

of the omnibus bill is undesirable. I cannot agree with them that H.R. 5726 is a satisfying substitute.

In my opinion there are several deficiencies in the bill.

The major deficiency in the bill is that it does not protect a citizen from an unlawful arrest and may, in fact, constitute an inducement to such arrests. The purpose of the *Mallory* rule is not limited to the prevention of conflicts over the nature of secret interrogations and the minimization of the temptation and opportunity to obtain coerced confessions. Of equal importance is the effectuation and implementation of a citizen's rights to be protected against an unlawful arrest, to be afforded an opportunity for release on bail, to consult counsel and to be informed of his right to remain silent. A citizen is protected against an unlawful arrest by the mandate that he be taken before a magistrate without unnecessary delay and that he be released from custody unless the Government can establish to the satisfaction of the magistrate that there is probable cause for believing that he is guilty. The proposed act would negate effectively this protection. An individual could be arrested without probable cause, interrogated, and the statement given by him used to establish probable cause. There is every reason to expect that the police will use the statute as a substitute for arrests for investigation, where they suspect that an individual has committed an offense but lack probable cause. I think that it is also reasonable to expect that ultimately statements obtained during a 6-hour period of interrogation following an illegal arrest will be suppressed by the courts through the extension of the doctrine of *Wong Sun v. United States*, 371 U.S. 471. Such suppression will rest on constitutional grounds rather than the supervisory power of the Supreme Court over the administration of justice in the lower Federal courts. At the least, we can expect considerable litigation on this point if the bill is passed.

The bill poses substantial problems of interpretation and administration. Initially we can expect considerable litigation concerning section 3(a), the requirement that police officers "plainly advise" a defendant "immediately prior to questioning" of his right to remain silent. I respectfully disagree with Chief Murray and Mr. Acheson that this warning by the police is "an absolutely unexceptional practice" which is done in almost every case (R. 702, 742). Some detectives and officers do give the warning. It is contained at the top of written statements signed by a defendant. It frequently—and I suspect usually—is not given before an interrogation begins and before an oral statement is taken. Existing Federal law does not require such a warning and statements obtained in the absence of a warning have uniformly been held to be admissible (*Morton v. United States*, 147 F. 2d 28; *United States v. Heitner*, 149 F. 2d 105).

Only in the military is such a warning required. The experience under the Uniform Code of Military Justice indicates that no other single provision has resulted in more appellate litigation. After 12 years, the meaning of article 31 of the military code, is still the subject of appellate court decisions. *United States v. King*, USCMA (No. 16,794, Nov. 15, 1963). Similar litigation will undoubtedly follow in the courts of the District of Columbia if the bill is passed.

Section 3(b) of the bill provides that a defendant shall be advised that "he would be afforded reasonable opportunity * * * to consult with counsel of his choosing." This is a desirable safeguard but will be meaningless in most cases. Few defendants have retained counsel and few know the name of a lawyer who is willing to represent them in the middle of the night. Over half of the defendants are indigent. The Legal Aid Agency has no statutory authority to represent a defendant prior to preliminary examination. The provision of the bill on its face affords a valuable right to a defendant; in reality it protects only those who need it the least.

Whether the provision is required by the Constitution cannot be determined until the Supreme Court decides the *Escobedo* case. If the Court holds that a defendant has a right to consult counsel, it may be incumbent upon the Government to provide counsel for the indigent; or at least not interrogate him in the absence of counsel (cf. *Lee v. United States*, supra).

I agree with Mr. Acheson that a 6-hour limitation is desirable if interrogation is permitted.

Section 3(d) will provide serious problems of administration. Who constitutes a "responsible person?" What is meant by "whenever reasonably possible" and "comparable means of verification?" These terms pose substantial problems of interpretation. The only fair and effective method of verification