UNITED STATES DEPARTMENT OF JUSTICE

Drug Enforcement Administration

In The Matter Of	)	
	)	Docket No. 84-48
MDMA SCHEDULING	)	
	)	

OPINION AND RECOMMENDED
DECISION ON
PRELIMINARY ISSUE

I

INTRODUCTION

This is a rulemaking proceeding pursuant to the Controlled Substances Act [1] (the Act) to ascertain in which schedule, if any, of the schedules established by the Act the substance 3, 4-methylenedioxymethamphetamine, also known as MDMA, should be placed. The Act itself placed a great many substances in one schedule or another. It vested the Attorney General with the authority, after considering various factors, to place other substances in appropriate schedules, to move substances from one schedule to another, and to de-schedule them. That authority has been delegated to the Administrator of the Drug Enforcement Administration (DEA). [2]

MDMA is not presently listed in any schedule. DEA published in the Federal Register [3] a notice of a proposed rulemaking to place MDMA in Schedule I. A number of persons filed comments and objections and requested a hearing. They are entitled to a hearing under the Act, conducted by an administrative law judge

1/ P.L. 91-513, 84 Stat. 1242.
2/ 28 C.F.R. §0.100.
3/ 49 F.R. 30210(1984).

pursuant to the Administrative Procedure Act. [4/] This administrative law judge was requested by the then-Deputy Administrator to convene and preside over the proceedings.

At a preliminary prehearing conference of participants on February 1, 1985 it was suggested that one of the issues arising in this proceeding presented a purely legal question which might be decided without the need of any evidence and in advance of the other issues in the case. After considering memoranda submitted by the participants the administrative law judge agreed and accepted the suggestion. The judge called for briefs from the parties on this one issue. They have been filed and carefully considered by the judge, who now sets out his opinion and recommended decision on this issue. The issue, designated number 1, is stated thus:

> 1. Assuming that a substance has a potential for abuse and has no currently accepted medical use in treatment in the United States, can the substance be placed in any schedule other than Schedule I?

4/ 21 U.S.C. §811(a); 5 U.S.C. §551, et seq.

II

STATUTORY LANGUAGE

This issue arises from the language of the Act codified at 21 U.S.C. §812. This section reads as follows, in pertinent part:

> §812 Schedules of Controlled Substances
>
> Establishment
>
> (a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. * * *
>
> Placement on schedules; findings required
>
> (b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:
>
> (1) Schedule I. -
>
> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.
>
> (2) Schedule II. -
>
> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.
>
> (C) Abuse of the drug or other substance may lead to severe psychological or physical dependence.

(3) Schedule III. -

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV. -

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V. -

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

* * *

[Emphasis added].

None of the words quoted above can be ignored. "'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 5/

5/ Sutherland Stat Const. § 46.06 (4th Ed.) (Footnotes omitted).

Focusing on the two introductory sentences of §812(b), we read:

> (b) Except where control is required by . . . treaty, convention or protocol, . . . a drug or other substance may not be placed in any schedule unless the findings required by such schedule are made with respect to such drug or other substance. The findings required . . . are as follows:
>
> * * *

[Emphasis added].

Our task here is to ascertain in which of the schedules, if any, a substance can be placed which has "no currently accepted medical use in treatment in the United States" but which has "a potential for abuse".

Looking at the "findings" which are "required" for each schedule, we see that schedules II, III, IV and V each require that a substance placed in it "has a currently accepted medical use." Clearly, the words of the statute flatly preclude the placing in any of those four schedules of a substance, such as we are considering which "has no currently accepted medical use."

That leaves Schedule I. Placement in Schedule I requires that the subject substance have "a high potential for abuse." We cannot ignore the word "high". It is obviously there to distinguish Schedule I (and Schedule II where it also appears) from Schedule III, which requires a finding of "a potential for abuse less than the drugs . . . in schedules I or II"; from Schedule IV, which requires a finding of "a low potential for abuse relative to . . . Schedule III"; and from Schedule V, which requires "a low potential for abuse relative to . . . Schedule IV." So, just "a" potential for abuse will not do for Schedule I. A "high" potential for abuse is "required" for Schedule I.

Then, what is to be done with such a substance as we are considering, one which has no currently accepted medical use and a potential for abuse that is less than "a high potential"? In which of the schedules can it be put? Reading the statute, the answer is clear - in none of them.

It is doubtless true that the Congress did not intend to leave such a hiatus in the Act. Assuredly the Congress intended to provide a classification system which would accommodate all substances having any potential for abuse. All of the legislative history points this way. But, regrettably, the Congress omitted to provide for a substance such as we are now considering. The Act as drafted precludes placing such a substance in any of the five established schedules.

True it is that, in certain circumstances, -

> the words of the statute will be modified [by a court] to agree with the intention of the legislature. Again, contrary to the traditional operation of the plain meaning rule, courts are increasingly willing to consider other indicia of intent and meaning from the start rather than beginning their inquiry by considering only the language of the act. The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to allow a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read to conform to the spirit of the act. While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words." 6/

6/ Op. cit. §46.07 (4th Ed.) (Footnotes omitted, emphasis added).

Key words here are "apparent", "manifest" and "obvious". From the briefs filed herein by the parties in opposition to each other it is unreasonable to conclude that the intention of the Congress with respect to a substance such as concerns us now is "apparent" or "manifest" or "obvious". If it were, we would not be confronted with such forceful opposing arguments.

To shoe-horn a substance such as we are considering into any of the established schedules requires us to rewrite the statute for the Congress, ignoring some provision of what it has enacted as we attempt to divine in murky waters what the Congress intended for substances such as we are considering.

The administrative law judge recommends, in the first instance, that the Acting Administrator decide that a substance which has a potential for abuse less than a high potential, and no currently accepted medical use in treatment, cannot be placed in any of the five schedules established by the Act. The judge further recommends that immediate thought be given to approaching the Congress in an effort to close this gap in the statutory scheme.

III

COURT DECISIONS

Nature abhors a vacuum. Lawyers and regulators abhor a statutory hiatus. Courts today are more than ready to plunge in and - despite their protestations to the contrary - undertake to write the legislation they conclude the Congress intended, but failed, to enact.

So it is that we find an authoritative court opinion "interpreting" the text of 21 U.S.C. § 812, known as NORML v. DEA, 559 F.2d 745 (D.C. Cir., 1977). In that opinion the court, after a lengthy discussion of the provisions of 21 U.S.C. § 811, which indeed calls for a balancing of factors and responsibilities, went on to state that Section 812, like Section 811, "contemplates balancing of medical usefulness along with several other considerations, including potential for abuse and danger of dependence." 559 F.2d at 748.

To this administrative law judge, Sections 811 and 812 are not similarly structured at all. No "balancing" is called for by Section 812. Rather, Section 812 provides that certain "findings" are "required" before a substance may be placed in any particular schedule. The opinion of the court however, brushes aside the plain language of the statute and provides a precedent, available if desired in our present situation, for permitting the scheduling of such a substance as we are considering.

The Agency's brief on issue number 1. states:

> ***Schedule I is intended to be the schedule into which all substances which have no accepted medical use and a potential for abuse are to be placed.

The court opinion in NORML v. DEA flatly rejects this position. The court said:

> ***The Acting Administrator premised his conclusion on the assumption that placement in CSA Schedule I is automatically required if the substance has no currently accepted medical use in the United States. Our analysis of the Act compels us to reject his finding.

559 F.2d at 747. The Court went on to say:

> Admittedly, Section 202(b), 21 U.S.C. § 812(b), which sets forth the criteria for placement in each of the five CSA schedules, established medical use as the factor that distinguishes substances in Schedule II from those in Schedule I. However, placement in Schedule I does not appear to follow inevitably from lack of a currently accepted medical use. Like that of Section 201(c), the structure of Section 202(b) contemplates balancing of medical usefulness along with several other considerations, including potential for abuse and danger of dependence. To treat medical use as the controlling factor in classification decisions is to render irrelevant the other "findings" required by Section 202(b). The legislative history of the CSA indicates that medical use is but one factor to be considered, and by no means the most important one.
>
> Moreover, DEA's own scheduling practices support the conclusion that substances lacking medical usefulness need not always be placed in Schedule I. At the hearing before ALJ Parker DEA's Chief Counsel, Donald Miller, testified that several substances listed in CSA Schedule II, including poppy straw, have no currently accepted medical use. Tr. at 473-474, 488. He further acknowledged that marihuana could be rescheduled to Schedule II without a currently accepted medical use. Tr. at 487-488. Neither party offered any contrary evidence.

559 F.2d at 748. (Footnotes omitted).

In a case coming before the Eighth Circuit Court of Appeals, [7] the Appellant argued that classifying marihuana in Schedule I was irrational and arbitrary. Rejecting the argument, for several reasons, the court said:

> ***[T]he three statutory criteria for Schedule I classification set out in § 812(b)(1) - high potential for abuse, no medically accepted use, and no safe use even under medical supervision - should not be read as being either cumulative or exclusive. Thus, even assuming, arguendo, that marijuana has some currently accepted medical uses, the Schedule I classification may nevertheless be rational in view of countervailing factors such as the current pattern, scope, and significance of marijuana abuse and the risk it poses to public health. 692 F. 2d at 548 (footnote omitted).

If the "criteria" for Schedule I do not necessarily bar from that schedule a substance having <u>some</u> accepted medical use, neither should the "criteria" for Schedules III, IV and V necessarily bar a substance which does <u>not</u> have an accepted medical use.

To the same effect as the above language in the Eighth Circuit opinion was the holding of the three-judge District Court for the District of Columbia in <u>NORML</u> v. <u>Bell</u>. [8] NORML there asserted that classifying marihuana in Schedule I was not rational. The three-judge court, Tamm, J., rejected the argument, saying:

> ***The statutory criteria of Section 812(b)(1) are <u>guides</u> in determining the schedule to which a drug belongs, but they are not dispositive. Indeed, the classifications at times cannot be followed consistently, and some conflict exists as to the main factor in classifying a drug - potential for abuse or possible medical use.

488 F. 2d 140 (Emphasis added).

7/ <u>United States</u> v. <u>Fogarty</u>, 692 F.2d 542 (1982)
8/ 488 F.Supp. 123 (1980)

Finally, in a criminal prosecution in the District of Connecticut [10], the defendants attacked the placement of marihuana in Schedule I. The District judge, in a footnote, raised hypothetically the very question now confronting us. He said:

> Defendants' attack on whether the findings required for Schedule I apply to marijuana assumes that for each schedule, all three findings must be met. This may be so only in a limited sense. Section 202 of the Act, in establishing the three findings for each of the five schedules, does not in terms specify whether the findings are cumulative. 21 U.S.C. § 812. In fact they cannot logically be read as cumulative in all situations. For example finding (B) for Schedule I requires that "The drug or other substance has no currently accepted medical use in treatment in the United States." Finding (B) for the other four schedules specifies that the drug has a currently accepted medical use. At the same time, finding (A) requires that the drug has a "high potential for abuse" for placement in Schedule I, but a "potential for abuse less than the drugs or other substances in schedules I and II" for placement in Schedule III. If the findings are really cumulative, where would one place a drug that has no accepted medical use but also has a potential for abuse less than the drugs in Schedules I and II? According to finding (A) for Schedule III it belongs in Schedule III, but finding (B) for that schedule precludes Schedule III; according to finding (B) for Schedule I it belongs in Schedule I, but finding (A) for that schedule appears to preclude Schedule I. The answer may be that applicability of

[11] United States v. Maiden, 355 F.Supp. 743 (1973)

> finding (B) concerning currently accepted medical use should be made first. If the drug has none (and marijuana probably does not, though the testimony indicated some interesting potential uses), then placement in Schedule I may be appropriate whether or not the potential for abuse is higher than for other drugs, so long as the abuse potential is not minimal. But once a substance is precluded from Schedule I because an accepted medical use currently exists, then the comparative potential for abuse may determine its placement in Schedules II, III, IV, or V.

355 F. Supp. at 748, 749 (footnote). (Emphasis added).

It should be noted that the Connecticut judge's answer was couched in the permissive. He did not venture a positive solution to the problem he saw but was not required to resolve. As in the other decisions mentioned above, however, he does state that § 812(b) should not be read so as to require all three criteria, (A), (B) and (C), to be present in order to classify. These "findings required" by the terms of the statute are merely "guides," in the eyes of the courts.

IV

LEGISLATIVE HISTORY

If they are but "guides", the "findings required" in §812(b) should be applied in the manner intended by Congress, as best we can determine that intent. In our efforts to divine the intent of Congress, we resort to the legislative history.

The Agency's brief points out (p. 5) that "the issue in question [here] was not addressed" specifically during the Congressional hearings. However, there is one relevant statement in the House Committee Report on the House bill. This was the bill eventually enacted. The House Committee Report states:

> A key criterion for controlling a substance, and the one which will be used most often, is the substance's potential for abuse. If the Attorney General determines that the data gathered and the evaluations and recommendations of the Secretary constitute substantial evidence of potential for abuse, he may initiate control proceedings under this section. Final control by the Attorney General will also be based on his findings as to the substance's potential for abuse. 12/

The briefs quote a number of statements made by individuals during the progress of the legislation through the Congress. Some of these quotations were addressed to the "balancing" called for by §811 between the Department of Justice (DEA) on the one hand, and the Department of Health, Education and Welfare, (Health and Human Services or HHS) on the other. Statements pertaining to that section are irrelevant to our present problem which concerns the language of §812.

One of the statements quoted by counsel is relevant, however. It was made by a member of the subcommittee which drafted the bill. As such it is entitled to some weight. It was made by Rep. Hastings, who said:

12/ [1970] U.S. Code Cong. & Ad. News 4601. (Emphasis Added).

> By tying the regulatory scheme into the drug classification scheme, thereby making the degree of regulatory control dependent on the schedule in which a substance is classified, considerable flexibility is achieved. This flexibility will enable the Attorney General to meet the demands of changing conditions in that he can tailor the regulatory controls imposed over any particular drug to fit the degree of abuse potential posed by it. 13/

The Agency's brief quotes a statement made on the floor of the Senate by Senator Hughes of Iowa to a somewhat different effect. This brief observation, however, is of no value to us. In Sutherland Statutory Construction we read:

> §48.06. - Reports of standing committees.
>
> The report of the standing committee in each house of the legislature which investigated the desirability of the statute under consideration is often used as a source for determining the intent of the legislature. This is especially true when the committee sets forth its grounds for recommending passage of the proposed bill and its understanding of the nature and effect of the measure. Concerning those parts of the bill passed as introduced by the committee without change, it is reasonable to assume that the legislature adopted the intent of the committee. Although not decisive, the intent of the legislature as revealed by the committee report is highly persuasive. * * *
>
> * * *
>
> §48.14 - Statements of committeeman in charge of the bill.
>
> When a bill is reported out of a standing committee, the member in charge of the bill, normally the chairman, explains its meaning to the house. He also answers questions concerning the meaning of

13/ 116 Cong. Rec. H-33309 (Sept. 23, 1970).

particular sections or phrases. The committeeman in charge has the duty of defending the bill, has familiarized himself with the situation sought to be remedied by the bill and his statements may be taken as the opinion of the committee about the meaning of the bill.

Courts have taken a realistic view of legislative procedure and have excepted the statements of the members of the committee during the course of floor debate from the general rule excluding or restricting the use of statements by individual legislators about the meaning of the bill in debate. His remarks upon presenting the bill to the house and his answers to questions asked by members will be considered by the courts in construing provisions of the bill subsequently enacted into law. These statements are regarded as being like supplemental committee reports and are accorded the same weight as formal committee reports. * * *

* * *

§ 48.13 - Legislative debates.

Statements by individual members of the legislature about the meaning of provisions in a bill, made during the general debate on the bill following presentation by a standing committee, are generally held not to be admissible as aids in construing the statute. Legislative debates are "expressive of the views and motives of individual members, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body," and " . . . it is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other . . . ."

As further reason for discounting the value of statements made in floor debate, it has been noted "in the course of oral argument on the Senate floor, the choice of words by a Senator is not always accurate or exact."

Sutherland, Op. cit. (Footnotes omitted).

From the foregoing principles it appears that the book co-authored by Michael R. Sonnenreich and published some five years after enactment of the statute is entitled to no authoritative weight whatever in our considerations. 14/

Insofar as the authoritative legislative history can be relied on, we must conclude that Congress intended the degree of potential for abuse to be given great weight in scheduling decisions. Existence of an accepted medical use was not mentioned at all. Final control by DEA is to "be based on . . . findings as to . . . potential for abuse."

14/ In 1978 Mr. Sonnenreich, having left the Department of Justice, was testifying before a subcommittee of the House of Representatives on the legislation which eventually was enacted as the Psychotropic Substances Act of 1978, P.L. 95-633, 92 Stat. 3768. Alluding to the Controlled Substances Act of 1970 Mr. Sonnenreich commented: "The bill provided for decisions concerning the control of drugs to be made by the Attorney General, with drugs to be placed in various schedules, depending on their potential for abuse and other similar factors." Hearing Before The Subcommittee On Health and the Environment, etc., on H.R. 9796, February 17, 1978, Serial No. 95-99, p. 148 (emphasis added). The one factor Mr. Sonnenreich then singled out for mention was "potential for abuse". He made no reference to accepted medical use. The changes made in that original bill before enactment, which Mr. Sonnenreich goes on to discuss, had to do with the "balancing" act called for in 21 U.S.C. §811, not the provisions of 21 U.S.C. §812. It is of tangential interest to note that further on in his testimony Mr. Sonnenreich, relied upon by the Agency now as an expert in these matters, proceeded to say:

> More fundamental, however, Mr. Chairman, is our opposition to the legislation based upon its potential implications for medical research. Often ignored in the national debate and discussions over the psychoactive drugs is the major role they play in the treatment of mental illness. Were it not for the very extensive use of tranquilizers and other mind-altering drugs, it is obvious that the population of our mental institutions in the United States today would be far greater than it presently is. We need more, not less, research in this area. Ibid, p. 151.

V

CONGRESSIONAL CLASSIFICATIONS

Congress, itself, has taken action on two occasions to place substances having no accepted medical use in treatment in schedules other than Schedule I.

First, in the Controlled Substances Act itself, Congress placed poppy straw in Schedule II although poppy straw has no accepted use in medical treatment in the United States. 21 U.S.C. § 812(c) Schedule II (a)(3).

Second, in 1978 Congress enacted the Psychotropic Substances Act of 1978, P.L. 95-633, 92 Stat. 3768. This was done so as to comply with the provisions of the international Convention on Psychotropic Substances. To conform with that convention or treaty it was necessary that two substances, not previously controlled in the United States, be subjected to controls and placed in one of the five schedules. The terms of the Convention did not mandate any particular schedule. Congress determined to take effective action itself to accomplish this scheduling, in order to avoid the delay which would be caused by administrative scheduling pursuant to 21 U.S.C. §§811 and 812.

The two substances to be controlled were pipradrol and SPA. Neither has an accepted medical use in treatment in the United States. Yet Congress in the legislation directed the Attorney General to place these substances in Schedule IV. See Sec. 102(c). Pub. L. 95-633. They are listed in Schedule IV today. See 21 C.F.R. § 1308.14(e).

This action was taken after consultation with DEA and other agencies.

The Senate report states:

> The Committee felt that there were two aspects of S. 2399 which needed further clarification. The first of these centered around Pipradrol and SPA which are included on schedule IV of the Convention. Neither of these drugs are manufactured or distributed in the United States. Nor do either of these drugs have a recognized medical use in this country. While the Drug Enforcement Administration is investigating both Pipradrol and SPA for inclusion in one of the schedules of the Controlled Substances Act, both

> drugs are, at the current time, unscheduled. After consultation with the Department of Health, Education, and Welfare, the Office of Drug Abuse Policy, and the Drug Enforcement Administration it was decided that the most efficacious way to meet the requirements of the Convention would be to Congressionally mandate the scheduling of Pipradrol and SPA in one of the least restrictive schedules of the Controlled Substances Act. In this respect, the decision to place Pipradrol and SPA in Schedule IV of the Controlled Substances Act is only meant to meet the minimum requirements of the Convention and is not intended to bind the Drug Enforcement Administration or the Department of Health, Education, and Welfare if they should find that a more restrictive schedule would be more appropriate. 15/

To the same effect is the following language in the House Interstate and Foreign Commerce Committee Report accompanying H.R. 12008, the bill which was substantially enacted:

> There are two drugs controlled under the Convention which are not currently controlled under the Controlled Substances Act. These drugs, pipradrol and SPA, are stimulants controlled in Schedule IV of the Convention. These drugs do not have current medical uses in the United States and are not manufactured domestically. Although the Committee is unaware of plans of any domestic producer to manufacture these drugs, the Committee's proposal contains a provision which would require the Attorney General to issue an order controlling these drugs in Schedule IV of the Controlled Substances Act. Schedule IV was selected as an appropriate schedule to assure that, with respect to these drugs, the minimum control requirements under the Convention would be met. The usual findings and procedures required under Section 201 of the Controlled Substances Act would be waived to avoid delay in the scheduling of these drugs. * * * 16/

15/ Report of the Committee On The Judiciary, United States Senate on S. 2399, Senate Report No. 95-959, 95th Cong., 2d Sess., at p. 18 (June 27, 1978) (Emphasis added).

16/ [1978] U.S. Code Congressional and Administrative News, 9504, f. (Emphasis added).

From this language in the Committee Report it is obvious that, "after consultation" with DEA and others, the Congress concluded that it had discretion as to where the two substances should be placed. There is no indication that Congress believed Schedule IV was required by the terms of the Convention. Congress understood that, if it took no action on this scheduling, the Attorney General would have to observe "the usual findings and procedures" set out in the Controlled Substances Act. Clearly Congress did not understand Section 812 of that Act as requiring placement in Schedule I for lack of an accepted use in medical treatment.

The Agency asserts, in effect, Congress is above the law and is free to take scheduling actions which DEA, bound by the statute, cannot take. No basis whatever is shown for this position in this context.

VI

DEA ACTIONS

DEA, itself, has shown in the past that it considers itself to have the authority to place "no accepted medical use" substances in schedules other than Schedule I.

> Moreover, DEA's own scheduling practices support the conclusion that substances lacking medical usefulness need not always be placed in Schedule I. At the hearing before ALJ Parker DEA's Chief Counsel, Donald Miller, testified that several substances listed in CSA Schedule II, including poppy straw, have no currently accepted medical use. Tr. at 473-474, 488. He further acknowledged that marihuana could be rescheduled to Schedule II without a currently accepted medical use. Tr. at 487-488. Neither party offered any contrary evidence. 17/

Thebaine is a controlled substance which has no accepted use in medical practice in the United States. 18/ Yet DEA's predecessor agency, the Bureau of Narcotics and Dangerous Drugs, placed thebaine in Schedule II shortly after the Controlled Substances Act was enacted. 36 Fed. Reg. 7776, 7804(1971).

DEA cannot now be heard to say that the agency has always interpreted the statute so as to require Schedule I placement for every substance with no accepted use in medical treatment.

17/ NORML V. DEA, 559 F. 2d at 748.

18/ Hoffmann-LaRoche and McNeilab so assert in their brief. There is no evidence in this record establishing this fact, but there is no evidence in the record yet with respect to any point. This threshold issue was briefed and is being considered as a legal question involving no factual issues. The Government's brief did not take exception to this assertion as to thebaine's lack of accepted medical use. The administrative law judge will accept it for the purposes of this memorandum opinion.

CONCLUSION

The administrative law judge adheres to his initial recommendation stated above on page 7. The Acting Administrator should decide that a substance which has a potential for abuse less than a high potential, and no currently accepted medical use in treatment in the United States, cannot lawfully be placed in any of the five schedules established by the Controlled Substances Act of 1970. The terms of the Act do not permit it. No amount of pouring over the legislative history empowers us to close the obvious gap left in the statutory scheme.

> * * * [I]t has been held that the committee report cannot give to the statute a meaning not fairly within its words. Where the terms of a statute are clear and unambiguous, the legislative intent must be derived from it, even if the intent expressed conflicts with the purpose of the statute as set forth in committee reports. 19/

If, however, the Acting Administrator rejects the above recommendation, the administrative law judge recommends, in the alternative, that the Acting Administrator decide that a substance having (1) a potential for abuse less than a high potential, and (2) no currently accepted use in medical treatment in the United States, should be placed in either Schedule III, IV or V depending upon the substance's degree of potential for abuse. This alternative recommendation is based upon the opinions of the Federal Courts in the District of Columbia and the Eighth Circuit discussed above, the intent of Congress as

19/ Sutherland, Op. cit, §48.06

revealed by its own actions and by the legislative history of the Controlled Substances Act of 1970, and on DEA's previous indications of its understanding of what the statute permits it to do.

Dated: JUN 1 4 1985

Francis L. Young
Administrative Law Judge