

the constitutionally permissible legal tools which they require in their fight against crime. I have, in effect, always attempted to balance the rights of society against the rights of the individual. Having done this now in respect to section 301 of H.R. 7525, I find that, in this instance, the rights of the individual must prevail.

With regard to section 302 of the bill I do, as I have indicated, endorse the principle of detaining material witnesses. Such authority is often an invaluable tool for securing the attendance of a witness at trial.

I do, however, see considerable merit in the recommendation of the Department of Justice and the Commissioners of the District of Columbia that material witnesses should be accorded protections similar to those provided in the Federal Rules of Criminal Procedure.

Rule 46(b) provides that if it appears by affidavit that the testimony of a witness is material in a criminal proceeding, the court or commissioner may require him to give bail for his appearance, and if he does not, his detention may be ordered pending disposition of the proceeding. In addition to modifying the requirement as to bail, the judge or commissioner may order release of a witness detained unreasonably.

In addition to such protections, the Justice Department urged that consideration be given to amendments which would take into account the financial ability of the witness to post bond, the filing of depositions as an alternative to confinement, the right to counsel, and to compensation for time detained. As the Department of Justice indicated:

"Even if detention is a public duty which a person may properly be called on to perform, it may operate as an intolerable burden on a witness and his family. If while prevented from working he is denied reimbursement during the detention period which under some circumstances might be prolonged for several months."

It is unfortunate that not one of the safeguards for material witnesses in felony cases suggested by the Department of Justice and the District Commissioners were incorporated in the House bill. I think their recommendations might, with profit, be considered by this committee.

By assuring that the policy behind the criminal statutes enacted by Congress and the administrative procedures sanctioned by it reflect a respect for constitutional principles, I believe that, in the final analysis, we secure the permanent benefit not only for the individual citizen, but for our entire society.

STATEMENT OF PROF. YALE KAMISAR, SCHOOL OF LAW, UNIVERSITY OF MINNESOTA, MINNEAPOLIS, MINN.

Mr. KAMISAR. I appreciate being here, Mr. Chairman, and I have been listening with great interest since 10 o'clock this morning. I have learned a great deal.

I must say I am most impressed with the judicious way in which you are handling this thing. I see no signs of favoritism one way or the other from you, and a great deal of leeway in getting every conceivable view into the record. Perhaps I will try your patience.

First of all—

The CHAIRMAN. I doubt it. We are delighted to have you here.

Mr. KAMISAR. It seems to me, as in most things, the way you come out depends on where and how you begin, on what your first premise is.

Once you assume that these statements are in fact voluntary—and that is all there is to it—one indeed asks, "Why do we throw them out?"

Now, the trouble is that they are voluntary so far as the record shows, which is not to say that they are actually voluntary.

The whole history of the confession law, the whole development of the *McNabb-Mallory* rule is an outgrowth of the Supreme Court's impatience and frustration at the inevitable dispute as to what happened behind closed doors.