

131081

UNITED STATES GENERAL ACCOUNTING OFFICE  
Washington, D.C. 20548

FOR RELEASE ON DELIVERY  
EXPECTED AT 10:30 A.M.  
SEPTEMBER 25, 1986



131081

STATEMENT OF  
WILLIAM J. ANDERSON  
ASSISTANT COMPTROLLER GENERAL  
FOR GENERAL GOVERNMENT PROGRAMS  
AND  
HARRY R. VAN CLEVE  
GENERAL COUNSEL  
BEFORE THE SUBCOMMITTEE ON HUMAN RESOURCES  
COMMITTEE ON POST OFFICE AND CIVIL SERVICE  
HOUSE OF REPRESENTATIVES

036791 - 131081

Mr. Chairman and Members of the Subcommittee, it is a pleasure to appear before you today to comment on the President's Executive Order requiring mandatory drug testing of federal employees. In brief, we believe that mandatory drug testing as provided for in the Order raises a constitutional problem which will ultimately be decided by the courts. Notwithstanding this concern, the Executive Order contains some positive approaches to combatting drug abuse.

#### Constitutional problem

The Executive Order raises a constitutional problem.<sup>1</sup> The issue is whether certain aspects of the testing programs called for would violate the Fourth Amendment to the United States Constitution which protects individuals from unreasonable searches. Most courts that have considered urinalysis testing of public employees for illegal drug use have held that the Fourth Amendment allowed such testing only when there was a reasonable suspicion that the persons to be tested were users of controlled substances or had been involved in extraordinary circumstances. Thus, decided cases have permitted testing of bus operators involved in serious accidents and city employees working around high voltage wires.

---

<sup>1</sup>The same issue was addressed by us in B-223280, Sept. 11, 1986, in which we commented on H.R. 4636--a bill to require controlled substance testing programs for federal employees and contractor personnel having access to classified information. On the constitutional issue, our comments both earlier and here are limited to urinalysis drug testing. The Order does not necessarily require this kind of testing. We append a copy of those comments.

Read literally, it is questionable that the mandatory testing programs would meet current Fourth Amendment requirements. The Order allows random testing, that is, testing without showing reasonable suspicion of drug use or other extraordinary circumstances. The testing is to be limited to employees in "sensitive" positions, but the definition of "employee in a sensitive position" is very broad. It includes employees who have been granted, or may be granted, access to classified information as well as a broad spectrum of individuals an agency head determines to be involved in law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence. Thus, the term "employee in a sensitive position" would appear to cover a substantial part of the federal workforce.

We will have to wait and see whether the regulatory guidance provided by OPM and HHS and the manner of implementation by the various agencies are sufficiently circumscribed to avoid any constitutional infirmity.

Already the National Treasury Employees Union has filed suit in the United States District Court for the Eastern District of Louisiana challenging the Executive Order both on constitutional and other grounds. Therefore, there is reason to believe that the legal issues raised by the drug testing program will be resolved in the courts.

### Need for widespread testing

If implemented, widespread testing programs in all likelihood would result in some benefits. A deterrent value would be established, drug users identified and perhaps rehabilitated, and the overall health and fitness of federal employees might be enhanced to the benefit of agencies and citizens. However, the benefits are difficult to measure.

We are not aware of any showing of the extent of drug abuse in federal service or the impact of such use on employee performance. According to a 1982 survey by the National Institute on Drug Abuse, drug abuse in the general population sharply declines after the age of 26. In this age category, 6.6 percent used marijuana, 1.2 percent used cocaine and less than one-half percent used hallucinogens or heroin. Ninety-four percent of the federal workforce are over age 26; the average age is 42. We suspect, given the screening processes that precede federal employment and security clearances, that drug abuse among the federal workforce would be less than in the general population. We recognize, of course, that a small number of drug abusers would be capable of inflicting grievous harm on national well-being, depending on their positions.

Because we do not know the number of individuals to be tested, we do not have a basis for estimating the cost of the testing program. The Administration estimates \$56 million in budgetary outlays. Although significant, this figure does not quantify the "cost" of governmental infringement on privacy rights, including the cost to defend the program in the courts.

With regard to purposes of the program that relate to reduced productivity, the government has some existing tools. When individual job performance or overall productivity suffers, supervisors have the responsibility to take appropriate action to relieve that problem. Upon identification, alcohol abusers, drug abusers, or other impaired workers may be referred for rehabilitation or disciplined in some appropriate fashion. We believe such measures can be used effectively to rid the workplace of drug users.

#### Other approaches to combat drug abuse

The Executive Order does call for several worthwhile endeavors toward the government's legitimate interest in a drug-free workplace:

- employee assistance programs emphasizing education, counseling, referral to rehabilitation and coordination with community resources;
- supervisory training to assist in identifying and addressing drug abuse by agency employees; and
- procedures for employees to voluntarily seek counseling and rehabilitation services and for supervisors to make such referrals which protect personal privacy.

Aside from these initiatives, the government may be able to identify a number of particularly sensitive positions where drug testing would comply with Fourth Amendment requirements. While we are not in a position to describe such positions, the number of employees covered would need to be constrained to meet a

stated, compelling governmental need while minimizing the government's intrusion on the privacy of the federal worker. Any testing program must produce reliable results.

This concludes my prepared comments. I would be happy to answer any questions you may have.



Comptroller General  
of the United States

3-223280

September 11, 1986

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

Dear Mr. Chairman:

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

Bill provisions

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

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

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

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

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

(7) an employee of the Botanic Garden; and

(8) an employee of the Capitol Guide Service.

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

#### Constitutional problem

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

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

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

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

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

Although there have been several instances where courts have sustained random urinalysis testing for drugs, they have done so in situations involving military personnel, prisoners, and thoroughbred race horse jockeys. The decisions permitting such tests of military personnel emphasized both that (1) military personnel have a lesser expectation of privacy than civilian employees under the Fourth Amendment, and, thus, have not been accorded the same protections, and (2) incidence of drug abuse in the Armed Forces is extensive. Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); Committee for GI Rights v. Callaway, 518 F.2d 466, 476-77 (D.C. Cir. 1975); see Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. Ct. App. 1985). The decision permitting tests of prisoners emphasized that the constitutional rights of prisoners give way when in conflict with prison security needs. Storms v. Coughlin, 600 F. Supp. 1214, 1215-19 (S.D.N.Y. 1984). In another instance a United States District Court sustained New Jersey State Racing Commission regulations providing for random urinalysis tests of jockeys at race tracks, Shoemaker v. Handel, 619 F. Supp. 1089, 1099-1102 (D.N.J. 1985). The Court specifically distinguished the McDonell case on the grounds that (1) horse racing was one of a special class of relatively unique industries that had been subject to pervasive and continuous state regulation; (2) jockeys were licensed by the state; and (3) the state had a vital interest in insuring that horse races were safely and honestly run, and that the public perceived them as such. Id. at 1102.

Consistent with the decided cases, it would not appear that the controlled substances testing programs authorized by H.R. 4030 meet

Fourth Amendment requirements. The bill does not provide a reasonable suspicion basis for the testing that most of the decided court cases have found<sup>1</sup> is necessary. Although courts have sustained random urinalysis testing of military personnel and prisoners, they have done so where Fourth Amendment rights are diminished, and, also as regards military personnel where substantial drug abuse was shown. Arguably, the Shoemaker court's reasons for testing jockeys would not be inconsistent with the reasons for testing federal employees and Members of Congress and their staffs having access to classified information. However, although Shoemaker sustained regulations for random urinalysis testing, most other courts have supported urinalysis only where there existed reasonable suspicion of drug use. We also point out that we are not aware of any showing that there is a drug problem among the individuals to be tested under the bill.

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

<sup>1</sup>As a general matter, the Supreme Court has found it inherently coercive to give individuals a choice between exercising their constitutional rights or losing their jobs. Uniformed Sanitation Men Assn. Inc. v. Commissioner of Sanitation, 392 U.S. 280, 284-85 (1968); Garrity v. New Jersey, 385 U.S. 493, 496-500 (1967). In both instances, however, the constitutional right involved was the privilege against self-incrimination and not the Fourth Amendment.<sup>2</sup>

---

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

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

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

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

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

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

#### Vagueness of the bill

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

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

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

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

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

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

---

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

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

Benefits and costs

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

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

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

<u>Fiscal year</u>	<u>Cost</u> <u>(in millions)</u>
1987	\$79
1988	\$84
1989	\$89
1990	\$94
1991	\$100

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

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

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

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

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

---

<sup>4</sup>General Accounting Office testimony of Apr. 10, 1985, before the Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs.

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

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

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

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

Sincerely yours,



*for* Charles A. Bowsher  
Comptroller General  
of the United States