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NATIONAL DRUG POLICY BOARD

Washington, D.C. 20530

September 29, 1988

Full

Dear Mr. Brady:

The next meeting of the National Drug Policy Board is set for October 3, 1988, at 1:00 p.m., in the Roosevelt Room, The White House. The President is scheduled to attend this meeting. This being the Chairman's first Policy Board meeting, we would very much appreciate your attendance. Enclosed are the agenda/fact sheet and the summary of minutes for the July 27, 1988 meeting.

If you or your staff have any questions regarding the meeting, please do not hesitate to contact me (633-3435).

Sincerely,

A handwritten signature in dark ink, appearing to read "D. Pickens", is written over the typed name.

David Pickens
Executive Director

Enclosures

The Honorable Phillip D. Brady
Deputy Counsel to the President
2nd Floor, West Wing
The White House
Washington, D.C. 20500



NATIONAL DRUG POLICY BOARD

Washington, D.C. 20530

AGENDA/FACT SHEET

National Drug Policy Board Meeting

Monday, October 3, 1988

1:00 P.M., Roosevelt Room

The White House

I. Introductory Remarks

II. 1988 Omnibus Drug Bill Legislation

Alan Kranowitz, Assistant to the President for Legislative Affairs will review the current status of the 1988 Drug Bill.

Frank Keating, Associate Attorney General, and Dr. Ian MacDonald, Chairmen of the National Drug Policy Board Coordinating Groups for Drug Enforcement and Drug Abuse, Prevention and Health, will comment on the specific impact that the drug legislation may have regarding specific supply and demand strategies.

III. National Drug Policy Board Strategy Implementation Plans

Mr. Keating and Dr. MacDonald will outline the process to audit the Strategy Implementation Plans of the Policy Board. As indicated to the Congress, the Policy Board Lead Agencies will review the Implementation Plans. The National Drug Policy Board Staff assessment of the drug strategies have begun with the submission of the Lead Agency's report.

IV. FY 1990, Drug Budget Review

Office of Management and Budget Director, Jim Miller, will outline the projections for the FY 1990 drug budgets.

V. International Drug Control Efforts

Secretary of State George Shultz recently traveled to South America.

Assistant Secretary for Inter-American Affairs, Elliott Abrams will provide background on the South American trip and the current situation.

Assistant Secretary for International Narcotics Matters Ann Wroblewski will discuss results of the experts' group meeting which was held as a follow-up to the Seven Industrial Nations Toronto Summit.

VI. Drug-Free America Week

Dr. Otis Bowen, Vice Chairman and Secretary of Health and Human Services will review the schedule of activities highlighting Drug-Free America Week scheduled for October 24 - 30, 1988.

VII. Closing Remarks

NATIONAL DRUG POLICY BOARD

Summary of Meeting

July 27, 1988

- I. Introductory Remarks. The Chairman convened the meeting at 3:00 P.M. Dr. Bowen, the Vice Chairman, made an opening statement thanking Mr. Meese for his extensive work on the front lines of the war on drugs, for his loyalty to the President and his contributions to the Administration's successes.
- II. Legislative Initiative Update. Mr. Keating summarized the progress achieved. He and Dr. Macdonald presented the NDPB's concept package on the Hill. They met with Alan Kronowitz, who agreed to lead the overall legislative effort with Mr. Keating and Dr. Macdonald as his principal resource people, along with other NDPB representatives. This working group will divide in five sub-groups and designate departments to lead development of specific proposals. The sub-groups will further subdivide according to issues.
- III. DOD Authorization Bill. Secretary Carlucci addressed the DOD Mission Statement and stated that DOD is capable of doing drug detection and monitoring, however there are resource problems. He also acknowledged that this will be a large task which will probably trigger some turf sensitivity. Thus, he explained that DOD has not sought this mission and that DOD will work fully with Customs and the Coast Guard in the development of implementation plans.

Mr. Keating remarked that the DOD Mission Statement was agreed to by all parties, and that Customs and the Coast Guard had participated in the drafting of the statement. The Enforcement Coordinating Group has requested that Customs and the Coast Guard continue to lead the overall interdiction policy.

Ms. Dawson (Transportation) asked that the Board devise a mechanism through which problems (if any should arise) can be solved. The Chairman proposed that the Coordinating Groups be that mechanism, but if the problems cannot be solved at that level the Board will meet quickly to resolve any disputes. The Board approved this proposal.
- IV. Public Health Service Proposal. Secretary Bowen proposed that Federal expertise be used to assist in the development of innovative drug treatment programs. Specifically the

proposal involves the use of underutilized medical facilities or those targeted for closure on military bases, as drug treatment centers. These centers would be operated under State/local control, with HHS (Public Health Service) technical assistance. Secretary Carlucci stated that DOD would be happy to cooperate in this matter. The Chairman and the Board gave their support to this proposal which HHS will begin to implement with DOD.

- V. Office of Workplace Initiatives. Dr. Bowen explained that the Office of Workplace Initiatives oversees the Federal government's drug-free workplace program. He stated that the Office is seriously in need of funding. It needs approximately \$ 1 million to cover the operating costs for the rest of this year and an additional \$2.8 million to be made available for 1989. He proposed that these costs be distributed among the various agencies based on their participation in the program. The Board unanimously approved this proposal and directed that it be submitted to OMB for clarification of each agency's share of the costs.
- VI. Drug-Free Workplace. Secretary Verity reported on the Department of Commerce's progress in its meetings with the private sector regarding drug-free workplaces. Mr. Verity was particularly impressed with Phillips Industries, which established a policy of zero tolerance in its plants. Commerce will begin a private/public partnership which will result in a program involving random drug testing, testing of all new employees and the promotion of employees generated interest in a drug-free workplace. The Chairman asked the Drug Prevention and Health Coordinating Group to coordinate this effort with other on-going projects.
- VII. President's Commission on AIDS Report. Dr. Macdonald reported that out of the report's 597 recommendations, chapter eight has 51 drug specific recommendations. He observed that most of these issues have already been addressed by the NDPB. On a separate subject Dr. Macdonald informed the Board that five or six States have not applied for drug treatment funds for FY88.
- VIII. Drug Eradication Issues. Mr. Keating informed the Board that President Garcia of Peru intends to start drug eradication, and the U.S. can help by providing herbicides. However, at the present time the company which produces the herbicide "Spike," will not sell it to the government. Mr. Keating noted that the Enforcement Coordinating Group has approved a resolution condemning the company, and asks the Chairman to invite the CEOs of several chemical manufacturing companies to come to Washington to discuss this issue. Other options proposed by the Coordinating Group included the purchase of the patent for the herbicide,

or if that is not possible the boycott of these companies' products by all governmental agencies.

Ms. Wrobleski informed the Board that State has been in contact with the company and that "Spike" is only one of the three chemicals being tested for use in Peru. Peru has not decided yet which chemical it will use.

Dr. Bowen explained that one chemical company might be willing to sell the formula to the government or to sell the chemicals to the government if it is willing to take responsibility for liability.

The Chairman summarized that testing of the chemicals will go forward, the companies should be encouraged to cooperate, and if talks with the leaders of these companies would be productive the Chairman will engage in such talks. He asked Mr. Keating to review the options and to make any necessary recommendations to the Policy Board.

The meeting concluded at 4:10 P.M.

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Winning the War Against Narcotics

1988
mg file



United States Department of State
Bureau of Public Affairs
Washington, D.C.

Following is an address by Secretary Shultz before a group of Bolivians and members of the press, La Paz, Bolivia, August 8, 1988.

Your government has received me with great cordiality, grace, and dignity despite the incident [bomb explosion along the Secretary's motorcade route] this morning. I am deeply grateful to President Paz and his associates.

In recent months, I've traveled to the Soviet Union, to Western Europe, to the Middle East, to the Far East, and now to Latin America. Everywhere there is a sense of great changes underway in the world. Science and technology are transforming the materials we use and the work we do. Today we live in a global economy in which international manufacturing processes bring goods and raw materials from around the globe to the market of choice. Another fact is the global financial market—a trillion dollars change hands every day, according to some estimates.

We don't have a name yet to capture these changes, but let me suggest one: the age of information. For what connects all of these new developments is knowledge, its discovery, its transmission, and the education needed to use it. Access to ideas has thus become the key to scientific and economic progress.

Two conclusions can be drawn about the age of information.

First, a society must be open if it hopes to take advantage of new opportunities. Closed societies, isolated econ-

omies and nations will not be able to progress. There is a profound political implication here. Democracy, which is justified by humane values that go beyond economic efficiency, happens to be best suited to the new age.

Bolivia has clearly understood this, and we welcome your achievements as a democracy—not the easiest path but surely the best. Freedom, openness, individual initiative, and individual responsibility—the cornerstones of democracy—are also the building blocks of the age of information.

Second, the opportunities and the problems presented by this rapidly changing world often transcend national boundaries. No country today can expect to prosper apart from the global economy. Every country today, including the United States, needs the cooperation of allies and friends to deal with mutual dangers. And that is my subject today: how, working together, we can win the war against the new pirates of the 20th century, the narcotics traffickers of the world, who threaten us all.

Bolivia and the United States are two of the many allies in this war. As democracies, we understand the dangers of failing to fight such a ruthless and pervasive enemy. And as the largest single market for illegal drugs, the United States has a special responsibility in this struggle—a very special responsibility.

So let us hold a council of war. What are we doing about drugs, as individual countries? What are we doing together? And what more can we do?

U.S. Efforts To Reduce Consumption

Many here and elsewhere continue to ask: "Is the United States really doing enough to reduce the vast American demand for drugs at the heart of this trade?" The answer is, we are doing a lot but not enough—not yet. But the answer also is that we are beginning to do what needs to be done—at last.

Americans are slow to anger, but once aroused, we know how to take action. Today Americans are sickened by the sight of young athletes, who should be heroes, throwing their lives away through drug abuse; by children, whose aspirations are perverted to a life of crime; by auto and train accidents, injuring or killing the innocent, because of drug abuse; by evidence of drug use by those entrusted with our health, our safety, and our security; by the international drug cartels that make the Capone crowd and the old Mafia look like small-time crooks.

Americans have finally begun to say "no" to drugs. Drug-taking is now seen increasingly for what it is: death, not life. A crucial psychological change has taken place, especially among young Americans. In the past 8 years, we have seen dramatic reductions in teenage marijuana abuse: today one in 30 students report using marijuana on a

daily basis, compared to one in nine 10 years ago. Cocaine use among young people has also declined, dropping by one-third last year. American students are saying "no" to drugs and "yes" to their future.

President and Mrs. Reagan have led the American fight against drug abuse. There are now more than 9,000 groups of parents working in communities, sharing information and tactics. Mrs. Reagan's "Just Say No" clubs are influencing a new generation of American children. Drug education and prevention efforts have become common in our schools, from kindergarten on up.

Everybody has a job to do—the churches, the workplaces, the government, coaches and athletes. Everywhere the word has to go out: "Don't take drugs, and if you do, we are going to be tough as nails." It is not a matter of choice, and it's no longer a careless attitude of "live and let live." No quantity of drugs, even small amounts once considered "personal possession" levels, will be tolerated—zero tolerance. Vehicles and yachts are being seized, offenders are being fined, and our enforcement agencies are sending a loud message—no one is above the law.

We are saying to lawyers, to stockbrokers, to doctors: by choosing to use drugs, you are throwing it all away—your possessions, your standing in the community, your freedom. Personal responsibility can no longer be denied.

Our law enforcement agencies and courts are arresting and convicting more drug offenders than ever before. Over 12,000 people arrested by the U.S. Drug Enforcement Administration were convicted of drug crimes last year, roughly twice the number in 1981. In New York City alone, felony drug convictions during the last 4 years more than tripled, from 4,202 to 13,466.

Over the last 10 years, the U.S. Coast Guard has arrested more than 8,500 drug smugglers. In 1983, we formed the National Narcotics Border Interdiction System, led by Vice President Bush, to coordinate Federal, State, and local law enforcement efforts against drug smuggling nationwide. Since the formation of the border interdiction system, annual cocaine seizures have gone up twentyfold.

The Comprehensive Crime Control Act, passed in 1984, helps us put drug dealers out of business by seizing their assets. Last year, over \$500 million in drug-related assets were seized in the United States. Since 1981, we have tri-

pled the antidrug enforcement budget, and President Reagan has asked for another 13% increase. That would give the U.S. Government \$3.9 billion next fiscal year to fight the drug menace.

Our Congress continues its crusade to eliminate drugs from America. The omnibus drug bill now being considered reflects the recent, important changes we have seen in American attitudes. Through the new legislation, Congress is proposing that more treatment be made available to users who seek it but is insisting at the same time that those who refuse to be treated will be in trouble with the law. Proposals have been made to rescind drivers licenses of young people who are discovered using drugs and to withhold Federal privileges, such as student loans.

A person must say "no" to drug abuse or eventually he will say "no" to life. A nation must say "no" to narcotics or eventually it will say "no" to democracy.

Strong new penalties against those who deal in illegal drugs—the peddlers of evil—are being developed. Local and Federal law enforcement agencies are being given increased resources and more legal tools with which to fight an already well-equipped enemy. Across the board, Congress and the Executive are proposing a number of measures to augment the order of battle at home and to help our allies abroad.

Anyone who doubts that the American people are serious about eliminating drug abuse ought to take a good look at any opinion poll, any newspaper, and every political speech. Drug abuse is the number one election issue. And the drug trade is the number one enemy.

So that is the news from the north. We are mobilizing fully to wage this war at home; to cut demand. We are going to win.

Challenges Facing South America

Let me turn now to the situation on this continent—what you face, what you are doing, and how we can help.

Physicians and scientists tell us that drug addiction does not usually result from massive doses but from small amounts. The addict believes that he or she can stop "at any time." Soon it is too late. The poison attacks the brain

and the body, and the victim soon loses health, will, and personality.

Similar things can happen to a country. The cultivation of the coca plants or of marijuana for illicit purposes starts small, in isolated places. People say, "It's always been grown here, and it is being used in dangerous ways elsewhere, so how can it harm us?" There is good money in it, and the drug dealers like to behave like Robin Hoods. They buy allies.

The economy of narcotics prospers, and soon a country's political institutions are undermined. Its constitution becomes a scrap of paper, while the guardians of its independence are corrupted—whether they be soldiers or civilians. And everything goes, including self-respect and sovereignty.

Ultimately, drugs destroy the moral fabric of society. That is why drugs and democracy are permanent enemies. Democratic thinkers from Thomas Jefferson to Victor Paz Estenssoro have taught that democracy rests upon certain ethical foundations. Ultimately, self-government in the political sense depends on self-government in the personal and moral sense. There can be no compromises here. A person must say "no" to drug abuse or eventually he will say "no" to life. A nation must say "no" to narcotics or eventually it will say "no" to democracy.

And what could be more destructive to a nation than a systematic attack on its natural resources? Look at Peru. Experts agree that—unless coca cultivation and cocaine processing are stopped soon—the Upper Huallaga Valley could be reduced to a toxic waste dump. Slash-and-burn agriculture is eroding the soil. Hired coca farmers are carelessly using chemicals and fertilizers. Processors have dumped millions of liters of kerosene, sulfuric acid, acetone, and toluene into the valley's rivers and ground water. When the sun hits the Huallaga River at just the right angle, the chemical pollution—a yellow color—can be seen from the air. That's the color of a dying land.

Recent Developments in Bolivia and Colombia

So, the challenges are clear. What is being done in the region about it? I will comment on developments in several countries, but concentrate on two that are very different—Bolivia and Colombia.

Bolivia. Here in Bolivia, despite strong opposition, your Congress has passed a comprehensive antinarcotics

law. You have kept your national pledge to the world community to outlaw all coca cultivation beyond that raised in specific areas, in certain quantities, for traditional uses. You have defined the crimes of illicit narcotics production, processing, and trafficking and specified the penalties for breaking the law. You have voluntarily eradicated over 2,000 hectares of coca over the past year—fulfilling the letter of your international commitments. You have captured and jailed Roberto Suarez, a leader among the international drug criminals.

All of this has been difficult. The pirates and warlords of the drug business have fought you at every step, with money, intimidation, and violence. But there can be no question that Bolivia has made the right choice. We salute you for that choice.

We have made the same choice. This morning's explosion brings that home. There is no turning back. The traffickers want us to look the other way. The terrorists want us to run and hide. To both I say: "You have picked on the wrong people. The democracies will not be intimidated. Bolivia and the United States will stand together. We will win this war."

When the history of the war against narcotics is written, Bolivia will rank high. Millions who are young, still more millions not yet born will owe you a priceless debt of gratitude.

There are many lessons to be learned from the Bolivian experience. Perhaps the most important is that a country's own strength to act against the drug menace can be multiplied many times more through international cooperation. A number of countries—including, very much, the United States through the State Department's International Narcotics Control Program and using development and other economic assistance funds—have pledged the monies necessary to support the unique Bolivian combination of economic incentive and law enforcement. And your own legislative decisions have mandated that the "Bolivian way" must be made a reality.

The U.S. Congress has looked at your law and your performance with great interest, and I trust that your steady commitment will convince the members of our legislative body of your serious intentions. To sum up, the drug traffickers are in trouble in Bolivia.

Colombia. In Colombia, the country is under siege. Narcotics traffickers and guerrillas, often operating together

in criminal conspiracy, threaten Colombian democracy. The Medellin cartel, as evil a bunch as exists anywhere, has murdered many officials and citizens whose sin it was to stand up for the rule of law, the honor of Colombia, democracy, and just plain human decency. They are in cahoots with other evil-doers. The FARC [Revolutionary Armed Forces of Colombia] guerrillas protect the traffickers in some areas and produce their own drugs in others. Then there is the M-19, a new "Murder Incorporated," hired by the drug cartels to kill those who oppose them, as we saw in the attack on the Palace of Justice 3 years ago.

The Government of Colombia is fighting back. The Colombian military—in its largest and most successful operation to date in the country's drug interdiction history—recently seized over 3,000 kilos of cocaine, a cache of sophisticated weapons, and large amounts of the chemicals used to manufacture the drug. Air force and army units combined to force down two trafficker planes at a clandestine airfield, where the cocaine was seized. This is only the latest example. To date in 1988, Colombian military and law enforcement units have seized 15 tons of cocaine hydrochloride (HCL) or equivalent; 680 cocaine HCL labs have been destroyed, compared to 183 for the same period in 1987.

We in the United States cannot and will not stand aside from this battle. We are going to help give Colombia the tools it needs to win this war. The U.S. Congress is considering passage of legislation to permit the Export-Import Bank to guarantee financing of loans to governments like that of Colombia for the purchase of weapons and other military equipment to use in the war on the traffickers.

Progress in Other Countries

What about other countries in the region? After a rough start, we are seeing some progress.

Peru. As producer of half the world's coca leaf, Peru has long been aware of the dangers posed by drug trafficking to its democracy and its physical environment. President Garcia began his presidency determined to stamp out this vile trade. His government has now pledged a program of large-scale eradication of coca, including the use of herbicides, once a safe and effective product is identified and fully tested. A small army has been mobilized in the remote Upper Huallaga Valley to fight the traffickers.

The United States provides financial and logistical aid, but it is the Peruvian *Guardia Civil* that is fighting the battles and taking the casualties in the struggle to defend Peru's institutions. The drug merchants and terrorists have joined in a deadly marriage of convenience whose only common ground is contempt for democracy and humanity.

Ecuador. Ecuador today is totally free of coca cultivation because of a determined governmental effort supported by the United States to destroy the crop. But trafficking in illicit drugs and precursor chemicals is up and has contributed to a substantial rise in local drug addiction.

Other Governments. As this suggests, the problem is changing all the time. The Venezuelan Government has had to move against increasing trafficker use of its territory. Brazil's vast border regions have been an inviting lure to cultivation for trafficking. Argentina has become a major locus of cocaine movement to Europe and the United States. But all three governments are now alert to the problem and are taking action against the traffickers. Last month, Argentine authorities were able to seize 1,200 pounds of cocaine and disrupt a major drug network.

Unfortunately, no country in the Western Hemisphere, including my own, has yet been able to control adequately the movement of coca, or paste, or cocaine, or the precursor chemicals which make it all possible. That's a sad but accurate conclusion. We are all fighting this war, and we have made some headway. Yet the fact is that despite the money spent, the laws passed, and the lives lost, there is more cocaine entering the United States and Europe from South America than ever before. We have failed to stop the enemy. We are responsible because the demand for drugs still exists, and *you* are responsible because the drugs are still being produced and shipped northward.

As the U.S. National Drug Policy Board recently reported, the pool of people using drugs has diminished, but the pool's drug consumption has risen. Clearly, though we are allies, we have not helped each other enough. And—that's the key to it—to increase our ability to act and our will to act through international cooperation. This is an international problem, and we must deal with it on an international basis if we want to succeed.

Future Efforts

Where do we go from here? Let me suggest some directions.

First, do not give up the fight. That's what it would mean if we legalized narcotics. We do not want a nation of addicts. Neither do you. And you don't want to make the drug syndicates even more powerful in your countries.

Second, mobilize more of our resources, our key institutions: the military, as in Colombia; the legislators, as in Bolivia; the media and the private sector, as in the United States; the schools, the churches, the workplaces, the home.

Third, expand international cooperation among the nations cursed by the drug trade. The Toronto economic summit in June called for more cooperation against "all facets" of the drug trade, particularly production, trafficking, and financing. The summit also supported the adoption of a UN convention on illicit trafficking. This convention is a Latin American initiative, and it is Latin American leadership that has brought rapid progress toward its completion in Vienna in November.

Great changes have already been taking place in this hemisphere, once known for its nationalistic border disputes. Direct law enforcement cooperation is becoming the norm—as among Ecuador, Colombia, and Peru; the Andean nations together in their regional antidrug communications network; and the specific agreements that Brazil has concluded with its neighbors. We all recognize the fact that the problem is greater than any individual country, including the United States.

Six weeks ago in Washington, a precedent-setting meeting of the leaders of the Andean Parliament and of our own Congress produced a joint declaration symbolic of this sense of regional responsibility and commitment.

The declaration recognized "the menace that organized narcotrafficking represents for the security and the continuation of democracy..." It insisted on the setting of specific goals for the complete elimination of both consumption and production of narcotics. It called for concrete measures to combat drug money laundering. And it asked for the development of "an international strategy and inter-American mechanisms of cooperation in the fight against the illegal production, traffic, and use of drugs."

Our Congress—from Chairman [of the Select Committee on Narcotics Abuse and Control] Rangel to Congressman Gilman to Senators D'Amato, Kerry, Murkowski, and DeConcini, all of whom contributed to that meeting of legislative leaders—championed those goals. [Bolivian] Vice President Garrett was there with his Andean colleagues and can take pride in his role in that effort. And we—the State Department, Justice, Treasury, and Defense—will do our part, specifically:

- We must continue to refine and expand the State Department's International Narcotics Control Program, now contributing some \$100 million a year worldwide (almost half of that in South America) to law enforcement and other antidrug efforts.

- We must expand our military assistance programs to those countries where the direct cooperation of the defense establishment with civilian agencies is essential if the war against the traffickers and their allies is to be won.

- We must revise our own laws and procedures which have made it difficult to provide useful assistance to foreign military or police forces. That means doing something about security assistance prohibitions imposed in the 1960s out of fear that such assistance might strengthen dictatorships. How tragic it is that these laws now hamper our help for democracies so urgently

in need. Limitations on what kind of credit and guarantees our Export-Import Bank can provide are also part of the problem. We hope that the omnibus drug bill now moving through the Congress will address these issues.

- We must continue to remember that coca eradication has economic ramifications. With the Europeans and others, we should continue to provide assistance to help countries make the transition to a legal economy.

Let me sum it up. We in the United States are ready to help, and we all need to help each other. We may be looking at the turning point in this war: at a United States aroused at last to discourage consumption, reduce demand, punish the users and the suppliers; at a United States generous and understanding of its allies in this struggle; at allies who, like Bolivia, aim at the total elimination of the illicit crop within a reasonable period of time; at the determined and rapid destruction of the laboratories, of the aircraft and landing fields; at the arrest, trial, conviction, and jailing of the so-called kingpins; at the seizure of the traffickers' assets; at the new hemisphere-wide conviction that a free people, in democratic consultation, can beat its most powerful enemies; in short, at the supremacy of law, the assertion of sovereignty, and the safeguarding of our peoples' health and honor, dignity, and security.

The war against narcotics can and must be won. ■

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U.S. Department of Justice

Drug Enforcement Administration

Office of the Administrator

Washington, D.C. 20537

August 26, 1988

Mr. Philip Brady
Deputy Counsel to the President
The White House
Washington, D.C. 20500

Dear Phil:

Enclosed is a copy of a draft press release which describes a major international narcotics enforcement effort which has just been completed.

I furnished a copy of this material to Mr. Boyden Gray on the Vice President's staff.

Sincerely,

Jack
John C. Lawn
Administrator

Enclosures

Hope you enjoyed your vacation!



U.S. Department of Justice
Drug Enforcement Administration

D R A F T

FOR IMMEDIATE RELEASE
TUESDAY, AUGUST 30, 1988

Simultaneous narcotics enforcement operations, fully coordinated among 30 nations throughout the Americas and Europe and unprecedented in scope, were detailed today at a press conference in Bogota, Colombia, by John C. Lawn, President of the International Drug Enforcement Conference (IDEC).

Mr. Lawn, who is Administrator of the U.S. Drug Enforcement Administration (DEA), was joined in Bogota by representatives of many of the participating nations. Similar news conferences to discuss the wrap-up of the first-ever series of operations that ran from August 1 through August 28, were held elsewhere throughout Latin America, and in North America and Europe.

The "IDEC Initiative," as the operation was called, was an "unqualified success," according to Mr. Lawn and Ann B. Wrobleski, Assistant Secretary of State for International Narcotics Matters.

DEA and the State Department were the principal United States agencies responsible for the initiative, assisted in various ways by the U.S. Customs Service, the Marshals Service, the Immigration and Naturalization Service, the U.S. Coast Guard and the National Guard, and the Federal Bureau of Investigation.

-more-

The IDEC Initiative grew out of a meeting of all member nations in Guatemala last March 23-24. The Police Action Working Group of IDEC recommended that all member countries carry out simultaneous enforcement operations on predetermined dates to demonstrate the feasibility of a regional approach to the drug problem.

IDEC President Lawn noted that this marked a major first step in developing and implementing a concerted regional strategy to disrupt cocaine producing and trafficking organizations. Cross-border operations, where law enforcement entities from two or more nations would utilize each other's manpower and equipment, had seldom if ever been attempted before.

At subsequent meetings of the police working group it was decided to conduct joint and cross-border patrols to gather intelligence, destroy cocaine laboratories and clandestine airstrips and eradicate coca leaves and marijuana plants.

Additionally, member nations decided to intensify searches of known drug trafficking border points; to locate, seize and destroy precursor chemicals stores at or destined for laboratory sites; to increase patrols at airports, key highway check points and on rivers of member nations, and to be on special alert for traffickers attempting to smuggle currency from member nations into Europe and the United States.

Mr. Lawn said that, concurrent with these South and Central American strategies, it was agreed there also would be a series of intensified operations in the United States, particularly along the borders, and in Canada and Europe, as well, during the same time frame.

In the United States, for example, Mr. Lawn said that agency resources among participants were directed at vessels, cargo and aircraft arriving from Latin America on a stepped up basis. Similar intensification was the primary thrust of law enforcement agencies in Canada and Europe. European nations that participated in the IDEC Initiative included Spain, Portugal, France, Belgium, the Netherlands, the United Kingdom, Germany, Switzerland, and Italy.

IDEC was organized in 1983 by DEA in an effort to bring together upper-level drug law enforcement officials throughout the Americas. The idea was to share intelligence, discuss common problems and develop a working strategy that could be used against international drug traffickers.

###

(Attention Correspondents: For more information, contact the DEA Office of Congressional and Public Affairs, (202) 633-1469.

A statistical summary of the IDEC Initiative accomplishments, a brief history of IDEC, and VHS video footage offering aspects of the initiative will be available at the press conference in Washington and Bogota.)



U.S. Department of Justice
Drug Enforcement Administration

Office of the Administrator

Washington, D.C. 20537

August 26, 1988

INTERNATIONAL DRUG ENFORCEMENT CONFERENCE

The International Drug Enforcement Conference (IDEC) was formed in 1983 by the Drug Enforcement Administration to bring together national police and public safety leadership in Latin America in order to enhance law enforcement cooperation in addressing the cocaine problem.

Thirteen nations met at the first conference where articles of association were prepared and ratified. According to those articles, the IDEC presidency is rotated annually. The Administrator of DEA is the permanent Co-President and DEA serves as the permanent Secretariat.

By the time IDEC IV convened in Argentina in 1986, bilateral and multilateral agreements had been negotiated between Colombia, Ecuador, Peru and Venezuela to establish a regional communications system in order to exchange drug information in a timely and secure manner. (This radio system, paid for by INM, was operational by late 1986.)

Working groups at IDEC III, IV and V attempted to develop strategy to control the sale and distribution of precursor chemicals. By 1986, three countries reported the passage of chemical control legislation. At the 1988 IDEC meeting in Guatemala, every IDEC country had either passed such legislation, or had legislation pending which would require stricter controls on the import and export of cocaine-producing chemicals. (Legislation in the United States, the Chemical Diversion and Trafficking Act, is pending.)

The current simultaneous enforcement operations involving all 20 IDEC countries and 10 other countries is the result of plans formulated at IDEC VI early this year. This multi-country initiative highlights IDEC's primary value and the importance of IDEC.

William von Raab

WASHINGTON POST 7/20/88

Legalize Drugs? Not Now, Not Ever

The drug panic in this country today is caused by the increase in drug-related crime and deaths—the fear in the heart of every parent who wonders if his child's health or future is being savaged by drug-dealing peers with fast cars and fancy clothes. Because of this fear, otherwise reasonable people are now talking about legalizing drugs.

People suggest legalizing drugs for different reasons. Some want to ease the fear and frustration; some want to punish dealers by taking the profit out of drugs; still others find nothing wrong with taking certain drugs. I am unalterably opposed to legalizing any drug. But if the legalization advocates are trying to solve our current crisis, then they have to talk about legalizing cocaine, and that to me is madness. As responsible adults and leaders, we cannot underestimate the weight our words and opinions carry with impressionable youth. The people we are trying to save from drug abuse are also the people most susceptible to peer pressure and reasonable-sounding arguments.

Drug pushers are probably already twisting the words of well-intentioned advocates of legalization such as Mayor Kurt Schmoke of Baltimore. I can imagine the conversation between a 15-year-old crack dealer with gold

"Why are otherwise good people so desperate and afraid that they would want drugs legalized?"

dripping from his neck and a 10-year-old on his way home from school: "Go ahead, man, crack's okay . . . it won't hurt you. Who're you going to believe—some stupid commercial on TV or the mayor? Go on, try it; it'll make you feel great!"

Why are otherwise good people so desperate and afraid that they would want drugs legalized? Is our country so backed into a corner by drug thugs that we must give up?

It is time we as a nation quit talking about throwing in the towel—that's just not the American way. What we must do is look for additional ways to punish drug traffickers and users alike, and take steps to put some meaning back into the lives of those who are so easily attracted to the death grip of drugs. It is time we "criminalized" the use of and trafficking in small amounts of drugs—crimes that have been "legalized" or overlooked since the early '70s.

The government's strategy for dealing with

the drug problem has heretofore been a five-part one: eradication, interdiction, investigation, rehabilitation and education. All five parts are equally important and must continue, but the government recently added the essential final part to the strategy: user accountability. On March 17, the National Drug Policy Board unanimously approved this part of the strategy. It is called "zero tolerance," and it is designed to attack demand for drugs by punishing the user and the small trafficker.

Until zero tolerance was approved, our country was in effect treating drug use as decriminalized. People caught with small amounts of drugs at the border were slapped on the wrist, made to pay a small fine and allowed to go off to buy more drugs from their pusher. Now, people caught with drugs at the border are arrested. They are fingerprinted, photographed and booked, and instead of a slap on the wrist, they get a criminal record. If they are driving their car at the time they are

caught, that is seized and put up for auction.

Drug users are the cause of our nation's drug problem—they are the customers drug traffickers are eager to reach, and until two months ago they were getting off scot-free. We need to take dramatic steps to put greater pressure on drug users. The federal government's zero-tolerance lead should be followed by states and local communities.

There are some additional steps states might consider taking. They could include drug testing in traffic accident investigations (when the police officer suspects drugs may be involved). "Drugged" drivers should have their licenses revoked or suspended for a period of time, just like drunk drivers. Courts should treat anyone caught selling drugs as an adult, regardless of age, and take him off the streets for a certain period of time.

States could also harness the energies of young offenders in a penal work program that would remove them from their criminal environment. They could be put to work fixing up our national parks or repairing our highways. They would pay something back to the country they are seemingly so eager to take something from. Six months in a work program could be the punishment for first-time youthful drug offenders. Such a punishment might give these

offenders a new respect for our country and show them what's good about it. We need to restore the work ethic that founded our country and get rid of the fast-buck-at-any-cost ethic. A work program wouldn't be a cure-all, but it would be a start. Repeat offenders should get mandatory minimum sentences.

We shouldn't kid ourselves into believing that legalizing cocaine or any drug would end crime, stop drug-related deaths or even dry up the market.

The attitude of Americans has changed over the past few years. People no longer think of drugs as harmless. People no longer consider users "casual" users. Drug abuse is no longer a problem that families can shrug off, as if a child came home one day with a bad report card. Drugs tear families apart; they dash families' hopes and ruin promising lives. Most of all, people today know that drugs kill.

Tougher actions against drug users—zero tolerance, useful punishment for young offenders and a continued emphasis on the first five parts of our national drug strategy—are just a few of the possible cures for our nation's drug fix. But not legalization—not now, not ever.

The writer is commissioner of the U.S. Customs Service.

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RICHARD K. WILLARD

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July 14, 1988

The Honorable Phillip D. Brady
Deputy Counsel to the President
The White House
Washington, D.C. 20500

Dear Phil:

Enclosed is a copy of the manuscript of an article on "Achieving a Drug-Free Workplace" that I have recently submitted for publication. Any comments are welcome.

Also enclosed, in case you missed it, is a copy of the recent New York Times editorial endorsing the Administration's random drug testing program.

Best regards.

Sincerely,



Richard K. Willard

Enclosures

file

The New York Times

Founded in 1851

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Yes: Drug Tests for (Some) Officials

Does the Federal Government have the right "to seize at random the bodily fluids of hundreds of thousands of its employees and search those fluids by urinalysis for evidence of drug abuse?" That's what the American Civil Liberties Union and other critics of the Reagan Administration's random drug testing program are asking.

In due course, they'll get an answer from the Supreme Court. The right answer is yes: if limited to cases of demonstrated need, such testing can be conducted with decent regard for privacy.

President Reagan is entitled to some latitude to fight the drug war on his own turf. Government has made the sale and use of certain substances illegal. Government need not hire drug users or keep them on the public payroll. But it's crucial that Government use its power sensibly and sensitively.

Law and public perceptions have come a long way since the Plainfield, N.J., fire department raided its own fire station two years ago, roused sleeping firefighters and demanded urine samples on the spot. The Reagan program addresses the need for fair warning to employees and job applicants, dignified yet reliable collection of samples, safeguards against false results and considerate behavior toward users willing to accept help.

The Civil Liberties Union argues that urine testing is a search. That's correct, but the next question is whether such a search is reasonable under the Fourth Amendment without a warrant based on reasonable suspicion of criminal conduct. The Gov-

ernment makes a plausible case when it compares drug testing to administrative health and building inspections, for which the Court has not demanded probable cause that there's evidence of crime.

The random drug testing program also asserts plausible Federal interests. In one case before the Court, a Customs Service regulation requires testing for any employee seeking a transfer to a position involving interdiction of narcotics, carrying firearms or handling classified material. In the other case, the Transportation Department mandates testing of railroad employees who are involved in train accidents.

It seems absurd, at least for personnel who enforce the law and have heavy responsibility for public safety, to insist that authorities must harbor strong suspicions before testing them. Random testing does not cast a net of suspicion over all employees in sensitive positions.

Despite court challenges, including a lawsuit filed by 42 Justice Department employees, the basic programs on their face are not excessively sweeping. The Justice plan, which conceivably can cover anyone connected with law enforcement, is prudently limited to employees with grand jury responsibility or access to classified information.

Even if the Supreme Court gives broad approval to the Reagan testing programs, the need will remain to administer them compassionately. But to tolerate drug abuse among pivotal public servants is to abuse the public they serve.

ACHIEVING A DRUG FREE WORKPLACE

By Richard K. Willard

July 1, 1988

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ACHIEVING A DRUG-FREE WORKPLACE

By

Richard K. Willard^{1/}

Introduction

Our society's attitude regarding illegal drugs changed substantially during the 1960's and 1970's to one of toleration and acceptance, particularly of marijuana and cocaine. In the late 1970's President Carter advocated relaxing the penalties for possession of marijuana. His drug advisor, Dr. Peter Bourne, made statements to the effect that marijuana and cocaine were relatively benign drugs. Drug use reached its peak of popularity in about 1978, when nearly 40 percent of high school seniors were using marijuana at least monthly and over 20 per cent were using it daily.^{2/}

During the 1980's we have come to view drugs as our number one domestic problem. Evidence of the impact of drugs on crime and the lives of our children is overwhelming. President Reagan and the First Lady have helped to crystallize the change of attitude to one of intolerance of drug use. Although levels of drug use are still much too high, there is good reason to believe that the tide is turning.^{3/}

^{1/} Partner, Steptoe & Johnson, Washington, D.C. The author served as Assistant Attorney General in charge of the Civil Division, U.S. Department of Justice, from 1983 until early 1988. In that capacity, he participated in the drafting and implementation of Executive Order No. 12,564 "Drug Free Federal Workplace" (Sep. 15, 1986), and supervised litigation challenging federal drug testing programs. He presented argument on behalf of the United States in NTEU v. von Raab, 816 F.2d 170 (5th Cir. 1987), cert. granted, 56 U.S.L.W. 3590 (Feb. 29, 1988), and in AFGE v. Dole, 670 F. Supp. 445 (D.D.C. 1987), appeal pending. The views expressed in this article are those of the author alone. Assistance in preparing the article was provided by Thomas M. Barba, Agnes Pek Dover, and Frank B. Stilwell III, who are also attorneys at Steptoe & Johnson.

^{2/} U.S. Department of Health and Human Services, National Institute for Drug Abuse, National Trends in Drug Use and Related Factors Among American High School Students and Young Adults, 1975-1986 (GPO:1987).

^{3/} See D. Musto, The American Disease ch. 12 (rev. ed. 1987).

One important realization has been that the drug problem cannot be treated as solely the concern of law enforcement agencies. Such efforts can affect the supply of drugs, but the problem will persist unless we also attack the demand for drugs. A demand-side strategy involves discouraging drug use by holding the consumers accountable for their activities. User accountability cannot be solely the responsibility of the police but must involve all of our social institutions -- families, schools, religious institutions and workplaces.

A major element of the demand-side strategy is the creation of drug-free workplaces. This effort is based on the realization that drug use endangers the safety, productivity and integrity of the workplace. It is in the employer's own economic self-interest to have a drug-free workforce.

This article discusses techniques for achieving a drug-free workplace in the private sector, with particular emphasis on drug testing, and related legal issues. It is my view that the legal system is the major obstacle to the natural economic pressure that would otherwise lead to the attainment of drug-free workplaces. This article suggests ways to reduce or eliminate those legal obstacles.

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I. DRUG TESTING AND DRUG-FREE WORKPLACES

A. Why Employers Should be Concerned About Drugs in the Workplace

Illegal drug use in our society is so widespread that no employer can afford to overlook its impact. Approximately 23 million Americans of working age use an illegal drug at least once a month. Six million of these use cocaine.^{4/} This means that, on the average, one of every six employees uses marijuana at least once a month, and one of twenty cocaine at least once a month.

Drug use is heaviest among younger individuals, particularly men, who are just entering the workforce. Nearly half of young men between the ages of 18 and 25 have used an illegal drug (other than alcohol) in the past month.^{5/}

Although levels of drug use may vary demographically, no segment of our society is immune from its effects. Use is widespread among college graduates and high school dropouts alike, in the inner cities and among the suburbs.^{6/} An employer who assumes that his employees do not use drugs is likely to be tragically mistaken.

The impact of drugs in the workplace can be analyzed in three categories: health and safety; productivity; and integrity.

1. Health and safety. Employees who use drugs are much more likely to be involved in on-the-job accidents, thus endangering themselves, their co-workers, and the public.^{7/} The potential for harm is quite dramatic for air traffic controllers and nuclear industry employees. But the potential for harm to health and safety is present in many jobs, including surgeons,

^{4/} U.S. Department of Health and Human Services, National Institute on Drug Abuse, National Household Survey on Drug Abuse: Population Estimates 1985 (GPO:1987), at 10, 14.

^{5/} U.S. Department of Health and Human Services, National Institute on Drug Abuse, The 1987 National High School Survey, Jan. 1988, Figure 8.

^{6/} U.S. Department of Health and Human Services, National Institute on Drug Abuse, National Trends in Drug Use and Related Factors Among American High School Students and Young Adults, 1975-1986 (GPO:1987), at 36, 39-41 and 76.

^{7/} M. Gold, P. Bensinger, A. Washton, & L. Chilnick, Drugs in the Workplace, Facts vs. Myths 4 (1986).

truck drivers, chemical plant workers, and pharmaceutical company employees.

The cost of on-the-job accidents can include lost time, medical costs, worker compensation claims and tort liability. For example, Conrail recently agreed to pay \$ 58 million to the families of 15 Amtrak passengers killed in the January 1987 train collision caused by its engineer's use of illegal drugs. Earlier Conrail had placed \$ 7.5 million in escrow to cover claims by passengers injured in the collision.^{8/}

2. Productivity. Employees who use illegal drugs also have lower productivity than their non-drug-using counterparts. This shows up in lower output on the job, higher rates of absenteeism, and more disagreements with co-workers and supervisors.^{9/}

3. Integrity. It is often overlooked that employees who use illegal drugs must regularly violate the law in order to pursue their habit. Drug users must come into contact with the criminal element in order to obtain drugs, and thus may be subject to blackmail. In addition, drugs are expensive, and users are more likely to steal from their employer and co-workers. These harmful effects can occur whether or not the employee actually uses or trafficks in drugs while on the job.

In summary, employers have numerous reasons to be concerned about drug use in the workplace, in addition to the broader public interest in achieving a drug-free America. The effort and expense necessary to achieve a drug-free workplace will repay itself many times in lower costs and higher productivity. It is thus in the economic self-interest of every employer to pursue this goal.

B. Developing a Workplace Policy on Drugs

The easy part of this topic is the proposition that every employer should have a clear policy on drugs in the workplace. I have yet to hear anyone disagree with this proposition. Certainly, having such a policy is both fair to employees and helpful to supervisors. Even-handed application of such a policy should also be helpful in defending against claims of discrimination or wrongful discharge.

The hard part of this topic is to decide what the policy should be. This discussion is intended to explore some of the difficult issues that often arise in the context of establishing

^{8/} National Law Journal, May 16, 1988.

^{9/} See generally, BNA Special Report, Alcohol & Drugs in the Workplace: Costs, Controls and Controversies (1986).

a workplace drug policy. Legal constraints on workplace drug policy are for the most part reserved for later discussion.

It should be apparent that in any case the particular needs and concerns of the individual workplace must be taken into account. Some employment situations involve special health or safety hazards; others involve special vulnerabilities to theft or embezzlement. Any employer in this day and age has reason to be concerned about drugs in the workplace, but particular needs may require appropriately tailored policies.

1. Legal and Illegal Drugs

The first hard question is whether the policy should cover use of illegal drugs only or also the abuse of alcohol and legally prescribed drugs. In my opinion, an employer should have policies in both areas but should recognize that the problems of illegal drugs are in many ways different from those of legal drugs such as alcohol and prescription medications.

Both categories of drugs can impair job performance and lead to unsafe practices. In fact, because alcohol is so widely used and available, the aggregate cost to business of alcohol abuse is probably greater than the cost of illegal drugs. Certain prescription drugs can also impair the ability of an employee to perform certain tasks safely. There are a number of differences, however, between legal and illegal drugs:

(1) No employee has a right to use illegal drugs on or off the job because such drugs are, well, illegal. Most employees who use alcohol and prescription drugs do so responsibly and do not violate the law.

(2) The use of illegal drugs, even if limited to off-duty hours, makes an employee subject to blackmail and the need to steal or deal drugs in the workplace to pay for his habit.

(3) Symptoms of alcohol abuse are often more readily detectable by supervisors, including the odor of alcohol on the breath or lack of coordination.

(4) Employers may wish to permit alcohol to be served at occasional company-sponsored social functions without also undertaking to permit marijuana and cocaine.

For these reasons, it makes sense for employers to adopt different policies for illegal drugs than for alcohol and legally prescribed drugs. The balance of this discussion will focus on illegal drug policies, without denying that employers should also have policies to deal with the abuse of legal drugs.

2. Off-duty Use and On-duty Impairment

The bare minimum policy on drugs in the workplace would prohibit the sale, possession or use of illegal drugs during working hours or on company property (including parking lots, locker rooms, and cafeterias). Such a minimum policy should also prohibit being under the influence of an illegal drug while on the job, since an employee who arrives at work stoned is just as much impaired as one who uses drugs at work.

The problem with an impairment standard is that it is difficult to define and enforce. There is no disagreement as to what constitutes possession, sale, or use--although in a particular case there may be conflicting evidence about what happened. Impairment is a subjective standard, and people may disagree about how much drug use how recently constitutes impairment. Some may say that a person is impaired if he is "high." On the other hand, some studies have shown that the use of illegal drugs can impair job performance long after the "high" has worn off. Finally, some employees may claim that they can perform their jobs perfectly well even if they are a little bit "high."

Complicating the problem with an impairment standard is the absence of any objective test to demonstrate impairment by illegal drugs. With alcohol, there is a general consensus that the blood alcohol level correlates with the degree of present impairment, and most states have statutory standards for defining intoxication in the context of motor vehicle operation (although even these standards are not uniform). Tests for illegal drugs, however, reveal only that the drug has been consumed in the recent past but do not measure the extent of current impairment.^{10/}

For the foregoing reasons, any policy that prohibits being "impaired" or "under the influence" of illegal drugs will always be subject to dispute in individual cases, even when it is undisputed that the individual has in fact used illegal drugs in the recent past.

There are several possible ways to address the imprecision of an impairment standard. One would be to specify a time period prior to working hours in which the use of illegal drugs would be

^{10/} See C. Chiang & R. Hawks, National Institute on Drug Abuse, Implications of Drug Levels in Bodily Fluids: Basic Concepts, in Urine Testing for Drugs of Abuse, DHHS Publication No. (ADM) 87-1481 (1986); American Medical Assn, Council on Scientific Affairs, Scientific Issues in Drug Testing, 257 JAMA 3110, 3111 (1987).

prohibited. This would be analogous to the "8-hour rule" prohibiting consumption of alcohol prior to piloting an airplane. Such an approach, however, may appear to condone illegal drug use at other times and in any event would make it easier to prove violation of the rule only in situations where there is an eyewitness to the drug use.

Another approach is to prohibit being at work with detectable traces of drugs in the body or to adopt a rule that anyone with such detectable traces is conclusively presumed to be impaired. This approach would allow a positive drug test to provide conclusive evidence of a violation of the company policy. As such, it is more likely to be effective than a mere "impairment" standard, although it might also be viewed as a bit disingenuous because detectable traces of some drugs (primarily marijuana) may remain in the body for some time after impairment is generally thought to exist.

Perhaps the most straightforward policy is simply to prohibit all illegal drug use by employees, on or off the job. This kind of policy may be criticized on the ground that it is none of the employer's business what employees do off-duty, so long as their job performance is not impaired. However, there are a number of reasons why an employer has a legitimate interest in prohibiting off-duty drug use:

(1) The effects of off-duty drug use may be difficult to detect but are likely to be present. Some drugs can cause "flashbacks" and the long-term effect of heavy marijuana use, for example, can be quite severe in its effect on memory and reasoning skills. Particularly in safety-related jobs, we should not have to take the chance that off-duty drug users are really unimpaired at work.

(2) Employees who use illegal drugs off-duty violate the law. They are subject to blackmail and a need to steal to support their habit. Most employers do not like to have criminals on their payroll, even if they commit their crimes during off-duty hours.

(3) Recreational drug users often become more compulsive and begin to use drugs on the job. Once an employee's drug use becomes so heavy that it shows up directly in the workplace, it may be too late to help. The success rate for addiction treatment programs is low (and from the employer's standpoint such programs are expensive to pay for). The best way to rehabilitate drug users is to prevent them from using drugs in the first place, or to get them to stop when they are still recreational or casual users.

It may be of interest that the drug policy for federal government employees completely prohibits illegal drug use, on or

off the job. This policy was established by President Reagan in Executive Order 12564.^{11/}

3. Sanctions and Rehabilitation

Once the policy on drugs in the workplace is set, then the employer should consider what sanctions to impose for violations of that policy. This question will depend largely upon the specific situation, including legal constraints and current practices for other violations of workplace rules. Employers may consider applying moderate sanctions initially, with more severe sanctions being imposed later as the workplace anti-drug policy becomes established and accepted.

An issue that regularly arises with regard to sanctions is what to do about first offenders. Many programs and some state statutes protect first offenders from discharge or discipline so long as they are willing to undergo "rehabilitation," often at the employer's expense. In my view this approach is based on the misconception that most workplace drug users have an illness that can be cured by medical treatment.

It is true that some aspects of drug addiction can be medically treated and there are rehabilitation programs that can help some drug users kick their habit, although the success rate for most programs is quite low and they are often quite expensive. However, the fact is that most workplace drug users are not addicted (at least not yet) and do not need expensive treatment or rehabilitation. They just need to stop using drugs, and the threat of workplace sanctions is highly effective in producing that result.

Policies that promise drug users a "free bite at the apple" by guaranteeing no penalty for first offenders who agree to rehabilitation are quite perverse. They undermine the deterrent impact of the policy by promising that users can keep using at least until they are caught once. And they are wasteful because they encourage those who are caught to go through expensive rehabilitation programs (generally at the employer's expense) that most of them do not really need.

In my view, a better approach to rehabilitation is to make it available to employees who have not been caught. Employees who need help in kicking their drug habit are thus encouraged to come forward without fear of retaliation. But no one is encouraged to keep using drugs until they get caught the first time. After all, prevention rather than cure should be the goal of workplace drug programs.

^{11/} 51 Fed. Reg. 32,889 (Sep. 15, 1986).

C. Pre-Employment Screening

The question of workplace drug policy is particularly relevant to the hiring process. Individuals just entering the workforce are especially prone to drug use. Even though drug use in some categories has declined in recent years, still nearly half of the young men in the 18 to 25 year age group used illegal drugs at least once in the last month. Thus demographics tell us that new job applicants are generally more likely to be drug users than current employees.

In addition, employers have fewer legal and practical obligations to job applicants than to current employees. It is easier to avoid problems by not hiring a drug user in the first place than to try to do something about his drug problem later.

For these reasons it is not surprising that pre-employment drug screening is much more common than programs to detect drug use among current employees.^{12/}

1. Establishing a hiring policy. Employers should give some thought to how their policies for hiring square with their policies for current employees. For example, if an employer takes the position that it is not concerned with off-duty drug use by employees, then it may be difficult to explain why it denies employment to "recreational" drug users. On the other hand, most young people these days have at least experimented at one time or another with an illegal drug;^{13/} it is probably not practical to exclude all such people from employment.

In my view, the best general policy is to deny employment to all current drug users (which would include everyone who tests positive for an illegal drug) and to take past drug use into account as a factor in the hiring process. Past convictions for drug offenses, particularly drug trafficking, should be treated the same way in the hiring process as other serious criminal convictions.

2. Screening methods other than testing. Such techniques for pre-employment drug screening are less satisfactory than the drug test in determining current use, although they have more value if it is important to find out about drug use in the past.

^{12/} See Gallup Organization, Drug Testing at Work: A Survey of American Corporations 27-38 (1988).

^{13/} U.S. Department of Health and Human Services, National Institute for Drug Abuse, National Trends in Drug Use and Related Factors Among American High School Students and Young Adults, 1975-1986 (GPO:1987).

Asking about drug use on application forms or in interviews is a low-cost technique. Such questions are unlikely to identify large numbers of users but may be worth trying in view of their low cost. Also, asking such questions may deter drug users from applying at all.

Background checks are more expensive and are also not particularly effective in uncovering drug use. Applicants generally give references who will speak favorably about them. However, if such inquiries are being made anyway, then it may be productive to ask about drug use.

Polygraph examinations are sometimes used to verify the accuracy of information provided on application forms, and in this context may induce applicants to be more truthful about past drug use. However, such examinations are expensive and much less accurate than urinalysis. And in most situations now such uses of the polygraph are prohibited by federal or state laws.

3. Applicant drug testing. The best way to screen applicants for current drug use is through urinalysis drug testing. Such tests are relatively inexpensive, although for economic reasons applicants should not be tested until there has been a tentative decision to hire them. Where hiring is subject to a pre-employment physical exam anyway, a urine specimen is already obtained and having it tested for drugs is relatively simple.

It is important to recognize that pre-employment drug tests will not detect all current drug users. An applicant will generally know that the test is required and can evade detection by temporarily refraining from drug use. However, despite the possibility of evasion, many pre-employment drug testing programs report a surprisingly high level of positive test results. One way to improve the effectiveness of pre-employment drug testing is to provide the minimum possible advance notice of the exact date and time of the test.

Summary. Urinalysis drug testing is the most effective way to screen potential employees for current drug use. Although such tests can be evaded, for most applicant populations they appear to be the most cost-effective means of reducing the number of drug users entering the workforce.

D. Detecting Drug Use Among Current Employees by Means Other Than Testing

The key to a workplace drug policy is enforcement. Employees who use drugs are willing to violate the law mostly because the laws against simple use or possession are rarely enforced. Similarly, they are not going to stop using drugs just because their employer has adopted an anti-drug policy unless

they believe they are likely to be caught and penalized for violating it. Before turning to the subject of testing, we look briefly at other means of enforcement.

1. Supervisory observation. Careful observation of job performance may provide indications that an employee is impaired by the use of illegal drugs. Training programs can improve the ability of supervisors to detect drug use. It is important that supervisors be told that detecting drug use is their responsibility. Too often supervisors ignore symptoms of drug use because they want to avoid dealing with a sensitive problem.

There are limits to the ability of supervisors to detect drug use, however. Some employees work at times and places where close supervision is not possible. The symptoms of drug use are often hard to detect, even for trained professionals, and workplace supervisors have many other responsibilities to perform. Many of the symptoms of drug use may also have other causes such as lack of sleep or illness. For these reasons, supervisors are often hesitant to accuse employees of drug use.

No matter how good a supervisory observation program may be, it will not be enough. Except in the situation where an employee is caught in the act of using or possessing drugs, proof will be difficult and employees can be expected to deny accusations that they were using drugs. In these situations, drug tests can provide reliable evidence to back up the supervisor's observation.

2. Workplace searches. Drugs can be brought onto company property in a variety of ways--automobiles, briefcases, handbags and lunchboxes; they can be kept in desks and lockers. The presence of drugs on company property is a particularly serious problem because it indicates trafficking and direct use in the workplace.

Because of the enormous variety of workplace situations, it is difficult to generalize about ways to deal with the problem of drugs physically present in the workplace. Drug-sniffing dogs can be useful in some situations; they are less intrusive because lockers or handbags do not have to be opened for examination unless the dog indicates that drugs are present. In situations where employers already conduct workplace searches to look for stolen property, then looking also for drugs may be warranted.

It is important to give careful consideration of the legal aspects of workplace search practices. In addition, such searches do not deal with the problem of employees whose performance is impaired because they ingest drugs outside the workplace.

3. Informants and Undercover Agents. An employee hotline may be helpful in acquiring information, especially where co-

workers feel that their safety is endangered by a colleague's drug use. Tips of this nature need to be evaluated carefully, however, since they can be fabricated out of animosity. Where drug problems are severe, the use of privately-hired undercover agents may be warranted.

4. Polygraph examinations. A polygraph examination for the purpose of detecting current drug use is less accurate and more expensive than urinalysis drug testing. The main advantage of the polygraph examination is in obtaining information about past drug use or drug trafficking not accompanied by current drug use. However, nearly all uses of the polygraph are now prohibited by federal or state law, and thus is it not available as an alternative to drug testing for most employers.

Most states have adopted laws that regulate or outlaw polygraph testing by private employers.^{14/} Newly enacted federal legislation will complete this process by outlawing most remaining uses of the polygraph.^{15/}

The new federal law, known as the Employee Polygraph Protection Act of 1988, applies to all private sector employers.^{16/} It entirely prohibits any use of polygraph testing by private sector employers with three exceptions.^{17/} Two of the exceptions allow some testing by certain employers in the private security and pharmaceutical industries.^{18/}

The remaining exception is available to all employers but is so restrictively worded as to be rarely useful. It permits use of polygraph examinations in ongoing investigations of "economic loss." In each case, the employee must be provided a written statement describing the incident under investigation and why there is "reasonable suspicion" of his involvement.^{19/}

^{14/} For a collection of citations to state statutes, see Zafran & Stickle, Polygraphs in Employment: A State Survey, 33 Clev. St. L. Rev. 751 (1985).

^{15/} See "Law Limiting Use of Lie Detectors Is Seen Having Widespread Effect," Wall Street Journal, July 1, 1988, p. 19.

^{16/} Pub. L. No. 100-347 (June 27, 1988). It does not apply to federal state or local governments. Id. § 7(a). It also does not apply to tests administered by the federal government to contractors or consultants in the national defense and security areas. Id. § 7(b), (c).

^{17/} Id. § 3.

^{18/} Id. § 7(e), (f).

^{19/} Id. § 7(d).

To the extent testing is permitted under the three exceptions in the new law, there are numerous additional restrictions on the manner of testing, the confidentiality of results, and the use of examination results to take adverse action.^{20/} And, as if this were not enough, the Act specifically notes that it does not preempt outright prohibition or additional restrictions of private-sector polygraph testing imposed by state or local law or a collective bargaining agreement.^{21/}

E. Testing Programs to Detect Drug Use Among Current Employees

It is important to recognize at the outset what drug tests can and cannot determine. Properly administered, such tests are highly accurate in determining whether or not an individual has used a particular drug in the recent past. The metabolites of most drugs remain detectable for a few days; metabolites of marijuana may be detectable for up to a month if the subject had been a very heavy user.^{22/}

Drug tests cannot determine the level of current impairment in the same sense as a blood alcohol test. Depending upon the circumstances, a drug test may provide some information relevant to a determination of impairment, but it can rarely be conclusive on this point.^{23/}

Therefore, the way in which drug testing is used will depend initially upon the employer's drug policy. Testing will be less helpful to employers whose policies prohibit on-the-job impairment but not off-the-job drug use.

1. Suspicion-based testing. The most common type of drug testing is undertaken when an employee is suspected of drug use in violation of company policy. Such testing can be used in an attempt to prove or disprove supervisory observation or information developed from other sources.

The level of suspicion required for this kind of testing can be described in different ways: "reasonable suspicion," "reason to believe," or "probable cause." Some rules or statutes require

^{20/} Id. §§ 8,9.

^{21/} Id. § 10.

^{22/} See, Manno, "Interpretation of Urinalysis Results," in Urine Testing for Drugs of Abuse, supra note 10, at 54; see also American Medical Ass'n, Council on Scientific Affairs, Scientific Issues in Drug Testing, 257 JAMA 3110, 3112 (1987).

^{23/} See note 10 supra.

this suspicion to be documented by reference to particular objective facts that indicate drug use, and there is often the requirement of approval by a second-level supervisor. Obviously, the more restrictions placed upon suspicion-based testing, the less likely it is to be employed.

In my view, suspicion-based testing is will rarely be used in any event. It effectively requires the supervisor to accuse the employee of drug use before the test can be administered. A supervisor who is unsure whether an employee is using drugs will hesitate to make such an accusation because of the ill-will it can engender if the employee comes out clean on the test.

Therefore, suspicion-based testing is unlikely to be as helpful in detecting drug use as in verifying drug use detected by other means. For this reason, such testing is also unlikely to have much of a deterrent impact on drug use; most users will continue to believe that they are sufficiently in control of their drug use so as to evade detection.

2. Random testing. The most effective means of deterring drug use in the workforce is random testing. This has been the approach followed in the armed services since 1981, and it has reduced drug use overall by more than two-thirds.^{24/} The current low level of drug use in the armed services is particularly commendable in view of the fact that young men between the ages of 18 and 25 generally have the highest level of drug use in our society.

Some of the controversy about random testing may be a semantic problem. In this context, "random" does not mean that employees are selected for testing at the whim or discretion of their supervisors. Random testing means just the opposite; employees are selected for testing by neutral criteria such as drawing numbers from a hat. The purpose of random testing is to protect employees from being singled out for testing for arbitrary or discriminatory purposes, as well as assuring that all covered employees are equally at risk for being tested.

The primary advantage of random testing is its deterrent impact. Since covered employees never know when they might be tested, the only safe way to avoid detection is to avoid using drugs altogether. Even employees who think that their drug use is "under control" cannot expect to avoid detection by random testing.

Random testing is also cost-effective because it minimizes the number of tests that have to be administered. The frequency of testing can be adjusted in light of experience to have the

^{24/} See "Drug Use in Military Drops; Pervasive Testing Credited," New York Times, Apr. 23, 1987, at A16.

desired impact. Once drug use in an employee population is largely eliminated, then random testing can be conducted only rarely in order to preserve the deterrent impact and monitor the population for any resurgence of drug use.

Random testing is certainly controversial, but in some ways it may reduce the offensiveness of the program to employees. It is certainly less offensive to be required to take a drug test because "your number came up" than because your supervisor suspects you of being on drugs. So long as the selection is truly random, then there is no stigma attached to being tested. Of course, many employees will find the requirement of providing a urine specimen to be offensive under any circumstances. A random testing program at least minimizes the number of occasions on which the tests have to be conducted.

3. Physical exam testing. Many employers who find random testing to be too offensive to their workforce may be able to use drug testing if they have a regular program of physical exams for employees. Such exams nearly always require the employee to provide a urine specimen anyway. Running a drug screen on specimens that are already being collected is a relatively inexpensive and inoffensive way to test.

There are limitations to the effectiveness of drug testing as part of a regular physical exam, however. Employees generally have ample advance warning of such exams, and it is relatively easy for a drug user to evade detection by temporarily refraining from drug use for a short period of time. Of course, employees who are addicted or drug-dependent may not be able to refrain from use and thus can be detected. Other employees may also be careless enough to be detected in this manner.

Despite its limitations, drug testing as part of a regular physical exam makes sense because it is relatively inexpensive and inoffensive. Employers should keep in mind that because such testing can be evaded, it will have much less deterrent impact than random testing and will not provide a true picture of the extent of drug use in the employee population.

4. Post-accident or post-leave. Other grounds for testing are available that combine some of the features of suspicion-based testing without requiring an accusation of drug use. Some programs require everyone involved in an accident or unsafe work practice to be tested, whether or not they are suspected of drug use. Other programs require drug tests of persons returning to work after an extensive leave or absence, generally treating these employees in the same way as new employees.

Programs of this nature attempt to limit testing to particular subsets of the employee population that are most likely to have a drug problem. By adopting objective criteria,

however, they seek to avoid the reluctance to use suspicion-based testing criteria.

The effectiveness of such programs in deterring drug use depends upon their frequency of use. If the criteria are drawn broadly enough that most employees have a reasonable expectation that they could be tested on any given day, then the program may be nearly as effective as random testing. Still, employees can delude themselves into thinking that they can evade testing much as a drunk driver may think he can avoid getting into an accident.

F. Implementing a Drug Testing Program

The most important consideration in implementing a drug program is to ensure the accuracy of test results. There are two kinds of errors that can be made. A "false negative" is a test result that fails to identify someone who is actually using drugs. A "false positive" falsely identifies an innocent person as a drug user.

Critics of drug testing accuracy will often fail to distinguish the two types of errors. A responsible workplace drug testing program will take every possible step to avoid false positives, including measures that may increase the number of false negatives. This approach gives the employee the benefit of any doubt. As a consequence, most testing errors tend to be false negatives rather than false positives.

There are many technical considerations that enter into the implementation of a drug testing program, and this discussion will not attempt to cover all of them. Probably the most important step is to hire a reliable testing laboratory. There are also a number of state laws that regulate drug testing methodology.

Guidelines published by the Department of Health and Human Services govern drug testing programs for federal employees.^{25/} These guidelines are comprehensive and provide a good model for a state-of-the-art testing program. In addition, a Research Monograph published by the National Institute on Drug Abuse entitled Urine Testing for Drugs of Abuse provides a comprehensive survey of the technical issues.^{26/}

^{25/} 53 Fed. Reg. 11970 (1988).

^{26/} R. Hawks & C. Chiang, eds., DHHS Pub. No. (ADM)87-1481 (1986). See also American Medical Ass'n, Council on Scientific Affairs, Scientific Issues in Drug Testing, 257 JAMA 3110 (1987).

What follows is a discussion of some of the policy issues that may arise in the process of implementing a testing program.

1. Collection. The process of collecting urine specimens is a very sensitive matter. Employee privacy concerns must be balanced against the possibility that drug users will take steps to evade detection. Many employers use laboratory personnel or an independent contractor for collection.

It is not necessary that the act of urination be observed by another person in order to have an effective program. The HHS Guidelines do not permit observation in most cases and instead use other less offensive techniques to prevent adulteration or switching of urine specimens. For example, taking the temperature of the specimen after it is provided makes substitution difficult.^{27/}

Of course, no set of safeguards is perfect. (Even with direct observation, the observer can be bribed to overlook sample substitution.) In my opinion, direct observation should ordinarily not be used in workplace testing programs because the additional protection against evasion is outweighed by its offensiveness to many employees. The possibility of direct observation should be retained, as provided in the HHS Guidelines, in situations where there is reason to believe that a particular employee is likely to adulterate or switch the sample.

Another important part of a collection program is the requirement that there be a strict chain-of-custody for specimens. This is necessary to prevent samples from being switched and misidentified. There are a number of techniques for assuring correct identification, including having the employee sign or place a fingerprint on the specimen bottle.^{28/}

A final issue with regard to collection is the need to minimize advance notice to employees. Most drug metabolites are detectable for only a few hours or days. If they have sufficient advance notice of a test, drug-using employees can attempt to evade detection by a number of means such as temporarily refraining from drug use, calling in sick, or drinking large quantities of liquids. In my opinion, notice should generally be provided on the same day the test is to be administered, preferably within an hour or two of the beginning of the work day. Where longer notice is necessary for logistical reasons, it should if at all possible be less than 48 hours.

^{27/} See 53 Fed. Reg. 11970, 11973 (1988).

^{28/} See Manno, "Specimen Collection and Handling," in Urine Testing for Drugs of Abuse, supra note 10, at 24.

2. Analysis. As mentioned earlier, selection of a reliable laboratory is of paramount importance.^{29/} There are a number of states that regulate drug testing laboratories, and the Departments of Defense and HHS certify laboratories for use in testing military personnel and other federal employees.

An additional safeguard for laboratory accuracy is the use of quality control. A reliable laboratory will have its own internal quality control program. In addition, it is possible to use a different quality control contractor to monitor the results of the primary contractor in analyzing blind samples that are from time to time mixed in with the employee samples.^{30/}

Once a laboratory is selected, it is necessary to decide which drugs to test for and what cutoff levels to employ. All programs should test every sample for marijuana and cocaine, since these are by far the most prevalent illegal drugs. Testing for PCP and LSD may not be cost-effective since they are less frequently used. A possible approach to these less common drugs is to test for them only in cases of suspicion of drug use and otherwise in a portion of the specimens to verify that their usage is not a problem in the particular workforce.

Testing for opiates, amphetamines and barbiturates involves the additional consideration that some employees may use these drugs legally by prescription. The decision whether to test for them will depend upon their frequency of illegal use in the particular workforce, as well as whether there are safety considerations presented by the use of these drugs even when prescribed.

Most laboratories use a two-stage process of analysis, with a less expensive and less accurate screening test such as EMIT or RIA being used on all samples. A confirming test (usually gas chromatography/mass spectrometry -- GC/MS) is then used on samples that test positive at the first stage. Use of this confirming test ensures virtually 100 per cent accuracy.^{31/}

The costs of drug tests vary widely depending upon the number of samples being tested and other factors. Screening tests range from \$5 to \$20 and the GC/MS confirming test \$30 to

^{29/} See Willette, "Choosing a Laboratory," id. at 13.

^{30/} See Willette, "Proficiency Testing and Quality Control Programs," id. at 20.

^{31/} See Hawks, "Analytical Methodology," id. at 30.

\$100. Some laboratories charge a flat fee that includes the confirming test where necessary.^{32/}

The inaccuracy of the screening tests has often been exaggerated. Properly used in laboratory settings, the EMIT or RIA can be highly accurate. However, the marginal cost of the GC/MS for positive samples would seem worthwhile, particularly if the test result will be used to take some adverse action against a current employee. The HHS Guidelines and several state statutes require the use of a confirming test.

The use of the confirming tests eliminates the possibility that a positive result will be attributable to cross-reactivity. The GC/MS identifies the particular molecule that constitutes a unique metabolite of the drug for which the test is conducted. The GC/MS cannot mistake over-the-counter remedies such as Advil or cold medications with illegal drugs such as marijuana or cocaine.^{33/}

An additional safeguard is the establishment of cutoff levels for the particular drugs being tested. This further reduces the possibility of a laboratory error and also guards against the possibility that a positive test will be produced by "passive ingestion" of the drug. The issue of passive ingestion primarily arises because an individual can show traces of metabolites simply from being in the same room with people who are smoking marijuana. Although the risk of obtaining a positive drug test result because of passive ingestion is often highly exaggerated and is in the real world unlikely to be a factor, setting cutoff levels near those recommended by the HHS Guidelines will assure that such is avoided.^{34/}

3. Reporting and Verification. Test results should be reported quickly, but in most situations only after the confirming test is run. For legal reasons, it is important that test results be disseminated only to those in the company who have a legitimate need to know the information and be otherwise kept confidential.

The employee who tests positive should be given some opportunity to explain or contest the test results. Of course, the employee may admit to drug use on the spot. Many will have explanations that may or may not be credible.

32/ Hoyt, Finnigan, et al., Drug Testing in the Workplace -- Are Methods Legally Defensible?, 258 JAMA 504, 508 (1987).

33/ See Blanke, "Accuracy in Urinalysis," in Urine Testing For Drugs of Abuse, supra note 10, at 51.

34/ See Hawks & Chiang, supra note 10, at 86.

The HHS Guidelines provide that every test result is reviewed with the employee by a medical review officer.^{35/} This is an expensive requirement that may be unnecessary in most cases. For example, medical review is not ordinarily necessary for positive marijuana or cocaine test results. However, medical review may be necessary if an employee's positive test result could be attributable to the legal use of a prescription drug.

Medical review may be particularly necessary when there is a positive test for opiates.^{36/} The test could be a result of heroin use, or it could be caused by use of cough syrup with codeine. It is even possible (although unlikely) that a person could eat enough poppy seed bagels to test positive for opiates. Medical examination can resolve these cases, since a heroin user will generally have needle tracks or other clinical symptoms.

II. LEGAL ISSUES FOR WORKPLACE DRUG PROGRAMS

A. Constitutional Issues

Most litigation arising out of workplace drug programs has centered on the question of whether urinalysis drug testing is an unreasonable search or seizure in violation of the Fourth Amendment of the U.S. Constitution. Other state and federal constitutional claims against drug testing have received less serious attention in the courts.

These constitutional issues do not directly concern most employers in the private sector, since the restrictions of the federal and most state constitutions apply only to governmental action. However, the ultimate resolution of these issues may well influence the climate of judicial and public opinion with regard to the reasonableness of drug testing programs in the private context as well. For example, a recent decision by the Ninth Circuit referred to Fourth Amendment principles in interpreting a collective bargaining agreement.^{37/}

1. The Government Action Requirement. It is well settled that the Bill of Rights and other safeguards in the federal

^{35/} 53 Fed. Reg. 11970, 11985 (1988).

^{36/} See Hawks & Chiang, supra note 10, at 99.

^{37/} Brotherhood of Locomotive Engineers v. Burlington Northern R.R., 838 F.2d 1087, 1092-93 (9th Cir. 1988), petition for cert. filed, No. 87-1631 (Apr. 1, 1988). See also part II.D.2 infra.

constitution secure individual rights against governmental action and do not ordinarily apply to private entities.^{38/} This is often referred to as the "state action doctrine," which actually refers to governmental action at any level--federal, state or local.

There are some conceptually difficult issues in the area of state action, most of which have arisen in the context of racial discrimination.^{39/} It is quite clear, however, that an ordinary private employer is not governed by the Fourth Amendment's prohibition of unreasonable searches and seizures.^{40/} There should be no doubt that a private employer's unilateral decision to require drug testing as a condition of employment is not subject to constitutional challenge. In fact, very few lawsuits have even attempted to argue to the contrary.

On the other hand, if a workplace drug testing program is mandated by statute or government regulation, then the statute or regulation itself is governmental action subject to constitutional challenge. Thus, for example, scrutiny under the Fourth Amendment has been applied to Department of Transportation regulations requiring railroads to administer drug tests to certain employees involved in accidents.^{41/}

More difficult questions are raised by government action that encourages but does not require private sector drug testing, such as some of the proposed statutes and regulations requiring contractors to have drug-free workplaces. In my view, such measures still leave the private employer with discretion as to how to implement the broad mandate, and thus do not make the employer's decision to require drug tests a decision of the government to which Fourth Amendment scrutiny is applicable. A court could easily resolve this question the other way, however, depending upon the specific facts and circumstances.

2. The Fourth Amendment and Drug Testing. Because of the state action requirement, most constitutional litigation about drug testing has arisen in the context of government employment.

38/ See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

39/ 39/ See L. Tribe, American Constitutional Law ch. 18 (2d ed. 1988).

40/ See e.g., United States v. Jacobsen, 466 U.S. 109, 113-15 (1984); Burdeau v. McDowell, 256 U.S. 465 (1921).

41/ Railway Labor Executives Assn. v. Burnley, 839 F.2d 575, 580-82 (9th Cir. 1988), cert. granted, 56 U.S.L.W. 3831 (June 6, 1988) (No. 87-1555).

A good argument can be made that drug tests of government employees, if imposed with advance notice as a condition of employment, are not "searches" or "seizures" within the meaning of the Fourth Amendment. However, most courts have thus far rejected this argument after fairly cursory analysis.^{42/}

Typically courts have determined whether drug tests are "unreasonable" under the Fourth Amendment by applying a balancing test that weighs the extent of invasion of privacy against the government's interest in detecting drug use. Various other factors enter into this balancing test, including the procedural safeguards built into the testing program. The decisions resulting from this analysis have fallen into two broad categories. Some courts have held that drug tests can only be required of employees if there is reasonable individualized suspicion of drug use.^{43/} Other courts, including the larger number of the federal courts of appeals, have held that testing

42/ See e.g., NFFE v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987); McDonnell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987).

The "no search or seizure" argument was made by the government in NTEU v. von Raab and rejected by the court of appeals, 816 F.2d at 174-76. The Solicitor General's brief in the Supreme Court declined to advance this argument without, however, disavowing it. See Brief for the United States, at 24-25 n.18. The Washington Legal Foundation filed a brief for itself and three other amici curiae primarily devoted to this argument.

The "no search or seizure" argument finds additional support in the Supreme Court's recent decision that discarded garbage is not protected by the Fourth Amendment. California v. Greenwood, 108 S. Ct. 1625 (1988). See also Lovvorn v. City of Chattanooga, 846 F.2d 1539, (6th Cir. 1988) (Guy, J., dissenting); NTEU v. von Raab, 808 F.2d 1057, 1061-62 (5th Cir. 1987) (Higginbotham, J., specially concurring in denial of stay); Comment, Random Testing of Government Employees: A Constitutional Procedure, 54 U. Chi. L. Rev. 1335, 1343-56 (1987).

43/ See, e.g., Lovvorn v. City of Chattanooga, 846 F.2d 1539 (8th Cir. 1988) (fire fighters); Penny v. Kennedy, 846 F.2d 1563 (8th Cir. 1988) (police officers); RLEA v. Burnley, 839 F.2d 575 (9th Cir. 1988), cert. granted, 56 U.S.L.W. 3831 (June 6, 1988) (train crews involved in accidents); NFFE v. Carlucci, 680 F. Supp. 416 (D.D.C. 1988), appeal docketed, No. 88-5080 (D.C. Cir.) (civilian Army employees in sensitive jobs).

without particularized suspicion is constitutional, at least for certain kinds of sensitive jobs.^{44/}

The Supreme Court granted certiorari in National Treasury Employees Union v. von Raab, a Fifth Circuit decision sustaining the constitutionality of a drug testing program for employees of the U.S. Customs Service.^{45/} Argument in von Raab is expected in October 1988, together with Burnley v. Railway Labor Executives Association, a case in which the Ninth Circuit held unconstitutional regulations requiring drug tests for members of train crews involved in accidents.^{46/} The Supreme Court's decisions in these two cases should provide a great deal of guidance to the courts in resolving a large number of cases that have challenged drug testing programs on Fourth Amendment grounds.

3. Other state and federal constitutional issues. Some arguments have been made that drug testing programs violate other provisions of the federal constitution: the Fifth amendment privilege against self-incrimination, the equal protection and due process clauses, and the penumbral right of privacy. None of these arguments has met with much success.^{47/} A drug testing

^{44/} See, e.g., Policemens Benevolent Assn. v. Town of Washington, No. 87-5793 (3rd Cir., June 21, 1988) (police officers); Rushton v. Nebraska Public Power Dist., 844 F.2d 562 (8th Cir. 1988) (nuclear power plant workers); NTEU v. von Raab, 816 F.2d 170 (5th Cir. 1987), cert. granted, 56 U.S.L.W. 3590 (Feb. 29, 1988) (law enforcement officers); McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (prison guards); Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir.), cert. denied, 479 U.S. 986 (1986) (race horse jockeys); Amalgamated Transit v. Suscy, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976) (bus drivers involved in accidents); Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) (military personnel); AFGE v. Dole, 670 F. Supp. 445 (D.D.C. 1987), appeal docketed, No. 87-5417 (D.C. Cir.) (air traffic controllers and other sensitive positions at Department of Transportation).

^{45/} 816 F.2d 170 (5th Cir. 1987), cert. granted, 56 U.S.L.W. 3590 (Feb. 29, 1988).

^{46/} 839 F.2d 575 (9th Cir. 1988), cert. granted, 56 U.S.L.W. 3831 (June 6, 1988).

^{47/} The courts have regularly rejected claims that drug testing violates the Fifth Amendment's prohibition of compulsory self-incrimination, on the theory that such tests are non-testimonial. See e.g., NTEU v. von Raab, 816 F.2d 170, 181 (5th Cir. 1987), cert. granted, 56 U.S.L.W. 3590 (Feb. 29, 1988). Procedural due process claims have also been rejected where drug
(continued...)

program that is run competently and even-handedly is unlikely to face a serious challenge on these grounds.

State constitutional provisions may in some cases provide a more fertile basis for challenges to drug testing programs. State courts are free to give a more liberal construction to the search-and-seizure clauses of their own constitutions than the U.S. Supreme Court, and many activist state courts have been doing so. For example, in deciding that mandatory drug tests for high school teachers are unconstitutional, the New York Court of Appeals was careful to base its decision on the state constitution so that the U.S. Supreme Court could not review the case.^{48/}

Also, a number of state constitutions contain provisions explicitly recognizing a right of privacy, and some of these may apply to private as well as state action.^{49/} If the U.S. Supreme Court upholds the constitutionality of drug testing, then we may expect to see more litigation raising a variety of state constitutional challenges. It is too soon to tell how such

^{47/} (...continued)
testing programs include confirmation tests and other reasonable safeguards. See id. at 181-82. Courts have also rejected various challenges under the Equal Protection Clause of the Fourteenth Amendment. See e.g., Copeland v. Philadelphia Police Dept., 840 F.2d 1139, 1147 (3d Cir. 1988) (different treatment of drug addicts and alcoholics); Shoemaker v. Handel, 795 F.2d 1136, 1144 (3d Cir.), cert. denied, 479 U.S. 986 (1986) (different treatment of grooms and jockeys). In one recent case, the court had no trouble rejecting a novel claim based upon the Free Exercise Clause of the First Amendment. Rushton v. Nebraska Public Power Dist., 844 F.2d 562, 564-65 (8th Cir. 1988). And even the Ninth Circuit, while finding that post-accident testing violated the Fourth Amendment, could not bring itself to find any violation of the penumbral right of privacy. RLEA v. Burnley, 839 F.2d 575, 591-92 (9th Cir. 1988), cert. granted, 56 U.S.L.W. 3831 (June 6, 1988).

^{48/} Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987).

^{49/} For example, the California state constitution's right of privacy apparently protects against both private and state action. See White v. Davis, 120 Cal. Rptr. 94, 533 P.2d 222, 233 (1975); Cutter v. Brownbridge, 183 Cal. App. 3d 836, 228 Cal. Rptr. 545 (1986). This issue is raised in a pending case in which a district court's preliminary injunction against a private sector applicant testing program was set aside by the appellate court. Times Mirror Books v. Wilkinson, No. A042567 (Cal. Ct. App., 1st Dist., June 24, 1988).

challenges might be resolved, and the results may well vary from state to state. The only way to preclude such challenges, at least for employers in interstate commerce, would be for federal legislation to preempt state laws that restrict drug testing.

B. State Drug Testing Legislation

As of this writing, ten states have adopted legislation regulating drug testing by employers: Connecticut, Iowa, Maryland, Minnesota, Montana, Nebraska, Oregon, Rhode Island, Utah, and Vermont.^{50/} Similar legislation is under active consideration in a number of other states. In two states--Maine and Wisconsin--legislation restricting employer drug testing was passed by the legislatures and vetoed by the governors.

All ten of the enacted statutes regulate testing methodology, primarily by requiring the use of certified laboratories and state-of-the-art technology. In addition, six of the statutes impose substantial limitations on the circumstances under which employers can use drug testing in efforts to achieve drug-free workplaces.

The net effect of most of this legislation is to discourage employers from engaging in drug testing, either by directly prohibiting certain practices or by creating new grounds for litigation challenging testing programs.

What follows is a survey of the key provisions of the statutes that have been enacted and their likely effect on drug-free workplace programs.

1. Test Methodology. All of the statutes contain provisions that regulate the methodology used in drug testing. These provisions typically require that an initial positive test result must be confirmed by an additional test of the same sample using a different technology. Sometimes that statute will specify that the confirming test use gas chromatography/mass spectrometry or an equally precise technology.

These statutes also commonly require tests to be performed in accredited laboratories and may assign to a particular state agency the task of supervising and licensing testing laboratories.

^{50/} Conn. Public Act No. 87-551; Iowa Code Ann. § 730.5; Md. House Bill No. 1186 (app. 1988); 1987 Minn. Laws ch. 388; Mont. Code Ann. § 39-2-304; Nebr. L.B. 582 (app. Jan. 29, 1988); 1987 Or. Laws ch. 669; R.I. Gen. Laws § 28-6.5-1; Utah Code Ann. § 34-38-1 et seq.; Vt. Stat. Ann. tit. 21, § 511 et seq.

So long as statutory provisions of this nature are reasonable, they are probably not objectionable. Most well-run corporate programs already follow similar standards.

At some point, regulation of testing methodology may become so complex and expensive as to discourage companies from testing. This may be a particular problem for companies that have operations in many states and have to modify their program in each state where they do business.

On the other hand, regulation of this nature may be helpful in reducing the risk of litigation. One of the statutes--Utah's--expressly provides defenses to tort liability for employers that comply with the statutory standards for testing. And, as a practical matter, a company may be able to rely on its adherence to the state's regulatory standards in proving that its program was conducted in a reasonable manner.

2. Applicant Testing. The most common form of drug testing in the corporate world is applicant testing, and most of the statutes do little to restrict this practice. A number of the statutes do require that employers provide notice to job applicants that they are subject to drug testing, that testing be limited to individuals who have otherwise been selected to receive job offers, and that test results be kept confidential. Well-run corporate programs observe these requirements anyway for economic reasons or to minimize the likelihood of litigation.

Three states have adopted more stringent limitations on applicant testing. Montana limits such testing to applicants for "employment in hazardous work environments or in jobs the primary responsibility of which is security, public safety, or fiduciary responsibility." Iowa limits applicant testing to jobs in law enforcement or jobs for which a comprehensive physical exam is required. Vermont also limits applicant testing to situations where it is part of a comprehensive physical exam, and in addition requires 10 days advance notice of the test.

The requirement that drug testing of applicants be limited to situations where there is a comprehensive physical exam will discourage testing by making it substantially more expensive, at least for employers who do not otherwise require such exams. The 10-day notice requirement will also make it easier for drug users to evade detection by temporarily abstaining from drug use immediately prior to the exam.

3. Random Testing. Random testing is the most controversial form of workplace drug testing, probably because it is also the most effective. This form of testing alone serves a substantial preventative purpose. Employees are discouraged from using drugs because they never know when their number might come up for testing.

Four states--Iowa, Montana, Rhode Island, and Vermont--outlaw random testing for all categories of employees. Two other states--Connecticut and Minnesota--permit random testing only for safety-sensitive jobs or as a follow-up to employee rehabilitation programs.

4. Physical Exam Testing. Drug tests administered during regularly scheduled physical exams are not very intrusive, since the employee is already providing a urine specimen for other purposes. It is probably more important for the employer to know that such an employee is using cocaine or PCP than to know if he has diabetes.

Although this kind of testing is not very intrusive, four states--Connecticut, Montana, Rhode Island, and Vermont--prohibit it altogether. Iowa and Minnesota allow such tests, but respectively require 30 and 14 days advance notice. Such advance notice requirements appear to serve little useful purpose except, as noted above, to assist drug users in evading detection.

5. Suspicion-based Testing. The six states that restrict or outlaw random testing do permit an employer to require a drug test of an employee based upon a suspicion that an employee's job performance is impaired on the job. Two of these states--Montana and Rhode Island--express this as a "reason to believe" type of test. Connecticut and Minnesota adopt the "reasonable suspicion" formulation. In addition, Minnesota allows certain kinds of post-accident testing. Finally, Iowa and Vermont require an employer to have "probable cause" before requiring a drug test, which is the same standard used in criminal law for issuance of a search warrant.

The problem with suspicion-based testing is that it is rarely used. The employee's supervisor is required in effect to accuse him of using drugs before the test can be required. Even if the test is positive, the employee can litigate over whether the statutory standard of suspicion was met in his case, much as criminal defendants litigate the validity of searches that produce incriminating evidence.

In addition, the statutes are drafted so as to require not only suspicion of drug use but also that the drug use has a certain effect on the workplace. For example, in Rhode Island the employer must have "reasonable grounds to believe based on specific objective facts, that the employee's use of controlled substances is impairing his ability to perform his job." Iowa imposes the requirement that impairment by the employee would present a danger to the employee or coworkers. In these states the employee can argue that, even if he was using drugs, he was still able to perform his job or was not endangering anyone.

Another effect of the suspicion-based testing statutes is to preclude employers from testing for off-duty drug use. Most drug

addicts go through a period of recreational or casual use before their drug problem may be obvious at work. It is certainly in everyone's interest to deter or at least detect drug use at this stage, before there is a need for expensive and often unsuccessful rehabilitation programs. Sometimes the first symptom of a drug problem may be an on-the-job accident. And even off-duty drug users are more likely to steal from their employer or co-workers to support their expensive habit.

6. Other Provisions. In addition to the direct restrictions imposed by these six statutes on employer drug testing, many of them also contain provisions that will discourage the use of testing and impede the development of drug-free workplaces.

Three of the states--Iowa, Minnesota, and Vermont--protect an employee who tests positive from being discharged for a first offense if he is willing to participate in a rehabilitation program. Many employers offer such opportunities anyway, but the requirement of a "free bite at the apple" in every case will deprive the program of its preventative character by encouraging employees to continue using drugs until they are caught the first time. Even worse, the Vermont statute seems to allow an employee an unlimited number of chances as long as he signs up for the rehabilitation program and completes it.

In addition, four of the statutes appear to require that employers who have drug testing programs provide rehabilitation programs for employees who test positive, either at the employer's expense or as part of an employee benefit plan. Again, many employers provide such benefits anyway, but the statutory requirement may serve to discourage testing among other employers by requiring them to assume expensive new obligations. And any employer may be concerned that litigation over this new statutory "entitlement" to rehabilitation may impose more expensive burdens than they would choose to undertake voluntarily.

C. Handicap Discrimination Laws

The Rehabilitation act of 1973, as amended,^{51/} affords handicapped individuals certain rights in the employment context, prohibiting employment-based discrimination against them. The Rehabilitation Act applies to federal agencies,^{52/} government contractors,^{53/} and programs or activities receiving federal

^{51/} y^{51/} 29 U.S.C. §§ 701 et seq.

^{52/} Id. § 791.

^{53/} Id. § 793.

financial assistance (including private employers receiving federal assistance).^{54/} Employees may allege private causes of action against federal agencies or programs receiving federal assistance^{55/} and administrative remedies are available against Government contractors.^{56/} Under the Rehabilitation Act, an employer must afford a handicapped individual, who is otherwise qualified for the position, reasonable accommodation to perform the job.

The Rehabilitation Act has been given an expansive reach by court decisions and the Civil Rights Restoration Act of 1988.^{57/} Similar laws have been enacted by most states and many localities.^{58/} One way or another, such laws apply to most employers in both the public and private sectors.

Over the years there has been considerable debate as to whether the protection of handicap discrimination laws should be extended to drug addicts and alcoholics. There is no direct evidence that Congress considered such persons to be handicapped when it adopted the Rehabilitation Act in 1973 or expanded its coverage in the 1974 amendments. The examples used in the

^{54/} Id. § 794.

^{55/} Strathie v. Dept. of Transportation, 716 F.2d 227 (3rd Cir. 1983).

^{56/} Id. § 793(b).

^{57/} Pub. L. No. 100-259 (Mar. 22, 1988); Grove City College v. Bell, 465 U.S. 555 (1984) (Title IX antidiscrimination provisions are applicable to indirect recipients of federal funds). But see United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986) (§ 504 not applicable to commercial airlines that benefit from federal aviation programs). Although the court in Grove City held that antidiscrimination provisions only applied to the "program or activity" within an institution which benefitted from federal aid and not the institution as a whole, Congress in the Civil Rights Restoration Act has provided that provision of direct or indirect federal aid to a corporation, partnership or other private organization is enough to cover the entire corporation. The language of the Act is difficult to interpret and is capable of extremely broad interpretation.

^{58/} For a collection of citations to state handicap discrimination statutes, see Cecere & Rosen, Legal Implications of Substance Abuse Testing in the Workplace, 62 Notre Dame L. Rev. 859, 870-71 (1987).

legislative history involved impairments of birth or accident, such as epilepsy, paralysis or blindness.^{59/}

In 1977 the Carter Administration espoused the view that alcoholics and drug addicts were "handicapped" within the meaning of the Act, in an opinion of Attorney General Griffin Bell and in regulations issued by the Department of HEW.^{60/} This conclusion was based in part on the perceived "medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical."^{61/} At the same time, the Carter Administration advocated relaxing penalties for possession of marijuana.^{62/}

The position of the Carter Administration aroused considerable controversy, and in 1978 the House of Representatives passed a bill to amend the Act to exclude alcoholics and drug addicts from its protection. The Senate, however, prevailed in watering down this amendment prior to enactment.^{63/}

As enacted, the 1978 amendment excludes from the definition of handicapped individual an

"alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to the property or safety of others."

This approach really did little if anything to change the Carter Administration's interpretation of the Act, which already limited its protection to individuals who were "otherwise qualified" for

^{59/} S. Rep. No. 318, 93d Cong., 2d Sess. (1973), reprinted in 1973 U.S. Code Cong. & Admin. News 2076, 2085 & 2092.

^{60/} 43 Op. Att'y Gen. 12 (Apr. 12, 1977); 42 Fed. Reg. 22,676 (May 4, 1977).

^{61/} 42 Fed. Reg. at 22,686 (1977). These conclusions were also based partly on the fact that in 1973 Congress was on notice that alcoholics and drug addicts had been eligible for rehabilitation services under a prior statute.

^{62/} D. Musto, The American Disease, at 265-69 (rev. ed. 1987).

^{63/} See 124 Cong. Rec. 30,322-25 (daily ed. Sept. 20, 1978).

their jobs.^{64/} In effect, Congress acquiesced in the view that alcoholics and drug addicts are for some purposes protected by the Act, and the Supreme Court has recognized the validity of this interpretation.^{65/}

Application of the Rehabilitation Act to alcoholics and drug addicts has produced some bizarre results. One court held that an admitted drug addict who had been participating in a rehabilitation program for several months had to be hired by a hospital as a nurse in an intensive care unit, even though the job would normally give her access to narcotics intended for patients.^{66/} Another court held that with regard to an alcoholic employee, the Act "requires forgiveness of his past alcohol-induced misconduct in proportion to his willingness to undergo and favorable response to treatment."^{67/}

Such decisions are probably not correct interpretations of the Act, but confusion and uncertainty as to its meaning are likely to continue so long as drug addicts and alcoholics remain covered. One way to solve this problem would be to amend the Act to limit its protection in the workplace to completely recovered alcoholics and drug addicts rather than current users.^{68/}

Perhaps the best approach would be simply to amend the Act to exclude alcoholics and drug addicts entirely from the definition of "individuals with handicaps." This approach would also send a message to the public that alcoholics and drug

^{64/} Both the opinion of Attorney General Bell and the preamble to the HEW regulations emphasized that an alcoholic or drug addict could be denied employment if his condition prevented successful job performance because such a person would not be "otherwise qualified." In addition, the HEW preamble observed that "employers may enforce rules prohibiting the possession or use of alcohol or drugs in the workplace, provided that such rules are enforced against all employees." 42 Fed. Reg. at 22,686 (1977). See Simpson v. Reynolds Metals, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980) (concluding that the 1978 amendment did not really change the Act's coverage of drug addicts or alcoholics).

^{65/} School Board of Nassau County v. Arline, 107 S. Ct. 1123, 1130 n.14 (1987).

^{66/} Wallace v. Veterans Administration, 683 F. Supp. 758, 764 (D. Kan. 1988).

^{67/} Walker v. Weinberger, 600 F. Supp. 757, 762 (D.D.C. 1985).

^{68/} Some courts have interpreted the current Act in this manner. See Burka v. New York City Transit Authority, 680 F. Supp. 590, 597 (S.D.N.Y. 1988) (Act does not protect current drug users, but only those who are rehabilitated or rehabilitating).

addicts are not "victims of disease" but instead will be held responsible for their conduct.

This issue was recently considered by the Supreme Court in Traynor v. Turnage.^{69/} There a narrowly-divided Court upheld VA regulations treating certain kinds of alcoholism as "willful misconduct" for purposes of denying an extension of a 10-year period for obtaining educational benefits. The Court rejected the argument that the regulations violated the Rehabilitation Act, noting that the scientific community is sharply divided over the issues of whether alcoholism is a "disease" and whether it should be treated as an involuntary condition.

As the Traynor case indicates, strict workplace policies on drugs and alcohol can be successfully defended against Rehabilitation Act claims. Careful attention to how these issues are litigated is important, however.

It is significant that the regulations protect drug addicts and not casual or "recreational" drug users. An individual who wishes to claim the protection of the Act must characterize himself as an addict, which may serve to deter some claims.

In addition, the Act does not prevent the enforcement of workplace rules regarding drugs or alcohol. So long as such rules are enforced even-handedly against addicts and non-addicts alike, there is no discrimination on the basis of handicap.^{70/} Alternatively, an alcoholic or drug abuser who violates the employer's policy may be "prevent[ed] . . . from performing the duties of the job in question or . . . constitute a direct threat to the property or safety of others" so as to be excluded from the definition of handicapped individual by the 1978 amendments.^{71/} Finally, such a person, even if regarded as handicapped, may not be "otherwise qualified" for the job in question.^{72/}

A remaining question is what obligations the Act imposes upon employers to accommodate and pay for drug and alcohol rehabilitation programs. Some cases have found that fairly

^{69/} 108 S. Ct. 1372 (1988).

^{70/} See 43 Op. Att'y Gen. 12 (April 12, 1977); 42 Fed. Reg. at 22,686 (May 4, 1977).

^{71/} Heron v. McGuire, 803 F.2d 67, 68-69 (2d Cir. 1986) (police officer's heroin addiction rendered him unfit for duty and thus not a "handicapped individual").

^{72/} Copeland v. Philadelphia Police Dept., 840 F.2d 1139, 1148-49 (3d Cir. 1988) (police officer who used marijuana off duty was not "otherwise qualified" and can be discharged).

extensive efforts to assist alcoholic employees are not good enough.^{73/} It does appear, however, that an employee can be discharged for misconduct (as distinguished from poor job performance) attributable to drugs or alcohol without a requirement that rehabilitation be offered.^{74/}

D. Drug Testing and Labor Law

1. National Labor Relations Act ("NLRA"). Under the NLRA,^{75/} the establishment of a drug testing program is most likely a condition of employment and thus must be negotiated with the appropriate union. On at least one occasion, a federal district court temporarily stayed the unilateral imposition of a company-wide drug testing program in order to permit arbitration between the employer and his union.^{76/} Several labor arbitrators have concluded that an employer may not unilaterally impose a drug testing program prior to negotiation with the union.^{77/} At least one arbitrator has concluded that this right is waivable.^{78/}

Rosemary Collyer, General Counsel of the National Labor Relations Board, in a memorandum to NLRB regional directors,

^{73/} See Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984), aff'd mem., 790 F.2d 964 (D.C. Cir. 1986) (repeated efforts by employer to counsel and rehabilitate alcoholic employee not adequate because he was never given a "firm choice" between rehabilitation and discipline).

^{74/} See Richardson v. United States Postal Service, 613 F. Supp. 1213 (D.D.C. 1985).

^{75/} See 29 U.S.C. § 151 et seq. (1982).

^{76/} International Brotherhood of Electrical Workers v. Potomac Electric Power Co., 121 L.R.R.M 3071 (1986) (collective bargaining agreement provided for arbitration of issues in dispute). A preliminary injunction was denied, however, when the parties agreed to negotiate the terms, procedures and other aspects of the drug testing plan. See International Brotherhood of Electrical Workers, v. Potomac Electric Power Co., 634 F. Supp. 642 (D.D.C. 1986). The court noted that the employer had agreed to implement certain procedures to assure that the company's prior practices regarding drugs in the workplace would continue unchanged prior to arbitration.

^{77/} Laidlaw Transit, 89 Lab. Arb. 1001 (1987) (Allen, Arb.); Philips Industries, 90 Lab. Arb. 222 (1988) (DiLeone, Arb.).

^{78/} Fleming Foods of Missouri, 89 Lab. Arb. 1292 (1988) (Yarowsky, Arb.).

concluded that the institution and terms of a drug testing program are mandatory subjects of collective bargaining.^{79/} In her view, testing of both current employees and job applicants is the subject of mandatory bargaining under section 8(d) of NLRA. Drug testing, she continued, is a substantial change in working conditions, even where physical exams are required or work rules prohibit the use or possession of drugs in the workplace.^{80/} Not only does the establishment of a drug testing program trigger mandatory bargaining, she continued, but the terms and procedures of drug testing are also the subject of collective bargaining requiring good faith negotiation to agreement or impasse.

A union may waive its rights to negotiate regarding this issue by contract, through past practice, or through inaction. However, Collyer noted, waiver will not be inferred from silent or ambiguous provisions in a collective bargaining agreement, nor through inaction resulting from lack of notice.^{81/}

The NLRB has not as yet addressed the subject of drug testing in any specific decisions. General Counsel Collyer's memorandum, however, has generated significant controversy.^{82/} Employers have criticized the position, arguing that the need to preserve safety in the workplace is within their management discretion. Likewise, some experts have challenged the NLRA's application to job applicants.

One benefit of coverage under federal labor law is that the existence of a grievance-resolution mechanism pursuant to a collective bargaining agreement has been held to preempt causes of action under state constitutional law and tort law relating to an employer's drug-testing program.^{83/}

2. Railway Labor Act. The issue of drug testing in the airline and railroad industries involves considerations under both the Railway Labor Act and regulations of the Department of

^{79/} See General Counsel Memorandum on Drug and Alcohol Testing; Memorandum GC-87-5 (Sept. 8, 1987).

^{80/} Id. at 1. Collyer noted that the introduction of physical examinations or use of the polygraph constituted subjects of mandatory bargaining.

^{81/} Id. at 1-2.

^{82/} See 91 Daily Labor Report A-1 (May 11, 1988).

^{83/} Utility Workers Local No. 246 v. Southern California Edison Co., No. 87-5674 (9th Cir., May 4, 1988); Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987); Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985).

Transportation.^{84/} In two recent decisions issued on the same date as it held unconstitutional the regulation requiring post-accident testing of train crews, a panel of the Ninth Circuit enjoined a railroad from implementing its own policy of post-accident testing and its use of sniffer dogs to detect drugs in the workplace. The court held that these policies were not management prerogatives excluded from bargaining under the Act. In addition, the court held that the policy in each case gave rise to a "major dispute" under the Act and thus could not be implemented without compliance with the Act's mediation procedures.^{85/} Apart from the Ninth Circuit, the courts are divided as to whether drug testing presents a major dispute under the Act.^{86/}

3. Arbitrators' Decisions. The subject of drug testing in the workplace has been addressed in literally hundreds of published arbitration decisions. These decisions sharply conflict on nearly every aspect of the drug testing issue.^{87/} Only patterns are discernible from this chaotic picture.

^{84/} The Department of Transportation regulations are discussed in part II.E.3. infra.

^{85/} Both cases are styled Brotherhood of Locomotive Engineers v. Burlington Northern R.R., 838 F.2d 1087 (9th Cir. 1988) (post-accident testing), petition for cert. filed, No. 87-1631 (Apr. 1, 1988); 838 F.2d 1102 (9th Cir. 1988) (sniffer dogs). Members of the author's firm represent Burlington Northern in the pending petition for certiorari.

^{86/} The following courts have held that drug testing programs involve a minor dispute: RLEA v. Norfolk & Western Ry., 833 F.2d 700 (7th Cir. 1987) (physical exam testing); Brotherhood of Maintenance of Way Employees Lodge 16 v. Burlington Northern R.R., 802 F.2d 1016 (8th Cir. 1986) (physical exam and post-accident testing); International Association of Machinists v. TWA, No. 87-0403 (D.D.C., May 16, 1988) (reasonable suspicion testing). The following have held testing programs involve a major dispute: RLEA v. Consolidated Rail Corp., 845 F.2d 1187 (3d Cir. 1988) (physical exam testing); International Brotherhood of Teamsters v. Southwest Airlines, 842 F.2d 794 (5th Cir. 1988) (post-accident testing); Transportation Workers Union v. SEPTA, 127 L.R.R.M. 2835 (E.D. Pa. 1988), appeal pending (random testing).

^{87/} One arbitrator commented "[p]erhaps on no other subject are arbitrators so diverse in their conclusions as on the subject of drug use and the testing for drugs and disease. No mainstream of precedent is available to the arbitrator for guidance. . . . [O]ne can find arbitration cases supporting almost every conceivable argument or position." See South Carolina Electric & Gas Co., 89 Lab. Arb. 845, 849 (1987) (Boals, Arb.).

Nearly all arbitrators have closely scrutinized the imposition and use of drug testing in the workplace. For example, many arbitrators require clear and convincing proof of drug use prior to upholding discipline.^{88/} Other arbitrators disagree, requiring only that the employer prove drug use by a preponderance of the evidence.^{89/}

Where work rules prohibit the use or possession of drugs on company property, some arbitrators have required the employer to demonstrate through evidence other than a positive drug test result that the employee was under the influence of a drug while at work.^{90/} This requirement is generally satisfied if the employee appeared through his behavior or conduct to be under the influence of a drug.^{91/} Some arbitrators refused to uphold a discharge when the employer failed to prove an employee, arrested for possession of drugs off work premises, was impaired by the drug at work.^{92/} Other arbitrators have been willing to permit discharges even when the activity occurred during off hours.^{93/}

On occasion, arbitrators have set aside discharges where the grievant was able to demonstrate discrepancies in his

^{88/} Amoco Texas Refining Co., 78 Lab. Arb. 1299 (1982) (Taylor, Arb.); Henry Vogt Machine Co., 80 Lab. Arb. 1074 (1983) (Gibson, Arb.); Pacific Southwest Airlines, 80 Lab Arb. 1292 (1983) (Darrow, Arb.). One reason for close scrutiny is the obvious fact that a severe stigma is associated with discharge for drug use on the job, resulting in difficulty in acquiring subsequent employment. See Ethyl Corp., 74 Lab. Arb. 953 (1980) (Hart, Arb.).

^{89/} MTA, Houston, 89 Lab. Arb. 129 (1987) (Baroni, Arb.).

^{90/} Herlitz, Inc., 89 Lab. Arb. 436 (1987) (Allen, Arb.).

^{91/} 89 Lab. Arb. at 440 (1987) (medical examination detected no physical problem, but patient's speech was abnormal and attention span was short); 89 Lab. Arb. at 131 (1987) (red eyes, and abnormal exaggerated head movements indicated drug use).

^{92/} John Morrell & Co., 90 Lab. Arb. 38 (1987) (Concepcion, Arb.); South Carolina Electric & Gas Co., 89 Lab. Arb. 845 (1987) (Boals, Arb.).

^{93/} New York Dept. of Correctional Services, 89 Lab Arb. 877 (1987) (Handsaker, Arb.); Marathon Petroleum Co., 89 Lab. Arb. 716 (1987) (Grimes, Arb.). See also Oil Chemical & Atomic Workers Local 4-228 v. Union Oil Co., 818 F.2d 437 (5th Cir. 1987).

urine sample's chain of custody.^{94/} Where the employer and drug testers maintain a well documented chain of custody, however, this problem can be easily avoided.

Another problem that arbitrators have faced is the "bashful kidney" syndrome. On several occasions, arbitrators have reinstated employees who were discharged due to inability to provide a urine sample for physical or psychological reasons.^{95/} Having the employee provide a sample in a private area and taking steps to assure that the sample is not tampered with should alleviate this problem.

E. Proposed Federal Legislation and Regulations

1. General Regulation of Private Sector Testing

Bills have been introduced in both houses of Congress to set nationwide standards for private sector drug testing.^{96/} This legislation typically mandates adherence to the HHS guidelines for federal employee drug testing programs. Such legislation may be attractive to businesses that operate in many states and thus face inconsistent regulation of their drug testing programs.^{97/}

It is important, however, than any legislation of this nature preempt all state laws regulating drug testing by covered employers. Otherwise, the legislation will discourage testing by adding a layer of federal regulation on top of the regulations being adopted in many states. Preemption only of "inconsistent" state laws is not much help in this regard, since it invites litigation over whether a state regulation is or is not "consistent" with the federal regulations.

^{94/} Phoenix Transit System, 89 Lab. Arb. 973 (1987) (Speroff, Arb.); Young Insulation Group, 90 Lab. Arb. 341 (1987) (Boals, Arb.).

^{95/} Gem Industrial Contractors, 89 Lab. Arb. 1087 (1987) (Wolk, Arb.) (inability to provide urine sample when observed; contentions of employee supported by medical testimony); Union Plaza Hotel, 88 Lab. Arb. 528 (1986) (McKay, Arb.) (employee unable to produce urine sample in presence of observer when required to totally undress before observer; request for robe was denied; employee reinstated).

^{96/} H.R. 2951, 100th Cong., 2d Sess. (1988) (Rep. English); S. 2205, tit. VIII, 100th Cong., 2d Sess. (1988) (Sen. DeConcini).

^{97/} For a discussion of state legislation regulating drug testing, see part II.B. supra.

Also, there should be a lengthy transitional period before such legislation takes effect. The HHS guidelines were promulgated only in April 1988 and few private sector programs presently satisfy every provision. Requiring immediate compliance with the HHS guidelines would effectively halt the vast majority of private sector programs for a year or two, just when the effort to achieve drug-free workplaces is taking hold.

2. Federal Contractors and Grantees^{98/}

A number of legislative proposals have been advanced that would require federal contractors and grantees to take measures to achieve drug-free workplaces. Early in 1988 Rep. Robert Walker (R.-Pa.) attached riders to a number of authorization or appropriations measures, which would require contractors or grantees to take unspecified steps to achieve drug-free workplaces.

In response to these efforts, Rep. Jack Brooks (D-Texas) introduced H.R. 4719 on June 1, 1988. This bill was endorsed by House Democratic leaders at a June 15 hearing before the legislation subcommittee of the House Government Operations Committee, both of which are chaired by Rep. Brooks. The Reagan Administration indicated opposition to H.R. 4719 on the ground that it preferred a broader approach along the lines of the Walker riders.

On June 28 and 29, H.R. 4719 was marked up by the subcommittee and full committee. There are reports that H.R. 4719 may be folded into omnibus drug legislation to be considered by the House later this year.^{99/}

In June 1988, Defense Secretary Frank Carlucci announced that his department would be requiring mandatory drug tests for contractor employees with access to highly classified information or in other sensitive positions. However, as of this writing no specific regulations had been proposed.

Because H.R. 4719 is the most advanced piece of legislation, it will be the focus of this analysis. Unfortunately, H.R. 4719 creates an elaborate bureaucratic system that will do very little to address the problem of drugs in the workplace--and may well be counterproductive.

^{98/} This section is based on a "Legal Backgrounder" prepared by the author for the Washington Legal Foundation, dated July 1, 1988, and is used with permission.

^{99/} See "House Democrats Back Brooks' Drug-free Work Bill, Adm'n Wants Broader Approach," 49 BNA Federal Contracts Report 1213 (June 20, 1988).

Similar criticism would apply to many of the other efforts to require specific anti-drug efforts by contractors and grantees. Such measures may backfire by exposing private sector drug programs to constitutional challenges that would not otherwise be possible.

What H.R. 4719 Requires. Under H.R. 4719, government contractors and grantees are required to certify that they have adopted certain measures to create drug-free workplaces. The contractor or grantee can be suspended, terminated, or debarred if it fails to make the requisite certification or if "such a number" of its employees are convicted of drug offenses occurring in the workplace as to indicate that it has failed to make a "good faith effort" to comply with the statute. Agency heads have the power to waive the suspension, termination or debarment upon a determination that it is in the public interest to do so.

The measures required by H.R. 4719 are: (1) that the employer adopt a policy prohibiting the manufacture, distribution, possession or use of illegal drugs in the workplace; (2) that the employer establish a drug-free awareness program; (3) that each employee certify that he or she understands and will abide by this policy and will report to the employer within 5 days any criminal conviction for a drug offense occurring in the workplace; (4) that the employer notify the granting or contracting agency of any such report of a criminal conviction within 10 days; and (5) that the employer impose a sanction or require participation in a rehabilitation program for an employee who files such a report of a criminal conviction.

Why H.R. 4719 Is Too Weak. Although H.R. 4719 appears to contain extensive requirements for contractors and grantees to assure drug-free workplaces, the bill is in fact carefully drafted to assure that it will have little impact on employees who use illegal drugs. Some of the specific loopholes in the bill are as follows.

First, the anti-drug policy mandated by the bill for contractors and grantees is an extremely weak policy. It prohibits only "the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance" in the workplace. It does not prohibit off-duty trafficking in or use of drugs, even if the result is impairment of job performance. An employee can use drugs just before reporting to work or while out to lunch without violating this policy.

Second, even this relatively weak anti-drug policy is made entirely toothless by the fact that H.R. 4719 requires a "criminal drug statute conviction for a violation occurring in the workplace" before any sanctions are triggered. Criminal convictions for drug use or simple possession are practically nonexistent, since law enforcement agencies are overburdened just

trying to prosecute traffickers. And, even if an employee is convicted of drug trafficking, the offense had to occur "in the workplace" for the sanctions to be triggered. The vast majority of drug-using employees have nothing to fear from this statute.

Third, in the rare case where an employee is actually convicted of a criminal drug offense occurring in the workplace, the bill requires only that the employer either take appropriate personnel action up to and including termination or "require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program." Both alternatives are weak. An appropriate personnel action could be as little as a letter of reprimand. And there is no standard for what constitutes satisfactory participation in rehabilitation, nor is there any requirement that employees be monitored afterwards to ensure that they remain drug-free.

Finally, the bill does authorize suspension, termination or debarment of a contractor or grantee who has a number of employees convicted of drug violations occurring in the workplace. However, as noted above, there are likely to be few if any such convictions, much less such a number as to indicate a lack of good faith in complying with the statute.

How H.R. 4719 Could Actually Backfire. Not only does H.R. 4719 do little to deter employee drug use, it may actually make it harder for covered employers to adopt tough anti-drug policies. The bill would provide new grounds for lawsuits challenging such employer policies. For example, some may argue that the weak anti-drug policy required by the bill precludes employers from adopting different and tougher policies of their own.

More important, anti-drug measures adopted by covered employers (particularly including drug testing programs) would be subject to legal challenge on constitutional grounds as having been compelled by "government action." As it stands now, private employers are not generally subject to litigation on constitutional grounds.^{100/}

Most of the legal challenges to drug testing programs have been based upon the Fourth Amendment, and because of the government action requirement have been limited to the context of public employment. The courts have split on whether government agencies can require their employees to submit to drug testing as a condition of employment without violating the Fourth Amendment's prohibition of unreasonable searches and seizures. This

^{100/} See part II.A.1. supra.

issue will be considered by the Supreme Court in the 1988-89 Term.^{101/}

In view of the uncertainty as to how the courts will resolve this Fourth Amendment issue, it would be perverse to place anti-drug programs by government contractors and grantees under the same legal cloud. Even if the courts ultimately uphold the constitutionality of government-mandated drug testing in the employment context, litigation over this issue could substantially delay the implementation of successful private sector programs.

H.R. 4719 Attacks the Wrong Problem. This legislation seems to be based on the premise that private employers, including government contractors and grantees, are not doing enough to fight the problem of illegal drugs in the workplace. The solution is a new layer of government regulation.

In fact, private employers do not need federal regulations to give them an incentive to fight drugs in the workplace. Drug-using employees are economically undesirable because of their low productivity and high rates of absenteeism, accidents and dishonesty. More and more private sector employers are developing their own tough anti-drug policies for their own reasons. For example, nearly half of our country's 500 largest corporations have drug testing programs; in this regard they are well ahead of the federal government's programs for its civilian employees.

In achieving drug-free workplaces in the private sector, government has mostly been part of the problem and not part of the solution. For example, the Rehabilitation Act has been interpreted to extend the legal protection of handicapped persons to include drug addicts.^{102/} H.R. 4719 does not change this restriction and in fact emphasizes that an employee convicted of a workplace drug offense can be terminated or suspended only "in accordance with applicable law and collective bargaining agreements."

Also, H.R. 4719 does nothing to preempt state laws that restrict the ability of employers to use drug testing to achieve drug-free workplaces. Such statutes have been adopted recently in a number of states, including Connecticut, Iowa, Minnesota, Montana, Rhode Island, and Vermont. Some of these statutes impose severe limits on the ability of employers to require drug testing as a condition of employment.^{103/}

^{101/} See part II.A.2. supra.

^{102/} See part II.C. supra.

^{103/} See part II.B. supra.

Summary. As in so many other areas, Congress would probably be best advised to do nothing and allow normal economic incentives to promote drug-free workplaces for government contractors and grantees. If legislation is to be adopted, it would most appropriately focus on reducing legal barriers to achieving drug-free workplaces rather than on creating new federal bureaucratic requirements. H.R. 4719 gives us the worst of both worlds: new federal regulations with no discernible impact on the problem of drugs in the workplace.

3. Transportation Industry

Although government-mandated drug testing in the private sector generally seems counterproductive, it does make sense in areas where there is an overwhelming concern with public health and safety. The transportation and nuclear industries, for example, are already heavily regulated by the federal government with regard to practices bearing on public safety. In these areas, to ignore the need for drug free workplaces would be highly irresponsible. Notwithstanding a few deviant decisions, drug testing in this area seems most likely to survive Fourth Amendment scrutiny.

Since 1985, the Department of Transportation under Secretaries Elizabeth Dole and James Burnley has implemented an aggressive program to achieve drug free transportation systems.

The pioneering effort was a Federal Railroad Administration rule requiring post-accident drug testing. This rule was enjoined by the Ninth Circuit in January, 1986 pending its hearing of an appeal challenging the constitutionality of the rule.^{104/} The Supreme Court, by an 8 to 1 vote, set aside the injunction and allowed the rule to take effect.^{105/} During the period Feb. 10, 1986 to Dec. 31, 1987, 1508 individuals were tested pursuant to the rule, which 10 tested positive for alcohol and 66 for illegal drugs.^{106/} It was under this program that Conrail engineer Ricky Gates was tested for drugs after the collision with an Amtrak train that killed 16 people.^{107/}

Notwithstanding these intervening events, a majority of the Ninth Circuit panel went ahead and held the railroad post-accident testing rule unconstitutional under the Fourth

^{104/} See RLEA v. Burnley, 839 F.2d 575, 576 (9th Cir. 1988), cert. granted, 56 U.S.L.W. 3831 (June 6, 1988).

^{105/} Dole v. RLEA, 474 U.S. 1099 (1986).

^{106/} 53 Fed. Reg. at 16,641 (May 10, 1988).

^{107/} Washington Post, Jan. 15, 1987, at A1.

Amendment. The Supreme Court has granted certiorari, and is expected to hear the case in October 1988.^{108/}

The Department of Transportation has not been deterred from its efforts and has recently issued a number of proposed rules mandating drug testing in safety sensitive jobs in the airline, motor carrier, merchant marine, pipeline and mass transit industries, as well as strengthening the railroad testing program.^{109/}

By contrast, the Nuclear Regulatory Commission has thus far adopted a laissez-faire approach to drug-free workplaces in the nuclear power industry. With one dissent, the NRC on August 4, 1986 adopted a policy statement encouraging self-regulatory efforts by the industry. There have recently been some indications, however, that NRC may be considering a mandatory testing rule.^{110/}

Legislative proposals to mandate anti-drug programs in the transportation industry have been under active consideration in Congress. A bill sponsored by Senators Hollings and Danforth was approved by the Senate in 1987 but did not reach a vote in the House.^{111/} On June 15, 1988, the House voted to instruct its conferees to agree to Senate language requiring drug testing in amendments to the Federal Aviation Act of 1958.^{112/} On June 22, a subcommittee of the House Energy and Commerce Committee approved a bill requiring some testing in the railroad industry.^{113/} The main difference between the House and Senate approaches is that the House version would scrap the current Department of Transportation regulatory initiatives and require an entirely new approach; the Senate version largely supports the current initiatives.

^{108/} RLEA v. Burnley, 839 F.2d 575 (9th Cir. 1988), cert. granted, 56 U.S.L.W. 3831 (June 6, 1988).

^{109/} 53 Fed. Reg. 8,368 (Mar. 14, 1988) (aviation); 53 Fed. Reg. 16,640 (May 10, 1988) (railroad random testing); 53 Fed. Reg. 22,268 (June 14, 1988) (motor carriers); 53 Fed. Reg. 25,926 (July 8, 1988) (commercial vessels); 53 Fed. Reg. 25,892 (July 8, 1988) (pipeline operators); 53 Fed. Reg. 25,910 (July 8, 1988) (mass transit).

^{110/} Drugs in the Workplace, Apr. 1988, pp. 1-3 (Business Research Publications, Inc.).

^{111/} S. 1041, 100th Cong., 1st Sess. (1987).

^{112/} H.R. 3051, 100th Cong., 2d Sess. (1988); see 46 Cong. Quarterly Weekly Report 1674 (June 18, 1988).

^{113/} H.R. 4748, 100th Cong., 2d Sess. (1988).

F. Additional Legal Issues

1. Tort law. A variety of tort law theories could be invoked to support lawsuits against an employer relating to anti-drug policies. Such theories could include defamation, wrongful discharge, intentional infliction of emotional distress, and invasion of privacy. Conversely, failure to adopt sufficient anti-drug policies could lead an employer to be sued for negligence if an employee's drug use causes property damage or personal injury to others.

It is difficult to generalize about tort liability, since the precise legal doctrines vary from state to state. There has been very little tort litigation thus far arising out of drug testing programs.^{114/} Such litigation can be expected to turn largely on the facts of the particular case, and it will be difficult to distill general rules that are likely to be applied.

In general, the best defense to tort liability is common sense. Liability is least likely to arise from anti-drug programs that are carefully designed, justified by legitimate employee interests, and fairly administered.

Suits based on defamation or slander should be easy for an employer to avoid. The key to avoiding this kind of litigation in the drug testing area is to keep the process confidential. If the drug testing program is run "in-house", only those employees who have a strict need to know test results can be allowed access. If the program is run by a contractor, employees should be identified by numbers or codes and not by name. Employees should only be informed of test results in a confidential setting.

2. Title VII. At the moment there are no reported decisions finding that an employer has violated Title VII of the Civil Rights Act of 1964 by implementation of an anti-drug program. In New York City Transit Authority v. Beazer,^{115/} the Supreme Court found that the Transit Authority's policy of

^{114/} See Luck v. Southern Pacific Transp. Co., No. 84-3230 (Cal. Super. Ct., Oct. 20, 1987) (\$485,000 award to employee discharged for refusal to submit to drug test), appeal pending; Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359 (D.S.C. 1985) (rejecting tort law theories for recovery by employee discharged after positive drug test); Houston Belt & Terminal Co. v. Wherry, 548 S.W.2d 743 (Tex. Civ. App. 1976), cert. denied, 434 U.S. 962 (1977) (upholding \$200,000 award for disseminating false drug test result).

^{115/} 440 U.S. 568 (1979).

refusing to hire methadone users was not violative of Title VII based on the statistics presented. The court went on to hold that, even if the statistics established a prima facie case of disparate impact on blacks and Hispanics, the rule excluding methadone users from safety-sensitive positions bore a "manifest relationship to the employment in question."^{116/}

In planning and implementing drug testing programs, employers should anticipate the possibility that an employee or group of employees might attempt to show an adverse impact or disparate treatment in the penalties imposed. In this regard, testing is only one part of the overall policy for dealing with drugs in the workplace. So long as the policy is well designed and applied evenhandedly, then there would be a strong basis for defending a lawsuit that is premised upon statistical evidence of disparate impact on minorities. The recent plurality opinion in the Supreme Court in Watson v. Fort Worth Bank & Trust,^{117/} may also indicate that the courts will be more receptive to employers' business justifications in such cases.

^{116/} Id. at 585.

^{117/} 56 U.S.L.W. 4922 (June 29, 1988) (O'Connor, J.).