

CONFIDENTIAL - ADMINISTRATIVE

TAB C

DRAFT/TEllenbogen:mmm
4/12/69

Dear Mr. Mayo:

This is in response to the request of Mr. James M. Frey, Deputy
Office of
Director, A Legislative Reference, for an expression of our views
on the Justice Department's draft bill "To protect the public health
and safety by amending the narcotic, marihuana and depressant and
stimulant drug laws, and for other purposes", to be known as the
"Controlled Dangerous Substances Act of 1969".

We have now informally obtained, from the Justice Department, at staff
level, a revised draft and shall therefore base this report on that
draft. There appear to be few substantive differences between
them, however.

This bill is designed to establish a single comprehensive code for the
control of narcotics, marihuana, depressant, and stimulant drugs (includ-
ing hallucinogenic drugs) and, eventually, such other substances (whether
or not technically "drugs") as are found by the Attorney General to
have a "potential for abuse". The bill is based on the commerce and
treaty powers of the United States, but it also covers activities that
are exclusively intrastate. It would take the place of the different
laws now on the books for the regulation and suppression of the production
and traffic in abusable drugs, particularly the Harrison Act of 1914
and related legislation, the Narcotic Drugs Import and Export Act, the
Narcotics Manufacturing Act of 1960, the Opium Poppy Control Act, the
Marihuana Tax Act of 1937, and so much of the Drug Abuse Control Amend-
ments of 1965 to the Federal Food, Drug, and Cosmetic Act as relates to

so-called depressant and stimulant drugs. (The Narcotic Addict Rehabilitation Act of 1966 would not be affected.)

In view of the detailed summary furnished to your Bureau by the Department of Justice we shall not burden this report with a summary of the provisions of the bill except insofar as necessary to a discussion of the issues raised in this letter.

We understand that the bill was originally prepared in the Justice Department, under the preceding Administration, for the consideration of the National Commission on Reform of Federal Criminal Laws, which had been requested by President Johnson, in his crime message of 1968, to review "all of our narcotics and drug abuse laws, and to recommend a balanced and consistent approach to this problem as soon as possible." Such an approach is, of course, desirable, and a single, comprehensive code, if soundly conceived, is a logical way to achieve it.

There is, however, some question as to the timeliness of this bill insofar as the vast range of psychotropic nonnarcotic drugs is concerned, in view of the fact that a new multilateral treaty (protocol) on such drugs, with control standards that might differ in significant aspects from those of the Single Convention on Narcotic Drugs, is in process of development under the aegis of the U.N. Commission on Narcotic Drugs; on that aspect we assume that the Department of State is being consulted.

Our primary focus in reviewing this bill has been on the regulatory, scientific, and educational aspects of this bill, as these relate to the respective missions of the Justice Department and this Department and

to the safeguarding and promotion of the public health and the health behavioral and A sciences, rather than on the penal aspects, although this report does offer some comment on the subject of penalties.

Regulation and licensing.

I. We have serious reservations about the provisions of the draft bill that would depart from the basic mission of the Justice Department as a law enforcement agency, in that the bill would (1) authorize that department to determine medical and scientific questions appropriate to regulation rather than law enforcement, (2) vest excessive control of the practice of medicine and medical research in the Federal Government, and particularly in a law enforcement agency, and (3) lay a statutory basis for thrusting the Justice Department comprehensively into the field of research and education related to these drugs and thereby duplicate the responsibilities of this Department in that field.

1. Regulatory functions in general. We are aware that, insofar as regulatory authority is concerned, the bill would build upon certain transfers of functions made last year by Reorganization Plan No. 1 of 1968. We believe, however, that consideration of the present draft bill, with its sweeping reform of existing law, is an appropriate occasion to reexamine the soundness of that reorganization insofar as it transferred to the Justice Department the regulatory functions, as distinguished from law enforcement functions, that were previously vested in this Department and the Treasury Department with respect to these drugs. A perusal of the Message of President Johnson in transmitting the reorganization plan to Congress makes clear that the objective in proposing the Plan was to improve the aspect of law enforcement--in the words of the Message, "to bring to the American people the most

efficient and effective Federal enforcement machinery that we can devise"--and to that end place the program in an agency primarily concerned with Federal law enforcement. There is no indication in the Message that adequate consideration was given to the implications of also transferring quasi-legislative regulatory and related scientific functions in this field to a law enforcement agency at the same time, a transfer contrary to the recommendations of the President's Advisory Commission on Narcotic and Drug Abuse (Prettyman Commission). (Final Report, November 1963).

The Prettyman Commission--composed of highly qualified members from the fields of medicine, law, and law enforcement (including penology)--made an exhaustive study of the field of drug abuse and its control and gave strong impetus to the subsequent enactment of the Drug Abuse Control Amendments of 1965 to the Food and Drug Act, which filled a serious gap by enacting a special regime to guard against diversion of so-called "dangerous drugs", i.e., barbiturates, amphetamines, hallucinogens, and other psychotoxic drugs, from legitimate channels. In its chapter on control of the drug traffic, the Commission's report drew a sharp distinction between regulatory functions in this field on the one hand and law enforcement (including investigation and prosecution) on the other. It recommended that there be centered in this Department all regulatory (including licensing) functions, such as regulation of the legitimate importation, exportation, manufacture, sale, and other

transfer of narcotics, marihuana, and other "dangerous drugs", where these functions could be carried out in the context of our responsibilities for drug regulation generally, for promotion of the public health, for research and education in the health and social science fields, for prevention and control of juvenile delinquency, etc. And it recommended on the other hand that there be centered in the Department of Justice the responsibility for the investigation of the illicit manufacture, sale, other distribution, or possession of these drugs, where that responsibility could be exercised within the framework of that department's total law enforcement mission. See pages 31-37, and recommendations 7-10 on pages 6 and 7, of the Commission's final report.

The Johnson reorganization plan, as above noted, went counter to the Prettyman Commission's organizational recommendations. Had it done so by assigning both regulatory and investigative (as distinguished from prosecutorial) responsibility to this Department, it would at least have been consonant with the fact that investigation is generally treated as an incident to regulation, as is, for example, true in the case of other drugs and articles subject to the Food and Drug Act and in the case of other regulatory laws administered by this Department. On the other hand, to treat regulation as merely incidental to investigation, as did the Johnson plan in effect, is anomalous and not supported by precedent, whereas the Prettyman Commission's two pronged approach was supportable in the light of the fact that the types of undercover investigative

technique largely needed to control the illicit traffic in certain of the drugs here involved, especially narcotics, were better suited to the Justice Department's mission and its special competence than this Department's.

When the Johnson Reorganization Plan was under consideration on the floor of the House, reservations were expressed, among other things, about the effect of the plan in transferring to the Department of Justice not merely law enforcement but regulatory functions, and in particular the function of administratively adding additional drugs to those controlled drugs specified in the law itself. Congressman Blatnik, who was the floor manager in support of letting the plan go into effect, agreed that if the plan became effective it would then be appropriate, and indeed desirable, to reconsider that aspect before the appropriate substantive legislative committee. It was not possible, of course, to amend the plan in Congress; it had to be voted either up or down. The vote was a close one, 200 to 190, so that a shift of 6 votes would have defeated the plan. It is a fair inference, therefore, that the plan would not have been permitted to become effective if it had not been with the understanding on the part of members who had such reservations that this aspect of the plan was not to be considered foreclosed or prejudiced by the vote.

The present draft bill would not only perpetuate and put on a statutory basis the situation created by the Johnson reorganization plan but would greatly broaden the regulatory authority conferred by the plan on the Justice Department. The principal means by which it would do so are the following:

- a. The coverage of the Act would be extended, beyond the drugs listed in the bill, to any substance which the Attorney General hereafter finds to have a "potential for abuse". The virtually unlimited range of possible coverage indicated by this test is suggested by the fact that the draftsman found it necessary to specifically exclude spirits, wine, malt beverages, and tobacco.
- b. The degree of regulatory control--including the establishment of manufacturing quotas and import and export control--and licensure control and the penalties with respect to a substance would depend on which, if any, of four schedules the substance is listed in. While at the outset these schedules would be set forth in the statute, the Attorney General would be authorized to add substances to any schedule or reclassify substances as between schedules. For example, such a change could, by placing a substance in Schedule I or II, subject a drug to production quotas set by the Attorney General for the country as a whole and on individual manufacturers, which under present law may be done only in the case of "basic narcotics"; in the case of Schedule I substances, it would also, as discussed below, in effect give the Attorney General (through broad licensure control) veto power over medical research (both on humans and animals) and over medical practice. The bill, to be sure, in broad terms lists a number of factors which the Attorney General is to consider in deciding whether to subject a drug or substance to

regulatory control, and requires that his classification of the substance to one of the four statutory schedules be based on specified findings applicable to the schedule he selects. The factors and findings listed, however, are broad and are in our view primarily matters within the special competence of medical, scientific, or public health experts rather than matters of law enforcement. (The one clear exception is the requirement that consideration be given to treaty obligations of the United States.) 1/ The bill calls for the appointment

1/ The listed factors, other than the question of treaty obligation, are "actual or relative potential of abuse"; state of current scientific knowledge, including pharmacological effect if known; history and current pattern of abuse; scope, duration, and significance of abuse; the risk, if any, to public health; the substance's "psychic or physiological dependence liability"; and whether the substance is an immediate precursor of an already controlled substance under the bill. The bill states that after considering these factors the Attorney General shall "make findings with respect thereto" and issue an order controlling the substance "if he finds that the substance has a potential for abuse or that control is required by United States obligations under international treaties *** ." (Emphasis ours) In a case in which a control decision rests on treaty obligation, the other 8 factors which the Attorney must consider would seem relevant, not to the basic question of control, but only, if at all, to selection of

of an advisory committee of experts by the Attorney General to advise him on classification of substances to the four schedules but this committee's advice is, of course, not binding. Nor would the Attorney General be required to even consult with this Department, although the bill provides that the advisory committee shall be advised by two consultants designated by the Secretary of HEW. (Under existing law, the technical advice of this Department must be obtained before a (synthetic) drug may be added to the list of "opiates" coming within the definition of narcotic drugs (26 U.S.C. 4731(g)).

1/ -- Continued

a particular control schedule for listing the substance; yet with respect to each schedule the bill separately lists requisite findings (e.g., high potential for abuse; no accepted medical use in the U.S.; a lack of accepted safety for use under medical supervision), but none of these findings refers to treaty obligations even though such obligations might in effect themselves create a need for inclusion in a particular schedule. Incidentally, if control is desired only because a substance is an "immediate precursor" of an already controlled substance, it is not clear how the precursor could be fitted into a particular schedule in view of the required findings for each schedule, which do not seem to fit such cases.

For the above-stated reason, among others, we recommend that regulatory functions (including licensure) under the bill be vested by the bill in this Department as recommended by the Prettyman Commission. Alternatively, the bill could be revised to authorize and direct the Attorney General to delegate such functions, including the appointment and use of an advisory committee, to this Department.

2. Control over medical practice and research.

a. The bill would require every person who manufactures, distributes, or dispenses ^{2/} a substance covered by the bill--regardless of the particular schedule in which it is listed, even in the case of the Schedule IV drugs, which are all over-the-counter drugs, to obtain an annual license. Dispensing is broadly defined to include, apparently, direct administration, as well as other "dispensing" by a physician to a human or animal "patient".

^{2/} The term "practitioner" includes physicians, dentists, veterinarians, scientific researchers, pharmacies, hospitals, or other persons licensed or permitted under applicable law to distribute (i.e., "deliver"), dispense, conduct research with respect to, or administer a controlled dangerous substance in the course of professional practice or research. The term "dispense" is defined as meaning "to deliver a controlled dangerous substance to the ultimate user or human research subject by or pursuant to the lawful order of a practitioner *** ." To "deliver" means "the actual, constructive, or attempted transfer of a controlled

In the case of Schedule I substances--i.e., substances which, as found by the Attorney General, have a high potential for abuse, have no accepted medical use in the United States, and have no "accepted safety" for use under medical supervision--a medical practitioner or researcher would have to meet all the requirements of a distributor applying for a license for distribution of such drugs; such a license would have to be denied if the Attorney General determined licensure to be "inconsistent with the public interest". Secondly, if the practitioner wishes to conduct research with such substances, as would presumably be true in all such cases, he would have to be referred to this Department for advice, and the Secretary would have to give prompt advice, to the Attorney General concerning the qualifications of the practitioner for that purpose, taking into consideration the qualifications of the researcher, the substances to be used, the place where research

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dangerous substance *** ." In the context of the bill, the term "dispense" appears to include direct administration to an "ultimate user", and is intended to include "dispensing" to or for animals.

will be performed, and the design of the research protocol. Such advice, however, in no way would be binding upon the Attorney General; rather, the latter would be authorized to issue a license to the researcher only if he found that the research would be "consistent with the public health and safety." Even then, moreover, as above noted, he would have to deny the license if he found that issuance would be "inconsistent with the public interest".

The bill further provides that the Attorney General "may" authorize persons licensed to engage in research on drug control under the bill to withhold the names and other identification characteristics of persons who are the subjects of such research, in which event the researcher would be immune from being required to disclose such identity in any Federal, State, or other proceeding. Finally, the bill provides that the Attorney General "may" authorize the possession and distribution of such drugs by persons engaged in research, in which case the individual would be exempt from State or Federal prosecution of such substances to the extent authorized by the Attorney General.

We are strongly opposed to a requirement of Federal licensing of physicians and researchers, let alone licensing by a Federal law enforcement agency. If such licensure were to be required, it seems obvious that this should be part of the mission of a health agency. We would not object to a requirement of registration, as of right, of physicians, researchers, and other practitioners authorized under State law to conduct such

research. [¶] We do now, under the new-drug provisions of the Food and Drug Act, have pervasive control over research on drugs which we have not yet approved for the market, or which are the subject of research to determine their safety and effectiveness for use under conditions for which they have not yet been so approved. Prior to such approval, we cannot authorize research use of the drug except by experts qualified by scientific training and experience, and then only if the research project meets specified statutory conditions (including record keeping and reports), plus such other conditions "relating to the protection of the public health" as we consider appropriate. In this connection, the names and qualifications of the investigators and the research protocol must be submitted to and are subject to review by us. (We would not authorize use of research drugs even by a highly qualified investigator if, clearly, he cannot be trusted to pursue the research with integrity.) And the use of the drug for research may be terminated by us at any time if we find in the light of our review or of the reports which we require that it would not be safe [¶] to continue the research or that there is no genuine research purpose. / We, of course, exercise most pervasive control over the use of drugs for research on humans, but we have broad authority to impose limitations and conditions on animal research to the extent appropriate for public health protection, and these may include requirements to guard against diversion of psychotropic drugs liable to abuse. In this connection, if additional controls are

desired, these could easily be added by amendment to the Food and Drug Act. For example, it would be appropriate to extend our new-drug section to narcotic and other "dangerous" drugs that have wholly intra-state origin. In no event do we believe that the freedom of bona fide research should be entrusted to a law enforcement agency.

Moreover, research data, including where necessary the names of the subjects of research, should be made available to us under an assurance of nondisclosure, and any sanctions available under the Food and Drug Act with respect to such research should not be blocked by immunity conferred by a law enforcement agency other than this Department.

b. In the case of substances on Schedules other than Schedule I, whether they be used for research, treatment, or dispensing, the bill requires the granting of an annual license to the practitioner if he is authorized to dispense the substance under the law of the State in which he practices. Such a license, however, could be denied, suspended, or revoked by the Attorney General upon a finding that the license has materially falsified any application filed pursuant to the bill, or has been convicted of a felony related to any substance controlled under the bill, or is no longer authorized by State law to engage in the activity involved.

It has been argued that in view of these requirements licensure in such cases amounts to no more than registration. This is not entirely correct, however, since even if the granting of a license in such cases were a purely ministerial act, the applicant would still have to refrain from

using such drugs in his practice pending any administrative delay in
and verification in
the review/of his application and/the granting of the license or, after
revocation, pending the granting of an application for reinstatement.

Our objection therefore holds even in such cases. If registration pure
and simple is desired, then registration should be provided for and
not licensure.

c. With respect to manufacturers and commercial distributors of
drugs controlled under the bill, we have no objection to a licensure
requirement either for narcotic or nonnarcotic drugs on Schedule I or II.
Here again, however, we question the vesting of such authority with its
broad discretion to grant or withhold a license in the "public interest"
in a law enforcement rather than a health agency. As to substances
other than those on Schedules I and II, it is not clear why registration,
which is now sufficient for manufacturers and wholesalers of depressant
or stimulant drugs, should not suffice for this bill except if and when
licensure is
/ required by treaty.

3. Manufacturing quotas. The bill (§306) provides that the Attorney
General shall determine the total quantity of, and establish production
quotas for, each substance controlled under Schedule I or II, to be
manufactured each calendar year, limiting these quantities and quotas
to the quantity necessary for the estimated medical, scientific, and
industrial needs of the United States, for lawful export requirements,
and for the establishment and maintenance of reserve stocks. Under

existing law, such quotas may be established only for basic narcotic drugs listed in or pursuant to the Narcotics Manufacturing Act of 1960. The Prettyman Commission's recommendations would entrust such regulatory functions to this Department. Even if the bill were to leave the over-all function to the Attorney General, we believe that the determination of total needs for such drugs for medical and scientific purposes should be the responsibility of this Department.

Under existing law (§302 of the Public Health Service Act) this Department is required to make studies and investigations as to the quantities of crude opium, cocoa leaves, and their salts, derivatives, and preparations, together with reserves thereof, necessary to supply the normal and emergency medicinal and scientific requirements of the United States and to advise the Secretary of the Treasury each year of the results of these investigations so as to enable the Secretary of Treasury to determine the amounts of these articles that should be permitted to be imported into the country under the Narcotic Drug Export and Import Act. (The functions of the Secretary of Treasury in this respect were presumably transferred to the Attorney General under Reorganization Plan No. 1 of 1968).

While the bill would not repeal this provision of the Public Health Service Act, we believe that if the over-all function of quota setting is left to the Attorney General, the bill should amend §302 of the Public Health Service Act so as to make it applicable to all Schedule I and II substances and require the Attorney General's determination of

total needs, insofar as medical and scientific needs are concerned, to be based on the Secretary's certificate under §302.

4. Exports and imports. The draft bill would forbid the importation into the United States of any substance listed in Schedule I or II of the bill, or of any narcotic drug in whatever Schedule listed, save pursuant to such exceptions as the Attorney General may by regulation provide as being necessary for medical, scientific, or other legitimate purposes. Nonnarcotic controlled substances could be imported for medical and other legitimate uses only, pursuant to such notification as the Attorney General might require.

With respect to narcotic drugs listed in Schedules I, II, and III the bill would forbid exportation to a country which is a party to the Single Convention on Narcotic Drugs, 1954, with certain exceptions and except as authorized by the Attorney General.

As to narcotics, requirements of this kind seem to be necessary in order to comply with treaty obligations, although, as above noted, the properly Prettyman Commission/recommended that such functions be vested in this Department.

With respect to the exportation of non-narcotic drugs controlled under the bill and listed in Schedule I or II, the bill would require an export permit by the Attorney General in each instance and would condition the granting of that permit on several findings, including a finding that the country of destination has instituted and maintains adequate import control and that the substance is to be applied

exclusively for medical, scientific, or other legitimate uses within that country. In the case of other substances controlled under the bill, an export permit would not be required but certain documentary evidence as to the laws of the country of destination and the parties to the shipment and the means of shipment would have to be provided in advance to the Attorney General. We believe that the question whether this function should be vested in the Attorney General or in another Federal agency should hinge on whatever decision is made with respect to exports and imports generally in this field.

We should like to add, however, that we believe that it is in the national interest, and in the interest of keeping down the cost of drugs and medical care, to hold Federal requirements and conditions in this field to the minimum required by treaty or otherwise necessary to reduce or eliminate the traffic in these drugs for purposes other than legitimate medical, scientific, or industrial purposes.

II. Education and Research

We have serious reservations about §602 of the draft bill which, in its present form, would appear to confer upon the Attorney General such a broad charter in the field of research and education relating to drug abuse--its causes, prevention, and social effects--as to furnish a potential basis for largely duplicating the massive educational and research efforts that are now going on or planned in this Department, especially through the National Institute of Mental Health.

We recognize, of course, that certain research, survey, training, and informational activities are necessary or appropriate to the discharge of responsibilities elsewhere conferred by the bill. In the field of research, for example, if the function of adding new substances to the Schedules of the bill, reclassifying substances among the Schedules, and removing substances from the Schedules, remains vested in the Attorney General, he will need such research support authority as is required to carry out that function. Similarly, in exercising his law enforcement functions, it will be necessary for the Attorney General to conduct or procure extramural or intramural laboratory analyses and identification of suspect contraband substances. Again, studies looking to the improvement of detection and law enforcement techniques in this field would obviously be appropriate and desirable. As above noted, however, the phrasing of the bill--for example, §602(b) which would authorize the Attorney General

to enter into contracts "for the purpose of conducting "research, demonstrations, or special projects which bear directly on misuse and abuse of controlled dangerous substances"/does not appear so limited. If it is intended to utilize the research authority conferred by the bill only for such research as is necessary or appropriate to the carrying out of the regulatory, licensure, and law enforcement functions under the bill, there is no need for an express grant of these functions since they would be necessarily implied, as they have hitherto been, in the functions in aid of which the research is to be conducted. If much broader research authority is to be sought, as seems to be suggested in the bill/^{and}by some of the explanatory language in the Johnson Budget for FY 1970 (Appendix, p. 668), such duplication of our responsibilities in a law enforcement setting would, we think, be unwise and not in the interest of economy and efficiency. We think, therefore, that the research provisions of the bill should be deleted or at least clarified so as to preclude misunderstanding.

We recognize that in the field of public information a hard and fast line between activities closely related to the regulatory and law enforcement functions of the bill and informational activities more broadly conceived cannot and should not be drawn. No doubt, officials of the Justice Department and the Bureau of Narcotics and Drug Abuse engaged in the administration of the Act or its supervision can and do, in addresses

before interested groups, in publications, and through other means, and in training Federal and State law enforcement personnel, make a useful contribution to public understanding of the Bureau's mission and the problems it deals with, and include in that context the latest reliable information on the risks and dangers of drug abuse. However, we do not believe that for such informational activities specific authority, especially as so broadly phrased in the bill, is needed. Moreover, even in the absence of statutory authorizing language, the explanation in the Johnson Budget for FY 1970 (see Appendix, p. 668) appears to envision a rather broad-gauged educational and informational program on drug abuse which would parallel ongoing or planned activities of this Department. We, of course, cannot divest ourselves of responsibility for health education in this area. And we believe that such activities can be more effective when presented under medical, health, or educational auspices. We therefore suggest elimination of the provisions for an educational program from the bill, except for the specific and authorizations for the training of Federal/ State law enforcement personnel (§§ 602(a)(6) and 603(a)(3)). This should be without prejudice to the consideration of informational activities in the annual budget.

III. Penalties.

We believe that the penalty provisions of the bill, while falling short of the reform of drug penalties under consideration by the National

Commission on the Reform of Federal Criminal Laws, point somewhat in that direction and away from the excessively punitive approach now imbedded in the narcotic and marihuana laws. In this connection, we note particularly that a first or second offense of possessing a narcotic for one's own use would be reduced to a misdemeanor, that the draft would, in the case of a first offense of trafficking, eliminate the statutory minimum sentences of imprisonment that now apply under the narcotic and marihuana laws, and that in the case of a first or second narcotic offense, the bill would restore the possibility of parole under 18 U.S.C. 4202 which is now foreclosed in the case of ^{nonpossessory} narcotic violations even for a first offense. We suggest that the bill not altogether preclude such parole in the case of a third offense, at least in the case of non-narcotic offenses to which that prohibition does not now apply and in the case of addicts. No such disqualification was imposed when Congress last year imposed increased penalties for violations involving stimulant or depressant drugs.

We believe that the bill's addition of a "special parole term" in the case of trafficking felonies is appropriate in that, if we understand it correctly, it assures that the prisoner will not at the end of his incarceration be discharged without supervision for a period to guard against the heavy risk of his return to a life of crime. We suggest, however, that the precise application of the special parole term, and its

relationship to regular parole under 18 U.S.C. 4202, be clarified.

We are also pleased to note that the draft bill, in the case of a first offense of unauthorized possession of a controlled drug for one's own use, extends to all controlled drugs the concept of the recently enacted Public Law 90-639 (amending the penalties applicable to depressant or stimulant drugs) which, in the case of a first offense of possession for one's own use, permits the court to place the defendant on probation for up to one year and, if he complies with the terms of probation, provides for cancellation of the conviction. The draft bill technically improves upon the terms of that provision. We suggest, however, that the bill be amended to make clear, _____ as we understand is intended, that discharge of the defendant and dismissal of the proceedings against him in such a case shall not be deemed a conviction for any purpose. This change would _____ resolve any doubt that a person who has thus been discharged and had the proceedings against him dismissed under that provision of the bill may truthfully state, in answer to a question in an application for employment, admission to an educational institution, or the like, that he has never been convicted of a crime.

Finally, we wonder to what extent consideration was given to the proposal before the National Commission for the Reform of Federal Criminal Laws that in a prosecution for possession for one's own use it shall be a defense, to be proved by a preponderance of the evidence, that the possessor was dependent on the use of the drug to a degree which deprived him of

substantial capacity to refrain from its use. In such cases, it seems questionable that a criminal conviction would serve any substantial corrective, deterrent, or other social purpose.

IV. Coverage of the Bill.

As noted at the outset of this report, the bill has virtually unlimited coverage in that it would permit the Attorney General to control any substance which he determines to have a "potential for abuse," except distilled spirits, wine, or malt beverages and tobacco. Such breadth of coverage, we believe, is greater than anything necessary to carry out the purpose of the bill. In this connection, we invite attention to the definition of "depressant or stimulant drug" in §201(v) of the Food and Drug Act, and more particularly clause (3) thereof, which refers to any drug that "contains any quantity of a substance which the [Attorney General], after investigation, has found to have *** a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect". Another possible guide may be found in §2(a) of Annex A to the U. N. Secretary General's Report on the Control of Psychotropic Drugs Not Under International Control (E/CM . 7/519), which refers to a substance that, "because of its capacity to produce stimulation, depression, hallucinations, or disturbances in perception or thinking, is (i) dependence producing, and (ii) liable to abuse constituting a public health and social problem". To this immediate precursors of such substances could be added.

We also suggest that consideration be given to the establishment of separate schedules for narcotics (as defined in the bill) on the one hand and other psychotropic drugs on the other instead of listing both kinds on the same schedules. The theory that, if the standards on which a particular schedule is based apply to particular drugs of both kinds, they should be on the same schedule breaks down in the operative parts of the bill. Narcotic drugs are singled out for special treatment in the import and export provisions of the bill, presumably because of treaty obligations, and in the penalty provisions because of the major involvement of organized crime in the narcotic traffic.

V. Interdepartmental Coordination.

Regardless of the ultimate form of this bill, mutual coordination and cooperation between the Department of Justice and this Department and other agencies concerned is necessary and desirable. To this end, after consulting the Attorney General, Dr. Stanley F. Yolles, Director of the National Institute of Mental Health, has been designated to arrange an interagency committee on research in this field. We think, however, that a broader coordinating mechanism is also desirable and should be established by executive action. The Interdepartmental Committee on Narcotics, established by Executive Order No. 10302 issued on November 5, 1951 (21 Chap. 6 U.S.C., ⁶ (note)), is dormant but could serve as a point of departure for establishment of a new interagency committee concerned with all abuseable drugs, not merely narcotics and marihuana.

We are enclosing herewith a staff memorandum raising additional questions of a more technical or specialized character that we suggest be taken into account in the further consideration of this bill.

Sincerely,

Robert H. Finch
Secretary

Enclosure

DRAFT
TEellenbogen:dfh
4/13/69

STAFF MEMORANDUM ON JUSTICE DEPARTMENT DRAFT
"CONTROLLED DANGEROUS SUBSTANCES ACT OF 1969"

Note: This memorandum does not cover any point discussed in the Secretary's letter to the Bureau of the Budget, but merely adds additional points primarily of a technical character.

1. Use of Term "Controlled Dangerous Substance". The short title of the draft bill is "Controlled Dangerous Substances Act of 1969". The term "controlled dangerous substance" is a key term in the bill and denotes those substances which at a given time are listed on one of the four schedules of the bill (either as the result of being listed in the bill itself or as the result of later regulatory action by the Attorney General) and thus bring into play the various regulatory provisions (including licensing requirements) of the bill and the application of criminal penalties. The term "dangerous drugs", which was used by the Prettyman Commission to refer to psychotropic (or, in its parlance, psychotoxic) drugs other than narcotics and marihuana, and alarmist is hyperbolic, as applied to many substances that would be under control under this bill either at the outset or by later action of the Attorney General. It would seem that at this date there is no longer any need for such a term of alarm. It is suggested that the short title of the bill be "Drug Abuse Control Act" or "Drug Abuse Control Code (preferably without designating the year of enactment), and that the term used in the body of the bill be "controlled substance" instead of "controlled dangerous substance".

2. Findings and Declaration of Policy (§101). The first paragraph of §101 would have the Congress find and declare that the "illegal importation, manufacture, distribution, possession and improper use" of controlled dangerous substances have a "substantial and detrimental effect on the health and general welfare of the American people".

It is suggested that this be changed to read along the following lines:

" *** that the misuse and abuse^{of} narcotic and other psychotropic drugs and substances, many of which are highly useful drugs in the armamentarium of the healing professions, have a substantial and detrimental effect on the health and general welfare of the American people, making necessary special provisions governing the importation, manufacture, distribution, and possession of such substances".

semantic

This would avoid the^{problem of conditioning}the establishment of controls for such substances on the illegality of activities many of which only the bill itself would make illegal.

Drug

3. Requirement that New-^A Applicant Submit Abuse Potential Information to Justice Department. Section 201(c) of the bill provides that, "where applicable", a manufacturer filing a new-drug application under the Food and Drug Act for a drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system "submit information on the abuse potential of the drug" to the Justice Department's Bureau of Narcotics and Dangerous Drugs for review by the Scientific Advisory Committee

prior to its advising the Attorney General whether or not to control the drug under the bill. This requirement would impose an intolerable burden not only on the manufacturer but on the advisory committee.

There is scarcely a drug in the Pharmacopoeia which cannot produce mental confusion, delirium, hallucinations, etc., in a few susceptible individuals or in many individuals in high doses. Steroids, digitalis preparations, anti-hypertensives, antihistamines, and many other well accepted therapeutic agents may all be said to have a "stimulant, depressant, or hallucinogenic effect on the central nervous system."

This requirement would in effect create a situation in which two departments would be reviewing new-drug applications, a purely technical and ~~minim~~ scientific function. The abuse potential of the drug would moreover be one of the matters with which this Department would have to concern itself in any event in considering a new drug application. This kind of duplication inherent in the draft bill underscores the point made in the Secretary's letter as to the appropriate place for lodgment of the function of classifying substances to and among the schedules of the bill.

4. Statutory Listing of Substances in the Schedules. The bill contains four schedules and lists a number of specific drugs, or preparations, in each schedule, but would empower the Attorney General to add ^{substances to the} ~~substances to the~~ ^{listed substances} ~~substances to the~~ schedules, remove ~~from the schedules~~ ^{from the schedules}, or reschedule substances.

The summary received by us with the draft bill states:

"Prior to the final passage of this legislation, the Bureau's scientific experts and its Advisory Committee should review this proposed list and adopt a final series of substances to be included in the statutory draft. There are a few control problems which remain open, e.g. what to do with combination drugs. Presently we are waiting for the National Academy of Sciences to set up a proposed method of control. The issue with respect to specific substances is not as important as a review of the overall statutory scheme contained in Title II."
(Emphasis ours)

It may be that this statement in the summary is out of date. It would seem incongruous to submit to Congress a bill with proposed statutory schedules but with the statement, in effect, that the content of the schedules is still under review and that a final version will be supplied to Congress prior to final Congressional action on the bill. It seems inadvisable to submit the bill to Congress until the Administration is reasonably satisfied that the version submitted should be enacted. Our own experts have raised questions about some of the content of the schedules, but they have not as yet completed their review. So far as we know, there is no emergency or crisis that necessitates precipitate action in submitting such a long-range fundamental restructuring of the law. We understand that, in the event of court decisions adverse to the Government in some of the cases now pending, the Justice Department is prepared with an emergency measure that could quickly be submitted to Congress.

5. Prescriptions--Application of Draft Bill to Non-Prescription Drugs.

Under present law (i.e., §511(f) of the Food and Drug Act) a "depressant or stimulant drug" "may" be exempted from the application of all or part of the special regulatory regime if it is found that such special regulation is not necessary for the protection of the public health. In addition, the Act directs that any depressant or stimulant drug be exempted from that regime if either (A) the drug is an over-the-counter rather than a prescription drug under the Food and Drug Act, or (B) it is found that the drug is contained in a compound or mixture which contains other substances (not having a stimulant or depressant effect) in such combination, quantity, proportion, or concentration as to neutralize the habit-forming or abuse potential of the depressant or stimulant ingredient.

certain
The draft bill lists "depressant or stimulant" drugs in Schedule III, paragraphs a. and b.. Paragraph c. attempts to adapt clause (B) of the above mentioned exempting requirement of the Food and Drug Act but makes it permissive rather than mandatory, and makes the authorization flexible by authorizing the Attorney General to exempt such combination drugs from "all or any part" of the bill. It would seem that the present provisions of the Food and Drug Act, bill should follow

mandatory
Secondly, we think that the present exemption of over-the-counter drugs from the application of the control regime to depressant or stimulant drugs should continue. In this connection we question

in general
§309(b) of the bill which provides that, except in emergency situations

prescribed by the Attorney General by regulation, the substances included in Schedule III may be dispensed only on written or oral prescription.

This provision is objectionable on three counts, i.e., that whether such a drug should be subject to a prescription requirement is adequately governed by the Food and Drug Act and Regulations thereunder (particularly §503(b) and 502(f)); that a prescription requirement, which substantially increases the cost of medical care, should be imposed only when a drug can be safely used only under medical supervision; and that exceptions from a prescription requirement should not be granted by any authority other than a public health agency.

, generally,
The bill (§309(a)) requires written prescription for Schedule II drugs--primarily narcotics and marihuana--except "in emergency situations as prescribed by the Attorney General by regulation".

We should have supposed that the emergency exempting authority of the Attorney General was intended only to apply to the question whether the prescription need be in writing, but the summary received with the bill states that, under §309, in "certain emergency situations, the Attorney General may provide by regulation for the dispensing of substances in Schedules II and III without a prescription". It should go without saying that, whether in the case of these or other prescription drugs, if authority to exempt from prescription requirements altogether is to reside anywhere, it should be vested in a health agency, i.e., this Department. Such exempting authority in a non-health agency would be seriously objectionable. The Food and Drug Act now provides in detail

the conditions under which oral prescriptions may be filled or refilled and the safeguards necessary in that connection.

In view of past history, however, we would have no objection to a requirement in the bill for a written prescription for a Schedule II drug, except in emergency situations when authorized by or pursuant to regulation of the Secretary of HEW.

to
6. Saving Provision as Requirements of Food, Drug, and Cosmetic Act.

Section 303(h) of the bill provides that a license granted under the bill does not relieve a licensee of any obligation imposed by the Food, Drug, and Cosmetic Act. We believe that this provision is not adequate and should be replaced by a provision to be inserted in the last title of the bill reading as follows:

"Nothing contained in this Act shall be construed as in any way affecting, modifying, repealing, or superseding the provisions of the Federal Food, Drug, and Cosmetic Act."

7. Statistics. Section 603(a)(4) provides that the Attorney General is authorized to maintain in the Bureau of Narcotics and Dangerous Drugs 1/ a unit for cataloguing, filing, and otherwise utilizing all information and statistics, including records of dangerous substance addicts and other dangerous substance law offenders, which may be received from Federal, State, and local agencies, and may make such information available for Federal, State, and local law enforcement purposes.

1/ In its final report the Prettyman Commission recommended that the then-existing reporting system of the Bureau of Narcotics be worked into the reporting programs of the Federal Bureau of Investigation.

While we have no objection to this provision per se, it should be understood that there should be no authority in the Justice Department to require information identifying individual addicts, patients, or research subjects from treatment or research source.

Whatever is done in the bill about statistical reporting for law enforcement purposes, it would not fully serve the purposes of this Department. As stated in the Prettyman Commission's report, only "a Federal health agency can possibly promote the full cooperation of physicians, hospitals and State and local health and welfare agencies" in making the necessary disclosures. The Commission therefore recommended that the Secretary of HEW establish a national reporting system "to collect, collate, and analyze data on all forms of narcotic and drug abuse so as to obtain an accurate assessment of the problem. This should be set up on a cooperative basis with Federal, State, municipal and private agencies participating." The system, the Report states, would help to identify the drug abuser, furnish as well as basic social and demographic information, record the nature and cause of drug abuse, and indicate any criminal history, and ^{that in order to achieve} it is full cooperation with the system "essential that the identity of the individual be kept confidential." We believe that it would be appropriate to add specific provisions to the bill for this purpose.

8. Administrative Inspection Warrants. The bill (§703) provides a procedure for obtaining judicially issued administrative inspection warrants on application of the Attorney-General, in order to comply with the Constitutional requirements of the Fourth Amendment, ^{as interpreted by the} ~~read into~~ Supreme Court the Fourteenth Amendment in the Camara and See cases. We commented at staff level some time ago upon a Justice Department draft bill to provide a procedure for issuance of administrative inspection warrants by courts across-the-board in any program in which administrative ^{authorized or} inspection is ~~required~~. We believe that it would be undesirable to insert provisions on this subject in one regulatory statute alone, thereby creating the possibility, if not likelihood, that either such provisions will be enacted on a piecemeal basis in regulatory statute after regulatory statute, or that in any event they will differ from those in any comprehensive bill on this subject eventually submitted to Congress. We therefore suggest the deletion of those provisions from the draft bill and the substitution of legislative history that will show an intent of Congress that Federal courts issue such warrants on proper application for administrative inspections under the bill.

^a Such ~~history~~, for example, was established in the recently enacted amendments to the Public Health Service Act giving authority to this Department to establish radiation protection standards for electronic products. Moreover, we have interpreted the Food and Drug Act to authorize issuance of such warrants in the light of the Camara and See decisions, and the Justice Department has cooperated with us in obtaining such warrants.

9. Drafting Points. Our technical staff, in reviewing the draft bill, have noted a number of drafting problems, among them the fact that conforming amendments in Title VIII of the bill, instead of being made to the provisions of the Food and Drug Act inserted therein in 1965, are stated in terms of amendments to the 1965 Act, and that, incidentally, the amendments made by P.L. 90-639 to the Food and Drug Act (increasing penalties, etc.) have been overlooked.

JAMES O. EASTLAND, MISS., CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, D.C. 20510

JOHN H. HOLLOMAN III
CHIEF COUNSEL AND STAFF DIRECTOR

April 22, 1970

The Honorable John Jarman
Chairman
Subcommittee on Public Health and Welfare
United States House of Representatives
Washington, D. C.

Dear Mr. Chairman:

I should like to thank you for the opportunity you gave me to submit a statement on S. 3246, "The Controlled Dangerous Substances Act," for the consideration of your Subcommittee. I felt certain that the statement would place in a better perspective both the legislation and the Senate hearings on which it was based. This should have allayed the concern about its provisions expressed by certain witnesses before your Committee.

I have given further thought to these matters and I should like to add several more comments at this point to make certain that this new legislation is not unjustifiably jeopardized in the House.

As you recall I was particularly concerned with the charge that the Senate hearings on this legislation held by the Subcommittee to Investigate Juvenile Delinquency did not elicit sufficient testimony from scientists or that scientists were actually denied the right to testify. The fact of the matter is that one-third of the witnesses who appeared during our hearings were from the fields of medicine, psychiatry, and related sciences.

Yet, Dr. Jonathan Cole, one of the leading witnesses before your Subcommittee, testified that, "My efforts and those of several other interested scientists and lawyers to testify before the Dodd Committee did not gain us the requested opportunity. "

This is patently untrue.

In fact, the Staff Director of the Juvenile Delinquency Subcommittee attended the hearings conducted by your Subcommittee and was at a loss to explain this statement by Dr. Cole. He approached the witness stand immediately after Dr. Cole's testimony and Dr. Cole turned, looked at him and said, "I am sorry that I mislead the Subcommittee, I guess I should have told them that you have our statement in your record."

In truth, there was a great deal of discussion with Dr. Cole over the matter of his making a statement and I think you will find this discussion in a letter from Dr. Cole to me at page 930 in the printed record of our hearings. And, as a matter of fact, Dr. Cole's prepared statement appears on page 931 of these hearings.

Dr. James Goddard, who told your Subcommittee that he had not been allowed to testify before us, in fact had been contacted by the staff of the Subcommittee on at least three occasions requesting his comments or statement on the inclusion of certain drugs in the legislation. At no time did he indicate a desire to testify. In a letter from me to Dr. Goddard dated November 4, 1969, I asked for a statement to be submitted for inclusion in the record by him and I have as yet received no response.

His claim that the American Public Health Association was not given an opportunity to testify is clearly refuted by the letter to me of its Executive Director, Berwyn F. Mattison, which appears on page 948 of our printed record and which states, "On behalf of the over 24,000 members of the APHA, I wish to thank you for the opportunity to present the views of the APHA."

Dr. Jerome Jaffe made a statement before your Subcommittee that he could not testify before the Dodd Committee because he was "unable to find out how to testify." Quite likely he was unable to do so because he never wrote or telephoned the Subcommittee to offer his testimony.

Dr. Daniel Freedman was not asked to testify because his position was adequately represented by other scientists and his views were well known to us, since he was testifying across the hall before Senator Hughes' Subcommittee on Alcoholism and Narcotics.

The persistence of this small medical clique has escalated into a full-fledged public relations campaign and has shown early signs of apparent success.

Thus, Stuart Auerbach of the Washington Post reported on March 29, 1970 under the headline "AMA, Liberals align against No-Knock Drug Bill" that "an unlikely coalition is showing political muscle in a congressional battle that might be called 'the scientists vs. the cops.' According to Auerbach, "such strange bedfellows as the AMA and the ultra-liberal Medical Committee for Human Rights have joined to fight part of the Nixon Administration drug abuse control bill. "

Again according to Auerbach, "it's a real groundswell movement," said Dr. Nathan S. Kline, Director of Research at Rockland State Hospital in Orangeburg, New York. "The scientists for the first time in my life have spontaneously risen up. "

Dr. Kline, Dr. Cole, Dr. Jaffe and Dr. Freedman are all mentioned in Stuart Auerbach's report which says categorically that the scientists "were barred from testifying when the Senate Juvenile Delinquency Subcommittee headed by Senator Thomas Dodd (D. -Conn.) held its hearings. . . "

One may well ask why this heated public relations campaign against this legislation.

Why are these same scientists "for the first time" as Dr. Kline put it willing to fly to Washington at the drop of a hat to attack this drug bill?

Mr. Auerbach unwittingly may have given us a hint of their real motives when he wrote. . . "what the scientists are really worried about is that their research projects into dangerous drugs will not be understood by the law-and-order types of the Justice Department, which is required to seek but not follow the advice of the Department of Health, Education and Welfare. "

In my statement to you of March 6, 1970, I said it was unclear to me why this segment of the scientific-medical profession manifested such an irrational fear of the new law. I think their emotional response to this bill now becomes clear.

These research contracts that they are so avidly trying to protect can be very lucrative.

A preliminary search by my staff has uncovered some very interesting facts. Instead of testifying as the disinterested, objective scientists they purported to be, a substantial number of the physicians appearing before your Subcommittee or who aligned themselves with the so-called "Committee for Effective Drug Abuse Legislation," in fact were there to protect the substantial grants given to them by the Department of Health, Education and Welfare. In order to make their defense credible, they did not reveal in their prepared statements to your Subcommittee that they personally had a vested interest in these research grants.

However, Dr. Daniel Freedman, one of the leaders of the attack on the proposed bill before your Subcommittee, received a \$66,862 grant for 1968-1969, with \$164,762 promised over the next three years. Dr. Jerome Jaffe, according to his own testimony, works for Dr. Freedman.

Dr. Jonathan Cole, the Chairman of the "Committee for Effective Drug Abuse Legislation," received \$87,221 in 1968-1969, with \$246,091 promised during the following three years.

Dr. Nathan Kline received \$78,610 in 1969.

These four gentlemen, admitted opponents of "The Controlled Dangerous Substances Act," who formed the basis for the Auerbach article are currently in the process of getting \$643,546 from the Department of Health, Education and Welfare.

Dr. Conan Kornetsky got sufficient grants to support a small university and a large staff: \$242,818 in the first year. And he is slated to receive \$167,713 and \$174,319 in future years.

Dr. Kornetsky is closely followed by Dr. Allan D. Bass, who received \$215,344 between 1968 and 1969.

What this means to me is that these doctors have not only been lobbying for the Department of Health, Education and Welfare, on which they rely for such largesse, but for their own personal and professional financial gain as well.

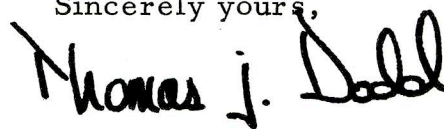
I should like to emphasize that these facts are only the result of some very preliminary research done by our staff. They may not be exhaustive; they do not indicate other doctors who belong to the hastily formed "Committee for Effective Drug Abuse Legislation" but who do not appear as the chief holder of a particular research grant.

I believe that the strong monetary interests which these witnesses had while they appeared before or were represented before your Subcommittee substantially diminishes their credibility, particularly if it be remembered that to a man they failed to indicate that they had a strong stake in these grants.

For your information, I am attaching a copy of the findings of our preliminary research on grants received by these witnesses and directly related to the proposed legislation. The total so far amounts to almost two million dollars.

With kindest personal regards, I am

Sincerely yours,

A handwritten signature in black ink that reads "Thomas J. Dodd". The signature is written in a cursive, slightly slanted style.

THOMAS J. DODD
Chairman
Subcommittee to Investigate
Juvenile Delinquency

Enclosure

cc: The Hon. Harley O. Staggers
The Hon. Samuel N. Friedel
The Hon. Torbert H. Macdonald
The Hon. John E. Moss
The Hon. John D. Dingell
The Hon. Paul G. Rogers
The Hon. Lionel Van Deerlin
The Hon. Jake Pickle
The Hon. Fred B. Rooney
The Hon. John M. Murphy
The Hon. David E. Satterfield
The Hon. Brock Adams
The Hon. Richard L. Ottinger
The Hon. Ray Blanton
The Hon. Bill Stuckey
The Hon. Peter N. Kyros
The Hon. Bob Eckhardt
The Hon. Robert O. Tiernan
The Hon. Richardson Preyer
The Hon. William L. Springer
The Hon. Samuel L. Devine
The Hon. Ancher Nelsen
The Hon. Hastings Keith
The Hon. Glenn Cunningham
The Hon. James T. Broyhill
The Hon. James Harvey
The Hon. Albert W. Watson
The Hon. Tim Lee Carter
The Hon. G. Robert Watkins
The Hon. Donald G. Brotzman
The Hon. Clarence J. Brown, Jr.
The Hon. Dan H. Kuykendall
The Hon. Joe Skubitz
The Hon. Fletcher Thompson
The Hon. James F. Hastings

MENTAL HEALTH RESEARCH GRANTS ACTIVE DURING JULY 1969
PREPARED BY THE SENATE SUBCOMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY

RECIPIENT	DURATION	GRANT	Future Yearly Projections		
			1st Year	2nd Year	3rd Year
Dr. Jonathan Cole	9/1/68 to 8/31/69	\$ 87,221	\$ 78,674	81,975	85,442
Dr. Edw. F. Domino	9/1/68 to 8/31/69	83,186			
Dr. Daniel Freedman	9/1/68 to 8/31/69	66,862	53,166	54,893	56,703
Dr. Conan Kornetsky	9/1/68 to 8/31/69	242,818	167,713	174,319	
Dr. Carl C. Pfeiffer	9/1/68 to 8/31/69	42,433	37,400		
Dr. Parkhurst A. Shore	1/1/69 to 12/31/70	53,539	36,272	38,016	
Dr. Richard Brotman	2/1/69 to 1/31/70	75,219			
Dr. Joseph Cochin	3/1/69 to 2/28/70	36,087	31,708		
Dr. Nathan S. Kline	5/1/69 to 4/30/70	78,610			
Dr. Allan D. Bass	6/1/69 to 5/31/70	215,344			
Dr. William McIsaac	6/1/69 to 5/31/70	47,865			
Dr. Roger E. Myer	6/1/69 to 5/31/70	5,926			
TOTAL		\$1,035,110	\$404,933	\$349,203	\$142,145
GRAND TOTAL		\$1,931,391			