

~~CONFIDENTIAL~~

cc - Mr. Schlei  
7 Mrs. Copeland  
Mr. Morrisson  
FILES

4 NOV 19 1963

4 Honorable E. Barrett Prettyman  
4 Chairman, President's Commission  
4 on Narcotic and Drug Abuse  
4 The White House  
4 Washington, D.C.

*Inf by  
message to  
Dean Markham  
11/20 @ 9am*

Dear Judge Prettyman:

I refer to my letter to you of May 24, 1963, attaching a memorandum on the constitutionality of federal detention and commitment of narcotics addicts. In that letter I indicated that I felt that memorandum understated the constitutional powers of the federal government with respect to narcotic problems. Further study has confirmed that feeling, and has led me to conclude that, assuming adequate facts in support of such action are available, Congress could constitutionally provide for civil commitment of narcotics addicts by a federal court to a federal institution. Accordingly, I feel that the choice among various possible measures to deal with addiction and illegal traffic in drugs need not be dictated by considerations of constitutional power, but can be made on the basis of policy considerations.

I attach a memorandum setting forth the basis for my conclusion, and superseding our previous memorandum.

7 Sincerely yours,

4 Norbert A. Schlei  
1 Assistant Attorney General  
Office of Legal Counsel

4/ Constitutional Authority of Congress  
to Provide for Civil Commitment of  
Narcotics Addicts

The President's Committee on Narcotics and Drug Abuse has inquired as to the constitutional authority of Congress to provide for civil commitment of narcotics addicts. This memorandum concludes that Congress would have such power if a proper factual basis for it can be shown.

There are several possible mechanisms for Congressional action in this area which present no constitutional problem. Thus, there would seem little doubt of Congress' authority to provide a grant-in-aid program to assist states - individually or cooperatively - to establish treatment centers and to condition such grants on the adoption by the state of a satisfactory procedure for civil commitment of narcotic users. /1/ Compare Steward Machine Co. v. Davis, 301 U.S. 548, 585 et seq. (1937);

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1/ In view of the facts set forth later in this memorandum Congress could regard the establishment of a civil commitment proceeding as essential to the effective use of the granted funds.

Oklahoma v. Civil Service Commission, 330 U.S. 127, 142-4 (1947). Similarly, it seems clear that, as an act of federal-state cooperation, Congress could authorize federal institutions to receive for treatment persons who had been committed by state proceedings. Compare 10 U.S.C. 5003; Duncan v. Madigan, 278 F.2d 695 (C.A.9, 1960), cert. den. 366 U.S. 919 (1960), reh. den. 366 U.S. 947 (1961); Duncan v. State of Maine, 295 F.2d 528 (C.A. 1, 1961); Hall v. Verdel, 40 F. Supp. 941 (W.D.Va., 1941); In re Ross, 48 F. Supp. 815 (D.Ore., 1942). Various methods of federal-state cooperation by interstate compact would also appear constitutionally permissible in the area of treatment of narcotics users. Congress also has considerable power to provide for hospital treatment for narcotic users who are charged with violation of federal laws. Compare Greenwood v. United States, 350 U.S. 366 (1956).

This memorandum will consider the authority of Congress to provide directly for civil commitment of

narcotics users, by federal court proceedings, to federal institutions for treatment. If Congress has authority to provide for such commitment, it follows, a fortiori, that it could enact some alternative form of legislation involving a greater measure of federal-state cooperation.

Civil commitment of narcotics addicts, under appropriate procedural safeguards, is compatible with the due process clauses of the Fifth and Fourteenth Amendments. In Robinson v. California, 370 U.S. 660, 669 the Court stated:

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7 "In the interest of discouraging the violation of [its narcotics laws], or in the interest of the general health or welfare of its inhabitants, a state might establish a program of compulsory treatment of those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement."

Congress has provided for civil commitment of any person within the District of Columbia who uses habit-forming narcotic drugs so as to "endanger the public morals, health, safety or welfare," or who is so addicted to their use "as to have lost the power of self-control

with reference to his addiction." Act of June 24, 1953,  
67 Stat. 77, as amended, D.C. Code § 24 - 601 et seq. /2/

A number of states have adopted civil commitment procedures  
for narcotics addicts. /3/

The due process clause does not prevent the involun-  
tary detention, for medical treatment, of persons suffer-  
ing from an illness which makes them dangerous to themselves  
or society. Laws for the commitment of mentally ill persons,  
and for the quarantine of those afflicted with contagious  
illness, are clearly valid, provided adequate procedures  
are established for determining the fact that an individual  
is suffering from such an illness, and for his release when  
he is no longer dangerous. E.g., Higgins v. United States,  
205 F. 2d 650 (C.A.7, 1953), cert. den. 346 U.S. 870; Wells

44/###FN2  
2/ The Act has been construed in one case, In re Whisaker,  
134 F. Supp. 864 (D.D.C. 1955) but its constitutionality  
does not appear to have been challenged.

44/###FN3  
3/ See, e.g., California Welfare and Institutions Code,  
5350-5361; 23 Ill. Stats. 3501 et seq.; Mich. Stats.  
18.1131 et seq.; New York Mental Hygiene Law, Art. 9,  
Pars. 200 et seq. The annotations to these statutes  
do not reveal any challenge to their constitutionality  
by persons committed pursuant to them.

v. Attorney General, 201 F. 2d 556 (C.A. 10, 1953). Congress or a state legislature could validly place narcotics addiction in the same category.

The only question, therefore, is whether legislation to provide for the treatment and cure of narcotics addicts comes within any power granted to Congress. It is believed that, assuming a proper factual showing, such legislation could be sustained as necessary and proper for carrying out Congress' power over commerce, its taxing powers, and the treaty obligations of the United States. Some judicial support for this view is afforded by the dictum in Robinson v. California, supra, that a state might establish a program of compulsory treatment of addicts "in the interest of discouraging the violation" of its laws against dealing in narcotics.

13 1. Federal Narcotics Statutes

Congress has comprehensively regulated dealings in narcotics in the United States. The Narcotic Drugs Import and Export Act, 35 Stat. 614 (1909) as amended, 21 U.S.C. 171-185, prohibits importation of narcotic drugs, except for such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds needed for medical and legitimate uses; it prohibits all exportation of smoking

opium, and permits other exportations only to signatories of the Hague Convention of 1912, and only if the Commissioner finds the recipient country has an adequate system of licensing control and the drugs will be used, and are needed for medical and legitimate uses. (21 U.S.C. 173, 182). Dealings in unlawfully imported drugs are prohibited. (21 U.S.C. 174). Possession of heroin is prima facie proof that it was illegally imported. (21 U.S.C. 1766). The constitutionality of this act has been sustained as an exercise of Congress' power over commerce. Yee Hem v. United States, 268 U.S. 178 (1925).

The Harrison Anti-Narcotic Act, 78 Stat. 785 (1914) as amended, 26 U.S.C. 4701 et seq. imposes a regulatory tax on narcotic drugs produced in or imported into the United States (26 U.S.C. 4701), a tax of \$300 per pound on opium for smoking (Sec. 4711), and an occupational tax on every person who deals in any way in narcotic drugs (Sec. 4721). Systems are set up for registering authorized dealers in narcotics (Sec. 4722), for authorizing sales on government order forms (Sec. 4705), for

dispensing on a doctor's prescription for medical purposes (Sec. 4705), and for keeping records of all transactions (Sec. 4705). Sale or distribution of narcotic drugs out of the original stamped package is prohibited, with certain exceptions. (Sec. 4704). The effect of the Harrison Act is to control minutely the distribution of narcotic drugs through medical channels for medical purposes and other legitimate purposes such as research, and to prohibit all other dealings in narcotics. Thus, the Harrison Act, although antedating the Geneva Convention of 1931, implements the undertakings which the United States made in that Convention.

The constitutionality of the Harrison Act has been sustained as an exercise of the taxing power. United States v. Doremus 249 U.S. 86 (1919); Nigro v. United States, 276 U.S. 332 (1928); cf. United States v. Sanchez, 340 U.S. 42 (1950). In Sanchez, involving the similar tax on marijuana (26 U.S. 4741 et seq.), the Court referred to the "congressional purpose of restricting traffic in

marijuana to accepted industrial and medical channels"; it recognized the "regulatory effect" of the tax, and held it valid even though "the revenue purpose of the tax may be secondary." 340 U.S. at 44.

While historically the constitutionality of the Harrison Act has been rested exclusively on Congress' power to tax, a good argument could be made under present concepts of constitutional law to support legislation of comparable scope as an exercise of the commerce power. The Harrison Act regulates dealings in (1) opium, (2) morphine, heroin and related drugs manufactured from opium, (3) cocaine, which is manufactured from coca leaves, and (4) synthetic equivalents of the foregoing. Neither raw opium nor coca leaves are produced in the United States. Traffic in Opium and Other Dangerous Drugs, Report by the Government of the United States of America for the Year Ended December 31, 1962, p.18. Thus all dealings in the natural drugs, produced from opium or coca leaves, necessarily involve interstate or foreign commerce. The fact that they may have

undergone manufacturing or other processing, or have come to rest in a particular state, no longer serves to prevent Congressional control. E.g., Wickard v. Filburn, 317 U.S. 111, 118-125 (1942); United States v. Sullivan, 332 U.S. 689, 697-8 (1948); Mandeville Farms v. Sugar Co., 334 U.S. 219, 229-235 (1948). While data as to the manufacture and distribution of synthetic narcotic drugs have not been examined in detail, it would appear that they also involve significant elements of interstate commerce. <sup>4/</sup> Moreover, regulation of synthetic substitutes would appear justifiable as a means of making effective, and preventing evasion of, the regulation of the natural drugs. Cf. Wickard v. Filburn, *supra*; United States v. Walsh, 331 U.S. 432, 437-8 (1947).

In addition, the United States has entered into international commitments to regulate and control dealings in narcotic drugs so as to confine their use to medical and other legitimate purposes (see *infra*). Congress has constitutional power to carry out these commitments by appropriate

44/ ~~###~~ FN4  
4/ At present there are 12 licensed manufacturers of natural or synthetic narcotic drugs in the United States. In general, the manufacturers are large drug manufacturers who sell in interstate commerce under brand names, and typically handle both natural and synthetic products. Traffic in Opium, etc. *supra* pp. 10-16.

regulatory legislation. Compare Missouri v. Holland, 252 U.S. 416 (1920).

102. International Agreements for  
7 Control of Narcotics

Since the raw materials of narcotic drugs are imported into the United States, the United States early concluded that effective control of dealings in narcotics required international as well as national measures. Accordingly, it early took the initiative in establishing comprehensive international controls.

The United States is a party to four multilateral agreements for the control of narcotic drugs. The Hague Convention of January 23, 1912, 38 Stat. 1912; the Geneva Convention of July 3, 1931, 48 Stat. 1543; the Lake Success Protocol of December 11, 1946, 61 Stat. 2230; and the Paris Protocol of November 19, 1948, TIAS 2308. It is represented on the Commission on Narcotic Drugs of the United Nations. The efforts at international control of narcotic drugs resulted largely from the initiative of the United States in 1908, and it has always played a leading role in the movement for international control. See Carnegie Endowment for World Peace, International Conciliation, (1948), pp. 303 et

seq.; Remberg, International Control of Narcotics, 22 Law and Contemporary Problems 86 (1957).

The undertakings made by the United States in these agreements are broad. Thus, Sec. 6 of the Hague Convention of 1912 provides:

10 The Contracting Powers shall take measures  
7 for the gradual and effective suppression of  
the manufacture, the internal traffic in and  
use of prepared opium so far as the different  
conditions peculiar to each nation shall allow  
of this . . . ." 38 Stat. 1931.

The Geneva Convention of July 31, 1931 seeks to limit the manufacture, exportation, importation and trade in narcotic drugs (morphine, cocaine and their derivatives) to that amount needed for medical and scientific needs. Each party is required to submit annual estimates of the amount of such drugs needed for medical and scientific purposes. Art. 5. The amount manufactured, imported and exported by such party is controlled by these estimates. Art. 6.1, 12. A Permanent Control Board is set up, which is to be notified of various export and import transactions, to collect statistics concerning each party's dealings in drugs, and to demand explanations from any party failing to carry out its obligations. Art. 14. The parties undertake to "take all

necessary legislative or other measures in order to give effect within their territories to the provisions of the Convention." They agree to create a special administration for "regulating, supervising and controlling the trade in the drugs" and for

7 "organizing the campaign against drug addiction, by taking all useful steps to prevent its development and to suppress the illicit traffic."

The scheme of international control has thus been described by an international official connected with its administration:

10 7 "The convention, particularly the limitation convention of 1931, represent the first concerted attempt by governments to regulate a single industry throughout the world, from the point at which the raw materials enter the international trade to the point at which they finally reach the legitimate consumer. The essential elements of this control may be summed up as follows: The determination in advance of legitimate world needs; the adjustment of world manufacture to legitimate world demand; the minute controlling of all channels of distribution, both national and international; and the entrusting to international organs of the task of supervising and coordinating the working of the whole machinery throughout the world. Nothing similar or as far-reaching in international cooperation has ever been attempted." Remberg, op. cit. supra, 110.

103. Power of Congress under the  
7 Necessary and Proper Clause

Whatever legal theory is relied on, there can be no

doubt at this late date that both the Narcotic Drugs Import and Export Act, and the Harrison Anti-Narcotic Act, are constitutionally valid exercises of Congressional power. Congress has power, under the "necessary and proper" clause, to take action which is reasonably appropriate to effectuate, and prevent or discourage violation and evasion of, the regulatory scheme which those Acts established. It may do so notwithstanding the fact that its statute covers matters which would be solely within state power, but for their relationship to a legitimate federal function, program or activity. Thus, to assist in obtaining evidence of narcotics violation, it may confer immunity from state as well as federal prosecution, Reina v. United States, 364 U.S. 507 (1960). /5/ In order to "make effective its regulation of interstate commerce" Congress may prohibit false guaranties as applied to intrastate shipments of misbranded drugs. United States v. Walsh, 331 U.S. 432, 437-8 (1947).

The scope of the "necessary and proper" clause is illustrated by cases dealing with federal control over banking.

The power of Congress to charter a national banking system

44/5/ ~~REINA~~ <sup>#FNS</sup> Reina makes it clear that the scope of Congress' power under the "necessary and proper" clause is not subject to "distinctions based upon the particular granted power concerned." 364 U.S. at 511.

for use as depositories of federal funds was implied, as "necessary and proper" to the exercise of its granted powers to lay and collect taxes and to engage in various activities involving the expenditure of funds. McCullough<sup>1ch</sup> v. Maryland, 4 Wheat. 316 (1819). From this it was further implied that Congress could give national banks the normal banking functions appropriate to enable them to function effectively. Osborn v. United States Bank, 9 Wheat. 738, 863-4. By further implication, it was held that Congress, to protect national banks from state competition, could authorize them to act as executors and trustees despite state law to the contrary. Burns National Bank v. Duncan, 265 U.S. 17 (1924). In the exercise of implied powers, Congress authorized issuance of national bank notes as part of the national currency; Congress was thus held to have the further implied power to prohibit, by tax, the issuance of state bank notes. Veazey Bank v. Fenno, 8 Wall. 533 (1869); National Bank v. United States, 101 U.S. 1 (1879). The whole detailed and elaborate federal regulation of banking rests on, not one, but a series of implications of power.

In view of the comprehensive and detailed federal statutory regulation of all dealings in narcotics, and the

extensive international obligations which the United States has assumed, the whole subject of dealing in narcotic drugs can fairly be said to have become one of dominant federal concern. Hence the scope of Congress' implied powers in this area can be deemed broad.

In the exercise of its implied powers Congress can provide for detention of individuals, provided the requirements of due process are met. Compare Greenwood v. United States, 350 U.S. 366 (1956) (commitment of mental incompetents pending trial on federal charges); Abel v. United States, 362 U.S. 232 (1960) (arrest on administrative warrant pending deportation); Chung Fook v. White, 264 U.S. 443 (1923) (administrative detention of an alien afflicted with a contagious disease); 42 U.S.C. 256, 264 (apprehension, detention, treatment and release of lepers and others infected with communicable diseases).

104. Relationship Between the Existing  
Federal Treaties and Statutes and  
a Federal Commitment Statute

A full study of facts which might justify federal civil commitment of narcotic addicts as a means of effectuating the federal program of narcotics control embodied in federal treaties and statutes has not been attempted. Available

published materials suggest the following as one possible approach, which is believed legally sufficient to sustain the constitutionality of federal civil commitment legislation provided the factual assumptions stated are deemed adequately supported by facts and competent expert opinion. There may be other factual approaches which would also establish a constitutionally sufficient relationship between federal civil commitment procedures and the exercise by Congress of its powers to implement treaty commitments, to tax, and to regulate commerce.

As stated above, the basic scheme of the federal treaties and statutes is to prevent all traffic in narcotic drugs, except for medical purposes and other purposes recognized as legitimate. The Federal Commissioner of Narcotics has stated that prevention of addiction is "the ultimate purpose of all narcotic drug control." Traffic in Opium and Other Dangerous Drugs, 1962, p. 22. The Geneva Convention of July 1, 1931, expressly recognizes that a major goal of the parties is a "campaign against drug addiction, by taking all useful steps to prevent its development and to suppress the illicit traffic."

Despite strong laws and vigorous enforcement, addiction to narcotic drugs, and illegal sales to addicts, continue

to be a substantial problem in the United States. /5/ The nature of addiction is to create a physiological and emotional dependence on the drug. Hence the presence of a large number of addicts creates a substantial demand and market for illegal sale of drugs. /2/ To the extent this market could be reduced, by successful treatment and cure of addicts, the demand for illegal drugs and the profits in illegal importation and sale of drugs would tend to dry up.

The intense craving of the addict for drugs is a cause of violation of federal law. The sale transaction by which the addict obtains his drugs, and his possession

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6/ The Federal Bureau of Narcotics has recorded 47,489 drug addicts in the United States. Traffic in Opium and Other Dangerous Drugs, 1962, p.18. Testimony before the Senate Subcommittee to Investigate Juvenile Delinquency is regarded by the Chairman of that Subcommittee as suggesting a considerably higher figure. White House Conference, Conference on Narcotic and Drug Abuse (1952) p.229.

## FN7 44/ 1/ "The average addicted youngster spends about forty dollars a week on drugs, often as much as seventy dollars." Cheln and Rosenfeld, Juvenile Narcotics Use, 22 Law and Contemp. Problems, (1957) 54. One addict spending \$40 a week would create a market of some \$2,000 a year for illegal drugs.

of drugs, are usually in violation of the Harrison Act, since the drugs are not normally obtained through legitimate channels. /3/ Addiction tends to spread from person to person. /2/ Hence treatment and cure of existing addicts may tend to reduce the number of new persons who become addicted. Moreover, one link in the illegal distribution chain is the "pusher", or retail distributor, who is typically an addict. /10/ Thus it could be argued that removal of the pusher-addict to treatment centers, and his eventual cure, would tend to break up the distribution pattern. There seems little doubt that a substantial

✓ ## FN8  
/3/ "Addicts for the most part obtain their drugs illegally." Report of an Ad Hoc Panel on Drug Abuse, White House Conference, pp. cit. supra, p. 290.  
## FN9 44 /2/ Report of an Ad Hoc Panel, supra, 306; Report on Narcotic Addiction by the Council of Mental Health of the American Medical Assoc. (1956), reprinted in Drug Addiction, Crime or Disease (Indiana Univ. Press, 1961) p. 170. S.Rept. 1850, 84th Cong., 2d Sess. pp. 6-7.  
## FN10 44 /10/ → "Many legislators feel that the easiest way to treat narcotic addicts is to eliminate the 'pusher', who buys his drugs from a jobber (peddler) and sells to the addict consumer. The 'pusher' is almost always an addict." Winick, Narcotics Addiction and its Treatment, 22 Law and Contemp. Problems (1957) 17.

reduction in the number of addicts, through treatment and cure, would tend to reduce the size and profitability of the illegal trade in narcotics and the number of violations of federal narcotics laws. /11/

A substantial body of medical opinion believes that effective treatment of drug addict requires treatment for 4½ to 6 months in a closed institution. /12/ The principal such institutions now in existence are the two federal hospitals at Lexington, Kentucky and Fort Worth, Texas, and a state center in California. /13/ The federal hospitals

44/ ## FN 11  
11/ U.S. consumption is estimated to be a very small part of world production, White House Conference, p.27. Hence a reduction in the number of U.S. addicts in itself might not significantly affect the international control problem. If it were to set a pattern for world-wide attempts to reduce the incidence of addiction, however, it might be said to have such an effect.

## FN 12 44/ 12/ S.Rept. 1850, 84th Cong. 2d Sess. p.3; Maurer and Vogel, Narcotics and Narcotic Addiction, p.170. "The successful and humane withdrawal of individuals addicted to narcotics in the United States necessitates constant control, under conditions affording a drug free environment, and always requires close medical supervision." Joint Statement of the American Medical Association and National Research Council, May 14, 1962, reprinted in Traffic in Opium and Other Dangerous Drugs, 1962, p.20.

## FN 13 44/ 13/ Lexington has 1480 beds and Fort Worth 1000 beds. Maurer and Vogel, p.173. California has recently established a Rehabilitation Center, to house 2250 addicts. White House Conference, p.247. Riverside Hospital, New York City, takes a small number of juvenile addicts.

are authorized to receive federal prisoners and probationers and voluntary patients. At present about 90% of admissions are voluntary. /14/ The majority of voluntary patients leave before the minimum period of 4½ months. /15/ The relapse rate is high. /16/ One cause of this may be the lack of adequate followup procedures for discharged patients. Another may be the failure of voluntary patients to complete the indicated period of treatment, which tends to result in a "revolving door" operation which is costly and not effective. /17/ A number of medical authorities feel that "treatment usually cannot be successfully completed without an element of restraint." /18/ This opinion, if valid, would warrant the conclusion that a procedure for involuntary commitment is an essential part

44/ ~~14/~~ ## FN14

44/ ~~15/~~ ## Maurer and Vogel, p.173.

44/ ~~16/~~ FN15 S.Rept. 1850, p.15.

44/ ~~17/~~ ## S.Rept. 1850, pp.14-15; Final Report of the Joint Committee of the American Bar Association and the American Medical Association on Narcotic Drugs (1959), reprinted in Drug Addiction, Crime or Disease (1961) p. 164-5.

44/ ~~18/~~ ## S.Rept. 1850, pp.14-17.

44/ ~~19/~~ ## Maurer and Vogel, p.175.

FN18

of an effective program to reduce narcotic addiction. /19/

This memorandum expresses no opinion on the wisdom of a federal program of civil commitment of narcotics addicts, or the desirability of an exclusively federal program as compared with one involving federal-state cooperation. /20/ It is felt, however, that choices on such matters need not be dictated by constitutional considerations. Assuming that facts and expert opinions

##FN19

44/19/ The President's Ad Hoc Panel concluded "The compulsive drug user may be rehabilitated to a legal and, in some cases, productive place in society", White House Conference, p.305. Some authorities consider that there is a "hard core" of addicts who are "incurable". S.Rept. 1850, pp. 19-20. Even if a substantial number of addicts are not curable by existing or reasonably foreseeable treatment methods, in the sense that if released from the institution they would resume the use of drugs, institutional confinement would still prevent their use of drugs while hospitalized, and thus reduce the demand for illegal drugs.

##FN20 44/20/ In connection with the second question, it should be noted that over 80% of the addicts reported by the Federal Bureau of Narcotics are located in four states (New York, 46.4%; California, 15.6%; Illinois, 14.8%; and Michigan, 3.8%), Traffic in Opium and Other Dangerous Drugs, 1962, p.52. Each of these states has a law providing for civil commitment. See note 3, supra.

exist on the basis of which Congress could conclude that effective cure of narcotics addicts will significantly reduce the illegal drug traffic in the United States and the number of violations of the federal narcotics laws, and that federal procedures for compulsory commitment are necessary to an effective program of treatment and cure, it is believed that the power of Congress to provide for such civil commitment would be sustained.