.

Is there any way of knowing how many people there are with epilepsy within the Federal employ?

Mr. POLLAK. What is the total of Federal employees?

Mr. ACKERMAN. Without counting the Post Office, it is about 2.1 million people.

Mr. POLLAK. It is 2 percent of that, so you are talking about 200,000—no, 400,000. My math is terrible.

Mr. ACKERMAN. Approximately 2 percent of 2 million?

Mr. POLLAK. Right.

Mr. ACKERMAN. So, 40,000.

Mr. POLLAK. 40,000.

Mr. ACKERMAN. So we could go through this whole program and turn up 40,000 people with epilepsy?

Mr. POLLAK. Correct. And even if you didn't turn them up—the threat. I have no problem in dealing with this publicly now, but for many years when I worked for large corporations in large news organizations, I did. In one case, the application did ask and I simply lied. There was only one such case and at no other time was I ever confronted. But I always feared being confronted with it and what the consequences of that would be.

If you are talking about 40,000 Federal employees, I can tell you unequivocally that the vast majority of them will fear this revelation, because there is a great deal of prejudice still in the society against this disorder, both socially and in job discrimination, because of ignorance.

Mr. ACKERMAN. Mr. Pollak, thank you very much. The subcommittee appreciates your testifying before us today.

The Chair would like to announce that there will be another hearing scheduled for Thursday, September 25, at 10:30 a.m.—tentatively scheduled for this room—when we will hear from the Justice Department and hopefully the Office of Personnel Management.

Thank you very much.

The subcommittee stands adjourned.

[Whereupon, at 3:20 p.m., the subcommittee was adjourned, to reconvene at 10:30 a.m., Thursday, September 25, 1986.]

# DRUG TESTING FEDERAL EMPLOYEES

THURSDAY, SEPTEMBER 25, 1986

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

The subcommittee met, pursuant to call, at 10:40 a.m., in room 311, Cannon House Office Building, Hon. Gary L. Ackerman (chairman of the subcommittee) presiding.

Mr. ACKERMAN. The subcommittee will come to order.

Today the Subcommittee on Human Resources continues its oversight hearings on proposals for drug testing Federal employees. We want to focus in particular on the Executive order signed by President Reagan on September 15, mandating drug tests of employees in "sensitive positions."

Our two previous hearings have convinced me that drug testing creates more problems than it solves. We have learned the following:

Drug tests such as urinalysis are often inaccurate, making many harmless substances register as something illegal.

These tests do not measure job impairment, which should be a primary concern.

Drug tests are prohibitively expensive.

Drug tests are an invasion of privacy, undermining constitutional protections against "unreasonable search and seizure."

And there is no evidence presented by anyone that drug abuse is a problem within the Federal work force.

For these reasons, on September 16, I introduced H.R. 5531, to restrict Federal drug testing to those instances where there is a reasonable belief that a specific employee's job performance is impaired because of the use of a controlled substance.

On September 18, a Federal District Court Judge in New Jersey ruled that mass, mandatory drug testing of firefighters and policemen is unconstitutional. The court held that while the drug problem in America may be serious, the city of Plainfield had no reason to suspect that its firefighters or policemen were using drugs and, therefore, had no cause to test them.

Federal Judge H. Lee Sarokin clearly and correctly proclaimed that:

> It is important not to permit fear and panic to overcome our fundamental principles and protections. . . . If we choose to violate the rights of the innocent to discover the guilty, then we will have transformed our country into a police state and abandoned one of the fundamental rights of our free society. In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.

The administration's "Chicken Little" mentality about Federal employee drug use would trample on rights firmly established in our Constitution, and reverse this country's well-established presumption of innocence.

Through his Executive order, the President has declared that each and every Federal employee subject to testing is suspected of drug abuse. The order would shift the burden of proof onto each employee to submit to a highly intrusive and inaccurate test in order to prove his or her innocence.

No one denies that drug abuse is a serious problem in our land, and serious efforts must be made to end drug use. But trashing the Constitution through trendy gimmicks is not the way to solve it.

Today we will hear from Richard K. Willard, Assistant Attorney General; William J. Anderson, Assistant Comptroller General, and Harry Van Cleve, General Counsel of the General Accounting Office; and Allan R. Adler, chief legislative counsel for the American Civil Liberties Union.

The subcommittee had invited Constance Horner, Director of the Office of Personnel Management, to testify on either of two occasions. Her office informed us that she was unavailable, and that the Justice Department would serve as the administration's voice on this issue.

[The summary of H.R. 5531 follows:]

Summary of H.R. 5531
Prepared by the Subcommittee on Human Resources
Committee on Post Office and Civil Service

H.R. 5531 would establish restrictions on the drug-testing of Federal civilian employees by adding Subchapter VI to Chapter 73 of title 5 United States Code. The Subchapter VI would consist of five subsections:

§7361 establishes definitions for the Subchapter. The bill covers executive agencies, military departments, United States Courts, the Library of Congress, the Botanic Carden, and the Government Printing Office. "Controlled substances" are those defined in 21 USC §802(6). "Action" is any personnel action as defined in 5 USC §2302(a)(2)(A).

§7362 restricts agencies from requesting, requiring, or threatening to require drug tests of employees or applicants. It also prohibits agencies from considering results of a voluntary drug-test submitted by employees or applicants. The section allows drug-testing only where two supervisory personnel concur that an employee's performance is impaired and that the impairment is due to the employee being under the influence of a controlled substance.

§7362(3) requires employees with a positive test result to take a confirmatory test to determine the validity of the initial screening.

§7362(4) permits agencies to take action against an employee whose confirmatory test is positive or if the employee refuses or fails to take the confirmatory test.

§7362(c)(1) requires the Office of Personnel Management to promulgate regulations with regard to aquisition and handling of samples; procedures used in evaluation of samples; levels of reliability for tests; qualifications for personnel conducting drug tests; procedures for maintaining confidentiality of records; and procedures for providing drug rehabilitation services.

§7363 establishes remedies for any person aggrieved by a violation of this Subchapter. This includes civil suits against the United States for equitable or monetary relief or both. These remedies are in addition to others already provided by law.

§7364 provides that employees within a unit for which a labor organization has exclusive recognition shall not be subject to drug tests if such tests would violate a collective bargaining agreement; or if such tests are not covered by such a collective bargaining agreement, unless or until there has been consultation or negotiation by the agency with the labor organization.

§7365 exempts the Central Intelligence Agency and the National Security Agency from the bill.

The effective date of the bill is 60 days after enactment.

Mr. ACKERMAN. I would like to call this morning as our first witness Mr. Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice.

Mr. Willard, welcome, and please join us.

## STATEMENT OF RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. WILLARD. Thank you, Mr. Chairman.

I would request that my prepared statement be placed in the record and that I be permitted to give a brief summary of it.

Mr. ACKERMAN. Without objection, the entire statement is placed in the record.

Mr. WILLARD. Mr. Chairman, I appreciate the opportunity to be here this morning to talk about the serious drug problem facing our Nation and the President's goal of establishing a drug-free Federal workplace.

Although the war against illegal drugs must be fought on many fronts, the President's program recognizes that we cannot devote our attention solely to law enforcement—we must also reduce the demand for illegal drugs. The administration believes that the Federal Government has a duty to adopt a leadership role in reducing the demand for illegal drugs by attaining a drug-free Federal workplace.

We must make clear that drug use by Federal employees—whether on or off duty—is unacceptable conduct that will not be tolerated.

I would also like to note at the outset that a drug testing program is only one means by which the Executive order will help us to achieve a drug-free workplace.

The President's order also requires agency heads to develop plans that must include a statement of agency policy, employee assistance programs, supervisory training programs, and procedures to put drug users in contact with rehabilitation services.

Because of the high rate of illegal drug abuse in our society and its debilitating effects on the work force, both public and private employers are increasingly instituting drug testing programs to deter employee use of illegal drugs. In private industry, approximately 30 percent of the Fortune 500 companies have testing programs that use urinalysis for drug detection.

These have been enormously successful, resulting in fewer on-the-job accidents, increased productivity, and improved employee morale.

The success of these programs, in both the public and the private sector, gives us real cause to believe that a carefully implemented program of drug testing can lead to progress in the war on drugs.

Now I would like to turn briefly to a couple of aspects of the President's program as set up by Executive Order 12564. The order by its very nature, sets up a general program without specifying in great detail how it will be executed. And while the details of how the order will be implemented remain to be worked out, I would like to indicate a couple of areas where the order provides for safeguards and procedural protections.

One issue, which has been raised, Mr. Chairman, is the question of the reliability of drug testing. Many critics have indicated that the false positive error rate for some drug tests can be as high as 20 percent. We clearly view it as unacceptable to allow that degree of error for an employee who has not used illegal drugs.

Moreover, there have apparently been abuses in the private sector where employers have discharged employees based on a single positive result from an unreliable first screening.

However, the President's order contains numerous safeguards to ensure reliability and fairness. First and foremost, the administration will not base any action on a first or preliminary test. Instead, following a positive test, we would test the same sample a second time using the most reliable available technology, such as the gas chromatography/mass spectrometry test. This test is somewhat more expensive than the initial screening, but, as the Office of Technology Assessment testified before this subcommittee, the GC/MS test is highly reliable and difficult to dispute.

Mr. ACKERMAN. On the first test—presuming that you got a positive indication—would there be a record made of that?

Mr. WILLARD. Mr. Chairman, the order provides that no action could be taken on the basis of the first test. And with respect to any records made, procedures would be developed to assure their confidentiality.

Mr. ACKERMAN. Aside from the confidentiality—however that may or may not hold up—if a test came back positive on the first instance, and we assume that there will be a number, is that indicated on the employee's work record that he took a first test?

Let me back up one step.

If an employee refused to take the test, what would happen to that employee?

Mr. WILLARD. It would depend on the circumstances of the situation, and it would be treated as a disciplinary matter as whenever an employee refuses any other kind of a job requirement.

Mr. ACKERMAN. If, under the President's order, his employer or supervisor says to him as he comes in to work, fill up this jar, and he claims that he has some constitutional protections against sharing his body fluids with his employer, is he going to be fired?

Mr. WILLARD. Not necessarily. It would be up to the supervisor to decide how to deal with that through the normal disciplinary process.

Mr. ACKERMAN. In one agency he or she might be fired, and in another he or she might not?

Mr. WILLARD. There's a whole range of disciplinary sanctions available that include——

Mr. ACKERMAN. Which would apply? Are we going to have different applications in different agencies, is what I am asking you? Is this something that is so wide open that it is up to the discretion of any supervisor? And that every supervisor will be promulgating their own rules?

Mr. WILLARD. It would be handled in the same way that other disciplinary measures are handled, and that includes the normal procedures for review. And there is an element of discretion in our Federal Civil Service system as to what kind of discipline is imposed.

It might depend, say, on the employee's prior work record, and whether there have been prior disciplinary violations.

Mr. ACKERMAN. What of their work record? In other words, persons who insisted on what they might think are their constitutional guarantees, would have as part of their permanent work record following them for the rest of their life, that this person refused to take a drug test.

Mr. WILLARD. That could certainly be the case.

I also want to answer another question you asked, Mr. Chairman, about whether or not the record of a positive on the first test would go into the work records if it was not confirmed on the second test. The answer to that is no. The order requires a confidentiality in the testing records and would assure that not happen.

Mr. ACKERMAN. Would that person's record indicate that that person tested positive the first time and negative the second time?

Mr. WILLARD. No; it would just not indicate anything. The procedures require——

Mr. ACKERMAN. Would a person's record indicate that he or she did take a drug test?

Mr. WILLARD. I don't know. That is not an issue that has yet been addressed and resolved.

Mr. ACKERMAN. And if a person leaves one agency and goes to another, would it, in your estimation, be appropriate for the new agency or new department within the Federal Government for them to know that this employee already had a drug test, failed one, or passed one? Or is nobody ever going to know about these things? Are we giving them just as an exercise?

Mr. WILLARD. If someone fails a drug test and that is confirmed through the confirming test, then that information would be provided to the supervisors to use for disciplinary action as well as for referral for rehabilitation or counseling. And that information could appear in the employee's record.

Mr. ACKERMAN. What if that person takes a drug test and fails the test, and then applies for work in a different agency? Does that record follow that employee?

Mr. WILLARD. I think it probably would.

Mr. ACKERMAN. Would that person be employable in another agency?

Mr. WILLARD. It would depend on the circumstances. If that person continued to use illegal drugs, then they would not be. The President's order makes it clear that people——

Mr. ACKERMAN. That person would have to be again tested in a new agency?

Mr. WILLARD. That would probably be the case.

Mr. ACKERMAN. So what you are saying, then, is this would become a permanent part of an employee's employment record?

Mr. WILLARD. That could certainly be the case, if it is confirmed on the second test.

Mr. ACKERMAN. And not a part of the medical record?

Mr. WILLARD. Not if there is a determination of illegal drug use, no, that would not be in that compartment at all.

Mr. ACKERMAN. So a person who has been tested positive would not be able to be employed by the Federal Government?

Mr. WILLARD. That is not true. What the order says is that someone who is currently using illegal drugs can't be employed. If someone tests positive, goes into a rehabilitation program and then stays clean afterward, then they certainly could be employed, although again, it would depend on the nature of the job and other information.

Mr. ACKERMAN. How long would that person have to stay clean, in your estimation?

Mr. WILLARD. The order doesn't specify. All it says is that someone who is a current drug user can't be hired. And, again, the issue of how long they have to stay clean would be left up to the agencies based upon the nature of the job.

Mr. ACKERMAN. A person who tests positive, how often would you intend to retest that person? I mean, a person can test positive, demand a new test or something, I would presume, under whatever regulations you might have, clean up his or her act, and then test negative. Would that person then be subjected to retesting periodically, say, every 2 months, to make sure that they didn't just clean up for the test?

Mr. WILLARD. They could be. The order doesn't specify the exact frequency.

Mr. ACKERMAN. Would it be practical to do that, or impractical?

Mr. WILLARD. I think it would be highly practical.

Mr. ACKERMAN. So that anybody who had tested positive could expect on a regular basis throughout the rest of their career to be required to give a urine sample on a regular basis when they came in to work?

Mr. WILLARD. That could certainly be the case. And in fact this is a standard part of most drug rehabilitation programs—followup testing to determine whether or not the program has worked, whether or not someone who formerly was using drugs continues to stay clean. This provides an incentive for them to stay clean, because they know that they are going to be tested from time to time in the future—and if they don't stay clean that will turn up again.

Mr. ACKERMAN. What if they refuse to take the test after they have tested clean for three times?

Mr. WILLARD. That would be handled the same way as I indicated earlier, in the context of any other refusal to be tested—through the existing disciplinary processes.

Mr. ACKERMAN. If a person tests positive the first time—or is accused of having tested positive the first time—and then is tested clean, and then is tested clean, and then is tested clean again subsequently, and claims that the first test was because of the inaccuracies in the testing system, would that employee have a right to claim that he is being harassed for whatever reason by his or her employer?

Mr. WILLARD. That certainly could be the case. I would like to point out that any adverse action that may be triggered by the first positive test would ultimately be determined on the basis of agencies finding that there was in fact illegal drug use.

The order points out that the test results can be rebutted by other evidence and that the agency is not bound to define that the test results are in fact true if there is evidence to the contrary. So there would be the normal procedural challenges for the employee

to challenge the reliability of the testing procedure involved, or to present other evidence that in fact the employee is not on drugs.

Mr. ACKERMAN. In that instance, presuming that the employee is successful—and I suppose that what you are saying is that in order to do that he has to be, or she has to be, tested again, and that has to show that the person is clean.

Mr. WILLARD. If the employee is successful in convincing the agency that in fact the employee had not used illegal drugs——

Mr. ACKERMAN. My question really is: How does an employee become successful in convincing an agency that the first test was wrong—and indications are they are wrong up to 20 percent of the time—that the test was wrong, and that he or she indeed is not a drug user?

Mr. WILLARD. First of all, we were not talking about the first test. Nothing is done on the basis of an initial test. And the confirming test, the GC/mass spec, is not wrong 20 percent of the time. According to the Congressional Office of Technology Assessment, it is completely reliable. So, no action of any kind could be taken based on an initial screening test unless it is confirmed.

Mr. ACKERMAN. What happens subsequent to that?

Mr. WILLARD. Once it is confirmed that it was a positive through the——

Mr. ACKERMAN. Where I am going, if I can give you an idea, is what is to prevent supervisors from harassing certain employees by continually requiring them to take the test after they say in their own mind, well, the first test showed positive—even though that may 20 percent of the time be wrong—I now have a right to continue to insist that this person urinate before coming to work on a regular basis?

Mr. WILLARD. I think I understand your question now, Mr. Chairman.

Supervisors would be prevented from harassing employees in this manner because the supervisors would not know that the initial screening test was positive. That information would be kept within the testing procedure.

Mr. ACKERMAN. Who would know?

Mr. WILLARD. Only the people at the testing organization.

Mr. ACKERMAN. How would the employee know that he or she had to be retested?

Mr. WILLARD. The retest is done on the same sample. In other words, the way the procedure operates in existing testing programs is that the sample is provided, and then a portion of it is withdrawn and tested under the initial test. If that comes up positive, then a second test is made of another specimen from the same sample using the GC/mass spec. Thus, only the laboratory knows that there was a positive on the first test if it is not confirmed by the second test.

The supervisor only finds out about a positive test result if it has been confirmed. If it is not confirmed, then as far as the supervisor is concerned, it is a negative test result.

Mr. ACKERMAN. All right.

As I understand the Executive order, you have taken out the requirement that the person urinate under the direct observation of somebody else. Is that correct?

Mr. WILLARD. That is correct, Mr. Chairman.

Mr. ACKERMAN. So I assume that the person would be afforded the dignity of going into a men's or women's room and providing the sample alone?

Mr. WILLARD. That is correct. In fact, I was just going to get to that in summarizing my prepared statement.

Mr. ACKERMAN. What would prevent an employee from bringing with him or her in their pocket or purse a clean urine specimen?

Mr. WILLARD. There are several factors that enter into that. One is, that because of the testing can be random and without prior notice, the employee would have to carry a bottle of urine around with them every day of the year in order to be assured that they would have it with them when called upon to provide a sample. And while, in fact, there may be some employees who will do that, we think that the program will be effective in deterring a great deal of drug use because many employees will stop using illegal drugs because they don't want to go to these lengths to ensure that their drug use is not detected.

Mr. ACKERMAN. We can probably logically make the presumption that those employees who have no fear—whether that no fear is founded or not—those employees who have no fear of being tested positively would have no necessity for carrying around a clean urine sample. And those employees who may indeed be drug addicts may not think that it is that much of an inconvenience to carry around a small tube or vial in their pocket or purse.

I know those of us who wear contact lenses usually carry around their contact lens case, and don't find it any great inconvenience.

Mr. WILLARD. I understand your point, Mr. Chairman.

Mr. ACKERMAN. I am suggesting that you are going to be catching the innocent in your 5 to 20 percent, and those who are actually drug abusers are going to escape your scrutiny.

Mr. WILLARD. First of all, I continue to object to the use of the 5 to 20 percent number. The confirming test, the GC/mass spec——

Mr. ACKERMAN. Well, if you come up with a number I will agree to it.

Mr. WILLARD. Does not have any false positive rate. So, we would not be identifying anyone innocent as a drug user.

In the second place, your question was posited in terms of the addict. Most people in the workplace who use illegal drugs are not addicts—they are the so-called recreational drug users. And these are people who could stop using illegal drugs if they wanted to. And the point of this kind of a program is to give them an incentive to stop using illegal drugs.

Mr. ACKERMAN. Let me, if I might, ask right there—you are saying that most people in the Federal employ who use drugs are not drug addicts but they are recreational drug users. I have been very hard pressed to find anybody who can tell me of any study, survey, or scientific guess, as to how many people in the Federal workplace are drug addicts, drug users, drub abusers, or recreational drug users, as you have characterized them.

Where does your conclusion come from, that those who do are doing it recreationally rather than habitually?

Mr. WILLARD. The statistics come from a nationwide basis. And, of course, it is not easy to get statistics about a level of drug users

because many people try to conceal it. But the best statistics that we have indicate that there are about 20 million marijuana users in this country, and about 5 million cocaine users. And of those 25 million, the majority are so-called recreational users. That is, they are not addicted, at least not yet, and they could stop using the drug if they wanted to—if they had a sufficient incentive without a need for medical treatment or therapy.

Mr. ACKERMAN. How many people working for the Federal Government use drugs, habitually or recreationally?

Mr. WILLARD. We don't know the exact number.

Mr. ACKERMAN. Is it over half?

Mr. WILLARD. I certainly doubt that it is that high number.

Mr. ACKERMAN. Is it over 100,000?

Mr. WILLARD. It is certainly possible. The level of drug use in the work force nationally has been estimated——

Mr. ACKERMAN. I am talking about specifically among Federal employees. That is what we are dealing with.

Mr. WILLARD. Mr. Chairman, we don't know that number.

Mr. ACKERMAN. You don't know.

Is it over 100?

Mr. BURTON. May I ask a question?

Mr. ACKERMAN. Let me just finish this point.

Is it over 100?

Mr. WILLARD. As I indicated, Mr. Chairman, we don't know the exact number.

Mr. ACKERMAN. You are willing to test over 2 million loyal, patriotic Americans who are giving their lives and careers to work for our country, and you can't even tell me that there are a hundred of them that are drug users or drug abusers.

I find it absolutely baffling, that given the current fiscal restraints, not knowing there are a hundred of them, that we are going to be spending hundreds of millions of dollars.

Mr. BURTON. Will the gentleman yield? Will the chairman yield?

Mr. ACKERMAN. Sure.

Mr. BURTON. I think it is important that we look at these figures that have just been presented to us. It has been alleged that probably 20 million people use marijuana and 5 million use cocaine. Now, I don't think Federal employees are probably any different from the average American.

Now, we have, what, 250 million people in the United States, which would indicate that approximately 1 out of 10 people in this country either use marijuana or cocaine on a fairly regular basis. Now, I would say the same percentage would probably apply to the Federal work force.

Now, if you are asking this gentleman to give you a hard and fast number, I think it is impossible to do that and I think you are kind of badgering him on this point.

But the fact of the matter is, I would say the percentages would be pretty much the same as the average use in the United States as a whole.

I thank the gentleman for yielding.

Mr. ACKERMAN. I thank you very much, Congressman Burton.

It is certainly not my intent to badger, but I do think that the committee has the responsibility that if we are going to add tre-

mendously to the debt that our Nation finds ourselves in, that we should have some reasonable cause to do that.

And if you just arithmetically make the jump from the general population to the Federal work force, I fail to understand why we are singling out Federal employees as the scapegoats for a witch hunt for what may amount to a problem that exists in the general population, with no indication—no indication whatsoever—that it is something that exists to any extent on Federal workplaces.

Mr. BURTON. Will the gentleman yield, please?

Mr. ACKERMAN. I would like to ask the witness, and then you can simply respond.

Mr. BURTON. I have one relevant remark if I may, Mr. Chairman.

This morning, on national television, the NCAA declared they are going to have mandatory drug testing of all athletes who participate in NCAA functions because they feel it is absolutely necessary.

Mr. WILLARD. Mr. Chairman, I would like to point out, though, that the President's Executive order does not mandate a particular extent or frequency of testing even among sensitive employees. It designates a certain kind of employee as "sensitive" thus authorizing him to be subject to testing. But the actual frequency of testing is left up to the agency heads, who will have flexibility in implementation.

So, for example, if an agency head began by doing a random test, say, of 5 percent of the employees in an agency and found no drug use, then it would not be necessary under the order to go ahead and test the other 95 percent.

On the other hand, if an agency head did an initial testing program and found a drug problem, then more frequent testing might be warranted.

Mr. ACKERMAN. Can I ask a question there, and I think this is key to the rational discussion on this issue.

You say that the President's order does not include all Federal employees, only certain Federal employees. I am trying very hard to understand the philosophy behind the President's Executive order.

Are we trying to rid America and the Federal work force of the use of drugs because drugs are bad per se, or because they are having an effect in certain sectors of the work force? What is the philosophy that the administration is trying to promote? Are you trying to end all drugs in America?

Mr. WILLARD. Yes, Mr. Chairman. The President's goal is a drug-free America. The Order covers all Federal employees. It is not limited to those in sensitive jobs in terms of mandating——

Mr. ACKERMAN. Not limited to those in sensitive jobs?

Mr. WILLARD [continuing]. In terms of mandating that all Federal employees refrain from using illegal drugs. Where it does differentiate between the sensitive and nonsensitive employees is in authorizing the additional tool of the random mandatory testing. There are actually several reasons for that. These are the jobs where drug use, if it occurs, would be likely to have the most serious affect. For instance, even if only 1 percent of our air traffic controllers were using drugs, we would want to know that. If only

1 percent of our FBI special agents were using drugs, we would want to know that.

So the order tries to focus the greatest attention on the jobs that are most sensitive while also making it clear to all Federal employees, you are under an obligation not to use illegal drugs.

Mr. ACKERMAN. Would you tell me why we are singling out Federal employees and why the President is not issuing an Executive order covering all Americans?

Mr. WILLARD. The employment relationship of the Federal Government to its employees is what gives rise to this order. Actually, we are following what is already occurring in the private sector. But it is our hope that this program will set an example for State and local governments, and also for the private sector, of how to run an effective program to achieve a drug-free workplace.

Mr. ACKERMAN. Why don't we, by executive fiat, require everybody, rather than just trying to set an example? I mean, you know, the President set the example by selecting his own date for when he was going to be tested and then changing the date because it looked like the medical procedure he had that date would cause him to test positive. He has already set the example for drug testing.

Why is that not sufficient? Why do we need to single out 2 million Americans, and why those 2 million?

Mr. WILLARD. First of all, it is my understanding the medical procedures the President had would not have caused him to test positive, but I am not a scientist.

In addition, the President has, as head of the executive branch, both constitutional and statutory responsibilities with regard to Federal employees, that give him a different role, vis-a-vis those employees, than he has with regard to people who don't choose to work for the Federal Government.

Also, I think, the Federal employees have a special trust and confidence, by virtue of the fact that we work for the people, which allows us to be held—if we should be held—to a higher standard of probity and conduct than you would necessarily expect of people at large.

Mr. ACKERMAN. I have several recent job positions at the Bureau of Public Debt. Here is a GSN-5 secretarial position listd as sensitive so that the person would have to have a drug test. The same would apply to this administrative aide-typist, a budget typist, a GSN-8 personnel assistant, and a GSN-5 space management specialist. How do you account for that? Are those——

Mr. WILLARD. First of all, Mr. Chairman, the President's order does not require everyone in a sensitive position to have a drug test. It simply authorizes it. It leaves it up to agency heads to decide which of the people in sensitive positions will in fact be tested in light of such a criteria as the nature of their duties.

The fact that someone is in a job which has been classified for another purpose as sensitive doesn't necessarily mean they would be tested.

The second point is that there are a variety of jobs which may involve sensitivity even though they are otherwise fairly low paying. For example, clerical employees may have access to classi-

fied information that needs to be protected. Messengers or couriers may carry around documents that are sensitive.

So I don't think you can look at the pay level of the job and say, well, only high paying jobs are sensitive. Our Government requires the loyalty of employees at all levels in order to function effectively.

Mr. ACKERMAN. So if you are including the possibility of messengers and secretaries, who would you not include? Could you give us a couple of concrete examples of who would not be included?

Mr. WILLARD. I am not saying that messengers and secretaries are not automatically excluded if, for example, they have access to classified information. It doesn't mean that they are automatically included—it really depends on the nature of the job.

Mr. ACKERMAN. Who would be excluded?

Mr. WILLARD. A messenger or a secretary who does not have access to sensitive information or whose duties would otherwise not impact upon public health or safety or national security would not be covered.

Mr. ACKERMAN. You can continue with your statement.

Mr. WILLARD. The order provides for five categories of people who are covered as sensitive: people whose jobs have been classified as special sensitive, critical sensitive, or noncritical sensitive, under the Federal Personnel Manual, with access to classified information; law enforcement officers, presidential appointees, and then other people designated by the agency head whose duties deal with national security, public health and safety, or some more kinds of duties.

Now, precisely which jobs will fall in those categories and which won't is something that will be worked out as the order is implemented.

Mr. ACKERMAN. Is it your position and the administration's position that you are not violating the fourth amendment provisions and prohibitions on illegal search and seizure when you take an employee without reason to suspect that person as an individual of any misconduct or crime and searching their body fluids?

Mr. WILLARD. It is our position that the kind of testing program authorized by this Executive order does not violate the fourth amendment.

Mr. ACKERMAN. Would you tell me what might violate the fourth amendment?

Mr. WILLARD. There are a lot of things that would violate the fourth amendment. Courts are regularly finding violations of the fourth amendment.

Mr. ACKERMAN. If an employee showed up for work—or every employee showed up for work—and the administration decided, as it has, and as we all agree that drugs are a terrible thing, whether recreational or habitual—and that in order to make sure that that employee was not using drugs in the workplace or at home, decided that as that employee showed up that their supervisors would have a right to search them, to look in their pockets, or go through the glove compartment of their car, to make sure they had no drugs in their glove compartment.

Would that violate the fourth amendment?

Mr. WILLARD. It is hard to answer a hypothetical question without knowing more about the circumstances.

Mr. ACKERMAN. The circumstances are this: The President says that drugs are bad and that no Federal employee should have drugs on them, should use drugs, or should transport drugs. And an employee walks into work and the supervisor says, everybody line up, we are going to search your pockets to see if you have drugs. That is a specific example.

And at the same time, the deputy assistant at the agency decides to go through everybody's car—their trunk, and their glove compartment, look under the seats, behind the visor, wherever have you, to see if they have drugs in their car.

Mr. WILLARD. Is this a situation where the car is parked in a garage?

Mr. ACKERMAN. The car is parked on Federal property.

Mr. WILLARD. There is a sign outside the garage I drive in every day saying, anyone entering these premises consents to the search of their car by entering. In fact, when I came into the building today here, I had to go through a magnetometer in order to be allowed in.

Mr. ACKERMAN. That is for different reasons, other than the possibility of a person carrying drugs.

Mr. BURTON. Will the gentleman yield on that point?

Mr. ACKERMAN. You can ask the question in a moment.

Mr. BURTON. When am I going to get to ask a question?

Mr. ACKERMAN. You will get to ask a question as soon as the witness answers the question. I think that is his purpose here. We have to learn to hold our water. [Laughter.]

Mr. BURTON. I have been here half an hour.

Mr. ACKERMAN. Would it be violative of the fourth amendment if an employer wanted to search his employee's person to see if he was carrying drugs?

Mr. WILLARD. It would depend entirely on the circumstances.

Mr. ACKERMAN. The circumstances are—well, there are no circumstances. You tell me the circumstances under which it would be appropriate.

Mr. WILLARD. For example, some courts have held that prison employees can be searched upon entering the prison for the presence of drugs. There is a case, I believe, in the fifth circuit that held——

Mr. ACKERMAN. Let's talk about the messenger and the secretary that you referred to before as having access to transporting sensitive materials. When they show up for work, can we search that secretary's pocketbook and that messenger's motorcycle and his wallet?

Mr. WILLARD. It would depend on whether it is done in a reasonable way. I think that kind of thing can be reasonable. The test of whether or not——

Mr. ACKERMAN. Without any suspicion, we can search a person's pockets on their way into work, without any accusations?

Mr. WILLARD. My pockets were searched by your magnetometer without any suspicion when I walked in the building today.

Mr. ACKERMAN. Your pockets were not searched. You were scanned to see if you were carrying a knife, or a gun, or some type of device.

But should every employee by searched without suspicion? It is a very simple question. It requires a yes or a no. Should we search people for drugs, without suspecting them of using drugs, as they show up for work?

Mr. WILLARD. Mr. Chairman, as I tried to indicate, the fourth amendment is not always a black or white thing. It turns upon a question of reasonableness. What is a reasonable expectation of privacy? The cases have indicated that has to be determined in each case in light of the facts and circumstances.

It is just not possible to say as a hypothetical that something is always proper or always improper.

Mr. ACKERMAN. The facts and the circumstances are exactly—I'm conceding that the facts and the circumstances are exactly those that you have described, requiring people to give urine samples on a regular basis to make sure that there are no drugs in their body fluids.

And under the same exact set of circumstances, should we allow—it is a simple question—the same circumstances that you have, whatever you envision them as being: that drugs are pervasive, that Federal employees are all junkies, that 20 percent of them are, that 10 percent of them are, or whatever possessed you to come up with this Executive order are the same circumstances. Do we deem it acceptable, given all of the givens that have brought us to this point in history at this moment, do we say it is acceptable to go through an employee's pockets?

Mr. WILLARD. I can't answer it any way other than I have, Mr. Chairman.

Mr. ACKERMAN. I suspect that.

Mr. WILLARD. And that is to say, that is the kind of thing that can be reasonable, can be constitutional, if carried out in a reasonable way.

Mr. ACKERMAN. I think that we have a basic disagreement in philosophy and approach, as I do not believe our Constitution or our Founding Fathers conceived of situations or instances in which the Government, without any probable cause, or reasons to suspect, could on a regular random basis select people, most of whom they knew to be innocent, were guilty of a crime, and therefore violate the rights of an entire society by searching their persons without warrants and without any other constitutional protections.

I think that is where we differ.

Mr. Burton.

Mr. BURTON. I think since the beginning, the inception of this country, wherever the national interest was concerned, laws were passed to protect the population of this country. Now, if there is a question about constitutionality—and I am putting this in the form of a question—if there is a question about constitutionality, I am sure somebody has the right to go to the courts and to have this checked out in a court of law. Am I correct?

Mr. WILLARD. That is correct, Congressman. And, in fact, I provided the subcommittee with a copy of a Friend of the Court brief

that we filed in a case in Boston where this very issue of the constitutionality of a drug testing program has been raised in court.

Mr. BURTON. Am I not correct when a person goes into the Army they are subject to a very extensive physical?

Mr. WILLARD. That is correct, Congressman.

Mr. BURTON. Which includes internal examination?

Mr. WILLARD. Well, certainly, when I went into the Army it included a lot of examinations.

Mr. BURTON. Yes, I recall very vividly the physical examination. Nobody questioned it as being a violation of my constitutional rights because it was a matter of employment, and you had to have a physical to be able to be qualified to serve in the armed services of the United States.

Mr. WILLARD. As a matter of fact, Congressman, our brief in the Boston case cites a court decision which holds that an Army preinduction physical does not violate the fourth amendment.

Mr. BURTON. When a person flies in a jet plane as a pilot, don't they have to go through some rigorous physicals?

Mr. WILLARD. It is my understanding they do, Congressman, including regular reexamination.

Mr. BURTON. When people go into various forms of athletics, before they can perform, they have to have physicals to make sure they are not going to have a heart attack and die before they perform; boxers and so forth; isn't that a requirement?

Mr. WILLARD. I understand that that occurs frequently.

Mr. BURTON. Yes.

In fact, in many segments of our society a very comprehensive physical is required to be given before people get certain types of employment?

Mr. WILLARD. That is correct, Congressman. And in fact, the Federal personnel regulations do include provisions on giving physical examinations to Government employees whose physical condition is——

Mr. BURTON. Where national security is concerned, when we go into the CIA building aren't we subject to a search if we are coming in there? Even employees?

Mr. WILLARD. That is correct.

Mr. BURTON. And when you come into a Federal building like the building we are in, you have to go through a metal detector. My assistant, this morning had her purse searched. She is an employee of mine. Most people's bags and purses are searched every single day, even though they are employees?

Mr. WILLARD. That has been my experience every time I have come up here.

Mr. BURTON. So it is not uncommon for the safety and security of the country, and the security of the individuals in this country, to have practices to protect them?

Mr. WILLARD. That is correct, Congressman.

Mr. BURTON. OK.

Now, let's get to specifics. Air traffic controllers have in their hands the lives of hundreds of people at a time, and sometimes three or four planes containing 300 or 400 people could be in jeopardy if we had an air traffic controller, who was using a hallucinogenic drug or some drug that would slow down his reflex time.

Mr. WILLARD. That certainly is a very sensitive position, it seems to me.

Mr. BURTON. So one of the reasons for this is to make sure people in the air, including Congressmen, will know the person at the scope is a reliable person and drug free?

Mr. WILLARD. That is correct.

Mr. BURTON. I am on the Foreign Affairs Committee, and as such I have the CIA come in and give me briefings quite frequently. When they come in to give me briefings they scan the room, and if there is any sensitive material, they make sure anybody in the meetings—is cleared for secret, or top secret, or for classified.

If we have a person who is cleared for secret, who develops a drug habit, or who is a recreational user of drugs, who might develop a dependency on drugs, would you consider them a security risk?

Mr. WILLARD. I certainly would.

Mr. BURTON. You would think they might be subject to being coerced by an agent of a foreign power, like the KGB, because of their drug usage into giving vital information to a foreign power?

Mr. WILLARD. That is one possibility, although I think there are other aspects to that as well. I think the President's order defines such conduct as displaying an instability or unreliability of character that could create other problems as well. It could involve their getting into financial problems, which could be used, or provide a basis for compromising the security of information. It could just produce carelessness.

A lot of classified information, unfortunately, is compromised through carelessness as well as through espionage.

I think basically when you have people who have access to classified information you don't want to take chances. You want to be assured that they are as trustworthy as possible.

If I am going to authorize someone to have access to classified information is for me to affirmatively determine that they are trustworthy.

Mr. BURTON. Random drug testing is now being conducted in the private sector and in athletics as well; am I correct?

Mr. WILLARD. That is correct, Congressman. As my statement indicates, it appears that about 30 percent of the Fortune 500 companies are using drug testing, and an additional 20 percent have plans in the works to do it within the next year or two.

Mr. BURTON. So the President of the United States is not trying to harass the Federal work force, but he is trying to protect this country and to try to create ultimately a drug-free America; that's his goal?

Mr. WILLARD. It certainly is. And in fact, I think it would be rather anomalous if the Federal work force alone of all the work forces in our country were not part of a program to assure a drug-free workplace.

Mr. BURTON. I want to congratulate you and the President on taking steps and showing leadership in this vital area. I want you to know there are Members of Congress who support what you are trying to do.

I thank you.

Mr. ACKERMAN. Thank you very much, Mr. Burton.

Let me say that we have no differences in some areas, although some would like to draw the lines of demarcation to indicate that we might.

I have no trouble with people taking physical examinations when they go into the U.S. Army. The Army is not a democratic organization.

I have no problem with people being tested when they go to work for the Drug Enforcement Agency, or when they go to work for other agencies that might require very special scrutiny.

I have no problem with air traffic controller's, involved with the immediate lives and safety of multiple numbers of citizens, being tested.

But those lines, in my mind, in order to be constitutional, would have to be very narrowly prescribed.

There is a distinction in my mind between a physical examination that can be required, and in many instances is, by most employers, including the Federal Government, that is done for medical reasons—a great difference between a medical examination and a Government investigation which would strip a person of their constitutional rights.

And I believe that when the Federal Government, without any cause to believe that an individual is guilty of taking drugs, has a right to deny that person their fourth amendment and other protections against illegal search and seizures, I think that what the administration seems to be doing is creating and capitalizing upon a national hysteria based on the fact that we have all come to the realization that drugs are very harmful to society, and then requiring everybody in society to give up their rights—a very dangerous precedent, indeed.

Should we require Federal employees, because of the same reasons, to take lie detector tests? Would that not be less intrusive? Would the administration propose, or agree to such a proposal, that in order to work for the Federal Government we give everybody a lie detector test and ask them if they are taking drugs?

Mr. WILLARD. Mr. Chairman, as I have indicated in prior testimony on that issue, we believe lie detector tests should be used only for extremely sensitive jobs, such as CIA and NSA, where they are used. But I do believe that there is an important distinction, and that is, drug testing, as conducted under the kind of program set forth in the President's order, is considerably more reliable.

There is a scientific debate about the reliability of lie detector testing and a possibility of false positives. And for that reason we have not supported the use of lie detector testing on a widespread basis.

The drug test is, in our view, scientifically highly reliable, and presents much less of a possibility of a false positive. For that reason, we think they can be treated differently.

Mr. ACKERMAN. So it is a technological objection that you have, but the mindset is basically that if the technology was there in lie detectors, that we should lie-detect all employees to make sure that they don't lie, cheat, steal, or use drugs, or do anything else illegal?

Mr. WILLARD. There are a lot of other considerations as well, Mr. Chairman, that distinguish the use of the techniques. But I think

the main distinction is the technological one in terms of its accuracy.

Mr. ACKERMAN. If we can, for a minute, talk about the types of tests that the administration may have in mind for us. And there is, I believe, a technology for the testing of blood. Will that become a part of the administration's program for a drug-free America?

Mr. WILLARD. I am not aware of any current plans to consider that.

Mr. ACKERMAN. If there are new technologies that are being studied now, such as saliva tests, would that be?

Mr. WILLARD. I understand that there is research going on about the possibility of testing saliva or hair samples. The order is not limited to any particular technology. It is our goal to use the technology that is both the least intrusive and the most accurate in implementing the program. That is why the order provides for the Secretary of Health and Human Services to issue scientific and technical guidelines that can be updated to assure that our program is technological sound and at the most advanced level possible.

Mr. ACKERMAN. What safeguards are there, or should we have any, to see that in the course of analyzing a person's urine that we are not testing to see if they are pregnant, to see if they have venereal disease, to see if they're epileptics, or any of the other things that you might be able to test for once you have acquired someone's urine?

Mr. WILLARD. The order only authorizes testing for illegal drugs, and does not authorize testing for any of these other purposes.

I think the concern you have raised is a very legitimate one, Mr. Chairman. I can assure you that in developing the implementing procedures, we will make sure that the kind of testing you referred to is not allowed to occur.

Mr. ACKERMAN. In other words, you will have a prohibition against testing for anything other than drugs?

Mr. WILLARD. That is correct, Mr. Chairman.

Mr. ACKERMAN. What about urinalysis which registers legal substances, harmless substances, as if they were illegal? We've heard testimony about such things as poppy seed taken in quantities that can register as an opiate; Advil and Nuprin, which, as we have heard, register as marijuana?

Mr. WILLARD. It is my understanding, Mr. Chairman, that the confirmatory tests, the GC/mass spec, does not confuse one substance with another. That is, it performs a molecular analysis and, therefore, that it is not possible for it to confuse Advil with marijuana. And since we require confirmatory tests before any positive test result is used, then that would provide a safeguard.

The question about poppy seeds is the only one that I have heard that possibly presents a problem because in fact poppy seeds are involved in the production of opiates. So that is not a false positive. However, the tolerance levels that are set in the testing programs require that there be a certain level of a substance present. So that if you have a minute amount of a substance truthfully detected, that that would not cause a positive test result. Therefore, you would have to consume extremely large quantities of poppy seeds in order to produce a positive test result under the program. And

that eating a poppy seed bagel could not cause a positive test result to register.

Mr. ACKERMAN. There are some people that obviously eat enormous quantities of poppy seed bagels.

I don't know where that threshold would be——

Mr. WILLARD. I understand the concern, Mr. Chairman, and I have talked to the scientific people involved in the testing programs and they have told me that it would be necessary to eat an enormous quantity of poppy seeds, far more than are contained upon poppy seed bagels, in order to do that.

Now, I would point out that our program provides that positive test results, even on the confirming test, are not conclusive. So, it would be open for an employee to allege, and try to prove, in a disciplinary proceeding, that the reason for a positive test result was that they had just eaten 3 pounds of poppy seeds the night before. Now, whether the agency believed them or not would be up to the agency, but it would not be foreclosed from being offered in evidence if the employee wanted to do so.

Mr. ACKERMAN. That person would then be retested and all he or she would have to do is refrain from eating bagels with poppy seeds or whatever the substance was?

Mr. WILLARD. Mr. Chairman, as I tried to indicate, I don't think that you can eat enough poppy seeds on bagels in order to produce a positive test. But it would be open to the employee to contend that the employee had eaten several pounds of poppy seeds, or whatever would be the necessary quantity. And if the employee could show that, then that would not be a determination of illegal drug use.

Mr. ACKERMAN. The point I am really trying to make, without belaboring it, goes back to a previous point and that is, any employee who then comes up with an excuse that they ate a substance which masks as an illegal substance, can use that as an excuse, clean up their act, and be retested. And as you have testified previously, although you basically extrapolated numbers from the general population rather than have any hard data about the Federal work force, those people would then be able, because, as you have said, they are using recreational drugs and are not habitual users, they would then refrain or have some other form of recreation besides drugs, and then be retested the following month, and then test as if they were not drug users.

Mr. WILLARD. In the first place, Mr. Chairman, as far as I am aware, the only substance that presents this problem is poppy seeds, because that is not a false positive, that is a true positive. Poppy seeds are involved in the production of heroin. So a large enough quantity could produce a true positive.

Other substances such as you had previously mentioned, might produce a positive on the initial test but not on the confirming test.

The second point, though, getting back to the underlying philosophy of the order, is that if in order to test clean, employees must refrain from using illegal drugs, then we have succeeded.

Our goal is not to catch people and punish them. Our goal is to get people to stop using illegal drugs. And if a drug testing program has that effect, then I think we have succeeded.

Mr. ACKERMAN. I think that the threat of removing the Constitution from a person's litany of safeguards and holding that as a threat might be a chilling factor on the use of drugs as well as in some societies if you are suspected or caught stealing, they chop off your hands. Those are certainly deterrents—and I don't know that we necessarily subscribe to the loss of either our hands or our constitutional liberties.

What happens to a person such as an epileptic who may be taking medication that would then show up? He doesn't want his employer to know that he has epilepsy, as we have heard.

Mr. WILLARD. I understand that concern, Mr. Chairman, and I think it is a very legitimate one.

The Executive order does provide that people in the testing program must be given the opportunity to provide information about prescription drugs or other substances they may be taking lawfully.

In addition, the order provides for procedures to protect the confidentiality of medical information of this kind. What I envision happening in the implementation process is that an epileptic, for example, would be allowed to provide that information to the testing unit, which would then be required to keep it confidential from the supervisors. The supervisors have no need to know whether or not someone is legally taking a prescription drug for the treatment of epilepsy. The only information that would be communicated would be if there was a determination of illegal drug use.

Mr. ACKERMAN. Let's eliminate for a moment from the discussion the problem that epileptics might have. Let's assume a person is taking prescription medication which indeed has in it an addictive substance or something that shows up as an addictive substance.

What does that person do?

Mr. WILLARD. The order provides that they are permitted to—must be allowed—to provide information about the prescription drug they are taking at the time of the test so that can be included in the records. Thus, if the test shows up positive for a substance, they would not be identified as an illegal drug user, when in fact they are a legal drug user.

Now, in addition I would point out that the definition of illegal drugs used in the order only extends to schedules 1 and 2 of the Controlled Substances Schedule. So it would not include a lot of drugs which are prescription drugs that people might be using.

Schedule 1, as I understand it, includes drugs for which there is no legal use recognized. And schedule 2 includes those which can be used by prescription but are heavily controlled because they are extremely dangerous.

So while I think the situation of someone taking prescription drugs is not going to be as common as some might envision, it is something that will be addressed through appropriate procedures.

Mr. ACKERMAN. One further question.

I don't know if this is a question or a statement but maybe I will make it as a statement that you can respond to it if you would.

I am seriously troubled by what seems to be the attitude of the administration as I read it in the Executive order and in the testimony that you present to us, that we really have nothing to worry about. All that we have to do is to go out and prove that we are innocent after we have been accused, for no apparent reason, with-

out anybody indicating, or anybody suspecting, or anybody even believing that we have done anything wrong.

It seems to me that our society was set up with certain concepts and precepts in mind, and, among them, one of the basic fundamentals was that we are innocent until we are proven guilty.

Here we have an accusation made in vague general terms, because there is a problem in society, an accusation made against millions of Americans in which they will then, due to the gratuitous attitude of the administration, have ample opportunities to prove that they were innocent. They can bring doctor's notes, they can bring medical records, they can demand to retest, they can present evidence, they can get retested.

It seems to me that we are shifting the burden of proof. Even if we accept a low number of false positives, even if we accept a small amount of inaccuracies in the technology, we are saying that you have nothing to fear.

Why do we need any constitutional protections if we say you will then have the opportunity to prove yourself innocent? How does this distinguish us from other totalitarian societies where there are no such safeguards?

Mr. WILLARD. Mr. Chairman, first of all, I am not willing to accept any number of false positives as being acceptable. Our goal in implementing the program is to put in place the kind of quality controls that are necessary to assure that we don't have false positives. So, we want to use the best available technology and techniques to avoid that result.

As to your other question about the presumption of innocence, I think what you are referring to really is the criminal justice system. What we are talking about here is not a criminal justice program. We are talking about a program to assure that employees are fit for duty. In that regard, we don't, for example, assume that everyone is qualified for the job and——

Mr. ACKERMAN. Is that physically fit or morally fit?

Are we making value judgments or are we going back to talking about a physical test to be in the Army or the police force?

Mr. WILLARD. You bet we are making a value judgment, Mr. Chairman. The President has determined that the use of illegal drugs, on or off duty, by Federal employees, is inconsistent with the trust and confidence the American people place in them.

Mr. ACKERMAN. I understand that, so we are conceding—and I have no problem with making that moral judgment—but we are conceding at this point, are you not, that this has nothing to do with job performance?

Mr. WILLARD. I am not, Mr. Chairman. I think that part of the job of a public servant is to have the trust and confidence of the people that are served. The President has determined, in this Executive order, that part of the job of being a Federal employee is being drug free.

Mr. ACKERMAN. And, therefore, the Government has the right to invade our bodies, and our bladders, and our bloodstreams, and make search to make sure that that is the case.

I mean, we've made societal judgments that people should not blow up buildings, but we don't invade everybody's house at night to see if they are making bombs. Unless there is an accusation,

unless there is reason to believe it. And then we have to get a search warrant. And then there has to be an accuser that you have a right to face in court.

Here we are taking away all of that. We all agree that drugs are a terrible thing. But I can't see our country living without our Constitution. There are other approaches to having a drug-free America.

Mr. WILLARD. Mr. Chairman, I respect our difference of opinion about the applicability of the fourth amendment and I appreciate the courtesy you have extended to me as a witness, and I understand that there is room for people of good faith to disagree on this issue. But we have studied the issue carefully, and we believe that this kind of drug testing program is similar to the other kinds of requirements that are made as a condition of employment.

When I went to work for the Justice Department, I had to give fingerprints. I had to be subjected to an FBI full field background investigation which looked into my moral trustworthiness to hold a job. Many employees have to undergo physical examinations and take other kinds of tests to assure fitness.

That is not part of a criminal enforcement system. It is part of a system to assure that Government employees are fit for duty, and we believe that this is a reasonable program to achieve that result.

Mr. ACKERMAN. We have no differences in most of those areas. People who teach our youngsters in our schools should have their backgrounds checked as well.

But unless there is reason to believe, I think that we have serious differences as to the intent of what our Constitution really means and how dearly we hold those rights.

Mr. Burton.

Mr. BURTON. A Friend of the Court brief has been filed.

Mr. WILLARD. That's right, Congressman.

Mr. BURTON. So the constitutional rights of these people are going to be checked and they will be protected.

Mr. WILLARD. That is correct. I am sure that this will not be the only case involving this constitutional issue.

Mr. BURTON. I know, but the point is there is recourse in the courts. Court action has already been started and if there is a violation of their constitutional rights, it undoubtedly will come out in court. And if the courts uphold it, then it will be constitutional. But that is a matter for the courts to decided, right?

Mr. WILLARD. That issue is now before the courts.

Mr. BURTON. OK, that is No. 1.

No. 2, you are not going to be testing every Federal employee. It is going to be those in sensitive positions where national security is concerned, or where the health and welfare of the people of this country are at risk, such as air traffic controllers?

Mr. WILLARD. Those are the kinds of jobs that would subject to the random testing authorized under the order.

Mr. BURTON. Right, but you are not going out just testing every clerk and every Federal employee regardless of the type of position they hold. It is where there is a sensitive position where there's national security interests, or where the safety of this country is at risk.

Mr. WILLARD. That is what the President's order provides.

Mr. BURTON. It sounds like to me you gave this a lot of thought before you came up with the program and it sounds like a well thought out program that should be embraced by most people. I once again thank you for being with us.

Mr. ACKERMAN. Could you just tell me how many people fit into that category of people who are going to be tested?

Mr. WILLARD. The category is not a rigid category. We don't know the exact number. In part it depends upon the determinations that are made by agency heads in the course of implementing the order.

Mr. ACKERMAN. The administration has no idea of how many Federal employees we have that are in sensitive positions?

Mr. WILLARD. A sensitive position is defined a lot of different ways for different purposes.

Mr. ACKERMAN. For the purpose of drug testing.

Mr. WILLARD. The way we have defined it here does not permit us to know the exact number. I know that it involves a substantial number of employees because, for example, we have a large number of employees who work at the Defense Department who have access to secret or top secret information. And so as my prepared statement indicates, we know it does cover a large number of employees because there are a lot of Federal employees who have those kinds of jobs.

Mr. ACKERMAN. Do we have any idea of a range? We have seen numbers and heard others testify that it is far in excess of a million, which would make it approximately half of the Federal employees who would fall into this category of having to have their urine tested in the interest of national security. Is that number accurate? Give or take a quarter of a million?

Mr. WILLARD. I can't disagree with that number, Mr. Chairman, because I know that the Department of Defense alone employs a large number of civilians in that range, most of whom do have access to either secret or top secret classified information.

The Department of Defense, I am sure you are aware, Mr. Chairman, is the largest employing agency, even of civilians, in the Federal Government.

Mr. ACKERMAN. So that is about one out of every two people would be required to be tested. I am not trying to nail you down on a specific number. I am just trying to, in my own mind, understand the scope of this.

Mr. WILLARD. I understand there are 2.8 million Federal civilian employees.

Mr. ACKERMAN. Counting the Postal employees.

Mr. WILLARD. If you exclude the Postal Service then I think there are 2.1 million or something like that.

Mr. ACKERMAN. 2.1.

Mr. WILLARD. Now, again, within those numbers, the question of which of them, and how many of them, will actually be subject to a test, is left up to the agency heads to decide in light of the sensitivity of the jobs and the other factors that I have discussed previously.

Mr. ACKERMAN. Mr. Willard, we thank you very much for your patience and stick-to-itiveness and the length of your testimony—we do appreciate it. We have different philosophical points from

which we come, and hopefully, in the interest of our Nation, we'll come to some kind of accommodation and approach.

I have a firm suspicion that this is going to have to be decided in the courts. Thank you very much.

Mr. WILLARD. Thank you, Mr. Chairman, I appreciate the opportunity to be here today.

[The prepared statement follows:]

STATEMENT OF RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee--

I appreciate the opportunity to be here this morning to talk about the serious drug problem facing our nation and the President's goal of establishing a drug-free federal workplace. Although the war against illegal drugs can and must be fought on many fronts, the President's program recognizes that we cannot devote our efforts solely to law enforcement--we must also reduce the demand for illegal drugs. The administration believes that the federal government has a duty to adopt a leadership role in reducing the demand for illegal drugs by attaining a drug-free federal workplace. We must make clear that drug use by federal employees--whether on or off duty--is unacceptable conduct that will not be tolerated. The Administration's program, as set forth in Executive Order 12564, is designed to achieve not only a drug-free federal workplace, but also to serve as a model for similar programs in the private sector. We also hope that the federal initiative will provide an incentive for state and local government to initiate their own programs that will serve the unique needs of their local communities.

I would also like to note at the onset that the drug testing program I will address today is only one means by which the Executive Order will help us to achieve a drug-free workplace. The Executive Order requires agency heads to develop plans that must include a statement of agency policy, Employee Assistance Programs, supervisory training programs, and procedures to put

drug users in contact with rehabilitation services. Drug testing is a diagnostic tool to be used along with other evidence of drug use that could be used to identify drug users. Of course, an aggressive program of public education would be continued to warn of the dangers of illegal drug use.

The Federal government is just one of an increasing number employers who have recognized a need to create an environment of zero tolerance for drug use by drug testing employees. In fact, "testing" is a very effective way to treat drug abuse in the workplace. When Dr. Charles R. Schuster, Director of the National Institute on Drug Abuse, testified before Congress last summer, he emphasized that "the integration of drug screening into programs of treatment, prevention and drug education will prove to be a highly effective way to manage substance abuse problems in industry."[1] Dr. Schuster also pointed out that testing can be an extremely useful tool within the context of an overall program or policy.

Because of the high rate of illegal drug abuse in our society and its debilitating effects on the workforce, both public and private employers are increasingly instituting drug testing programs to deter employee's use of illegal drugs. In private industry, approximately 30 percent of the Fortune 500 companies, including Ford Motor Company, IBM, Alcoa Aluminum, Lockheed, Boise Cascade and the New York Times have instituted

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[1] Statement of Dr. Charles R. Schuster before the Select Committee on Narcotics Abuse and Control, U.S. House of Representatives on May 7, 1986, at p.6.

testing programs using urinalysis for drug detection. Testing programs such as these have been enormously successful resulting in fewer-on-the-job accidents, increased productivity and improved employee morale.[2] Consequently, their use is growing. It is estimated that an additional 20 percent of Fortune 500 companies will institute drug testing programs within the next two years. The success of these programs gives us real cause to hope that a carefully implemented program of drug testing can lead to real progress in the war on drugs.

Before turning to the specifics of the program under the Executive Order, I would like to reiterate a point stressed by the President in his recent address to the nation: no matter how much the government does about the problem of drug abuse, in the long run, it is up to each American to make the drug-free decision. As the President stressed:

> As much financing as we commit, however, we would be fooling ourselves if we thought that massive new amounts of money alone will provide the solution. Let us not forget that in America people solve problems and no national crusade has ever succeeded without human investment. Winning the crusade against drugs will not be achieved by just throwing money at the problem.
>
> Your government will continue to act aggressively, but nothing would be more effective than for Americans simply to quit using illegal drugs. We seek to create

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[2] Employees who use drugs have three times the accident rate of non-users, double the rate of absenteeism, higher job turnover rates and cost three times as much in terms of medical benefits. See The Conference Board Research Report, "Corporate Strategies for Controlling Substance Abuse", The Conference Board, Inc., 1986; Peter Bensinger, "Drugs In The Workplace: Employer's Rights and Responsibilities"; National Institute on Drug Abuse National Household Survey.

> a massive change in national attitudes which ultimately will separate the drugs from the customer--to take the user away from the supply. I believe, quite simply, that we can help them quit.

Americans can beat the drug problem if we all work together as managers of the federal workplace, and guardians of public health and safety, it behooves us to begin with the problem in the federal workplace itself.

I

Let me turn now to the specifics of the President's program to foster a drug-free workplace. The Executive Order, by its very nature, sets forth a general authorization for a drug testing program without specifying in great detail how such a program would be conducted. While the details on how the Order will be implemented have yet to be decided, I would like to take this opportunity to elaborate on the sort of program which we envision and stress some of the protections which are to be included.

1. Employees Covered by the Random Testing Requirement. Under the President's Executive Order, the head of each agency can order testing of any employee where there is reasonable suspicion of drug use, in the course of a safety investigation, or as a follow-up to a rehabilitation program. Random or uniform drug testing would only apply to "employees in a sensitive position", defined in section 7(d) of the order by reference to

five separate catagories. These would include law enforcement personnel, employees designated Special-Sensitive, Critical-Sensitive and Noncritical-Sensitive under federal personnel rules, all presidential appointees, all employees with a secret and top secret security clearances and any other employees whom that agency head determines hold positions "requiring a high degree of trust and confidence."

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

In addition, the testing could take the form of random testing of only a fraction of covered employees each year. Our program will be flexible--testing frequency can be adjusted based upon extent of drug use and degree of job sensitivity. Most of these issues have yet to be resolved, but my point is that it is

misleading to imply that millions of employees will automatically be tested.

Of course, voluntary testing programs will be set up for non-sensitive employees. Finally, the order authorizes any applicant for a job to be tested for illegal drug use. Section 3(d).

2. Reliability of Testing Procedures. Many critics of drug testing have alleged that the "false positive" [3] error rate for the most commonly used drug tests can be as high as 20%, clearly an unacceptable level given the serious consequences which can follow a finding that an employee has used drugs. And there have apparently been abuses in the private sector, where employers have discharged employees based solely on a single, positive result from an unreliable first screening.

However, the Administration's proposal contains numerous safeguards to ensure reliability and fairness. First and foremost, the administration will not base any action on an initial test. Instead, following a positive test result indicating drug use, we would test the same sample using a second, much more reliable devices, such as the gas chromatography/mass spectrometry (GC/MS) test. This test is somewhat more expensive than the initial screening, but, as the

[3] "False positive" refers to a test result which erroneously concludes that a subject is using drugs. A "false negative" means that a test failed to detect the actual presence of drugs in a specimen.



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Office of Technology Assessment (OTA) has recognized, is virtually 100% reliable. We would agree with OTA's recent statement before this subcommittee that "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." Testimony of Lawrence Miike, at pp 13-14.

Moreover, the order would require that, before conducting a drug test, the agency shall inform the employee of the opportunity to submit medical documentation that may support a legitimate use of a particular drug. Section 4(b). And all such information, as well as test results themselves, would be kept confidential. Section 4(c). In addition, the order provides that employees may rebut a positive drug test by introducing other evidence that an employee has not used illegal drugs. Technical and scientific guidelines are being drawn up by the Department of Health and Human Services. I can assure the Subcommittee that we have an unshakable commitment to ensuring the absolute integrity of our program.

Of course, there would be no way to detect a "false negative", short of performing the GC/MS in every case, which we do not see as cost-effective. However, a properly run testing program, such as that of DOD, only produce results in false negatives in 5% to 10% of samples, an acceptable number.

3. Privacy Concerns. Because there is a danger of an individual attempting to adulterate or substitute a specimen,

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

In an attempt to minimize the intrusiveness of the required drug test, the administration's Executive Order provides that "[p]rocedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided." Section 4(c). Although this might make it easier to adulterate a sample, it has been our experience under testing programs, that the mere fact that a test is required will ensure a significant deterrent effect. The percentage of employees who are sufficiently committed to illegal drug use that they are prepared to chemically tamper with a specimen, or to substitute a "clean" specimen, is so low as to have only a marginal effectiveness on the effect of the program.[4] We feel that with this single change, the program will be no more intrusive on an individuals privacy than an ordinary visit to the doctor.

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[4] After the 60 day general notice, testing need not be announced in advance, making it difficult to be prepared every day. Also, we could test for chemical tampering and where it is indicated, retest with observation.

4. The Non-Punitive Nature of the President's Program. Our program is premised on the President's strongly-held belief that federal employees who are found to be using drugs should be offered a "helping hand" to kick their habit. Each agency would be required to establish Employee Assistance Programs to ensure an opportunity for counseling and rehabilitation, Section 2(b)(2), and to refer employees to counseling if found to be using, illegal drugs. Section 5(a). The sixty-day warning period prior to implementation of a drug testing program would allow casual users to cease and addicts to come forward and request treatment. Moreover, no disciplinary action would be required for an employee who comes forward voluntarily and agrees to be tested, obtains counseling or rehabilitation, and refrains from illegal drug use in the future. Section 5(b).

Obviously, agencies must have the discretion to relieve employees in sensitive, and potentially life-threatening positions, of their assignments where drug use is indicated. Section 5(c). However, even here, the agency head would have the discretion to allow an employee to return to a sensitive assignment as part of a rehabilitation program.

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

5. Procedural Protections. Career employees in the civil service are protected by statute from preemptory dismissal or

discipline by their superiors. Instead, due process protections included in the Civil Service Reform Act ensure them of the right to notice and opportunity to respond before any adverse personnel action is taken and the right to an impartial adjudication of any subsequently filed appeal. None of these rights would be abrogated by the President's Executive Order, which expressly provides that "[a]ny action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act." Section 5(g).

II

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

Many critics of the President's program allege that drug testing contravenes the Fourth Amendment. The Justice Department recently filed a brief in support of the constitutionality of the Boston Police Department's drug testing program which sets forth our position on this issue in great detail. (A copy of our brief in that case, Guiney v. Roache, has been provided to the Subcommittee.) In that brief we explain that drug testing does

not implicate Fourth Amendment interests and that, even if it does, the reasonableness of random testing of employees in sensitive positions fully comports with the Fourth Amendment. A copy of the brief is attached to this testimony.

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

III

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

With respect to the first issue, we believe that a drug-free requirement for federal employees is reasonably related and furthers "the efficiency of the service" because illegal drug use - whether on or off duty - is inconsistent with the nature of public service, undermines public confidence in the government and entails unwarranted costs in terms of employee productivity.

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

"nexus" between employee misconduct for which severe sanctions may be imposed and the employee's performance of his job.[5]

Within these constraints, the President has broad authority to define conditions of employment. Under 5 U.S.C. §3301, the President may prescribe regulations for the admission of employees that "will best promote the efficiency of the service," as well as "ascertain the fitness of applicants" for employment. This authority is contained under 5 U.S.C. §7301 which explicitly recognizes the President's authority to prescribe "regulations for the conduct of employees in the executive branch." These provisions afford the President broad discretion to define conditions of employment that will best promote the efficiency of the service. The President exercised his power under these authorities when Executive Orders were issued freezing federal hiring in 1981, and later barring the reemployment of air traffic controllers for participating in an illegal strike. The imposition of a drug-free requirement for federal employees is no less of an action to further the efficiency of the service.

First, there is no logical reason why federal service which turns on public trust requires tolerance of on-going illegal

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

behavior by public servants. As noted above, the courts have recognized that "where an employee's misconduct is contrary to the agency's mission, the agency need not present proof of a direct effect on the employee's job performance," Allred v. Department of Health and Human Services, 786 F.2d 1128, 1131 (Fed. Cir. 1986). Similarly, "Congress expressly permitted removal of employees whose actions might disrupt an agency's smooth functioning by creating suspicion, distrust, or a decline in public confidence." Borsari v. Federal Aviation Authority, 699 F.2d 106, 112 (2d Cir. 1983). The illegal use of drugs by a federal employee--whether on or off duty--is inconsistent with the nature of public service and undermines the general confidence of the public in government. It also creates suspicion and distrust that is inimical to the cooperation among employees necessary for the efficient operation of an agency. See Wild v. United States Department of Housing and Urban Development, 692 F. 2d 1129, 1133 (7th Cir. 1982).

Second, employee drug use imposes an extraordinary cost on the government in terms of the safety of the workplace and employee productivity. Studies by the National Institute on Drug Abuse document that employees who use drugs have three times the accident rate as non-users, double the rate of absenteeism, higher job turnover rates and cost three times as much in terms of medical benefits. These high costs provide a sufficient foundation for any requirement that federal employees abstain from the use of illegal drugs, and demonstrate that there is a

clear nexus between drug abuse, employee productivity and the "efficiency of the service."

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

Now let me turn briefly to the Rehabilitation Act, 29 U.S.C. §791, and its effect on the President's Executive Order. That Act prohibits discrimination against, and requires accommodation of persons suffering from handicapping conditions. Current regulations include drug addiction as a handicapping condition. 29 C.F.R. §1613.702. The Executive Order contains provisions to ensure that an employee who is addicted to drugs will receive counseling and therapy, Section 5(a), as required by the Rehabilitation Act. The level of accommodation provided is, we believe, adequate to satisfy the requirements of the Act.

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

Section 103 of the Administration's bill would provide that an individual could not be handicapped merely by reason of his or her drug addiction. (Those with other, physical, handicaps, would still be considered "handicapped" under the Act even if they are also drug users.) This change is needed because of the propensity of some courts to adopt an overly broad reading of the

Act, requiring repeated offers of rehabilitation before allowing the government to take action against drug addict who is unable to perform his job. See Whitlock v. Donovan, 598 F. Supp. 123 (D.D.C. 1984); Healy v. Bergman, 609 F. Supp. 1448 (D. Mass. 1985). It makes no sense to permit an employee to seek treatment, come back to work, fall off the wagon and resume drug use and then seek treatment again and again and again.

IV

Finally, I would like to discuss the various pieces of legislation which have been introduced bearing on the issue of drug testing. First, we have the administration's bill, which I understand will be introduced in the Senate by Senator Robert Dole and in the House by Congressman Shaw. While not expressly authorizing a drug testing program, it would make a useful contribution by clarifying current law to make clear that neither the Rehabilitation Act nor the Civil Service Reform Act would affect our program. I should stress at the outset that we feel that the President's program, as set forth in Executive Order 12564 is fully consistent with the requirements of those two statutes, for the reasons set forth above. However, we can foresee legal challenges based in whole or in part on those statutes, and we feel that Congress ought to amend the law to set those issues to rest.

Two other bills would also authorize or require drug testing in some measure. Congressman Clay Shaw's bill, H.R. 4636, would require that each federal agency and member of Congress institute a drug testing program for employees having access to classified information. This bill is premised on the sound recognition of the fact that employees with drug habits are particularly susceptible to blackmail and the temptation to sell classified information to agents of foreign government in order to get money to buy drugs.

Congressman Charles Schumer recently introduced H.R. 5530, a bill to extend many of the protections which will be included in the administration's drug testing program to similar programs in the private sector. While considerations of federalism and other limitations on federal authority may preclude us from supporting a sweeping federal regulatory scheme in this area, we are heartened by Congressman Schumer's recognition that a carefully tailored program of drug testing can play a major role in reducing the scourge of drug use. We also share his view that any program of drug testing must be carefully designed to include basic protections to ensure accuracy and fairness. A second confirmatory test if an initial screening indicates drug use and an opportunity for the employee to examine test results are clearly essential to any effective program. It is our hope that firms in the private sector would voluntarily adopt these protections without the need for federal legislation.

Finally, we come to H.R. 5531, Mr. Chairman. This legislation would bar any use of drug tests in the federal service except where two of an employee's supervisors concur that his performance is impaired and that the impairment is due to his "then being under the influence of a controlled substance." Thus, this approach would not only bar random testing, but would also bar testing where a supervisor concluded that there was a reasonable suspicion of off-duty drug use. We cannot share the view that the use of illegal drugs is acceptable behavior as long as it is not done on the job. The President feels that there is too much at stake to permit federal employees with the responsibility for public health, safety and national security the unrestricted right to use marihuana, cocaine, heroine or PCP as long as they not do it at the office.

This bill would effectively block most existing drug testing programs; only the CIA and NSA would be exempted from its restrictions. We cannot share the belief that illegal drug use by agents of the FBI and DEA--and both of these agencies recently instituted drug testing programs--is not something we should be trying to detect and halt.

Moreover, even the limited testing which the bill purport to authorize--upon reasonable suspicion of the employee then being under the influence of drugs--would not be effective. By authorizing suit against the government for any infringement of rights under the statute, the bill would have a chilling effect on any exercise of this authority.

We do not believe that H.R. 5531 is premised on a realistic recognition of the very real problems of drug use. Instead it seems to accept and countenance drug use by federal employees, by codifying a right to be free from discipline for such behavior. We simply have no sympathy for that view Mr. Chairman. And we do not feel that the American people share it either.

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

Mr. ACKERMAN. Our next witnesses will be Mr. William J. Anderson, the Assistant Comptroller General for General Government Programs, and Mr. Harry R. Van Cleve, General Counsel, General Accounting Office.

Gentlemen, welcome. Please take your time, make yourselves at home. I am sorry for the long wait that you endured before joining us at the table.

STATEMENTS OF WILLIAM J. ANDERSON, ASSISTANT COMPTROLLER GENERAL FOR GENERAL GOVERNMENT PROGRAMS, AND HARRY R. VAN CLEVE, GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE

Mr. ANDERSON. Good morning, Mr. Chairman.

Mr. ACKERMAN. Good morning.

Mr. ANDERSON. What I would like to do, sir, is that Mr. Van Cleve and a number of us have worked very carefully to come up with a bunch of carefully chosen words that are in a very short statement. With your permission, I will read the statement in its entirety and invite you to break in at any time as we proceed.

Mr. ACKERMAN. Without objection. Please proceed.

Mr. ANDERSON. Thank you.

It is a pleasure to appear before you today to comment on the President's Executive order requiring mandatory drug testing of Federal employees. In brief, we believe that mandatory drug testing as provided for in the order raises a constitutional problem which will ultimately be decided by the courts. Notwithstanding this concern, the Executive order contains some positive approaches to combating drug abuse.

With respect to the constitutional problem, the Executive order does raise one. The issue is whether certain aspects of the testing programs called for would violate the fourth amendment to the U.S. Constitution which protects individuals from unreasonable searches.

Most courts that have considered urinalysis testing of public employees for illegal drug use have held that the fourth amendment allowed such testing only when there was a reasonable suspicion that the persons to be tested were users of controlled substances or had been involved in extraordinary circumstances. Thus, decided cases have, for example, permitted testing of bus operators involved in serious accidents and city employees working around high voltage wires.

Read literally, it is questionable that the mandatory testing programs would meet current fourth amendment requirements. The order allows random testing, that is, testing without showing reasonable suspicion of drug use or other extraordinary circumstances.

The testing is to be limited to employees in sensitive positions, but the definition of such employees is very broad. It includes employees who have been granted, or may be granted, access to classified information as well as a broad spectrum of individuals an agency head determines to be involved in 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. Thus, the term "employee in a sensitive position" would

appear to cover a substantial part of the Federal work force. And you got some idea of that from Mr. Willard earlier.

We will have to wait and see whether the regulatory guidance provided by OPM and HHS and the manner of implementation by the various agencies are sufficiently circumscribed to avoid any constitutional infirmity.

Already the National Treasury Employees Union has filed suit in the U.S. District Court for the Eastern District of Louisiana challenging the Executive order both on constitutional and other grounds. Therefore, there is reason to believe that the legal issues raised by the drug testing program will be resolved in the courts.

If implemented, widespread testing programs in all likelihood would result in some benefits. A deterrent value would be established, some drug users identified and perhaps rehabilitated, and the overall health and fitness of Federal employees might be enhanced to the benefit of agencies and citizens. However, these benefits are difficult to measure.

We are not aware of any showing of the extent of drug abuse in Federal service or the impact of such use on employee performance. According to a 1982 survey by the National Institute on Drug Abuse, drug abuse in the general population sharply declines after the age of 26. In this age category, 6.6 percent used marijuana, 1.2 percent used cocaine and less than one-half percent used hallucinogens or heroin. Ninety-four percent of the Federal work force are over age 26; the average age is 42.

We suspect, given the screening processes that precede Federal employment and security clearances, that drug abuse among the Federal work force would be less than in the general population. We recognize, of course, that a small number of drug abusers would be capable of inflicting grievous harm on national well-being, depending on their positions.

Because we do not know the number of individuals to be tested, we do not have a basis for estimating the cost of the testing program. The administration estimates $56 million in budgetary outlays. Although significant, this figure does not quantify the "cost" of governmental infringement on privacy rights, including the cost to defend the program in the courts.

With regard to purposes of the program that relate to reduced productivity, the Government has some existing tools. When individual job performance or overall productivity suffers, supervisors have the responsibility to take appropriate action to relieve that problem. Upon identification, alcohol abusers, drug abusers, or other impaired workers may be referred for rehabilitation or disciplined in some appropriate fashion. We believe such measures can be used effectively to rid the workplace of drug users.

There are other approaches to combat drug abuse. The Executive order does call for several worthwhile endeavors toward the Government's legitimate interest in a drug-free workplace. Probably the most substantive good that comes of it is to focus attention beyond alcohol and on drugs from the standpoint of managers and supervisors in the Federal work force. Such endeavors include:

(1) Employee assistance programs emphasizing education, counseling, referral to rehabilitation and coordination with community resources;

(2) Supervisory training to assist in identifying and addressing drug abuse by agency employees; and

(3) Procedures for employees to voluntarily seek counseling and rehabilitation services and for supervisors to make such referrals while protecting personal privacy.

Aside from these initiatives, the Government may be able to identify a number of particularly sensitive positions where drug testing would comply with Fourth Amendment requirements. While we are not in a position to describe such positions, the number of employees covered would need to be constrained to meet a stated, compelling governmental need while minimizing the Government's intrusion on the privacy of the Federal worker. Any testing program must produce reliable results.

That concludes our prepared statement, Mr. Chairman. Mr. Van Cleve and I will be happy to answer any questions.

[The statement of Messrs. Anderson and Van Cleve follows:]

UNITED STATES GENERAL ACCOUNTING OFFICE
Washington, D.C. 20548

FOR RELEASE ON DELIVERY
EXPECTED AT 10:30 A.M.
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STATEMENT OF

WILLIAM J. ANDERSON

ASSISTANT COMPTROLLER GENERAL

FOR GENERAL GOVERNMENT PROGRAMS

AND

HARRY R. VAN CLEVE

GENERAL COUNSEL

BEFORE THE SUBCOMMITTEE ON HUMAN RESOURCES

COMMITTEE ON POST OFFICE AND CIVIL SERVICE

HOUSE OF REPRESENTATIVES

Mr. Chairman and Members of the Subcommittee, it is a pleasure to appear before you today to comment on the President's Executive Order requiring mandatory drug testing of federal employees. In brief, we believe that mandatory drug testing as provided for in the Order raises a constitutional problem which will ultimately be decided by the courts. Notwithstanding this concern, the Executive Order contains some positive approaches to combatting drug abuse.

Constitutional problem

The Executive Order raises a constitutional problem.[1] The issue is whether certain aspects of the testing programs called for would violate the Fourth Amendment to the United States Constitution which protects individuals from unreasonable searches. Most courts that have considered urinalysis testing of public employees for illegal drug use have held that the Fourth Amendment allowed such testing only when there was a reasonable suspicion that the persons to be tested were users of controlled substances or had been involved in extraordinary circumstances. Thus, decided cases have permitted testing of bus operators involved in serious accidents and city employees working around high voltage wires.

[1]The same issue was addressed by us in B-223280, Sept. 11, 1986, in which we commented on H.R. 4636--a bill to require controlled substance testing programs for federal employees and contractor personnel having access to classified information. On the constitutional issue, our comments both earlier and here are limited to urinalysis drug testing. The Order does not necessarily require this kind of testing. We append a copy of those comments.

Read literally, it is questionable that the mandatory testing programs would meet current Fourth Amendment requirements. The Order allows random testing, that is, testing without showing reasonable suspicion of drug use or other extraordinary circumstances. The testing is to be limited to employees in "sensitive" positions, but the definition of "employee in a sensitive position" is very broad. It includes employees who have been granted, or may be granted, access to classified information as well as a broad spectrum of individuals an agency head determines to be involved in 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. Thus, the term "employee in a sensitive position" would appear to cover a substantial part of the federal workforce.

We will have to wait and see whether the regulatory guidance provided by OPM and HHS and the manner of implementation by the various agencies are sufficiently circumscribed to avoid any constitutional infirmity.

Already the National Treasury Employees Union has filed suit in the United States District Court for the Eastern District of Louisiana challenging the Executive Order both on constitutional and other grounds. Therefore, there is reason to believe that the legal issues raised by the drug testing program will be resolved in the courts.

Need for widespread testing

If implemented, widespread testing programs in all likelihood would result in some benefits. A deterrent value would be established, drug users identified and perhaps rehabilitated, and the overall health and fitness of federal employees might be enhanced to the benefit of agencies and citizens. However, the benefits are difficult to measure.

We are not aware of any showing of the extent of drug abuse in federal service or the impact of such use on employee performance. According to a 1982 survey by the National Institute on Drug Abuse, drug abuse in the general population sharply declines after the age of 26. In this age category, 6.6 percent used marijuana, 1.2 percent used cocaine and less than one-half percent used hallucinogens or heroin. Ninety-four percent of the federal workforce are over age 26; the average age is 42. We suspect, given the screening processes that precede federal employment and security clearances, that drug abuse among the federal workforce would be less than in the general population. We recognize, of course, that a small number of drug abusers would be capable of inflicting grievous harm on national well-being, depending on their positions.

Because we do not know the number of individuals to be tested, we do not have a basis for estimating the cost of the testing program. The Administration estimates $56 million in budgetary outlays. Although significant, this figure does not quantify the "cost" of governmental infringement on privacy rights, including the cost to defend the program in the courts.

With regard to purposes of the program that relate to reduced productivity, the government has some existing tools. When individual job performance or overall productivity suffers, supervisors have the responsibility to take appropriate action to relieve that problem. Upon identification, alcohol abusers, drug abusers, or other impaired workers may be referred for rehabilitation or disciplined in some appropriate fashion. We believe such measures can be used effectively to rid the workplace of drug users.

Other approaches to combat drug abuse

The Executive Order does call for several worthwhile endeavors toward the government's legitimate interest in a drug-free workplace:

--employee assistance programs emphasizing education, counseling, referral to rehabilitation and coordination with community resources;

--supervisory training to assist in identifying and addressing drug abuse by agency employees; and

--procedures for employees to voluntarily seek counseling and rehabilitation services and for supervisors to make such referrals which protect personal privacy.

Aside from these initiatives, the government may be able to identify a number of particularly sensitive positions where drug testing would comply with Fourth Amendment requirements. While we are not in a position to describe such positions, the number of employees covered would need to be constrained to meet a

stated, compelling governmental need while minimizing the government's intrusion on the privacy of the federal worker. Any testing program must produce reliable results.

This concludes my prepared comments. I would be happy to answer any questions you may have.

United States
General Accounting Office
Washington, D.C. 20548

Comptroller General
of the United States

B-223280

September 11, 1986

The Honorable William D. Ford
Chairman, Committee on Post
Office and Civil Service
House of Representatives

Dear Mr. Chairman:

Your letter of May 20, 1986, asked for our views on H.R. 4636--a bill to require controlled substance testing programs for federal employees and contractor personnel having access to classified information. Although the decision to establish these programs is a matter of policy for the Congress to decide, we cannot support enactment of the proposed legislation. The bill raises a constitutional problem and is vague in numerous respects. In addition, the potential benefits are unmeasurable while the estimated costs are significant.

Bill provisions

The bill would require the heads of congressional offices and agency heads to implement drug testing programs for themselves, their employees, and contractors whose duties involve access to classified information.

Under the bill, each Member of Congress, the employing authority for other congressional employees, and agency heads would be responsible for implementing a testing program for their employees having access to classified information. The bill defines "Member of Congress" as a (1) Senator, (2) Member of the House of Representatives, (3) Delegate to the House of Representatives, and (4) the Resident Commissioner from Puerto Rico. The definition of "congressional employee," referenced to 5 U.S.C. 2107, is

(1) an employee of either House of Congress, of a committee of either House, or of a joint committee of the two Houses;

(2) an elected officer of either House who is not a Member of Congress;

(3) the Legislative Counsel of either House and an employee of his office;

(4) a member of the Capitol Police;

(5) an employee of a Member of Congress if the pay of the employee is paid by the Secretary of the Senate or the Clerk of the House of Representatives;

(6) the Architect of the Capitol and an employee of the Architect of the Capitol;

(7) an employee of the Botanic Garden; and

(8) an employee of the Capitol Guide Service.

For the executive branch, the bill uses the Administrative Procedure Act definition of an agency: any (1) executive department, (2) military department, (3) government corporation, (4) government controlled corporation, (5) or other establishment in the executive branch of the government (including the Executive Office of the President), or (6) any independent regulatory agency.

Constitutional problem

The constitutional problem raised by H.R. 4636 is whether the controlled substances testing programs provided for would violate the Fourth Amendment to the United States Constitution which protects the privacy of individuals from invasion by unreasonable searches of the person and those places and things wherein an individual has a reasonable expectation of privacy. Terry v. Ohio, 392 U.S. 1,9 (1968); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985). Whether an individual has a reasonable expectation of privacy and whether governmental intrusions are reasonable are to be determined by balancing the claims of the public against the interests of the individual. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976).

Most courts that have considered the issue of drug testing of public employees have found that a urinalysis test constitutes either a search or a seizure within the meaning of the Fourth Amendment. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266-67 (7th Cir. 1976); Storms v. Coughlin, 600 F. Supp. 1214, 1217 (S.D.N.Y. 1984). Moreover, most courts have found that random testing violates the Fourth Amendment.

In McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), the Court found violative of the Fourth Amendment an Iowa Department of Corrections policy that subjected the Department's correctional institution employees to, among other things, urinalysis testing for drugs. The Court held that the Fourth Amendment allowed testing of urine only when there was reasonable suspicion based on specific objective facts and reasonable inferences drawn from the

facts that an employee was under the influence of a controlled substance. Id. at 1130. A similar decision was rendered in the United States District Court for the District of Columbia involving a school bus attendant. Jones v. McKenzie, 628 F. Supp. 1500 (D.C.D.C. 1986).

Furthermore, although a number of other courts have sustained urinalysis testing of public employees for drugs, they have done so only when there existed reasonable suspicion of drug use, or extraordinary circumstances justifying the test. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976) (Chicago Transit Authority required Transit Authority bus operators to submit to blood and urine tests either when they were suspected of using narcotics or alcohol or after being involved in a serious accident); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008-9 (D.C. Ct. App. 1985) (Police Department regulation allowing urinalysis testing of members of the police force when a Department official had a reasonable, objective basis to suspect that urinalysis would yield evidence of illegal drug use); Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D.Ga. 1985) (City required urinalysis tests of city employees who worked in the Electrical Distribution Division around high voltage wires and were observed smoking marijuana by an informant).

Although there have been several instances where courts have sustained random urinalysis testing for drugs, they have done so in situations involving military personnel, prisoners, and thoroughbred race horse jockeys. The decisions permitting such tests of military personnel emphasized both that (1) military personnel have a lesser expectation of privacy than civilian employees under the Fourth Amendment, and, thus, have not been accorded the same protections, and (2) incidence of drug abuse in the Armed Forces is extensive. Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); Committee for GI Rights v. Callaway, 518 F.2d 466, 476-77 (D.C. Cir. 1975); see Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. Ct. App. 1985). The decision permitting tests of prisoners emphasized that the constitutional rights of prisoners give way when in conflict with prison security needs. Storms v. Couglin, 600 F. Supp. 1214, 1218-19 (S.D.N.Y. 1984). In another instance a United States District Court sustained New Jersey State Racing Commission regulations providing for random urinalysis tests of jockeys at race tracks, Shoemaker v. Handel, 619 F. Supp. 1089, 1099-1102 (D.N.J. 1985). The Court specifically distinguished the McDonell case on the grounds that (1) horse racing was one of a special class of relatively unique industries that had been subject to pervasive and continuous state regulation; (2) jockeys were licensed by the state; and (3) the state had a vital interest in insuring that horse races were safely and honestly run, and that the public perceived them as such. Id. at 1102.

Consistent with the decided cases, it would not appear that the controlled substances testing programs authorized by H.R. 4636 meet

Fourth Amendment requirements. The bill does not provide a reasonable suspicion basis for the testing that most of the decided court cases have found is necessary. Although courts have sustained random urinalysis testing of military personnel and prisoners, they have done so where Fourth Amendment rights are diminished, and, also as regards military personnel where substantial drug abuse was shown. Arguably, the Shoemaker court's reasons for testing jockeys would not be inconsistent with the reasons for testing federal employees and Members of Congress and their staffs having access to classified information. However, although Shoemaker sustained regulations for random urinalysis testing, most other courts have supported urinalysis only where there existed reasonable suspicion of drug use. We also point out that we are not aware of any showing that there is a drug problem among the individuals to be tested under the bill.

In support of the bill, it has been suggested that accepting public employment under circumstances where random testing will be carried out operates as an implied consent[1] to the testing, and, thus allays any Fourth Amendment problems. Although there is minimal jurisprudence on this issue, what there is suggests that such consent would not render proper an otherwise improper search and seizure.

As a general matter, the Supreme Court has found it inherently coercive to give individuals a choice between exercising their constitutional rights or losing their jobs. Uniformed Sanitation Men Assn. Inc. v. Commissioner of Sanitation, 392 U.S. 280, 284-85 (1968); Garrity v. New Jersey, 385 U.S. 493, 496-500 (1967). In both instances, however, the constitutional right involved was the privilege against self-incrimination and not the Fourth Amendment.[2]

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[1]It is clear that consent to a search renders permissible under the Fourth Amendment what would not be permissible without a warrant. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). When consent is the justification for the search, the government bears the burden of demonstrating that it was freely and voluntarily given, and was not simply an acquiescence to a claim of lawful authority. United States v. Gomez-Diaz, 712 F.2d 949, 951 (5th Cir. 1983), cert. denied 104 S. Ct. 731 (1984).

[2]Nevertheless, in Garrity the Court relied on Boyd v. United States, 116 U.S. 616 (1886), where a statute offered the owners of certain goods an election between producing a document or forfeiting the goods. The Court found this choice to be a form of compulsion violative of both the Fourth and Fifth Amendments.

More particularly, only in McDonell, discussed above, has a federal court directly considered the consent issue in the context of random urinalysis testing of public employees for drugs though the consent given there was explicit: the employee had signed a form permitting searches of prison employees for security reasons at any time. The Court said that advance consent to future unreasonable searches was not a reasonable condition of employment. 612 F. Supp. at 1131. Since the court found the random urinalysis testing program to be unreasonable and therefore violative of the Fourth Amendment, signing of the consent form essentially was without effect.

In another instance in which an individual's right to visit a prison inmate was conditioned on her submitting to a strip search, a United State District Court held that submission to the search was not voluntary since consent was given under that inherently coercive circumstance. Cole v. Snow, 586 F. Supp. 655, 661 (D. Mass. 1984). Similarly, where a motorist driving through a national park was subjected to a roving stop by park police, a United States Court of Appeals denied that there had been an implied waiver of Fourth Amendment protections on the ground that government regulation of public parks was well known to the public. United States v. Munoz, 701 F.2d 1293, 1298-99 (9th Cir. 1983).

These cases suggest that consenting to random drug testing as a condition of employment would not satisfy Fourth Amendment requirements. Consent to the test arguably would be coercive and would not constitute an effective waiver of an otherwise impermissible search. This conclusion would appear more compelling when consent is merely implied than when directly given. At least when consent is directly given, an individual both has specifically agreed to the search and presumably would have had a better opportunity to consider the pros and cons of granting consent.

Nevertheless, there is at least one case that provides some support for the implied consent position. In United States v. Sihler, 562 F.2d 349, 350-51 (5th Cir. 1977), the United States Court of Appeals for the Fifth Circuit sustained a warrantless search of a prison employee as a reasonable security measure since the employee voluntarily accepted and continued an employment which he knew could subject him to random searches. In this case there was no written consent, but the employee had notice that prison employees would be subject to these searches. It should be pointed out, however, that though the court discounted this factor, the particular search was based on information from an informant that the employee would be bringing narcotics into the prison.

Vagueness of the bill

Aside from the constitutional problem, the bill is obscure in numerous respects. The bill is silent about the procedures for

administering and monitoring the drug testing programs. For example, the bill does not indicate what substances are to be tested and the frequency of the testing. Furthermore, the bill does not provide for a monitoring mechanism that would enhance the reliability of drug testing. In 1985, the Centers for Disease Control (CDC) published the results of a study evaluating the performance of 13 laboratories which served a total of 262 methadone treatment facilities by testing for six substances. Due to the error rate found, CDC concluded that drug treatment facilities should monitor the performance of their contract laboratories with quality-control samples.

The bill also does not assign responsibility for oversight. Such a single agency focal point would appear to be necessary to answer the many questions that organizations are likely to have on implementing such a program.

The bill does not address the actions agencies might take on individuals testing positively. Thus, the bill does not provide any guidance about how the offices and agencies implementing the drug testing programs would handle such consequences as revocation of security clearances, reassignment to non-sensitive areas, demotion, and termination of employment. Furthermore, the bill does not address the policy set forth in the Rehabilitation Act of 1970, as amended, and the Drug Abuse Office and Treatment Act of 1972, as amended. Pursuant to these acts, the Office of Personnel Management (OPM) states it is the policy of the federal government to offer appropriate prevention, treatment, and rehabilitation programs and services for federal civilian employees with drug problems and that short term counseling and/or referral is appropriate for these programs.

The bill also does not provide for due process protections for individuals adversely affected by actions taken by agencies. In a recent case involving the Merit System Protection Board's jurisdiction in a matter involving the revocation of a security clearance, the Board held that agencies need to provide (1) notice of the denial or revocation of a security clearance, (2) the reasons for the agencies' decisions, and (3) an opportunity for the employee to respond.

The bill does not define the term "controlled substance." Under current law, the Drug Enforcement Administration classifies more than 200 substances as controlled which are required to be under varying degrees of control over their production, distribution, prescribing, physical security, and record-keeping.[3] The

[3]A definition of controlled substances is provided in section 802 of Title 21 of the United States Code. That section refers to section 812 of the same title which sets forth five schedules of controlled substances and enumerates them.

Department of Defense's program for military personnel currently tests for six drugs and/or their metabolite(s): amphetamines, barbiturates, cannabinoids (marijuana), cocaine, opiates, and phencyclidine (PCP).

Benefits and costs

The potential benefits if the bill were enacted are not measurable. In all probability, a deterrent value would be established and some drug abusers identified and thus, national security better protected. In addition, similar to the objectives of a Department of Defense program, the health and fitness of employees might be enhanced to the benefit of agencies and U.S. citizens. It is difficult, however, to estimate the magnitude of such effects.

Complicating the measurement of effects is the fact that characteristics other than drug abuse may also have a bearing on individuals' trustworthiness. For example, recent news media accounts of espionage cases have focused attention on disclosures of national security information. These accounts have not shown that drug abuse was any more of a factor threatening national security than other characteristics. In addition, the Department of Defense directive on personnel security contains guidelines to assist in determining an individual's eligibility for employment, retention in sensitive duties, or access to classified information. The guidelines identify the following characteristics: financial irresponsibility, criminal conduct, connection to individuals residing in countries currently hostile to the United States, subversive activity, alcohol abuse, and security violations, in addition to drug abuse. The guidelines also identify factors and mitigating factors related to each characteristic which may be considered in determining whether to deny or revoke a clearance, but points out that each is to be an overall commonsense determination. Defense's policy is to subject individuals in selected positions to periodic reinvestigations on a 5-year recurring basis--another complicating factor in identifying the potential benefits of this bill.

The cost of controlled substance testing programs is more quantifiable. At the request of Representative Shaw who introduced the bill, the Congressional Budget Office (CBO) estimated the following costs:

| Fiscal year | Cost (in millions) |
|---|---|
| 1987 | $79 |
| 1988 | $84 |
| 1989 | $89 |
| 1990 | $94 |
| 1991 | $100 |

CBO estimated that about 4.5 million federal employees, military members, and contractor personnel have access to classified information and would be tested once a year for the presence of eight controlled substances. After an initial screening at a cost of $15, 5 percent would test positive and be given a second verification test that would cost $30.

The bill provides that the term classified information has the same meaning given that term by section 1 of the Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025. Consistent with this definition, the controlled substances testing programs would extend to civilian and military personnel having access to "confidential," "secret," and "top secret" information.

The number of individuals that CBO assumed have access to classified information appears to be reasonable. As of December 31, 1983,[4] the year for which we have the most complete data, about 4.2 million civilian, military, and contractor employees had confidential, secret, or top secret security clearances. Although less than CBO's, our figure is not current and does not include all personnel covered by the bill such as legislative branch employees.

CBO assumed that all 4.5 million individuals would be tested once a year since the bill is silent on this parameter, as CBO recognized. If organizations tested more or less frequently, the costs would obviously change. Also, the bill specifically states that military personnel are among those to be tested although it is not clear whether the bill envisioned that military personnel already subject to drug testing would also be tested under this program. According to a Defense official, each military service sets its own policy for determining who is subject to testing. Although Defense knows that all military personnel with security clearances are not presently tested, records do not exist specifying the numbers. As a result, we do not know the extent of potential duplication.

Since the substances to be identified by testing are not specified by the bill, CBO contacted laboratories to obtain information on the number of drugs for which testing is usually conducted. On the basis of this and other information, CBO assumed the programs called for by the bill would test for the presence of eight controlled substances which included the six in Defense's current program.

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[4]General Accounting Office testimony of Apr. 16, 1985, before the Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs.

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CBO's assumption of a two-step testing process is particularly appropriate. To greatly reduce the possibility that a cross reacting substance or a methodological problem could have created the positive test result, the National Institute on Drug Abuse advocates a two-step process using two different technologies. A Department of Defense official told us that Defense follows this two-step process for its ongoing drug testing program.

According to CBO, 10 percent typically test positive initially in tests conducted on people not having access to classified information. Since people having access to classified information have had background investigations, CBO assumed they would test positively less frequently and projected that 5 percent of those screened would test positive and the second test performed. CBO points out that the number of verification tests to be conducted, if any, is speculative since little is known about the use of controlled substances by individuals having access to classified information.

The CBO estimate appears to be a reasonable approximation of direct laboratory costs but does not include organizations' administrative costs. According to a Defense official, the Defense drug testing program for fiscal year 1985 tested about 2.3 million specimens at a cost of about $47 million--a figure which also does not include all administrative costs.

In summary, we cannot support enactment of the bill. We trust you will find our comments useful as your committee considers this proposal.

Sincerely yours,

Milton J. Socolar

for Charles A. Bowsher
Comptroller General
of the United States

Mr. ACKERMAN. Thank you very much.

Are you aware of any studies or surveys from which the administration might have been able to draw any conclusions in this area?

Mr. ANDERSON. No, I am not aware of any studies at all, much less ones that point with reliability to the incidence of drug abuse, for example, in the Federal work force, or any problems that result currently from abuse of drugs.

Mr. ACKERMAN. If there were any such study or numbers available, would you in general be aware of them?

Mr. ANDERSON. Yes, sir; I am sure that the work we did in connection with preparing for this hearing would have surfaced them.

Mr. ACKERMAN. So, then, we can be reliably sure that the administration's conclusions are based on numbers and statistics that do not exist?

Mr. ANDERSON. They are based on extrapolations of private sector experience in some cases, sir, so they are trying to assert that the——

Mr. ACKERMAN. Which, according to what you said before, is not necessarily reliable?

Mr. ANDERSON. That is correct, sir; and some of the private sector studies that are leaned on appear to be suspect in themselves.

Mr. ACKERMAN. Are you aware of how many cases there might be involving spies or the selling of national secrets on the part of Federal employees?

Mr. ANDERSON. No, sir; I am not. I read the press and I presume that there are other things going on that never make the papers—I have no sense of that. I am sure that there are few in number. I think I could say that with some degree of assurance.

Mr. ACKERMAN. Are there any numbers kept on those that are few in number, how many of the people involved are Federal employees who might be involved in the use of drugs?

Mr. ANDERSON. I am not aware of any such statistic, sir.

Mr. ACKERMAN. Are you aware of any one individual case even?

Mr. ANDERSON. Harry, are you?

Mr. VAN CLEVE. Mr. Chairman, as I guess most people have done, I read the newspapers as these various cases have been discussed in the press. I can recall no case involving a person accused of treason or espionage where drug use was part of the background of that person.

Mr. ANDERSON. I hesitate to concur with that totally. I do remember a case a couple of years ago involving civilians—contractor employees—sir, in California; if I remember correctly, I think one of them may have been feeding an expensive drug habit. I would be reluctant to say that there has never been an incidence where a contractor employee, or perhaps even a Government employee, has sold a secret in order to feed an expensive drug habit.

Mr. ACKERMAN. I have been hard pressed myself to find even one case in the last half a dozen years, at least, in which a Federal employee who would be covered in any way, form, or aspect by the President's order would have fallen into this category. It seems nonexistent—that I am just very curious—and I know this isn't a question to ask necessarily of either of you—I am just very curious as to why, when the discussion comes up, we keep having waved in

our face our country's honor and national security. And people seem to be leading us down the path to believe that there are wide-scale breaches in our national security—Federal junkies needing the money and selling our country down the river to the Commies.

I think that is a hysterical approach. And everybody agrees that drugs are not good, and being a spy for the other side is not nice, and selling America down the river isn't good. But there are no examples of this. And they seem to make a great leap because these things are bad, we should do something else. And there seems to be no correlation, unless I am just not finding one.

Mr. ANDERSON. I think intellectually we could all accept that the probability exists that, like Wall Street or some other place, there's a Federal employee out there that is hooked on drugs. Of course, drugs keep getting cheaper and cheaper. Cocaine is now an easy habit to feed. But heroin, for example, is still an expensive one.

Intellectually, I can accept there is somebody out there. But I really don't know what the implications are in terms of the Executive order or how far it means we should go in developing a drug testing program.

Mr. ACKERMAN. In section 5(h) of the order, it is unclear as to whether the test would be provided to the Department of Justice for investigative purposes, though the provision states that the tests are not to be conducted for gathering evidence for use in criminal proceedings. As stated, agencies are not required to report results to Justice, although they apparently may do so at the agency's discretion.

Do you see any problem with that practice?

Mr. VAN CLEVE. I beg your pardon, Mr. Chairman?

Mr. ACKERMAN. Do you have any problems with that practice?

Mr. VAN CLEVE. It does appear that while 5(h) says that tests may not be conducted for the purpose of gathering evidence for use in criminal proceedings, nevertheless, it is clear that agencies are free, if they wish, to report the results of all of their testing to the Department of Justice.

If that were in fact to happen, if an agency were to have conducted under this order many, many tests and report all positives to the Department of Justice, then I think the questions of the fourth amendment rights of the individuals involved are more acutely raised than they would be if only a question of employment were involved.

In other words, the purpose of the testing would then become very nearly that of law enforcement, even though it was not in fact administered for the purpose of criminal proceedings. And I think that fourth amendment tests would be harder to meet in that case.

Mr. ACKERMAN. Do you have any reasonable guess how much this testing program will actually cost?

Mr. ANDERSON. As you know, sir, the administration attaches a $56 million number. Let me throw some other numbers out that may reflect a little bit on that. The Congressional Budget Office came up with an estimate of the cost that may have been associated with H.R. 4636, if passed. They estimated that as many as 4½ million people—Federal employees and contractor employees—have access to classified material. And for a program of that mag-

nitude, they had first-year costs of $80 million or so running out beyond that.

I think that within the Department of Defense right now—and if you will bear with me just a second, I can give you some specific numbers that I had flagged for easy retrieval on what they are spending.

The Navy reportedly tests 1.8 million urine specimens annually at a cost of about $25 million a year, or approximately $13 per specimen. However, the Navy has its own drug screening laboratories which may hold the costs down.

I think that what we can have a little better idea on are the costs per test. The preliminary test would apparently run anywhere from $11 to $15. That has been the experienced range among Federal agencies.

The second test, the so-called GC/MS test, can run anywhere from $20 to $65, depending on the particular drug that you are isolating for the confirmatory assay—to use their language.

So if you are talking of a million and a half or so initial tests, you can work it out from there, Mr. Chairman; figure a 10 percent rate that would require a retest of some kind. I could develop some numbers here probably without too much difficulty.

Mr. ACKERMAN. We are talking about costs in excess of $56 million?

Mr. ANDERSON. It could exceed that, sir, yes.

In fact, there are other costs associated with the program beyond those associated with the costs of the tests themselves. This is the point that we make in the statement. In other words, there are a lot of people, a lot of work hours involved in that—lost time while the test is being taken; people involved in administering the tests; the people that would be associated in developing the various training programs that are provided for in the program. But for the tests themselves—it is strictly a function of how many tests there are—$56 million may not be bad. There's certainly a number of people out there that $56 million would be a good number for.

Now, let me take a million and work it out for you, if I may, sir. Thirteen dollars apiece on the initial test would give you $13 million. Ten percent of those would be 100,000 that you are going to pay, let's say, $50 apiece for. And right there I am talking of only around $18 million for the first round of tests, assuming that 10 percent require a confirmation test, and assuming that they are given once a year.

But, again, as I said, the other extreme is the $80 million that CBO estimated. H.R. 4636 provided for trying to keep 4.5 million people tested, you know, with new employees coming in, and retested from time to time. And that was going to be accomplished for about $80 million a year. So I think the $56 million is not a wild, high number, or an unduly low number.

Mr. ACKERMAN. Do you have any numbers that show what it costs to keep a person in a program or to rehabilitate a person who was on drugs?

Mr. ANDERSON. No, I don't, sir. We could provide numbers like that for the record based upon Government funded programs in the private sector.

Mr. ACKERMAN. We would appreciate that.

[The information follows:]

A 1982 National Institute on Drug Abuse report contained the results of a September 30, 1982, National Drug and Alcoholism Treatment Utilization Survey. Of 3,018 drug abuse treatment facilities responding to the survey, 2,875 units provided funding data and 2,870 units provided data on treatment costs per client. These units reported a total of $534 million in funding support for their respective fiscal years which included September 30, 1982. The average annual cost per budgeted client was $2,818. Detoxification was the most costly type of treatment and averaged $15,521 per client year—ranging from an average cost of $2,229 in an outpatient environment to an average cost of $50,751 in a hospital environment. Drug free/outpatient and maintenance/outpatient, the predominant types of treatment, cost an average of $1,575 and $2,174, respectively, per client year.

To obtain a perspective of current costs, we surveyed several treatment programs in the Washington, D.C., metropolitan area. They reported typical costs of about $1,300 per outpatient and $9,500 to $15,000 per inpatient.

Mr. ACKERMAN. We heard that there were 25 million hard drug abusers in the population, according to the testimony that we just heard. And if we presumed that we are aiming for a drug-free America, and you took 25 million and you put them in programs, I think that would be rather costly. And I am not saying that we shouldn't, but I am saying that if the administration is looking for a drug-free America, then we have to be prepared somewhere to pick up the cost.

Do you have any idea or any inkling where that real money would be coming from?

Mr. ANDERSON. No, I don't, sir. I really don't know what the number of additional people that might be put into treatment programs would be. If you assume, for example, that the incidence of cocaine use and heroin use in the Federal work force was the same as it was in the private sector, and you could identify all of them in the public sector working in the Federal work force, you would probably have around 50,000 people, if the incidence of use was the same as it is across all of the private sector. I am talking about maybe 2 percent, which is, if anything, a little liberal—if you could identify them all.

Given the number of people that are on treatment across the Nation, obviously, we have less money and less spots out there now for addicts who are coming forward. I know you are well aware of underfunded methadone programs and other programs across the country. But it would obviously have an impact to the extent that people are identified because these programs are expensive. The nonresidence ones, obviously, are not as expensive as those with some kind of a residency program, but there are some of those. And there you are talking really big money.

Mr. ACKERMAN. Are you aware of any of the administration's plans concerning the National Institutes and taking the money, some $15 million, from cancer research, and some $16 million from heart research, in order to fund this?

Mr. ANDERSON. No; I don't have direct knowledge of that, sir. I do know that the initiative provides for making more moneys available after some years of reducing the amount of moneys made available on that part of the war on drugs.

Mr. ACKERMAN. I thank both of you very much for your testimony and for your patience.

Mr. ANDERSON. Thank you, sir.

Mr. ACKERMAN. The final witness, now this afternoon, will be Mr. Allan R. Adler, legislative counsel, American Civil Liberties Union.

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

Mr. ADLER. Thank you, Mr. Chairman.

If it is all right with you, and in the interest of the brevity of time, I would ask you to submit my statement for the record. The statement that I have submitted generally is an analysis of recent court decisions focusing upon the fourth amendment issues raised by compulsory drug testing programs under Government authority.

Mr. ACKERMAN. Without objection, the entire statement is submitted for the record.

Mr. ADLER. Thank you.

What I would like to do is just briefly comment on six major points raised by Mr. Willard in defense of the Government's position on drug testing.

In the first place, Mr. Willard argued that drug use by Federal employees, on or off duty, cannot and should not be tolerated. I don't think that there is substantial disagreement about that generally among the public, and certainly the ACLU doesn't write any briefs for people to have the right to use illegal drugs.

But what we are talking about here—the single narrow issue we are talking about with respect to compulsory drug testing, is a disagreement over the means that the Government may use to determine whether such use is actually occurring; and because the tests, of course, are inherently limited in their ability to tell whether you are at the time of testing either impaired or under the influence of a drug, primarily we are talking about whether or not the Government should be permitted to test people, who show no signs of drug use, to determine whether they use drugs off duty. And that is where the fourth amendment privacy concerns primarily come into play.

The second point made by Mr. Willard is that testing is simply a diagnostic tool that is useful in the totality of the program of the Government's efforts to fight drug use.

We would strongly disagree with that.

It is quite clear from the statements made by Mr. Willard, as from the statements made by President Reagan, that this form of testing is an investigatory tool. And that, indeed, this entire notion of fighting drug abuse in the workplace is simply an effort to have employers serve as the surrogates for a law enforcement effort against illegal drugs.

It is quite clear, for example, that individuals under this Executive order risk losing their jobs if they are detected as drug users, and identified as such by testing. That is why I say it is an investigatory device.

They also suffer a great loss to reputation if they are detected by this investigatory tool and thereby labeled as drug users.

And, finally, there is a very real potential for criminal liability for individuals who are identified as drug users under this testing program.

I would point out to you, as you have already noted, that the Executive order seems to say that there will be no criminal context in which the results of tests will be placed. But note, of course, that it says testing shall not be conducted "for the purpose" of gathering evidence. It doesn't say that it could not be a secondary use. And although it says that agencies are not "required" to report to the Attorney General, for investigation or prosecution, any evidence of drug use, it certainly leaves open the possibility of discretionary reporting by the agencies.

And even the Privacy Act, which protects the rights of individuals with respect to personal information being utilized by the Government, contains a "routine use" exception and a specific exception for disclosure of information between agencies relating to law enforcement activities that avoids the general rule requiring the subject individual's consent to disclosure.

So I think it is quite clear that there is a very real potential, despite the good intentions stated by Mr. Willard, that the results of these tests may in fact be reported in a criminal context.

The third point made by Mr. Willard is that testing is an effective way of treating drug abuse in the workplace. Again, testing does not "treat" drug abuse, and it does not focus on drug abuse "in the workplace." It will inevitably be focusing on identifying drug users who use drugs out of the workplace and off duty.

I think it is very important to note in this regard that the statements made about the degree to which testing programs in the private sector have served as a very successful means of reducing losses in job productivity, absenteeism, and other problems attributed to drug use have to be examined very closely. For the most part, those tests cited by the Justice Department can be characterized as self-serving because they are the conclusions of professional consultants who are now urging corporations in the private sector to adopt drug testing. And the pharmaceutical companies, of course, are also supporting this because they see a major commercial market developing for their products in the testing field.

The fourth point, of course, concerns Mr. Willard's efforts to minimize the number of persons in the "sensitive duty" category who would be subjected to testing under this program.

I contacted the staff director at the House Civil Service subcommittee who said that OPM had indicated to them that if you look at the three categories listed as sensitive duty positions under Executive Order 10450 you are talking about approximately 100,000 people listed as special sensitive, 400,000 people listed as critical sensitive, and 600,000 people listed as non-critical sensitive, for an approximate number of 1.1 million people.

Most importantly, though, I would point out the open-endedness of the definition. The fifth criteria of the definition of "an employee in a sensitive position" simply states "other positions that the agency head determines 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."

Since this administration has made it clear that it believes a high degree of trust and confidence is necessary for every Federal employee, I submit to you the potential that every Federal employee could fall within this definition.

I would also point out to you in your search for an example of a national security case to justify this sensitive duty criteria, I have been looking through recent espionage cases to determine whether there is any legitimate justification. The one case that I would give you, to anticipate the administration discovering it, involves Christopher Boyce and Andrew Dalton Lee, who were both convicted for espionage and later were highly publicized in a book and movie called "The Falcon and the Snowman." Although both of those individuals did use drugs, and one of them, Mr. Lee, was even reputed to have been a drug dealer, in Mr. Boyce's testimony last year, when he was invited by the Senate Permanent Investigations Subcommittee to testify about how he got involved in espionage and what his motivations were, drugs were not mentioned at all. And neither the FBI reports nor any other investigatory reports of the *Boyce-Lee* case indicate that support of a drug habit was in any way a motivation for espionage.

The fifth point concerns the reliability of the tests and the safeguards. You, of course, have already heard in your first day of hearings about problems with respect to the accuracy and reliability of the commonly used tests in this area. But I just want to focus on two of so-called safeguards that Mr. Willard mentioned.

One, of course, is the administration's assurance that absolute confidentiality will be provided, not only to the testing process but the results of the tests as well. Again, I would point out to you the specific language of the Executive order. In section 4(c) of the Executive order where it provides for these confidentiality protections, it talks about procedures "consistent with applicable law" to protect confidentiality.

I would submit to you that "consistent with applicable law" would mean reading in the exceptions of the Privacy Act, which would permit the interagency dissemination of this kind of information for law enforcement purposes, as well as for other purposes that might be considered "routine uses" of Government agencies.

It is rather ironic that in demonstrating their sensitivity to privacy concerns, they have determined that an individualized suspicion standard should apply to deciding whether or not a particular individual being tested should have to undergo direct observation in providing the sample. Yet, of course, they will not limit their testing to an individualized suspicion standard generally.

We would point out, rather sadly——

Mr. ACKERMAN. Would you please go over that for me once more?

Mr. ADLER. Yes. What they have emphasized is that—they emphasize this, by the way, in the brief that was filed, the amicus brief, in the Boston Police Department case—that the administration's programs would not, as a general rule, require the urine sample to be tested to be collected under the direct observation of another individual. In other words, this is the way they show their sensitivity towards the privacy concerns.

And they say that they would be willing to accept an individualized suspicion standard as the exceptional rule where they would require direct observation.

Unfortunately, if you do not have direct observation of collection, you cannot certify that the specimen has not been tampered with,

and, therefore, you cannot validate the accuracy of the testing process. And for that reason, if they mean to have a testing process that has integrity in terms of accuracy and reliability in the chain of custody of the specimen, indeed, they must have direct observation of collection of the specimen.

Mr. ACKERMAN. I know you are not a technician in this area, but we have heard testimony also from people who are not, but are there substances that can be added to urine that would cancel out the fact that a person had indeed been using drugs?

Mr. ADLER. The technical literature that I have read—and again, I am not in any way an expert on this—and the professional people in the field that I have spoken to have suggested that while it is not clear that you can mask out the presence of a metabolite of THC, for example, or any other byproduct of drug use, you certainly can raise a question about whether or not the test results can be validated as adequate simply by introducing an element such as salt, sodium chloride.

Mr. ACKERMAN. What does that do?

Mr. ADLER. Excuse me?

Mr. ACKERMAN. What does that do?

Mr. ADLER. It raises, as I understand it—it changes the phenyl factor to some extent, and there is a possibility that that could affect some of the more sensitive initial screening tests that are used, that are being commercially marketed.

I have also been told that there are a number of other chemical means of tampering with the specimen, as well as the possibility, as you have mentioned, of simply substituting a guaranteed clean specimen.

All of those concerns are what require generally that the specimen be collected under direct observation, thereby raising the privacy question.

I would also note that in his statement, Mr. Willard raised a specific objection to the chairman's bill limiting the use of drug tests with respect to the fact that it provided individuals a cause of action to sue the Government for infringements of the protections of that bill.

I would also note that in the earlier draft of the President's Executive order the White House was considering precluding judicial review of the testing process. Now, fortunately, that was not included in the Executive order as signed by the President.

But, again, the question has to be raised, if Mr. Willard believes that providing an individual with a right to go to court, to sue because of damage to that person as a result of the testing process would have, as he says, a "chilling effect," on the Government's ability to exercise its authority to test, then I am not very sanguine about the Government's willingness to assure that the safeguards appropriate to the protection of the rights of individuals will be provided for this program.

The final point I would mention with respect to Mr. Willard's testimony is his comment that this is a non-punitive process. Again, the question is raised about whether or not any criminal action could be taken.

But more importantly, I would simply cite provision 5(d) of the President's Executive order, which says, I think, rather clearly and unambiguously, "agencies shall initiate action to remove from the service"—not talking about a lesser form of discipline or adverse personnel action—"agencies shall initiate action to remove from the service any employee who is found to use illegal drugs"—meaning who test positive and presumably has that test result confirmed—"and refuses to obtain counseling or rehabilitation through an Employee Assistance Program, or does not thereafter refrain from using illegal drugs."

The upshot of that is that an agency is required by this Executive order to begin separation proceedings for an individual, terminate his Government employment, if the individual tests positive, and if the individual refuses counseling or rehabilitation.

Mr. ACKERMAN. Do you think that that's punitive?

Mr. ADLER. Yes, we do. Certainly in the context of our objections to this program overall, we think it is punitive. And it also seems to run against some of the more euphemistic terms we have been hearing from the administration about the need to "rehabilitate" people. But since the majority of people who would test positive would not be addicts but people who simply have chosen to recreationally use drugs, "rehabilitation" means only that they will be told they have a choice: they can either stop using drugs or give up their Government job. And for that reason, I don't think it is accurate to describe the process as rehabilitation or counseling.

These basically are the comments that I would make on Mr. Willard's presentation. As for the testimony that I submitted to you on the fourth amendment arguments, I think it is fairly clear that the large majority of courts that have in the past 2 years considered compulsory testing programs of public sector employees, or even private employees, where the testing is required by governmental authority, have found those programs to violate the fourth amendment unless there was either individualized suspicion as the predicate for the test, or the circumstances of the employment presented some unique requirement to preclude the necessity of individualized suspicion.

The chief case on that is one involving testing requirements of the New Jersey Racing Commission, for jockeys, where there had been a long tradition in New Jersey law of pervasively regulating the industry of racetracks.

The Supreme Court has only determined so far that dealing in firearms, the liquor trade, and the mining industry, are the kind of pervasively regulated business activities that would justify precluding an individualized suspicion requirement for certain kinds of inspections or searches coming within the reach of the fourth amendment.

I don't think given the scope of this Executive order in terms of the vast different array of people it would reach, that any argument could be made that the administration has limited its reach to unique circumstances so as to justify foregoing an individualized suspicion requirement.

The second point I would make is that contrary to the administration's representations, the Supreme Court has repeatedly said the Government does not have the right to force individuals to surrender their constitutional rights as a prerequisite for securing Federal employment.

I would be happy to answer any questions.

[The statement of Mr. Adler follows:]

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

Mr. Chairman and Members of the Subcommittee:

On behalf of the American Civil Liberties Union, I want to thank you for inviting me here today to present the ACLU's views on President Reagan's Executive Order 12564, "Drug-Free Federal Workplace."

In recent months, the growing national frenzy over the use of illegal drugs has become a matter of paramount concern for the ACLU. While drug abuse is undoubtedly a serious and continuing problem throughout the United States, a combination of opportunistic political grandstanding and melodramatic news coverage on the issue has overwhelmed the public's ability to comprehend the true nature and extent of the problem. The resulting portrayal of a nation in the grip of an unprecedented drug epidemic has generated a crisis atmosphere which threatens to sacrifice individual rights and fundamental principles of law to expedient measures of dubious remedial value.

Proposals to authorize the death penalty and the use of criminal evidence illegally obtained under so-called "good faith" circumstances have been revitalized in the guise of drug enforcement measures. Broad use of the military in domestic law enforcement efforts has been advocated as essential for interdiction of drug traffic at U.S. borders, notwithstanding that such a policy would violate the century-old prohibition against military exercise of law enforcement authority.

While these demonstrate the quality of the threats to civil liberties in the prevailing climate, none is more illustrative of

the current hysteria than the President's Executive Order requiring the establishment of drug testing programs in every agency of the federal government.

The heart of Executive Order 12564 is its requirement that the head of each Executive agency "shall establish a program to test for the use of illegal drugs by employees in sensitive positions." Although "the extent to which such employees are tested and the criteria for such testing" are to be determined by the head of each agency, it is noteworthy that the test programs for employees in sensitive duties and test programs for "voluntary employee drug testing" are required while testing in all other circumstances under the order -- including "reasonable suspicion"; "regarding an accident or unsafe practice"; "follow-up to counseling or rehabilitation"; and, "applicant" -- is merely authorized.

The distinction between the required program for sensitive positions and the authorized testing for any or all other agency employees would appear to indicate that the required program for sensitive positions contemplates mandatory testing in addition to whatever testing might otherwise be authorized under the enumerated "circumstances." It is not clear whether such mandatory testing is required or merely authorized by the Executive Order in regard to sensitive positions; even in the latter case, however, full exercise of authority could lead to mandatory testing of more than half of the federal civilian workforce. Indeed, the "catch-all" portion of the definition of the term "employee in a sensitive

position" -- including in addition to those specified "[o]ther postions that the agency head determines 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" -- is so sweeping as to encompass virtually all federal civilian employees.

The assumption that mandatory testing is, at least in part, intended by Executive Order 12564 is supported by the Administration's interest in the outcome of Guiney v. Roache, Civil Action No. 86-1346-K (D.Mass., Memorandum of Law and Authorities of Amicus Curiae United States in Support of Defendants' Motion to Dismiss filed September 12, 1986), a case involving a challenge to the City of Boston's proposed mandatory testing of employees engaged in law enforcement activities. Having informed the court of its "significant interest in this issue stemming from its position as the largest employer of law enforcement personnel," the Administration then sets forth its defense of the testing program at issue in anticipation of programs to be established "in the near future" consistent with Executive Order 12564.

Briefly stated, the Justice Department's argument is that mandatory drug testing in the workplace does not implicate any Fourth Amendment interests because the Amendment is inapplicable where government is functioning in a proprietary capacity as an employer, rather than as a sovereign authority, and, in any event, employees have no legitimate expectation of privacy that precludes reasonable employer inquiries into their fitness for duty. Moreover, the argument continues, unobserved drug testing as an employment screen constitutes neither a "search" nor a "seizure" because the

employee's freedom of movement is no more restricted by a required drug test than by being required to remain at his usual work station; unobserved collection of the specimen is not intrusive; collection of body waste is no more a "seizure" than collection of hair clippings, voice exemplars, or handwriting samples; and, a urinalysis limited to revealing only use of illicit substances is not a "search".

Alternatively, if the Fourth Amendment was implicated, the Administration claims, the test requirements meet the essential "reasonableness" standard even without any objective individualized suspicion because employees who choose to accept or retain their positions voluntarily consent to the testing as a condition of employment for which they receive advance notice. In addition, the government has a critical interest in precluding the use of illegal drugs by its employees, particularly law enforcement personnel, which, when balanced against the privacy considerations on the other side, renders the testing "reasonable " under the Fourth Amendment.

The ACLU strongly disagrees with the Administration's position in its entirety and finds substantial support for its disagreement in the Fourth Amendment rulings of the Supreme Court and other federal courts, as well as in a host of recent federal and state court decisions expressly addressing the drug testing issue.

First, federal and state courts have uniformly held that mandatory urinalysis drug tests required by government authority in an employment context fall within the search and seizure doctrine of the Fourth Amendment, relying on analogy to the Supreme Court's holding regarding blood tests in Schmerber v. California, 384 U.S. 757 (1966):

> "One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids."

McDonell v. Hunter, 612 F.Supp. 1122, 1127 (D.Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 482, 488-489 (N.D.Ga. 1985); Storms v. Coughlin, 600 F.Supp. 1214, 1217-1218 (S.D.N.Y. 1984). See also Shoemaker v. Handel, 795 F.2d 1136, 1142 (3rd Cir. 1986) and Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976) (both cases assuming applicability of Fourth Amendment search & seizure doctrine).

The Supreme Court has rejected the argument that Fourth Amendment considerations are not implicated if the results of the search could not be used in any criminal investigation or prosecution:

> "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

The courts have also rejected the argument that Fourth Amendment considerations are mitigated by a subject individual's prior consent to testing as a condition of employment. "Advance consent to future unreasonable searches is not a reasonable condition of employment." McDonell, supra, 612 F.Supp. at 1131 (emphasis supplied). See generally Frost v. Railroad Commission, 271 U.S. 583 (1925) (State may not compel relinquishment of a constitutional right as

a condition of its granting a privilege); Pickering v. Board of Education, 391 U.S. 563 (1968) (public employees cannot be bound by unreasonable conditions of employment).

Where the Supreme Court has distinguished the Fourth Amendment as proscribing "only governmental action", it has emphasized the distinction as against a search "affected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." U.S. v. Jacobsen, 466 U.S. 109, 113 (1984), citing Walter v. U.S., 447 U.S. 649, 662 (1980). It has never held that government action is tantamount to private action simply because, in a particular instance, government is acting as an employer. With respect to constitutional considerations, government qua employer is still government.

The fundamental command of the Fourth Amendment is that searches and seizures be "reasonable." New Jersey v. T.L.O., __U.S.__, 105 S.Ct. 733, 743 (1985). However:

> "The test of reaonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

Bell v. Wolfish, 441 U.S. 520, 559 (1979).

> "Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether

> this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field." [citations omitted]

Delaware v. Prouse, 440 U.S. 648, 654-655 (1979).

By a large majority, federal and state courts that have recently considered mandatory drug testing requirements imposed by government authority have held them to be unreasonable and therefore unconstitutional if they were not based on a standard of individualized suspicion. These cases again follow the rationale of the Schmerber Court in its discussion of blood tests:

> "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search."

384 U.S. at 770.

The recent cases include:

Capua v. City of Plainfield, Civil Action No. 86-2992 (D.N.J., September 18, 1986) (struck down mandatory random testing of city police and fire departments personnel absent "individualized suspicion, specifically directed to the person who is targeted for the search)

Patchoque-Medford Congress of Teachers v. Board of Education of the Patchoque-Medford Union Free School District, 4281 E (Supreme Court of New York, Suffolk County, August 11, 1986) (struck down mandatory testing requirement for probationary teachers as condition of receiving tenure where Board "failed to show an objective, factual basis for inferring that any one of the subject teachers uses or has used illegal drugs")

Caruso v. Ward, Index #12632/86 (Supreme Court of New York, New York County, July 1, 1986) (struck down testing requirement for applicants to and current members of NYPD's Organized Crime Control Bureau as condition of assignment, ordered as exception to Department general policy of testing only upon "reasonable belief," applicant

screening, or part of medical examination)

Mack v. United States, No. 85 Civ. 5764 (S.D.N.Y., Apr.21, 1986) (upheld discharge of FBI agent based upon positive testing for cocaine use; test predicated upon suspicion of use because of agent's association with another agent suspected of dealing)

Jones v. McKenzie, 628 F.Supp. 1500 (D.D.C. 1986) (found violation of rights of school bus attendant dismissed for positive result in test ordered by D.C. School Board with "no particularized suspicion that she had ever used or was under the influence of drugs, either on or off premises")

Odenheim v. Carlstradt-East Rutherford Regional School District, No. C-4305-85E (Superior Court of N.J., Chancery Division, Bergen County, December 9, 1985) (struck down testing requirement for all students enrolled or to be enrolled in school district high schools because test was separate from required physical examination and was not premised upon individualized suspicion)

Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C.Ct. App. 1985) (upheld D.C. Police Dept. Special Order permitting any Dept. official to order any member of the force to be tested when "suspected" of drug use; Ct. construed the term "suspected" as requiring a "reasonable, objective basis to suspect that a urinalysis will produce evidence of an illegal drug use")

McDonell v. Hunter, 612 F.Supp. 1122 (S.D.Iowa 1985) (struck down policy requiring Corrections Dept. employees to submit to urinalysis without "reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances")

City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla.Dist.Ct. App. 1985) (struck down policy permitting random standardless testing of fire and police department employees)

In its amicus brief in the Boston case, the Administration has argued for recognition of what would amount to an "employment context search of government employees" exception to the Fourth Amendment. Yet the cases cited in support of the proposition that government employers can greatly diminish or even eliminate an employee's legitimate expectation of privacy in the workplace through rules and regulations were actually decided on factual bases emphasizing the presence of individualized suspicion in the context of work-connected criminal investigations. See, e.g., U.S. v. Bunkers, 521

F.2d 1217 (9th Cir. 1975), cert. den., 423 U.S. 989 (1975) (upheld warrantless search of Postal Service employee's locker as part of investigation of missing C.O.D. parcels after employee's work schedule was found to coincide with times of losses and subsequent observation of employee taking parcel from work area to locker area & returning without the parcel) and U.S. v. Collins, 349 F.2d 863 (2d Cir. 1965), cert. den., 383 U.S. 960 (1966) (upheld a warrantless search of Customs employee's work jacket hanging in public area after extensive chain of circumstantial evidence led to suspicion of theft of package of emeralds known to have been last accounted for on employee's desk).

Similarly, two federal court decisions on drug testing that are alleged to support the proposition that the government as employer "has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties" also relied upon factual situations involving individualized suspicion. See Allen v. City of Ma rietta, 601 F.Supp. 482 (N.D.Ga. 1985) (employees tested had been observed smoking marijuana on the job) and Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1976) (upheld warrantless testing standard for bus drivers involved in serious accidents or suspected of being intoxicated on the job, but only where two supervisory employees concurred as to an individualized, reasonable suspicion).

Where individualized suspicion was neither the standard for testing nor the factual predicate to a decision upholding a mandatory testing requirement, the few available court cases have emphasized unique institutional considerations as justification.

See, e.g., Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986) (tests for jockeys upheld in light of "pervasive regulation" of racetrack industry "in order to minimize the criminal influence to which it is so prone"); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (tests for prison inmates upheld because of "security" needs); Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) (upheld testing in military services); Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, No. L-095001-85E (Superior Court of New Jersey, Essex County, March 20, 1986) (upheld testing for applicants to and members of Narcotics Bureau of City Police - contra to Caruso, supra and Turner, supra.)

With respect to the other "circumstances" in which Executive Order 12564 would "authorize" testing, it should be noted that the court in Suscy found a "post-accident" standard to be reasonable and numerous courts have accepted the reasonableness of urinalysis drug testing as part of a comprehensive physical examination, especially when required as part of the employment application process.

Beyond these comments, further generalizations from the extant caselaw are difficult to draw. Contradictory views on the degree of intrusiveness of urinalysis, especially with regard to the procedure for collection of the specimen, appear in the judicial opinions. For the most part, these depend upon whether direct observation of the collection is required by other personnel. Ironically, both the President's Executive Order and the Administration's amicus brief in the Boston police case emphasize the significance of not requiring observation in arguing the

reasonableness of the testing requirements they support. Yet, without observation, it is impossible to certify that the specimen obtained has not been tampered with by the subject who yielded it and the integrity of the testing process is seriously impaired.

Judicial opinions differ regarding the weight to be given the asserted governmental interest in testing, especially in cases involving law enforcement employees and in cases where (as with the Executive Order) there is no evidence of a drug abuse problem specifically linked to the group targeted for testing. With regard to the former consideration, courts have disputed whether or not police personnel are sufficiently similar to "paramilitary" organizations in order to justify findings of diminished expectations of personal privacy on the order of the military services. Courts have also disagreed on the importance of public perception of police involvement with drugs in terms of its impact on public confidence in police capabilities and effectiveness in performing primary law enforcement responsibilities.

With regard to the issue of a demonstrable drug abuse problem as justification for testing without individualized suspicion, some courts have flatly rejected the proposition that the widespread, large-scale use of illegal drugs in all segments of the population leads to a reasonable inference that some of those affected may ultimately be employed or seeking employment in a public-safety capacity. See City of Plainfield, supra ("If we cannot impute suspicion from one individual legitimately under investigation to others in his presence, we cannot impute suspicion to an entire fire fighter force when no reasonable suspicion exists as to any

one of the individuals to be searched.")

For the ACLU, a constitutionally-permissible drug testing program is one that comports traditional standards of presumption of innocence and reasonable, individualized suspicion with appropriate procedural safeguards to assure due process and essential confidentiality. Any effort to eschew the individualized suspicion standard in deference to so-called "safety-sensitive" or "security-sensitive" categorical testing ignores both the inherent limitations of the testing process (which cannot determine either intoxication or impairment at the time of testing) and the inevitable "slippery-slope" problem of elastic definitions that is exemplified by the explanation of "employee in a sensitive position" in Executive Order 12564. Moreover, it requires an exorbitant expenditure of resources which, when stretched to serve the desired quantity of tests, must unavoidably fall short of the necessary requirements to assure quality (accurate and reliable testing) on an individualized basis.

While the ACLU advocates the requirement of a nexus to job performance, so vigorously opposed by the Administration in its own legislative proposals to permit discharge of federal employees on the basis of off-the-job drug use, we do not necessarily disagree with the Administration's assertion that the government as employer, especially of law enforcement personnel, should not have to tolerate illegal drug use by its employees. Where we disagree is primarily over the question of the means the government may utilize to determine whether such drug use is occurring.

As stated at the outset, our law-makers and law enforcers must not seek short-cut measures to deal with a serious and continuing national problem. They must not exploit or be exploited by overblown and exaggerated assessments of the drug abuse problem, leading them to cast aside important principles of law and the protections of civil liberties & individual rights in an effort to appear to be "getting tough with drug abuse."

If managers and supervisors would manage and supervise their employees with an emphasis on direct, interpersonal contact, the identification of employees with drug problems, which is the stated goal of the drug testing advocates, would be accomplished without compromising principles or people. The impersonal, technological "fix" which has led some employers, including the federal government, to assess personal integrity and trustworthiness of employees and applicants by the dubious polygraph should not become a model for efforts to deal with drug abuse.

Perhaps the most important distinction between our legal system and those of all other nations, the true secret of our freedom, is our refusal to achieve laudable ends by means which are inconsistent with the core values of our society. Our willingness to go "the long way around" to avoid trampling on the rights of a few in pursuit of a goal of the many is the meaning of due process and the safeguard of individual liberty in our country. Our President spoke eloquently of our heritage of freedom in seeking to enlist public support for a national effort against drug abuse. Our rejection of Executive Order 12564 demonstrates that we listened closely to what he had to say.

Mr. ACKERMAN. Thank you very much for your testimony and your statement.

I don't know if this is a legal question or a philosophical question, but maybe you can help me out.

Is a person's body considered as his property?

Mr. ADLER. It doesn't have to be considered property as such, because the fourth amendment talks about people being secure, not only in their property, but in their persons, meaning their bodies.

Mr. ACKERMAN. I was puzzled when I gave an hypothesis of a person's property being searched, either his wallet, or his pockets, or her pocketbook, or his or her glove compartment, and I was asked where the car was being parked.

Do we give up our rights to our property when we appear on a Federal jobsite.

Mr. ADLER. No, not at all.

Mr. ACKERMAN. Do we lose any of our constitutional protections because we park our car in a Federal lot rather than on a public street?

Mr. ADLER. No, we do not.

The Supreme Court has said that the protections of the fourth amendment, as to whether or not particular activities are unreasonable searches and seizures, really focus on the question of reasonableness in the totality of the circumstances. And it focuses on an individual's subjective expectations of privacy, if society is willing to accept those subjective expectations of privacy as reasonable.

And for that reason, unless an individual is suspected of criminal activity and is under investigation, where you park your car, assuming you are not violating the law, would ordinarily have nothing to do with your reasonable subjective expectation that law enforcement authorities have no business going through your trunk.

Mr. ACKERMAN. You are telling us that there is no difference and no waiving of the probable cause provisions of the Constitution if we are talking about our bodies or our property—there is no distinction?

Mr. ADLER. No. It may not be in a noncriminal context traditional "probable cause," but lesser individualized suspicion standards—reasonable suspicion is the operative standard that certainly would apply.

Mr. ACKERMAN. I saw a case in the newspapers, I think it was about maybe a year or so ago, where an individual who was suspected of participating in a crime had been shot by a police officer, and that person carried the bullet around in his person and refused to have it removed when the police wanted to do ballistics tests. I forget what the outcome of that was, but that person claimed a right not to have surgery or any invasive procedure performed in order to recover that bullet.

Are you familiar with that?

Mr. ADLER. The Supreme Court has ruled in a series of cases presenting different factual circumstances and different degrees of intrusion into a person's body. In that kind of case, if it would require surgery, generally the bright line that has been drawn—and obviously it doesn't rule in every case—is that if the surgery would require a general anesthetic rather than being something that could be performed just below the level of the skin requiring

simply a local, then the fourth amendment would preclude the Government from requiring that without obtaining a warrant based upon probable cause.

The Court has also ruled in a seminal case called Schmerber against California, in 1966, that blood tests implicate fourth amendment considerations. And that is why virtually every Federal and State court that has considered compulsory urinalysis, has considered it as implicating fourth amendment issues and concerns because they have analogized compulsory urinalysis to the Schmerber ruling on blood tests.

It is less intrusive with respect to the actual means of collection. But in terms of the invasion of one's personal privacy, the embarrassment that it might cause, the affront to personal dignity, the courts have been more than willing to assume, if not to expressly find, that it is a fourth amendment issue.

Mr. ACKERMAN. A person walking around with a bullet in them, that would be sufficient reasonable cause to believe that they are involved in something.

Mr. ADLER. It would still require that they go get a warrant stating is their basis for probable cause in order to require that that individual be subjected to a surgical procedure.

Mr. ACKERMAN. If the Federal Government sought warrants for all Federal employees because of a general percentage of people suspected of using drugs in the general population, would anybody consider issuing those warrants, in your opinion?

Mr. ADLER. No, I think that clearly would be considered unreasonable in the totality of the circumstances.

I would point out with respect to a comment that Mr. Burton had made about assuming that the Federal work force is using drugs in the same proportions as the National Institute of Drug Abuse has cited for the general population, that this might be a common-sense principle that we can assume and discuss here.

As a legal matter, however, the Supreme Court has made it clear that you cannot impute suspicion from one individual legitimately suspected to other people who are in his or her presence.

In a recent decision by a Federal court in the *Plainfield* case—which was mentioned by you, Mr. Chairman, at the beginning of this hearing—Judge Sarokin said, if we cannot impute suspicion from one individual legitimately under investigation to others in his presence, we cannot impute suspicion to an entire work force when no reasonable suspicion exists as to any one of the individuals to be searched.

So, again, we come back to the question of whether the Government has any solid documentary evidence of the existence of a drug problem in the particular segments of the work force it seeks to subject to testing?

Mr. ACKERMAN. Mr. Adler, thank you very much for your testimony, and for participating with us here at the hearing.

I think there still remain a great many unanswered questions and a lot of very serious concerns that have been raised—and we leave open the very clear possibility of additional hearings on this matter.

Thank you very, very much.

Mr. ADLER. Thank you.

Mr. ACKERMAN. The committee stands adjourned.

[Whereupon, at 12:40 p.m., the subcommittee was adjourned, to reconvene subject to the call of the Chair.]

[The following statements were received for the record:]

NORTHWESTERN UNIVERSITY
CHICAGO, ILLINOIS 60611

THE MEDICAL SCHOOL
WARD MEMORIAL BUILDING
303 E. CHICAGO AVE.

10/1/86

Dear Chairman Ackerman:

This is the letter I promised regarding my Study and my thoughts on testing for drugs in urine.

The EMIT procedure is technically a valid method with reasonable reliability w'en performed correctly. Unconfirmed or false positive results occur, however, for several reasons. One reason is the presence of cross-reacting substances in the specimen or other factors that invalidate the test procedure. In my own study of the various EMIT tests this accounts for about 6 false positives in 100 tests or a specificity of about 94 percent overall. In one study of the EMIT test for cocaine, specificity was only 86 percent. A serious problem with the EMIT test for cannabinoids that has been in use for the past several years is the fact that cross-reactivity occurs with ibuprofen (Advil) a commonly used over-the-counter aspirin-like drug. Syva Co., maker of the EMIT test kits, claims to have eliminated this problem with a new formulation of the assay. There is no assurance however that other drugs will not produce the same problem with the new formulation. In the five years or so before the ibuprofen problem was found, Syva had maintained that there was no possibility of cross-reaction interference by any drug with the original test kit. Since ibuprofen is widely used, for example by athletes for muscle aches and pains and by women for menstrual cramps, testing of certain groups might produce a very high incidence of false positives as a result of this drug interference.

A second reason for the occurence of false positive results in the EMIT tests is technician error. These are not the fault of the test procedure or the manufacturer but the error rate can vary over the entire range of possibilities. A CDC study found that this type of error was unexpectedly low for the cannabinoid test (published as an abstract in Clinical Chemistry) but performance by different laboratories varied over a wide range. An earlier study at the CDC, published in the Journal of the AMA, indicated the false positive rate in screening for several drugs of abuse (primarily by EMIT) by several laboratories went as high as 66 percent.

In my evaluation of these tests, I have focused on the uncertainty of the EMIT result when EMIT is used as the sole test in a screening program. This uncertainty derives from the characteristics of the test and is no different from the limitations of any test used for screening an unselected population of subjects. It is the result of the low incidence of actual drug containing urine specimens in the test population. A test procedure that is technically valid and has a high sensitivity and specificity can produce results with very low predictive value. If for example, the rate of actual drug containing urine specimens is 5 percent in the population being tested and the sensitivity and specificity of the EMIT test are 98 and 94 percent respectively, then the likelihood that any individual EMIT positive specimen actually contains the drug is only 46 percent. If only 1 percent of the population being tested actually have drugs present, the predictive value of a positive EMIT result is only 14 percent. In other words, there will be about 7 false positives for each true one.

In the past, urine testing for drugs was done almost exclusively in situations where circumstances indicated that the subject may have been using drugs; for example, a teenager brought to an emergency room by police because he/she appeared intoxicated or a patient with a history of drug use. In that select population the incidence of actual drug use was obviously high and the predictive value of a positive test is correspondingly high. Testing on a general scale is quite different. The circumstances may be simply the fact of employment by an agency or company that has an employee drug testing program. The incidence of actual drug use in a group of veteran police officers or government officials, for example, is likely to be quite low (perhaps 1 percent or less).

This type of analysis of test predictability is frequently used by physicians but apparently is not appreciated by many people involved in the area of drug testing.

The EMIT tests should be used as screening procedures and never as the sole test procedure without confirmation. The cost of confirmation procedures, however, is large and probably not feasible in large scale testing programs.

The confirmation procedure of choice is the GC/MS test. This test, when done properly, is as definitive as a fingerprint. The problem is that (perhaps as a result of the money to be made in drug testing now) there are laboratories getting into the business without entirely qualified personnel. Interpretation of a GC/MS test record requires training and experience. My involvement as an expert witness in several recent cases against the City of Chicago indicates that there are laboratories providing drug testing services which are not fully qualified to do so. False positive results can occur in the GC/MS confirmation when the individual doing the test does not interpret it properly.

I hope this discussion is sufficient for your needs. I would be glad to discuss it further if necessary. I am providing the appendix to aid in explanation of the calculation of positive predictive values referred to above.

Sincerely,

John J. Ambre, M.D., Ph.D.
Associate Professor
Internal Medicine

Sensitivity: Probability that test result will be positive when the drug (eg. cannabinoids) are actually present.
Specificity: Probability that test result will be negative when the drug is actually absent.

Assume 5 % use once per week (detectable use).

If you test 1000 samples from this population:

| Actual distribution | | present | absent |
|---|---|---|---|
| | | 50 | 950 |
| EMIT | positive | 49 | 57 |
| | negative | 1 | 893 |
| | | sensitivity 98% | specificity 94% |

$$PPV = \frac{49}{49 + 57} = 46\%$$

PPV(positive predictive value: Probability (likelihood) that the cannabinoids are actually present when the test is positive.

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

Rudolph G. Penner
Director

September 24, 1986

Honorable Gary L. Ackerman
Chairman
Subcommittee on Human Resources
Committee on Post Office and Civil Service
U. S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

At your request, the Congressional Budget Office has reviewed the President's Executive Order of September 15, which mandates the drug testing of certain Federal employees. Unfortunately, at this time we are unable to estimate the costs of all portions of the order.

An estimated 1.4 million Federal employees will require drug testing under the order at a cost of $27 million. This estimate assumes that the presence of 8 controlled substances are tested at a cost of $15 per initial screening and $30 per verification of positive screening tests. This estimate takes into account that screening tests are prone to a high level of false positive results (10 percent) and require additional verification tests.

The order calls for employee assistance programs (EAP) to educate, counsel and refer for treatment those individuals verified as using drugs. The Office of Personnel Management, the executive agency required to develop a model EAP, has been unable to provide any costs or parameters related to such programs. Therefore, we cannot estimate the costs of this portion of the Executive Order. However, we will furnish an estimate to the committee as soon as the necessary data become available.

With best wishes,

Sincerely,

James Blum
for Rudolph G. Penner

cc: Honorable Dan Burton
Ranking Minority Member

*FEDERAL EXECUTIVE AND PROFESSIONAL ASSOCIATION*
*210 NORTH ADAMS STREET • ROCKVILLE, MD 20850 • (301) 294-2508*

Intelligent Management of Drug and Substance Abuse in the Federal Establishment

The stark truth regarding drug and substance abuse in the United States is that it is out of control, largely beyond legislative solutions, and, unfortunately, a desired (by many) way of life in this nation. Current press reporting represents only the tip of the problem. Its dimensions go beyond a 1930's prohibition mentality of lawlessness and is an order of magnitude more damaging to both the individual user and society at large. Something must be done. But What?

The Reagan administration continues to support wide spread drug testing and polygraph screening of Federal employees as part of a campaign to reduce Federal employees' rights in the workplace. These actions are justified on public safety and national security grounds. Some Federal programs are so essential that the waiver of basic legal rights are justified. Indeed, the testing for these positions should go beyond drug testing and polygraphs, which are inaccurate, and should include more sophisticated techniques. However, not all of the 1 million plus civilians holding security clearances (which equate to a successful Federal career) should be included in this group. The most important aspect of the drug use phenomenon for Federal employees continues to become clearer as time goes on, yet it is not recognized or appreciated by this administration. Drug abuse in the Federal government is not a problem. It is not a problem because the vast majority of the Federal workforce is aware, concerned, and educated against its use.

Unfortunately, the very strengths and best defenses against the problem, i.e., trust, concern, and intelligent self interest have become the first casualties of the Federal establishment's response to alleged drug abuse among its own. Currently the problem is addressed in terms of distrust and misunderstanding and is becoming increasingly political with the Feds once again being targeted as the "football". Our Federal workforce understands its responsibilities to resist this plague because it has pride of mission, pride of place, and a belief that it is a trusted leadership elite. Can you imagine what mandatory testing, polygraph examinations, and an "informant" mentality will do to these ethics, especially when there is no problem? It will tell high minded Federal employees that they are keepers of a government that doesn't trust them, and participants of a system that is so weak and untrustful, that its own elite cannot be trusted. The only way our nation, including the Federal workforce, can effectively address this pandemic, and it is a pandemic, is through enlightened and heightened awareness by Federal organizations and individuals of the sad results of drug use

and the development of comprehensive and intelligent programs. A program that presumes guilt and requires mandatory testing without specific cause will not be effective, it will be the opposite.

Before implementing an ineffective and damaging drug testing program, the Administration and the Congress should consider a few of the impacts including the following: Federal drug and substance programs must recognize that the only effective and equitable test for drug use must be based on testing related to individual job performance. If results are positive, then hold the employee accountable only for failure to meet job requirements and proceed accordingly. Random testing of a population long after the fact does not justify the alleged rationale behind drug testing. i.e., protection of the public from unsafe practices. A mass urinalysis testing program (for national security reasons) is inaccurate, subject to extensive abuse, costly, and is beyond degrading when individuals are required to urinate in the presence of a witness. There are other current technologies available that are more cost effective, i.e., computerized alertness tests can immediately identify levels of performance degradation. These tests measure real time performance, are accurate, nondegrading, and are real time verifiable for performance evaluation purposes. There are thousands of Federal employees who are required to routinely take drugs on a prescription basis. They are epileptics, narcoleptics, and many others who have been advised by the medical profession to keep their illnesses a private matter. Exposure of their illnesses by a random drug testing program will have significant negative impacts on their careers and lives. Without access to a security clearance even at the lower levels a Federal employee's career is ended. No one can expect to reach any reasonable level of responsibility in the Federal establishment without a security clearance. Relating test failures to loss of security clearances effectively ends an employees career.

These are but a few of the pitfalls associated with a mass testing program. Before proceeding further everyone involved should be sure they fully understand all the ramifications associated with this approach. There are many, and they are significant.

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