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Drug Testing in the Federal Government

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Abstract

When the President's Commission on Organized Crime issued its March 1986 report recommending that federal employees and contractors be subject to drug testing, there was little indication that drug testing would become one of the hottest political and media issues of 1986.

KEYWORDS: crime, government, testing

Drug Testing in the Federal Government

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Introduction

When the President's Commission on Organized Crime issued its March 1986 report recommending that federal employees and contractors be subject to drug testing, there was little indication that drug testing would become one of the hottest political and media issues of 1986. Initial reaction to the drug testing recommendations was critical. It was ridiculed during Congressional hearings. The editorial boards of such diverse newspapers as the *New York Times*, the *Washington Post*, the *Philadelphia Inquirer* and the *Wall Street Journal* all agreed that the drug testing recommendation was bad public policy. Indeed, the issue might have died quietly had it not been for the drug-induced deaths of two prominent athletes in the early summer of 1986 and the national media focus on the cocaine derivative "crack."

An anti-drug surge hit the capital like a tidal wave. Politicians fought to out-do one another in demonstrating their opposition to drug use. Bills were introduced, press conferences were held, and plastic vials were filled with urine. Drug wars soon became Jar Wars.

The Politics of Anti-Drug Legislation

In July, the Democratic leadership of the House of Representatives set enactment of comprehensive anti-drug legislation as its highest priority. At the same time, the Reagan Administration was struggling to wrest control of the anti-drug initiative away from the House. The Administration sought to project the President as a leader on this issue.

Congress tried to identify various methods for reducing drug use. Amid work on increased funding for drug interdiction efforts, anti-drug education programs, and drug treatment facilities, the issue of drug testing of federal employees re-surfaced. Several bills to require drug testing of federal employees were introduced. One would have re-

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quired testing of all employees with access to classified information — well over a million federal employees; another would have required taxpayers to pay for drug tests of members of Congress and their staffs.

Yet, most Democratic members of Congress opposed drug testing. The only bill to require drug testing which passed the House would have required testing of employees in the intelligence community, but even this provision was dropped before final passage of the bill. There was no reference to drug testing in the omnibus anti-drug bill which was enacted into law on October 27, 1986.¹

Republicans, however, were bitterly divided on the issue. In the Administration's search to develop an alternative to the Democratic legislation, early draconian proposals gave way to vague policy announcements — although with new drug testing regulations the pendulum now seems to be sweeping back.

The U.S. Office of Personnel Management (OPM) proposed in late July that drug testing be required of federal employees. Under this proposal, an employee would be summarily dismissed after two positive tests for drug use. OPM urged repeal of the current law which allows an employee to be dismissed only if drug use (or alcohol use or emotional difficulties) impairs on-the-job performance.

The OPM proposal created an uproar. Members of Congress, public employee organizations, and federal manager organizations expressed outrage at the punitive nature of the program and its emphasis on getting drug users off the federal payroll rather than into treatment programs. Within two weeks, the White House had publicly rejected the OPM proposal.

Yet, the Republicans refused to let go of drug testing as a policy option. The White House Domestic Policy Council staff proposed in late August that federal workers in sensitive positions or those suspected of using drugs should be subject to urinalysis. Testing would be required of job applicants and random testing would be done among employees in critical positions, under the staff proposal.

The President's Executive Order

President Reagan took the staff recommendation into account in developing an executive order on drug testing. On September 15, 1986, federal employees in "sensitive" positions were made subject to

1. Omnibus Anti-drug Act of 1986, Pub. L. No. 99-570 (1986).

mandatory drug testing by Executive Order.² The executive order defines "sensitive" positions as: (1) employees in designated critical/sensitive positions; (2) employees who have access to classified information; (3) Presidential appointees; (4) law enforcement officers; and (5) "Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence."³ The President emphasized that his program was not intended to ferret out drug users for disciplinary action, but rather to identify employees who needed help in breaking a drug habit.

On December 1, 1986, the Office of Personnel Management (OPM), in consultation with the Justice Department, issued guidelines to implement the executive order. The guidelines are entitled "Establishing a Drug-Free Federal Workplace." They emphasize discipline rather than rehabilitation. Under the OPM approach, each agency head will be free to decide which groups among the employees in sensitive positions will be tested and whether testing will be random. An employee can be dismissed on the basis of one confirmed positive drug test and an employee who refuses to take a drug test can also be fired.

These regulations are a dangerous precedent. Once an agency head is given the discretion to fire employees for drug use, why should the agency spend money on rehabilitation? The federal government does not have an unqualified go-ahead for its drug testing program, however. Several federal employee organizations have filed suit in the U.S. District Court for the Eastern District of Louisiana seeking an injunction against the executive order.

The same district court decided on November 12, 1986, that a random testing program by the U.S. Customs Service was unconstitutional.⁴ A permanent injunction was issued by the court and the Customs Service was prohibited from conducting random tests of its employees. The Administration has appealed the Customs decision.

Whatever the decision of the district court on the constitutionality of the executive order, the controversy will not be easily resolved.

2. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

3. *Id.*

4. National Treasury Employees Union v. Von Rabb, 649 F. Supp. 380 (E.D. La. 1986).

A Summary of the Subcommittee on Civil Service Study on Drug Testing

The Subcommittee on Civil Service conducted a five-month study on drug testing in the federal government and in June 1986 issued a staff report.⁵ At that time, nearly one agency in five reported that it currently tested or planned to begin testing certain employees or applicants. The agencies are: The Departments of the Army, Navy, and Air Force; components within the Department of Justice; the Federal Aviation Administration in the Department of Transportation; the Secret Service Uniformed Division and U.S. Customs Service within the Department of the Treasury; the Central Intelligence Agency; the National Aeronautics and Space Administration; the Panama Canal Commission; the U.S. Postal Service; the Tennessee Valley Authority; and the Veterans Administration. Three other agencies — the Department of Energy, General Services Administration, and Nuclear Regulatory Commission — are beginning to develop employee drug testing programs.

Several agencies reported that they conduct drug testing only as part of an accident investigation, or where there was probable cause that an employee was using drugs. But other agencies, including the U.S. Customs Service and the military departments, seek to implement wide-scale, random testing, where there is no indication of employee drug abuse. The Customs program has been struck down and it remains to be seen how other agencies' random testing programs will be affected by the executive order or litigation.

The Subcommittee report identified a number of technological and legal issues pertaining to drug testing. A summary follows:

Purpose: Two reasons are generally given to support drug tests. First, for work-site safety and second, to deter off-the-job drug use. But urinalysis, unlike breathalyzer tests for alcohol, cannot determine present drug intoxication, so drug testing will not insure worksite safety. Routine scheduled tests will not deter off-the-job drug use since employees can test negative by avoiding drug use prior to the test. Random testing is intended to work as a deterrent but it violates constitutional protections against unreasonable search and seizure as well as common expectations of privacy.

Cost: A drug testing program can be either accurate or inexpen-

5. See Rep. Patricia Schroeder, Chairwoman, Subcomm. on Civil Service, Comm. on Post Office and Civil Service, Press Release (June 20, 1986).

sive, but not both. While initial screening can be done for about \$15 per sample, confirmatory testing by state of the art technology can raise the cost to about \$100 per drug per sample.

Authority: Until the December 1, 1986 issuance of drug testing guidelines, nothing in the Federal Personnel Manual or civil service laws authorized mandatory drug testing, any more than it authorized mandatory testing for venereal disease, pregnancy, cancer, or contagious diseases like hepatitis. Rather, the emphasis is on rehabilitation of employees who abuse drugs or alcohol. The Federal Personnel Manual provides guidance to Federal agencies in establishing alcoholism and drug abuse programs that deal with employees' health in relation to their work.⁶

Agencies may require employees to undergo fitness-for-duty examinations when there is a question about the employee's physical or mental ability to perform the job. Drug testing may be required as part of this examination if drug or alcohol abuse is suspected.

The Department of Defense on April 8, 1985 issued a directive that limits drug testing to employees in specifically designated positions, but does allow random testing.⁷ The Department of Defense is reviewing its directive in light of the issuance of the President's Executive Order and recent court decisions.

Timing: Urinalysis can determine recent use of such drugs as marijuana, cocaine, amphetamines, barbiturates, and heroin. Marijuana residues stay in the body for up to 30 days; residues of other drugs stay in the body only 2 to 5 days. If the urine sample is not taken within 48 hours after drug use, all traces of the drug may have been excreted and subsequent urinalysis will not reveal drug use. Thus, to thwart a scheduled urinalysis test, a drug user could simply refrain from using drugs for a short time prior to the test. Further, since most drugs take from six to eight hours to go from ingestion to excretion, a urine sample taken an hour after an individual had taken drugs is likely to test negative.

Errors: The initial drug screening tests have error rates ranging from 5 to 20 percent. Test results can be affected by many factors, including over-the-counter medications and foods such as the poppy seed buns on fast food hamburgers. Quality control and chain of cus-

6. FEDERAL PERSONNEL MANUAL ch. 792 (Federal Employees Health and Counseling Programs).

7. Department of Defense Directive 1010.9 (April 8, 1985) (DOD Civilian Employees Drug Abuse Testing Program).

tody problems also produce false positives (samples incorrectly identified as containing drugs). False positive errors rates of up to 66% were identified in a study by the Centers for Disease Control. The Defense Department had to drop disciplinary proceedings against thousands of military personnel after sloppy quality control and chain of custody errors led a blue-ribbon panel to conclude that 97% of urinalysis tests at Ft. Meade were "not scientifically or legally supportable."⁸

Legal Issues: Courts are now considering many drug testing cases. They exist in public employment, private sector employment, and educational programs. In public employee cases, three main issues have been identified:

(1) *Search and seizure* — the fourth amendment to the U.S. Constitution protects individuals against unreasonable searches and seizures. Recent court decisions have upheld the assertion that the government's taking of a urine sample is an unreasonable search or seizure within the meaning of the fourth amendment.⁹ Courts have also required some reasonable suspicion of drug use before an individual government employee can be required to undergo urinalysis testing.¹⁰

(2) *Nexus* — under the merit principles of the civil service, federal employees can only be disciplined for off-duty conduct if it adversely affects on-duty job performance, and demonstration of a clear "nexus" or connection is required.¹¹ The Merit Systems Protection Board decided in 1981 that an employee's off-duty use of marijuana, while unlawful, did not have the requisite nexus with the efficiency of the service to support the agency's decision to remove the employee.¹² Yet, the Second Circuit Court of Appeal has presumed a nexus between off-duty drug use and certain critical jobs (the employee was an air traffic controller).¹³ The court did not provide standards for determining what those jobs are.

8. Washington Post, Apr. 27, 1984, at A21, col. 1.

9. See, e.g., *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985), modified, 809 F.2d 1302 (8th Cir. 1987); *National Treasury Employees Union v. Von Rabb*, 649 F. Supp. 380 (E.D. La. 1986); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. Nov. 13, 1986).

10. *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); *McDonell*, 612 F. Supp. at 1122.

11. 5 U.S.C. § 2302(b)(10) (1982).

12. *Merritt v. Department of Justice*, 6 M.S.P.B. 585 (1981).

13. *Borsari v. FAA*, 699 F.2d 106 (2d Cir. 1983).

(3) *Rehabilitation* — under the Rehabilitation Act of 1973¹⁴ federal agencies cannot discriminate against an individual with a handicapping condition, and alcohol and drug addiction qualify as handicapping conditions. Before taking any disciplinary action for performance problems, an agency must offer rehabilitative assistance (including sick leave to participate in a rehabilitation program) to accommodate an employee with a drug or alcohol problem.¹⁵ Thus, if a drug user were identified through a urinalysis program, an agency might be required to offer rehabilitative assistance and immediate removal would be precluded.

Conclusion

Prove yourself human! That's the underlying theme of drug testing programs. It seeks to thwart our constitutional protections. As public policy, massive drug testing programs funnel millions of dollars into the drug testing business and diverts funds away from law enforcement and drug interdiction efforts. Furthermore, since proper drug testing procedure requires that an observer watch as a urine sample is collected, testing programs violate our common expectations of privacy in performing bodily functions.

Drug testing is a short-sighted response to our frustration at being unable to get drugs out of our schools, workplaces, and homes. As in all controversial, emotional issues, we have to make sure that the solution is not worse than the problem.

14. 29 U.S.C. § 791 (1982).

15. *Ruzek v. G.S.A.*, 7 M.S.P.B. 437 (1981).