A rule which gives the prosecution the burden of establishing sanity beyond a reasonable doubt, as does *Durham*, puts too great a burden on the prosecution. *McDonald* does not change this rule substantially. It modifies only the degree of evidence which must be presented to inject the issue of sanity into the case.

I think that much of the confusion engendered in this area is due to the failure to recognize clearly that the function of the law is one thing and the function of psychiatrists is entirely a different thing in this area.

The law is trying to create a standard not to determine whether a person has one of the varieties of mental diseases or mental defects, but to determine whether the nature of his mental disease or defect is such that it would be unjust to punish him for an act which would otherwise be criminal in the average individual; whereas, the psychiatrist is concerned with the question of the nature and degree of his mental illness, not for the purpose of determining his legal or moral accountability but for the purpose of determining what means should be used either to cure him or to alleviate his condition.

The provisions of the bill relating to criminal responsibility which I have discussed, in my view, go far toward establishing the proper role of law in this area.

TITLE III

Title III of H.R. 7525 accords legislative sanction to the former police practice in the District of Columbia of arresting for investigation; that is, it provides for detention of persons when an officer has "reasonable grounds to suspect" he is committing, has committed, or is about to commit crime. The second half would add to the law new procedures for the detention of material witnesses.

While I endorse the principle of the provision regarding material witnesses, I cannot, in good conscience, endorse the section relating to investigative arrests.

There are constitutional as well as policy considerations that sometimes prevent lawmakers from legislating upon the theory that, in law as well as in geometry, a straight line is the shortest distance between two points.

In the matter of investigative arrests—and I do believe such dentention amounts to arrest, regardless of stipulations that it does not—our legislative road toward decreasing the crime rate in the District of Columbia is neither clear nor straight. Rather, it is marked by those constitutional guarantees which the Founding Fathers saw fit to incorporate in the Bill of Rights. The fourth amendment assuring the hard-won guarantee, deeply rooted in Anglo-American experiences, that there will be no seizure of persons without probable cause; the fifth amendment providing for due process of law, with all that has been held to include; the sixth amendment assuring the right to counsel—these are obstacles in the path of Congress which are not to be ignored. Incorporating some of the fundamental principles on which our society rests, these amendments were meant to guide lawmakers in the centuries ahead, and are so basic that they should not be overlooked in our effort to meet the exigencies of the moment.

This measure appears to establish a subjective test for apprehending suspects, a rule of thumb to be interpreted by every policeman patrolling his beat. In effect, by premitting the detention for 6 hours of a suspect when his replies to questions are not satisfactory to a policeman, this bill would, for the convenience of law enforcement officers, postpone that point at which all the procedural guarantees of the Constitution become operative for the individual arrested. As was stated by the Department of Justice report on the bills, this proposal provides "for a seizure of the person without probable cause, in violation of the fourth amendment, and accompanied by the consequences of a conventional arrest."

It would permit "a 6-hour police interrogation of a person suspected of committing a felony, without the assistance of counsel." Such a procedure, in the Justice Department view, "would be violative of the sixth amendment's guarantee that an accused shall have the assistance of counsel for his defense."

The constitutionality of this section, in my view, could not withstand judicial review.

I tend, futhermore, to agree with the opinion expressed by the U.S. attorney for the District of Columbia[1] that enactment of a workable bill dealing with the *Mallory* problem may obviate some of the need police feel for the provisions of title III.

Familiar as I am with the problems faced by law enforcement officials who must protect society from the criminal, I have always been willing to grant them

[1] House hearings, p. 144.