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The Department of Justice

The Project supplemented its examination of the five executive departments with a review of the drafting and processing of legislation in the Department of Justice (DOJ). Of prime concern was an analysis of the effect of the Department's judicial orientation on the legislative process generally. It was noted, for example, that DOJ had a comparatively closer relationship between its general functional divisions and its specific legislative objectives than the other departments examined. The Project anticipated that the Department would have a fairly well-defined and integrated coordination system with respect to its sub-agencies most involved in the legislative process, and at the same time would maintain close attention to good draftsmanship.

Also of concern was the Department's commenting procedure on the legislative drafting agencies. This seemed particularly important since the Department has been referred to repeatedly as one of the key commenting agencies throughout the bill tracing procedure. Interviews disclosed that the Office of

419. There are three principal disciplines within the DOJ: investigation, litigation and corrections. Mr. Herbert E. Hoffman, Former Chief of Legislation of the Office of the Deputy Attorney General (ODAG), in an interview recognized that the Department's work centers on litigation, both trial and appellate. He noted that the courts are constantly required to make interpretive judgments, often of statutes which may be unclear on their face or with an ambiguous legislative history. Mr. Hoffman made clear that from a legislative standpoint the scope of the Department's authority differs considerably from its enforcement responsibilities. In this sense, the drafting responsibilities of the Department, while considerable, embrace only specific areas of the law, covered by its seven principal divisions: tax, civil, civil rights, criminal, land and natural resources, internal security and antitrust. The enforcement function of the Department, on the other hand, covers the entire gamut of federal activity. For example, in executing its enforcement function the Department may have to argue the enforcement provisions of a statute drawn and administered by the Food and Drug Administration of the Department of HEW.

One result of the Department's constant concern with litigation problems was its natural orientation toward judicial interpretation. The Department maintained that this sharpened recognition of the problems of draftsmanship improved generally the quality of proposed legislation. Other departments examined are principally oriented to specific areas such as social planning, economics, regulatory matters or defense purposes.

420. Throughout the interviews and the tracing procedure it was established that DOJ was frequently solicited for comments on legislative proposals, either by the agency involved or OMB. See, e.g., DOJ-FAA note 59. See footnote 51, supra, for instructions on how to use the file citation system.

Interviews with DOJ officials also disclosed the varied use of DOJ within the interdepartmental commenting procedure. It was maintained that all agency proposals were submitted to the Department by way of the OMB. Some agencies, however, by virtue of their relationships with particular units in the Department, supplement this activity by working in a more direct manner. What was necessary and most effective seemed to be the controlling factors.

One area mentioned in which the direct liaison practice was found more frequently was legislation involving DOJ's enforcement responsibilities. This point seems to be confirmed by the NRA tracing procedure, which establishes that DOJ officials met on a number of occasions with draftsmen and policymakers from the Treasury and HEW. See DOJ-NRA notes 21, 23, 26, 30, 31, 34.
Legal Counsel had served during the later part of President Johnson’s Administration as a “clearing house” for all executive legislative proposals.421

A third objective was served by examination and discussion of the recently released Report of the National Commission on Reform of Federal Criminal Laws.422 Comments pertaining to the objectives of this study, as well as to problems relating to its initial impetus, focused attention on key areas of concern to the draftsman: the reform-codification-consolidation problem, executive review and initiation of legislative proposals, and present structural inadequacies in certain statutes.423

Organization

The Justice Department is the primary investigative, litigating and corrections agency of the federal government. It has 23 separate organizations under the control and authority of the Attorney General.424 The DOJ legislative process operates under the authority of the Deputy Attorney General (DAG) with each component expected to clear its views through the DAG by way of its own

35, 41, 45, 46, 47, 51.

Of the agencies examined, the relationship between the FTC and DOJ seems to have been considered of a “special nature.” One reason stems from the Commission’s position as an independent regulatory agency. As a consequence, important legislative matters concerning the Commission are considered independently of its authority, usually by a select group of executive personnel. Whether the Commissioner and FTC staff personnel are involved in these deliberations is decided upon by the Administration. The usual procedure in such cases seems to be that the Commission is advised of the executive’s ideas on the subject and comments and suggestions are in turn advanced by the Commissioners. In any case, the Project revealed that a constructive partnership vis-a-vis drafting and formulating legislative proposals dealing with matters of “great importance” to the Commission is not present and some question as to its advisability under present law was suggested.

421. The only published material available on the OLC is former Ass’t Atty. Gen. Frank M. Wozencraft’s article on the formation and duties of the OLC. Wozencraft, OLC: The Unfamiliar Acronym. 57 A.B.A.J. 33 (1971).

422. The final report was submitted to the Congress on January 7, 1971.

423. Id.

424. Twenty-one of these organizations under the direct authority of the Attorney General are: Office of the Attorney General (OAG); Office of the Deputy Attorney General (ODAG); Solicitor General (SG); Office of Legal Counsel (OLC); Board of Parole (BP); Pardon Attorney (PA); Board of Immigration Appeals (BIA); Administrative Division (Adm. Div.); Tax Division (Tax Div.); Civil Division (Civ. Div.); the Land and Natural Resources Division (Ld. and Nat. Res. Div.); Antitrust Division (Antr. Div.); Criminal Division (Crim. Div.); Civil Rights Division (Civ. Rts. Div.); Federal Bureau of Investigation (FBI); Internal Security Division (I. S. Div.); Bureau of Prisons (Bur. Pris.); Bureau of Narcotics and Dangerous Drugs (Bur. Narc. Dang. Dr.); Immigration and Naturalization Service (INS); Community Relations Service (CRS); and Law Enforcement Assistance Administration (LEAA).

Two others, United States Attorneys (USA) and United States Marshals (USM), are in the ODAG, but practically speaking are within the responsibility of the Attorney General.
respective legislative sections.425

The impetus for legislation within the Department stems principally from two general sources: (1) through policy discussions in the respective component organizations throughout DOJ; and (2) from reports received from outside governmental or private groups.428

One means of initiating legislative proposals is to develop them from the policies of the President and the Attorney General.427 Guidelines on departmental policy or directives asking for clarification or evaluation of existing programs often stimulate thorough review of past positions in specific areas.428 A third, more common method of initiating ideas and proposals, is the annual

425. There are legislative personnel in varying numbers in each of the component organizations of DOJ. Interviews disclosed that eleven of these twenty-three under-agencies in the Department consistently contributed to the Department's legislative program and, as a consequence, have formal or informal legislative sections: OLC, Ld. and Nat. Res. Div., Civ. Div., Antr. Div., Crim. Div., Civ. Rts. Div., I. S. Div., FBI, Bur. Pris., INS, and LEAA. The remaining twelve components, for the most part, have no separate unit handling legislative work, but operate usually as a part of the office of the unit chief.

It was also noted throughout the Department and confirmed in the tracing procedure of the Magistrates Act (FMA) and the Narcotics bill (NRA) that close professional cooperation among the under-agencies is standard practice within the Department. This pertains to on-going legislative matters, such as the formulation of committee reports, as well as to the initial preparation of a component organization's legislative program.

426. With few exceptions, legislative proposals cannot be attributed to a particular factor or source; rather, they result from a culmination and interaction of efforts, often by diverse parties over a period of time. Moreover, the diversity of input to a single proposal depends on its nature and substance. The narcotics legislation, for example, is representative of a major bill which was to a great extent dependent upon radical changes in public and governmental thought on the social and criminal purposes served by the existing federal narcotics laws. In this case, both a policy shift and a substantial educational effort had to precede the functioning of the legislative process. The issue of the commissioner system, on the other hand, while dependent upon the exposure of the Tydings Subcommittee, seems to have been a legal and administrative problem, which DOJ felt could have been approached in a more positive manner. The control and involvement of the U.S. Judicial Conference, however, may belie the political consequences of independent departmental action in this instance.

427. For example, President Johnson's respective Crime Messages to the Congress in March, 1965 and 1966, resulted in the passage of the Narcotic Addict Rehabilitation Act of 1966, 80 Stat. 1438, as well as a number of other pieces of crime legislation. See accompanying text.

428. Two examples of this type of interaction between the higher echelon of DOJ and the component's legislative shop occur in the magistrates and narcotics legislation. In the Magistrates Act the files reveal that although the Criminal Division had anticipated problems in the commissioner system, and had solicited specific memoranda from the U.S. Attorneys on the matter, legislative work directed toward rearranging the commissioner system did not begin substantially until after the directive of the ODAG and the Criminal Division's Assistant Attorney General. DOJ-FMA note 11.

Similarly, in the narcotics bill, although the Assistant Attorney General's memorandum was in part responsible for the major policy switch by DOJ, the subsequent additional study directed by the ODAG and conducted by the Criminal Division marked the Department's first sustained effort to implement legislation for the rehabilitation of narcotics addicts. DOJ-NRA note 25.
solicitation of recommendations for inclusion in DOJ’s legislative program for the upcoming session of Congress. In this case, two or three months prior to the end of each session the legislative section of ODAG requests that each component of the Department analyze its current legislative position. In DOJ this solicitation encourages the Department’s components to act on legislative proposals on a continuing basis and motivates individual attorneys to be constantly attentive to possible legislative improvements. A fourth method in which legislative activity is generated comes as a reaction to a professional or departmental study in a specific area. Both the narcotics legislation and the present departmental effort to formulate specific recommendations in the reform of the federal criminal laws can be attributed in great part to studies sponsored by congressional and presidential commissions. A fifth stimulus for action stems from inquiry and legislation initiated by the Congress. This may encompass the introduction of a single bill or a complete congressional investigation such as that illustrated in the bill tracing of the Magistrates Act.

It is at the component level that specific legislative ideas are drafted and where reports or congressional proposals are prepared. The usual procedure is to assign the matter to one or more attorneys within the section. After coordinating the work with the legislation chief or the appropriate unit head, the proposal is researched and drafted or the report written. In either case, the

429. Mr. Hoffman observed that DOJ, as well as all the other executive departments and agencies, is required by the OMB to prepare annually proposed legislative programs for the forthcoming session of Congress. Such programs include all items of legislation, including proposals to repeal provisions of existing law or to extend provisions of expiring law, which an agency contemplates proposing to the Congress or is actively supporting if already pending during the coming session. In DOJ he noted that the practice was for the Legislation Office of ODAG to send a memorandum to each of the components, two or three months before the end of each session, requesting recommendations for inclusion in the Department’s legislative program. In response, the components of the department would solicit legislative recommendations from their own respective offices and attorneys, formulate the proposals and, after required interdepartmental commentting, would forward the finished proposals to the Legislation Section, ODAG. Letter from Mr. Hoffman to the Project, Aug. 11, 1971, at 4, on file at Catholic U. L. Rev. [hereinafter cited as Hoffman Letter].

430. Id.

431. In the Magistrates Act at least this process began with the Criminal Division’s memorandum on the problems to be anticipated in the Commissioner System. See DOJ-FMA note 1. In the development of the Narcotics Act, the culmination of nearly one year’s inquiry resulted in the study and report of the Assistant Attorney General advocating vigorously a shift from enforcement to rehabilitation methods. See DOJ-NRA, notes 8-15.


433. DOJ-FMA notes 1-55.

434. See text accompanying footnotes 429-431 supra for discussion of the approximate time spent on legislative activity.
component's legislation office or the files section of DOJ will have proposals or memoranda pertaining to the same or similar subjects. These the draftsman can use as a basis for his initial research and writing. At the component level it is expected that the views of the affected or interested units will be requested on all legislative matters. The Project found that the opinions of all pertinent DOJ components are usually obtained. Mr. Hoffman described this intradepartmental commenting procedure as it related particularly to the writing of congressional reports:

This resulted in either the dropping of the input of other units or amendments in the developmental process. On some occasions, the proposal did not reflect the contribution of other units but was accompanied by a memorandum explaining why.

In some instances two variations of this procedure may be employed. In one, a team of attorneys works directly from the bill's initial development with a representative of ODAG or a high policymaker in the Department. This was characterized as "unusual." In another case, attorneys from affected divi-

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435. The Department keeps files available on virtually all interagency memoranda. In addition, the legislation offices of the major component organizations maintain departmental memoranda on all legislative proposals until such time as the subject matter either becomes law or is obsolete in a legal sense. Finally, the Department's divisions have the additional duty of compiling legislative histories on bills affecting that division, which the Department proposes or which are introduced in the Congress or enacted into law. A legislative history consists of these items generally: the public law, the principal bill in all of its forms, the pertinent committee reports, the committee hearings on the bill, similar bills introduced in both houses, debate on the bill, additional remarks on the subject matter and earlier congressional hearings. Complete compilation of such histories enables the Department to refer to the legislative and departmental history of any law for which the Department is responsible.

436. Hoffman letter supra footnote 429, at 6. The procedure for obtaining reports on congressional legislation involves essentially the process noted in the text. In this case, however, the units are designated respectively by ODAG as the "Reporting Unit" and the "Advisory Units." In addition, the advisory units prepare memoranda, sending the original to the reporting unit and a copy to the ODAG Legislation Office. Based on these memoranda, and its own views, the Reporting Unit prepares a proposed Report to the Committee for the signature of the Attorney General. When the proposed report is received, it is sent to the attorney involved for review, who notes applicable changes adopted or rejected by the reporting unit. Once satisfied, the attorney passes the report to the Chief, Legislative Section, for review before forwarding it to the Deputy Attorney General. Id.

437. Attorneys in the Department characterized this approach and the "drafting team" suggestions as "not the usual way" and "most unusual." Similarly, a "conference" method suggested by the project was "not the normal" procedure. Development of the narcotics legislation and other observations did indicate, however, what Mr. Hoffman agreed was participation "in inter-unit conferences and work sessions in the development of legislation." Thus, it was found that "section" work-sessions between two or more attorneys occurred on a fairly regular basis, while inter-unit conferences were observed in the development of most major legislative proposals. Finally, while inter-departmental commenting was common in DOJ, interdepartmental participation in drafting as in the narcotics legislation was an even less common feature in the Department's legislative process.
sessions participate in inter-unit conferences and work sessions throughout the formation of the legislation.438 In both instances, subject matter and time are important factors.439

Once the work has been approved at the division level, the proposal is submitted to the legislative section, ODAG. There, eight attorneys control the solicitation, coordination and final review of the Department's legislative program.440

Lawyers in the ODAG Legislative Section, as do most attorneys involved in drafting and the legislative process in DOJ, characterize their roles as "generalists." They do not consider themselves specifically as trained professional draftsmen; rather, they are attorneys who work primarily in the legislative area and who through experience, training and work have become competent in drafting and those related disciplines involved in the legislative process.441 Also, the word "generalist" is used to establish the idea that the draftsman is not confined to particular areas of the law, but is received in the Department as being capable of functioning in all areas of departmental statutory authority.442

The first proposition seems readily confirmed by the respective activities of the attorneys in the legislative office of ODAG and the draftsmen at the component level of DOJ. The second one, pertaining to the multi-dimensional ability of the lawyers involved, misstates to some degree the principal methodology which the Department employs.

Questionnaires pertaining to approximate time allocations on legislative activities confirmed the draftsman's view that much of the work—approaching 75 percent—involved the preparation of reports to the Congress on bills referred to the Department.443 Although a somewhat smaller figure seems appl-

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438. Id.
439. This situation occurs most frequently prior to the initial introduction of a bill, before committee hearings, during committee make-up sessions and during final consideration of the proposal. In this sense, too, last minute legislative activity between the principal draftsmen themselves and not infrequently between congressional staff representatives, will be concerned with issues of policy, question and answer preparation, the wording of testimony, the writing of Committee Reports, as well as questions of draftsmanship. See, e.g., DOJ-FMA, notes 43-51.
441. Concluded from a number of interviews with departmental attorneys involved in the legislative process and through observations in the Department.
442. Id.
443. Mr. Hoffman, for example, estimated that attorneys in the legislative office of ODAG, besides the estimated 75 percent on the preparation of reports to the Congress, spent the balance of their time in this manner:
   Drafting: 2 percent
   Legislative Liaison: 5 percent
   Preparation and follow-through of Legislative Program: 20 percent
   Preparation for hearings and actual testimony: 15 percent
icable to the draftsman at the component level, it is clear that general legislative
work, such as the preparation of legislative programs, testimony and hearing
requirements, and reports to the Congress, account for the great proportion of
the legislative attorney’s time. Drafting per se constitutes only from two to ten
percent of the lawyer’s activity. This sense of the term “generalist” was further
confirmed in the context of the activity observed in both the magistrates’ and
narcotic proposals. Here, not only was the great portion of the work formal
and preparatory, but the methodology of the Department left much of the
shaping and formulation of policy to the draftsman. This proved especially true
when questions on specific provisions and amendments to the bills were at issue
in the later part of congressional consideration. With markups of committee
prints, for example, the Department relies heavily upon the judgment and
analysis of the two or three component draftsmen who have been with the
legislation since its beginning. At this point, policy and drafting considera-
tions converge. The need is for attorneys who understand the problems gener-
ally, and not just in the context of terminology.

Returning to the second question, however, it seems less clear that draftsmen
or legislative attorneys in the Department are capable of handling all areas of
DOJ’s statutory. The practices in ODAG and at the component level seem to
confirm this point. In the components the legislative attorney, except in a few
instances, is confined to the functional limitations of his unit. The attorneys
involved in legislation in the antitrust division draft and process proposals
within the broad, but defined, limits of antitrust statutory authority. Similar
instances of subject, policy or statutory limitations can be seen in each of the
components of DOJ, except the Office of Legal Counsel (OLC), the Solicitor
General’s Office and ODAG itself.

The personnel in the Solicitor General’s Office will comment when requested
on specific provisions of DOJ proposals. This is unusual and these comments

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Legal memos: 1 percent or less.
Hoffman Letter, supra footnote 429, at 3.
444. Examination of DOJ files relating to the Magistrates Act indicates differences of opinion
between the Criminal Division and the Office of Criminal Justice on specific provisions such as
time limitations on pretrial arraignment, the use and availability of probation services, and waiver
of the right to counsel. DOJ-FMA notes 39-42. These first memoranda were written over a three
week period following the bill’s passage in the Senate and in preparation of a report on the bill to
the House. A second group of memoranda involving the same offices and ODAG was written over
an 8 day period in preparation for the Department’s testimony before the House Judiciary Com-
mittee. DOJ-FMA notes 43-47. The arguments on the issues make clear that the draftsmen put
forth their substantive reasons for a certain position and that the one most appropriate is adopted.
In this way the Department depends on the initiative and advice of the involved legislative attor-
neys.

445. This was restated in interviews by a number of attorneys involved in legislative work. It
seem to be more in the context of their own expertise—not as draftsmen per se, but as individuals involved at the highest level of the judicial interpretative viewpoint. The OLC comments on legislative proposals are much more frequent. In fact, OLC personnel are continuously involved as draftsmen in major legislative proposals. Moreover, OLC served for over a two year period as a clearing-house for all executive legislative proposals, doing, in the words of one attorney, “a yeoman’s task.” This OLC function seems to be the major exception to the departmental policy of using only the divisions for their own respective legislative work.

The time allocations of the Legislative Office of ODAG are comparable to the attorney-draftsman at the component level. But, the sheer volume and type of legislative materials processed, rather than an involvement in the same detailed legislation work, accounts for the time similarity. Essentially, an attorney in ODAG is a supervisory legislative lawyer who processes and reviews the legislative product of the component division. While he approaches this meaning of the term “generalist,” it was found that the Office does “tend somewhat to have... attorneys work with certain components of the Department more than with others.”

This point illustrates the most apparent and strongest use of the phrase “generalist”: that is, an attorney who has substantial expertise in a particular area of the law but lacks drafting experience or training. This expertise may take the form of having drafted similar legislative proposals, trial experience, or research within an appellate section. This allows the Department to bring great variety and depth of experience to legislative questions, while continuing the policy of involving lawyers in all phases of the prosecutorial experience.

The Federal Magistrates Act of 1968

The stimulus for changing the U.S. Commissioner system arose out of the passage of the Criminal Justice Act of 1964 and subsequent investigatory hearings conducted by Senator Tydings’ Senate Subcommittee for the Improvement of Judicial Machinery.
The Tydings Proposal

Staff members with the subcommittee stated, and the files and committee hearings confirm, that Senator Tydings initiated the commissioner investigation in October 1965, on an independent “exploratory” basis. Advice and suggestions on the matter had come from a number of sources, particularly federal judges, law professors and members of the bar. From the information received at the three respective hearings, supplemented with data gathered from the responses of over 400 U.S. commissioners to a Senate questionnaire, the foundation was laid for the drafting of the Tydings magistrate proposal.

The DOJ Response

The files reveal that DOJ had begun to inquire independently into the inadequacy of the commissioner system even before the commencement of the Tydings investigation. In January 1965, just ten months before the first subcommittee hearings, a departmental memorandum was circulated which anticipated “legal, administrative and constitutional” problems resulting from the passage of the Criminal Justice Act of 1964. The memorandum noted that with the right to counsel applicable to commissioner proceedings, there was “bound to [be] considerable impact on the handling of criminal cases. . . .” Assuming the growth of “substantial adversary proceedings,” it predicted “a severe strain” on the system “as presently constituted” and concluded with the solicitation of opinions from all U.S. Attorneys on the practical and legal impact of the law in eight specific areas.

right to counsel applicable to criminal proceedings before the Commissioners. Previously much of a commissioner’s work involved defendants who were indigent and either involved cases of federal misdemeanors or preliminary hearings. As a consequence, the matter now would “not [be] intended to be a perfunctory matter, but a substantial adversary proceeding.” Id. The Tydings hearings confirmed not only the Department’s assessment of the effect of the Criminal Justice Act, but questioned the performance, quality and substance of the entire Commissioner system. See Hearings on S. 3475 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., pt. 1 (1965-66) [hereinafter cited as the Tydings Hearings]. For a summary of the findings of the Tydings Investigation, see H.R. Rep. No. 1629, 90th Cong., 2d Sess., at 9-10 & n.8 (1968).

452. Interview with Mr. William T. Finley, former Chief Counsel, Senate Subcomm. on Judicial Machinery, and Ass’t Deputy Atty. Gen. 1967-68, August 1970 [hereinafter cited as Finley Interview].
454. DOJ-FMA note 1.
455. Id.
456. Id.
457. Id. The Tydings hearings confirmed the Department’s analysis of the inadequacy of the existing commissioner system. The most substantial defects referred to in subcommittee testimony
Although the initial departmental analysis of the problem was exceptional, its subsequent action was incomplete and tenuous. It was acknowledged that prior to the Tydings hearings only a small percentage of replies had been received, while no further actions such as an independent departmental investigation were taken. With the initiation of investigatory hearings, however, the Department made subcommittee appearances responding with memoranda on specific points of inquiry. Although it is clear that the Tydings measure was drafted principally by the staff of the Senate subcommittee, throughout the bill's preparatory stages the Department submitted its views on early drafts of the proposal. Further, the professional and cooperative relationship which characterized much of the legislation's development began at this early stage. At this point legislative activity in the DOJ increased substantially. The Criminal Division prepared a memorandum analyzing the provisions of the Tydings bill, and discussed in some detail the principal constitutional, legal, and practical problems presented. At the same time, intra-departmental comments on the proposed legislation were circulated among affected components of DOJ. In all cases, it appears that legislative attorneys within these units analyzed the provisions of the bill and wrote reports relative to those portions concerned these areas: underpayment and inadequate training; the fee system of compensation; the lack of a clear definition of the functions and duties of the commissioners; the pro forma fashion in which many search warrants were being issued; confusion and differences over the scope and procedures applicable to preliminary hearings; the established practice of downgrading offenses to come within their limited jurisdiction; and the waiving of prosecution where commissioner jurisdictional standards cannot be met. See DOJ-FMA note 5.

458. No evidence was made available by the DOJ regarding the number of quality of reports on the commissioner system received from the U.S. Attorneys. It was stated, however, that responses were received from approximately 30 percent of the U.S. Attorneys. Of these, the great majority seem to have been in the form of short, succinct comments.

459. DOJ-FMA note 1.

460. See DOJ-FMA notes 3 and 4.


462. See footnote 428 infra. In the files at least one instance can be noted where the Department makes "several observations" on a draft bill, while at the same time not making any commitment on the part of the Department. See DOJ-FMA note 4.

463. There were no overwhelming differences politically or on criminal enforcement policy between the Department and the Tydings subcommittee. The necessity for changing the existing commissioner system was apparent at an early stage to all parties: "[H]earings have made clear that something has to be done with the present system." DOJ-FMA note 4. The important matters to be developed were first, the constitutional case for a magistrate system and, second, the practical development of such a system. The latter consideration was to involve detailed scrutiny of the draft bills by members of the Judicial Conference, in addition to the continued scrutiny of DOJ and the congressional committee members. See text accompanying footnotes 500-501.

464. See DOJ-FMA notes 5-9.

465. DOJ-FMA note 5.

466. DOJ-FMA notes 6-9.
of the proposal which affected their specific responsibilities. These "advisory" memoranda were reviewed and acted upon appropriately by the Criminal Division, and the completed report was submitted to the Legislation Office, ODAG. The legislative material provided a fairly detailed analysis of the Tydings proposal, while most of the commenting units accompanied their remarks with suggested changes in language and construction. The coordinating and processing of these first substantial reports on the Magistrates Act conformed accurately to the Department's own description of its legislative procedures.

With the report examined and the comments consolidated, the Legislation and Special Projects Section of the Criminal Division was assigned specific responsibility for preparing the Assistant Attorney General's testimony and was made "reporting agency" on the legislation as a whole. Available to the two legislative attorneys working on the bill, in addition to the material mentioned earlier, were "many previous studies done in the past by various offices in the Department on very similar proposals." These included opinions of the Office of the Solicitor General, the Criminal Division, the Office of Criminal Justice and the Office of Legal Counsel. The availability of this material stems directly from the Department's system of creating and filing legislative histories, and it results in an organized and thorough approach to the accomplishment of related legislative tasks. Viewed in conjunction with the work of the Department traced in the narcotics legislation it seems clear that the procedure marks a quality improvement over the legislative methodology observed in other executive departments.

467. The Administrative Division, for example, noted that while it favored the administrative portions of the bill as a major improvement on the organization, supervision and training of magistrates, it deferred comment on the legality of the measure to other components of the department. DOJ-FMA note 7.

468. In this regard the Criminal Division, FBI and the Office of Criminal Justice all had some comments pertaining to the draftsmanship of the original bill. See DOJ-FMA notes 5-8. In completed form the Assistant Attorney General's testimony directed at least three comments toward drafting problems in the bills:

1. § 636B "the language . . . does not make it clear whether these tasks could be assigned to magistrates . . . ."
2. Possibility of unequal treatment from district to district.
3. § 303 should be in conformity with the Bail Reform Act.

Id.

469. See text accompanying footnotes 436-442.

470. DOJ-FMA note 12.

471. Id.

472. Id.

473. Id. The important point is for the comments of the components to offer a thorough and independent analysis of the proposal. In turn, this allows the reporting agency to write the Assistant Attorney General's testimony with some depth on specific provisions of the bill. See footnote 468, supra.

474. See text accompanying footnotes 505-29 re the processing of the narcotics legislation.
The July Hearings—Constitutionality and Implementation

The July hearings on the Tydings proposal brought responses and testimony from a multitude of sources, including the Department, federal judges, the Judicial Conference, law associations, law professors and U.S. commissioners themselves. It was apparent from this record that two principal issues would be of continuing concern to the Committee: first, the question of the magistrate system's constitutionality in view of Article III of the United States Constitution and Supreme Court requirements; and second, examination of the measure's administrative and judicial workability.

Detailed consideration of the constitutionality of the magistrate system began soon after the July hearings. With each interest group cooperating, the two staffs exchanged quality memoranda defending one position or the other. Research, writing and redrafting covered a period of over three months, and finally, in a memorandum from the Assistant Attorney General to Senator Tydings the Department expressed this opinion:

[These memoranda point out clearly that the issue of constitutionality is one on which lawyers will differ and that the ultimate answer as to constitutionality can be determined only by the Court. . . . [Thus] it occurs to one that if the bill were limited to certain petty offenses, a case testing its constitutionality would stand in a better posture.]

The examination of the proposal's constitutionality is a good example of DOJ's "court-interpretative" viewpoint. Also important to the issue of quality draftsmanship is the recognition by the Assistant Attorney General that efforts toward limiting the bill's scope, application and procedural requirements should be made to ensure presentation of the "best possible case." Thus the

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475. See generally Tydings hearings, supra footnote 450.
476. DOJ-FMA notes 6, 8, 11, 12, 17, 19, 20, 21, 22, 23, 24, 25, 34, 35, 38, 39, and 53 pertain to the constitutionality of the Magistrates Act.
477. Nearly all of the memoranda in the Department files deal in one way or another with practical issues concerning the proper implementation of the magistrate system.
478. On August 16, 1966, just one month after the Tydings hearings on the Magistrates Act the Senate subcommittee staff memorandum supporting the legislation's constitutionality was submitted for review to the Department. The files indicate that work briefing the opposite conclusion began soon afterwards, continuing throughout the remainder of 1966. DOJ-FMA note 20.
479. Id.
480. DOJ-FMA note 19.
481. The Assistant Attorney General, for example, suggests that a case testing its constitutionality would stand "in a better posture. . . . if the petty offenses covered were limited to those which are malum prohibitum." In this, he refers to the arguments of Mr. Justice Douglas, dissenting, in Cheff v. Schnackenberg, 384 U.S. 373 (1966). Id. Further references throughout the remainder of the files indicate the Department's continuing concern that the scope and procedural requirements incorporated in the legislation be within acceptable constitutional standards. See, e.g., the Assistant
major issue of the bill's constitutionality, although ceded to the Court's final judgment, was related directly to the Department's continued reconsideration of specific provisions. 482

Drafting objectives at this point related closely to the second problem of the bill: the proper implementation of criminal policies. 483 In January, 1967, for example, the Tydings bill was reintroduced and included provisions on pre-trial proceedings, the availability of post-trial relief, the inclusion of minor offenses, an extraordinary circumstances provision, a grandfather clause and an itemized list of misdemeanors excluded from the magistrate's jurisdiction. 484 Each of these provisions was considered and evaluated in terms of the structure and purposes of the federal judiciary system and the Department's own criminal justice policies. 485 In this sense, the Department's method of evaluating and compiling reports and legislative recommendations confirms Mr. Hoffman's statement that

[much of the legislation is drafted with another factor in mind—that is the practicability of law enforcement. . . . [I]n other words, apart from what the courts will say about a particular statute, how will it operate? Can the agencies which must apply them do so in a reasonable and effective manner? 486

The DOJ Methodology

The methodology the Department uses to examine specific provisions from both an interpretative viewpoint and as a matter of practical implementation is basically an adversary approach. 487 Research and the presentation of compet-

482. Attorney General's testimony in which he "sees [a] constitutional problem in the magistrate system as to waiving right to a jury trial in district court, but agrees that the courts must settle the matter and proposes that hearsay evidence must still be admissible at the preliminary hearing." DOJ-FMA note 34.
483. Id.
484. In DOJ-FMA note 11, the Assistant Attorney General states that "the language . . . does not make it clear whether these tasks could be assigned to magistrates. . . ." The Senate Report states that there is "a recognition by the Department [that] there may be valid policy considerations underlying an expanded minor offense jurisdiction for magistrates, and that the only authoritative resolution of the constitutional problem raised can be by judicial decision." S. Rep. 371, supra footnote 451, at 36.
485. No memoranda in the files pertained to the period from March through September, 1967 when the measure passed the Senate. Activity, however, relating to the specific provision in question is indicated subsequent to the Senate action and through the bill's passage in the House. See, e.g., DOJ-FMA note 43 from the Office of Criminal Justice acknowledging that a previous Criminal Division memorandum was persuasive in indicating that S.945 was deficient in several respects.
ing ideas and positions in the magistrates legislation involved two principal components in DOJ—the Criminal Division and the Office of Criminal Justice. Their memoranda can be characterized as a debate. Frequently this dialogue among the legislative attorneys at the component level involves comments and suggestions relating to the bill’s draftsmanship. In one instance, the Office of Criminal Justice stated that the language used is “too loose”; another phrase was questioned because case law may qualify its application. In a third, a memorandum began discussion of particular amendments by noting that the “provisions, as now drafted, are confusing and ineffective in several respects.” Memoranda on the legislation were also directed to questions of priorities and strategy, particularly as the act neared its final format. This was the culmination of lawyer participation by negotiation in the bill’s development. In some instances it meant outright concessions; in others, compromises involving policy matters or the legal aspects of the law’s application, scope or procedural requirements. Some issues were settled with changes in terminology. The DOJ legislative attorney often employed the technique of trying to establish a legislative history supporting a particular analysis of the law. Attorneys in DOJ noted that this occurs most frequently in the writing of House and Senate reports or in floor debate on the bill itself. This type of involvement in the legislative process, for example, occurred in the Magistrates Act drafting when one draftsman suggested that the question concerning waiver of the right to counsel be in either the Federal Magistrates Act or the legislative history of the Act.

To develop an adequate history the DOJ draftsmen can utilize the expertise of the varied components of DOJ, the executive branch and many other independent law-related institutions. For example, at one point, the Office of Criminal Justice suggested that court probation services be available to the magis-

488. See, e.g., DOJ-FMA note 47.
489. DOJ-FMA note 42.
490. Id.
491. DOJ-FMA note 47.
492. See, e.g., DOJ-FMA note 46.
493. The Senate report on the Magistrates Act, for example, notes that subsection 631(h) “has been drafted to ‘strike a balance’ in resolving three overlapping and partially conflicting aims of your committee.” S. Rep. 371, supra footnote 451, at 17.
494. Grammatical or superficial changes to conform the language of interrelated provisions are usually made by the House or Senate committees. Changes suggesting conformity with earlier laws may bring about substantive questions, but in most instances it remains simply an amending process. The Department, for example, was the first to suggest changes to conform the provisions of the law to the recently enacted Bail Reform Act. See DOJ-FMA note 40. S. 945 was substantially intact as a drafting instrument and presented few major questions to the parties, because the measure had been previously submitted to and examined in detail by the Judicial Conference. S. Rep. 371, supra footnote 451, at 9.
495. See, e.g., DOJ-FMA note 46.
trates. The Criminal Division, however, after considering the provision suggested that the Department first check "to see if the probation service has sufficient manpower to conduct such investigations." Two U.S. Attorneys submitted memoranda to the Department on the issue of the constitutionality of the Magistrates System under Article III. The views of the Departments of Defense and Interior were solicited regarding extension of the magistrate's jurisdictional base. In-house, interdepartmental, and outside commenting on particular provisions of the Act, however, was not extensive. There are no indications in the files that DOJ attorneys consulted independently with federal judges, professors or even selected commissioners. However, DOJ and the Senate subcommittee did continually solicit the approval of one interest group whose approval was probably critical to the bill's enactment—the Judicial Conference. Subsequent to the first hearings of the Tydings bill the Conference examined in detail all the provisions and amendments pertaining to the legislation. The theory was simply that this approval would ensure the development of a viable magistrate system compatible with the existing federal judiciary.

Nevertheless, attorneys for the Department indicated that in most cases the Department prefers to use its own resources in supporting the development of a particular bill. This procedure changes in some cases on major pieces of legislation or on bills sponsored by the Department, where for any number of reasons outside authorities are asked to comment on drafts or suggest amendments. To some degree, the narcotics legislation confirmed this type of legislative activity.

496. DOJ-FMA note 40.
497. DOJ-FMA note 41.
498. DOJ-FMA notes 17, 18.
499. DOJ-FMA notes 27, 28.
500. DOJ-FMA note 55.
501. Id. The Senate report contains many explanatory comments on amendments accepted by the Committee that had earlier been passed on by the Judicial Conference. For example, the report notes [T]he report of the [Conference] recommended deletion of S. 3475's reference to the general conflicts of interest statutes, on the grounds that these provisions would not define with sufficient clarity the scope of outside employment permitted a deputy (part-time) magistrate, and that the resulting uncertainty might discourage highly qualified attorneys from accepting appointments as deputy (part-time) Magistrates. The Judicial Conference committee also reasoned that many aspects of a magistrate's outside employment might more appropriately be regulated by standards of judicial ethics than by proscriptions of felony statutes.
502. Interview with Mr. W. Thomas Finley, DOJ, March, 1972.
503. Id.
504. See text and accompanying footnotes 505-29 infra relative to departmental and interagency development of the narcotics legislation. In the narcotics legislation the key policy change
The Narcotics Rehabilitation Act

Origins

In two statements on law enforcement and the criminal process in 1965 and 1966 President Johnson stressed the need for narcotics programs which emphasized rehabilitation and de-emphasized the criminality of addiction. In March, 1966 he pointed out that treatment of addicts as criminals is neither "humane nor effective" and indicated that his administration had proposed legislation which would "authorize the civil commitment of certain addicts, while retaining the full criminal sanctions against those who peddle and sell narcotics."506

These statements marked a major departure from the earlier conventional wisdom which saw addiction as voluntary and thus criminal per se. Notwithstanding the ultimate effectiveness of the measure, this was a significant shift in policy for the executive and was particularly meaningful coming from the President himself.508

DOJ Perspective

The files reveal that until 1961, the Department viewed the problems of narcotics addiction as essentially criminal506 and while disposed toward the medical viewpoint,508 DOJ expressed great reluctance to get into the entire rehabilitative question. Essentially, DOJ's views were based on two grounds: that the question remained outside of DOJ's statutory authority and that effective methods of treating narcotic addiction were by all accounts non-existent.509 As the problem of drug addiction became a more important public issue510 internal considered upon the question of the appropriate correctional action for the Department to advocate regarding drug users. See, e.g., DOJ-NRA note 15. A second question confronting the Department was the problem of establishing legislative and public approval of their new rehabilitative policy. Subsequent to the White House and commission studies, the Department's work centered on drafting a proposal which would implement the policies decided upon.

In the Magistrates Act, departmental efforts were divided into two major areas: first, establishing the constitutionality of the proposed system; and, second, commenting upon congressional bills that were designed to revamp the existing commissioner system. It is in this sense that the Magistrates Act was developed more from a court-interpretative viewpoint than was the narcotics legislation.

506. The Supreme Court had also taken a major step toward the decriminalization of addiction with its decision in Robinson v. California, 370 U.S. 660 (1962). It is unclear precisely what effect Robinson had on the President's position but perhaps it is safe to surmise that it had some effect.
507. DOJ-NRA notes 4-11.
508. See, e.g., DOJ-NRA note 5.
509. See, e.g., DOJ-NRA notes 6 & 10.
510. See DOJ-NRA note 15.
disagreement on the issue grew, culminating in a cautious but steady shift toward affirming a rehabilitation policy. Finally in December, 1961, the Assistant Attorney General of the Criminal Division, in a lengthy and detailed memorandum to the Executive Assistant of the Attorney General, advocated a complete reorientation of departmental narcotic policy.

The Legislative Process

The legislative process examined in the Magistrates Act was similar to the development of the narcotics legislation. There were, however, some distinguishing characteristics in the initiation and processing of the proposal. For example, in the narcotics legislation the issue of primary concern involved substantial changes in the departmental criminal policy, while in the Magistrates Act there was extended discussion relating to questions of implementing a constitutional system. Interesting also are the different methods used by the Department in developing support for major legislative changes, which the Department anticipated in both instances. The narcotics proposal, moreover, affected and involved a number of executive agencies, indicating the kind of coordinated interdepartmental action that can be produced on urgent legislative matters. In the Magistrates Act the Department acted as the principal commenting agency in the executive, with the Senate Subcommittee and the Judicial Conference drafting and developing the legislation; in the narcotics legislation, however, the bill tracing reveals that the Department, in conjunction with other executive agencies, researched, drafted and developed an Administration bill which became the major rehabilitation proposal. Examination of the legislative work in the two proposals seems to indicate that the Department's legislative process works as much from the implementation and policy viewpoint as the court-interpretative approach. This seems to substantiate the views of Mr. Hoffman who suggested that the approaches serve complimentary

511. In commenting on a number of legislative proposals before the Congress, all extending in some degree the rehabilitative services available to the narcotics addict, the Criminal Division's response varied considerably. In some, the measures were referred to the Public Health Service and HEW. See DOJ-NRA, notes 8, 9, 13, 14. In others, the Department expressed opposition to the establishment of patient units for the care and treatment of drug addicts, although the memo noted that the bills are outside the competence of the Criminal Division.

Internal disagreement on the matter is evident. In March, 1961, for example, the Assistant Attorney General expressed "reluctance" to forego criminal prosecution in favor of medical therapy, especially since there seems to be no existing method for effective treatment. DOJ-NRA note 10. In July, the Assistant Attorney General expressed the same view, also expressing the opinion that the bill is ineffective inasmuch as it does not apply to the sale or transfer of narcotics. DOJ-NRA note 12. By October, the Criminal Division no longer objected to the bills, but still reserved "affirmative endorsement" because of its fiscal and medical features. DOJ-NRA note 14.

512. DOJ-NRA note 15.

513. HEW, the Public Health Service, the Surgeon General and the Department of the Treasury as well as the White House were involved. DOJ-NRA notes 30, 34, 35, 46, 47 and 51.
functions in the Department's legislative process.\footnote{514}

Interviews disclosed that the matter had come to an impasse in the Criminal Division by the fall of 1961. At that time, the Assistant Attorney General, with the concurrence of the ODAG, assigned two legislative attorneys to make a comparative investigation of the two conflicting approaches. Their report proved to be so authoritative\footnote{515} that the Assistant Attorney General's memorandum to the higher policy makers in DOJ insured the shift in a major departmental criminal policy.\footnote{516}

Activity subsequent to the Assistant Attorney General's memorandum indicates that a more detailed consideration of specific rehabilitation proposals, particularly S. 1694, had begun.\footnote{517} Early in 1962, however, evidence that Congressional Committee action would not be forthcoming brought forth the compromise solution of establishing both a White House Conference on Drugs and a Presidential Advisory Committee on Narcotics and Drug Abuse for the purposes of initiating a broad, independent and authoritative study on the "multi-dimensional" aspects of the whole program.\footnote{518} This action, although postponing legislative consideration for nearly two years, was supported by DOJ, with the hopes that the specific findings and recommendations of the committee would prove useful toward gaining both congressional and public support.\footnote{519}

The final report of the President's Advisory Commission was released in January, 1964.\footnote{520} Memoranda in the files indicate that the Criminal Division

\footnote{514} Hoffman letter, supra footnote 429, at 8.
\footnote{515} The report of the investigation included a survey of present law, a discussion of its rationale, examination of the sentencing provisions, a review of the question of the attachment of criminality to the behavioral problem of drug usage, an analysis of the causes of drug addiction, consideration of the specific aspects of alternate methods of drug treatment plans and programs, an overall view of the present state of the problem and a detailed analysis of the provisions of a Congressional rehabilitative proposal, S. 1694. DOJ-NRA note 15.
\footnote{516} The Assistant Attorney General's memorandum stated in part: [I] believe that it is time for the Department of Justice to energetically approve legislation which will at least attempt to come to grips with the narcotics problem. . . . Merely placing all addicts in penal institutions for longer and longer periods of time is no solution to a multi-dimensional problem. We must attempt feasible alternatives until the morally debilitating effects of narcotics remain no longer. . . . My study of the problem indicates that no group or expert opposes such an approach. . . . Notwithstanding my reservations [on S. 1694, which is the basis for the Report], no evidence has been adduced which would cause me to hesitate in my advocacy of this measure.
\footnote{DOJ-NRA note 15.}
\footnote{517} DOJ-NRA notes 16-19.
\footnote{518} DOJ-NRA note 20.
\footnote{519} Id. Interviews confirmed that politically the issue needed much more exposure to impress upon congressional leaders and the public at large the "debilitating" affects of existing criminal policies.
\footnote{520} DOJ-NRA note 21.
was given primary responsibility for reviewing and commenting upon the report.\textsuperscript{521} The examination resulted in the compilation of a position paper outlining the committee's findings as well as suggesting alternatives for further departmental action.\textsuperscript{522} These comments were reviewed and revised continually and comprise the great bulk of a major presidential message on crime submitted to Congress.\textsuperscript{523}

\textit{The DOJ and Congressional Activity}

Three major narcotics proposals were submitted to Congress—the DOJ bill, a bill by Senator McClellan, and a Kennedy-Javits proposal. Subsequent to their committee testimony on the DOJ bill\textsuperscript{524} the Department examined comments of other interested parties, particularly emphasizing the substance of the other two bills.\textsuperscript{525} Following its standard procedure, the Criminal Division set out in detail its comments on the proposal—a procedure which enabled DOJ to examine in depth the specific provisions of each bill.\textsuperscript{526}

By early 1966, the Judiciary Committee had substantial agreement on the basic issue of rehabilitation but certain collateral problems remained. For example, DOJ comments were directed towards the constitutionality of certain voluntary commitment procedures, the method of release for the offender, the definitional problem of specifying what constitutes a narcotic and the "fuzziness of expression" noted in certain portions of the bill.\textsuperscript{527}

Final passage of the Act came in September of 1967. Two subsequent memoranda show DOJ's concern with proper follow-up work in the legislative process. The first memorandum contains a substantive analysis of the provisions of the final bill, its application in particular instances, and an overview of the problem of testing criminal responsibility in drug abuse cases.\textsuperscript{528} This type of memo sent to all U.S. Attorneys is a standard procedure on all legislative matters of concern to DOJ. The second memorandum outlines a discussion on the Act at a regional meeting conducted specifically for the benefit of various concerned federal authorities.\textsuperscript{529}

\begin{itemize}
\item \textsuperscript{521} DOJ-NRA notes 23 and 24.
\item \textsuperscript{522} Id.
\item \textsuperscript{523} DOJ-NRA note 26.
\item \textsuperscript{524} S. 2152, 89th Cong., 1st Sess. (1965).
\item \textsuperscript{525} DOJ-NRA notes 29, 31, 38, 39, 41, 42, 43, 53, 54 and 55.
\item \textsuperscript{526} See, e.g., DOJ-NRA note 43.
\item \textsuperscript{527} Id.
\item \textsuperscript{528} DOJ-NRA note 48.
\item \textsuperscript{529} DOJ-NRA note 58.
\end{itemize}
DOJ Evaluation

The Project's examination of the legislative process in DOJ clearly establishes it as superior in almost all phases of the drafting and legislative activity. This stems from a number of interrelated factors: the experience and quality of the Department's personnel; DOJ's organization and operational procedure; the far-ranging scope of the Department's activities; and the specific legislative methodology employed.

Personnel

Perhaps the principal factor contributing to the Department's excellence is the quality and experience of its personnel. In the legal profession experience in DOJ is highly regarded. DOJ's annual law school recruitment program has always attracted high quality law school graduates. Although there is some turnover in DOJ, the change in personnel appears to be an invigorating occurrence rather than an enervating one. At the same time, DOJ has retained a large number of career lawyers, many of whom often work as legislative draftsmen. In the legislative section of the Office of Deputy Attorney General, the eight attorneys have an average of about nine years experience in DOJ.\(^{530}\)

Organization and Operating Procedures

DOJ maintains a well-defined yet flexible organization and operation. The legislative process of the department was rarely deviated from throughout the tracing of the Magistrates Act and the NRA. The Department's method of compiling legislative histories and its central filing system makes research data and analysis available on virtually all legal propositions. Perhaps 70 percent or more of the legislative work in DOJ involves the interpretation of the law or the administration of justice within acceptable legal policies. What this means is that the lawyer-draftsmen in the great majority of instances is working within the context of his own profession in comparison with other departments where legislative matters more often pertain to non-legal policy implementation.

DOJ's Statutory Authority

The existing statutory authority of DOJ spans literally every title in the United States Code. Although primary areas of concentration exist, the basis of the department's jurisdictional authority is scattered. This scattering has a benefi-

\(^{530}\) Hoffman letter, *supra* footnote 429, at 5.
cial effect in that it gives the DOJ draftsmen wide experience in a large number of disparate fields. On the other hand, it significantly impedes neither consolidation nor codification. As one writer has put it, the federal criminal code is a "spotty, duplicative and opaque collage." A codification project for Title 18 is progressing but DOJ still administers large numbers of other statutes which remain neither codified nor consolidated.

The Legislative Methodology

DOJ employs a legislative and commenting procedure which employs a modification of the adversary process. The files are replete with argumentative memos bouncing back and forth between the various DOJ components on both bills. This approach has, like the adversary system as used in the legal system, both advantages and disadvantages. Beneficially, it provokes considerable depth and quality of comment. The DOJ lawyers, as draftsmen, were inevitably thoroughly prepared and always combative. As a negative factor it produces considerable delay and occasional absurdities. For example, when the narcotics legislation was in the final committee stages, memos were still being written arguing definitions in the original DOJ bill.

The file begins with a departmental memorandum noting that problems were to be anticipated in the Commissioner system, following the passage of the Criminal Justice Act of 1964. During the same period Senator Tydings, the Chairman of the Senate Subcommittee on Judicial Reform, began an investigation of the Commissioner system, conducting three hearings over the next year. The Department recognized that the hearings established basic flaws in the Commissioner system and began legislative work on a Tydings bill introduced in June, 1966. The files established that there was cooperation with the Senate Staff in the form of comments on early drafts of the Tydings proposal. It indicates too quite clearly the legislative process involved in evaluating a proposal, preparing a departmental position and drafting testimony for committee hearings.

After the Senate hearings the Department and the Senate Staffs begin detailed consideration of the constitutionality of the Magistrate System. The Senate Staff in August, 1966 gives DOJ a lengthy memorandum supporting its constitutionality. Three months later the Department draftsmen have an equally thorough analysis concluding the opposite. Views on the bill's constitutionality are received from the U.S. Attorneys, supporting the theory that the Department's in-house access to information is wide. Outside comments to the Senate Staff and the Department are received from two other executive departments, as well as the U.S. Commissioner Association.

Senator Tydings' bill reintroduced with some changes in Feb., 1967. The legislation section, Crim. Div., outlines the amendments comparing it to the first bill. In March, the Ass't Atty. Gen. sends DOJ's completed memorandum on the unconstitutionality of the Tydings legislation to the Senate Subcommittee. Both sides agree in essence that a real controversy exists that can only be decided by the Courts. No further correspondence noted until the measure passes the Senate in Sept., 1967. Thereafter, the files reveal the interdepartmental commenting process involved in preparing a legislative report for the House and in drafting the Dep. Atty. Gen.'s testimony. Three offices mainly involved: Crim. Div.; The Office of Crim. Justice; and the Legislation Section, ODAG. As deadlines approach there are a number of conferences held on specific differences among the draftsmen.

It is to be noted that the Chief Counsel of the Tydings Senate Subcommittee has become the Ass't Dep. Atty. Gen. in DOJ. Similar preparatory works done on earlier hearings can be seen in DOJ as testimony given in March and April. One of the Department attorneys goes to the hearings and writes a summary of the testimony for the Department. The
hearings, particularly the testimony of Judge Edwards and the Ass't Dep. Atty. Gen. reveal extensive contact between the Senate Staff Committee and a panel of judges representing the U.S. Judicial Conference. During the entire processing stage of the legislation they passed on particular provisions in the proposed bill and suggested both drafting and policy changes some of which were adopted by the Senate and House Committees. The files end with the House testimony. The measure passed and was signed into law soon afterwards.

FEDERAL MAGISTRATES ACT
FILE NO. I

1. January, 1965

Subject: Memorandum entitled "some Anticipated Problems at Commissioner's Hearings." Discusses problems that will probably appear at such Hearings as a result of the passage of the Criminal Justice Act of 1964. Memo notes that CJA of 1964 gives right to Counsel before Commissioners similar to that afforded by Rule 44 before Federal District Court. States that such law is "bound to have considerable impact on the handling of criminal cases at the Commissioners level." Logical to assume that more counsel will be appointed, more preliminary hearings—in essence "not intended to be a perfunctory matter but a substantial adversary proceeding." As a result, the memo predicts two immediate consequences:

(1) work increase for U.S. Attorneys;
(2) severe strain on the U.S. Commissioner system as presently constituted.

2. June 6, 1966

Subject: Copy of Supreme Court case Cheff v. Schnackenberg, 384 U.S. 373 (1966).

Comment: Assume that the reason the case is here is because it discusses what is a crime within the meaning of art. III, § 2, and a criminal prosecution within the meaning of the sixth amendment.

3. February 7, 1966


Subject: Letter concerning several questions asked at a prior subcommittee hearing. One related to the department's views on the relegation of certain misdemeanors to the jurisdiction of Commissioners. The view is that certain misdemeanors and petty offenses can be suitable for a trial by a Commissioner with the proviso that the Commissioners are selected and appointed differently. Attached to the letter are two items bearing on the problem:

(1) a departmental memo which concludes that the preliminary hearing should be tailored to the fundamental purpose which it serves, determination of probable cause, and should not be so structured as to obstruct the progress of a criminal case.
(2) a June 3, 1966 Time Magazine article which notes that
abolishment of the Commissioner system in Michigan "has notably improved and speeded up justice."

4. May, 1966

From Ass't Atty. Gen., Crim. Div. to Senator Tydings.

Subject: Response to a draft bill and attached staff study on U.S. Commissioner system. Notes that hearings have made clear that something has to be done with the present system. No committment on part of Justice, yet makes several observations on draft bill.

(1) Cites need for study re statistics on how much the courts would be relieved if a magistrate system were installed.

(2) Election by defendant provided for District Court trial, "to obviate the Constitutional problems".

(3) 10 and 20 day mandatory hearing requirements.

(4) Expresses view that the Bill should include provision relating directly to the admissibility of evidence.

Concludes that staffs should be consulted on both sides of the problem.

5. June 7, 1966

Subject: Staff Memorandum: U.S. Commissioners; S.3475; Federal Magistrate Act of 1966.

Outline:

1. The present situation found unsatisfactory. Reference is made to Subcommittee testimony revealing most substantial defects as: underpayment of commissioners; inadequate training of commissioners; fee system of compensation; lack of clear definition of commissioner’s function; cursory fashion in which many search and arrest warrants are issued; confusion of commissioner over purposes and procedures of preliminary hearings; practice of downgrading federal offenses to come within limited jurisdiction of commissioner or waiving prosecution where offenses cannot meet commissioner jurisdictional standards rather than add to burden of district court dockets.

2. Recommendation to upgrade commissioner system.

3. Specific provisions of proposed new system discussed.

   A. A two tier system of full-time and deputy magistrates is described.

   B. The number and location of both full-time and deputy magistrates provided for. Full-time magistrates are to be appointed whenever practicable.

   C. Magistrates shall be appointed by the district courts.

   D. A new standard of state bar membership is imposed for all new magistrates.

   E. Magistrate terms get 8 years with mandatory retirement at age 70. Provisions for removal also specified.

   F. Salary scales provision.

   G. The name "magistrate" will replace the present title "commissioner".

   H. Expenses provision.
I. Additional duties specified, consistent with the magistrate’s non-article III status.

J. Preliminary hearing requirements noted. Waiver only with aid of counsel. Discovery provisions of F.R. Crim. P. endorsed.

K. Magistrate jurisdiction expanded to include many misdemeanors.

L. Administrative office given responsibility of compiling data re magistrate system.

M. Implementation timetable and phase-out of Commissioner system.

6. June 15, 1966

From Director, FBI to Mr. Herbert E. Hoffman, Chief, Legislative and Legal Section, Office of the Deputy Attorney General.

Subject: Short memo discussing S.3475, the Federal Magistrates Act of 1966. Notes that the Bureau favors the use of lawyers and, aside from possible constitutional objections, favors generally the provision allowing magistrates to try minor offenses. Disagrees with bill as it pertains:

1. to allowing supervision of pre-trial discovery;

2. to giving preliminary consideration to a convicted defendant’s post-trial relief;

3. and willful contempt power.

Suggest instead here the appointment of judge under the constitutional system. Draft change suggested: use “unable to pay” rather than “indigent”.

7. June 21, 1966

From Ass’t Atty. Gen. for Administration to Mr. Hoffman.

Subject: S.3475, the Federal Magistrates Act. Favors the administrative portions of the Bill as a major improvement of the organization, supervision, and training of magistrates. No comment on legality of measure.

8. June 30, 1966

From Mr. Subin, Office of Criminal Justice to Mr. Hoffman.

Subject: S.3475. The memorandum sets forth 6 major shortcomings of the Act. Substantive discussion of each point as it relates to the Tydings measure. Notes that pt. (2) raises two very serious constitutional questions:

(a) whether a non-article III judge has power to try criminal cases, and (b) whether the bill’s procedures amount to an unconstitutional denial of jury trials to defendants tried by magistrates. On Pt. 3 the memo suggests that it might be better to consolidate all the functions of quasi-judicial officers (all Hearing examiners, Bankruptcy referees, etc.) thus insuring a wide distribution of magistrates.

Comment: Memo by the Office of Criminal Justice; is substantive and deals aggressively with the issues and problems presented by the Tydings legislation and the Criminal Division Memorandum 5 noted infra.
From Staff, Nat'l Crime Commission to Mr. Hoffman.


From Staff, Nat'l Crime Commission to Mr. Hoffman.

Subject: Copy of opening statement of Senator Tydings. Beginning of three days of hearings. The Senator states "that S.3475 was drafted as a result of a study of the Commissioner system which the [his] subcommittee began last fall [1965]." Sets forth early history of hearings and states the principal provisions of the bill.

From Staff, Nat'l Crime Commission to Mr. Hoffman.


Outline of Testimony:

(1) system needs an overhauling. Examples given of the non-lawyer and the fee-system.

(2) recent legislation has increased the duties and function of Commissioners.

(3) enlarged jurisdiction causes Department concern on two grounds:
   a) Practical: Will defendants choose this alternative—which gives government no right to bring case in district court;
   b) Constitutional: Primarily, are the Commissioners article III judges?

Suggests if hearings disclose a genuine need for a tier of federal police courts, you should go further and make the Magistrates article III judges.

Other Sections of the bill:

(1) §636 (B) "The language . . . does not make it clear whether these tasks could be assigned to Magistrates . . . ."

(2) Possibility of unequal treatment from district to district too.

(3) §303—should be in conformity with the Bail Reform Act.

From Staff, Nat'l Crime Commission to Mr. Hoffman.


From Staff, Nat'l Crime Commission to Mr. Hoffman.

Subject: Earlier draft of the Ass't Atty. Gen.'s testimony.

From Staff, Nat'l Crime Commission to Mr. Hoffman.

Subject: Another draft of the Ass't Atty. Gen.'s testimony—almost the final copy.
Subject: The final copy of the Ass't Atty. Gen.'s testimony.


Subject: Expression of doubt over constitutionality of the conduct of criminal trials by non-article III judicial officers. Also note that, the 10 day period for preliminary hearings is desirable in the interest of prompt federal justice.

Subject: Expression of reluctance to support The Federal Magistrates Bill on basis of article III distribution of the judicial power.

Subject: On the constitutionality of the minor offense provisions of S.3475. Opinion expressed: "... these memoranda point out clearly that the issue of constitutionality is one on which lawyers will differ and that the ultimate answer as to constitutionality can be detainted only from the Court. Since ..., it occurs to one that if the bill were limited to certain petty offenses, a case testing its constitutionality would stand in a better posture. This would be especially true if the petty offenses covered were limited to those who are malum probitum."

Subject: Memorandum prepared by the Senate Subcommittee on the constitutionality of Trial of Minor Offenses by U.S. Magistrates. Memorandum discusses problem of non-article III courts. Study includes exercise of judicial power through court officers, consent to trial by a judicial officer other than a judge, and appellate review by article III Court.

Comment: It is quite apparent that much effort went into the compilation of this memorandum. It is very thorough.

Subject: Note expressing thanks for copy of Staff Memorandum on the constitutionality of the minor offense provisions of S.3475.

Subject: Trial of Petty Offenses by U.S. Commissioners. Discussion of Cheff v. Schnackenberg, the problems of defining the line between petty and serious offenses. Two principle Law Review articles—Frankfurter and Corcoran (1926) and Doub and Kestenbaum (1959).

Subject: Draft of Memo entitled "The Constitutionality of Trial of Minor Offenses by U.S. Magistrates."

Issues: Are Magistrates article III tribunals, or exemptions to article III? If not can jurisdiction conferred on them be reconciled with spirit of article III?

Comment: Prepared over a three month period and circulated to a number of attorneys in the Criminal Division. It
DOJ

compares favorably with the work on the same issue done by the Senate Staff.

24. No Date

Subject: Second Draft on the constitutionality of the Magistrate Bill.

25. No Date

From Senator Tydings to a newspaper.

Subject: Commenting on the paper's general support of his bill, S.3475 on U.S. Magistrates and discussing the possible constitutional objections raised by the Asst. Atty., Crim. Div., concerning the status of magistrates as quasi-article III judges.

26. No Date

Subject: A draft copy of the U.S. Magistrates Act.

27. No Date

From Secretary of the Interior to Senate Judiciary Committee.

Subject: Response to request for views of Interior Dept. on S.3475. Supports thrust of bill and suggests extension to other unified districts than national parks.

28. No Date

From the Dept. of the Air Force to Senate Judiciary Committee.

Subject: View of D.O.D. on S. 475.

29. June, 1966

From President of National Association of U.S. Commissioners to Senate Subcommittee.


30. July, 1966

Subject: News release from Senator Tydings; notes beginning of hearings, purpose and background of bill.

31. June, 1966

From Treasurer of the National Association of U.S. Commissioners to Senate Subcommittee.

Subject: Role of U.S. Commissioner. Approving especially:
   1) Raising the dignity of the office.
   2) Limiting appointments to attorneys.
   3) Recognition of need for more uniform practices by Commissioners.

32. No Date

Subject: List of minor offenses (penalty of no more than a year in prison and/or $1000 fine) found in Title 18 and 26 U.S.C. Excludes petty offenses. Approximately 128 offenses designated.

33. June 7, 1966

Subject: Copy of Congressional Record, Vol. 112, No. 93. Statement Senator Tydings on Federal Magistrates Act of 1966 introducing this bill which is contained in the Record.

34. No Date

From Ass't Dep. Atty. Gen. to Subcommittee #4 of the House Committee on the Judiciary.

Subject: A statement on S.945 expressing view of Justice Dept. Sees constitutional problem in Magistrate system as to waiving right to a jury trial in district court, but agrees that the courts must settle the matter and proposes that hearsay evidence must still be admissible at the preliminary hearing.
35. No Date  
**Subject:** 5 copies of an unsigned memo from Justice on constitutional problem of Sec. 302 of S.935 and finds Sec. 060 (d) confusing as to the meaning of “without prejudice” release from custody after imposition of sanction for excessive delay.

36. No Date  
**Subject:** 2 copies of an unsigned memo on Sec. 303 saying Justice Dept. wants time limits set forth in the bill, but that this should be left to the discretion of the judge. Both this and the previous memo probably are the basis or body of Dep. Atty. Gen’s. testimony.

37. February 13, 1967  
From Atty., Crim. Div., to Chief Legislation and Special Projects Section, Crim. Div.  
**Subject:** Notes that Sen. Tydings has made a few key changes in the bill on U.S. Magistrates. The bill as introduced in the first session of the 90th Congress is S.945.

Seven changes noted:  
1) Provision for non-lawyer magistrates.  
2) Additional duties divided into:  
   a) supervision of pretrial proceedings  
   b) preliminary review of post-trial relief  
3) Contempt provision outlined.  
4) Minor offenses provision.  
5) Extraordinary circumstances provision; let Magistrate extend deadline for Preliminary Hearing.  
6) Grandfather clause.  
7) List of misdemeanors excluded from jurisdiction of Magistrates.

38. March 13, 1967  
**Subject:** Note that in accord with the Senator’s request the Dept. has received a Senate Staff memo on the constitutionality of the minor offense provision of S.3475 (89th Congress). The Asst. Atty. Gen. encloses a departmental memo (see DOJ-FMA, note) that is the product of their services. He notes that: “It sets forth the case against the constitutionality of the proposal. Be that as it may, the substance of the two conflicting memoranda underscores the fact that this is an issue over which a genuine difference of opinion can exist.” Suggests that the Senate should consider in that light minor modifications of the bill to place it in the best possible constitutional posture. Concludes by noting the department recognizes the need for reform and intends to cooperate toward that end.

39. September 15, 1967  
From Ass’t Atty. Gen. to Acting Director, Office of Criminal Justice.  
**Subject:** S.945 notes that it has passed Senate and now in House. Notes that 2 conflicting memos on the constitutionality of the proposal had been written—“underscores the fact that this is an issue over which a genuine difference of opinion can exist and a judicial decision will be necessary to settle the constitutional difficulty.” Not recommended despite reservations. (Opposition to S.945) Discusses time limits left to rule making power under the bill—“more flexible to meet needs of C.J.”
Comment: Genuine constitutional issue presented—interpretive viewpoint; practical considerations, despite reservations, recommends passage. No correspondence in files from Feb. to Sept. during which time the measure passed the Senate.

40. September 25, 1967

From Acting Director, Office of Criminal Justice to Ass't Atty. Gen., Crim. Div.


Report states: "In harmony with advisory opinion received from various divisions with one exception." Reject the Crim. Div. suggestion re time change—says will keep 10-20 day limit. Adds suggestions:
1) unrepresented defendants not permitted to waive trial by District Court.
2) no restriction on the availability of probation services to Magistrates.

Two technical changes advanced:
1) Bail
2) Federal Hearing Examiners

41. October 3, 1967

From Ass't Atty. Gen. to Acting Director, Office of Criminal Justice.

Subject: Argues against time decision on basis of arbitrariness—not in the interests of justice to aim at rearrest procedure. -Believes that defendant should be able to sign waiver of right to District Court trial. -Checks first to see if the probation service has sufficient manpower to conduct such investigations.

42. October 6, 1967


Subject: Previous memo of Oct. 5, 1967, (DOJ-FMA, note 40). States that Criminal Division memo persuasive that S. 945 deficient in several respects:
1) time limits are too arbitrary,
2) waiver,
3) probation.

Drafting suggestion: suggests substitute for "in the interests of Justice" and "extraordinary circumstances." The first is "too loose." Cases may qualify the latter. Copy sent to Mr. Hoffman's legislation office, ODAG.

43. Oct. 26, 1967


Subject: Draft of Deputy Atty. Gen.'s testimony before House Judiciary Committee.

Contents:
1) Analysis of S. 945
2) Upgrading necessity shown
3) Most controversial provisions discussed.

Conclude arguments good on both sides. Therefore, suggest Committee "focus its attention upon whether [it] will con-
tribute to the fair and expeditious administration of Criminal Justice, while recognizing that the trial provision represents an innovation which may be tested by litigation in the Courts."

Comment: Testimony notes that both sides have examined the matters. Attached is memo noting that meeting on the testimony with the principal departmental draftsmen in attendance will be held in Mr. Hoffman's Office.

44. Oct. 30, 1967


Subject: A second draft of the Deputy Attorney General's testimony:
- changes in language—some handwritten.
- separates the problem of Constitutionalty—pro and con— from the testimony itself.
- 18 pages in toto.

45. Oct. 31, 1967

From Atty., Criminal Division, to Chief, Legislation and Special Projects Section, Crim. Div.

Subject: Two further drafts of the Dep. Atty. Gen.'s testimony: one a clean copy written before the conference in Mr. Hoffman's office; the other, a result of that conference. Changes:
(1) Advocates Attorney's requirement in all cases—notes that minimize isolation problem with Rules 419 of F.R. Crim. P.—extended use of summons for travel reasons.
(2) Other language changes.

46. Oct. 31, 1967

From Atty., Crim. Div. to Mr. Hoffman.

Subject: Re-draft of Section of testimony relating to waiver of right to counsel. Suggested that language be in "either the Federal Magistrates Act or the Legislative History of the Act." Cites and discusses two recent cases in support thereof.

47. Nov. 2, 1967

From Acting Director, Office of Criminal Justice, to Chief, Legislation Section, Crim. Div., and Mr. Hoffman.

Subject: Notes meeting on subject (S. 945) held and this memo relates to agreement reached at that discussion. Changes relate to proposed 10 and 20 day limits.
States that: "These provisions, as now drafted, are confusing and ineffective in several respects."
- 10 day limit reasonable if conscientious application of the Bail Reform Act.
- 20 day major difficulties: (1) beyond capacity of many federal Districts; the personnel available should relate to the defense as well as prosecutor. (2) sanction provision "confusing"—says to be released without prejudice yet—how can further proceedings be instituted; if automatic—no sanction, if not—what does "without prejudice" mean.

Comment: short to the point discussion of drafting and policy issues.

48. Nov. 11, 1967

From Ass't Atty. Gen. to Chief, Legislation and Special Project Section, Crim. Div.
Subject: Copy of draft of Dep. Atty. Gen.'s testimony. Comments made by both the Ass't Atty. Gen. and another departmental attorney.

- Constitutional section change wording to suggest "strong" arguments against, but "respectable" arguments.
- Inclusion of note on time limit suggestion.

49. Feb. 5, 1968
From Mr. Hoffman to Ass't Atty. Gen., Crim. Div.

Subject: Requesting preparation of testimony in support of S. 945 and along the lines of Justice's proposed report now pending at BOB.

50. Feb. 12, 1968
From Mr. Hoffman to Ass't Atty. Gen., Crim. Div.

Subject: Request that testimony be ready for Feb. 23 so that it can be thoroughly reviewed in advance of March 6 hearings.

From Mr. Hoffman to Chief, Legislation and Special Project Section, Crim. Div.

Subject: Ass't Dep. Atty. Gen. will testify on S. 945 on March 6.

52. No date.
Subject: Alternative statement on S. 945 contains four differences from the one finally used.

53. March 7, 1968

Subject: Views of Department of Justice on S. 945 in response to Celler's request for Justice's views. The letter contains an outlining of the provisions of the bill. States that the constitutionality of magistrates trying other than petty offenses has been examined and that the Justice Department believes there to be authority under either article III or I of the Constitution. Contains four suggestions amending the bill.

54. April 2, 1968
From Atty., Legislation and Special Project Section, to Chief, Legislation and Special Projects Section.

Subject: Hearing before House of Representatives Judiciary Subcommittee No. 4 on Wed., March 13, 1968. Review of the testimony of three witnesses:

1. William Herngate—Representative — Democrat from Missouri.
2. Attorney General William T. Finley of DOJ.

All three express support for generally the same reasons:
1. It would upgrade quality of personnel;
2. Help relieve heavy burden on Federal District Courts;
3. Accelerate judicial process;
4. Substitute fixed salaries for fee system.

Discussion of constitutional question of waiving right to trial by art. III, Constitution. Some minor amendments suggested by Committee members.

Downgrading of offenses discussed along with salary provision and cost of magistrate system.

Judge Ted Levin of Michigan supplied the only opposition
as he wanted to abolish the U.S. Commissioner system and increase the number of U.S. District Court Judges. Chairman Rogers in introducing Finley took note of the fact that the latter had worked with Senator Joseph Tydings' Senate Judiciary Subcommittee two years ago on a similar Magistrates bill.

Finley stated that when he was counsel for the Tydings' Senate Judiciary Subcommittee, a memo was written which considered the constitutional question involved in the area of a defendant waiving his right to an Article III court and submitted the memo to several university scholars and found there was a legitimate constitutional basis for the bill.

Subject: Statement of Circuit Judge George Edwards, U.S. Court of Appeals, before House Judiciary Subcommittee on the Federal Magistrates bill. This gives a history of Senate Bill S. 3475 of Senator Tydings in 1966 and shows how S. 3475 went from the early beginnings to its final form and later became S. 945—the Magistrates Act. S. 3475 was referred by Judicial Conference to Committee on the Administration of Criminal Law in 1966 and it was considered in detail by a subcommittee of Judges Clayton, Zerpoli, and Chilson, who made recommendations for amendment in about 50 instances. The Committee in Sept. 1966 recommended qualified approval of S. 3475, and the Judicial Conference took favorable action thereon. The full committee received the findings of the subcommittee and gave qualified approval. The Conference authorized the Chairman of the committee to confer further with the chairman, members, and staff of the Senate Subcommittee on Improvements in Judicial Machinery as to differences between the committee and Senate subcommittee as to two sections. Further recommendation for more specific approval of S. 3475 was given at the meeting of the Judicial Conference of the U.S. sessions on March 30-31, 1967. There had been a redraft allowing District Court judges to assign U.S. Magistrates as Special Masters, with certain qualifications. Judge Edwards notes too that the draft allowed U.S. Magistrates to conduct pretrial or discovery proceedings on civil or criminal actions, as well as other powers and duties which may be assigned to Magistrates.

The other area of disagreement was Section 302 extending the jurisdiction of a Magistrate to try “minor offenses.” He stated that the definition of “minor offense” in the draft bill has been narrowed to meet the approval of the committee. Bill thereafter was conformed to the recommendations of the Judicial Conference and passed the Senate.
rate, advocating no legislation unless it was punitive. In late 1961, the files reveal that a major change in Departmental Policy was advocated by the Assistant Attorney General, Criminal Division. Essentially, it calls for a rehabilitation approach to the narcotics problem. It seems the memorandum to some extent was responsible for the formation of the President's Advisory Commission on Drugs in 1962. The latter portion of the file reveals DOJ intradepartmental and White House Correspondence on the specific recommendations of the President's Commission released in 1964. At this point the DOJ was developing both policy and drafts pertaining to proposed legislation in the area of narcotics rehabilitation.

FILE NO. II (3/17/65-8/2/65)

In March, 1965 the DOJ submitted recommendation on the sentencing and treatment of narcotic and marijuana offenders in compliance with the President's Message on Crime. Numerous drafts of the Message and proposed bills are in the files. The Administration bill is introduced in June, 1965 with the coordinated support of HEW, DOJ, and the Treasury Department. After Departmental testimony on the legislation in July, the Criminal Division does extensive follow-up work on the Departmental bill and the two other major proposals—the Kennedy-Javits bill and the McClellan measure. Preparation for extended hearings on the bills begins.

FILE NO. III (1/20/66-9/29/66)

This last file traces the development of the NRA from the beginning of the new session to its passage in September, 1966 and subsequent implementation by the DOJ. Cooperation between the Department and Senate Staff people is noted in the development of the bill, while the tracing procedure reveals the legislative process DOJ follows internally. Much attention is paid in the Criminal Division and OLC analyses of the Senate drafts, particularly Committee Prints. Most of the problems in the proposed legislation are policy matters relating to the scope and implementation of the measure; however, some drafting comments are made on the legislation. After the measure passed, the files note a dispute involving the administration of certain provisions of the Act existed between the DOJ and NIMH.

NARCOTICS REHABILITATION ACT OF 1966
(DOJ-NRA)

FILE NO. I


From Dep. Atty. Gen. to Chairman, House Committee on Interstate and Foreign Commerce.

Subject: General response to Committee regarding views of H.R. 5422: "To authorize the care and treatment at facilities of the Public Health Service of narcotics addicts committed by State courts and the United States District Court for D.C. and for other purposes." Used for review of bill by committee on intergovernmental relations is cited.
2. April 6, 1954


Subject: Discusses rejection of H.R. 5433 and subsequent modifications contained in other legislation.

3. April 16, 1954


Subject: Identifies H.R. 8559 as successor to H.R. 5422 and establishes its Senate counterpart as S. 3109.

4. Feb. 24, 1959


Subject: Identifies issues of proposed bill as one for policy review by Public Health Service and Congress.

5. April 27, 1960


Subject: Discussion of H.R. 11329 "to provide for grants-in-aid to the States for the construction and operation of narcotic addiction clinics." Opinion expressed that a medical viewpoint is desirable.

6. May 6, 1960

From Dep. Atty. Gen. to Chairman, Senate Committee on Labor and Public Welfare.

Subject: No recommendation as to enactment of S. 717 because of inappropriate authority in Justice Department in matters of health.

7. May 31, 1970


Subject: Reference to another bill for grants-in-aid for narcotics treatment, H.R. 12120.


Subject: Reference to S. 657 for establishment of post-hospital program for drug treatment. Referral to Public Health Service and Congress.


From Acting Ass't. Atty. Gen., Criminal Division, to Deputy Attorney General.

Subject: Referral made to Secretary of HEW on H.R. 616.

10. March 20, 1961


Subject: Expresses reluctance of Justice Department to forego criminal prosecution of addicts in favor of medical therapy, especially since there is no currently existing effective method of treatment.

11. April 17, 1961


Subject: Discussion of H.R. 5999 as proposed amendment to Public Health Safety Act. Expresses opposition of Criminal Division to a bill in as much as it would establish out patient units for care and treatment of drug addicts. Opinion noted that H.R. 5999 is outside the competence of Criminal Division, however.
Subject: Discussion of S. 1694, designed to enable courts to deal more effectively with problems of narcotic addiction. Opinion of ineffectiveness of bill in as much as it does not apply to the sale or transfer of narcotics.

From Dep. Atty. Gen. to Chairman, Committee on Interstate and Foreign Commerce.
Subject: Defers comment on H.R. 5999 for establishment of hospital in New Jersey for treatment of drug addicts. No need of hospital is acknowledged by Justice Department.

Subject: H.R. 9141 to assist the several states in establishing hospital facilities and programs of post-hospital aftercare for narcotics treatment and other purposes. Opinion expressed no legislative objection to passage of bill, though affirmative endorsement is reserved because of fiscal and medical features of bill.

15. Dec. 29, 1961
From Ass't. Atty. Gen. to Executive Assistant to the Attorney General.
Subject: On S. 1694 and general subject of enabling the courts more effectively to deal with problem of narcotics addiction. Reflects major policy switch of Justice Department's reaction to bills for treating narcotics addicts. Observation made initially that the punitive approach is not solving the problem and that new ground should be broken. Report includes: a survey of present law on subject of narcotics; rationale of present law; some criticism of the sentencing provisions in the current law; the question of when criminality attaches to drug use; an analysis of causes of addiction; consideration of alternate methods of drug treatment presently implemented, its failure and success, severity, timing, duration, and voluntary or compulsory nature. The high incidence of relapse under the present system is taken as evidentiary of a need for change and a new emphasis on rehabilitation. The specific provisions of S. 1694 are discussed. Constructive comments recording what additionally should be included in the Bill. Objections to use of drugs for rehabilitation purposes is considered and rejected. Finally, it is stated:

With the exception of several provisions I feel S. 1694 is a long, although modest, step forward. I believe that it is time for the Department of Justice to energetically approve legislation which will at least attempt to come to grips with the narcotics problem. It attempts to resolve doubts many of us have concerning the sentencing of first offenders without going “soft” as to those who may be termed the “hard core” addicts with criminal records.

... Merely placing all addicts in penal institutions for longer and longer periods of time is no solution to a multi-dimensional problem. We must attempt feasible alternatives until the morally dehabilitating effects of narcotics remain no longer. S. 1694 points the way to such an end. My study
of the problem indicates that no group or expert opposes such an approach. It is sponsored by leaders in New York, a state with almost 50 percent of the known narcotics addicts in the United States. Notwithstanding my reservations, no evidence has been adduced which would cause me to hesitate in my advocacy of this measure.

Subject: Comments on S. 1694 and observation that its effect is necessarily limited because it cannot affect treatment of those dealing in sales or transfer of drugs, and also because it applies only to first offenders. Reservation is expressed as to the relapse provisions.

From Assistant Attorney General to Deputy Attorney General.
Subject: Upon completion of Criminal Division study of S. 1694, approval of that Act is expressed.

Subject: Introduction to discussion of S. 1693, a bill to provide for the general welfare by assisting the states through a program of grants-in-aid, to establish and aid hospital facilities for the treatment and cure of narcotic addicts. It is to be a companion bill to 1694.

19. April 6, 1962
From Deputy Attorney General to Chairman, Senate Committee on the Judiciary.
Subject: Gives the views of Justice Department on S. 1694. Summary of provisions of bill is given. General agreement expressed with added suggestion that the statement of the policy of Congress in the bill be narrowed to the extent of the operative portions of the bill.

Subject: Comment on S. 3098 which provided that narcotics addiction be regarded as a mental illness. Suggests deferral of judgment until after upcoming White House conference on narcotics.

21. Feb. 27, 1964
Subject: Final Report of the President's Advisory Commission as: 1. The transfer of the Bureau of Narcotics and certain Food and Drug Administrative investigative functions to the Department of Justice. 2. Revision of the existing structure of sentencing as it relates to narcotic offenses. Also discussed is the Commission's request that the American Medical Association and the National Research Council submit a joint statement as to what constitutes legitimate medical treatment of narcotics addicts "in and out of institutions." The Commission calls for increased, deepened and varied research, and an improved and coordinated method of obtaining and promulgating statistics. Recommendation of the enactment of legislation authorizing the use of wire-tapping by Federal law enforcement officials in limited circumstances is made. Finally, it is recommended that the Federal government aid and assist the states in developing
programs of research and developing the use of non-hospital type treatment for addicts.

22. June 20, 1963

Subject: H.R. 576, designed to assist the several states in establishing hospital facilities and programs of post-hospital after-care for the care, treatment and rehabilitation of narcotic addicts and for other purposes. Comment deferred in view of the fact that the President's Advisory Committee on Narcotics and Drug Abuse might shortly be asking the Department to comment on various legislative proposals relating to care and rehabilitation of narcotic and drug abusers.

23. April 8, 1964
From the White House to Deputy Attorney General.

Subject: Comments on Criminal Division, Department of Justice, Position Paper on the Final Report of the President's Advisory Commission on Narcotic and Drug Abuse. A section by section and page by page critical analysis is made of the memo of February 27, 1964 from the Assistant Attorney General to Deputy Attorney General.

24. June 9, 1964
From Ass't. Atty. Gen. to the Attorney General.

Subject: Final Report of President's Advisory Commission on Narcotics and Drug Abuse—Sentencing, Treatment, and other Problems. This is one of two memos prepared on request of Attorney General in response to the "Comments on Criminal Division, Department of Justice, Position Paper on the Final Report of the President's Advisory Commission on Drug Abuse." It concerns itself primarily with the part of that report on sentencing and treatment of drug abusers, and also with other miscellaneous problems. It is a paragraph by paragraph critical analysis of the appropriate portions of "the Comment."

25. Aug. 3, 1964
From Ass't. Atty. Gen.

Subject: Outline of new policy of Justice Department to be applied regarding charging of narcotic and marijuana offenders. "In any case where a person, not previously convicted of any felony, is charged with violating the federal laws relating to narcotics or cannabich substances, and either section 4704 or 4744 of Title 26 is applicable to the offense, that section shall be used exclusively unless clearance to prosecute under other applicable sections is received from the Criminal Division." The policy is qualified to apply only to persons not previously convicted of any felony, and does not apply to border cases where there is direct proof of importation by the defendant, to which offenses only Title 21 provisions are applicable.

FILE NO. II

26. March 17, 1965

Subject: Recommendations Submitted by the DOJ on the Sentencing and Treatment of Narcotic and Marijuana Offenders in accordance with The President's Message on Crime.

This memorandum covers:
1. Relevant background information.
2. Recommendations for limiting the coverage of the mandatory minimum penalty sentences.
3. Proposals for a federal civil commitment statute.

Appendix A: Comparison of Sentencing of Narcotics and Marijuana Offenders comparing the present law (3/65) with Department of Treasury proposals, Department of Justice proposals, and the President's Advisory Commission proposals.

Appendix B: a letter from Assistant Attorney General (Criminal Division) to all U.S. attorneys instructing them to, whenever possible, prosecute first offenders (excluding traffickers) under Title 26, §4704 or §4744, making them eligible for parole, probation or suspended sentence.

Appendix C:
(1) From Assistant Secretary of the Treasury to Assistant Attorney General. A memorandum and draft bill to provide courts with more discretion in granting probation and making parole available to certain offenders of the narcotic and marijuana laws. With the exception of instances of a person over 21 selling or conspiring to sell to a person under 21, the proposal provides for possibility of suspension of sentence or probation:
   a. to all first offenders convicted of selling marijuana.
   b. all first time marijuana offenders.
   c. second offenders convicted of acquiring marijuana.
   d. all first offenders convicted of selling narcotics.
   e. second offenders convicted of receiving or possessing narcotics, but only if the court determines that the offender is a narcotic addict, and where the court finds that the offender would be benefited by the provisions of parole.
(2) A draft bill by the DOJ to extend sentencing and probation provisions of the Federal Youth Corrections Act to offenders age 26 and under.
(3) A table comparing Youth Corrections Act commitments between age brackets of under 21 and 22 and over from 1960-1964.
(4) A draft bill based on S. 1694 proposing election of civil commitment to be available to certain drug offenders before conviction.
(5) A draft bill based on the President's Advisory Commission's recommendation proposing election of civil commitment to be available to certain drug offenders after conviction and that successful completion of the rehabilitation program result in the setting aside of the conviction.
(6) A draft bill based on the President's Advisory Commission's recommendations, basically the same as (5), but adding the requirement that the Director of the Bureau of Prisons certify that treatment facilities are available.
(7) Table of elapsed time of trials between court filing and termination of case in the five districts having the most drug offenses between 1960 and 1964.
(8) Table of offenders received in Fort Worth and Lexington prisons in 1963 and 1964 by offense, showing the percentage of drug offenders to total prisoner population.
(9) A draft bill providing for certain options after convic-
tion allowing the court to sentence the defendant to treatment and rehabilitation without the defendant so electing, for a maximum period of 10 years but in no event for a period exceeding the maximum sentence that could otherwise have been imposed on the offender.

27. March 22, 1965

From Mr. Hoffman to Executive Assistant to the Attorney General.

Subject: Memo indicates that Sen. Kennedy would like to introduce the narcotics legislation; suggest also that Sen. McClellan interested.

28. No Date

Subject: Comparison of S. 2191 as reported by the Sen. Jud. Comm. and H.R. 9167 as passed by the House. (Narcotics Legislation)

29. June 4, 1965

From Acting Ass't. Atty. Gen. to Mr. Hoffman

Subject: Senator McClellan's letter of April 8, 1965, civil commitment for narcotics addicts. Notes distinctions between Senator McClellan's bill and the departments'.

Title II—Senator allows person voluntarily committed to leave after 6 mos.; authorities state must continue treatment.

Title III—Custody Surgeon General; we have Attorney General; Senator's Bill—18 mos. max. after conviction; Dept.—indeterminate term of ten.

Title IV—aftercare and Federal Asst. to states and localities. No comparable provision in Department Bill.

others:—marijuana problem
—type of offender included
—exclusion of certain classes of Individuals

Conclude—our bill preferable.

30. June 15, 1965

Subject: DOJ Release announcing that Secretaries Fowler and Katzenbach asked for increased emphasis on rehabilitation rather than simply imprisoning Federal narcotics offenders.
—provides for civil commitment
—treatment program
—ease mandatory penalties on offenses that do not permit parole.

31. June 15, 1965

From Attorney General and Secretary of the Treasury to Speaker of the House.

Subject: Speaker letter and identical letter sent to Vice President on H.R. 9167 and S. 2152. Addict Rehabilitation Act of 1965. Notes that at the 1962 White House Conference on Narcotic and Drug Abuse, many concluded that procedure should be established whereby narcotics in violation of law could be dealt with in better ways than presently available. Also penalty structure should be modified. Views reiterated in Final report of the President's Advisory Commission on Narcotic and Drug Abuse, Nov., 1963; Special Message of the President—March 8, 1965.

Bill
(1) Custody of Surgeon General for treatment
—defendant elects to receive physical
32. June 16, 1965
From Deputy A.G. to Senator McClellan.
Subject: Letter analyzing a number of draft bills sent to the department by the Senator. One pertains to civil commitment of narcotic addicts. There was a mix-up regarding the sponsorship of the administration proposal. Hopes you can support still.

33. June 18, 1965
Subject: H.R. 7846—bill to permit Surgeon General to treat certain persons for addiction problems.
Recommendation: defer making general comment. Bill would add barbituates and amphetamines to "habit-forming drug". Difficult to say as to affect on expanding existing drug treatment facilities (Public Health Hospital) — defer judgment to another agency closer to the problem.

34. July 14, 1965
"the Departments of Justice and Treasury and Health Education and Welfare collaborated in the preparation of its specific proposals.
—drafted only after closest study of Narcotics addiction, a complex subject which cuts across the boundaries of many disciplines—criminology, sociology, psychology, as well as medicine, pharmacology and the various biological sciences."
—"a fundamental reorientation toward the problem of addiction."
too long stressed punitive solutions and neglected medical and rehabilitative measures.
—directed toward the permanent rehabilitation of addicts the legislation follows many of the recommendations of the Prettyman Commission
—carefully balances—however, most addicts will leave unless continued treatment is compulsory (bec/emotional and psychological instability)
Outlines the three titles to the bill.

35. No Date
Subject: A Treasury Department Comparison of H.R.
9051, H.R. 9167 and existing provisions. H.R. 9051 (described as a Kennedy-Javits type Bill by Mr. Cellar). H.R. 9167 (Administration Bill by Mr. Cellar).

Comment: detailed comparison of the provision of the two major bills.

36. Aug. 2, 1965


Subject: At least 7 separate bills have been introduced in the House relating to sentencing and treatment of narcotics and marijuana violators and rehabilitation programs. Notes that A.G. appeared before the House Committee on July 14, 1965 and testified on these bills. Analyzes provisions of each of the major bills before the House Committee.

Comment: again representative of the Department's following procedure in the development of the legislative process. Precise comment on the facts.

37. No Date

Subject: two page summary of the provisions of a Narcotics Bill.

38. No Date

Subject: This is a comparative analysis of the Administration bill (H.R. 9167) and S. 2114.

Main Points:
(1) Sentencing Marijuana
(2) Sentencing Narcotics
(3) Youth Offenders
(4) Review of Sentences
(5) Treatment After Sentence
(6) Effective Date

Analysis also of S. 3113 and the NRA (adm. Bill) complete with questions and answers on the major bills.

Example: What are the major differences between Kennedy-Javits bill and NARA of 1965.

(1) Initial Flexibility
   —administration bill broader
(2) Due Process
   —administration bill provides for court advice as to implications of choosing civil commitment
(3) Adversary Proceeding
   —adm. bill lets court consider findings of S.G. and no appeal from such decision
   —Kennedy-Javits bill allows appeal from S.G.'s decision
(4) Length of Treatment
   —adm. bill 36 months; change can be renewed
   —36 and two years after case
(5) Court's Responsibilities After Civil Commitment
   —under both bills specifications as to when return to court

39. August 2, 1965


Subject: Six page single spaced memo on S. 2113-2116 and S. 2191—package bills introduced by Kennedy-Javits. Principle discussion on S. 2191—Senators McClellan and
Lausche. Memo distinguished between Adm. Measure and Senator McClellan’s Bill.

(1) Key provision relates to the consent of the individual to the return after 6 months to civil commitment. “Element of compulsion, considered essential to the success of any treatment program.”

(2) Conviction—full scale adversary hearing provided on whether narcotic or not—once established can be put under the control of the Surgeon General. Success—conviction automatically out

(3) Establishment of out-patient units of Public Health Service Hospitals. Appropriations for programs for treatment and development, construction and maintenance of treatment centers.

(4) DOJ wants addicts in custody of Attorney General rather than the Surgeon General.

(5) Similarly DOJ wants to be able to set conditions of Release after treatment.

40. No Date

Subject: Questions and answers on the NARA of 1965 (H.R. 9167).

Examples:

Q.—attitude to grants-in-aid re research on drug abuse and for treatment facilities construction?

Q.—Does pretrial commitment raise any constitutional issues?

Q.—Will it jeopardize prosecution if treatment unsuccessful?

Q.—Differences between S. 2113 (Kennedy-Javits) and NARA of 1965.


Q.—Is there to be contracting out to local services (Health Treatment)?

Q.—What measures are taken for treatment of addicts under Title II?

Q.—Distinguish between definition of addict in Titles I and II.

Comment: questions and answers of substances. Again, preparation for hearings thorough.

FILE NO. III

41. Jan. 20, 1966

Subject: Memorandum as to S. 2152—Narcotic Rehabilitation Act by Mr. Herbert Hoffman. On Wed., Jan. 19, 1966, in anticipation of Attorney General’s testimony before the Special Subcommittee on Juvenile Delin. of Sen. Judiciary Committee, the chief of the Leg. and Sp. Proj. Section and an attorney from the same office, Mr. Hoffman and the staff Director of the Subcommittee met to discuss areas of special concern. The Staff Director stated that he had shown the administration’s bill to many persons active
in the narcotic treatment and rehabilitations fields and to several members of the Judiciary. Discussion as to:

1. Exclusionary clause of the bill, ineligibility of convicts, judicial discretion in evaluating an offender's record.
2. Election provision of title
3. Facilities and funds
4. Dangerous drug abusers should be treated, though differently than addict. Attorney General's statements to Subcommittee distributed 24 hours before his appearance.


Subject: A response to Herbert Hoffman's memo of April 6, 1966, requesting views on constitutionality of civil commitment provisions (Title II) of S.2191 which allow addict to be committed and confined when not charged with a criminal offense (deprivation of liberty idea); due process idea; civil commitment under Title II as a proper exercise of federal jurisdiction.


Subject: A memo on S. 2191, McClellan's Narcotic Bill—Description of the Bill's provisions.

1. Constitutionality of voluntary commitment procedure is doubted because procedural safeguards may come too late. Suggest defendant should be preliminarily warned at the time of voluntary commitment that he may be involuntarily committed later as is proposed in Sec. 102(a) of S. 2152, the Administration's bill.
2. "Fuzziness of expression" noted.
3. Mandatory period of supervised release recommended instead of consensual agreement.
4. Too broad a definition of narcotic, should not include marijuana.
5. Criminal offense definition needed State and Federal offenses should be combined.
6. Rich people should be called upon to pay part of the treatment costs, if possible.
7. Patients should not be limited to U.S. citizens.


Subject: Comments on the Committee privilege of H.R. 9167 with a copy of the privilege attached. Comments as to 2901(g)(2)—narcotics sellers excluded from civil commitment provisions: 2902(a) Criminal Division favors judicial discretion as to offering addicts election for Title I commitment. Criminal Division does not agree with Section 302 change and strongly recommends a reconsideration and implementation of sentencing under the scheme of the Youth Corrections Act. The Committee Print is dated June 16, 1965 and was introduced by Cong. Celler.


Comment: Major function legislatively is the process of commenting on Congressional or Administration bills.
46. March 2, 1966


Subject: On H.R. 531—a bill to establish hospital facilities and programs of post-hospital aftercare for care, treatment, and rehabilitation of narcotic addicts. DOJ will defer to HEW on matters of grants-in-aid as the Attorney General testified before Sen. Dodd's special subcommittee of the Senate Judiciary Committee, Criminal Division refers to HEW on H.R. 531.

47. Jan. 25, 1966

Subject: Statement by Attorney General Katzenbach before a Special Subcommittee of the Senate Committee on the Judiciary on S. 2152, the Narcotic Addict Rehabilitation Act.

"As you know, numerous bills reflecting these recommendations have been introduced into Congress—all of them representing ambitious innovative approaches to the problem of narcotic addiction. For a number of reasons, I would like to explain this morning, I think that S. 2152, which was prepared by DOJ, Treasury, and HEW, represents a successful accommodation of many valuable views."


From Ass't Atty. Gen., Crim. Div. to all U.S. Attorneys


Overview of the Act
(1) Narcotic addicts are medical problems
(2) Effective treatment requires treatment of underlying emotional disorders
(3) Aftercare is required for treatment of emotional disorders.
(4) Three types of commitment procedures, different but related are to be found in Title I, II, III.

Comment: Substantive analysis of the provisions in the legislation, its applicability in particular instances, and an overview foreseeing a broadening of the test of criminal responsibility in relation to criminal acts resulting therefrom. This type of analysis on developments in the law is a consistent feature of the DOJ activities.

49. Jan. 7, 1966


Subject: Proposed testimony of Attorney General Katzenbach on Narcotics Legislation. (S. 2152) Premise stated that narcotics addicts should not be invariably treated as common criminals. For young offenders, a flexible variety of programs involving institutions of different security is already available under the Youth Corrections Act. The importance of adequate funding for provision of necessary personnel and facilities is stressed.

50. Aug. 30, 1966

From Ass't Atty. Gen. to Acting Atty. Gen.

Subject: Regarding views on applicability of Titles I and II of H.R. 9167, as it passed the House, to juveniles. Conclusion reached that H.R. 9167 does not apply against a youth as a juvenile delinquent.
From Ass't Atty. Gen. to Acting Atty. Gen.

Subject: Regarding Senator Javits' proposed grant-in-aid alternative to that present in Senator McClellan's bill (HR. 9167), the opinion is expressed that judgment on the matter is to be made by HEW, and that despite Javits' contrary insistence, HEW is opposed to any other type of grant-in-aid bill that would specifically authorize treatment and construction.

From Acting Atty. Gen. to Director, Bureau of the Budget.

Subject: Letter on H.R. 9167. It is observed that the Senate added to the bill substantially the content of Title III, providing for hospitalization and aftercare of narcotic addicts. Also, the grant program of Title IV was added by the Senate. It is pointed out that despite modification by the House, the enacted version still permits marijuana offenders to be considered for release on parole pursuant to Section 4202 of Title 18. Generally, the bill's approved as an excellent measure providing considerable facilitation in coping with criminal activity and drug addiction.

Subject: Intradepartmental memorandum re: Issue whether civil commitment procedures under S. 2191 constitute a case or controversy within the meaning of art. III, § 2 of the Constitution of the U.S. Suggests resolution of this problem by an adversary proceeding where the U.S. attorney occupies the position of defendant.

"The ex parte proceedings provided for in the bill are vulnerable as against the contention that they do not reflect the regular course of judicial procedure" as defined in Troup v. U.S., 270 U.S. 568. The U.S. must be entitled to establish by adversary proceeding that the conditions for voluntary commitment do not exist.

From Ass't Atty. Gen., Criminal Division to Deputy Attorney General.

Subject: Committee found of S. 2191, McClellans' Narcotics Bill: criticism of five major provisions.

(1) Comm. print form overexpands civil commitment by providing for (a) involuntary Federal commitment even of addicts not charged with Federal offenses and (b) permits commitment machinery to be set in motion by "any individual."

Problems: 1. Violates power of States. 2. Establishes in effect a "Federal police power" unless constitutionality can be based on Congress' taxing or treaty power.

(2) Comm. first provides that whenever after arrest and before conviction U.S. Attorney believes defendant to be an addict, he shall file a motion asking for an examination which may take up to 30 days, whether or not the accused had been previously admitted to bail. Following exam court may advise of right to elect civil commitment. Problem: 1. This should be done before 30 day exam. Forces exam even on those who would never elect civil commitment. 2. Contravention of constitutional right to bail.
(3) Comm. print permits conviction to be set aside upon the successful completion of rehabilitation purpose. Makes provision for 3 years institutional confinement and 3 years post-hospital treatment regardless of maximum length of sentence otherwise possible.

(4) Comm. print continues to define marijuana as a narcotic drug.

(5) Comm. print makes no parole provision for marijuana offenders.

Recommendation is that Administration bill is preferable but S. 2191 Comm. print O.K. with these corrections.

**Subject:** Intradepartmental memo: Observations pertaining to the Committee Print of Aug. 10, 1966 of S. 2191, Senator McClellan's Narcotics legislation. Notes that Comm. print differs considerably from bill as introduced by the Senator. Notes 17 specific areas in the draft that should be changed, four of which pertain primarily to drafting problems:

1. Require due process warning if addict subjects himself to voluntary civil commitment.
2. Various inconsistencies in terminology and other technical drafting errors.
3. What is legal effect of "automatically setting aside" a conviction?
4. In defining "crimes of violence" burglary and housebreaking are omitted.

**Subject:** Intradepartmental memo containing two additional observations on McClellan bill in Committee.

**Subject:** Criminal Division belief that some constitutional question exists regarding the propriety of federal court commitment for addicts not charged with federal crime. Also general favoring of Administration bill where different from S. 2191 with the addition of severability provision.

**Subject:** Chicago Meeting on the Narcotic Addict Rehabilitation Act—(Sept. 25-27). He explained procedures under the Act as they affect the court and the U.S.A. Questions afterwards—pertained to U.S. Attorney who complained the DOJ had not given direction in terms of his functions under the Act and "not even informed him that the act was now operational."

—Reason why not fully implemented was reluctance of the Department to come to terms with NIMH with respect to procedures and financing. Complained that all the Act was the brainchild of the DOJ—the department was trying to transfer the entire burden of implementation to NIMH.

All probation Chiefs and Community Center Directors were there—addressed—they have charge of after-care duties
Questions and Suggestions Raised:
1. Judges want a checklist of duties re each of the titles of the Act. Administrative Office of U.S. agreed to print and distribute which Ass't Atty. agreed to do.
2. Judges made clear that their willingness to invoke the Act is going to depend upon the viability of the treatment program under the Act.
   —Think going to have to keep close tabs on the programs developed by NIMH—since it will be the U.S. Attorney who will be obliged to justify invocation of the Act. Intend to rely (Judges) on U.S. Attorney for this and other kinds of information.
3. Asked if Department had coordinated implementation efforts with the Judicial Conference. Suggested Committee needed to handle questions that arise under the Act. Want the Department to provide Model orders to the Conference under the Act.
4. Technical Questions
5. Assistant U.S. Attorney’s questions relating to their obligations under title III:
   —How can they find out whether a patient is an addict.
   —where to handle patient
   —Whether pending criminal prosecution
   —want guidelines re Criminal Division
6. Found that initially 39 commitments under title II, 23 of which came from Albuquerque, New Mexico. Suggest Department examine that matter.