

First, I want to respond to your letter of November 8, 1963, pertaining to the four safeguards recommended by Deputy Attorney General Katzenbach as essential for incorporation in title I of the bill.

Second, I want to respond to your request at the hearings for my comments on testimony given by some preceding witnesses on title I and title III of H.R. 7525.

Third, recognizing that the preponderance of testimony before your committee has been opposed to section 301 of H.R. 7525, on the grounds that its provisions would be unconstitutional, I want to propose for your consideration some alternative language which has come to my attention and which may meet the constitutional objections to section 301 as presently written.

I. THE FOUR PROPOSED SAFEGUARDS

Deputy Attorney General Katzenbach, in his testimony to the committee, recommended that any corrective legislation pertaining to the *Mallory* rule incorporate four safeguards of rights of defendants. He briefly outlined these four safeguards in his written and oral statement to the committee, but modified these outlines by his statement that "the [same] safeguards are contained in * * * H.R. 5726."

When I later testified, in response to specific questions from the chairman, I gave my comments on the four safeguards as condensed by Mr. Katzenbach. I have since had opportunity to compare those suggested safeguards with H.R. 5726. After making this comparison, I believe it would be well for me to amplify and, to a limited extent, modify my comments on these proposed safeguards.

(1) A plain warning to the defendant, immediately in advance of the questioning, that he is not required to make any statement at any time and that any statement made by him may be used against him:

I find the requirement that a plain warning be given to the defendant in advance of the questioning to be reasonable. However, I would be apprehensive over the possible interpretations of the wording "immediately prior" in view of the severe time restrictions which have flowed from interpretations of the *Mallory* doctrine.

If, for instance, a defendant is so warned at the time of his arrest, possibly at the scene of a crime, and then some time later, after being transported to headquarters for routine fingerprinting and photographing, he makes admissions regarding the offense, it would seem that if an appreciable amount of time had passed, his confession might be invalidated unless another warning was given "immediately" prior to this confession. I would, therefore, oppose inclusion of the word "immediately" and favor language providing for the warning simply prior to or in advance of the questioning.

(2) The arrested person's being afforded a reasonable opportunity to notify a relative or friend and consult with counsel of his choosing:

I testified before your committee regarding my objection to the notification of a friend, as provided by this section, because of the possibility that the arrested person might use this opportunity to warn a confederate or accomplice to escape or to dispose of evidence or the proceeds of crime.

Even though I did not, in my oral testimony, object to the notification of a relative, I should call to your attention the fact that this same danger exists in permitting notification of a relative. In a great many cases, relatives have been found to be accomplices or accessories to the crime. Incidentally, our police manual already requires that such a notification be made unless "it will defeat the ends of justice."

It would seem to me that a "reasonable" opportunity for notification should be limited to avoid the possibility that a defendant might thereby obtain an opportunity to initiate a message to a confederate or accomplice which would serve to defeat the ends of justice.

In comparing Mr. Katzenbach's language with the wording of the safeguard proposed under H.R. 5726, I find an additional basis for objection.

H.R. 5726 includes not only a requirement that the arrested person be afforded a reasonable opportunity to notify a relative and to consult with counsel of his choosing, but also includes a requirement that the arrested person be advised of this opportunity by the police officers having custody of him.

As I have testified to your committee, the current policy and practice of this Department is to permit an arrested person to communicate with an attorney upon his request, and I would not oppose writing this policy and practice into the law. On the other hand, I believe that the additional requirement that the