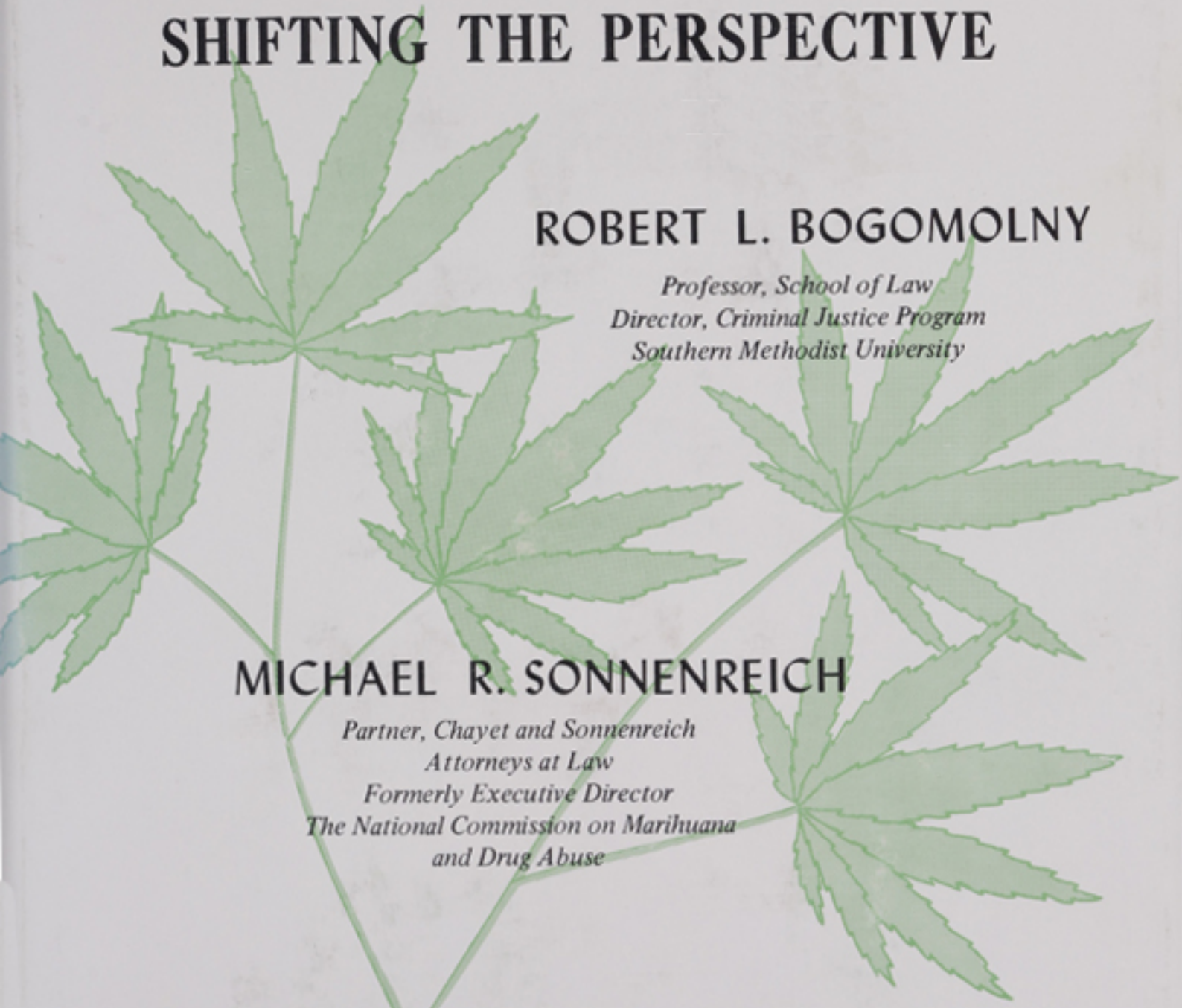
A HANDBOOK ON THE 1970 FEDERAL DRUG ACT

SHIFTING THE PERSPECTIVE



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CHARLES C THOMAS • PUBLISHER • SPRINGFIELD • ILLINOIS

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CHARLES C THOMAS · PUBLISHER
Springfield · Illinois · U.S.A.

Published and Distributed Throughout the World by
CHARLES C THOMAS • PUBLISHER
Bannerstone House
301-327 East Lawrence Avenue, Springfield, Illinois, U.S.A.

ISBN 0-398-03190-8
Library of Congress Catalog Card Number: 74-8452

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Printed in the United States of America
C-1

Library of Congress Cataloging in Publication Data

Bogomolny, Robert L. 1938-
A handbook on the 1970 Federal drug act.

1. Narcotic laws—United States. 2. Drugs—Laws and legislation—United States. I. Sonnenreich, Michael R., 1938- joint author. II. Roccograndi, Anthony J., joint author. III. Title. [DNLM: 1. Drug abuse—Prevention and control—U. S. 2. Drug addiction—Prevention and control—U. S. 3. Drug and narcotic control—U. S. WM270 B675h 1974]
KF3890.B63 344'.73'0545 74-8452
ISBN 0-398-03190-8

The authors wish to express their appreciation to Roy E. Kinsey, who provided substantial assistance in preparing parts of the analysis of the Act.

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PART I

INTRODUCTION

CHAPTER 1

DEVELOPMENT OF THE ACT

THE COMPREHENSIVE DRUG ABUSE Prevention and Control Act of 1970 is considered by many to be a major advance in bringing some coherence and rationality into a highly diffuse area, criminal and regulatory laws dealing with federal response to drug use and control. It was designed to be sufficiently flexible to deal with the ever-changing drug scene as well as the ever-changing social conditions which require federal intervention. However, like all laws, whatever their original intent, some of the Act's provisions fall short of the mark, either in terms of need or because of lack of sufficient implementation.

Like most legislation, the Federal Drug Act was evolved with the intention to benefit the public, assist law enforcement, and bring some consistency to regulatory controls in this area. However, as is often the case with such legislation, this law was too altered by vested interests inside and outside government seeking to modify its force to suit preconceived positions. Those provisions in the Act in which the public interest was compromised are fairly obvious to the interested reader. Since this book is not intended to be an exposé, but rather a commentary on the Act itself, the activities of vested interests will be dealt with only when they are necessary to increase understanding as to the evolvement of a particular provision. The main purpose of the material presented here is to complement and explain the language of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[1]

To provide better understanding of the Comprehensive Drug Abuse Prevention and Control Act of 1970, this introduction will present some of the pertinent history that led to drafting the law

1. 21 U.S.C. §§801-966.

and some of the highlights of the legislative history concerning particular provisions of the law. Following this discussion, an analysis of the Act, section by section, will be undertaken.

SETTING THE STAGE

The logical forerunner to the reform of criminal drug laws was the uniting of major parts of drug law enforcement functions. Investigation of drug offenses flows logically into the prosecution of the offender. Until 1968, law enforcement functions were scattered among the Federal Bureau of Narcotics, the Bureau of Customs, the Bureau of Drug Abuse Control (BDAC) in the Department of Health, Education and Welfare (HEW), and the Immigration and Naturalization Service of the Department of Justice. Prosecution of all drug cases was handled through the United States Attorney's Offices of the Department of Justice. The need for some reorganization was apparent to most thoughtful observers.

The first important recommendations dealing with this problem came from the First Hoover Commission in 1949.[2] Both the First (1947-49) and the Second (1953-55)[3] Hoover Commissions were established as a "Commission on Organization of the Executive Branch of the Government." Their purpose was to study and investigate organization and methods of operation of the Executive Branch and to recommend organizational changes to promote economy, efficiency and improved services; theirs was a broad mandate. One of the many areas studied by the First Hoover Commission was that of federal drug law enforcement. The Commission felt that, since there was duplication of effort by the Federal Bureau of Narcotics and the Department of Justice in their relationships with state and local law enforcement agencies, the fight against narcotic crimes would be facilitated if the Federal Bureau of Narcotics was placed in the Department of Justice. Therefore, the Commission recommended that the

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2. The Commission was officially entitled the Commission on Organization of the Executive Branch of the Government. It was established and approved on July 7, 1947 by Pub. L. No. 162, 80th Congress.

3. Pub. L. No. 108, 83rd Congress, 1st Sess., 1953.

regulatory and law enforcement functions of the Federal Bureau of Narcotics, in the Treasury Department, be transferred to the Department of Justice.[4] No action was taken on this recommendation.

In contrast to the Hoover Commission, the establishment of the Prettyman Commission[5] in 1963 was for the purpose of reviewing and evaluating federal drug law enforcement and prevention functions and of recommending a program to prevent the abuse of narcotic and dangerous drugs and to provide rehabilitation to habitual drug users.

The Prettyman Commission submitted its report in November, 1963. Its recommendations were similar to those of the First Hoover Commission. "The Commission recommends that the functions of the Bureau of Narcotics relating to the investigation of the illicit manufacture, sale, other distribution, or possession of narcotic drugs and marihuana be transferred from the Department of the Treasury to the Department of Justice."[6]

The Prettyman Commission stated that the Bureau of Narcotics was an anomaly in the Department of the Treasury, because the great majority of the Bureau's activities concerned law enforcement, not taxation. The Commission recognized that taxation was only a guise for law enforcement and regulation. It felt that top Treasury officials were diluting their productivity by having to be concerned with criminal investigations when their expertise lay in financial matters. The Department of Justice was the natural haven for the Bureau of Narcotics.[7]

This recommendation, in addition to the others of the Prettyman Commission, was given greater consideration by the Administration and the Congress than the recommendations of the Hoover Commission, mainly because the times were different and there were different considerations to review. Misuse of drugs (dangerous drugs), other than narcotics and marihuana was ap-

4. Final report of the President's Advisory Commission on Narcotic and Drug Abuse, November 1963, at 33.

5. Final report of the President's Advisory Commission on Narcotic and Drug Abuse, November, 1963.

6. *Id.* at 32.

7. *Id.* at 32-33.

parently increasing, and drug abuse was spreading from the ghettos to middle class suburbia. Legislators, law enforcement and the judiciary were receiving more and more pressure to do something about drug abuse.

The misuse of dangerous drugs was of particular concern. Prior to 1951, there was no federal statute specifically prohibiting the distribution of dangerous drugs for other than medical purposes. However, federal health authorities who could not condone such activities, utilized some legal fictions to overcome the lack of specific statutory authority. For example, those accused of illicit distribution were charged with having "misbranded" the drugs, not having labeled them as required by law.[8]

Although until 1951 there was comparatively little illicit traffic in dangerous drugs, a small number of manufacturers, distributors, physicians and pharmacists were allegedly diverting these drugs into illicit channels. In that year, Congress passed the Durham-Humphrey amendment[9] to the Federal Food, Drug and Cosmetic Act, aimed at this group, which prohibited the dispensing of dangerous drugs without the prescription of a licensed practitioner. Despite the creation of this specific statutory authority, the procedures required to enforce this provision still presented a legal anomaly. Although there now existed a statutory prohibition against the act of illegally dispensing dangerous drugs, the violation charged was still the misbranding of the drugs.[10]

Throughout the early and mid 1950's, the efforts of the Food and Drug Administration concerning illicit traffic in dangerous drugs were almost solely against physicians and pharmacists. In the late 1950's and early 1960's it was discovered that, in increasing numbers, truck drivers involved in or the cause of highway

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8. 21 U.S.C. §§333 (k), 352 (f), See *Sullivan v. United States,* 332 U.S. 689 (1947). This case involved the prosecution of a pharmacist for illicitly distributing dangerous drugs. Since it was prior to the Durham-Humphrey Amendment, the charge was that the pharmacist removed the labeling from the drugs and in dispensing them in this condition had misbranded them. As tortuous as the path was to obtain convictions in these kinds of cases, it is obvious that, since they were obtained, the courts were assisting in the fight against flagrant distribution of dangerous drugs.

9. Pub. L. No. 215, 82nd Cong., 1st Sess., H.R. 3298, 1951.

10. See *United States v. Carlisle,* 234 F.2d 196 (1956).

accidents were under the influence of amphetamines or barbiturates (to bring them down from amphetamines) or had these drugs in their possession. In that period, FDA's focus expanded to include the illicit distribution of dangerous drugs to truckers. Despite a growing traffic, FDA's former enforcement policy continued to exist; i.e. investigators were not to go out to seek persons violating the law but were to await the receipt of complaints and conduct follow-up investigations. This policy diminished the number of cases investigated and thereby precluded obtaining a realistic estimate of the extent of the problem.

The early 1960's also saw the public discovery of the properties of hallucinogenic substances, particularly LSD, and a growth in their usage, first in academic circles and later by "street" people. With demand for amphetamines, barbiturates and now hallucinogens, FDA's enforcement personnel began encountering a more sophisticated trafficker who was better organized to meet the demands for these drugs. FDA personnel did not have the experience in criminal investigations of this nature nor the statutory authority (i.e. to make arrests, execute search warrants or carry weapons) necessary to cope with the increasing traffic or the more businesslike criminal.

After analyzing the above mentioned setting, the Prettyman Commission recommended the following:

> The Commission recommends that the responsibility for the investigation of the illicit traffic in dangerous drugs be transferred from the Department of Health, Education and Welfare to the Department of Justice.[11] The Commission recommends that the functions of the Bureau of Narcotics relating to the investigation of the illicit manufacture, sale, other distribution, or possession of narcotic drugs and marihuana be transferred from the Department of the Treasury to the Department of Justice.[12]

The main difference between Hoover Commission and the Prettyman Commission concerned the placement of regulatory control over licit drug importation, exportation, manufacturing and distribution. The Prettyman Commission felt that regula-

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11. *Supra* note 4, at 35.
12. *Supra* note 4, at 32.

tory control over licit activity involving dangerous drugs should *remain* in the Department of Health, Education and Welfare and that "the functions of the Bureau of Narcotics relating to the regulation of the legitimate importation, exportation, manufacture, sale and other transfer of narcotic drugs and marihuana be *transferred* from the Department of the Treasury to the Department of Health, Education and Welfare."[13]

The major reason set forth for the recommended transfer of functions was that it was no longer necessary to rely on Congress' taxing powers to control narcotics and marihuana;[14] therefore, the Treasury Department was an inappropriate repository for these duties. The Commission recommended that the transfer of functions be accomplished by new legislation utilizing Congress' authority to regulate interstate commerce.[15]

Valid arguments can be and have been made for both uniting regulatory and law enforcement functions in one department and for dividing such functions among two departments. Regardless of the acuity of the arguments, the most imposing obstacle was the entrenchment of the agencies concerned within their parent organizations. The most prominent argument given really rested on a desire to maintain the *status quo,* coupled with uncertainty as to new department procedures should a change occur. A major argument for unification was the overlap between joint functions, as when a legitimate drug dealer, controlled under the regulatory scheme, engages in criminal activity, such as the manufacture of prohibited substances or the diversion of dangerous drugs into illicit channels. In fact, the drafters of the Comprehensive Drug Abuse Prevention and Control Act relied on this position after a BNDD (Bureau of Narcotics and Dangerous Drugs) study revealed that 92 percent of all stimulant and depressant drugs on the illicit market had been diverted from legitimate manufacturers.[16] A companion recommendation to be discussed later, was that a specialized unit be formed in the

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13. *Supra* note 4, at 35 and 36.
14. *Supra* note 4, at 36.
15. *Supra* note 4, at 36.
16. Internal BNDD memorandum (1969).

Department of Health, Education and Welfare to conduct the regulatory control of narcotic and dangerous drugs.[17]

In the ensuing years, only a portion of these recommendations were followed. The first step taken was the passage of the Drug Abuse Control Amendment of 1965.[18] This law created criminal sanctions for illegal activities involving dangerous drugs including hallucinogenic substances. It also empowered persons enforcing the law to carry firearms, execute search warrants and make arrests.[19] However, enforcement of the law was placed under the auspices of the Department of Health, Education and Welfare instead of the Treasury Department. To carry out this mandate, the Bureau of Drug Abuse Control was created within the Food and Drug Administration. The recommendation of the Prettyman Commission was put into effect; however, instead of reducing the number of agencies involved in similar tasks, the creation of BDAC created one more agency working on drug abuse problems.

To a great extent, the Drug Abuse Control Amendments reflected the philosophical convictions of health law officials rather than conventional law enforcement agencies. To demonstrate, unauthorized possession of the drugs for one's own use was not prohibited, and illicit manufacture and sale carried only misdemeanor penalties. Further evidence is that possession of a drug such as LSD, quickly becoming an emotional concern in the public mind, was not prohibited, while the majority of law enforcement officials believed that the two-to-ten-year minimum-mandatory penalty for possession of any amount of marihuana was justified.

Despite criticism from some quarters that the new law was not strong enough, it was the most important piece of legislation in the fight against the abuse of dangerous drugs in a decade. It was

17. Controversy in this area still exists today. Just recently the Department of Justice reclassified those agents who conducted regulatory operations to the status of a general investigator rather than criminal investigator. It would not be surprising to see next an attempt to transfer the entire function to the Department of Health, Education and Welfare.

18. Pub. L. No. 89-74, H.R. 2, July 15, 1965 (21 U.S.C. §3602).

19. 21 U.S.C. §372.

no longer unclear whether the manufacture and sale of dangerous drugs for other than medicinal purposes was proscribed. Control was obtained over hallucinogenic substances, and it became mandatory for all handlers of dangerous drugs to register and maintain records of the manufacture and distribution of these drugs.

The new law was quickly implemented by the Bureau of Drug Abuse Control in the Food and Drug Administration. Misuse of dangerous drugs was growing so rapidly, however, that the new law was almost immediately subject to reexamination. Public pressure began to mount to increase the penalties for dangerous drug violations and to make simple possession of such drugs unlawful. The pressure was in part due to the lurid stories of LSD "trips" and "speed freaks" dutifully reported and exploited by the media. A sense of crisis seemed to invade government at all levels. In response, Congress, with little debate in committee or on the floor of both houses, amended the Drug Abuse Control Amendments in 1968 to make simple possession of amphetamines, barbiturates, and hallucinogens a misdemeanor, and the penalty for illegal sale and manufacture increased from a misdemeanor to up to five years.[20]

Despite strong public opposition from medical and scientific groups, Congress made possession for personal use unlawful as a concession to law enforcement. Law enforcement argued that the penalty served both as a deterrent and as a warning to young people that these drugs were dangerous. It was claimed that because there was previously no penalty for use, young people felt that the drugs were not dangerous. Another argument advanced was that, in cases when undercover agents could not make a purchase from a peddler, it was often difficult to obtain sufficient evidence to successfully prosecute. With the availability of a possession offense, this difficulty was surmounted. Subsumed within this argument was the unspoken reason for wanting a possession offense—the added leverage it gives law enforcement. It is much easier to extract information from an individual who has the

20. Pub. L. No. 90-639, 1968.

threat of a prison sentence hanging over his head than one who doesn't. According to the argument, the same individual can be turned into a useful informant by continuing the threat. In most cases small-time peddlers or possessors of small amounts of drugs for their own use are not the type of criminal in which federal law enforcement professes interest. Federal agents would not focus attention on them without a possession penalty; however, with a possession penalty, it is argued, they provide a convenient first rung up the ladder to big dealers.

As a consolation to the medical and scientific communities for having provided law enforcement with this possession offense, Congress included an innovative provision in the Amendments. It stated that anyone charged with simple possession, who had not been previously convicted of a violation of dangerous drug laws, could, within the discretion of the court, be placed on probation for one year with certain conditions, usually rehabilitative in nature, set by the court; if, after the period of probation, the defendant meets all conditions of this probation, the court may then set aside his conviction.[21] This provision was aimed at the numerous youthful offenders who were being arrested and forever burdened with a criminal record. Congress' inclusion of first offender treatment for simple possession was another step in the growing recognition that illegal possession of a drug for one's own use is an offense markedly different from possession of a drug for purposes of illegal distribution or manufacture.[22]

In addition to the penalty provision of the Drug Abuse Control Amendments of 1965, the Secretary of Health, Education and Welfare was authorized to investigate and then to designate drugs that, having a potential for abuse because of their depressant or stimulant effect on the central nervous system or because of their hallucinogenic effect, should be under the control of the Drug Abuse Control Amendments.[23] This delegation of authority to the Secretary of Health, Education and Welfare was

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21. 21 U.S.C. §333 (b) (3) (B).
22. H.R. Rep. No. 1609, 90th Cong., 2d Sess. (1968) at 4-6.
23. 21 U.S.C. §321 (v).

both practical and realistic; it gave him the administrative discretion to place drugs under control without having to return to Congress each time a new drug capable of abuse was discovered or presented a problem.[24]

The authority to designate drugs for control was transferred to the Attorney General by Reorganization Plan No. 1 of 1968, which moved the Federal Bureau of Narcotics and the Bureau of Drug Abuse Control to the Justice Department and combined them to form the Bureau of Narcotics and Dangerous Drugs (BNDD). In its report on the Amendments to the Drug Abuse Control Amendment, the Senate Committee on Labor and Public Welfare expressed its concern over the transfer of the subject authority with the following comment:[25]

> Since the Committee recognizes the expertise, experience, and responsibility of the Department of Health, Education and Welfare in the field of public health and drug evaluation, it directs the Department of Justice to consult with and act in conjunction with the Department of Health, Education and Welfare before designating a drug as a depressant or stimulant drug in accordance with Section 201 (v) of the Federal Food, Drug and Cosmetic Act, as amended.[26]

This statement was a forerunner of a major controversy which would develop over the same issue when the Drug Abuse Prevention and Control Act of 1970 was being considered.

The second step taken in following the recommendations of the Prettyman report was a major one. On April 8, 1968, Reorganization Plan No. 1 of 1968 created the Bureau of Narcotics and Dangerous Drugs in the Department of Justice.[27] The President's message accompanying the plan specifically stated that the move was in the direction recommended by the 1949 Hoover

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24. This authority was the precursor to the scheduling system authority utilized in the 1970 Act.

25. H.R. Doc. No. 249, 90th Cong., 1st Sess., 1968. Prepared by President Lyndon B. Johnson and submitted to the Congress February 7, 1968, pursuant to Chapter 9 of Title 5 of the United States Code (5 U.S.C. §906).

26. *Supra* note 22, at 6.

27. *Supra* note 25.

Commission and the 1963 Presidential Advisory Commission on Narcotic and Drug Abuse. The new Bureau was a merger of the Federal Bureau of Narcotics and the Bureau of Drug Abuse Control. The laws to be enforced were, of course, the conglomeration of narcotic and marihuana laws, criminal and regulatory, and the Drug Abuse Control Amendments of 1965.

Some ancillary background leading to the reorganization plan is worth noting. At the time the reorganization was being considered by President Johnson, the Federal Bureau of Narcotics had a reputation for employing more than a few agents of questionable integrity. This integrity issue was further compounded by the fact that many of the agents in the new Bureau of Drug Abuse Control had been recruited from the Bureau of Narcotics. It was well known and accepted that the new organization's first priority was to be a major housecleaning. One propounded solution, to place the new Bureau of the Justice Department within the Federal Bureau of Investigation, was adamantly rejected by J. Edgar Hoover. He felt that such a move would tarnish the image of the FBI with the inevitable publicity that would occur in such a cleanup. His subterfuge argument was that drug investigations were of an initiatory nature whereas the FBI investigated crimes after the fact and that the two basic differences in investigation technique could not be resolved. Thus, the proposed integration of drug law enforcement into the larger federal law enforcement responsibility never got off the ground, and the administration decided to proceed with a reorganization which would create a brand new bureau. The housecleaning took place shortly after the Bureau was formed, evidenced by numerous resignations, adverse personnel actions and prosecutions. Internal investigations are still continuing, but the major violators have apparently been eliminated from the Bureau.

A surprising factor in the history of the reorganization is that almost a majority of the House of Representatives opposed it. At the hearings held by a Subcommittee of the Committee of Government Operations to consider the reorganization, House Resolution 1101, stating that the House of Representatives did