

The part of the Horsky report I particularly call your attention to is the conclusion that arrests for investigation are illegal because they directly violate the requirement of the fourth amendment to the Constitution that arrests be made only on probable cause to believe that the arrested person has committed a crime. (Horsky report, pp. 2, 22 ff.) This really makes it academic whether investigative arrests are a good idea from the police viewpoint; although in fact the Horsky report shows that their value is far less than has been claimed—inasmuch as they are a bad idea from a constitutional viewpoint. Any restraint of locomotion or freedom to come and go as one pleases is an arrest, and investigative arrests are not “probable cause” arrests because they are not based on a criminal charge.

These are not just theories. They are the gist of very clear holdings by the Supreme Court and our own U.S. Court of Appeals. Now, plainly, the label “detention” and the incredible assertion in section 301 of this bill that a detention shall not constitute an arrest are deserving of better irony than I can muster. To put it pallidly, this is tantamount to saying black is white when the Constitution has already labeled it black.

In the light of these clear legal principles I have vainly puzzled over pages 28-34 of the House committee report which seeks to justify section 301. If I have gotten any glimmer about the views of the House sponsors of the bill, it is that they have simply changed the subject, omitting all reference to the fourth amendment, the court decisions discussed in the Horsky report, and the report itself. Seemingly, from their defense of title III, all that is at issue is the right to detain a person before charging him and granting him a preliminary hearing. If that were so, section 301 would be redundant in view of title I and it would be less objectionable but for different reasons which Mr. Harris has already outlined in connection with the *McNabb-Mallory* rule.

But section 301 does much more. It is a terrible thing to be subject to arrest and detention without judicial approval because you fail to satisfy a policeman who suspects you of possible past or future criminal activity. I doubt that we will ever have a better or more literal definition of the police state in practice.

We submit that it is nonsense to argue that the police need this unreviewable power to avoid precipitate accusations against the innocent. Ask any man in this town—ask yourselves—whether this dubious protection is really preferable to his rights under the fourth amendment. No one except the police has ever suggested that a regime of unconstitutional arrests is preferable to an occasional mistaken constitutional arrest. This argument is not even a siren song; it is just bunk.

Let me turn to section 302 which permits precisely the same practices under another name—so that if this committee or the Congress rejected section 301 but enacted section 302 we would be no better off. I cannot stress this too strongly. The two sections provide alternate routes to the same forbidden destination.

Look at section 302 and this will become clear. It, too, authorizes 6 hour unreviewable detention. It, too, permits arrests to be made before a formal charge is to be filed, that is “during the investigation.” It, too, specifies that the detention “shall not constitute an arrest” even though it plainly is one.

The man thus arrested is denominated a “material witness.” On occasion he may really be a witness and no more. But it is clear that he can also be the real suspect, the future defendant. For 6 hours the police have him completely in their custody, incommunicado, without warning of his rights, without access to a lawyer, without judicial protection—in short, without any meaningful rights at all. Like the person arrested under section 301 he is subjected to a complete denial of his rights under criminal rule 5(a). Like that person he can be released and arrested again to avoid the 6-hour rule, because the right to arrest and detain goes on so long as there is a pending investigation of a crime. It is not tied to a criminal charge and court rules of criminal procedure.

All this is permitted in the name of holding material witnesses, but we already have laws to permit such a detention where approved by a judge in connection with a pending court case. There is Federal Rule of Criminal Procedure 46(b) and there is also District of Columbia Code, section 4-144 which this new section 302 would replace. These provisions tie detentions to the need to produce the witness at the trial of an actual case already in the court. Rule 46(b) requires court approval to begin with and authorizes release of the witness if detention goes on too long. The police rarely use these existing provisions and