

lation of due process. The court in both *Mallory* and *Killough* based its decision on its interpretation of the will of Congress as expressed in rule 5(a) of the Federal Rules of Criminal Procedure. I do not believe that the court has correctly interpreted the will and intent of Congress in this matter. It is for this reason that I endorse title I, a provision to make voluntary admissions and confessions admissible in criminal proceedings and prosecutions in the courts of the United States and the District of Columbia.

When all is said, the *Mallory* case rests upon the conviction that voluntary confessions made by an accused before arraignment must be excluded because their admission might tempt arresting officers to extort involuntary confessions. This being true, the reasoning which underlies the *Mallory* case is really a throwback to the common law philosophy that the interests of parties to actions might tempt them to testify falsely and for this reason they should be prevented from testifying at all for fear that they might commit perjury. In other words, the *Mallory* case rests upon the proposition that arresting officers must be freed from temptations even if the process by which they are so freed results in the freeing of those who murder innocent victims or prey upon a society which the criminal law was designed to protect.

TITLE II

Mr. Chairman, title II of H.R. 7525 represents a substantial improvement over the *Durham* rule, the existing test for determining responsibility for criminal conduct in the District of Columbia.

Section 201(a) (1) of the bill provides that criminal responsibility be measured by the following standards:

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to know or appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

This rule establishes a specific test, on which a judge can instruct a jury and which a jury can understand. It is substantially similar to the provision recommended by the American Law Institute in its model penal code.

My objections to the *Durham* rule arise out of my experience as a trial judge in North Carolina. Under North Carolina law, the judge has an absolute duty to instruct the jury as to all of the substantial questions arising in a criminal prosecution, and it is error for him to fail to do so. I think that the *Durham* rule is inadequate because it establishes no definite tests to ascertain responsibility for crime. It would seem to me that under the *Durham* rule, the jury in effect is forced to try one of the crucial issues of the case; namely, a man's legal accountability for a crime, without any test that they can apply.

I do not think, as some have claimed, that the case of *McDonald v. United States*, 312 F. 2d 847, handed down last year by the Court of Appeals for the District of Columbia sitting en banc remedies the difficulties with the *Durham* rule. *McDonald* provides "that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls" (p. 851).

However, it is clear that this standard, while shedding some light on the problem of what constitutes a mental disease or defect still leaves the jury in the dark as to how that mental disease or defect must affect a defendant's conduct which is in issue at the trial.

McDonald does not change the "productivity" test established by *Durham*. Told that they must find that the crime was the product of a mental disease or defect, the jury, under *Durham*, is not told how the mental disease or defect must affect the conduct in question. Productivity is a psychiatrist's term. Laymen cannot readily relate criminal acts to mental conditions in terms of productivity.

I also want to commend to you section 201(c) (1) which makes the existence of a mental disease or defect excluding responsibility an affirmative defense. In my home State of North Carolina, as in many other States, insanity is ordinarily an affirmative defense. Under the North Carolina rule, the person who relies upon the plea of insanity is required to establish to the satisfaction of the jury that he is insane, subject to exception in cases which require a specific intent. In those cases, the burden is on the State to establish beyond a reasonable doubt the existence of criminal intent, and, of course, in connection with that, the State must prove that the man has the capacity to entertain criminal intent.