12/2/86 — Send to MacDonald for Answering — write letter to Mary. Says letter sent to Mary

Sandy —

OK send ~~the~~ to Carlton Turner handle? Thanks

Mary

8 Req. RSVP 12/5/86

Scheduling 12/86 open

Tholenstraat 56
3086 TN Rotterdam
Netherlands
November 18, 1986

The Honorable Ronald Reagan
President of the United States
The White House
1600 Pennsylvania Avenue, N. W.
Washington, D. C.

Dear Mr. President:

I wholeheartedly support your fight against drugs and the negative effects they have on our society.

I am an expert in so-called Bio-Energetic Medicine, which is a relatively new method which has been developed in Europe over the last three decades through the cooperation of medical doctors, physicists, acupuncturists and homoeopathic doctors. Although a world Congress on this type of healing has been held in the United States, quite recently, the system itself is not well-known here.

However, since you are so involved in the fight against drug use, I would like to inform you of the following:

a. that marijuana is beneficial to the nervous system, but it is a "killer" for the endocrine system, especially for the pituitary gland (the master gland of the human body). When this gland does not function properly, all the other glands will follow, and slowly, but certainly, the whole body will collapse.

b. that the antidote for marijuana to the homoeopathic preparatives of the European mistletoe (Viscum Album).

c. that the Bio-Energetic method does exist, which according to my experience, is the most effective non-invasive method of getting drug residues out of the body. With drug residues I mean the residues of any drug (including medical drugs).

d. the effect of marijuana is really the same as that of an aspirin, just a lot stronger. It affects the pituitary gland in such a way that this gland suppresses the sensory system by means of the production of endorphine (the bodies own morphine) and therefore also the bodies warning systems are out of order.

I hope that you can assist in spreading this information, especially the details mentioned under b). If you are interested, I would be pleased to demonstrate the system of Bio-Energetic Medicine to you during my next visit to the United States, which is scheduled for next month.

Could you please let me have your reaction to my residence in the Netherlands by December 5, 1986.

Yours faithfully,

(Mr.) Johan C. Boswinkel

JCB:ceb

THE WHITE HOUSE

WASHINGTON

September 25, 1986

NOTE FOR DONNA KNIGHT

FROM: LISA ARMSTRONG
PRESIDENTIAL PERSONNEL

SUBJECT: V.J. Adduci

Attached please find a copy of a letter from the Chairman of the National Commission on Drunk Driving. This was a Presidential Commission, but as a Private Sector Initiative, it became private after its expiration. I sent the enclosed response to his letter, and he called me to say that if we needed any help in the private sector with the campaign against drug abuse, please call him. He would like to help in any way he can.

I thought you might find this useful.

NATIONAL COMMISSION AGAINST DRUNK DRIVING

September 8, 1986

President Ronald Reagan
The White House
Washington, D.C. 20500

Dear Mr. President:

In April 1982 you honored me by appointing me as a member of the Presidential Commission on Drunk Driving. Governor John Volpe served as the outstanding chairman of the 32 member Commission. On December 13, 1983 we submitted our Final Report along with 39 recommendations which you approved.

To ensure the follow up and implementation of the report one recommendation was the creation of a private sector National Commission Against Drunk Driving. Members of the Presidential Commission now serve either as members of the Board of Directors of which I am the pro-bono chairman, or on the Board of Trustees which is chaired by James S. Kemper, Jr. Last year we submitted a Progress Report to you and we plan to submit one this year as well.

You have expressed concern time and time again about the nation's problem with drug abuse. The citizens share your deep concern. It was good news indeed, to hear that you and Mrs. Reagan will speak to the American people about the drug problem and will propose measures to combat it.

In view of the public awareness created and actions undertaken as a result of the Presidential Commission on Drunk Driving I would recommend a similiar Commission to study the issue, hold hearings throughout the nation and submit appropriate recommendations or actions to you, Mr. President. Since alcohol is a major component of substance abuse I believe it should be included in any analysis of the drug issue. The National Commission Against Drunk Driving stands ready to support and assist you in this much-needed campaign against drug use and abuse.

[illegible] Ronald Reagan
[illegible] October , 1980
Page Two

Speaking as Chairman of the National Commission I would be honored to serve on a Commission to study the drug problem and know from the commitment of our Board members, they also would be pleased to offer their services to help make this country drug-free. I trust that you will not consider me presumptious in making this recommendation. However, I do want you to know that I admire all that you have done and continue to do to make our country a place to live, to love and to labor in freedom and happiness.

Very truly yours,

V.J. Adduci

VJA/mmg

cc: Mr. Edwin Meese
Mr. Donald Regan
Dr. Carlton Turner
Mr. Wernel Speirs

September 17, 1986

Dear Mr. Adduci:

On behalf of the President, thank you for your letter of September 8, 1986 suggesting the creation of a Presidential Commission to examine the problem of illegal drugs in the country.

We have received many letters in support of the President's drug abuse initiatives. At this time, a Commission has not been created to deal with this serious problem; however, should such a commission be established, we would be able to consider you for a position.

More important even than the creation of a Commission, the President recently called for all Americans to not simply support a government anti-drug effort, but to become actively involved in a crusade against illegal drugs. What is needed is the development of private sector initiatives -- community-based solutions to the drug problem.

President Reagan stated, "We must determine how we, as a free people, will conduct our lives, what our standards are, what behavior we will and will not tolerate. The time has come to decide on this issue and act, each one of us." I encourage you to meet the President's challenge in the private sector, and I assure you that he will continue to do all that he can to achieve the goal of a drug-free nation.

The President appreciates your taking the time to send your comments and suggestions, and we will consider them when making our decisions.

Sincerely,

Catherine Bedell
Director, Presidential
Boards and Commissions
Office of Presidential Personnel

The Honorable V.J. Adduci
Chairman
National Commission Against
Drunk Driving
1140 Connecticut Avenue, N.W.
Suite 804
Washington, D.C. 20036

THE WHITE HOUSE

WASHINGTON

August 15, 1986

MEMORANDUM FOR DENNIS THOMAS
FROM: CARLTON E. TURNER
Subject: Media/Drugs Activities for September 1986

September is the start of the television Fall season. The networks, accordingly, are gearing up to capitalize on the drug momentum. The following is scheduled:

Week One September 1- 6

September 2	CBS/Dan Rather 2-hour special on drugs.
September 5	NBC/Tom Brokaw 1-hour special on drugs, focussing on cocaine. (Mrs. Reagan has agreed to be interviewed for this program.)

CBS News "Nightwatch" and ABC's "Nightline" are developing options for this week.

NOTE: The NBC project was sparked by a comment from Don Regan to Larry Grossman, head of the NBC documentary division. Our office was contacted several months ago by Bob Rogers of NBC. The project was recently seized by Mr. Brokaw.

NOTE: A significant amount of print attention can be expected to accompany the network focus during this week.

Week Two September 7-13

Major affiliates have scheduled or expressed interest in highlighting the drug issue. Some examples are:

- CBS affiliate in Philadelphia is scheduling special programming.
- ABC affiliate in Chicago is considering using the Keebler film (for which Mrs. Reagan did the introduction) as a kick-off for programming.
- The ABC/Boston Herald program in Boston will be on-going through the week.

Print Media

- Reader's Digest will do a special issue or series of articles. NOTE: Ken Tomlinson, formerly of VOA, is currently Number 2 person at the magazine.
- USA Today will be talking with us about special features.
- People magazine is considering a special issue and poll.
- Science Weekly will devote November issues to the drug issue.
- Pharmacy Times is having a special issue in the Fall.
- PBS's "Frontline" will be doing a 3-part series.

On-Going

- The National Association of Broadcasters (NAB) is distributing "Project: Workplace" materials to broadcasters across the country. This project, done in conjunction with the U.S. Chamber of Commerce, the AFL-CIO and others distributes PSA's, fact sheets, and community activities throughout the country. Other programs done by the NAB include a series of PSAs done by Congressional wives to be aired in their districts.
- The AAAA $1.5 billion advertising campaign is scheduled to begin in November.
- There are many local stations and newspapers who are doing complementary stories and programming.

DOMESTIC POLICY COUNCIL WORKING GROUP ON DRUG ABUSE POLICY

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Assistant Attorney General
Civil Division
Department of Justice

Thomas Barba
Special Assistant
Civil Division
Department of Justice

Daniel Bensing
Director, Office of Policy and Legislative Affairs
Civil Division
Department of Justice

James Colvard
Management Advisor to the Director
Office of Personnel Management

Charles Cubic
Domestic Policy Council

Lee Cummings
Director, Legislation Division
Alcohol, Drug Abuse and Mental Health Administration

Robert Cynkar
Deputy Assistant Attorney General
Federal Programs and Consumer Litigation
Civil Division
Department of Justice

Nanette Everson
Special Assistant
Civil Division
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Counselor to the Inspector General
Department of the Treasury

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Public Health Service
Department of Health and Human Services

Lenore Mintz
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Department of the Treasury

Ronald E. Robertson
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Barbara Selfridge
Deputy Assistant Director
Special Studies
Human Resources, Veterans and Labor
Office of Management and Budget

Debbie Steelman
Associate Director for Human Resources, Veterans and Labor
Office of Management and Budget

Robert Sweet
Domestic Policy Council

John Walters
Special Assistant to the Secretary
Department of Education

Karen Wilson
Budget Examiner
Commerce/Justice Branch
Office of Management and Budget

Bruce Wood
Associate Deputy Under Secretary
Department of Labor

DRUG-FREE WORKPLACE TASK FORCE

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Assistant Secretary for Policy
Department of Labor

David Armor
Principal Deputy Assistant Secretary
Force Management and Personnel
Department of Defense

Patrick Cleary
Executive Assistant to the Assistant Secretary for Policy
Department of Labor

James Colvard
Management Advisor to the Director
Office of Personnel Management

Robert Cynkar
Deputy Assistant Attorney General
Federal Programs and Consumer Litigation
Civil Division
Department of Justice

Shelton Jackson
Deputy Director
Office of Economics
Department of Transportation

Boykin Rose
Executive Office of U.S. Attorneys
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Office of Safeguards and Security
Department of Energy

Robert Sweet
Domestic Policy Council

J. Michael Walsh
National Institute on Drug Abuse
Department of Health and Human Services

Gail Webber
Budget Examiner, Federal Payment
Office of Management and Budget

DRUG-FREE SCHOOLS TASK FORCE

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Special Assistant to the Secretary
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Department of Health and Human Services

Initial Task Force Membership within Department of Health and Human Services.

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ACTION

Richard Smith
Department of Transportation

Richard Walsh
Department of Transportation

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Rockville, Maryland 20857

MEMORANDUM

Date: January 16, 1986

To: Division File Nos. 44B, 18D

From: Senior Attorney
Public Health Division

Subject: Mandatory Urinalysis of Federal and Contractor Employees Working at Addiction Research Center -- GH Ref. 85-0297

This memorandum analyzes whether NIDA may perform random, mandatory 1/ urinalysis tests on its employees at the Addiction Research Center (ARC) in Baltimore, Maryland, to screen for drug abuse. It also considers whether NIDA contractors may perform such tests, and whether NIDA and its contractors may pre-screen new hires for current drug abuse.

Urinalysis Is A Search

We begin our analysis with the proposition that mandatory urinalysis is a "search" for purposes of the Fourth Amendment to the Constitution. The Fourth Amendment establishes "[t]he right of the people to be free in their persons ... against unreasonable searches and seizures ...." This right protects an individual from unreasonable intrusions by the State into areas where one has a legitimate expectation of privacy. It has been held in the employment context that the taking of a urine sample to test for illicit drug use is a "search" within the meaning of the Fourth Amendment. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976); McDonell v. Hunter, ___ F. Supp. ___ (July 9, 1985, S.D. Iowa); Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); Patchogue-Medford v. Board of Education, C.A. No. 85-8759 (June 14, 1985, NY Sup. Ct). See also, Schmerber v. California, 384

1/ "Random" as used in this memorandum means selection based on neutral criteria. It does not mean that selection is arbitrary or made at the discretion of line personnel.

"Mandatory" means that submission to urinalysis tests may be made a condition of employment, not that such tests may be forcibly administered.

U.S. 757, 86 S.Ct. 1826 (1966); Yanez v. Romero, 619 F.2d 851 (10th Cir. 1980), cert. den. 101 S. Ct. 221 (1980); Storms v. Coughlin, 600 F. Supp. 1214, 1217-18 (S.D. NY 1984). It is important to note, however, that not all searches are proscribed by the Fourth Amendment--only unreasonable searches.

Reasonableness of the Search

The determination of whether a search is reasonable "requires a balancing of the need (for the search) against the invasion of personal rights that the search entails." Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884 (1979). In Bell v. Wolfish, the Supreme Court laid out four factors to consider in determining whether the search is reasonable: the scope of the particular intrusion on an individual's expectation of privacy; the manner in which the search is conducted; the justification for initiating it, and the place where it is conducted. The Supreme Court has also found the efficacy of the search as a factor to be weighed. U.S. v. Martinez-Fuerte, 428 U.S. 543, 561-62, 96 S. Ct. 3074, 3084-85 (1976).

In determining the validity of a search, the justification for the search and the place in which it is performed (i.e., the "context" of the search) often appear to be the paramount factors. For example, in Committee for GI Rights v. Calloway, 518 F.2d 466 (1975), the District of Columbia Circuit Court of Appeals held that military necessity justified a warrantless drug inspection of military quarters for illegal drugs. In reaching this conclusion, the court noted that the "increased incidence of drug abuse in the Armed Forces poses a substantial threat to the readiness and efficiency of our military forces." 518 F.2d at 476.

Likewise, the security demands of our criminal justice and prison systems appear to justify searches that may be impermissible in other contexts. In Ferguson v. Cardwell, 392 F. Supp. 750 (D. Ariz. 1975), the court held that the taking of blood samples from prison inmates suspected of using drugs did not violate the Fourth Amendment and that no probable cause was required. See also, Storms v Coughlin, 600 F. Supp. 1214 (S.D. NY 1984) (random urinalysis testing of prisoners does not violate the Fourth Amendment). The Supreme Court held in Bell v. Wolfish that visual body-cavity searches of pre-trial detainees for contraband following contact visits violated neither the Fourth nor the Fifth Amendments. 99 S. Ct. at 1884. In so concluding, the Court stated "[a] detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is an all too common occurrence." Id.

Nevertheless, even in the penal situation, generalized searches are not always tolerated. Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982), held that reasonable suspicion is required that a particular visitor is trying to smuggle drugs or other contraband into the prison before a strip search may be performed. Similarly, in Security and Law Enforcement Employees, Dist. C.82 v. Carey, 737 F.2d 187 (2nd Cir. 1984), the court held that reasonable suspicion that a particular corrections officer was carrying contraband was required before a strip search of the officer could be performed. In addition, in a very recent case specifically involving urinalysis, the Federal District Court for the Southern District of Iowa has ruled that reasonable suspicion is required before urinalysis may be performed on a prison employee. McDonell v. Hunter, _____ F. Supp. _____ (July 9, 1985). Citing Suscy, discussed infra, the court stated:

> "It is this court's conclusion that the Fourth Amendment allows defendants 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." Slip opinion at 8.

This case is also significant because the court ruled that an attempt to obtain employee consent to urinalysis as a condition of employment was unreasonable and, thus, invalid because public employees could not be bound by unreasonable conditions of employment. Slip opinion at 9.

Another line of cases has to do with drug searches in school situations. Although perhaps not to the degree of prison inmate or military personnel cases, these cases also suggest a lesser Fourth Amendment standard applies. As stated in one case, "the student's Fourth Amendment and other constitutional rights are modified by that limited in loco parentis relationship which the school officials have with the students." Doe v. Renfrow, 475 F. Supp. 1012, 1023 (N.D. Ind. 1979), rev'd on other grounds, 631 F.2d 91 (7th Cir.) (per curiam), cert. denied, 451 U.S. 1022, 101 S. Ct. 3015 (1982). Nevertheless, even under this lesser standard, the school must have a "reasonable cause to believe" that a student is concealing drugs before a search of a student's pockets or purse can be made. Id. at 1024. The Fifth Circuit has gone even further, requiring that "reasonable cause to believe" that a student is in possession of drugs must exist prior to canine sniffing of an individual. Horton

v. Goose Creek Indiana School District, 690 F.2d 470, 481-82 (5th Cir. 1982), cert. den. 103 S. Ct. 3536 (1983). See also, Tartar v. Raybuck, 742 F.2d 977 (6th Cir. 1984), cert. den. 105 S. Ct. 1749 (1985). A recent case involving urinalysis of probationary teachers who were candidates for tenure to test for the presence of illegal drugs was decided in June by the New York Supreme Court. Patchogue-Medford v. Board of Education, supra. Here, the local school district proposed to require all probationary teachers eligible for tenure to submit to urinalysis and the court ruled that absent individualized reasonable suspicion of the use of illegal drugs the proposed policy was an unconstitutional search in violation of the Fourth and Fourteenth Amendments.

In addition to McDowell and Patchogue-Medford discussed above, both of which require individualized suspicion to warrant mandatory urinalysis, we have identified three cases involving employment rights that specifically deal with urinalysis testing, two of which are very recent. In the earliest of these cases, the court upheld the constitutionality of a rule requiring bus drivers to submit to blood or urine tests following their involvement in a serious accident or when they were suspected of being under the influence of narcotics. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (2nd Cir. 1976). In so holding, the court concluded that because the transit authority had a paramount interest in protecting the public by insuring that bus and train operators are fit to perform the jobs, the transit employees had no reasonable expectation of privacy with regard to submitting to blood and urine tests. 538 F.2d at 1267. However, the court noted that these tests were done only in hospitals and with the concurrence of two supervisory employees. Id.

The next case is Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985). Plaintiffs in this case all worked for the Marietta Board of Lights and Water and worked around high voltage electric wires. Based on reports of drug use among its employees and evidence of a large number of employee injuries, the Board began an undercover investigation into illicit drug use by its employees. Relying on the results of this investigation, the Board demanded that sixteen employees undergo urinalysis tests. Each of the six plaintiffs tested positive for marijuana use and were fired. Although the court ruled that the urinalysis tests were a reasonable search and did not violate the Fourth Amendment, 601 F. Supp. at 491, it did not specifically consider whether reasonable suspicion was required. However, we do not believe this was an issue as the record appears to show reasonable suspicion existed based on the Board's undercover investigation which identified individual employees as users of illicit drugs. 601 F. Supp. 484.

The court also ruled that because the Board's personnel policies stated plaintiffs would not be dismissed except for good cause, they had a proprietary interest in their jobs and, thus, were entitled to due process as part of their removal. 601 F. Supp. at 492. Because plaintiffs were provided a hearing on the reasons for their discharge, the court found that due process had been provided.

In the final case we have reviewed on this issue, the court ruled in denying a motion for a preliminary injunction that the New Jersey Racing Commission could demand that every jockey racing at a licensed racetrack submit to a post-race urinalysis test to test for illegal substances. Shoemaker v. Handel, 608 F. Supp. 1151 (D. N.J. 1985). 2/ In rejecting plaintiffs' claims that the urinalysis constituted an illegal search and seizure under the Fourth Amendment, the court first ruled that a search warrant was not required because the horse racing industry in New Jersey has long been subject to pervasive regulation and close supervision. 608 F. Supp. at 1156. As stated by the Supreme Court in Marshall v. Barlow's Inc., 436 U.S. 307, 313, 98 S. Ct. 1816 (1978), "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy ... could exist for a proprietor over the stock of such an enterprise." See Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 S. Ct. 774 (1977); United States v. Biswell, 406 U.S. 311, 92 S. Ct. 1593 (1972); Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727 (1967). The court then proceeded to consider the "reasonableness" of the search and concluded that the plaintiffs had failed to make a sufficient showing of probable success on the merits. In so concluding, the court emphasized the danger posed to jockeys by the use of drugs, the diminished expectation of privacy held by jockeys because of the pervasive historical regulation of the industry, and the public interest in preserving the health, safety, and integrity of the industry. 608 F. Supp. at 1157-1159.

In reviewing the cases we have considered so far, the courts have found that the special needs of military readiness and the detention of prisoners justify Fourth Amendment searches even when there exists no individualized suspicion of illicit drug use or possession. See Calloway (drug

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2/ On September 9, 1985, the New Jersey District Court ruled in favor of the New Jersey Racing Commission on the merits, holding that mandatory urinalysis testing did not violate the jockeys' Fourth Amendment rights.

inspection of military quarters), Storms (random urinalysis of prisoners), and Wolfish (body-cavity searches of pre-trial detainees), supra. In the school situation, drug searches of students require individualized suspicion although no search warrant is required. See Renfrow, Horton, and Tartar, supra. Finally, in five urinalysis cases involving civilian employees, the judicial precedent is split. Two cases flatly rule that individualized suspicion is required (Patchogue-Melford and McDonell, supra), one that it is not (Shoemaker, supra), and two more state that urinalysis testing is permissible but do not directly consider whether individualized suspicion is needed to warrant it (Allen and Suscy, supra). 3/ Because the judicial precedent is not uniform, we believe it will be helpful to examine the factors laid out by the Supreme Court for determining whether a search is reasonable as they apply to the ARC situation. Bell v. Wolfish, and United States v. Martinez-Fuerte, supra.

In applying these factors to the ARC, we will assume that performing a urinalysis test is an efficacious method of detecting use of illicit drugs. 4/ We also assume that the manner in which the test is conducted is quite routine and would be rather non-invasive. Below, we review the other three factors, i.e., the justification for the search, the place where it is conducted, and the scope of the intrusion on the individual's expectation of privacy, in weighing the reasonableness of the proposed mandatory urinalysis.

The justification for the search and the place where it is to be conducted, i.e., the "context" of the search, can be analyzed together. The ARC is a public facility dedicated to the treatment and research of drug addiction. As such, staff have access to controlled substances, such as methadone, and are responsible for the clinical care of patients, including the giving of drug medication. Drug addiction among staff could not only endanger patient care, but also could result in diversion of drugs from the facility. Such diversion might lead to falsification of medical and research records regarding the amount of patient medication and, thus,

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3/ Although the facts in both these cases are such that it would have been possible to conclude that individualized suspicion had been established, as noted in the text, the issue was not addressed by the court.

4/ This is an important point. If the test results are not scientifically valid, it may substantially weaken the legal support for performing the urinalysis.

potentially jeopardize patient care as well as the research results. Staff addiction could also result in the sale or other transfer of drugs to patients. Further, to the extent that patients were aware of or suspected unauthorized drug use among staff, it would certainly set a bad example and would tend to have a demoralizing effect on the whole institution. In this regard, it would be directly contrary to the basic purpose and mission of the ARC. Finally, this could result in erosion of public support and loss of funding for important research.

Clearly, the public interests at stake are great. Thus, the context of the search provides a very substantial justification for permitting urinalysis testing on ARC employees and, in this regard, we believe can be favorably compared to the justification for performing a search found in the security needs of a prison (Storms) or the public safety and public interest concerns involving high voltage employees (Allen), public transit workers (Suscy), or regulated horse racing (Shoemaker).

In assessing the intrusiveness of urinalysis testing on ARC employees' expectation of privacy, we believe that ARC staff would have a certain expectation of privacy with respect to their bodily fluids even though involved in patient care or the handling of controlled substances. 5/ However, because of the ARC mission which is to perform drug abuse research, including research on controlled substances, we believe it is reasonable to conclude that ARC employees have a diminished expectation of privacy. The use and distribution of controlled substances has traditionally been highly regulated activities both at the Federal and State levels. Thus, just as the court in Shoemaker determined that the highly regulated nature of the thoroughbred racing industry created a lower expectation of privacy by jockeys, we believe the highly regulated nature of the controlled substances used by the ARC in its research and treatment program, along with the important and salient public interest in the ARC's activities, lessens the degree of privacy that ARC employees may reasonably expect.

Furthermore, recent acceptance of drug screening in certain professional sports and private industry suggest some

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5/ In this regard, even though an employee may not use illegal drugs, it could be acutely embarrassing to have to divulge the use of certain prescription drugs, such as those for the control of mental illness, that would be identified through urinalysis.

societal weakening of privacy expectations in urinalysis testing. Recent actions by certain Federal agencies have also shown a move in this direction. In this regard, the Department of Defense has issued a policy authorizing drug screening on its civilian employees in "critical jobs." 6/ Also, the Federal Railroad Administration has promulgated final regulations authorizing the railroads to conduct breath and urine tests on their employees to screen for unauthorized use of alcohol and drugs. 7/ Thus, we believe one may reasonably argue that the ARC employee's expectation of privacy with respect to urine testing is diminished.

Thus, based on our review of the reported cases and weighing the intrusiveness of the search against the context in which it would be performed and the employee's expectation of privacy, we believe there are reasonable legal grounds on which to base an ARC policy mandating random urinalysis testing of its employees. However, in order to show a sufficiently compelling interest to warrant a non-consensual search of its employees, 8/ we believe the ARC should

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6/ DoD Directive 1010.9, April 8, 1985.

7/ 49 CFR Part 219, published on August 2, 1985, 50 FR 31508. Because of an injunction ordered by the Ninth Circuit Court of Appeals, implementation of these regulations has been delayed. 50 FR 45917, November 5, 1985; 50 FR 50888, December 12, 1985; 51 FR 756, January 8, 1986.

8/ In 62 Op. Atty. Gen. Cal. 344 (1979), the Attorney General of the State of California advised a local school district that it would not violate the Fourth Amendment to require a student, or if a minor, the student's parent or guardian, to consent to unannounced urine tests as a condition of participation in extra-curricular athletic programs. In giving his advice, the Attorney General emphasized that the purpose of the drug surveillance was to protect students from injury. While an argument might be made that it would be permissible to condition ARC employment on such a consent, we believe that there are substantial doubts regarding the validity of such a policy. The Attorney General's opinion relied heavily on Wyman v. James, 400 U.S. 309, 91 S. Ct. 381 (1971), citing that case for the proposition that a

(footnote continued on next page)

restrict such random testing to cases in which it is clearly essential to public safety and the integrity of its operations. Thus, we advise limiting random testing to employees who are directly involved in patient care, who have access to controlled substances, or otherwise occupy positions identified as critical by the ARC. 9/

(footnote continued)

State could condition welfare benefits on a "home visit" by a welfare worker, i.e., a "search." However, in Wyman, the Supreme Court specifically held that this did not involve a Fourth Amendment search, 91 S. Ct. at 386, while the courts have routinely found urinalysis to be a search under the Fourth Amendment. See cases cited supra. In a subsequent case involving a Fourth Amendment search, the Federal District Court for Minnesota distinguished Wyman and held a consent to the search invalid in face of a threat to deny welfare benefits. Reyes v. Edmunds, 472 F. Supp. 1218 (1979). This holding is consistent with the general rule that a valid consent to a Fourth Amendment search must be, as measured against the totality of all the circumstances, a voluntary, free and unrestrained choice. Id. at 1223. See Darryl H. v. Coler, 585 F. Supp. 383, 388 (N.D. Ill. 1984). Furthermore, even if found valid for new hires, we believe a policy of requiring consent to urinalysis as a condition of employment would be more difficult to defend for current employees who have certain rights in retention of their employment. See also, McDowell, supra, which held invalid as an unreasonable condition of employment an attempt to obtain employee consent to urinalysis testing, Slip opinion at 9; Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 1734 (1968), which held that public school teachers may not constitutionally be required to relinquish First Amendment rights ("'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected'").

9/ As an alternative to random testing of its critical employees, the ARC may wish to consider periodic (e.g., annual or twice yearly) physicals which could include urinalysis tests and physical or mental examinations for alcohol or substance abuse. As routine physicals are common practice in certain safety sensitive jobs such as airplane pilots, we believe the employee expectation of privacy in this area is even less than with random urinalysis testing. Thus, we believe the legal support for performing such regular examinations would be at least as great as that for random urinalysis tests.

In addition, we believe there is legal support for an ARC policy which would require urinalysis testing based on an individualized suspicion that a particular employee is using illicit drugs. There also could be other situations, such as the accidental death or overdose of a patient, that would justify giving urinalysis tests to all employees that reasonably could be responsible for the event. Cf., Suscy, supra. We believe these conclusions which we have reached for ARC employees would apply as well to contractor employees. 10/

Due Process

We believe that a hearing or other due process must be provided to an employee prior to termination, transfer, or other adverse action based on a finding of use of illicit drugs made as a result of a urinalysis test. This conclusion is based on the proposition that adverse action against an employee on a basis which imposes a stigma which limits other employment opportunities and impairs an individual's good name invokes a constitutionally protected liberty interest. Reeves v. Golar, 45 AD 2d 163 (Sup. Ct. N.Y. 1974); Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507 (1971); Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155 (1976) (due process requires notice and an opportunity to be heard when an individual's good name and legal rights or status are affected by governmental action). See also, Cleveland Board of Education v. Loudermill, _____ U.S. _____, 53 L.W. 4306 (1985), and Allen, supra, 601 F. Supp. at 492 (when removal is limited to "good cause," a public employee has a property interest in his job and is entitled to due process prior to dismissal). This hearing would provide an opportunity for the employee to challenge the results of the urinalysis test, including whether the testing procedure was valid and the results were properly interpreted. For ARC employees, the requirements for such a hearing could presumably be met by civil service laws or employee grievance procedures.

Employment Discrimination

10/ Assuming that the ARC requires a contractor to perform urinalysis testing on contractor employees as a condition of entering into the contract, we believe that the urinalysis testing of contractor employees would be considered governmental action and subject to the same constitutional analysis as that applied to urinalysis testing performed directly by the ARC. See Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764, 2771-2772, n. 6 (1982); Griffin v. Maryland, 378 U.S. 130, 84 S. Ct. 1770, 1773 (1964).

Equal Protection

We do not believe that the refusal to hire or retain in employment a current user of illicit drugs would violate any equal protection rights of ARC employees or applicants. The leading case is Beazer v. New York City Transit Authority, 440 U.S. 568, 99 S. Ct. 1355 (1979), which held that the NYC Transit Authority's blanket exclusion from employment of persons who regularly use narcotic drugs, including methadone, does not violate the Fourteenth Amendment equal protection clause. 11/ The Court found this to be true even though certain individuals may have progressed far enough in their rehabilitation that they could safely perform certain non-sensitive jobs. In rendering its opinion, however, the court did not rule upon the effect, if any, of the Rehabilitation Act of 1973 on the Transit Authority's hiring practices. 99 S. Ct. at 1363-64.

Sections 501, 503 and 504 of the Rehabilitation Act of 1973

Although we believe that Beazer, supra, establishes the principle that the ARC could deny employment on the grounds of current drug abuse by an applicant or current employee without violating the individual's equal protection rights, sections 501, 503, and 504 of the Rehabilitation Act create rights that go beyond an employee's constitutional protections. Section 503 of the Act, 29 U.S.C. 793, requires contractors with the United States (for contracts in excess of $2,500) to take affirmative action in employment of qualified handicapped individuals. Section 504, 29 U.S.C. 794, prohibits discrimination against a qualified handicapped

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11/ Compare, Osterman v. Paulk, 387 F. Supp. 669 (S.D. Fla. 1974) holding unconstitutional under the Fourteenth Amendment a standard disqualifying from public employment any person who had used marijuana on any occasion in the six months preceding the application for employment and Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978)), concluding that the blanket refusal of a city to hire former drug addicts violates equal protection and due process and denial of a job must be based on an individual determination of unsuitability. See also, Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977) and 451 F. Supp. 954 (1978), finding that refusal of the city to hire an applicant for policeman solely on grounds of his prior epilepsy violates equal protection and section 504 of the Rehabilitation Act.

individual, solely by reason of his handicap, under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the U.S. Postal Service. For purposes of sections 503 and 504, as they relate to employment, "handicapped individual" does not include "any individual who is 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 property or the safety of others." 29 U.S.C. 706(7)(B). 12/

Because of the restrictive definition of handicapped individual as it applies to employment under sections 503 and 504, we believe that a reasonable argument could be made that the ARC may exclude from employment current drug abusers who are involved in direct patient care or have direct access to controlled substances and, thus, would constitute a threat to property or to safety of others. 13/ With respect to

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12/ One court has concluded, based on the legislative history of 29 U.S.C. 706(7)(B), that section 504 does not apply at all to Federal employees who are currently abusing alcohol or drugs and are in need of rehabilitation. Whitlock v. Donovan, 598 F. Supp. 126, 129 (D.D.C. 1984). While there may be merit to this position, we are unwilling to rely on it totally because it is inconsistent with the literal language of the statute. In our view, it would seem possible that someone could abuse alcohol or drugs while off duty yet still perform the duties of his job while at work.

13/ By way of comparison, several courts have upheld agency decisions to fire, or refuse to hire, Federal employees who have had personal involvement with (by use, possession, or sale) controlled substances. While these decisions are based on challenges under civil service laws and do not consider potential rights of the employee under the Rehabilitation Act, they are arguably relevant to an agency determination that employee behavior could constitute a threat to property or the safety of others or that an employee would otherwise be unqualified to perform the duties of his position. In Borsari v. Federal Aviation Administration, 699 F.2d 106 (2nd Cir. 1983), cert. denied, 104 S. Ct. 115 (1983), the Second Circuit affirmed a decision of the Merit Systems Protection Board sustaining an FAA dismissal of an air traffic controller based on his sale and possession of illicit

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persons employed in other types of positions, a determination would need to be made that the drug abuse prevents the person from performing the duties of his job. See Southeastern

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substances. In denying the employee's challenge to the FAA action, the court stated:

> "The remaining question is whether the MSPB correctly found Borsari's involvement with drugs sufficiently related to his duties as an air traffic controller to justify his removal. 5 U.S.C. 7513 makes clear that dismissal is proper only 'to promote the efficiency of the service.' Although petitioner correctly points to the considerable evidence indicating his superior job performance, we are not convinced this is the only relevant factor. Rather, we are persuaded by the FAA's simple but seemingly uncontrovertible reliance on the incompatibility of drugs with successful air traffic control.
>
> "The phrase 'promote the efficiency of service' cannot be so limited as to require the agency to wait for an on-the-job violation before dismissing an offending employee. Indeed, it has repeatedly been held that where an employee's misconduct is in conflict with the mission of the agency, dismissal without proof of a direct effect on the individual's job performance is permissible under the 'efficiency of the service' standard ...." 699 F.2d at 110.

See also, Masino v United States, 589 F.2d 1048 (Ct.Cl. 1978) (upholding discharge of a customs officer following his off-duty use of marijuana, one of the substances he was assigned to exclude from the country); McDowell v. Goldschmidt, 498 F. Supp. 598 (D. Conn. 1980) (upholding dismissal of air traffic controller based on conviction of possession of marijuana and three instances of being absent without leave); Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963), cert. denied, 379 U.S. 951, 85 S. Ct. 452 (1964) (affirming dismissal of air traffic controller based on pre-employment conduct including homosexual
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Community College v. Davis, 442 U.S. 397, 99 S. Ct. 2361 (1979).

In making the determination that an employee or applicant should be denied employment based on current drug abuse, we believe caution is warranted by two opinions approving consent decrees in cases involving challenges to urinalysis testing of employees. Rodriquez v. N.Y.C. Police Department, 80 Civ. 4784 (S.D.N.Y. 1981) (slip op., January 20, 1981); Keyes v. N.Y.C. Department of Personnel, 79 Civ. 5786 (S.D. N.Y. 1980) (slip op. August 22, 1980). In both of these cases individuals were denied employment with the City of New York on the basis of a single urinalysis test showing a finding of a controlled substance. This practice was challenged on both constitutional grounds and sections 503 and 504 of the Rehabilitation Act. A settlement was reached which required the taking of two urine samples and a separate confirmation of any positive findings on the first batch.

Although the court's opinions are not binding precedent, they do indicate a judicial finding that the consent decree is a fair and reasonable settlement of the parties' legal rights and obligations. Thus, we believe care is needed to make the urinalysis testing procedure sound and equitable in the manner in which it identifies individuals who are abusing drugs. In addition, the ARC must be able to make a reasonable showing that refusal of employment is based upon a real threat to property or safety of others or because of inability to perform one's duties. Otherwise, an individual may be able to prove discrimination "solely based on handicap," i.e., the individual's current substance abuse. See Osterman, Davis, and Duran, supra.

In addition to sections 503 and 504, section 501 of the Act, 29 U.S.C. 791, requires that each Federal agency have an

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activity and smoking of marijuana). But see, Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977) (reversing dismissal of civilian army employee for off-duty possession of controlled substance); McLeod v. Department of the Army, 714 F.2d 918 (9th Cir. 1983) (reversing dismissal of civilian Army employee based on employee's possession of marijuana).

affirmative action program for the hiring, placement, and advancement of handicapped individuals. While it is clear that the term "handicapped individual" includes alcohol and drug abusers for purposes of section 501 (43 Op. Atty. Gen. No. 12 (1977); 42 F.R. 22686, May 4, 1977; Tinch v. Walters, 573 F. Supp. 346, 348 (E.D. Tenn. 1983), aff. 765 F.2d 599 (6th Cir. 1985)), the implementing regulations of the Equal Employment Opportunity Commission provide protection only for a "qualified" handicapped person who is defined, in part, to be "a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others ...." 29 CFR 1613.702(f); 5 U.S.C. 7203. 14/ Under section 501, Federal employees have a private right of action to enforce their right to receive affirmative action (29 U.S.C. 794a (a)(1); Whitlock, supra, 598 F. Supp. at 130) and the employing agency is required to make "reasonable accommodation" to the limitations of a handicapped employee unless the agency can show such accommodation would impose an "undue hardship" on its operations. 29 CFR 1613.704. Furthermore, in discussing its general policy under section 501, the EEOC regulations state: "[t]he Federal Government shall become a model employer of handicapped individuals." 29 CFR 1613.703. 15/

14/ No "threat to property" limitation is placed on the scope of this protection as is the case with sections 503 and 504. See discussion of 29 U.S.C. 706(7)(B), supra.

15/ The section 501 regulations also place certain restrictions on pre-employment medical examinations and pre-employment inquiries regarding an applicant's handicap. 29 CFR 1613.706. However, they do not prohibit "an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty" if all entering employees are subject to such exam. 29 CFR 1613.706(b). Hence, we do not believe they would prohibit the ARC from implementing the policies discussed in this memorandum assuming urinalysis tests were performed on all entering employees. Generally, the regulations also require that medical information obtained on an applicant be kept confidential. Basically similar provisions on pre-employment medical examinations are also included in the section 503 and 504 regulations. 45 CFR 84.14; 41 CFR 60-741.6(c)(3).

In a far-reaching decision, the Federal District Court of the District of Columbia found that the Labor Department had violated section 501 by dismissing an alcoholic employee without providing reasonable accommodation. Whitlock, supra, 598 F. Supp. 126. Although the court acknowledged that the "Department of Labor treated George Whitlock with compassion and tolerance, and more patience than most employers would have shown," it nevertheless concluded that the Department "fell short of the statutory mandate for accommodating handicapped employees." 598 F. Supp. at 136. In rendering its decision, the court enunciated the following general standards for agency accommodation of alcoholic employees: (1) the agency must first offer counseling to the employee, (2) if the employee rebuffs the offer, the agency must offer a "firm choice" between treatment and discipline before taking adverse action against the employee, (3) if removal of the employee is considered, the agency must determine whether keeping the employee presents an undue hardship under 29 CFR 1613.704, 16/ (4) if removal is deemed appropriate after this determination, the agency must offer the employee leave without pay if the employee will seek more extensive rehabilitation that seems promising, and (5) once an employee has shown evidence he can be accommodated, the burden of persuasion is on the agency to show that it cannot accommodate the employee. 598 F. Supp. 133-137. While the court was unwilling to require the agency to reinstate the plaintiff with back pay, it did order it to allow Whitlock to reapply for his job. 598 F. Supp. at 137.

In another recent section 501 case, the Federal District Court of the District of Columbia ruled that the Merit Systems Protection Board inappropriately considered the pretreatment transgressions of an alcoholic employee in sustaining the employee's removal and remanded the matter to the MSPB for reconsideration. Walker v. Weinberger, 600 F. Supp. 757 (1985). In rendering its decision, the court stated: "[i]n a disciplinary context ... 'reasonable accommodation' of an alcoholic employee requires forgiveness of his past alcohol-induced misconduct in proportion to his willingness to undergo and favorable response to treatment." 600 F. Supp. at 762.

The Merit Systems Protection Board has adopted a more limited approach than the courts in interpreting the reason-

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16/ Factors to be considered in determining whether an "undue hardship" exists include (1) the overall size of the agency's program, (2) the type of agency operation, including the composition and structure of the work (footnote continued on next page)

able accommodation requirements of section 501 for alcoholic and drug abusing employees. In the leading decision, Ruzek v. General Services Administration, 7 MSPB 307 (August 20, 1981), the Board enunciated the following standard for accommodating alcoholic employees under section 501: "in order to afford reasonable accommodation to an employee who is handicapped by alcoholism, an agency must offer the employee rehabilitative assistance and allow him an opportunity to take sick leave for treatment, if necessary, before initiating any disciplinary action for continuing performance or misconduct problems related to his alcoholism." Slip opinion at 6.

The MSPB continues to follow Rusek even after the two recent D.C. cases discussed above. In Noe v. U.S. Postal Service, Docket #SF 07528411002 (June 17, 1985), the Board ordered a Postal employee reinstated under Rusek because the Postal Service had not offered counseling or other rehabilitation to treat the employee's alcoholism before removing the employee. In Noe, the Board also decided that the employee could raise the issue of alcoholism for the first time in response to the agency's notice of proposed removal and, nevertheless, timely trigger the protection of section 501. Slip opinion at 3.

In the only MSPB decision on drug abuse under section 501 that we have identified, the Board ruled in Kulling v. Federal Aviation Administration, Docket #CH 07528210378 (October 31, 1984), that Rusek did not require the FAA to offer an air traffic controller treatment prior to removal because of the overriding public safety mission of the agency. In rendering its decision, the agency concluded that the employee was not a "qualified" handicapped employee because he could not perform the essential functions of his position "without endangering the health and safety of the individual or others ...." 29 CFR 1613.702(f); Slip opinion at 2. In its analysis, the MSPB relied heavily on Borsari v. FAA, 699 F.2d 106, discussed supra, where the Second Circuit upheld the removal of an air traffic controller based on his off-duty sale and possession of marijuana and possession of cocaine. The Board also ruled that, even assuming the employee was a qualified handicapped employee, the FAA did not have to consider his reassignment as a reasonable accommodation of his handicap.

Recent regulations of the Office of Personnel Management

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force, and (3) the nature and cost of the accommodation. 29 CFR 1613.704(c).

have basically adopted the MSPB approach to reasonable accommodation of alcohol and drug abusing employees in Federal service. These regulations are issued under 42 U.S.C. 290dd-1 and 290ee-1 17/ and require the agency to offer counseling and treatment services when they become aware of an employee's problem. 5 CFR 792.105(c), 49 F.R. 27921, July 9, 1984. If the employee fails to accept the offer or fails to improve his performance, the agency may proceed with an adverse action. Id. As Whitlock and Walker were decided, in part, under prior OPM policies implementing these statutes, it is possible that the D.C. District Court will follow the more limited approach to reasonable accommodation of the MSPB in future cases. However, as section 501 provides separate authority mandating reasonable accommodation for the alcoholic or drug abusing Federal employee, it is not clear to what extent the court will rely on the OPM regulations implementing 42 U.S.C. 290dd-1 and 290ee-1.

If an ARC employee involved in direct patient care or who has access to controlled substances is involved in substance abuse, we believe the ARC may persuasively argue that the employee is not otherwise "qualified" because he could not perform the essential functions of his position without endangering the health or safety of himself or others. Kulling and Borsari, supra. 18/ Thus, the ARC would

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17/ These statutes provide that OPM is responsible for developing appropriate treatment programs for Federal civilian employees with alcohol and drug problems.

18/ A recent court decision suggests that this determination must be made on a case-by-case basis and could not be made in advance solely on the agency's determination that an employee's substance abuse would be inconsistent with the elements of the job. In discussing this issue in Mantolette v. Bolger, 767 F.2d 1416 (1985), the Ninth Circuit stated:

> "[I]n some cases, a job requirement that screens out qualified handicapped individuals on the basis of possible future injury is necessary. However, we hold that in order to exclude such individuals, there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical

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be under no obligation under section 501 to hire or retain the employee in the position.

However, it is not entirely clear whether this would relieve the ARC of an obligation to offer the employee treatment under the OPM regulations, 5 CFR Part 792. Thus, we believe that the ARC should consult with its personnel office or OPM directly to find out if it has issued any policy guidance on this issue.

Summary of Conclusions

In summary, we believe there is reasonable legal support for the following propositions:

1) Random urinalysis testing for substance abuse may be performed on ARC and contractor employees in identified critical positions, including those involved in direct patient care or who have direct access to controlled substances.

2) Urinalysis testing may be performed on any ARC or contractor employee based on a reasonable suspicion that the employee is using illicit drugs or on an event, such as the death or overdose of a patient, where the public safety has been jeopardized. In the latter situation, urinalysis could be performed on all employees who may reasonably have been be involved in causation of the event.

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> reports. The question is whether, in light of the individual's work history and medical history employment of the individual would pose a reasonable probability of substantial harm.
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> * * *
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> In applying this standard, an employer must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury. This of course, involves a case-by-case analysis of the applicant and the particular job." 767 F.2d at 1422-1423.

See also, Arline v. School Board of Nassau County, 772 F.2d 759, 764-765 (11th Cir. 1985) (section 504).

3) Prior to termination or other adverse action against an employee based on a urinalysis test, some sort of due process hearing must be offered. For ARC employees, this presumably could be met by existing civil service rules and employee grievance procedures.

4) Under section 504 of the Rehabilitation Act (section 503 for contractors), the ARC could refuse to hire, or terminate the employment of, a current drug abuser so long as it can demonstrate the individual would pose a threat to property or the safety of others or otherwise would be unable to perform the duties of his job. Under section 501 of the Act, the applicable standard would be whether the employee, with reasonable accommodation, endangers the health and safety of himself or others or otherwise is unable to perform the duties of his job. Furthermore, for current employees, OPM regulations under 42 U.S.C. 290dd-1 and 290ee-1 may require the ARC to offer the employee an opportunity to rehabilitate himself prior to removal from Federal service.

5) Although the conditions outlined above would generally apply to contractor employees as well, the requirements of sections 501 and 504 of the Rehabilitation Act and 42 U.S.C. 290dd-1 and 290ee-1 would not apply to these employees.

In rendering this advice, there is one other issue that needs to be addressed. Because constitutional issues are involved, Federal officials responsible for adopting or implementing a policy requiring mandatory urinalysis testing of ARC and contractor employees might be sued in their individual capacity on the grounds that the official or officials had committed a constitutional tort (such as invasion of privacy or illegal search and seizure) against the employees. Bivens v. Six Unknown Federal Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971); Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982). But see, Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404 (1983). 19/ Under such circumstances, it is conceivable,

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19/ In Bush, the Supreme Court refused to find liability on a First Amendment claim by a Federal employee against his supervisor stating it would not create a new judicial remedy where the Civil Service laws provide a comprehensive scheme protecting civil servants against arbitrary action by supervisors, thus providing a meaningful remedy for employees. While we believe Bush raises substantial doubts whether an ARC employee may sustain an action against Federal officials in their individual capacities premised on the Fourth Amendment,
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although highly improbable, that the Federal official could be found liable for damages in his individual capacity. 20/ It would also be necessary to obtain Department of Justice approval for U.S. Government representation of a Federal official sued in his individual capacity, although such approval is normally readily obtained when the employee has acted within the scope of his or her official duties. See 28 CFR §§ 50.15 and 50.16.

We consulted with the Business and Administrative Law and Civil Rights Division in preparing this analysis.

Chris B. Pascal
Senior Attorney
Public Health Division

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it is nevertheless possible that a contractor employee might do so.

20/ Between 1971 and 1982, only 14 of some 10,000 constitutional tort cases brought against Federal employees resulted in adverse judgments, mainly against law enforcement officers. In fact, no judgment has ever been rendered against an employee of this Department. Thus, the possibility of a finding of individual liability against a Departmental official who was responsible for instituting an ARC urinalysis policy is extremely remote.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Rockville, Maryland 20857

January 16, 1986

Note to Dr. Jaffe

Re: Urinalysis Testing of Addiction Research Center and Contractor Employees

In response to your informal request for advice on whether NIDA may require mandatory urinalysis testing of employees of the Addiction Research Center (ARC) and its contractors, we have prepared the attached legal analysis. In general, we conclude that there is a reasonable expectation that such a policy would withstand constitutional challenge. In addition, although the particulars of the policy would need to comply with the restrictions of the nondiscrimination provisions against handicapped persons in the Rehabilitation Act, we do not believe these restrictions would prevent implementation of a urinalysis policy along the lines we have discussed.

Thus, within certain limitations discussed in the memorandum, it is our opinion that NIDA could adopt a mandatory urinalysis testing policy for ARC and contractor employees. More particularly we conclude the following:

1) Random urinalysis testing for substance abuse may be performed on ARC and contractor employees in identified critical positions, including those involved in direct patient care or who have direct access to controlled substances.

2) Urinalysis testing may be performed on any ARC or contractor employee based on a reasonable suspicion that the employee is using illicit drugs or on an event, such as the death or overdose of a patient, where the public safety has been jeopardized. In the latter situation, urinalysis could be performed on all employees who may reasonably have been be involved in causation of the event.

3) Prior to termination or other adverse action against an employee based on a urinalysis test, some sort of due process hearing must be offered. For ARC employees, this presumably could be met by existing civil service rules and employee grievance procedures.

4) Under section 504 of the Rehabilitation Act (section 503 for contractors), the ARC could refuse to hire, or terminate the employment of, a current drug abuser so long as it can demonstrate the individual would pose a threat to property or the safety of others or otherwise would be unable to perform the duties of his job. Under section 501 of the Act, the applicable standard would be whether the employee, with

reasonable accommodation, endangers the health and safety of himself or others or otherwise is unable to perform the duties of his job. Furthermore, for current employees, OPM regulations under 42 U.S.C. 290dd-1 and 290ee-1 may require the ARC to offer the employee an opportunity to rehabilitate himself prior to removal from Federal service.

5) Although the conditions outlined above would generally apply to contractor employees as well, the requirements of sections 501 and 504 of the Rehabilitation Act and 42 U.S.C. 290dd-1 and 290ee-1 would not apply to these employees.

While we believe there is reasonable support for the legal positions we have outlined, there are no definitive answers. Even though a great number of cases exist on the legal principles involved, there is limited judicial precedent on the specific issues germane to your inquiry. Furthermore, much of the precedent that is available is quite recent and not always consistent. This reflects, we believe, the difficulty and complexity of the legal issues and the controversy surrounding the subject of mandatory urinalysis. It also reflects the increased judicial attention given this issue in recent years which we expect to continue. Thus, we would expect continued litigation in this area in the immediate future and do not believe it is entirely clear the direction the courts will ultimately take.

Because of the controversial nature of the subject and the continuing development of the law in the area, it is very possible that an ARC decision to institute mandatory urinalysis testing of its employees would lead to litigation. Accordingly, while you have recently indicated there are no immediate plans to institute a urinalysis testing policy, we would like an opportunity to discuss the matter with you further if and when you decide to move forward. At that time, we would want to discuss with you the details of any proposed policy and consider what other legal issues need to be addressed, such as the impact of any union contracts that may be pertinent. Furthermore, before giving final approval to any particular course of action, we would want to advise the Department's General Counsel and determine whether coordination with the Department of Justice would be appropriate.

In the meantime, if you have any questions regarding our legal analysis, please let me know.

Chris

Chris B. Pascal
Senior Attorney
Public Health Division

Attachment

cc: Mr. Trachtenberg

Department of Defense
DIRECTIVE

April 8, 1985
NUMBER 1010.9

ASD(HA)

SUBJECT: DoD Civilian Employees Drug Abuse Testing Program

References: (a) DoD Directive 1010.1, "Drug Abuse Testing Program," December 28, 1984
(b) Public Law 91-513, "Controlled Substances Act," Section 202, October 27, 1970 (21 U.S.C. § 812)
(c) Federal Personnel Manual Supplement 792-2, February 29, 1980
(d) Assistant Secretary of Defense Memorandum, "Drug Abuse Control Policy," November 25, 1983

A. PURPOSE

This Directive:

1. Authorizes the establishment of the DoD Civilian Employees Drug Abuse Testing Program.

2. Provides policy, prescribes procedures, and assigns responsibilities for drug abuse urinalysis testing for DoD Civilian Employees (hereafter referred to as "employees").

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense, the Military Departments (including their reserve components), the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies (hereafter referred to collectively as "DoD Components").

C. DEFINITIONS

1. Confirmed Positive. Urine sample that has been tested positive under procedures required by this Directive and that has been reported as positive because it meets both initial and confirmatory test levels established under sections E. and F., enclosure 3, of reference (a).

2. Controlled Substances. Substances listed in the schedules published under reference (b).

3. Critical Jobs. Those jobs or classes of jobs sufficiently critical to the DoD mission or protection of public safety that screening to detect the presence of drugs is warranted as a job-related requirement.

4. DoD Civilian Employee. An employee of the Department of Defense who is paid from appropriated or nonappropriated funds.

D. POLICY

It is DoD policy that DoD Components may establish a drug abuse testing program for civilian employees in critical jobs to:

1. Assist in determining fitness for appointment or assignment to, or retention in, a critical job.

2. Identify drug abusers and notify them of the availability of appropriate counseling, referral, rehabilitation, or other medical treatment.

3. Assist in maintaining the national security and the internal security of the Department of Defense by identifying persons whose drug abuse could cause disruption of operations, destruction of property, threats to the safety of themselves and others, or the potential for unwarranted disclosure of classified information through drug-related blackmail.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense (Health Affairs) (ASD(HA)) is responsible for the administration of this program.

2. The Assistant Secretary of Defense (Manpower, Installations, and Logistics) (ASD(MI&L)) is responsible for the concurrence in the designation of jobs or classes of jobs identified as "critical jobs."

3. Heads of DoD Components that intend to institute civilian employee drug abuse testing, an optional program, shall issue implementing documents incorporating the guidelines and procedures set forth in this Directive before requesting designation of jobs or classes of jobs as "critical jobs."

F. PROCEDURES

1. Designation of Critical Jobs

a. DoD Components shall submit 5 copies of requests for designation of jobs or classes of jobs as "critical jobs" to the ASD(HA). The ASD(HA) shall obtain the concurrence of the ASD(MI&L).

b. The request from the DoD Component shall specify the job or classes of jobs, the justification for drug abuse testing of the specific job or class of jobs, the locations in which drug abuse testing is likely to be conducted, and the approximate number of persons within the job or class of jobs.

c. Critical jobs come within one or more of the following categories:

(1) Law enforcement.

(2) Positions involving the national security or the internal security of the Department of Defense in which drug abuse could cause disruption of operations, destruction of property, threats to the safety of personnel, or the potential for unwarranted disclosure of classified information.

(3) Jobs involving protection of property or persons from harm.

2. Guidelines for Use of Urinalysis

a. Employees in or applicants for positions that have been designated in paragraph F.1.a., above, as critical jobs may be required to participate in urinalysis testing in the following circumstances:

(1) Before appointment or selection.

(2) Periodically after appointment or selection on the basis of neutral criteria.

(3) When there is probable cause to believe that an employee is under the influence of a controlled substance while on duty.

(4) In an examination authorized by the Department of Defense or the DoD Component regarding a mishap or safety investigation undertaken for the purpose of accident analysis and the development of countermeasures.

b. When a DoD Component establishes a urinalysis testing program, it shall inform, in writing, each employee in a critical job before the initial urinalysis test, of:

(1) The reasons for the urinalysis test.

(2) The consequences of a positive result or refusal to cooperate, including adverse action.

(3) The opportunity to submit supplemental medical documentation that may support a legitimate use for a specific drug.

(4) The availability of drug abuse counseling and referral services, including the name and phone number of the local employee assistance program counselor.

c. The information in paragraph F.2.b.(1), (2), (3), above, shall be given to each applicant who is required to undergo urinalysis testing. The information in paragraph F.2.b., above, shall be given to each employee who enters a critical job that is subject to urinalysis testing after the program is established.

d. An employee whose urinalysis has been confirmed as positive shall be offered counseling or treatment, or both, through the local employee assistance program in accordance with the Federal Personnel Manual Supplement (reference (c)), if qualified. Nothing in this provision precludes the use of a confirmed positive urinalysis result in an authorized adverse action proceeding or for other appropriate purposes, except as otherwise limited by rules issued by the DoD Component concerned.

e. The results of field tests may not be used in administrative or disciplinary proceedings except as permitted in subsection F.4., below.

3. Urinalysis Testing Procedures

a. Urine samples shall be processed under chain of custody procedures set forth in the DoD Component's implementing document. The ASD(HA) shall ensure that such procedures apply the principles set forth in enclosure 2 of DoD Directive 1010.1 (reference (a)), so far as the ASD(HA) deems practicable.

b. Urine samples shall be tested at a laboratory certified under enclosure 4 of reference (a), using procedures set forth in enclosure 3 of reference (a). The DoD Component's implementing document shall contain:

(1) Procedures for timely submission of requests for retention of records and specimens under sections H. and I., enclosure 3, of reference (a).

(2) Procedures for retesting. The ASD(HA) shall ensure that such procedures apply the principles set forth in section J., enclosure 3, of reference (a), so far as the ASD(HA) deems practicable.

4. Field Testing of Urine Samples

a. Field tests of urine samples may be conducted only if approved by the ASD(HA) for the DoD Component concerned under the principles in enclosure 5 of reference (a).

b. All urine specimens identified as positive by a field test shall be sent immediately to a laboratory certified under enclosure 4 of reference (a) for testing under enclosure 3 of reference (a).

(1) Positive test results from field tests are preliminary results until confirmed as positive (by both initial and confirmatory testing) or by an admission of the employee.

(2) Before receipt of the report of tests results under enclosure 3 of reference (a) or an admission by the employee, positive results of field tests may be used for temporary referral to a civilian employee assistance program, temporary detail to other duties or administrative leave, or temporary suspension of access to classified information.

c. If a positive field test result is not reported as positive by a certified laboratory or an admission of an employee:

(1) The result may not be used to take further action against the employee.

(2) Any temporary action based upon the field test shall be rescinded.

d. To the extent that an action is based upon evidence other than the field test result, nothing in this Directive prohibits continuation of a temporary action or other appropriate action.

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective immediately for the purpose of preparing implementing documents. The ASD(HA) memorandum of November 25, 1983 (reference (d)) is canceled, effective June 1, 1985. This Directive applies to drug abuse testing of DoD civilian employees conducted on or after June 1, 1985, except that a DoD Component, with the approval of the ASD(HA), may implement this Directive before June 1, 1985.

2. Nothing in this Directive shall be construed to render invalid any test conducted before June 1, 1985, under a DoD Component's drug abuse testing program.

3. DoD Components that propose to conduct civilian employee drug abuse testing on or after June 1, 1985, shall forward two copies of proposed implementing documents to the Assistant Secretary of Defense (Health Affairs) at least 45 days before the date on which the Component plans to initiate such a program. Implementing documents are not required from other DoD Components.

William H. Taft, IV
Deputy Secretary of Defense

COMMUNITY SYSTEMS DEVELOPMENT PROJECTS

Goals:

- o Enhance public awareness and understanding of the problems of drug and alcohol use.
- o Foster attitude changes that deglamorize drug and alcohol use.
- o Make illicit drug use utterly unacceptable.
- o Create drug free communities

Population Focus: Non-user and early initiator populations

Objective: Support model community systems development projects that feature:

a) coordination of community-wide activities relevant to prevention, education, and early intervention services, including integrative early identification, referral, and services delivery systems

b) linkage of all relevant social and familial institutions (i.e., criminal justice, business and industry, religious, educational, social services)

c) innovative community coalitions of public and private organizations (i.e., community recreational facilities, public housing, volunteer organizations, health care systems, welfare units)

d) focused activities on at-risk populations who exhibit high-risk behaviors. Such targetting has the highest potential for cost-offset and cost-benefit to society.

e) surveillance and monitoring systems to rapidly identify changes in incidence and prevalence rates

f) programs that address the needs of school-age youth who are not in traditional public or private school settings. Specific at-risk groups include runaways, ethnic minority youth, youth in the juvenile justice system, and youth in alternative schools or state training schools.

g) development of community model standards and community intervention guides. This includes adoption of specific local level goals, objectives, and activities according to a community needs assessment profile.

Budget: $70.0 M
14 FTEs

NATIONAL CENTER FOR PREVENTION, EDUCATION, AND EARLY INTERVENTION SERVICES

Goal: Establish within DHHS a National Center for Prevention, Education, and Early Intervention Services as the lead Departmental unit for the collection and dissemination of accurate and timely information, model programs, and resources to address alcohol and drug issues. The Center will be responsible for developing and implementing national training programs, prevention and intervention materials development and dissemination, and clearinghouse functions. This Center will liaison with other Federal units responsible for elements of the enhanced demand reduction strategy (The President's Initiative on Drug Abuse).

Population Focus: Non-users and early initiator populations

Objective: Develop programs to bring alcohol and drug problem awareness, recognition, and early intervention services into the mainstream of primary health care.

Objective: Disseminate information to State and local organizations in support of their efforts to develop and implement prevention, education, and early intervention programs. Innovative early intervention and prevention programs developed through the research and evaluation component of the initiative will be rapidly disseminated.

Objective: Ensure that accurate programs and messages reach citizens through public print and electronic media (TV, radio, newspapers, magazines).

Objective: Ensure that every State has a broad-based system for coordination of focused alcohol and drug programs. This is to include support of existing networks and organizations (i.e., NPN, NFP) as well as fostering the development of needed coalitions and task forces where gaps exist.

Objective: Establish a national prevention training center to ensure the training of "gatekeepers" at the community level (i.e., police, teachers, probation officers, social workers, judges, parents, clergy, primary care professionals, etc.). This unit will be responsible for developing and disseminating manuals, handbooks, and training materials.

Objective: Provision of rapid response/crisis response technical assistance teams to State and local organizations in support of their immediate needs to develop and implement prevention, education, and early intervention programs. This approach is based on the CDC Epidemic Intelligence Services (EIS) model.

Budget: $15.0 M
18 FTEs

EPIDEMIOLOGY AND SURVEILLANCE

Goal: Improve and expand epidemiologic surveillance systems and investigation capability to ensure comprehensive tracking of the prevalence of alcohol and drug use and related behaviors at the national, State, and local levels.

Objective: Establish new epidemiologic surveillance systems to monitor drug abuse in populations, such as schools and colleges; juvenile and adult criminal justice; military; the workplace; life transition points, such as at time of birth and marriage; and hidden populations, such as high school dropouts, runaways, and the homeless. Evaluate the use of sentinel health events to measure the impact of drug abuse (i.e., criminal activity, motor vehicle accidents, intentional and unintentional injuries).

Objective: Establish rapid turn-around survey methodologies, such as telephone surveys and public opinion polls to measure the impact of drug issues. Work with CDC to enhance drug abuse components of the behavioral risk factor surveillance system (BRFS).

Objective: Establish a demonstration project to test surveillance and other data gathering techniques to permit identification of at risk groups for drug and alcohol use as well as early experimenters with drugs and alcohol.

Objective: Develop an ongoing epidemiologic surveillance and investigation capability to identify new and emerging drugs of abuse by establishing a national reporting database from treatment programs, health facilities, hot lines and crisis centers, and law enforcement offices based on toxicology screenings, urinalysis, street drug analysis, intelligence reports, and ethnographic research.

Objective: Establish the capability to conduct field investigations of acute drug-related outbreaks which threaten public health in the communities and improve epidemiologic surveillance at the State and local community level, by expanding technical assistance and collaboration with State and local officials (rapid deployment mechanisms), providing epidemiology training to community-based drug abuse researchers and other professionals, and encouraging the establishment of a State drug abuse epidemiologist in each State.

Budget: $3.0 M
8 FTEs

RESEARCH

Goal: TO DEVELOP INNOVATIVE, COST-EFFECTIVE TREATMENT PROGRAMS.

Current treatment research is concentrated on the evaluation of established narcotic treatment techniques. Relatively little research is being conducted on innovative treatments for cocaine dependence or the treatment of narcotic users as part of an AIDS risk reduction program. We propose to establish an intramural and extramural research program to address this problem area. The ARC will develop a model adult and adolescent in- and out-patient treatment research program focusing on cocaine and IV drug users. Our extramural research capacity will be increased to develop and evaluate innovative treatment techniques for cocaine and heroin abusers based on new knowledge of the biological and behavioral bases of drug abuse. This will include an emphasis on alternatives to methadone maintenance such as depot naltrexone and buprenorphine. Further expansion of extramural research on cocaine and controlled substance analogs and their toxic effects will also be initiated.

BUDGET: $11,400,000 FTE: (27)

Goal: TO DEVELOP A PROGRAM TO EVALUATE THE EFFICACY OF CURRENT TREATMENT

A variety of treatments, including the use (alone and in combination) of drugs such as bromocriptine, amantadine, imipramine, and behavioral therapy and psychotherapy are currently being used to treat cocaine addiction. Specialized treatment research laboratories will be established to evaluate the efficacy of these treatment approaches. The results of this research will provide a rational basis for choosing the most cost-effective treatment for specific clients.

BUDGET: $8,100,000 FTE: (2)

Goal: TO DETERMINE THE EFFICACY OF PREVENTION PROGRAMS

In collaboration with state and local agencies, programs funded under the Community Systems Development Project will be identified for evaluation. These programs will emphasize the school, the family, and the worksite as points of contact, and the preadolescent, adolescent and young adult as the focus of concern. The efforts will involve both evaluation of efforts to prevent the initiation of drug and alcohol use and the development of early intervention strategies targeted at the potential drug user and his or her family.

BUDGET: $5,700,000 FTE: (3)

Goal: TO IDENTIFY CHILDREN AT RISK FOR DRUG AND ALCOHOL ABUSE

Recent studies have shown that the way children respond to the first year in school is predictive of teenage and adult problems. Aggressiveness, such as not obeying rules, truancy, and fighting with classmates often is associated with problems such as drug and alcohol abuse and delinquency later in life.

We propose to fund research to improve and determine the validity of identification criteria and the effectiveness of various interventions to avert the development of drug and alcohol problems in such high risk children. Further, we propose to expand our current extramural research on the biological and behavioral bases of illicit drug use with special emphasis on investigations of the social, behavioral, genetic, and biomedical factors underlying "invulnerability" to drug abuse.

BUDGET: $4,100,000 FTE: (3)

Goal: DEVELOP VALID AND RELIABLE DRUG SCREENING METHODS AND PROGRAMS

HHS will develop standardized procedures for monitoring quality control for drug testing of urine. Working with the private sector, we will develop procedures to certify the proficiency of laboratories to perform these analyses. Further research will be conducted to develop more sensitive systems of analysis that may be useful as a diagnostic methodology for drug abuse. In addition, non-invasive technologies, designed to assess specific motor and cognitive performance effects of abused drugs, will be developed.

BUDGET: $3,700,000 FTE: (3)

Toward A Drug Free Society: Drug Abuse Research, Education, and Intervention
OVERVIEW

Goals

- o Raise a drug free generation in a drug free environment
- o Change individual and societal attitutes, beliefs, and behavior
- o Mobilize community efforts

Population Focus and Rationale

- o Focus on non-users and less severely involved users

  - Non-users, especially children and adolescents

    --to maintain a drug free life

  - Early Users/Experimenters

    --to avoid progression of use and contagion of new users
    --to intervene when demands on resources are minimal or modest
    --to take advantage of private sector incentives for participation: personnel systems; Employee Assistance programs; private insurance
    --to achieve the highest payoff for the dollars: more likely cost offsets; return to productive lives

- o Associated Considerations

  - AIDS
  - Waiting Lists for Treatment

- o Target of initiative: return from epidemic to endemic levels of use

  - An epidemic in drug use has occurred over the past 25 years.
  - Prior to that there was endemic use, but it was not part of the workplace or the school.
  - Close association with social, economic, psychological, educational, and medical factors.

Principles

- o Expanded awareness of hazards of drug abuse
- o Message of utter unacceptability of drug use
- o Integration of alcohol and drug abuse into the mainstream of health care
- o Involvement of all segments of society--the school, the workplace, the church, the health care system, the criminal justice system, civic and voluntary associations, the media, and all levels of Government--to enhance local systems capacity and capability

Activities

1. Community Systems Development Projects

   - Provide short-term financial assistance (on a matching basis with a declining Federal share) to communities to assist them in mobilizing comprehensive, integrated efforts to make illicit drug use totally unacceptable and to reduce drug abuse. Build on existing public and private sector institutions. Develop a permanent capability which can be sustained by the States and communities themselves.

2. National Center

   - Establish a National Center for Prevention, Education, and Early Intervention Services to strengthen coordination of Federal activities with public and volunteer efforts and to disseminate knowledge gained from prevention research and treatment through a statewide prevention network. Provide immediate aid to communities in drug crisis through rapid response technical assistance, needs assessment, and advice on effective prevention strategies.

3. Epidemiology and Surveillance

   - Develop enhanced epidemiology and surveillance systems to assure comprehensive tracking of the incidence and prevalence of alcohol and drug use and improved identification of risk factors and risk groups

4. Research

   - Develop better and more effective methods of detecting, diagnosing, and treating illicit drug use and intervening with high risk children and adolescents

   - Develop alternative drug detection mechanisms and national standards of accreditation for laboratory testing

Anticipated Outcomes

- Diminished use of drugs in schools and the workplace
- Establishment of coordinated alcohol and drug abuse prevention and treatment systems nationwide.

Magnitude of Effort

o Research	33 million
o Primary Prevention and Epidemiology	$ 28 million
o Secondary Prevention (pushing people into treatment)	60 million
o HCFA	10 million
o HHS/DEd	4 million
o HHS/DoL/OPM	5 million
Total	$140 million

TABLE I

ESTIMATED NUMBERS OF CURRENT USERS (within past 30 days)*

AGE	<12	12-17	18-25	26-40	>40
DRUG GROUP					
Primarily Opioids	2,500	10,000	190,000	200,000	100,000
Cocaine					
Non-Freebase	(50%)120,000	(55%)380,000	(65%)1,560,000	(78%)655,000	(80%)400,000
Freebase, Including "Crack"	(50%)120,000	(45%)310,000	(35%) 840,000	(22%)185,000	(20%)100,000
Total	240,000	690,000	2,400,000	840,000	500,000
Opioids Complicated by Cocaine	These Individuals are Included in the Two Categories Above				
Primarily Marijuana	886,000	2,660,000	8,990,000	5,859,000	2,511,000
Primarily Alcohol	2,068,000	6,210,000	22,250,000	28,704,000	43,056,000
Primarily Sedatives/ Stimulants/Other	300,000	900,000	2,380,000	1,064,000	116,000
Opioid/Alcohol/Poly-drug	These are Included Among Category IV Opioid/Cocaine Users				

* Because many individuals use more than one substance, there is great overlap and the total shown here far exceeds the number of unduplicated individuals who have used various drug categories.

TABLE II

RESOURCE DEMAND DISTRIBUTION WITH DRUG USE CATEGORIES FOR RECENT USERS (last 30 days)

(Resource demand is a higher order category that incorporate co-existing pathology, social disability, and severity of dependence)

Category	Description of Syndrome and Likely Resource Demand
I	Minimal demand - responds to threat of urine testing, admonitions of employer, wife, etc., some counseling, modest supervision.
II	Modest demand - requires range of drug-related treatment, inpatient, outpatient, detoxification, therapeutic community, oral methadone, drug counseling, private therapy, naltrexone or pharmacological supports for cocaine, etc.
III	Extrordinary demand - severe dependence or psychopathology requiring special services (e.g., psychotherapy beyond that available in clinic settings, but ultimately when such services are provided these individuals respond by improving).
IV	Maximal demand/minimal response - social impairment/psychopathology exceeds the level that can be successfully addressed by current methods - requires chronic care, compulsory confinement.

TABLE III

EXPECTED RESOURCE DEMANDS AMONG INDIVIDUALS USING THIS DRUG CATEGORY OVER LAST 30 DAYS
PRIMARILY COCAINE

Resource Demand Categories								
67% I	17% II	8% III	8% IV	Intervention Resource Description	Cost/Slot/ Year	Days/Episode	Throughput	Cost/Episode
20	5	2	1	Self Help	N/A	180	2	N/A
5	30	15	8	Outpatient Psychotherapy	7500	60	6	1250
0	30	25	17	Outpatient Psychotherapy plus Pharmacotherapy	8500	90	4	2125
0	25	30	30	Non-medical Residential (e.g., Hazelton)	75,000-100,000	21	16	4688-6250
0	6	10	15	Non-medical Residential - Concept House	13000	120	3	4333
0	3	18	29	Medical/Psychiatric Inpatient	120,000	21	16	7500
75	0	0	0	Employee Assistance Programs Urine Screening/ Minimal Counseling	3000	60	6	500

* Total cocaine use consists of both free-base (including "crack") and non-free-base forms. Our very rough estimates are that at present about 2/3 of users are still involved with non-free-base forms and about 1/3 are being exposed to free-base, including "crack." The estimates of resource demand shown in this Table are for non-free-base forms. We estimate that for free-base and cocaine, the percentage of those users in category I would drop to 30% and those in categories II, III and IV requiring more extensive services would rise to 70%. The distribution of resource categories also differs by age group and education; thus among Federal workers, we would expect more than 90% of recent users to be in category I.

TABLE IV

EXPECTED RESOURCE DEMANDS AMONG INDIVIDUALS USING THIS DRUG CATEGORY OVER LAST 30 DAYS
PRIMARILY OPIOIDS

Resource Demand Categories								
15% I	30% II	30% III	25% IV	Intervention Resource Description	Cost/Slot/ Year	Days/Episode	Throughput	Cost/Episode
0	35	10	5	Methadone Outpatient Category II	2500	180	2	1250
0	0	30	50	Methadone Category III & IV	7500	180	2	3750
0	15	20	20	Outpatient Detoxification (with or without methadone)	3000	30	12	250
0	10	10	10	Non-medical Therapeutic Community or Concept House	10,000	120	3-4	2500-3333
0	2	5	5	Hospital Inpatient Detoxification (approx. $265/day)	120,000	7	52	2308
5	10	10	10	Outpatient Post-withdrawal Treatment (e.g., naltrexone)	3500	90	4	875
0	4	5	3	Medically Augmented Concept House (e.g., Second genesis)	15,000	120	3	5000
5	10	5	5	Outpatient - Drug Free (primarily non-medical)	2000	60	6	333
5	1	2	0	Other - Private Psychotherapy (psychologist, social worker, etc.)	N/A	90	4	N/A
10	3	3	2	Other - Self Help	N/A	180	2	N/A
75	10	0	0	Employee Assistance/Urine Testing, On-job Counseling, School Counseling	3000	60	6	500

Assumptions about distributions within resource demand categories. Category I, 15% (75,000); Category II, 30% (150,000); Category III, 30% (150,000); Category IV, 25% (125,000).

Policy Options for HHS Employee Drug Testing

Over the last five years, there has been an increasing interest and use of urinalysis to deter and detect the use of illicit drugs by employees in American industry as well as service personnel of the Armed Forces. The factors which have caused this phenomenon of widespread use of urinalysis include both the development of methods suitable for such analysis and the increasing awareness in our society regarding the adverse impact of drug illicit use on the health, safety, and productivity of the American worker.

Legal Background

The Office of General Counsel (OGC), DHHS, has recently reviewed (January 16, 1986) the legal issues involved in a proposed random/mandatory drug testing program for Federal and Contractor employees working at NIDA'S Addiction Research Center (ARC). Although the review considered the specific situation at the ARC, the findings and recommendations are cogent to the discussion of any policy decision regarding urine drug testing of federal employees for drug abuse.

The OGC identified a number of complex issues including: Fourth Amendment rights to reasonableness in search and seizure, privacy and confidentiality, due process before adverse action is taken, employment discrimination, equal protection, and Sec. 501, 503 and 504 of the Rehabilitation Act of 1973, and has discussed them throughly in the attached document. Based on existing law and case review OGC concluded there is legal support for the following propositions: 1) Pre-employment and random urinalysis testing for substance abuse may be performed in ARC and contractor employees in identified critical positions, where it is essential to public safety and the integrity of the missions' operations. In the case of the ARC, OGC advised limiting random testing to employees who are directly involved with patient care, who have access to controlled substances, or otherwise occupy positions identified as critical by the ARC. 2). Drug testing may be performed on <u>any</u> ARC or contract employee based on a reasonable suspicion that the employee is using illicit drugs or on an event, such as the death or overdose of a patient, where the public safety has been jeopardized. In the latter situation, urinalysis could be performed on all employees who may reasonably have been involved in causation of the event. Furthermore, for current employees, OPM regulations under 42 U.S.C. 290dd-1 and 290ee-1 may require the ARC to offer the employee an opportunity to rehabilitate himself prior to removal from Federal service.

The Department of Defense has authorized its components to implement, should they choose to do so, civilian drug testing programs for critical skill occupations. At present, the US Army has the only DOD approved civilian drug testing program (see attached policy) covering approximately 10% of its civilian workforce. Approval of a Navy civilian program appears to be imminent and will cover approximately 15% of its civilian workforce.

It is clear from the OGC review and the private sectors' experience over the last four years that the legal defensibility of any Employee Drug Testing Policy will be based on the two basic tenets of "Reasonableness and Appropriateness" that must be attended to in balancing the rights of the employee with those of the "good of the service".

Policy Options

Over the last four years a continuum of policies has evolved ranging from pre-employment to random mandatory testing which afford multiple options to meet the needs of various workplaces .

Pre-Employment Testing - This type of policy generally refers to the drug testing of prospective employees and is usually performed during a pre-employment physical. Many companies have adopted a policy that they will not hire any applicant who is currently using illicit substances. Therefore, a confirmed drug presence in an applicant's urine screen would generally have a serious negative impact on the applicant's chances for employment. Organizations should inform job applicants when the reason they are denied employment is based primarily on a positive drug screen. Some companies allow applicants to reapply at a future date, generally with a mandatory three to six months waiting period. Information is given that the company is serious about substance abuse and that if the applicant is serious about working for the company, he/she needs to do something about their current use of drugs. Suggestions are made regarding appropriate treatment programs, if necessary, and the individual is informed of the requirement of a negative drug screen on future requests for employment. Successful reapplication after originally presenting positive drug use usually results in being hired on a one-year probationary status and retesting occurs throughout the probationary period. Ultimately, successful completion of the probationary period results in conversion to full time permanent status. Allowing an applicant the opportunity to cease his/her substance abuse and/or to seek treatment and reapply is a very positive approach to this problem, and it is recommended where possible.

Company policy regarding the frequency of drug screening for in-service employees is usually determined with consideration of risk factors associated with safety, security, and health.

Incident Testing - These policies include specifically defined "incidents" where testing will be required. For example, an accident, a fight, or other incident which is defined in the policy would require all involved personnel to report for testings. The Federal Railroad Administration has recently required the railroads to test on an "incident" basis.

Probable Cause -This type of policy is similar to an "incident-driven" policy in that testing may be required by a supervisor when there is "reasonable suspicion" or "probable cause" to suspect that an employee is using drugs, intoxicated or under-the-influence of drugs. The difference between "probable cause" and "incident" policies is that the event that triggers the requirement for testing is not specified in the policy and is discretionary.

Scheduled - High risk or safety sensitive occupations, where public safety is of special concern, may require routine scheduled screening. In these cases, screening is often tied to a specific schedule (e.g., quarterly) or to annual physical examinations.

Random Testing - In hazardous and high risk occupations, periodic, unannounced or random testing to assure the health and safety of employees may be warranted. It is generally agreed that random unannounced testing is legally defensible and appropriate in occupations where it is essential that the individual be free of any and all effects of illicit drugs at all times.

Many companies have struggled to develop a single policy which will cover all employees. We would suggest that in large organizations, where differing skills are required which may range from safety or security sensitive positions to a large office/clerical staff, multiple policies may be required. The issue of suitability or appropriateness of the drug policy is critical. Clearly there are critical skill occupations where aggressive employee drug testing may be appropriate; however, it is unlikely that the massive screening of all workers could be justified as being appropriate or suitable in workplaces where the perceived safety/security risk is minimal.

Options - Who would be tested - If the purpose of a drug testing program is to create a credible deterrence to illicit drug use, an employee must have some expectation of being detected if he/she continues to use or initiates drug use.

- 0 144,000 currently employed in HHS
- 0 4,000 new hires from outside government in FY 1985.
- 0 525 senior executive service employees.

The numbers of employees with security clearances or in "Sensitive" positions as defined by OPM was unavailable. However, if you use a 15% critical skill figure (a high estimate based on Navy Civilian program) an estimated 21,600 HHS employees would be in "Sensitive and Critical Skill Occupational Codes".

A. All employees could be tested. Using an estimated cost of $32.00 per individual/screen (A assay cost derived from 5 years experience with DOD which would include screen/confirmation/administrative costs, etc.) each total workforce testing would cost approximate $4.6 million. It is unlikely that screening the entire workforce would pass the test of being reasonable, appropriate, or cost-effective.

B. Job applicants could be tested. Currently the DOD policy allows only the pre-employment testing when hiring for "Critical Skill" positions. OCG has indicated that refusal of employment must be based on threat to property or safety or inability to perform one's duties. If all HHS job applicants "New" to the Federal Government were tested, the cost would approximate 128K/yr. Limiting pre-employment testing to "Critical Skill" occupations would reduce cost to approximately 20K/yr. The reasonableness and appropriateness based on current law suggests the "Critical Skill" approach as most reasonable and appropriate. However, proposed legislation may alter the basis for this decision.

C. Limit testing to "Critical Skill" employees
Critical Skill employees are generally defined in the following broad categories:

1. Employees who have access to classified information.
2. Employees performing tasks related to, or that may have an effect on National Security, or the investigation of possible violation of federal law.
3. Law enforcement, public safety (e.g., policy, security guards, firemen, elevator mechanics. chauffeurs, bus drivers, etc.).
4. Jobs involving protection of property or persons from harm (e.g., those involved in direct patient care, physicians, nurses, etc.).
5. Any other position determined to be critical to the integrity of the operation of the agency's mission.

In the DOD policy, civilian employees in identified critical skill positions come under three testing procedures: 1) pre-employment, 2) probable cause and 3) random/mandatory testing. To have a credible deterrence program the number of random tests ideally should range from 3-5 times per year. Clearly the "critical skill occupational code" concept meets the criteria for reasonableness and appropriateness. However, efforts must be made to insure that job codes so classified are truly "critical skill", [10-20% of the total workforce has been deemed "acceptable" at DOD) with authority to implement the program held by the Assistant Secretary of Defense (Health Affairs)].

Conclusions

In our experience with private industry, a major pitfall has been the attempt by large corporations to develop a single policy for all employees. When measuring options with the ruler of "reasonableness and appropriateness" what seems to work well for one segment of the workforce (e.g., nurses and physicians) will not hold well for another (e.g., large clerical staff). The "Critical Skill" concept has a great deal of appeal and can be easily justified and carried out at a moderate cost. If there is a desire to cover all employees (i.e., the approximately 85% of the workforce not covered by "Critical Skills") a probable cause or incident driven policy appears to be the best option. This can be easily justified and the Federal as well as Non Federal Unions have stated support for such a policy. Assuming a 1% incidence rate (per year) where probable cause will be invoked, the cost of this policy for all employees would be minimal. (See estimated cost projections for various options - Table 1)

Options - Procedures for Collection and Assay

Specimen Collection

Collection of urine samples involves two key issues - integrity of sample and chain of custody procedures. Sites must be designated which are accessible to employees and which provide an adequate resource for appropriate collection. The integrity of the sample is assured by witnessed collection in a clean environment and signed acknowledgement of the sample identity by employee and authorized witness.

The second issue of critical importance is the chain-of-custody procedures for documentation of specimen custody and transport to laboratory. This responsibility must fall to personnel trained and experienced in forensic chain of custody procedures.

These two critical aspects of specimens collection can be accomodated through several options.

Site

1. Staff clinics in government buildings provide the most accessible facility for collection. The draw back of using many different sites is the increased cost of collection logistics.

2. "Regional" clinics (PHS, DOD, etc.) would provide less accessible but more centralized collection. Some inconvenience to the employee could be highly cost saving to the program.

3. Private contract sites (labs, hospital clinics, etc.) could be regionally designated as official collection sites.

Personnel

Regardless of whether option 1,2 or 3 above is chosen, personnel to handle collection and chain of custody documentation should be trained and experienced in these matters. Such experience (with the exception of DOD) is limited in the Federal Government and could best be provided by outside private contract. These personnel would staff collection sites and transport specimens to labs and maintain appropriate documentation.

Assays

1. In house - the CDC, NIH, or ARC facilities could provide the required services. However, using state of the art research facilities as service laboratories is not cost effective. In addition, should litigation occur, use of in-house labs may be a problem. Privacy and confidentiality of record keeping would also be more difficult.

2. Government Laboratories - the DOD has several regional laboratories and the possibility exists to "buy into" that system. It should be noted however, that substantial analytical work in the Army and Air Force is contracted to private commericial labs at this time.

3. Contract labs that can provide high quality service and rapid turn around of results are available. Privacy and confidentiality could be more easily maintained. This option is probably the most cost effective.

Caveat: Cost estimates in table 1 do not include followup testing which may be required during treatment or provisional status periods which would follow initial detection of drug use by an employee. Estimate $250./yr. followup testing cost.

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COST ESTIMATES (in thousands)

For HHS

	Policies					
	Pre-Employment	Probable Cause/ Incident	Random 1	Random 2	Random 3	Random 4
All Applicants (3%)	128	*(Assuming 1% Incidence)				
Critical Skill Applicant	20					
All Current Employees	--	46	4,608	9,216	13,824	18,432
Critical Skill Employees	--	7	691	1,382	2,073	2,764

FOR NIDA (260 Employees)

	Pre-Employment	Probable Cause/ Incident	Random 1	Random 2	Random 3	Random 4
All Applicants	.750	*Assume 1%				
Critical Skill Applicants	.100					
All Current Employees	--	.100	8.3	16.6	24.9	33.2
Critical Skill	--	.030	1.3	2.6	3.9	5.2