U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

July 23, 1986

TO: Peter Wallison

FROM: Charles J. Cooper

Returning the attached with
many thanks.

Chuck

DRAFT

THE WHITE HOUSE

WASHINGTON

July 22, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: ROBERT M. KRUGER

SUBJECT: Legal Aspects of Drug Testing and Drug Treatment

You have asked me to examine legal issues raised by the following initiatives proposed in a July 14 memorandum from Dr. Carlton Turner to the Domestic Policy Council:

"[1] Develop ways to provide funding assistance to states which implement programs to support specific drug-related health problems --

- o Develop mandatory treatment for intravenous (IV) drug users
- o Identify drug users and force them into appropriate treatment

* * *

[2] Institute a testing program for pre-employment screening of all applicants for federal jobs, with a policy that a confirmed positive test for illicit drug use disqualifies the applicant and another application may not be made for one year.

[3] Require a comprehensive testing program for all federal employees in national security positions, safety-related positions, law enforcement officers and support personnel, drug abuse organizations, and any positions designated as sensitive by regulation or by the agency head.

[4] Request the Secretary of Defense to explore ways to require Defense contractors to have a policy of a drug-free workplace."

(Emphasis added.)

In my memorandum of July 15, I preliminarily identified various legal issues implicated by similar proposals which were outlined in a memorandum dated July 8. I observed that the prohibition against unreasonable search and seizure under the Fourth Amendment and the Due Process Clause of the Fifth Amendment, as well as various federal statutes, raised serious questions for drug testing programs covering federal employees.

I noted that private employees (i.e. defense contractors) also faced state constitutional or statutory privacy provisions, common law protection against the tort of invasion of privacy and common law protection against libel and slander. With respect to mandatory drug treatment programs, I indicated that Fourth and Fifth Amendment questions similar to those implicated by drug testing programs would be involved.

This memorandum will discuss some of these issues in greater detail. The memoranda we previously obtained from the Congressional Research Service and from Jim Knapp at the Department of Justice also analyze the legal aspects of drug testing programs, but like similar studies conducted in the private sector, they conclude that there is an inadequate body of law in this area from which to glean specific guidance. As noted in my July 15 memo, several of these legal issues are presently before the courts.

I. FOURTH AMENDMENT ISSUES RAISED BY DRUG-TESTING PROGRAMS

General Principles

The Fourth Amendment to the Constitution prohibits unreasonable searches and searches. Courts have consistently held that requiring a person to provide a sample of his urine is a seizure within the meaning of the Fourth Amendment, basing their analysis on Schmerber v. California, 384 U.S. 757 (1966), which held that the extraction of blood was a Fourth Amendment search. Shoemaker v. Handel, No 85-5655 (3d Cir. July 10, 1986); Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1024 (1976); Jones v. McKenzie, No. 85-1624, slip. op. (D.C.C. Feb. 24, 1986); McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 452 (N.D. Ga. 1985); Murray v. Haldeman, 16 M.J. 74, 81 (C.M.A. 1983).

The Fourth Amendment prohibits only unreasonable searches and seizures. Carroll v. United States, 267 U.S. 132 (1925). Generally, the determination of reasonability is made by a magistrate considering an application for a warrant. Where reasonability is challenged in a prosecution based on a search or seizure, the courts have balanced the intrusiveness to the individual against the benefit to be derived by the public. The more intrusive the search or seizure the higher the level of state interest required to justify it. United States v. de Hernandez, _____ U.S. _____, 105 S. Ct. 3304 (1985). Inspections of personnel effects are generally viewed by the courts as among the least intrusive searches, while breaches of the "integrity of the body" are seen to involve the greatest invasion of privacy. (Urinalysis has been deemed less intrusive than other searches of the body, such as the extraction of blood, Schmerber, supra, or the administration of an emetic,

Rochin v. California, 342 U.S. 165 (1952). In balancing interests, courts also consider an individual's reasonable expectations of privacy. Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985)

Exceptions to the Warrant Requirement

The Supreme Court has held that warrantless searches are "per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Most of the exceptions to the warrant requirement involve some sort of exigent circumstances, such as immediate danger to police officers or the community, see e.g. Terry v. Ohio, 392 U.S. 1 (1968), or the risk that the evidence could vanish or be destroyed while a warrant is being obtained. See Schmerber, supra, (1966). See also Mackey v. Montrym, 443 U.S. 1 (1979)(law requiring drivers to submit to blood alcohol or breathalyser tests). Either of these exceptions to the warrant requirement arguably encompass certain drug testing programs. Law enforcement officers who carry firearms, for example, are likely to pose an immediate danger to the community if under the influence of drugs. Where a drug testing program is triggered by the suspicion that an employee is presently under the influence of drugs, the "evidence" of drug usage might be eliminated or weakened by a delay in testing.

Authorities have suggested that an exception to the warrant requirement for drug testing programs might be more easily derived from jurisprudence outside the law enforcement arena. One such line of cases allows administrative searches of heavily regulated industries. Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985) (state mandated urinalysis testing of jockeys), United States v. Biswell, 406 U.S. 311 (1972)(inspections of firearms dealers); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)(inspections of liquor industry). Certain security-sensitive agencies might qualify as heavily regulated within the reasoning of these cases (i.e. their employees are already subject to close governmental supervision). Cases permitting government employers to conduct searches of employee lockers and other personal areas for purposes related to job performance, United States v. Bunkers 551 F. 2d 1217 (9th Cir.), cert. denied, 473 U.S. 989 (1975) (warrantless search of postal employee's locker upheld); United States v. Collins, 394 F. 2d 863 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966) (warrantless search of Custom's employee's jacket upheld) recognize the government's right as an employer (as opposed to its right as a law enforcer) to investigate employee misconduct which is directly relevant to the employee's performance of his duties and the government's performance of its statutory responsibilities.

At first consideration, this latter exception for a government employer's conduct "qua employer" would appear to cut a wide swath for drug testing of government employees. The rationale carries its own important limitations, however. First, to the extent that the government is constrained under this approach to investigations which are directly relevant to an employee's job performance, the coverage of a drug testing program might be limited to those identified individuals whose use of drugs actually impairs their ability to function, a standard that is arguably narrower than reasonable suspicion that an employee is under the influence. Second, to the extent that the government is engaging in a search or investigation to secure evidence of a crime, as opposed to malperformance, courts are likely to view the government's conduct as a search within the meaning of the Fourth Amendment. United States v. Hagarty, 388 F. 2d 713 (7th Cir. 1968); United States v. Kahan, 350 F. Supp. 84 (S.D. N.Y. 1972), aff'd in part and rev'd in part, 479 F. 2d 290 (2d Cir. 1973), rev'd 415 U.S. 239 (1974). In both Bunkers, supra, and Collins, supra, the government employer had a undeniable business reason, apart from any law enforcement purpose, in stopping pilfering and theft among its employees. In Allen v. City of Marietta, supra, the District Court for the Northern District of Georgia summarized the caselaw on this point thusly:

> [A] government employee's superiors might legitimately search her desk or her jacket where the purpose of the search is not to gather evidence of a crime unrelated to the employee's performance of her duties but is rather undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibilities.

The Court also noted the cautionary "fact that government investigations of employee misconduct always carry the potential to become criminal investigations." Allen, supra, at 491. And see McDonnell, supra, at 1127 ("All of us are protected by the Fourth Amendment all of the time, not just when police suspect us of criminal conduct.")

In fact, the Allen court upheld urinalysis testing primarily on the basis of the government's rights as an employer. However, the facts of the case reaffirm the limitations on this doctrine. The plaintiffs in Allen were employed by a state entity to work on high voltage electric wires. Through reports from various sources, including an undercover investigator, their supervisor determined that the plaintiffs had used drugs on the job. Subsequent urinalysis testing indicated the presence of marijuana in the plaintiffs' bodies. The plaintiffs did not contest that the urinalysis was conducted in a purely employment context and was not done in connection with any criminal investigation or procedure. Commentators have viewed the

supervisor's reasonable suspicion and the hazardous nature of the plaintiff's work in Allen as integral to the holding in the case.

The court in Allen ultimately combined its analysis of the basis for an exception to the warrant requirement with its analysis of the reasonability of the underlying search. Other urinalysis cases do not even consider the warrant requirement, thereby suggesting that overall reasonability is the essential determination to be made and that an employee drug testing program which constitutionally balances governmental interest and individual rights will not be struck down under the Fourth Amendment's warrant requirement. But see, Shoemaker, supra, at 1156 ("While horse racing comes within the recognized exception to the administrative search warrant rule, the court must still address whether the state's regulations which provide for the use and administration of breathalyzer tests and urinalyses meet the 'reasonableness' test of the Fourth Amendment.")

Consent

A search or seizure conducted pursuant to a voluntary consent does not violate the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). "Voluntariness is a question of fact to be determined from the totality of the circumstances." Id. at 249. If federal employees consent to urinalysis testing, the voluntariness of that consent becomes an issue. If employment is conditioned on the relinquishment of constitutionally protected rights it is unlikely that the consent will be viewed as voluntary. See Pickering v. Board of Education, 391 U.S. 563 (1968)(teachers retain their First Amendment right to comment on matters of public interest in connection with the operation of the public schools in which they work); Garrity v. New Jersey, 385 U.S. 493 (1967)(threat of removal from public office for failure to forgo the privilege against self-incrimination secured by the Fourteenth Amendment rendered the resulting statements unconstitutional). In McDonnell v. Hunter, supra, at 1131, the plaintiffs (state prison employees) signed consent forms, in some cases years before undergoing urinalysis under the Department of Correction's drug testing program. The record before the court provided no evidence concerning the circumstances of that signing from which the court could determine voluntariness. On this record the court refused to assume a voluntary consent "in advance to any search made under the Department's policy."

The McDonnell court also concluded that a consent form does not constitute a blanket waiver of all Fourth Amendment rights. Rather, the court said, it should be construed as valid only as to searches that are reasonable and therefore permissible under the Fourth Amendment. Citing Pickering, supra, for the proposition that public employees cannot be bound by

unreasonable conditions of employment, the court held that "[a]dvance consent to future unreasonable searches is not a reasonable condition of employment."

Reasonability

The emerging law of drug testing has identified the following state interests as being potentially sufficient to overcome Fourth Amendment challenge to an employee drug testing program:

1. Reasonable Suspicion that an Employee is Under the Influence of Drugs.

   As discussed, the urinalysis testing upheld in Allen, supra, was predicted, at least in part, on evidence that identified employees were working under the influence of drugs. In Division 241, supra, city transit authority rules requiring municipal bus drivers to submit to blood urine tests following their involvement in a serious accident, or when they were suspected of being intoxicated or under the influence of narcotics, were upheld by the District Court for the Northern District of Illinois. In McDonnell v. Hunter, supra, the District Court for the Southern District of Iowa held that:

   > [T]he Fourth Amendment allows a state department of corrections to demand of an employee a urine, blood or breath specimen for chemical analysis only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances.

   (Emphasis added). A footnote to this passage observes that the Fourth Amendment "does not preclude taking a body fluid specimen as part of a pre-employment physical examination or as part of any routine periodic physical examination that may be required of employees. ..."

2. Public Safety Concerns.

   In Allen, the urinalysis testing upheld by the court was applied to employees engaged in "extremely hazardous work." In Division 241, the court upheld a drug testing program for bus drivers based on the public interest in the safety of mass transit riders. The significance of the safety factor to both holdings is rendered somewhat uncertain by the fact that in both cases, as noted above, the testing was also predicted, at least in part, on evidence that the tested employees

were under the influence of drugs. The limitations on the safety justification are further illustrated by the refusal of the District Court for the District of Columbia to apply it to a drug testing program covering school bus attendants. Jones v. McKenzie, supra. The Department of Corrections in McDonnell apparently failed to make a public safety argument for testing correctional employees, arguing instead that urinalysis helped identify possible drug smugglers.

3. Special Circumstances Surrounding Military Service.

In Committee for GI Rights v. Callaway, supra, at 476-77, the Court of Appeals listed the following factors as compelling, the conclusion that "in the military context" drug testing procedures are not reasonable: (1) The increased incidence of drug abuse posed a substantial threat to the readiness and efficiency of the armed forces, (2) the lowered expection of privacy in the military, (3) the purpose of the testing was related to the health and fitness of servicemen to perform their jobs and (4) the magnitude of the drug problem in the armed services. Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

The District Court for the District of New Jersey listed a number of factors in upholding the state's regulations providing for breathalyzer and urine tests of licensed jockeys, Shoemaker, supra. First, the Court cited the prevalence of drug and alcohol use in the horse racing industry. Second, the Court observed that other heavily regulated sports industries, such as boxing, impose similarly stringent testing to ascertain participants' physical fitness to compete. Third, the Court noted the relationship between substance above and serious injury and death that might occur during a race. Finally, the Court noted the diminished expectation of privacy as to job-related searches and seizures that jockeys bring to their jobs. In an opinion issued last week, the Third Circuit affirmed the District Court's rejection of the jockeys' challenges to the testing regulations. Shoemaker v. Handel, No. 85-5655 (3d Cir. July 10, 1986). The Court placed greatest emphasis on the state's interest in assuring the public of the integrity of the persons engaged in the horse racing industry (the same interest which justifies pervasive regulation of the industry in the first place) and the resulting reduced privacy expectations of persons engaged in the horse racing business.

Some final guidance on the state interest necessary to overcome Fourth Amendment challenge to drug testing is offered by the Court in McDonnell:

"Defendants also argue that taking body fluids is reasonable because it is undesirable to have drug users

> employed at a correctional institution, even it they do not smuggle drugs to inmates. No doubt most employers consider it undesirable for employees to use drugs, and would like to be able to identify any who use drugs. Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. There is no doubt about it -- searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one.

McDonnell, supra, at 1130.

Reasonableness of Testing Program

The government's purpose in testing employees constitutes but one half of the balance to be made under the Fourth Amendment. At the other end, of course, is the intrusiveness of the test itself. Many of the specific features of a urinalysis test may be more appropriately discussed in connection with procedural due process under the Fifth Amendment. Obviously, such questions as whether the employee will be observed during testing (and by whom), how employees are to be selected for testing and what safeguards exist to ensure the confidentiality of test results will impact on the court's view of a test's intrusiveness. See NFFE v. Weinberger, No. 86-0681 (D.D.C. June 23, 1986), ("[T]he fact that the field testing stage of the program requires observed urinalysis makes the court question the reasonableness of the intrusion into possible privacy expectations.")

Existing Programs and Initiatives

As my July 15 memorandum reports, a number of programs to screen and test government employees in positions involving national security, public safety and law enforcement (hereinafter referred to as "critical positions") are being implemented or are already in place. These programs generally cover employees seeking to enter into critical positions (whether through application, promotion or transfer).

The initiatives set out in Dr. Turner's July 14 memorandum go beyond these programs in two important respects. First, they propose testing all employees in critical positions, apparently irrespective of new or incumbent status. Second, they propose pre-employment screening of applicants for all federal jobs, regardless of the nature of the position applied for.

Neither the drug testing programs already in place nor those proposed in the Turner memorandum appear to premise testing on a

"reasonable suspicion" that an employee is presently under the influence of a controlled substance. Accordingly, they all fail to meet the surest standard for a finding of constitutionality. Notwithstanding the absence of caselaw on point, however, programs to test employees in critical positions carry public policy justifications which should weigh heavy in the Fourth Amendment balance. Supporters of such programs might analogize to factors considered persuasive by courts upholding military testing or to the public safety factors given weight in Allen, Division 241 and Shoemaker. Thus, the government might argue that:

1. Federal prosecutors and law enforcement officials are charged with enforcing the United States' drug laws.

2. Use of drugs by federal prosecutors, policy makers and law enforcement personnel would make them targets for corruption and blackmail.

3. Federal employment in critical jobs is highly regulated and requires an in-depth security clearance (i.e. there is a reduced expectation of privacy).

4. Drug use by law enforcement personnel presents a serious public safety problem because law enforcement personnel carry firearms.

5. The impact of drug use on the health, morale and fitness for duty of persons in security forces is no different than for persons in the military.

The analogy to the military cases is not perfect. The Courts have treated the military community as unique in many respects and have held that its system of justice must be responsive to needs not present in the civil society. See Murray v. Haldeman, 16 M.J. 74. Moreover, the problem of drug abuse in the military has been deemed of an especially serious nature and magnitude. (In her July 18, 1986, memorandum to the Attorney General, the Director of OPM states that "there is no evidence of widespread illegal drug usage in the federal workplace.") Nor has the public safety rationale been universally effective in justifying drug testing programs. See, e.g., Jones v. McKenzie, supra. In the bus-driver cases, the public safety rationale was buttressed by a "reasonable suspicion" that the employee was under the influence of drugs. Thus, the constitutionality of a program to test critical employees remains untested and uncertain.

A distinction based on whether an individual is an applicant or already holds a position in the federal government has not arisen in the existing caselaw on the constitutionality of drug testing under the Fourth Amendment. In the context of programs to test critical employees, observing such a distinction may

undermine the argument for testing any at all. The same security rationale that justifies the testing of new employees would appear to compel the testing of incumbent employees.

However, I can think of several reasons why pre-employment tests might better withstand challenge under the Fourth Amendment. First, prospective employers lack any opportunity to observe an applicant on the job and therefore cannot formulate a reasonable suspicion before hiring. Second, an applicant's expectation of privacy is clearly lower than an incumbent's; applicants generally assume that they will be "checked out." Third, it is less likely that the voluntariness of an applicant's consent to testing would be questioned. Applicants need not apply for government jobs. Consent by an incumbent may be tainted by fear that his or her job; promotion, performance rating, etc. lies in the balance.

The real significance of the applicant/incumbent distinction may pertain to challenges to drug testing programs brought under the Fifth Amendment and the various Federal statutes outlined in my July 15 memo. The lack of a property interest in a particular governmental job may lessen procedural requirements attending programs and personnel actions based on test results under the Due Process Clause of the Fifth Amendment. More importantly, it may remove certain concerns under the Rehabilitation Act, the Civil Service Reform Act and the other Federal statutes discussed in my July 15 memorandum.

In Sum

Without the details of an actual proposal to evaluate (i.e., exactly what positions would be covered and why, how the testing is to be administered, etc.), it is impossible to predict the outcome of a Fourth Amendment challenge to any drug testing program. I believe that the government's interest in protecting the national security and the public safety is sufficiently strong to overcome the intrusiveness of drug testing so long as (1) the program's coverage is limited to individuals whose responsibilities demonstrably put national security or public safety at risk and (2) the testing is designed to safeguard the dignity and privacy of the individual insofar as practical. I do not think courts would deem the government's desire to rid its workforce of drug users as being of sufficient weight to justify testing applicants for all government jobs. See McDonnell, supra, at 1130 (quoted above). Unless a physical examination is already part of the pre-employment process (indicating that job performance has a physical component), I would not be optimistic about judicial analysis of applicant testing under the Fourth Amendment.

II. Fifth Amendment and Federal Statutory Challenges to Drug-Testing Programs

Fifth Amendment

The Fifth Amendment is concerned with the process by which the government proceeds against an individual. The cases have not sufficiently addressed the due process concerns that might arise in drug testing cases. Among those sure to arise if government-wide testing is begun involve:

1. Whether positive tests will be retested.

2. Whether persons will be allowed some kind of hearing to offer evidence to dispute the results of tests.

3. Whether persons may be dismissed on the basis of the tests alone (without corroborating evidence of malperformance of duties).

4. What measures will be instituted to protect the specimens as to chemical requirements and as to linking them with the identity of those being tested, i.e., to protect the chain of custody.

5. Confidentiality.

6. Relationship with rehabilitation program.

Federal Statutes

The Rehabilitation Act of 1973 may provide legal recourse for employees subjected to drug testing. Some alcohol or drug abusers may fit within the definition of handicapped individuals and thus receive protections under the Act from certain adverse actions (i.e. be entitled to an offer or opportunity of rehabilitation). The Act also prohibits the federal government from denying or depriving federal civilian employment "solely" on the basis of prior drug use. 42 U.S.C. 290ee-1.

A number of other federal statutes may serve as a basis for legal challenge to drug testing programs. In a suit against the Department of Defense's civilian drug testing program the National Federation of Federal Employees has alleged violations of inter alia, the Administrative Procedure Act and numerous provisions of the Civil Service Reform Act. The Civil Service statutes have been interpreted as requiring that there be a nexus between the use of drugs by a government employee and his or her performance on the job.

Whatever incompatability these laws present could be dealt with, at least in part, through legislation clarifying the relationship of drug testing laws to other federal statutes.

Federal Labor-Management Issues

Where tested employees are represented by a union, testing programs may be challenged as terms or conditions of employment subject to labor-management negotiations or, where unilaterally implemented, as unfair labor practices. In NFFE v. Weinberger, N. 86-0681 (D.D.C. June 23, 1986), the National Federation of Federal Employees ("NFFE") raised constitutional and statutory challenges to a proposed drug abuse testing program covering federal civilian employees who work for the Department of the Army in "critical" job categories. The court held that "the ultimate concern on the merits concerns a labor management dispute -- i.e., an issue of federal personnel policy." Accordingly, resting on the assumption that the Civil Service Reform Act's remedial framework would provide adequate review of NFFE's constitutional and statutory concerns, the court dismissed the complaint and referred NFFE to the FLRA or MSPB. In so doing, however, it noted that "the drug testing program, on its face, raises substantial Fourth Amendment concerns" and specifically questioned the reasonableness of "observed urinalysis." The court also relied on the ultimate opportunity for judicial review of the constitutional questions following the administrative process.

Bivens-Type Actions

The Supreme Court has recognized a private cause of action for damages against federal agents who, acting under color of authority, engage in unconstitutional conduct. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1970). Individuals ordering or supervising drug testing may be subject to such suits. See NFFE v. Weinberger, supra.

III. Requiring Government Contractors to Have a Policy of a Drug-Free Workplace

Increasing numbers of companies have adopted strategies to attack the problem of chemical abuse (according to a survey 30 percent of the Fortune 500 companies now screen employees or job applicants.) Partly because of the divergent laws, regulations and collective bargaining agreements to which private sector employers are subject, these programs vary widely.

While not strictly subject to constitutionally standards governing privacy and due process, private employers may encounter state constitutional or statutory privacy provisions, common law protection against the tort of invasion of privacy and common law protection against libel and slander. Accordingly, national employers must sometimes devise different programs for different jurisdictions in which they operate. It may not be possible for all private sector employers to meet a single definition of a drug-free workplace without risking state

court litigation and in some jurisdictions substantial tort liability. Work rules, including drug testing programs, for unionized employees are usually the subject of company-specific collective bargaining agreements.

Unless federal preemption of these various state laws is contemplated, recognition of a drug-free workplace may have to be a relative concept measured in terms of efforts made and goals achieved rather than an absolute imperative.

One problem with imposing requirements on federal contractors is that such a program could subject otherwise private conduct to some of the aforementioned constitutional challenges (i.e. create an element of state action). It may be difficult to view compliance with such requirements as voluntary without appearing to be inconsistent with the Administration's position on the regulations issued by the Labor Department which implement the Executive Order on affirmative action. In that case, the Administration presumably views implementation of affirmative action programs as a form of state action subject to constitutional challenge.

IV. Constitutional Issues Raise by Mandatory Drug-Treatment Programs

I assumed in my July 15 memorandum that the mandatory drug treatment programs referred to in Dr. Turner's July 8 memorandum were to be predicated on the criminalization of drug addiction. Accordingly, I expressed serious reservations about their constitutionality. I have since focused on the question from the standpoint of the state's power to protect the health and welfare of the population and have found several sources of support for the legality of such programs. I believe consultation with HHS would be very helpful at this stage in understanding exactly what programs and related laws are already in existence. In the interim, I am of the view that "[d]evelop[ing] ways to provide funding assistance to state which implement programs to support specific drug-related health problems [including] mandatory treatment for intravenous (IV) drug users" would not present serious legal questions.

The Supreme Court in Robinson v. California, 370 U.S. 660 (1961), provided a general endorsement of state laws mandating drug treatment. The Court in that case was faced with a California statute which made it a criminal offense for a person to "be addicted to the use of narcotics." The Court held that such a law, which made the "status" of narcotic addiction a criminal offense, inflicted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

In reaching this conclusion, the Court considered the broad power of a state to regulate the narcotic drugs traffic within

its borders. Given the significance of the Court's views to the issue of drug initiatives in general, I set out these passages in full:

> "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question." [Quoting from Whipple v. Martinson, 256 U.S. 41 (1921)]
>
> Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the violation of such laws or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. Cf. Jacobson v. Massachusetts, 197 U.S. 11. [Upholding a Massachusetts law mandating vaccinations for small pox.] Or a State might choose to attack the evils of narcotics traffic on broader fronts also -- through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide.

370 U.S. at 664-54 (Emphasis added; footnote omitted). The California statute, the Court noted, was not one which punished a person "for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration." The Court noted further that the law did not "even purport to provide or require medical treatment." (In a footnote the Court observed that California had already established a compulsory treatment program and wondered why the civil procedures authorized by this legislation were not utilized in this case.)

In several cases since Robinson, arising chiefly in the mental illness context, the court has elaborated on the due process requirements for civil commitment. See O'Connor v. Donaldson, 422 U.S. 563 (1975)(state cannot constitutionally confine,

without more, a nondangerous individual who is capable of surviving safely in freedom).

Since the proposed initiative presumably would not involve the Administration in the design of compulsory treatment programs, but rather would involve funding and assistance for programs implemented by the states, hypothesizing about the constitutional infirmity of particular features of such programs seems unwarranted. Monies can be restricted, of course, to programs which meet certain standards (which might be developed by HHS and Justice). (Incidentally, the appellant in Robinson was apparently arrested for the crime of drug addiction based, at least in part, on examination of his arms by a police officer. The appellant claimed that this observation constituted an unconstitutional search and seizure. Because of its disposition of the case, the Court never reached the Fourth Amendment issue.)

Nonetheless, several of the procedural issues identified in our earlier discussions are addressed, and the entire issue of mandatory treatment illuminated, by a number of existing federal statutes in this area. Chapter 42 of U.S.C. (the Narcotic Addict Rehabilitation Act of 1966) sets out procedures for the civil commitment of persons not charged with any criminal offense. Briefly, the statutory scheme is as follows. A petition may be filed by a narcotic addict desiring to obtain treatment for his addiction, or by a certain class of individuals (essentially relatives of or dwellers in the same residence as an addict) with a U.S. Attorney requesting that such addict or person be admitted to certain hospitals for treatment of his addiction. 42 U.S.C. § 3412(a). If the U.S. Attorney determines that there is reasonable cause to believe that the person is a narcotic addict within the meaning of the statute, and that appropriate state or other facilities are not available to such person, he may file a petition with the U.S. district court to commit such a person for treatment (also defined in the statute). 42 U.S.C. § 3412(b). The court may order the patient to appear before it for an examination by physicians, as provided under 42 U.S.C. § 3413 and for a hearing, if required, under 42 U.S.C. § 3414. At the hearing, the court must advise the patient, inter alia, of his right to counsel at every stage of the proceedings and that:

> [I]f, after an examination and hearing as provided in this subchapter, he is found to be a narcotic addict who is likely to be rehabilitated through treatment, he will be civilly committed to the Surgeon General for treatment; that he may not voluntarily withdraw from such treatment; that the treatment (including posthospitalization treatment and supervision) may last forty-two months; that for a period of three years following his release from confinement he will be under the care and custody of the

> Surgeon General for treatment and supervision under a posthospitalization program established by the Surgeon General; and that should he fail or refuse to cooperate in such posthospitalization program or be determined by the Surgeon General to have relapsed to the use of narcotic drugs, he may be recommitted for additional confinement in an institution followed by additional posthospitalization treatment and supervision.

Other sections of Chapter 42 contain provisions for release from confinement, petitions for inquiry into the necessity for continuation of confinement, and the posthospitalization program. The statutory scheme is not applicable to any person against whom there is a criminal charge or who is on probation or who is serving a sentence following a conviction.

Chapter 314 of 18 U.S.C. contains a codification of counterpart provisions of the Narcotic Rehabilitation Act for eligible criminal offenders. It permits judges who believe that certain offenders are addicts to refer them for rehabilitative treatment (to count toward service of their sentence).

Section 257 of 42 U.S.C. empowers the Surgeon General to provide programs for the care and treatment of narcotic addicts, including but not limited to those committed or sentenced to treatment in accordance with the aforementioned statutory provisions. It provides for the establishment of treatment and rehabilitation programs in the hospitals of the Public Health Service.

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FROM: ROBERT M. KRUGER

SUBJECT: Legal Aspects of Drug Testing and Drug Treatment

You have asked me to examine legal issues raised by the following initiatives proposed in a July 14 memorandum from Dr. Carlton Turner to the Domestic Policy Council:

"[1] Develop ways to provide funding assistance to states which implement programs to support specific drug-related health problems --

- o Develop mandatory treatment for intravenous (IV) drug users
- o Identify drug users and force them into appropriate treatment

* * *

[2] Institute a testing program for pre-employment screening of all applicants for federal jobs, with a policy that a confirmed positive test for illicit drug use disqualifies the applicant and another application may not be made for one year.

[3] Require a comprehensive testing program for all federal employees in national security positions, safety-related positions, law enforcement officers and support personnel, drug abuse organizations, and any positions designated as sensitive by regulation or by the agency head.

[4] Request the Secretary of Defense to explore ways to require Defense contractors to have a policy of a drug-free workplace."

(Emphasis added.)

In my memorandum of July 15, I preliminarily identified various legal issues implicated by similar proposals which were outlined in a memorandum dated July 8. I observed that the prohibition against unreasonable search and seizure under the Fourth Amendment and the Due Process Clause of the Fifth Amendment, as well as various federal statutes, raised serious questions for drug testing programs covering federal employees.

I noted that private employees (i.e. defense contractors) also faced state constitutional or statutory privacy provisions, common law protection against the tort of invasion of privacy and common law protection against libel and slander. With respect to mandatory drug treatment programs, I indicated that Fourth and Fifth Amendment questions similar to those implicated by drug testing programs would be involved.

This memorandum will discuss some of these issues in greater detail. The memoranda we previously obtained from the Congressional Research Service and from Jim Knapp at the Department of Justice also analyze the legal aspects of drug testing programs, but like similar studies conducted in the private sector, they conclude that there is an inadequate body of law in this area from which to glean specific guidance. As noted in my July 15 memo, several of these legal issues are presently before the courts.

I. FOURTH AMENDMENT ISSUES RAISED BY DRUG-TESTING PROGRAMS

General Principles

The Fourth Amendment to the Constitution prohibits unreasonable searches and seizures. Courts have consistently held that requiring a person to provide a sample of his urine is a seizure within the meaning of the Fourth Amendment, basing their analysis on Schmerber v. California, 384 U.S. 757 (1966), which held that the extraction of blood was a Fourth Amendment search. Shoemaker v. Handel, No 85-5655 (3d Cir. July 10, 1986); Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1024 (1976); Jones v. McKenzie, No. 85-1624, slip. op. (D.C.C. Feb. 24, 1986); McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 452 (N.D. Ga. 1985); Murray v. Haldeman, 16 M.J. 74, 81 (C.M.A. 1983).

The Fourth Amendment prohibits only unreasonable searches and seizures. Carroll v. United States, 267 U.S. 132 (1925). Generally, the determination of reasonability is made by a magistrate considering an application for a warrant. Where reasonability is challenged in a prosecution based on a search or seizure, the courts have balanced the intrusiveness to the individual against the benefit to be derived by the public. The more intrusive the search or seizure the higher the level of state interest required to justify it. United States v. de Hernandez, _____ U.S. _____, 105 S. Ct. 3304 (1985). Inspections of personnel effects are generally viewed by the courts as among the least intrusive searches, while breaches of the "integrity of the body" are seen to involve the greatest invasion of privacy. (Urinalysis has been deemed less intrusive than other searches of the body, such as the extraction of blood, Schmerber, supra, or the administration of an emetic,

Rochin v. California, 342 U.S. 165 (1952)). In balancing interests, courts also consider an individual's reasonable expectations of privacy. Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985)

Exceptions to the Warrant Requirement

The Supreme Court has held that warrantless searches are "per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Most of the exceptions to the warrant requirement involve some sort of exigent circumstances, such as immediate danger to police officers or the community, see e.g. Terry v. Ohio, 392 U.S. 1 (1968), or the risk that the evidence could vanish or be destroyed while a warrant is being obtained. See Schmerber, supra, (1966). See also Mackey v. Montrym, 443 U.S. 1 (1979)(law requiring drivers to submit to blood alcohol or breathalyser tests). Either of these exceptions to the warrant requirement arguably encompass certain drug testing programs. Law enforcement officers who carry firearms, for example, are likely to pose an immediate danger to the community if under the influence of drugs. Where a drug testing program is triggered by the suspicion that an employee is presently under the influence of drugs, the "evidence" of drug usage might be eliminated or weakened by a delay in testing.

Authorities have suggested that an exception to the warrant requirement for drug testing programs might be more easily derived from jurisprudence outside the law enforcement arena. One such line of cases allows administrative searches of heavily regulated industries. Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985) (state mandated urinalysis testing of jockeys), United States v. Biswell, 406 U.S. 311 (1972)(inspections of firearms dealers); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)(inspections of liquor industry). Certain security-sensitive agencies might qualify as heavily regulated within the reasoning of these cases (i.e. their employees are already subject to close governmental supervision). Cases permitting government employers to conduct searches of employee lockers and other personal areas for purposes related to job performance, United States v. Bunkers 551 F. 2d 1217 (9th Cir.), cert. denied, 473 U.S. 989 (1975) (warrantless search of postal employee's locker upheld); United States v. Collins, 394 F. 2d 863 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966) (warrantless search of Custom's employee's jacket upheld) recognize the government's right as an employer (as opposed to its right as a law enforcer) to investigate employee misconduct which is directly relevant to the employee's performance of his duties and the government's performance of its statutory responsibilities.

At first consideration, this latter exception for a government employer's conduct "qua employer" would appear to cut a wide swath for drug testing of government employees. The rationale carries its own important limitations, however. First, to the extent that the government is constrained under this approach to investigations which are directly relevant to an employee's job performance, the coverage of a drug testing program might be limited to those identified individuals whose use of drugs actually impairs their ability to function, a standard that is arguably narrower than reasonable suspicion that an employee is under the influence. Second, to the extent that the government is engaging in a search or investigation to secure evidence of a crime, as opposed to malperformance, courts are likely to view the government's conduct as a search within the meaning of the Fourth Amendment. United States v. Hagarty, 388 F. 2d 713 (7th Cir. 1968); United States v. Kahan, 350 F. Supp. 84 (S.D. N.Y. 1972), aff'd in part and rev'd in part, 479 F. 2d 290 (2d Cir. 1973), rev'd 415 U.S. 239 (1974). In both Bunkers, supra, and Collins, supra, the government employer had a undeniable business reason, apart from any law enforcement purpose, in stopping pilfering and theft among its employees. In Allen v. City of Marietta, supra, the District Court for the Northern District of Georgia summarized the caselaw on this point thusly:

> [A] government employee's superiors might legitimately search her desk or her jacket where the purpose of the search is not to gather evidence of a crime unrelated to the employee's performance of her duties but is rather undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibilities.

The Court also noted the cautionary "fact that government investigations of employee misconduct always carry the potential to become criminal investigations." Allen, supra, at 491. And see McDonnell, supra, at 1127 ("All of us are protected by the Fourth Amendment all of the time, not just when police suspect us of criminal conduct.")

In fact, the Allen court upheld urinalysis testing primarily on the basis of the government's rights as an employer. However, the facts of the case reaffirm the limitations on this doctrine. The plaintiffs in Allen were employed by a state entity to work on high voltage electric wires. Through reports from various sources, including an undercover investigator, their supervisor determined that the plaintiffs had used drugs on the job. Subsequent urinalysis testing indicated the presence of marijuana in the plaintiffs' bodies. The plaintiffs did not contest that the urinalysis was conducted in a purely employment context and was not done in connection with any criminal investigation or procedure. Commentators have viewed the

supervisor's reasonable suspicion and the hazardous nature of the plaintiff's work in Allen as integral to the holding in the case.

The court in Allen ultimately combined its analysis of the basis for an exception to the warrant requirement with its analysis of the reasonability of the underlying search. Other urinalysis cases do not even consider the warrant requirement, thereby suggesting that overall reasonability is the essential determination to be made and that an employee drug testing program which constitutionally balances governmental interest and individual rights will not be struck down under the Fourth Amendment's warrant requirement. But see, Shoemaker, supra, at 1156 ("While horse racing comes within the recognized exception to the administrative search warrant rule, the court must still address whether the state's regulations which provide for the use and administration of breathalyzer tests and urinalyses meet the 'reasonableness' test of the Fourth Amendment.")

Consent

A search or seizure conducted pursuant to a voluntary consent does not violate the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). "Voluntariness is a question of fact to be determined from the totality of the circumstances." Id. at 249. If federal employees consent to urinalysis testing, the voluntariness of that consent becomes an issue. If employment is conditioned on the relinquishment of constitutionally protected rights it is unlikely that the consent will be viewed as voluntary. See Pickering v. Board of Education, 391 U.S. 563 (1968)(teachers retain their First Amendment right to comment on matters of public interest in connection with the operation of the public schools in which they work); Garrity v. New Jersey, 385 U.S. 493 (1967)(threat of removal from public office for failure to forgo the privilege against self-incrimination secured by the Fourteenth Amendment rendered the resulting statements unconstitutional). In McDonnell v. Hunter, supra, at 1131, the plaintiffs (state prison employees) signed consent forms, in some cases years before undergoing urinalysis under the Department of Correction's drug testing program. The record before the court provided no evidence concerning the circumstances of that signing from which the court could determine voluntariness. On this record the court refused to assume a voluntary consent "in advance to any search made under the Department's policy."

The McDonnell court also concluded that a consent form does not constitute a blanket waiver of all Fourth Amendment rights. Rather, the court said, it should be construed as valid only as to searches that are reasonable and therefore permissible under the Fourth Amendment. Citing Pickering, supra, for the proposition that public employees cannot be bound by

unreasonable conditions of employment, the court held that "[a]dvance consent to future unreasonable searches is not a reasonable condition of employment."

Reasonability

The emerging law of drug testing has identified the following state interests as being potentially sufficient to overcome Fourth Amendment challenge to an employee drug testing program:

1. Reasonable Suspicion that an Employee is Under the Influence of Drugs.

   As discussed, the urinalysis testing upheld in Allen, supra, was predicted, at least in part, on evidence that identified employees were working under the influence of drugs. In Division 241, supra, city transit authority rules requiring municipal bus drivers to submit to blood urine tests following their involvement in a serious accident, or when they were suspected of being intoxicated or under the influence of narcotics, were upheld by the District Court for the Northern District of Illinois. In McDonnell v. Hunter, supra, the District Court for the Southern District of Iowa held that:

   > [T]he Fourth Amendment allows a state department of corrections to demand of an employee a urine, blood or breath specimen for chemical analysis only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances.

   (Emphasis added). A footnote to this passage observes that the Fourth Amendment "does not preclude taking a body fluid specimen as part of a pre-employment physical examination or as part of any routine periodic physical examination that may be required of employees. ..."

2. Public Safety Concerns.

   In Allen, the urinalysis testing upheld by the court was applied to employees engaged in "extremely hazardous work." In Division 241, the court upheld a drug testing program for bus drivers based on the public interest in the safety of mass transit riders. The significance of the safety factor to both holdings is rendered somewhat uncertain by the fact that in both cases, as noted above, the testing was also predicted, at least in part, on evidence that the tested employees

were under the influence of drugs. The limitations on the safety justification are further illustrated by the refusal of the District Court for the District of Columbia to apply it to a drug testing program covering school bus attendants. Jones v. McKenzie, supra. The Department of Corrections in McDonnell apparently failed to make a public safety argument for testing correctional employees, arguing instead that urinalysis helped identify possible drug smugglers.

3. Special Circumstances Surrounding Military Service.

In Committee for GI Rights v. Callaway, supra, at 476-77, the Court of Appeals listed the following factors as compelling, the conclusion that "in the military context" drug testing procedures are not reasonable: (1) The increased incidence of drug abuse posed a substantial threat to the readiness and efficiency of the armed forces, (2) the lowered expection of privacy in the military, (3) the purpose of the testing was related to the health and fitness of servicemen to perform their jobs and (4) the magnitude of the drug problem in the armed services. Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

The District Court for the District of New Jersey listed a number of factors in upholding the state's regulations providing for breathalyzer and urine tests of licensed jockeys, Shoemaker, supra. First, the Court cited the prevalence of drug and alcohol use in the horse racing industry. Second, the Court observed that other heavily regulated sports industries, such as boxing, impose similarly stringent testing to ascertain participants' physical fitness to compete. Third, the Court noted the relationship between substance above and serious injury and death that might occur during a race. Finally, the Court noted the diminished expectation of privacy as to job-related searches and seizures that jockeys bring to their jobs. In an opinion issued last week, the Third Circuit affirmed the District Court's rejection of the jockeys' challenges to the testing regulations. Shoemaker v. Handel, No. 85-5655 (3d Cir. July 10, 1986). The Court placed greatest emphasis on the state's interest in assuring the public of the integrity of the persons engaged in the horse racing industry (the same interest which justifies pervasive regulation of the industry in the first place) and the resulting reduced privacy expectations of persons engaged in the horse racing business.

Some final guidance on the state interest necessary to overcome Fourth Amendment challenge to drug testing is offered by the Court in McDonnell:

"Defendants also argue that taking body fluids is reasonable because it is undesirable to have drug users

> employed at a correctional institution, even it they do not smuggle drugs to inmates. No doubt most employers consider it undesirable for employees to use drugs, and would like to be able to identify any who use drugs. Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. There is no doubt about it -- searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one.

McDonnell, supra, at 1130.

Reasonableness of Testing Program

The government's purpose in testing employees constitutes but one half of the balance to be made under the Fourth Amendment. At the other end, of course, is the intrusiveness of the test itself. Many of the specific features of a urinalysis test may be more appropriately discussed in connection with procedural due process under the Fifth Amendment. Obviously, such questions as whether the employee will be observed during testing (and by whom), how employees are to be selected for testing and what safeguards exist to ensure the confidentiality of test results will impact on the court's view of a test's intrusiveness. See NFFE v. Weinberger, No. 86-0681 (D.D.C. June 23, 1986), ("[T]he fact that the field testing stage of the program requires observed urinalysis makes the court question the reasonableness of the intrusion into possible privacy expectations.")

Existing Programs and Initiatives

As my July 15 memorandum reports, a number of programs to screen and test government employees in positions involving national security, public safety and law enforcement (hereinafter referred to as "critical positions") are being implemented or are already in place. These programs generally cover employees seeking to enter into critical positions (whether through application, promotion or transfer).

The initiatives set out in Dr. Turner's July 14 memorandum go beyond these programs in two important respects. First, they propose testing all employees in critical positions, apparently irrespective of new or incumbent status. Second, they propose pre-employment screening of applicants for all federal jobs, regardless of the nature of the position applied for.

Neither the drug testing programs already in place nor those proposed in the Turner memorandum appear to premise testing on a

"reasonable suspicion" that an employee is presently under the influence of a controlled substance. Accordingly, they all fail to meet the surest standard for a finding of constitutionality. Notwithstanding the absence of caselaw on point, however, programs to test employees in critical positions carry public policy justifications which should weigh heavy in the Fourth Amendment balance. Supporters of such programs might analogize to factors considered persuasive by courts upholding military testing or to the public safety factors given weight in Allen, Division 241 and Shoemaker. Thus, the government might argue that:

1. Federal prosecutors and law enforcement officials are charged with enforcing the United States' drug laws.

2. Use of drugs by federal prosecutors, policy makers and law enforcement personnel would make them targets for corruption and blackmail.

3. Federal employment in critical jobs is highly regulated and requires an in-depth security clearance (i.e. there is a reduced expectation of privacy).

4. Drug use by law enforcement personnel presents a serious public safety problem because law enforcement personnel carry firearms.

5. The impact of drug use on the health, morale and fitness for duty of persons in security forces is no different than for persons in the military.

The analogy to the military cases is not perfect. The Courts have treated the military community as unique in many respects and have held that its system of justice must be responsive to needs not present in the civil society. See Murray v. Haldeman, 16 M.J. 74. Moreover, the problem of drug abuse in the military has been deemed of an especially serious nature and magnitude. (In her July 18, 1986, memorandum to the Attorney General, the Director of OPM states that "there is no evidence of widespread illegal drug usage in the federal workplace.") Nor has the public safety rationale been universally effective in justifying drug testing programs. See, e.g., Jones v. McKenzie, supra. In the bus-driver cases, the public safety rationale was buttressed by a "reasonable suspicion" that the employee was under the influence of drugs. Thus, the constitutionality of a program to test critical employees remains untested and uncertain.

A distinction based on whether an individual is an applicant or already holds a position in the federal government has not arisen in the existing caselaw on the constitutionality of drug testing under the Fourth Amendment. In the context of programs to test critical employees, observing such a distinction may

undermine the argument for testing any at all. The same security rationale that justifies the testing of new employees would appear to compel the testing of incumbent employees.

However, I can think of several reasons why pre-employment tests might better withstand challenge under the Fourth Amendment. First, prospective employers lack any opportunity to observe an applicant on the job and therefore cannot formulate a reasonable suspicion before hiring. Second, an applicant's expectation of privacy is clearly lower than an incumbent's; applicants generally assume that they will be "checked out." Third, it is less likely that the voluntariness of an applicant's consent to testing would be questioned. Applicants need not apply for government jobs. Consent by an incumbent may be tainted by fear that his or her job, promotion, performance rating, etc., lies in the balance.

The real significance of the applicant/incumbent distinction may pertain to challenges to drug testing programs brought under the Fifth Amendment and the various Federal statutes outlined in my July 15 memo. The lack of a property interest in a particular governmental job may lessen procedural requirements attending programs and personnel actions based on test results under the Due Process Clause of the Fifth Amendment. More importantly, it may remove certain concerns under the Rehabilitation Act, the Civil Service Reform Act and the other Federal statutes discussed in my July 15 memorandum.

In Sum

Without the details of an actual proposal to evaluate (i.e., exactly what positions would be covered and why, how the testing is to be administered, etc.), it is impossible to predict the outcome of a Fourth Amendment challenge to any drug testing program. I believe that the government's interest in protecting the national security and the public safety is sufficiently strong to overcome the intrusiveness of drug testing so long as (1) the program's coverage is limited to individuals whose responsibilities demonstrably put national security or public safety at risk and (2) the testing is designed to safeguard the dignity and privacy of the individual insofar as practical. I do not think courts would deem the government's desire to rid its workforce of drug users as being of sufficient weight to justify testing applicants for all government jobs. See McDonnell, supra, at 1130 (quoted above). Unless a physical examination is already part of the pre-employment process (indicating that job performance requires that the employee be in good physical condition), I would not be optimistic about judicial analysis of applicant testing under the Fourth Amendment.

II. Fifth Amendment and Federal Statutory Challenges to Drug-Testing Programs

Fifth Amendment

The Fifth Amendment is concerned with the process by which the government proceeds against an individual. The cases have not sufficiently addressed the due process concerns that might arise in drug testing cases. Among those sure to arise if government-wide testing is begun involve:

1. Whether positive tests will be retested.

2. Whether persons will be allowed some kind of hearing to offer evidence to dispute the results of tests.

3. Whether persons may be dismissed on the basis of the tests alone (without corroborating evidence of malperformance of duties).

4. What measures will be instituted to protect the specimens as to chemical requirements and as to linking them with the identity of those being tested, i.e., to protect the chain of custody.

5. Confidentiality.

6. Relationship with rehabilitation program.

Federal Statutes

The Rehabilitation Act of 1973 may provide legal recourse for employees subjected to drug testing. Some alcohol or drug abusers may fit within the definition of handicapped individuals and thus receive protections under the Act from certain adverse actions (i.e. be entitled to an offer or opportunity of rehabilitation). The Act also prohibits the federal government from denying or depriving federal civilian employment "solely" on the basis of prior drug use. 42 U.S.C. 290ee-1.

A number of other federal statutes may serve as a basis for legal challenge to drug testing programs. In a suit against the Department of Defense's civilian drug testing program the National Federation of Federal Employees has alleged violations of inter alia, the Administrative Procedure Act and numerous provisions of the Civil Service Reform Act. The Civil Service statutes have been interpreted as requiring that there be a nexus between the use of drugs by a government employee and his or her performance on the job.

Whatever incompatability these laws present could be dealt with, at least in part, through legislation clarifying the relationship of drug testing laws to other federal statutes.

Federal Labor-Management Issues

Where tested employees are represented by a union, testing programs may be challenged as terms or conditions of employment subject to labor-management negotiations or, where unilaterally implemented, as unfair labor practices. In NFFE v. Weinberger, N. 86-0681 (D.D.C. June 23, 1986), the National Federation of Federal Employees ("NFFE") raised constitutional and statutory challenges to a proposed drug abuse testing program covering federal civilian employees who work for the Department of the Army in "critical" job categories. The court held that "the ultimate concern on the merits concerns a labor management dispute -- i.e., an issue of federal personnel policy." Accordingly, resting on the assumption that the Civil Service Reform Act's remedial framework would provide adequate review of NFFE's constitutional and statutory concerns, the court dismissed the complaint and referred NFFE to the FLRA or MSPB. In so doing, however, it noted that "the drug testing program, on its face, raises substantial Fourth Amendment concerns" and specifically questioned the reasonableness of "observed urinalysis." The court also relied on the ultimate availability of judicial review of constitutional questions following the administrative process.

Bivens-Type Actions

The Supreme Court has recognized a private cause of action for damages against federal agents who, acting under color of authority, engage in unconstitutional conduct. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1970). Individuals ordering or supervising drug testing may be subject to such suits. See NFFE v. Weinberger, supra.

III. Requiring Government Contractors to Have a Policy of a Drug-Free Workplace

Increasing numbers of companies have adopted strategies to attack the problem of chemical abuse (according to a survey 30 percent of the Fortune 500 companies now screen employees or job applicants.) Partly because of the divergent laws, regulations and collective bargaining agreements to which private sector employers are subject, these programs vary widely.

While not strictly subject to constitutionally standards governing privacy and due process, private employers may encounter state constitutional or statutory privacy provisions, common law protection against the tort of invasion of privacy and common law protection against libel and slander. Accordingly, national employers must sometimes devise different programs for different jurisdictions in which they operate. It may not be possible for all private sector employers to meet a single definition of a drug-free workplace without risking state

court litigation and in some jurisdictions substantial tort liability. Work rules, including drug testing programs, for unionized employees are usually the subject of company-specific collective bargaining agreements.

Unless federal preemption of these various state laws is contemplated, recognition of a drug-free workplace may have to be a relative concept measured in terms of efforts made and goals achieved rather than an absolute imperative.

One problem with imposing requirements on federal contractors is that such a program could subject otherwise private conduct to some of the aforementioned constitutional challenges (i.e. create an element of state action). It may be difficult to view compliance with such requirements as voluntary without appearing to be inconsistent with the Administration's position on the regulations issued by the Labor Department which implement the Executive Order on affirmative action. In that case, the Administration presumably views implementation of affirmative action programs as a form of state action subject to constitutional challenge.

IV. Constitutional Issues Raise by Mandatory Drug-Treatment Programs

I assumed in my July 15 memorandum that the mandatory drug treatment programs referred to in Dr. Turner's July 8 memorandum were to be predicated on the criminalization of drug addiction. Accordingly, I expressed serious reservations about their constitutionality. I have since focused on the question from the standpoint of the state's power to protect the health and welfare of the population and have found several sources of support for the legality of such programs. I believe consultation with HHS would be very helpful at this stage in understanding exactly what programs and related laws are already in existence. In the interim, I am of the view that "[d]evelop[ing] ways to provide funding assistance to state which implement programs to support specific drug-related health problems [including] mandatory treatment for intravenous (IV) drug users" would not present serious legal questions.

The Supreme Court in Robinson v. California, 370 U.S. 660 (1961), provided a general endorsement of state laws mandating drug treatment. The Court in that case was faced with a California statute which made it a criminal offense for a person to "be addicted to the use of narcotics." The Court held that such a law, which made the "status" of narcotic addiction a criminal offense, inflicted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

In reaching this conclusion, the Court considered the broad power of a state to regulate the narcotic drugs traffic within

its borders. Given the significance of the Court's views to the issue of drug initiatives in general, I set out these passages in full:

> "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question." [Quoting from Whipple v. Martinson, 256 U.S. 41 (1921)]
>
> Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the violation of such laws or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. Cf. Jacobson v. Massachusetts, 197 U.S. 11. [Upholding a Massachusetts law mandating vaccinations for small pox.] Or a State might choose to attack the evils of narcotics traffic on broader fronts also -- through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide.

370 U.S. at 664-54 (Emphasis added; footnote omitted). The California statute, the Court noted, was not one which punished a person "for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration." The Court noted further that the law did not "even purport to provide or require medical treatment." (In a footnote the Court observed that California had already established a compulsory treatment program and wondered why the civil procedures authorized by this legislation were not utilized in this case.)

In several cases since Robinson, arising chiefly in the mental illness context, the court has elaborated on the due process requirements for civil commitment. See O'Connor v. Donaldson, 422 U.S. 563 (1975)(state cannot constitutionally confine,

without more, a nondangerous individual who is capable of surviving safely in freedom).

Since the proposed initiative presumably would not involve the Administration in the design of compulsory treatment programs, but rather would involve funding and assistance for programs implemented by the states, hypothesizing about the constitutional infirmity of particular features of such programs seems unwarranted. Monies can be restricted, of course, to programs which meet certain standards (which might be developed by HHS and Justice). (Incidentally, the appellant in Robinson was apparently arrested for the crime of drug addiction based, at least in part, on examination of his arms by a police officer. The appellant claimed that this observation constituted an unconstitutional search and seizure. Because of its disposition of the case, the Court never reached the Fourth Amendment issue.)

Nonetheless, several of the procedural issues identified in our earlier discussions are addressed, and the entire issue of mandatory treatment illuminated, by a number of existing federal statutes in this area. Chapter 42 of U.S.C. (the Narcotic Addict Rehabilitation Act of 1966) sets out procedures for the civil commitment of persons not charged with any criminal offense. Briefly, the statutory scheme is as follows. A petition may be filed by a narcotic addict desiring to obtain treatment for his addiction, or by a certain class of individuals (essentially relatives of or dwellers in the same residence as an addict) with a U.S. Attorney requesting that such addict or person be admitted to certain hospitals for treatment of his addiction. 42 U.S.C. § 3412(a). If the U.S. Attorney determines that there is reasonable cause to believe that the person is a narcotic addict within the meaning of the statute, and that appropriate state or other facilities are not available to such person, he may file a petition with the U.S. district court to commit such a person for treatment (also defined in the statute). 42 U.S.C. § 3412(b). The court may order the patient to appear before it for an examination by physicians, as provided under 42 U.S.C. § 3413 and for a hearing, if required, under 42 U.S.C. § 3414. At the hearing, the court must advise the patient, inter alia, of his right to counsel at every stage of the proceedings and that:

> [I]f, after an examination and hearing as provided in this subchapter, he is found to be a narcotic addict who is likely to be rehabilitated through treatment, he will be civilly committed to the Surgeon General for treatment; that he may not voluntarily withdraw from such treatment; that the treatment (including posthospitalization treatment and supervision) may last forty-two months; that for a period of three years following his release from confinement he will be under the care and custody of the

> Surgeon General for treatment and supervision under a posthospitalization program established by the Surgeon General; and that should he fail or refuse to cooperate in such posthospitalization program or be determined by the Surgeon General to have relapsed to the use of narcotic drugs, he may be recommitted for additional confinement in an institution followed by additional posthospitalization treatment and supervision.

Other sections of Chapter 42 contain provisions for release from confinement, petitions for inquiry into the necessity for continuation of confinement, and the posthospitalization program. The statutory scheme is not applicable to any person against whom there is a criminal charge or who is on probation or who is serving a sentence following a conviction.

Chapter 314 of 18 U.S.C. contains a codification of counterpart provisions of the Narcotic Rehabilitation Act for eligible criminal offenders. It permits judges who believe that certain offenders are addicts to refer them for rehabilitative treatment (to count toward service of their sentence).

Section 257 of 42 U.S.C. empowers the Surgeon General to provide programs for the care and treatment of narcotic addicts, including but not limited to those committed or sentenced to treatment in accordance with the aforementioned statutory provisions. It provides for the establishment of treatment and rehabilitation programs in the hospitals of the Public Health Service.