

**MALLORY AND DURHAM RULES, INVESTIGATIVE ARRESTS AND AMENDMENTS TO CRIMINAL STATUTES OF DISTRICT OF COLUMBIA**

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**HEARINGS**

BEFORE THE

**COMMITTEE ON**

**THE DISTRICT OF COLUMBIA**

**UNITED STATES SENATE**

**EIGHTY-EIGHTH CONGRESS**

**FIRST SESSION**

**ON**

**H.R. 7525**

**RELATING TO CRIME AND CRIMINAL PROCEDURE IN THE  
DISTRICT OF COLUMBIA**

**S. 486**

**TO AMEND CERTAIN CRIMINAL LAWS APPLICABLE TO THE  
DISTRICT OF COLUMBIA, AND FOR OTHER PURPOSES**

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**PART 1**

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**OCTOBER 10, 15, 16, 17, 22, 23, 24; NOVEMBER 5, 6, 7, 1963**

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Committee on the District of Columbia**



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# MALLORY AND DURHAM RULES, INVESTIGATIVE ARRESTS AND AMENDMENTS TO CRIMINAL STATUTES OF DISTRICT OF COLUMBIA

THURSDAY, OCTOBER 10, 1963

U.S. SENATE,  
COMMITTEE ON THE DISTRICT OF COLUMBIA,  
*Washington, D.C.*

The Committee met, pursuant to notice, at 10 a.m., in room 6226, New Senate Office Building, Senator Alan Bible (chairman) presiding. Present: Senators Bible, Beall, and Dominick.

Also present: Chester H. Smith, staff director; Fred L. McIntyre, counsel; Martin A. Ferris, assistant counsel; and Richard Judd, professional staff member.

The CHAIRMAN. The committee will come to order.

This is the time we have regularly set and noticed for the commencement of our hearings on H.R. 7525. This bill is hereby made a part of the record of this hearing and the reporter will, likewise, make as a part of the record of this hearing the official reports received, one from the Department of Justice on this overall bill, the official report of the District of Columbia Commissioners dated September 13; a letter and enclosure from Mr. Acheson, Chairman of the Council on Law Enforcement in the District of Columbia, dated September 12; a letter from Mr. Franklin L. Orth, executive vice president of the National Rifle Association of America, dated September 20, 1963, requesting permission to testify if the subject of registration of handguns is heard by the committee. Each of these official communications will be made a part of the record at this point.

(H.R. 7525 and the reports referred to follow:)

[H.R. 7525, 88th Cong., 1st sess.]

AN ACT Relating to crime and criminal procedure in the District of Columbia

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## TITLE I

SEC. 101. (a) In the courts of the District of Columbia, evidence, including, but not limited to, statements and confessions, otherwise admissible, shall not be inadmissible solely because of delay in taking an arrested person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States.

(b) No statement, including a confession, made by any person during an interrogation by a law-enforcement officer made while such person is under arrest shall be admissible unless prior to such interrogation the arrested person had been advised that he is not required to make a statement and that any statement made by him may be used against him.

## TITLE II

Sec. 201. Section 927 of the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901, as amended (D.C. Code, sec. 24-301 and the following), is amended to read as follows:

“§ 927. Insane criminals

“(a) Mental disease or defect excluding responsibility; sociopathic and psychopathic personality is not disease or defect:

“(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to know or appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

“(2) The terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

“(b) Evidence of mental disease or defect admissible when relevant to element of the offense:

“(1) Evidence that the defendant in a criminal proceeding suffered from a mental disease or defect shall be admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

“(c) Mental disease or defect excluding responsibility is affirmative defense; requirement of notice; form of verdict:

“(1) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by showing of substantial evidence.

“(2) Evidence of mental disease or defect excluding responsibility shall not be admissible unless the defendant, at the time of entering his plea of not guilty or within fifteen days thereafter or at such later time as the court may for good cause permit, files with the court and the prosecution written notice of his purpose to rely on such defense.

“(3) When the defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state.

“(d) Mental disease or defect excluding fitness to proceed:

“(1) No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried or sentenced for the commission of an offense so long as such incapacity endures.

“(e) Psychiatric examination of defendant with respect to mental disease or defect excluding responsibility or fitness to proceed:

“(1) Whenever the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility supported by prima facie evidence submitted to the court or there is substantial reason to doubt his fitness or capacity to proceed, or substantial reason to believe that mental disease or defect of the defendant will otherwise become an issue in the case, the court shall appoint at least one qualified psychiatrist or shall request the Superintendent of the District of Columbia General Hospital or the Superintendent of Saint Elizabeths Hospital or the superintendent of any other appropriate institution to designate at least one qualified psychiatrist, which designation may be or include the superintendent of such hospital, to examine and report upon the mental condition of the defendant. The court may order the defendant committed to a hospital or other suitable facility for the purpose of examination for such reasonable period as the court may determine to be necessary for the purpose of such examination and report. The court's power to so commit a defendant shall exist, notwithstanding the fact that the defendant has been at large on bond or bail.

“(2) In such examination any method may be employed which is accepted by the medical profession for the examination of those thought to be suffering from mental disease or defect.

“(3) The report of the examination shall include the following:

“(A) A description of the nature of the examination;

“(B) A diagnosis of the mental condition of the defendant;

“(C) If the report concludes that defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense;

“(D) When a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the extent, if any, to which the

capacity of the defendant to know or appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired at the time of the criminal conduct charged;

"(E) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect; and

"(F) The report of the examination shall be filed in triplicate with the clerk of the court who shall cause copies to be delivered to the prosecution and to defense counsel.

"(f) Determination of fitness to proceed; effect of finding of unfitness; proceedings if fitness is regained:

"(1) When the defendant's mental fitness to proceed is drawn in question, the issue of such fitness shall be determined by the court. If neither the prosecution nor counsel for the defendant contests the finding of the report filed pursuant to subsection (e), the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue without a jury. If the report is received in evidence upon such hearing the parties who contested the finding thereof shall have the right to summon and cross-examine the psychiatrists who joined in the report and to offer evidence upon the issue. If the court determines that the defendant possesses fitness to proceed to trial, that is, that the defendant has the capacity to understand the proceedings against him and to assist in his own defense, the court shall order the defendant to stand trial within a reasonable time.

"(2) If the court determines at any stage of the proceedings that the defendant lacks mental fitness to proceed, the proceeding against him shall be suspended, pending trial in the future, and the court shall commit the defendant to an appropriate hospital or institution for so long as such unfitness shall endure. Such suspension of proceedings shall not cause jeopardy to attach barring subsequent trial. Whenever the defendant who has been committed to such hospital or other institution is restored to mental fitness in the opinion of the superintendent of such hospital or institution, such superintendent shall certify such fact to the clerk of the court in which the charge against the defendant is pending and the clerk of that court shall furnish copies of said certificate to the parties to the cause.

"(3) After the court receives the certificate of such superintendent that the defendant has regained mental fitness to proceed and the court determines that the defendant has regained such fitness to proceed, the trial proceedings shall be resumed or commenced within a reasonable time. Such determination of fitness may be made by the court on the basis of such certificate that the defendant has regained fitness to proceed provided neither the Government nor counsel for the defendant contests the findings that the defendant has regained such fitness to proceed. If the finding that the defendant has regained fitness to proceed is contested, the court shall hold a hearing without a jury on the issue and shall determine such fitness to proceed.

"(4) If, however, the court is of the opinion that so much time has elapsed since the commitment of the defendant (to determine the fitness to proceed) that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant committed for examination and determination of status by the Mental Health Commission under the provisions of applicable law.

"(g) Determination of irresponsibility on basis of report; access to defendant by psychiatrists of own choice; form of expert testimony:

"(1) If the report filed pursuant to subsection (e) finds that the defendant at the time of the criminal conduct charged suffered from a mental disease or defect which substantially impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and the court is satisfied that such impairment was sufficient to exclude responsibility, the court shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.

"(2) When, notwithstanding the report filed pursuant to subsection (e), the defendant wishes to be examined by qualified psychiatrists of his own choice, such psychiatrists shall be permitted to have reasonable access to the defendant for the purposes of such examination.

"(3) Upon the trial, the psychiatrists who filed reports pursuant to subsection (e) may be called as witnesses by the prosecution, the defendant, or the court. If called by the court, such witnesses shall be subject to cross-examination by the prosecution and by the defendant. Both the prosecution and the defendant may summon any other qualified psychiatrist to testify but no one who has not examined the defendant shall be competent to testify to his opinion as a psychiatrist with respect to the mental condition or responsibility of the defendant.

"(4) When a psychiatrist who has examined the defendant testifies concerning his mental condition, the witness shall be permitted to make a statement as to the nature of his examination, and his diagnosis of the mental condition of the defendant at the time of the commission of the offense charged. Such psychiatrist shall be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

"(5) Nothing herein shall exclude the prosecution from causing an examination of the defendant to be made to determine whether or not he had the capacity either to know or appreciate the wrongfulness of his conduct, to conform his conduct to the requirements of law or to understand the proceedings against him and assist in his own defense, provided the prosecution makes available to a defendant or his counsel the results of such examination.

"(h) Legal effect of acquittal on the ground of mental disease or defect excluding responsibility; commitment; release or discharge:

"(1) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court shall order him to be committed to a hospital having facilities for the custody and care of the mentally ill.

"(2) If the superintendent of such hospital is of the view that a person committed to his custody pursuant to paragraph (1) of this subsection is no longer suffering from mental illness and may be discharged or released on probation without danger to himself or to others, he shall make application for the discharge or release of such person in a report to the court by which such person was committed and shall transmit a copy of such application and report to the prosecution and defense counsel. The court shall thereupon appoint at least two qualified psychiatrists to examine such person and to report within sixty days, or such longer period as the court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examination, and the proceedings thereon, the court may cause such person to be confined in any institution which is suitable for the temporary detention of irresponsible persons.

"(3) If the court is satisfied by the report filed pursuant to paragraph (2) of this subsection and the testimony of the psychiatrists making such report, if the court deems it advisable to hear their testimony, that the committed person may be discharged or released on probation without danger to himself or others, the court shall order his discharge or release upon probation, on such conditions as the court determines to be necessary. If the court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released. According to the determination of the court upon the hearing, the committed person shall thereupon be discharged or released on probation on such conditions as the court determines to be necessary, or shall be recommitted to the custody of such hospital subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

"(4) If after the release on probation of a committed person, the court shall determine, after notice and hearing, that the conditions of probation have been violated and that for the safety of such person or the safety of others his probation should be revoked, the court shall forthwith order him recommitted to a hospital having facilities for the custody, care, and treatment of the mentally ill subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

"(5) A committed person may make application for his discharge or release to the court by which he was committed and the procedure to be followed upon such application shall be the same as that prescribed above

in the case of an application by the superintendent of such hospital. However, no such application by a committed person need be considered until he has been confined for a period of not less than six months from the date of the order of commitment, and if the determination of the court be adverse to the application, such person shall not be permitted to file a further application until one year has elapsed from the date of any preceding hearing on an application for his release or discharge.

“(i) Jury not to be told of consequence of verdict:

“(1) The jury shall not be told by the court or counsel for the Government or the defendant at any time regarding the consequences of a verdict of not guilty or acquittal by reason of insanity.

“(j) Availability of habeas corpus:

“(1) Nothing herein contained shall preclude a person confined under the authority of this Act from establishing his eligibility for release by a writ of habeas corpus.

“(k) Courts concerned:

“(1) This section shall apply only to proceedings brought by information or indictment in the United States District Court for the District of Columbia, and the District of Columbia Court of General Sessions, and to proceedings brought to juvenile court in the District of Columbia.

“(l) Severability:

“(1) The invalidity of any portion of this section shall not affect the validity of any other portion thereof which can be given effect without such invalid part.”

Sec. 202. Nothing contained in the amendment made by section 201 of this title shall be deemed to alter, amend, or repeal section 928 or section 929(b) of such Act of March 3, 1901, as amended, or the Act entitled “An Act relating to the testimony of physicians in the courts of the District of Columbia”, received by the President May 13, 1896 (29 Stat. 138; D.C. Code, sec. 14-308).

Sec. 203. Subsection (a) of section 929 of such Act of March 3, 1901, as amended (D.C. Code, sec. 24-303(a)), is hereby repealed.

### TITLE III

Sec. 301. (a) An officer or member of the Metropolitan Police force of the District of Columbia may detain any person abroad whom he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

(b) Any person so questioned who fails to identify himself or explain his action to the satisfaction of the officer or member (as the case may be) may be detained and further questioned and investigated.

(c) The total period of detention provided for by this section shall not exceed six hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

Sec. 302. Section 401, the Revised Statutes of the United States, relating to the District of Columbia (D.C. Code, sec. 4-144), is amended to read as follows:

“Sec. 401. (a) Whenever there is reasonable ground to believe that any person may be a material witness to the commission of any felony or attempt to commit any felony, and that there is a reasonable probability that such person will not be available as a witness during the investigation of such offense by the Metropolitan Police, or when a suspect is arrested or tried therefor, such person may be required by a judge of the United States District Court for the District of Columbia or of the District of Columbia Court of General Sessions, or by a United States Commissioner to post bond or deposit collateral to secure his appearance as such witness during the investigation of such felony or attempt or the trial of such suspect. Such person may be detained by the Metropolitan Police, pending the posting of bond or collateral, in a room specially provided for witnesses, separate and apart from the quarters provided for those charged with crime, and in any event he shall be presented before a judge or commissioner within six hours of the beginning of such detention, and the judge or commissioner shall then require him to post bond or collateral, or discharge him. Such detention shall not constitute an arrest within the meaning of that term as used in any other law.

“(b) The Board of Commissioners shall provide suitable accommodations within the District of Columbia for the detention of witnesses who are unable

to furnish security for their appearance in criminal proceedings. Such accommodations shall be in premises other than those used for the confinement of persons charged with crimes."

#### TITLE IV

Sec. 401. The definition of "crime of violence" contained in section 1 of the Act entitled "An Act to control the possession, sale, transfer, and use of pistols and other dangerous weapons in the District of Columbia, to provide penalties, to prescribe rules of evidence, and for other purposes", approved July 8, 1932 (D.C. Code, sec. 22-3201), is amended by inserting immediately after "burglary," the following: "robbery,"

#### TITLE V

Sec. 501. Section 803 of the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901 (31 Stat. 1321; D.C. Code, sec. 22-501), is amended by inserting immediately after "for not" the following: "less than two years or".

Sec. 502. (a) Section 823 of the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901 (31 Stat. 1323; D.C. Code, sec. 22-1801), is amended to read as follows:

"SEC. 823 BURGLARY.—(a) Whoever shall, either in nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break or carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in the actual occupation of any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. Burglary in the first degree shall be punished by imprisonment for not less than twenty years nor more than life imprisonment, and, notwithstanding any other provision of law, any person who violates this subsection and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.

"(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than five years nor more than fifteen years."

(b) Any person tried before the effective date of this Act for violation of section 823 of such Act approved March 3, 1901, and who is before a court for the purpose of sentence or resentence, shall be sentenced in accordance with the law in effect before the effective date of this Act.

Sec. 503. Section 810 of the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901 (31 Stat. 1322; D.C. Code, sec. 22-2901), is amended by striking out "six months" and inserting in lieu thereof "five years".

Sec. 504. Section 869e of the Act entitled "An Act to establish a code of law for the "District of Columbia", approved March 3, 1901 (D.C. Code, sec. 22-1513), is amended to read as follows:

"SEC. 869e. CORRUPT INFLUENCE IN CONNECTION WITH ATHLETIC CONTESTS.—(a) If any person shall bribe or offer to bribe or shall aid, advise, or abet in any way another in such bribe or offer to bribe, any player or participant in any athletic contest with intent to influence his play, action, or conduct and for the purpose of inducing the player or participant to lose or try to lose or cause to be lost such athletic contest or to limit or try to limit the margin of victory or defeat in such contest; or if any person shall bribe or offer to bribe or shall aid, advise, or abet in any way another in such bribe or offer to bribe, any referee, umpire, manager, coach, or any other official of an athletic club or team, league, association, institution, or conference, by whatever name called connected with such athletic contest with intent to influence his decision or bias his opinion or judg-



ment for the purpose of losing or trying to lose or causing to be lost such athletic contest or of limiting or trying to limit the margin of victory or defeat in such contest, such person shall be imprisoned not less than one nor more than ten years, and shall be fined not less than \$3,000, nor more than \$10,000.

"(b) If any player or participant in any athletic contest shall accept, or agree to accept, a bribe given for the purpose of inducing the player or participant to lose or try to lose or cause to be lost or to limit or try to limit the margin of victory or defeat in such contest; or if any referee, umpire, manager, coach, or any other official of an athletic club, team, league, association, institution, or conference connected with an athletic contest shall accept or agree to accept a bribe given with the intent to influence his decision or bias his opinion or judgment and for the purpose of losing or trying to lose or causing to be lost such athletic contest or of limiting or trying to limit the margin of victory or defeat in such contest, such person shall be imprisoned not less than one nor more than ten years, or fined, or both.

"(c) To violate subsection (a) or (b) of this section, it shall not be necessary that the player, manager, coach, referee, umpire, or official shall, at the time, have been actually employed, selected, or appointed to perform his respective duties; it shall be sufficient if the bribe be offered, accepted, or agreed to with the view of probable employment, selection, or appointment of the person to whom the bribe is offered or by whom it is accepted. It shall not be necessary that such player, referee, umpire, manager, coach, or other official actually play or participate in an athletic contest, concerning which such bribe is offered or accepted; it shall be sufficient if the bribe be given, offered, or accepted in view of his or their possibly participating therein.

"(d) As used in this section, the term "bribe" means any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or the promise thereof, bestowed or promised for the purpose of influencing, directly or indirectly, any player, referee, manager, coach, umpire, club or league official, in connection with any athletic contest with respect to which an admission fee may be charged, or in connection with any athletic contest with respect to which any player, manager, coach, umpire, referee, or other official is paid any compensation for his services. A bribe need not be direct; it may be such as is hidden under the semblance of a sale, bet, wager, payment of a debt, or in any other manner designed to cover the true intention of the parties.

"(e) If any player or participant shall commit any willful act of omission or commission, in playing of an athletic contest, with intent to lose or try to lose or to cause to be lost or to try or limit the margin of victory or defeat in such contest for the purpose of material gain to himself, or if any referee, umpire, manager, coach, or other official of an athletic club, team, league, association, institution or conference connected with an athletic contest shall commit any willful act of omission or commission connected with his official duties with intent to try to lose or to cause to be lost or to limit or try to limit the margin of victory or defeat in such contest for the purpose of material gain to himself, such person shall be imprisoned not less than one nor more than ten years, or fined, or both.

"(f) Nothing in this section shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager, coach, or professional player, or to any league, association, or conference for the purpose of encouraging such manager, coach, or player to a higher degree of skill, ability, or diligence in the performance of his duties."

SEC. 505. Section 2 of the Act entitled "An Act to control the possession, sale, transfer, and use of pistols and other dangerous weapons in the District of Columbia, to provide penalties, to prescribe rules of evidence, and for other purposes", approved July 8, 1932 (47 Stat. 650; D.C. Code, sec. 22-3202), is amended by striking out "he may" at each of the four places it appears therein and inserting in lieu thereof at each such place "he shall"; and by adding at the end thereof the following: "If a person is convicted of having committed a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, then, notwithstanding any other provision of law, the court shall not suspend his sentence or give him a probationary sentence."

SEC. 506. Section 872 of the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901 (D.C. Code, sec. 22-2001), is amended to read as follows:

"SEC. 872. INDECENT PUBLICATIONS.—(a) Whoever sells, or offers to sell, or give away, in the District, or has in his possession with intent to sell or give away or to exhibit to another, any obscene, lewd, or indecent book, pamphlet, drawing,

engraving, picture, photograph, instrument, magazine, story, paper, writing, card, print, motion picture film, image, cast, slide, figure, statue, phonograph record, wire, tape, or other sound recording, or other presentation or article of indecent or immoral use, or advertises the same for sale, or writes or prints any letter, circular, handbill, book, pamphlet, or notice of any kind stating by what means any of such articles may be obtained, or advertises any drug, nostrum, or instrument intended to produce abortion, or gives or participates in, or by bill, poster, or otherwise advertises, any public exhibition, show, performance, or play containing obscene, indecent, or lascivious language, postures, or suggestions, or otherwise offending public decency, shall be fined not less than \$200 nor more than \$5,000, or imprisoned not less than three months nor more than two years, or both.

"(b) Whoever in the District with knowledge that the same is for the purpose of being sold, given away, or exhibited to another, produces, manufactures, photographs, acts in, poses for, models for, prints, records, televises, composes, edits, writes, publishes or offers to publish, or has in possession, any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, magazine, story, paper, writing, card, print, motion picture film, image, cast, slide, figure, statue, phonograph record, wire, tape, or other sound recording, or other presentation or article of indecent or immoral use, or advertises the same for sale, or writes or prints any letter, circular, handbill, book, pamphlet, or notice of any kind stating by what means any of such articles may be obtained, shall be fined not less than \$200 nor more than \$5,000, or imprisoned not less than three months nor more than two years, or both.

"(c) The United States attorney for the District of Columbia and the Corporation Counsel of the District of Columbia are authorized to petition the United States District Court for the District of Columbia for a temporary restraining order to restrain the sale, gift, or exhibition, or distribution, or the offer to sell, give, exhibit, or distribute any obscene, lewd, or indecent matter the sale, gift, exhibition, or distribution of which is punishable under either subsection (a) or (b) of this section, and to restrain the use of any real or personal property for such purpose, and the United States District Court for the District of Columbia is authorized to issue ex parte such a temporary restraining order for a period of not to exceed ten days.

"(d) Whenever a temporary restraining order is issued under subsection (c) of this section, the United States District Court for the District of Columbia during the period such temporary restraining order is in effect, and after notice and hearing, may issue a preliminary injunction pending a trial of the issues enjoining the sale, gift, exhibition, or distribution, or the offer to sell, give, exhibit, or distribute the matter and enjoining the disposition and the use of property subject to the restraining order, and such preliminary injunction may permit the seizure of such obscene, lewd, or indecent matter.

"(e) If after a trial of the issues a permanent injunction shall be issued by the United States District Court for the District of Columbia, such injunction shall require the destruction of the obscene, lewd, or indecent matter seized under the preliminary injunction and permanently enjoin the use of the real property subject to the preliminary injunction for the purpose of violating this section.

"(f) Any personal property subject to a preliminary injunction issued under subsection (d) of this section shall, if a permanent injunction is issued under subsection (e) of this section, in the discretion of the court, be forfeited to the District of Columbia, and sold at public auction, the proceeds from such sale to be deposited in the Treasury to the credit of the District of Columbia. If any item of such property is not purchased at such auction it shall be disposed of in accordance with regulations prescribed by the Commissioners. If any property seized under authority of this subsection is subject to a lien which is established to the satisfaction of the court as having been created without the lienor's having any notice that such property was to be used in connection with the violation of this section, such lien shall be transferred from the property to the proceeds of any sale or other disposition thereof made under authority of this subsection.

"(g) For the purpose of obtaining a temporary restraining order or a preliminary or permanent injunction under subsection (c), (d), or (e) of this section, it shall not be necessary for the United States attorney or the Corporation Counsel to allege or prove that an adequate remedy at law does not exist or that substantial irreparable damage would result from the violations alleged.

"(h) Injunctive proceedings under this section shall be governed by the Federal Rules of Civil Procedure so far as they are consistent with the provisions of this section."

SEC. 507. Section 825a of the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901 (D.C. Code, sec. 22-3105), is amended by striking out "or by imprisonment not exceeding ten years." and inserting in lieu thereof the following: "and by imprisonment for not less than five years or more than ten years."

SEC. 508. Whoever shall make or cause to be made to the Metropolitan Police Department of the District of Columbia, or to any officer or member thereof, a false or fictitious report of the commission of any criminal offense within the District of Columbia, or a false or fictitious report of any other matter or occurrence of which such Metropolitan Police Department is required to receive reports, or in connection with which such Metropolitan Police Department is required to conduct an investigation, knowing such report to be false or fictitious; or who shall communicate or cause to be communicated to such Metropolitan Police Department, or any officer or member thereof, any false information concerning the commission of any criminal offense within the District of Columbia or concerning any other matter or occurrence of which such Metropolitan Police Department is required to receive reports, or in connection with which such Metropolitan Police Department is required to conduct an investigation, knowing such information to be false, shall be punished by a fine not exceeding \$100 or by imprisonment not exceeding six months, or both.

Passed the House of Representatives August 12, 1963.

Attest:

RALPH R. ROBERTS, *Clerk.*

U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
*Washington, D.C.*

HON. ALAN BIBLE,  
*Chairman, Committee on the District of Columbia,  
U.S. Senate, Washington, D.C.*

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on H.R. 7525, a bill relating to crime and criminal procedure in the District of Columbia. We understand from Mr. Acheson that he has asked you to consider this report as a response to your request for his views.

#### TITLE I. MALLORY RULE

Title I as passed by the House of Representatives is intended as a response to the Supreme Court decision in *Mallory v. United States*, 354 U.S. 449 (1957). However, it raises serious constitutional difficulties in dispensing with safeguards which the Mallory rule assured to persons charged with crime. If a change in some of the recent interpretations of the Mallory rule is to be legislated, certain essential safeguards should be preserved to save the bill from constitutional attack.

The Mallory rule is a rule of evidence in criminal trials. The rule excludes a confession from evidence if it was obtained during a period of unnecessary delay in bringing an arrested person before a committee magistrate. It is intended as a judicial sanction with which to enforce Rule 5(a) of the Federal Rules of Criminal Procedure, which rule requires that an arrested person be taken without unnecessary delay to a committing magistrate to be advised of his rights and to receive a preliminary hearing. The Supreme Court made it clear that the Mallory rule was intended to prevent law enforcement officers from delaying preliminary hearings for the purpose of eliciting confessions. This is as it should be.

However, since the decision in the Mallory case there have been numerous cases in the District of Columbia<sup>1</sup> interpreting "unnecessary delay." Compara-

<sup>1</sup> The Mallory rule is not frequently invoked in Federal criminal cases in jurisdictions other than the District of Columbia. The reason is twofold. First, only in the District of Columbia do the Federal courts have broad jurisdiction over crimes of violence which characteristically lack eyewitnesses and independent evidence. It is quite common in cases of homicide, joke robberies, rapes, and certain other crimes that there is no third eyewitness, and it is often very difficult for the complaining witness to make an identification. In homicides there is no complaining witness at all. Thus, confessions assume far greater significance as evidence of guilt, and it becomes important to defendants to exclude their confessions in the courts of the District of Columbia. Second, by contrast most Federal criminal cases in other jurisdictions involve frauds, mail thefts, narcotic violations, and the like, where there is substantial evidence apart from a confession, i.e., contraband property, financial records, tax returns, etc.

tively brief periods of interrogation following arrest have been held to be unnecessary delay and have resulted in the exclusion of confessions. See, e.g., *Elsie V. Jones v. United States*, 113 U.S. App. D.C. 256, 307 F. 2d 397 (1962); *Charles S. Coleman v. United States*, 114 U.S. App. D.C. —, 313 F. 2d, 576 (1962); *Carl A. Tatum v. United States*, 114 U.S. App. D.C. —, 313 F. 2d 579 (1962); *Tony Coleman v. United States*, — U.S. App. D.C. —, 317 F. 2d 891 (1963).<sup>2</sup>

Most recently, in a dissenting opinion in *Robert A. Muschette v. United States*, D.C. Cir. No. 17410 (July 25, 1963), it was contended that a confession obtained 25 minutes after arrest, and 1 hour and 50 minutes before the arrested person was presented to the committing magistrate, should be excluded. In the recent case of *United States v. James J. Jones*, Crim. No. 366-63, the trial judge excluded a confession which occurred 15 minutes after arrest, and prior to presentment of the arrested person to the committing magistrate.

These more extreme applications of the *Mallory* rule suggest that any interrogation of arrested persons prior to presenting them to committing magistrates may result in the banning of confessions for unnecessary delay. This is an unnecessary and undesirable application of the *Mallory* rule. Interrogation itself is not a violation of due process or other constitutional rights. Interrogation, free of abuses, is a valuable investigative tool. Hence, within the framework of rule 5(a) of the Federal Rules of Criminal Procedure, any legislation dealing with the *Mallory* rule should set up standards for the use of confessions and assure the presence of the essential safeguards assured to defendants by the Constitution and rule 5(a).

Title I of H.R. 7525 does not provide adequate standards, or maintain necessary safeguards. The dissents of four Justices in two Supreme Court cases suggest that a warning such as the one incorporated in H.R. 7525 is not adequate. In the cases of *In re Groban*, 352 U.S. 330 (1956) and *Anonymous v. Baker*, 360 U.S. 287 (1958), four dissenters expressed their view that compulsory interrogation in camera without permitting a subject to be accompanied by counsel amounts to denial of due process of law. Although these views are dissenting views, the issue cannot be ignored, and would be squarely before a reconstituted court under subsection (b) of section 101.

As an alternative to H.R. 7525, we call your attention to the provisions of H.R. 5726, which was prepared by the U.S. attorney for the District of Columbia. Under H.R. 5726, a confession elicited after arrest could not be received in evidence unless the defendant had been advised of his right not to make a statement and that any he did make might be used against him, given an opportunity to notify a relative or friend and consult with counsel, and, when reasonably possible, interrogated in the presence of an independent witness or a recording device, and presented to a magistrate no more than 6 hours after arrest.

## TITLE II. DURHAM RULE

The provisions of title II of H.R. 7525, dealing with the defense of insanity in criminal cases are identical with those of H.R. 7052 of the 87th Congress, which passed the House of Representatives in June 1961. They are directed at the problems which have arisen in the application of the decision of the U.S. Court of Appeals for the District of Columbia in *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F. 2d 862 (1954). In the opinion of many qualified commentators, this decision complicated the trial of the issue of criminal responsibility and introduced serious handicaps to criminal prosecution, in spite of the fact that the basic aim of Durham was to allow a greater latitude to both defense and prosecution in the use of psychiatric testimony. The difficulties which evolved from Durham have been discussed in a recent article by Mr. David C. Acheson, U.S. attorney for the District of Columbia, in "*McDonald v. United States: The Durham Rule Redefined*," 51 Georgetown Law Journal 58.

In Mr. Acheson's opinion and that of the Department of Justice, the difficulties that inhere in the Durham rule have been largely obviated by the decision in *McDonald v. United States*, 312 F. 2d 847 (1962). The *McDonald* decision brings the test of criminal responsibility closer to the standard of control over behavior and restores to the jury the function of passing upon the credibility and weight

<sup>2</sup> *Elsie V. Jones*: Arrest, 4:25 a.m. Sunday; confession, 8 a.m. Sunday; committing magistrate, 9 a.m. Monday. *Charles T. Coleman*: Arrest, 6:45 p.m.; confession, 8:50 p.m.; committing magistrate, 10 a.m. *Carl A. Tatum*: Arrest, 8 p.m.; confession, 12:15 a.m.; committing magistrate, 10 a.m. *Tony Coleman*: Arrest, 12:25 a.m.; confession, 1 to 3 a.m.; committing magistrate, 10 a.m.

of testimony of expert witnesses, thus sharply curtailing the practice of court-directed verdicts of acquittal by reason of insanity. It is a major modification of the *Durham* rule. It is noteworthy that in the *McDonald* case the en banc opinion of the court was unanimous, and reflected a willingness on the part of the court to make adjustments in the *Durham* rule and to apply a continuing re-evaluation to developments in this field of the law. We believe, therefore, that the court should be given the opportunity to further consolidate and crystallize its recent departure in the field of criminal responsibility, and that legislation at this time would only bring new controversy and confusion into a field which seems to be clarifying in a satisfactory way.

It should be added that the effect of *McDonald* appears to have been to reduce sharply the rate of acquittals by reason of insanity. The following comparison of fiscal years may be of interest to the committee:

| Fiscal year | Defendants disposed of by verdicts of not guilty by reason of insanity <sup>1</sup> | Verdicts of not guilty by reason of insanity in trials by court | Verdicts of not guilty by reason of insanity in trials by jury | Verdicts of not guilty by reason of insanity directed by court |
|-------------|-------------------------------------------------------------------------------------|-----------------------------------------------------------------|----------------------------------------------------------------|----------------------------------------------------------------|
| 1958.....   | 21                                                                                  | 8                                                               | 13                                                             | 4                                                              |
| 1959.....   | 35                                                                                  | 19                                                              | 16                                                             | 10                                                             |
| 1960.....   | 36                                                                                  | 19                                                              | 17                                                             | 5                                                              |
| 1961.....   | 66                                                                                  | 47                                                              | 19                                                             | 8                                                              |
| 1962.....   | 67                                                                                  | 42                                                              | 25                                                             | 9                                                              |
| 1963.....   | 2 50                                                                                | 34                                                              | 15                                                             | 3                                                              |

<sup>1</sup> Total of cols. 3 and 4.

<sup>2</sup> Total of cols. 3 and 4, plus 1 case verdict of not guilty by reason of insanity directed by court of appeals.

### TITLE III. DETENTION OF SUSPECTS AND MATERIAL WITNESSES

Section 301 of title III permits an officer or member of the Metropolitan Police Department to detain, for a period of 6 hours, any person found abroad whom such officer has reason to suspect is committing, has committed, or is about to commit a crime, and who, upon inquiry, fails to identify himself or give a satisfactory explanation of his action.

Such detentions are arrests. Legislative statements to the contrary cannot avoid the fact that title III provides for seizure without probable cause. This is a violation of the fourth amendment to the Constitution. Further, title III provides for 6 hours of detention without any provision for the assistance of counsel. This procedure may well be violative of sixth amendment rights. See *In re Groban* and *Anonymous v. Baker*, cited above. In addition, the detention proposed by title III deprives a person of his opportunity to seek bail immediately, keeps him incommunicado, suspends his right of habeas corpus, and tends to impair his privilege against self-incrimination under the fifth amendment. Essentially, section 301 is a legislative effort to reinstitute investigative arrests, a practice long criticized by the bar of the District of Columbia, condemned by a special committee appointed by the District of Columbia Commissioners to study the problem, and ended by order of the Commissioners in March of this year.

While, for these reasons, we must oppose section 301 of H.R. 7525, we fully recognize the necessity for securing the appearance of material witnesses, which is the subject of section 302. In this connection, we call your attention to S. 1148, a bill prepared by the District of Columbia Commissioners "To amend the law relating to material and necessary witnesses to crimes committed in the District of Columbia." We believe that bill represents a sounder approach to the problem of material witnesses than does section 302. S. 1148 is patterned after rule 46(b) of the Federal Rules of Criminal Procedure. It does not permit a 6-hour detention; rather, it requires presentment of the witness to a judicial officer "without unnecessary delay" for determination of whether the person is a material and necessary witness and whether there is a reasonable probability he will not be available at the trial.

If the committee should be disposed to consider S. 1148 favorably, we offer the following suggestions for improvement of that bill:

Recognizing that the person involved is not accused of a criminal act, and may even be the victim of that act, it would seem desirable to provide a means for witnesses to be released from confinement when financially unable to post bond.

In some States, by statute, once the defendant is apprehended the deposition of the witness may be taken, and the defendant afforded the right of cross-examination. Rule 15(a) of the Federal Rules of Criminal Procedure has a similar provision. While the rules of criminal procedure for the District of Columbia provide for depositions of material witnesses for the defendant who are about to leave the District (D.C. Code, sec. 23-111), no like provision is made for depositions of witnesses for the government.

It is also suggested that although the witness is not accused of a crime, he should have the right to counsel and be advised of this right. An analogous situation is the right of an accused to counsel in a preliminary hearing. There is precedent for this practice. In New York, for example, the magistrate advises the witness of his right to counsel, and if he cannot pay for it the court will assign an attorney to serve without compensation. (See 40 Neb. L. Rev. 503, 510; 511, note 42 commenting on "Imprisonment of the Material Witness for Failure to Give Bond.")

Consideration should also be given to compensating a witness for time spent in detention awaiting interrogation or trial. While there are provisions in the District of Columbia Code for witness fees for attendance in court (D.C. Code, secs. 11-1501 and 23-109), under the weight of authority these provisions would not be broad enough to permit payment of compensation to a material witness under detention. 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 a prolonged detention period.

As is provided in rule 46(b) of the Federal Rules of Criminal Procedure, consideration should be given to a provision which would authorize the judge or commissioner to order the release of the witness if he has been detained for an unreasonable amount of time, and to modify at any time the requirement as to bail.

Under the language of the bill the police would, without judicial process, be empowered physically to take the material witness before the judge on the basis of their own determination that the statutory grounds exist. As a practical matter this would seem to be necessary where a witness is taken into custody at the scene of the crime. However, with respect to witnesses other than those taken into custody at the scene of the crime we suggest that consideration be given to a revision of the proposal to provide that such witnesses may not be taken before a judge except pursuant to a court-issued subpoena. This could be based on an ex parte affidavit or petition. Such a revision would be consistent with rule 46(b) of the Federal Rules of Criminal Procedure.

Also, to clarify the intention that not all witnesses must be detained but that those who are must be taken before a judicial officer without unnecessary delay, it is suggested that on page 2 of S. 1148, lines 2 through 4, should be amended to read: "\* \* \* believed to be a material and necessary witness may be detained by a member of the Metropolitan Police force, or by a Federal law enforcement officer. Any person so detained shall, without unnecessary delay, be taken

\* \* \*

#### TITLE IV. DEFINITION OF CRIME OF VIOLENCE

The Department has no objection to title IV of H.R. 7525. Title IV amends 22 District of Columbia Code 3201 to include robbery within the definition of "crime of violence" as used in the chapter entitled "Weapons". The definition includes the crimes of murder, manslaughter, rape, mayhem, maiming, kidnapping, burglary, housebreaking, larceny, assault with intent to kill, commit rape or robbery, assault with a dangerous weapon, and assault with intent to commit any offense punishable by imprisonment in the penitentiary.

#### TITLE V. CRIMINAL OFFENSES AND MINIMUM SENTENCES

Title V of H.R. 7525 contains numerous redefined criminal offenses and provisions for minimum sentences. For the most part we believe that the provisions of title V are unnecessary and undesirable.

Sections 501, 502, 503, 505, and 507 establish mandatory minimum sentences for assault with intent to kill, rob, rape, or poison (2 years), for burglary (20 years, first degree: 5 years, second degree), for robbery (5 years), for crimes of violence committed when armed with a firearm (5 to 30 years additional), and for use of explosives with intent to injure (5 years). Mandatory sentencing is not in keeping with modern thinking, as expressed repeatedly by judges and

in the American Law Institute Model Penal Code. They result in serious inequities and make it even more difficult to obtain warranted convictions.

Sentencing should take into account numerous factors which vary from case to case, and the weight to be assigned to each factor should be left to the discretion of the presiding judge in each instance. The interim report of the New York State Temporary Commission on Revision of the Criminal Code, published on February 1, 1963, indicates similar misgivings about the operation of New York's habitual offender legislation.

Finally, mandatory minimums are in direct conflict with Public Law 85-752 (72 Stat. 845, approved Aug. 25, 1958) which seeks to invest the sentencing process with a full consideration of all the factors involved, an objective which that law proposes to reach through judicial institutes and indeterminate sentences.

Section 504 would amend section 22-1513 of the District of Columbia Code which deals with bribery in connection with athletic contests. Although we are not aware of the need for an amendment such as that proposed, this Department interposes no objection. However, the question is raised whether an intention "to limit the margin of victory or defeat" is necessarily a culpable intention. It may well be desirable to state the intended prohibitions in more specific terms. Also, it is noted that subsections (b) and (c) of the proposed amended section of the District of Columbia Code fail to designate the fine applicable to persons convicted thereunder.

Section 506 would amend section 22-2001 of the District of Columbia Code which relates to indecent publications. The section is similar to H.R. 4670 of the 87th Congress which was vetoed by the President on the basis of grave constitutional and other considerations posed by the legislation.

This section of the bill authorizes the issuance of an ex parte temporary restraining order prohibiting the sale or distribution of materials alleged to be obscene and restraining the use of real or personal property for such purpose. Since this is an area involving the application of the first amendment, we have serious doubt that such an ex parte proceeding would be constitutionally permissible. We are not aware of any recent decision specifically upholding such a procedure, and the strong dissenting opinions in *Kingsley Books v. Brown* (354 U.S. 436, 445, 446, 447), indicate that ex parte procedures of this type may be held unconstitutional under the first amendment. Moreover, it is our view that the provisions authorizing ex parte orders enjoining the use of real or personal property may raise due process questions.

Proposed subsection (f) of proposed section 872 provides for the forfeiture of personal property used to produce materials found to violate the statute. This provision raises a substantial constitutional question under the first amendment. While the Supreme Court has held that it is permissible for the legislature to prevent the dissemination of obscene materials through resort to the injunctive process and to provide for the seizure and destruction of materials judicially found to be obscene (*Kingsley Books, Inc. v. Brown*, 354 U.S. 436), we are not aware that it has ever been called upon to consider a statute which provided that the means of producing obscene material may be forfeited, nor are we aware of any such statute.

We recognize, of course, that in areas not involving freedom of expression the instruments of wrongdoing may be validly forfeited (*Goldsmith-Grant Co. v. United States*, 254 U.S. 505). We doubt, however, that this principle authorizes the forfeiture of the means of production of obscene materials, for example, a printing press, or the enjoining of their use so broadly as to preclude utilization for purposes protected by the first amendment. In our view, it is probable that this provision would be held by the courts to constitute an unwarranted, prior restraint on freedom of expression, prohibited by the first amendment.

The Department of Justice is appreciative of the objective of section 506. However, committee consideration of the alternative language proposed in the report of the Commissioners of the District of Columbia is recommended. The Commissioners' substitute eliminates the objectionable aspects of section 506 without sacrificing any of its effectiveness.

Section 509 would prohibit the giving of false reports or information to the Police Department with knowledge that the information is false. The Department of Justice defers to the views of the Commissioners of the District of Columbia as to the need for and desirability of this section of the bill.

It is the view of the Department of Justice that legislation directed to strengthening the law relating to crime and criminal procedure in the District of Columbia should embrace a provision imposing some degree of regulation of

the possession of handguns and requiring their registration. Such legislation is essential to the safety of the law-abiding population of the city for we have a most dangerous situation of serious proportions resulting from the opportunity for virtually unrestricted possession of handguns by irresponsible and criminally motivated individuals. Shootings repeatedly occur in which the weapon used was kept in readiness at the home of the defendant. In the 7-month period from September 1, 1962, through March 31, 1963, the Metropolitan Police seized 334 handguns in connection with arrests for criminal assaults, the carrying of dangerous weapons, and robberies.

H.R. 5608 is a bill which would accomplish this objective. It was strongly supported in oral testimony before the House Committee of the District of Columbia by the District of Columbia Commissioners and the U.S. attorney for the District of Columbia. We therefore urge the committee to use H.R. 5608 as a basis for the needed corrective legislation. This legislation need in no way interfere with the lawful use of rifles or shotguns for sporting purposes or the lawful pursuits of collectors, nor need it unduly restrict our law-abiding citizens with respect to the possession of such dangerous weapons.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

NICHOLAS DEB. KATZENBACH,  
Deputy Attorney General.

SEPTEMBER 13, 1963.

HON. ALAN BIBLE,  
Chairman, Committee on the District of Columbia,  
U.S. Senate, Washington, D.C.

MY DEAR SENATOR BIBLE: The Commissioners of the District of Columbia have for report H.R. 7525, 88th Congress, a bill relating to crime and criminal procedure in the District of Columbia, passed by the House of Representatives on August 12, 1963.

#### TITLE I

Title I is intended to qualify and amend the rule of the Supreme Court as enunciated in the case of *Mallory v. United States* (354 U.S. 449 (1957)), so as to provide that in the courts of the District of Columbia, evidence, including, but not limited to, statements and confessions, otherwise admissible, will not be inadmissible solely because of delay in taking an arrested person before a Commissioner or other officer with power to commit persons charged with offenses against the laws of the United States. The title also provides that no statement, including a confession, shall be admissible in evidence against an accused unless prior to the interrogation of such person he had been advised that he was not required to make a statement and that any statement made by him may be used against him.

The Commissioners favor the admissibility of confessions and statements which are made freely and voluntarily. However, they believe that the title should be amended in several respects, to expand its coverage and to afford certain safeguards to the person making such confession or statement. The changes proposed by the Commissioners are the following:

1. Insert before the period at the end of line 9 of the first page the phrase "or of the District of Columbia".

2. Insert before the word "prior" in line 2 on page 2 the word "immediately".

3. Insert between lines 5 and 6 on page 2 the following new subsections:

"(c) Each arrested person shall, after his arrest and prior to his being interrogated for the first time by any law-enforcement officer, be plainly advised by the officer or officers having him in custody of his right to be afforded reasonable opportunity to communicate with counsel or with a relative or friend, and shall in fact be afforded such opportunity.

"(d) Each interrogation of an arrested person and the warning and advice required by subsections (b) and (c) of this section shall, whenever reasonably possible, (1) be witnessed by a responsible person who is not a law-enforcement officer, or (2) be transcribed verbatim, or (3) be recorded by a wire, tape, or other sound-recording device, or (4) be conducted subject to other comparable means of verification.

"(e) This title shall be construed in the light of its limited purpose of governing the admissibility of certain evidence in criminal trials in the District of Columbia. Nothing herein contained shall be construed as modifying the right



of an arrested person to be taken before a committing magistrate without unnecessary delay."

If title I of the bill be amended as set forth above, the Commissioners would have no objection to its enactment.

#### TITLE II

Title II of the bill is patterned after the formulation recommended by the American Law Institute as the test of insanity as a defense in criminal cases, sometimes referred to as the test of criminal responsibility. This title is intended to apply to criminal cases in the District of Columbia, replacing the test of criminal responsibility stated for the District of Columbia by the U.S. Court of Appeals in the line of cases beginning with *Durham v. United States* (94 U.S. App. D.C. 228, 214 F. 2d 862 (1954)) and ending with *McDonald v. United States* (312 F. 2d 847), decided October 8, 1962. The language of the title is identical with the purview of bills previously introduced as H.R. 2519 in the 86th Congress, H.R. 7052 of the 87th Congress, and H.R. 1932 in the 88th Congress.

Title II changes existing law in a number of respects. The language of the title provides for the exclusion of sociopathic and psychopathic personality, or apparently any combination of these two types of personality, from the category of mental illnesses or defects which exclude responsibility for crime. The title places on the defendant the burden of proof of establishing a mental illness or defect excluding such responsibility, instead of leaving the burden of proof on the prosecutor to prove a lack of mental illness or defect, when mental illness becomes an issue. The title also requires that a defendant give notice at the time of his plea or within 15 days thereafter, of his intention to rely on the defense of mental disease or defect, or else be precluded from having evidence of mental disease or defect introduced, unless the court may have good cause to permit the introduction of such evidence at a later time. The title requires a notice supported by prima facie evidence, or substantial reason to doubt the defendant's fitness or capacity to proceed, or substantial reason to believe that mental disease or defect of the defendant will become an issue, before the court may order an examination of the defendant or a commitment for such examination. After any such examination, the issue must then be resolved by a judge without a jury. Further, the title requires that when a defendant is acquitted on the ground of a mental disease or defect excluding criminal responsibility, the court shall order him committed to a hospital for custody and care. If the superintendent of such hospital determines that such person is no longer suffering from such mental illness, the superintendent must make application to the court for the discharge or release of such person, and the court must then appoint two psychiatrists to examine the person and report to the court with respect to his mental illness. In any case in which the court is not satisfied with the report of the psychiatrists appointed by it, the title provides that the court may order a hearing in the nature of a civil proceeding, in which the burden of proof will be on the committed person to prove that he may safely be discharged or released.

The Commissioners question the desirability of changing existing law in the District of Columbia with respect to the test of criminal responsibility, as set forth in the *Durham-McDonald* line of cases. The Commissioners are informed that from a public health point of view, the so-called Durham rule as modified by *McDonald* seems to be working very well, because any person acquitted by reason of his plea of insanity at the time of the commission of the alleged crime, or any person determined to be incapable of contributing toward his defense because of mental illness or defect at the time of trial, must be sent to a mental hospital for treatment, and continue to receive treatment for his mental illness or defect. The Commissioners are informed that while the treatment of such persons has not been a complete success in every case, nevertheless it can be said that experience indicates that there is less likelihood of recidivism on the part of such persons than there is on the part of those sent to prison.

Aside from the fact that the enactment of title II would have the effect of substituting a new test of criminal responsibility for a test that has been hammered out in court decisions in the past 9 years, and possibly lead to a new series of court decisions, the Commissioners believe that the enactment of this title will operate to complicate the determination of mental illness or defect by preventing evidence of sociopathic and psychopathic personality from being presented to the jury in a determination of whether there is mental illness or defect. Since it is generally accepted in this jurisdiction that such evidence is material in establishing whether a person is suffering from or has had a mental disease

or defect, the Commissioners are informed that this proposed provision of law will in many cases operate to prevent the commitment of persons needing treatment for mental disease or defect. Further, the Commissioners believe that the title will operate to complicate the release of apparently recovered persons by introducing a process that could be very costly to the District of Columbia, requiring the appointment of two psychiatrists to advise the court in every case in which the superintendent of a hospital has determined that the patient has recovered and should be released.

In view of the foregoing, the Commissioners recommend against the enactment of title II of the bill. They note, incidentally, that their position with respect to this title of the bill is substantially in accord with the position of the Department of Justice as stated in its report to your committee.

#### TITLE III

Title III is virtually identical with the purview of bills previously introduced in the Congress as H.R. 12851 of the 87th Congress and H.R. 1929 of the 88th Congress. The language of the first of the two sections of the title (sec. 301) is virtually identical with that of the so-called Uniform Arrest Act. The purpose of the section is to permit an officer or member of the Metropolitan Police force to detain, for a period not exceeding 6 hours, any person found abroad whom such officer or member has reasonable ground to suspect is committing, has committed, or is about to commit a crime, who, upon demand of him of his name, address, business abroad, and whither he is going, fails to identify himself or explain his actions to the satisfaction of the officer or member. Under the provisions of the bill, such detention is not an arrest and shall not be reported as an arrest in any official record.

Section 302 amends section 401 of the Revised Statutes of the United States, relating to the District of Columbia (sec. 4-144, District of Columbia Code), to provide for the detention of certain material witnesses prior to their presentment before a judge or commissioner for the purpose of determining whether they may be required to post bond or deposit collateral to secure their appearance when needed. Suitable accommodations for the witness so detained, and for the witness who is unable to furnish security for his appearance, are authorized.

On March 9, 1961, the Commissioners appointed Charles A. Horsky, Esq., Roger Robb, Esq., and William B. Bryant, Esq.—three distinguished members of the bar of the District of Columbia—as a committee “to inquire into the policy and practices of the Police Department that lead to arrests for ‘investigation’ and to make recommendations to the Commissioners in respect thereto.” In its report and recommendations to the Commissioners, submitted in July 1962, the committee concluded “that arrests for investigation, as presently practiced in the District of Columbia, are not sanctioned by any District statute and are in violation of the constitutional rights of persons thus arrested.” The report of the committee is an exhaustive and excellent study of the problem of police arrests for investigation, and its conclusion that arrests for investigation are illegal is amply supported by authority.

The Commissioners are in accord with the conclusion contained in the report of this committee and are unalterably opposed to the enactment of section 301. The Commissioners are of the opinion that “arrests for investigation” are unconstitutional in that such arrests sanction the search and seizure of any person thus detained without the requirement of “probable cause” as a basis therefor. The Commissioners are of the further opinion that the enactment into substantive law of this section of the bill will not operate to cure the constitutional objections to arrests for investigation, and that the proviso, set out in subsection (c) of such section, that the detention will not be labeled “an arrest,” will not make such physical restraint on an individual’s liberty any less unconstitutional. The Commissioners note, incidentally, that the committee mentioned in the preceding paragraph included in its report, at pages 72 through 76, a discussion of certain court decisions interpreting provisions of Delaware and Rhode Island law virtually identical with subsections (a), (b), and (c) of section 301 of H.R. 7525. In Delaware, the Supreme Court said in *De Salvatore v. State*, 163 A. 2d 244 (1960), that—

“We can find nothing in 11 Del. C. § 1902 [substantially identical, except for the 2-hour period of detention, to subsec. (a), (b), and (c) of sec. 301] which infringes on the rights of a citizen to be free from detention except, as appellant says, ‘for probable cause’. Indeed, we think appellant’s attempt to draw a dis-

tion between an admittedly valid detention upon 'reasonable ground to believe' and the requirement of § 1902 of 'reasonable ground to suspect' is a semantic quibble. We point out that in *Wilson v. State*, in referring to the arrest of the defendant, we said, 'Nor can it be doubted that the arrest was legal, that is, upon reasonable suspicion of felony' [citing case]. In this context, the words 'suspect' and 'believe' are equivalents." [Bracketed language added.]

A somewhat similar result was reached in the Rhode Island case of *Kavanagh v. Stenhous* (174 A.2d 560 (1961)), in which the Supreme Court, after quoting with approval *De Salvatore v. State of Delaware*, supra, made the following statement:

"The plaintiff, however, contends that since the pertinent language is \* \* \* whom he has reason to suspect is committing, has committed, or is about to commit a crime \* \* \* the test could only be subjective, since it represents nothing more than a mere suspicion entertained by the officer. This contention misconceives the purpose of 'reason to suspect' as it appears in the context. *These words are connotative with grounds for belief as distinguished from mere suspicion.* It is for the jury [in an action for false arrest] to determine from all of the evidence whether in the circumstances the detaining officer was warranted in concluding that reasonable grounds did exist. His conclusion must find justification in the minds of the jury." [Italic and bracketed language supplied.]

It appears, therefore, that in two of the three States which have adopted the so-called Uniform Arrest Act, from which subsections (a), (b), and (c) of section 301 are derived, the highest courts of those States have held that the phrase "reasonable ground to suspect" (in Delaware) and "reason to suspect" (in Rhode Island) are tantamount to "reasonable ground to believe," that is, probable cause. Assuming this to be so, the Commissioners are of the view that the so-called Uniform Arrest Act is unnecessary, in view of the fact that the Metropolitan Police already possess the power to make arrests on the basis of probable cause. However, if the phrase "reasonable ground to suspect" connotes something less than probable cause, and is intended to authorize "arrests for investigation," then the Commissioners are of the view that the provisions of section 301 do not conform with the requirements of the fourth amendment.

As reasons in support of their belief that arrests for "investigation" and the detentions authorized by section 301 are unconstitutional, the Commissioners adopt, in part, the following considerations advanced by its committee on police arrests for investigation:

1. Such arrests cannot be reconciled with the fourth amendment to the Constitution of the United States in that there is not a requirement of "probable cause" and that they permit the police to subjectively determine whom to detain, and for how long and under what circumstances, without the participation of a judicial officer at any stage.
2. Such arrests deny to the person so detained the opportunity to secure his liberty by seeking bail or by posting collateral.
3. Such arrests may permit the person so detained to be held incommunicado and thus, in effect, denied the right of habeas corpus.
4. Such arrests deprive the person so detained of the right to have the assistance of counsel.
5. Such arrests tend to impair the right of the person, under the fifth amendment to the Constitution, not to be compelled in any criminal case to be a witness against himself.

With respect to section 302 of the bill, the Commissioners recognize the desirability and practical necessity of securing the appearance of material witnesses, under the particular circumstances outlined in such section. However, the Commissioners are again opposed in principle to any provision which would authorize the detention of any person as a prospective material witness for a maximum period of 6 hours without presentment before a judicial officer. The Commissioners are of the view that such persons should be subjected to even less restraint on their physical liberty and freedom than those formally charged with crime, and that they should in all cases be permitted to appear immediately at the beginning of their detention before a judge or commissioner for the purpose of determining whether they are, in fact, necessary and material witnesses and, if necessary to secure their appearance at trial, an opportunity to post bond or deposit collateral.

However, the Commissioners prefer that the Congress consider, as a replacement for section 302 of H.R. 7525, their draft bill forwarded to the Congress on March 12, 1963, and introduced as S. 1148, a bill to amend the law relating to material and necessary witnesses to crimes committed in the District of Colum-

bia, if such bill be amended in accordance with certain of the suggestions proposed in the report of the Department of Justice to your committee. As so amended, S. 1148 would provide that section 401 of the Revised Statutes of the United States relating to the District of Columbia be amended to read as follows:

"Sec. 401. (a) Whenever in a criminal proceeding there is reasonable ground to believe that any person is a material and necessary witness to the commission of any crime or attempt to commit any crime punishable by imprisonment for one year or more, and there is a reasonable probability that such person will not be available to testify at the trial of the person charged with such offense, such person so believed to be a material and necessary witness shall be taken by a member of the Metropolitan Police force, or by a Federal law enforcement officer, without unnecessary delay, before a judge of the United States District Court for the District of Columbia or a judge of the District of Columbia Court of General Sessions or a United States commissioner. Such judge or commissioner shall afford such person a hearing and shall, prior to commencing the hearing, advise such person that he is entitled to be represented by counsel. Such judge or commissioner may, after a hearing is afforded to such person and such judge or commissioner is satisfied by testimony given under oath that such person is a material and necessary witness and that there is reasonable probability that such person will not be available at the trial as provided in this subsection, require such witness to post bond or collateral as security that he will appear and testify at such trial or, upon his failure to post such bond or collateral after a reasonable opportunity to do so, to order his further detention until such time as he appears and gives testimony in such criminal case or until such criminal case has been finally disposed of otherwise. The detention, as herein provided, of any such witness shall not constitute an arrest within the meaning of that term as used in any other law or in any rule or regulation. No statement made by such witness in the course of his detention as authorized by this section shall be used in a prosecution against him for the commission of any crime.

"(b) A person detained as a material and necessary witness pursuant to this section shall, for the period beginning with his detention and until he is discharged from detention, be entitled to be paid amounts equivalent to the amounts payable to witnesses testifying in the United States District Court for the District of Columbia.

"(c) Whenever a material and necessary witness is ordered detained by a judge or commissioner, such judge or commissioner shall order the deposition of such witness taken as soon as it is feasible to do so. Each person charged with the crime or crimes in connection with which such deposition has been ordered taken shall, if such person be in custody or be at large on bail, be present at the taking of the deposition of the witness and shall be entitled to be represented by counsel. The taking of such deposition shall be open to the public. After such deposition is taken, the judge or commissioner may order the release from detention of such witness. Such witness shall be released from detention if it appears to any such judge or commissioner that the witness has been detained for an unreasonable length of time. Notwithstanding any other provision of this section, such judge or commissioner may at any time modify the requirement as to bail, or release the witness on his own recognizance.

"(d) The Board of Commissioners shall provide suitable accommodations within the District of Columbia for the detention of persons who are unable to furnish security for their appearance as witnesses, as provided in subsection (a). Such accommodations shall be separate and apart from quarters used for the confinement of persons charged with crime. The said Commissioners may, in their discretion, enter into agreements with any Federal agency, including the United States courts, for the use of suitable space in a building under the jurisdiction of any such agency, and such agency is hereby authorized to allow the use of such space for the purpose of providing the accommodations required by this subsection. In carrying out the purposes of this Act, the said Commissioners may utilize any appropriate space in any building which is owned privately or which is owned or leased by the government of the District of Columbia. In the case of any witness detained by an officer other than an officer or member of the Metropolitan Police force, the District of Columbia shall be reimbursed for the accommodations furnished such witness at rates to be determined by the Commissioners.

"(e) Appropriations to carry out the purposes of this section are hereby authorized."

In the belief that the above language will better protect the rights of persons detained as material and necessary witnesses, the Commissioners strongly recommend that it be used instead of the present amendatory language contained in section 302 of H.R. 7525.

#### TITLE IV

Title IV has the effect of including the crime of robbery among the crimes contained in the definition of "crime of violence" set forth in the first section of the act approved July 8, 1932 (sec. 22-3201, District of Columbia Code, 1961 edition). The Commissioners favor the enactment of this title of the bill.

#### TITLE V

Section 501 has the effect of establishing a mandatory minimum sentence of not less than 2 years' imprisonment upon conviction of the offense of assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or willfully poisoning any well, spring, or cistern of water. For the reason set forth below concerning the efficacy of mandatory minimum sentences, the Commissioners question this section of the bill.

Section 502 amends section 823 of the act approved March 3, 1901 (31 Stat. 1323; District of Columbia Code, sec. 32-1801), now captioned "Housebreaking," to define the offense of "burglary" and to further define such offense as either "first degree" or "second degree," depending on whether the offense occurs in an occupied place of residence, and should any such resident be in occupancy at such time the offense is that of burglary in the first degree. Any other breaking and entering, or entering without breaking, of the various specified premises is defined as burglary in the second degree. The Commissioners favor the enactment of this section of the bill. The Commissioners note, incidentally, that the penalty for burglary in the first degree is imprisonment for not less than 20 years nor more than life, as compared with the present penalty for housebreaking of imprisonment for not more than 15 years. While the Commissioners do not object to the enactment of section 503, they question so much thereof as establishes mandatory minimum sentences, for the reason set forth below.

Section 503 amends section 810 of the act of March 3, 1901, defining the offense of robbery, so as to provide a mandatory minimum sentence of not less than 5 years in place of the present mandatory minimum sentence of not less than 6 months. Again for the reason set forth below concerning the efficacy of mandatory minimum sentences, the Commissioners question this section of the bill.

Section 504 of the bill generally relates to bribing or offering to bribe persons participating in athletic contests, and the acceptance or agreement to accept such bribes by such persons. This section amends existing law (act approved July 11, 1947; 61 Stat. 313; sec. 22-1513, District of Columbia Code, 1961 edition) having a somewhat similar effect, and providing for a penalty upon conviction of imprisonment for not less than 1 year nor more than 5 years and a fine of not more than \$10,000, as compared with the penalty set forth in subsection (a) of the new section 869e of imprisonment for not less than 1 nor more than 10 years, and a fine of not less than \$3,000 nor more than \$10,000. Inasmuch as section 504 appears to add nothing to existing law except insofar as penalties are concerned, and inasmuch as the Commissioners are informed that there appears to be no need for a change in existing law, the Commissioners see no need for section 504.

Section 505 makes it mandatory (rather than at the discretion of the judge, as under existing law) that when any person commits a crime of violence when armed with or having readily available any pistol or other firearm, he shall, in addition to the punishment provided for the crime, also be punished by the penalties prescribed in section 2 of the act of July 8, 1932 (sec. 22-8202, District of Columbia Code, 1961 edition). Further, section 505 adds to such section 2 language prohibiting the court from suspending sentence upon conviction of a crime of violence when armed with or having readily available any pistol or other firearm, or from giving the defendant a probationary sentence. The Commissioners question the desirability of removing from the judges the discretion they have under existing law.

Section 506, amending section 872 of the act approved March 3, 1901 (District of Columbia Code, sec. 22-2001), is identical with the purview of H.R. 5989 of the 88th Congress, except for certain additions on which the Commissioners will comment in the next paragraph. The provision of existing law amended by section 506 reads as follows:

"Whoever sells, or offers to sell, or give away, in the District, or has in his possession with intent to sell or give away or to exhibit to another, any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, or article of indecent or immoral use, or advertises the same for sale, or writes or prints any letter, circular, handbill, book, pamphlet, or notice of any kind stating by what means any of such articles may be obtained, or advertises any drug, nostrum, or instrument intended to produce abortion, or gives or participates in, or by bill, poster, or otherwise advertises, any public exhibition, show, performance, or play containing obscene, indecent, or lascivious language, postures, or suggestions, or otherwise offending public decency, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned not more than one year, or both."

The foregoing provision of law does not, however, take into account certain relatively modern means of publication or communication, nor does it affect persons engaged in the production of indecent publications.

Section 506 has for its purpose the expansion of existing law relating to indecent publications so as to make it applicable to publishing and communicating techniques developed since the enactment of the 1901 act; to extend its provisions to persons engaged in the production or dissemination of obscene materials; to authorize temporary restraining orders, preliminary injunctions, and permanent injunctions affecting the production, distribution and sale of obscene materials; and to provide for the forfeiture to the District of Columbia of personal property made subject to any such permanent injunction. The Commissioners note, incidentally, that the language of section 506 departs from the language of H.R. 5989 by providing, in subsections (a) and (b) of the proposed new section 872, for certain mandatory minimum sentences, involving fines of not less than \$200 or imprisonment for not less than 3 months for violations of section 872, as amended by the bill. For the reasons they have set forth at greater length below, the Commissioners have some doubt as to the effectiveness of a mandatory minimum penalty.

The Commissioners also object to that provision contained in subsection (c) of the amended section 872 which requires the U.S. attorney for the District of Columbia and the Corporation Counsel of the District of Columbia to join in an action to petition the U.S. district court for the temporary restraining order authorized by such subsection. At the very least, the language of the subsection should be couched in the disjunctive so as to authorize either the U.S. attorney or the Corporation Counsel, but not both, acting in concert, to file a petition for such a temporary restraining order. In point of fact, the Commissioners fail to see the need for including the Corporation Counsel in the language of the revised section 872. Prosecutions for the violation of this provision of law would be the function of the U.S. attorney for the District of Columbia. The Commissioners strongly believe that every aspect of the problem, including not only prosecution but also the securing of a temporary restraining order, a preliminary injunction, and a permanent injunction, all as authorized by the proposed new section 872, should be solely the responsibility of the U.S. attorney, without participation by the Corporation Counsel at any point in the process.

The Commissioners are aware that the proposed legislation is concerned with an area in which one must be mindful of the protections guaranteed by the first amendment. The Commissioners accordingly requested the Office of the Corporation Counsel to review the proposed legislation in this light, in cooperation with the Department of Justice and other interested agencies. As a result of that further study the Commissioners believe that there may be constitutional objections to those provisions of section 506 which relate to an ex parte proceeding in connection with the issuance of a temporary restraining order, and which provide for the forfeiture of property other than the obscene and indecent material itself. Accordingly, the Commissioners recommend that subsections (b) through (h) of the amended section 872, as set forth in section 506, be changed to read as follows:

"(b) Whoever in the District produces, or participates in the production of, any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, magazine, story, paper, writing, card, print, motion picture film, image, cast, slide, figure, statue, phonograph record, wire, tape, or other sound recording, or other presentation or article of indecent or immoral use, with knowledge that the same is to be sold, given away, or exhibited to another, shall be fined not more than \$5,000, or imprisoned not more than two years, or both.

"(c) The U.S. attorney for the District of Columbia is authorized to apply

to the U.S. District Court for the District of Columbia for a preliminary injunction and a permanent injunction to restrain the sale, gift, exhibition, distribution, production, disposition, or removal of any obscene, lewd, or indecent matter described in subsection (a) of this section. A hearing on the preliminary injunction shall be had not more than five days, excluding Sundays and holidays, after service upon the defendant of a copy of such application. After such hearing the said court may issue a preliminary injunction which shall remain in effect until final determination of the application for the permanent injunction, but in no case for more than thirty calendar days from issuance of the preliminary injunction.

"(d) If, after a trial of the issues, the court shall order a permanent injunction, such injunction shall include a provision for the immediate seizure and destruction of the obscene, lewd, or indecent matter, and forbidding its reproduction or duplication.

"(e) For the purpose of proceeding under subsection (c) or (d) of this section, it shall not be necessary for the U.S. attorney to allege or prove that an adequate remedy at law does not exist or that substantial and irreparable damage would result from the violations alleged.

"(f) Proceedings pursuant to this section shall be governed by the Federal Rules of Civil Procedure, except as they may be inconsistent with the provisions and purpose of this section."

If section 506 be amended in the manner suggested by the Commissioners, they would have no objection to it. However, should the section not be so amended, the Commissioners recommend against its enactment.

Section 507 amends existing law (act of Mar. 3, 1901, as amended; sec. 22-3105, District of Columbia Code, 1961 edition) making it an offense to place explosives or cause them to be placed at certain specified locations, with the intent to cause damage, so as to provide a mandatory minimum sentence of not less than 5 years' imprisonment upon conviction of the offense. Again the Commissioners question the efficacy of mandatory minimum penalties for the reason set forth below.

Section 508 provides it shall be an offense to make a false or fictitious report to the Metropolitan Police Department of the commission of any criminal offense, knowing such report to be false or fictitious, or to communicate or cause to be communicated to such Department any false information concerning the commission of any criminal offense within the District of Columbia or concerning any other matter or occurrence of which such Department is required to receive reports or conduct an investigation, knowing such information to be false. This section is substantially similar to section 5 of article 19 of the police regulations of the District of Columbia except for the penalty to be imposed for the commission of any such offense. The existing police regulation, which has been in effect for many years, provides for the penalty of a fine not exceeding \$300 or imprisonment not exceeding 10 days. Section 508 provides for a penalty of a fine not exceeding \$100 or imprisonment not exceeding 6 months, or both. The Commissioners consider the proposed change in existing law both unnecessary and undesirable. They believe that increasing the penalty for this type of offense is unnecessary, in that the present penalty imposed under the authority of section 5 of article 19 of the police regulations is considered adequate to deal with this type of offense, generally relatively minor in nature. The Commissioners consider the proposed change in penalty undesirable in that it has the effect of permitting persons accused of making false reports to demand trial by jury for what all too often is an offense of relatively little significance, such as reporting a robbery to cover a gambling loss, or reporting that an assault was by an "unknown" person, in order to shield another member of the reporter's family, or a friend. The Commissioners believe that in cases of this kind, it is undesirable that the time of the courts be taken up in conducting jury trials whenever demanded by accused persons. Accordingly, the Commissioners recommend against the enactment of section 508.

#### MISCELLANEOUS COMMENTS

In the event the Congress should enact H.R. 7525 despite the objections and deficiencies discussed above, the Commissioners desire to point out that the bill in their view is also deficient in that it fails to contain a separability provision, a provision for an effective date, and a provision coordinatng the proposed act with Reorganization Plan No. 5 of 1952. To correct these deficiencies, the Com-

missioners suggest that there be added at the end of the bill the following new title:

"TITLE VI

"Sec. 601. If any part of this Act is declared unconstitutional, or the applicability thereof to any person or circumstances is held invalid, the applicability of such part to other persons and circumstances and the constitutionality or validity of every other part of the Act shall not be affected thereby.

"Sec. 602. Nothing in this Act shall be construed so as to affect the authority vested in the Board of Commissioners of the District of Columbia by Reorganization Plan No. 5 of 1952 (66 Stat. 824). The performance of any function vested by this Act in the Board of Commissioners or in any office or agency under the jurisdiction or control of said Board of Commissioners may be delegated by said Board of Commissioners in accordance with section 3 of such plan.

"Sec. 603. This Act shall become effective on the first day of the second month which follows its approval by more than ten days."

The Commissioners note that throughout the bill the intention appears to be to increase the penalty presently provided for certain offenses, and in several instances to establish a mandatory minimum penalty. The Commissioners have considerable question concerning the effectiveness of a mandatory minimum penalty. They are of the view that any such penalty may in its effect be self-defeating, in that if the mandatory minimum penalty is considered excessive by a jury, it may tend to acquit the defendant rather than subject him to what the jury may consider an excessively high mandatory minimum penalty. The Commissioners are cognizant of the fact that some effort is made to keep from the jury the knowledge of the penalty to which a defendant may be subject, in view of the fact that this knowledge is irrelevant to the question of whether the defendant did or did not commit the offense with which he is charged. However, the Commissioners recognize that sooner or later the jurors in attendance at court acquire knowledge concerning the maximum and minimum penalties for the more common offenses, and carry this knowledge with them into the jury room at the time they begin their consideration of a case. In view of this, the Commissioners question whether a mandatory minimum penalty, or an increase in an existing mandatory minimum penalty, will operate in such manner as to affect materially the crime situation in the District of Columbia.

Finally, the Commissioners are of the view that H.R. 7525 in its present form does not deal with the serious inadequacies in present law regarding the acquisition and possession of firearms. They believe that an appropriate means of dealing with this problem is that set forth in H.R. 5608, 88th Congress, a bill to amend the act of July 8, 1932, relating to the control of possession in the District of Columbia of dangerous weapons, and for other purposes, introduced at the request of the Commissioners. The purpose of this bill is to reduce the rate of serious crimes in the District by more closely controlling the acquisition and possession of dangerous weapons, with particular attention to handguns, which the Commissioners feel are now too easily available to criminal elements in the community. In general, the bill requires persons desiring to possess handguns to obtain permits therefor from the Commissioners; prohibits possession of handguns by persons under 18 years of age; prohibits the carrying about of any loaded rifle or shotgun anywhere in the District, except in one's home, place of business, or on other land owned or leased by the possessor of such weapon; requires closer surveillance by law-enforcement authorities over the importation and delivery of handguns into the District; requires stricter licensing of manufacturers and dealers in weapons in the District, and requires records to be kept and reports to be made to the chief of police concerning weapons sold and repaired and to whom sold or for whom repaired; tightens existing provisions prohibiting the possession of a dangerous weapon with intent to use it unlawfully, including establishment of a presumption that the possession of certain weapons, including possession of a pistol without a permit, constitutes possession of such weapon with intent to use it unlawfully; and require any person desiring to purchase a pistol, machinegun, sawed-off shotgun, or blackjack, within the District, first to obtain a permit to purchase any such weapon. The foregoing provisions, the Commissioners believe, constitute a strong, enforceable law to deal with the dangerous weapons problem in the District of Columbia. Accordingly, the Commissioners recommend that legislation substantially similar to H.R. 5608 be enacted by the Congress.



The Commissioners have been advised by the Bureau of the Budget that, from the standpoint of the administration's program, there is no objection to the submission of this report to the Congress.

Sincerely yours,

WALTER N. TOBINER,  
President, Board of Commissioners, District of Columbia.

U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF THE U.S. ATTORNEY,  
Washington, D.C., September 12, 1963.

Hon. ALAN BIBLE,

Chairman, Committee on the District of Columbia,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter, written on behalf of the Council on Law Enforcement in the District of Columbia, is in response to a letter request dated August 20, 1963, of Mr. Chester H. Smith, staff director of your committee, that the council submit its views on H.R. 7525.

Of course, no form of words which purports to represent the corporate view of the council can accurately reflect every precise shade of the views of all individual members, or all of the reasons that support those views. Therefore, the most feasible means of conveying the council's views is to report the action that the council has voted on each section of the bill and the principal reasons on which most of the council's members were agreed.

The report of the council's action will be broken down by titles of the bill:

#### TITLE I

This title represents a change in the so-called *Mallory* rule in the courts of the District of Columbia. Since the views of the council on the *Mallory* rule and proposed changes in the *Mallory* rule were voted at a special meeting of May 6, 1963, and communicated to the chairman of the House Committee on the District of Columbia, the council thought it best to rest upon that action, and accordingly the council invites your attention to our attached advice to the House committee.

#### TITLE II

A majority of the council members present voted to recommend against enactment of title II of the bill, with the reservation that the council should express no view on the standards and procedures governing release from mental hospitals of persons committed there following acquittals by reason of insanity, until a study of this question can be made by the council. This reservation relates to subsection (h) (2)-(5) on pages 10-13 of the bill. So far as the council's action relates to the *Durham* rule and the standards governing acquittal or conviction in criminal cases in which the insanity defense is interposed, the main reason governing the council's action is that the standards of the *Durham* rule have already been sharply modified in *McDonald v. United States*, 312 F. 2d 847 (1962), which goes far in the direction taken by the bill. Accordingly, a majority of the council felt that the courts, showing a disposition to make important and desirable changes in the *Durham* rule, should have an opportunity to consolidate a judicial solution of the problem, a solution which has moved far in a promising direction.

#### TITLE III

A majority of the members present voted to recommend against enactment of section 301 of title III. A majority of the members felt that this section is merely a reinstitution of arrests for investigation which are not consistent with the provisions of the fourth amendment to the Constitution of the United States.

With respect to section 302, a majority of the members of the council present voted to recommend that this section should be enacted, but with amendments which the council understood were being recommended to your committee by the Department of Justice and the Commissioners for the District of Columbia.

#### TITLE IV

A majority of the members present voted to recommend that title IV should be enacted.

## TITLE V

*Section 501, 502.*—A majority of the members present voted to recommend against enactment of these two sections. The principal reason governing this action was the opposition of the majority of the members to mandatory minimum sentences, which, it is felt, take away from the courts a desirable degree of discretion and flexibility in suiting particular sentences to the particular circumstances of the individual offense.

*Section 503.*—A majority of the members present voted to recommend against enactment of section 503. This section would add very substantially to the severity of a mandatory minimum sentence already contained in District of Columbia Code 22-2901, and the attitude of the members set forth just above applies here as well.

*Section 504.*—A majority of the members present voted to recommend against enactment of this section.

*Section 505.*—A majority of the members of the Council present voted to recommend against enactment of this section, since, like sections 501, 502, and 503, this section restricts a desirable flexibility in sentences that may be imposed by sentencing judges.

*Section 506.*—A majority of the members of the Council present voted to recommend against enactment of this section.

*Section 507.*—A majority of the members of the Council present voted to recommend against enactment of this section, for the reason referred to above in connection with sections 501, 502, 503, and 505.

*Section 508.*—A majority of the members of the Council present voted to recommend against enactment of this section. The increase in the sentence beyond that contained in existing law (police regulations, are 19, sec. 5) governing false reports to the police would convert this offense from one triable without a jury and normally disposed of by fine to one requiring jury trial. District of Columbia Code 11-715(a). Considering the frequently minor character of such offenses, and the congested state of the trial calendar in the jury branch, District of Columbia court of general sessions, the members were of the view that the interests of law enforcement would not be served by this amendment.

This action of the Council was voted at a meeting on September 10, 1963. In the absence of our chairman, Mr. Clemmer, owing to hospitalization, the undersigned acted as chairman of that meeting and is transmitting this letter for the Council.

Sincerely yours,

DAVID C. ACHESON,

*Vice Chairman, Council on Law Enforcement in the District of Columbia.*

Enclosure: Copy of letter to Chairman McMillan dated May 7, 1963.

COUNCIL ON LAW ENFORCEMENT  
IN THE DISTRICT OF COLUMBIA,  
May 7, 1963.

HON. JOHN L. McMILLAN,  
*Chairman, Committee on the District of Columbia,  
U.S. House of Representatives,  
Washington, D.C.*

DEAR MR. CHAIRMAN: The Council on Law Enforcement, District of Columbia, has studied the *Mallory* matter over the years and most recently during special meetings on April 29 and May 6.

You are respectfully advised that at yesterday's meeting, the Council voted 9 to 1, with one abstention, in favor of modifying the present *Mallory* definition by legislation. The Council does not endorse any particular bill nor offer argumentation since extensive hearings have been held and many of the members of the Council have testified in their official and independent capacities. We have thought it sufficient to express the collective view of the Council by simply advising you of the vote that modification of *Mallory* seems indicated to us.

For your ready reference, a copy of the statute creating the Council is enclosed together with the names of present members and their vote on *Mallory*.

Sincerely,

DONALD CLEMMER,

*Chairman (Director of Corrections, District of Columbia).*

Enclosure.

NATIONAL RIFLE ASSOCIATION OF AMERICA,  
*Washington, D.C., September 20, 1963.*

HON. ALAN BIBLE,  
*Chairman, Committee on the District of Columbia,  
U.S. Senate,  
Washington, D.C.*

DEAR SENATOR BIBLE: I note with interest the reports that the Senate District Committee will begin hearings in the very near future on H.R. 7525, relating to crime and criminal procedures in the District of Columbia, and which was recently passed by the House of Representatives.

Because of the nature of this bill and the number of legislative measures contained therein, I understand that there is a distinct possibility that your committee will wish to study in toto each bill originally introduced in the House on the subject of crime and crime prevention in the District of Columbia and subsequently incorporated in whole or in part in H.R. 7525.

In recent days, the Department of Justice has urged the enactment of legislation requiring the registration of handguns. On May 1, 1963, I appeared before Subcommittee No. 6 of the House Committee on the District of Columbia in opposition to such a measure, which appears in the guise of a requirement that a person have a license merely to possess a pistol or revolved even in his home or place of business. As you know, the House committee rejected this approach to the District of Columbia law enforcement problem.

The National Rifle Association of America is unalterably opposed to this method of firearms regulation. The practical result of such legislation, as has been proven many times in those jurisdictions having such provisions, will be that the criminal will generally violate the act and take his chances of discovery and punishment while the law-abiding citizen will find it increasingly difficult to possess firearms for defense of home or property. Experience has shown that such legislation only aids the criminal by ultimately disarming the citizen of good repute and depriving him of any means of self or property protection.

The National Rifle Association of America, a nonprofit organization of more than 600,000 shooter-sportsmen and 11,000 affiliated shooting clubs, requests the opportunity to appear before your committee at any hearing that may be scheduled on this proposal by the Department of Justice, or any proposal which would restrict the rights of law-abiding citizens to possess arms.

Sincerely,

FRANKLIN L. ORTH,  
*Executive Vice President.*

The CHAIRMAN. Before calling the first witness this morning, I believe it might prove helpful to outline what this committee proposes to do over the next 3 weeks. There will be an in-depth examination of the need for strengthening the District of Columbia criminal justice code.

H.R. 7525, the House-passed omnibus crime bill to which I have just referred and made a part of this record, covers a broad field of 14 proposed amendments in 5 separate titles. We will propose to cover each of these subjects separately.

For the benefit of our witnesses and the general public, our ground rules of procedure will call for testimony today on title IV, pertaining to establishing robbery as a crime of violence, and 7 sections in title V dealing with minimum sentences for various crimes; defining burglary in two degrees; corrupt influence in connection with athletic contests; making mandatory the punishment of crimes of violence; and fictitious reports to the Metropolitan Police Department. In addition to the aforementioned we shall also receive testimony on S. 486, which I hereby make a part of the record at this point.

(S. 486 and the reports follow:)

[S. 486, 88th Cong., 1st sess.]

A BILL To amend certain criminal laws applicable to the District of Columbia, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 848 of the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901, as amended (D.C. Code, sec. 22-403), is further amended to read as follows:

"SEC. 848. Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his own, of the value of \$200 or more, shall be fined not more than \$5,000 or shall be imprisoned for not more than ten years, or both, and if the value of the property be less than \$200 shall be fined not more than \$1,000 or imprisoned for not more than one year, or both."

SEC. 2. The first section of the Act entitled "An Act for the preservation of the public peace and the protection of property in the District of Columbia", approved July 29, 1892, as amended (D.C. Code, sec. 22-3112), is further amended by striking out "destroy, injure, disfigure, cut, chip, break," and inserting in lieu thereof "disfigure, cut, chip,".

SEC. 3. Section 812 of the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901, as amended (D.C. Code, sec. 22-2101), is further amended by striking out "for ransom or reward", and inserting in lieu thereof "for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof,".

SEC. 4. Section 9 of the Act entitled "An Act to enjoin and abate houses of lewdness, assignation, and prostitution; to declare the same to be nuisances; to enjoin the person or persons who conduct or maintain the same and the owner or agent of any building used for such purpose; and to assess a tax against the person maintaining such nuisance and against the building and owner thereof", approved February 7, 1914, as amended (D.C. Code, sec. 22-2721), is further amended to read as follows:

"SEC. 9. In any prosecution for violation of this Act or so much of the first section of the Act entitled 'An Act to confer concurrent jurisdiction on the police court of the District of Columbia in certain cases', approved July 16, 1912 (37 Stat. 192; D.C. Code, sec. 22-2722), as relates to the keeping of a bawdy or disorderly house, the court, upon application of the United States attorney made after such attorney has given notice thereof to the Corporation Counsel of the District of Columbia, may order any witness to testify or to produce evidence, or both. Upon such order of the court, such witness shall not be excused from testifying or from producing evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he has been ordered to testify or to produce evidence after having claimed the privilege against self-incrimination, nor shall testimony or other evidence ordered to be given or produced under the provisions of this section be used as evidence in any criminal proceeding against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed in connection with giving testimony or producing evidence under order of the court as provided in this section."

SEC. 5. The last sentence of section 46 of the Healing Arts Practices Act, District of Columbia, 1928 (D.C. Code, sec. 2-137), is amended by striking out "by said United States District Attorney when instituted on behalf of the Commission, and" and by striking out "when instituted on behalf of the Commissioners of said District or by the major and superintendent of police of said District".

SEC. 6. The fourth sentence of section 8 of the Act entitled "An Act to define the term 'registered nurse' and to provide, for the registration of nurses in the District of Columbia", approved February 9, 1907, as amended (D.C. Code, sec. 2-407), is amended by striking out "United States Attorney for the District of Columbia" and inserting in lieu thereof "Corporation Counsel of the District of Columbia".

SEC. 7. Section 2 of the Act entitled "An Act to regulate the practice of optometry in the District of Columbia", approved May 28, 1924 (D.C. Code, sec. 2-502), is amended by adding at the end thereof the following new sentence:

"Prosecutions for violations of this Act shall be conducted in the name of the District of Columbia by the Corporation Counsel".

SEC. 8. Section 9 of the Act entitled "An Act to create a board of accountancy for the District of Columbia, and for other purposes", approved February 17, 1923 (D.C. Code, sec. 2-909), is amended by adding at the end thereof the following new sentence: "Prosecutions for violations of this Act shall be conducted in the name of the District of Columbia by the Corporation Counsel."

SEC. 9. Sections 425 to 428, inclusive, of the Act entitled "An Act to revise and consolidate the statutes of the United States, general and permanent in their nature, relating to the District of Columbia, in force on the first day of December, in the year of our Lord one thousand eight hundred and seventy three", approved June 22, 1874 (D.C. Code, secs. 4-168-171, inclusive), are hereby repealed.

SEC. 10. The last sentence of the first section of the Act entitled "An Act to provide for the conservation and settlement of estates of absentees and absconders in the District of Columbia, and for other purposes", approved April 8, 1935, as amended (D.C. Code, sec. 20-701), is amended by striking out "The United States Attorney in and for the District of Columbia" and inserting in lieu thereof "The Corporation Counsel of the District of Columbia".

SEC. 11. Sections 1, 2, and 3 of this Act shall apply to all conduct within the terms of said sections which shall occur subsequent to the approval of this Act. Sections 4, 5, 6, 7, 8, 9 and 10 of this Act shall take effect thirty days from the approval of this Act, but shall not in any case apply to proceedings instituted prior to the approval of this Act."

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OFFICE OF THE ATTORNEY GENERAL,  
Washington, D.C., January 14, 1963.

The VICE PRESIDENT,  
U.S. Senate, Washington, D.C.

DEAR MR. VICE PRESIDENT: Enclosed for your consideration and appropriate reference is a legislative proposal to amend certain provisions of the Code of the District of Columbia. For the sake of clarity there is also attached a statement setting forth the need for each such amendment and how these amendments will resolve the problems created by the present statute.

An identical proposal was submitted to the 87th Congress on July 25, 1962, which was introduced as S. 3670. No action, however, was taken on this bill by the Senate Committee for the District of Columbia since it was received so late in the session.

This proposal was drafted with the assistance of the Corporation Counsel of the District of Columbia who indicated that he is in complete accord with the need for such legislation. The proposal will accomplish a number of things. It will strengthen certain criminal sections of the District of Columbia Code; it will broaden the immunity statute of the District of Columbia so that it will conform with other Federal statutes; it provides for certain procedural changes in matters which are essentially local in nature and permit the substitution of the Corporation Counsel of the District of Columbia as the moving party rather than the U.S. attorney.

It is the view of the Department that this legislation is highly desirable and it is urged that the Congress give favorable consideration to this matter.

The Bureau of the Budget has advised that there is no objection to the submission of this recommendation from the standpoint of the administration's program.

Sincerely,

ROBERT F. KENNEDY,  
Attorney General.

Enclosure.

#### EXPLANATORY STATEMENT

A bill to amend certain criminal laws applicable to the District of Columbia, and for other purposes

#### SECTION 1. DESTRUCTION OF PROPERTY

This section would amend section 848 of the act approved March 3, 1901 (31 Stat. 1327, ch. 854), as amended by the act approved August 12, 1937 (50 Stat. 629 ch. 599) (District of Columbia Code, sec. 22-403), by—

1. Removing the language which restricts the application of the section to property which is movable.

2. Broadening the section to cover the malicious destruction of any property whether personal or real.

3. Increasing the value line of demarcation between misdemeanors and felonies from \$50 to \$200.

4. Increasing the maximum fine for misdemeanors from \$200 to \$1,000, and changing the penalty for felonies from the present mandatory minimum of 1 year and maximum of 10 years to a fine of not more than \$5,000 or imprisonment for not more than 10 years or both.

The effects of the change would be to simplify prosecutions for malicious destruction of property and, by the change in penalties, to provide a more effective deterrent.

#### SECTION 2. DISFIGUREMENT OF PROPERTY

This section would amend section 1 of the act approved July 29, 1892 (27 Stat. 322, ch. 320), as amended by the act approved July 8, 1898 (30 Stat. 723, ch. 638) and by the act approved April 21, 1906 (34 Stat. 126, ch. 1647) (District of Columbia Code, sec. 22-3112), by—

1. Striking out the language which permits a defendant who has willfully or wantonly destroyed, broken, or injured property to be prosecuted under this section which relates principally to disfiguring of property and which subjects the offender to relatively minor punishment.

2. Conforming the coverage of the section to the expanded coverage of section 1 of this act.

#### SECTION 3. KIDNAPING

This section would amend section 812 of the act approved March 3, 1901 (31 Stat. 1322, ch. 854), as amended by the act approved February 18, 1933 (47 Stat. 858, ch. 103) (District of Columbia Code, sec. 22-2101), by—

1. Conforming the existing local law relating to kidnaping to the Federal statute applicable in all other Federal jurisdictions.

2. Excepting parents, as regards their minor children, from the coverage of the statute.

3. Broadening the local kidnaping statute which now makes punishable only a holding for ransom or reward to include instances where no ransom or reward is demanded but where the motive may be lust, a desire for companionship, revenge, or any other nonmonetary motivation.

#### SECTION 4. IMMUNITY

This section would amend section 9 of the act approved February 7, 1914 (38 Stat. 282, ch. 16), as amended by section 1 of the act approved June 25, 1948 (62 Stat. 909, ch. 646) (District of Columbia Code, sec. 22-2721), by—

1. Broadening the coverage of the section, now applicable only to civil actions relating to the abatement of the nuisances of disorderly houses to include criminal prosecutions for keeping disorderly houses.

2. Granting authority to the courts upon application of the prosecutor to compel a witness to testify in a criminal prosecution for keeping a disorderly house notwithstanding his claim of privilege under the fifth amendment.

3. Granting witnesses immunity from prosecution on the matters on which testimony was compelled, after a claim of privilege against self-discrimination.

4. Subjecting such witnesses to whom immunity is granted to the ordinary possibilities of prosecution for perjury or contempt of court committed in connection with their testimony.

5. Harmonizing this local immunity statute to comparable Federal laws.

#### SECTION 5. HEALING ARTS PRACTICES

This section would amend section 46 of the act approved February 29, 1929 (45 Stat. 1340, ch. 352), as amended by the act of June 25, 1948 (62 Stat. 909, ch. 646) (District of Columbia Code, sec. 2-137), by—

1. Substituting the Corporation Counsel of the District of Columbia for the U.S. attorney as the party who shall conduct certain proceedings relating principally to the suspension or revocation of doctors' licenses; this follows naturally from a recent change effected by the District Commissioners in the composition of the District Commission on Licensure by which the Corporation Counsel was substituted for the U.S. attorney.

## SECTION 6. REGISTERED NURSES

This section would amend section 6 of the act approved February 9, 1907 (34 Stat. 888, ch. 913) as amended by the act of March 2, 1929 (45 Stat. 1521, ch. 540) and the act of June 25, 1936 (49 Stat. 1921, ch. 804) and the act of June 25, 1948 (62 Stat. 991, ch. 646) and the act of May 24, 1949 (63 Stat. 107, ch. 139) (District of Columbia Code, sec. 2-407), by—

1. Substituting the Corporation Counsel of the District of Columbia, for the U.S. attorney as the party who shall conduct certain proceedings relating principally to the suspension or revocation of nurses' licenses issued by a local board appointed by the Commissioners of the District of Columbia.

## SECTION 7. OPTOMETRY

This section would amend section 2 of the act of May 28, 1924 (43 Stat. 177, ch. 202) (District of Columbia Code, sec. 2-502), by—

1. Designating the Corporation Counsel of the District of Columbia specifically as the prosecutor for misdemeanor violations of provisions concerning optometrists' licenses issued by a local board appointed by the Commissioners of the District of Columbia.

## SECTION 8. ACCOUNTANCY

This section would amend section 9 of the act approved February 17, 1923 (42 Stat. 1263, ch. 94) (District of Columbia Code 2-909), by—

1. Designating the Corporation Counsel of the District of Columbia specifically as the prosecutor for violations of provisions concerning accountants' licenses issued by a local board appointed by the Commissioners of the District of Columbia.

## SECTION 9. PRIVATE DETECTIVES

This section would repeal sections 425 and 428, inclusive of the act approved June 22, 1874 (Revised Statutes, District of Columbia, secs. 425-428), as amended by the act of June 11, 1878 (20 Stat. 107, ch. 180) (District of Columbia Code, secs. 4-168-4-171, inclusive), relating to the appointment and bonding of private detectives. This amendment would not change existing substantive law. The sections expressly repealed by the amendment have been given no effect since 1932 when they were repealed by implication and superseded by the act of July 1, 1932 (47 Stat. 559, ch. 366) (District of Columbia Code, sec. 47-2341).

## SECTION 10. ESTATES OF ABSENTEES AND ABSCONDERS

This section would amend section 1 of the act of April 8, 1935 (49 Stat. 111, ch. 46), as amended by the act of June 25, 1936 (49 Stat. 1921, ch. 804), and the act of June 25, 1948 (62 Stat. 991, ch. 646), and the act of May 24, 1949 (63 Stat. 107, ch. 139) (District of Columbia Code 20-701). This amendment would have the effect of transferring what is essentially a local government function to the local government through its attorney, the Corporation Counsel. Under existing law, it is the District of Columbia, not the United States, to which estates normally escheat and by which support payments are made. The amendment would grant specifically to the District of Columbia the right to be made a party in every proceeding where one seeks to place in receivership property of absentees or absconders who—

(a) have left the District without making provisions for the support of their dependents and

(b) whose assets are treated under certain circumstances as if the absentee had died intestate.

## SECTION 11. EFFECTIVE DATE

This section provides that sections 1, 2, and 3 of this act would be applicable only to acts committed after the date of enactment; whereas, sections 4 through 10 would be applicable to proceedings instituted 30 days after enactment and not to proceedings instituted prior thereto.

THE OPTOMETRIC SOCIETY OF THE DISTRICT OF COLUMBIA,  
*Washington, D.C., February 11, 1963.*

MR. CHESTER H. SMITH,  
*Staff Director, Committee on the District of Columbia,  
 U.S. Senate, Washington, D.C.*

DEAR MR. SMITH: First of all, let me assure you that we greatly appreciate the action of Senator Bible and yourself in requesting the comments of the District Optometric Society concerning S. 486.

Section 7 of the bill, which would amend the District of Columbia optometry law to provide that prosecutions of its violations shall be conducted in the name of the District of Columbia by the corporation counsel, has our unqualified support.

Incidentally, if this bill passes as we hope it will, it will be the first amendment to the District optometry law since its passage May 28, 1924.

Whenever we can be of service, please feel free to call upon us.

Respectfully,

HORACE W. WHITE, Jr.,  
*Executive Secretary.*

The CHAIRMAN. S. 486 is a bill introduced by myself which amends certain criminal laws applicable to the District of Columbia. We will not conclude the testimony on this legislation today. We will continue tomorrow morning and Monday, if necessary, and the three remaining titles will be heard in the succeeding 2 weeks.

These hearings are designed to implement factfinding sessions held in February and March before joint meetings of the Senate and House District of Columbia Committees on the upsurge of crime in Washington, D.C.

Today we are here in a conscientious and determined effort to make headway in the difficult area of more effective law enforcement within the District of Columbia. The city of Washington is not alone in the upward crime trend, since all major cities in the country have similar problems in varying degrees. As I have said too many times, the fact that we compare favorably with cities of comparable size is, in my opinion, of slight consolation, because there is, certainly, too much crime.

Congress has the legislative responsibility over the Nation's Capital City. Each of you in your capacity as an administrative official, law enforcement officer, or a concerned citizen, have your responsibility with respect to law enforcement.

Personally, I favor taking every reasonable step to strengthen the arm of law enforcement agencies so long as constitutional guarantees are protected. As I have stated before, I believe just as strongly, that those constitutional guarantees should not deprive law-abiding men, women, and children of another important right—the right to walk our streets without fear of bodily harm and the right to the safety of our homes.

These problems and their associated causes have no simple answers. It is my hope, and I believe that hope is shared by every member of this committee, that we can make some headway in discharging our obligation in this field.

As I indicated previously, the first range of hearings will be on title IV, and the following subsections of title V.

There are, as I indicated, seven subsections under title V as it comes to us in the House bill. We will proceed in that order.

After testimony is concluded on titles IV and V we shall proceed during the next 2 weeks to the consideration of titles I and II, the so-called *Mallory* and *Durham* rules.



I am advised that because of some problems of some out-of-town witnesses who are experts on these two subjects that it may be necessary to change the order of the hearing on *Durham* and *Mallory*, but we will give due notice to everybody in proper time.

That, in general, is the schedule of this committee that it will attempt to follow. We will set a date quite possibly sometime later for hearings on section 506 of title V which is the title that deals with indecent publications.

Our first witness is Commissioner Tobriner.

Senator Beall, do you have any statement?

Senator BEALL. I just want to say that I certainly concur in what you have said. Crime has been rising all over the country and in the Nation's Capital. Our problem, of course, in this committee, is to deal with the situation right here in Washington and I think it is time that we go into this as thoroughly as we possibly can and as quickly as we possibly can. I concur in what you have said.

The CHAIRMAN. Thank you.

As I stated earlier, our first witness this morning is the Chairman of the Board of Commissioners, Mr. Walter N. Tobriner.

**STATEMENT OF WALTER N. TOBRINER, PRESIDENT, BOARD OF COMMISSIONERS, DISTRICT OF COLUMBIA; ACCOMPANIED BY ROBERT F. KNEIPP, ASSISTANT CORPORATION COUNSEL; AND GILBERT GIMBLE, ASSISTANT CORPORATION COUNSEL**

Mr. TOBRINER. Mr. Chairman and members of the committee, I wish to say preliminarily that the Commissioners and the entire government of the District of Columbia share with you your concern respecting the mounting crime rate in the District of Columbia and will cooperate with you to the fullest in securing protection against crime, consistent with constitutional rights.

The Commissioners appreciate this opportunity to present their views on titles IV and V of H.R. 7525 and on S. 486. However, since I understand that section 506 of title V (as the chairman has so indicated) is to be made the subject of a later hearing before this committee, I shall reserve to such later hearing my statement as to the views of the Commissioners on that section. Accordingly, nothing in the testimony I offer here today should be considered as being applicable, either directly or indirectly, to section 506 of title V.

The CHAIRMAN. That deals with indecent publications which will be made the subject of a separate hearing.

Mr. TOBRINER. Yes, Mr. Chairman.

The CHAIRMAN. We understand that what you are going to say on title V does not have any relation to section 506.

Mr. TOBRINER. Right.

H.R. 7525, as passed by the House of Representatives on August 12, 1963, is intended to change existing law in the District of Columbia so as to deal more effectively with the crime situation. This is a situation with which the Commissioners have long been concerned, and accordingly they welcome the interest in the problem which the Congress is showing. However, for reasons which they will develop in the course of these hearings, the Commissioners, while they favor certain provisions of the bill, nevertheless, have a number of reserva-

tions concerning many of its provisions. As a result, they have recommended to this committee, in a letter dated September 13, 1963, that the bill not be enacted in its present form.

The chairman has already incorporated that letter into the record.

The CHAIRMAN. That is correct. It has already been incorporated into the record.

Mr. TOBRINER. Title IV of H.R. 7525 has the effect of including the crime of robbery in the group of crimes embraced within the term "crime of violence," as specified by the first section of the act approved July 8, 1932. In view of the fact that the term "crime of violence" as presently defined in such section includes murder, manslaughter, rape, mayhem, maliciously disfiguring another, abduction, kidnaping, burglary, housebreaking, larceny, any assault with intent to kill, commit rape, or robbery, assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment in the penitentiary, it appears that the addition of the crime of robbery in this group of crimes is merely the correction of an oversight. The Commissioners favor this change in existing law.

Title V consists of seven sections (excluding sec. 506). Six of these sections amend a variety of existing laws, while the seventh enacts in statutory form an existing District of Columbia police regulation prohibiting the making of false or fictitious reports to the Metropolitan Police Department. The sections of this title have virtually nothing in common with one another, except that several of the sections either specifically or in effect change existing law so as to provide for the imposition of mandatory minimum sentences upon convictions of certain specified offenses. On this aspect of the general problem, the Commissioners question the effectiveness of a mandatory minimum penalty, in the belief that any such penalty not only deprives the courts of discretion in the sentencing of offenders, but also many, in its effect, be self-defeating. If the mandatory minimum penalty be considered excessive by a jury, the jury may tend to acquit the defendant rather than subject him to what it considers an excessively high penalty. In view of this, the Commissioners question whether a mandatory minimum penalty, or an increase in an existing mandatory minimum penalty, will operate so as to affect materially the crime situation in the District. Accordingly, my comments respecting the sections of title V which would have the effect of establishing a mandatory minimum penalty, or increasing an existing mandatory minimum penalty, should be considered as including the foregoing general comment concerning the efficacy of mandatory minimum penalties.

The CHAIRMAN. Do you have someone who is going to testify on this subject of mandatory minimum sentence in more detail? My understanding is that Mr. Clemmer, Director of the District of Columbia Department of Corrections, will testify in detail as to how the present penalties work under the various code sections.

Mr. TOBRINER. Yes; that is under his jurisdiction, in the Department of Corrections.

The CHAIRMAN. I will then withhold those questions, and ask them of him.

Mr. TOBRINER. Yes.

Section 803 of the act of March 3, 1901, presently provides that every person convicted of any assault with intent to kill or commit

rape, or to commit robbery, or of mingling poison with food, drink, or medicine with intent to kill, or of willfully poisoning any well, spring, or cistern of water, shall be sentence to imprisonment for not more than 15 years. Section 501 of H.R. 7525 amends this provision so as to provide a mandatory penalty of not less than 2 years. For the reasons I have already stated, the Commissioners question the desirability of this section of the bill.

Section 502 amends existing law relating to housebreaking so as to denominate the offense as burglary; to provide for two degrees of such offense; and to establish a minimum and maximum penalty for each such degree. The bill provides that burglary in the first degree involves the breaking and entering, or the entering without breaking, with criminal intent, of any dwelling, or room used as a sleeping apartment in any building, if any person be in actual occupation of any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking. Burglary in the second degree involves the breaking and entering, or entering without breaking, with criminal intent, of any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade. The penalty prescribed for first degree burglary is imprisonment for not less than 20 years nor more than life, and for the lesser offense of burglary in the second degree, imprisonment for not less than 5 years nor more than 15 years. In general, subject to the comment I have made with respect to the desirability of mandatory minimum penalties, the Commissioners favor the enactment of section 502. They suggest, however, that the language of subsection (b) of the proposed new section 823, would be clearer if the phrase "whether at the time occupied or not," appearing in line 8 on page 18, were changed to "regardless of whether any person other than the owner of the premises in which such apartment or room is located is entitled to the occupancy thereof."

The CHAIRMAN. Do I understand that the Commissioners' position on this section is that there should not be a minimum of 20 years for burglary—is that correct?

Mr. TOBRINER. We say that there should be no minimum sentence imposed but that we favor the designation of burglary in two separate degrees.

The CHAIRMAN. I understand that, but you are opposed to the imposition of a minimum mandatory sentence?

Mr. TOBRINER. That is correct.

Section 503 increases the existing mandatory minimum penalty of 6 months upon conviction of the offense of robbery to a mandatory minimum penalty of 5 years' imprisonment. Here again the Commissioners question the desirability of establishing a mandatory minimum penalty.

The CHAIRMAN. May I ask you a question there? Do you object to the setting of a minimum penalty of 6 months upon conviction for an offense such as robbery as it is now in the statute?

Mr. TOBRINER. No. I would not object to that, because I think that is practically deminimis in respect to a crime of that kind.

The CHAIRMAN. I am wondering if you are consistent, though, where you object to minimums in relation to the other sections—why do you not object to a minimum sentence for robbery?

Mr. TOBRINER. Because we think that in the case of robbery, which is a felony, that the minimum sentence currently prescribed is one which any court would normally give.

The CHAIRMAN. That is written into the statute?

Mr. TOBRINER. It is written into the statute, but I feel that it is a de minimis matter, and the Commissioners have no strong feelings about this item of 6 months under the robbery section.

The CHAIRMAN. The burden of your argument up to date on the House passed bill is to oppose a minimum sentence?

Mr. TOBRINER. We do, sir, but I say that a sentence of 6 months on a conviction for robbery is so minimal that I do not feel, if that were permitted to stay in the statute that it would constitute any real interference with judicial discretion.

The CHAIRMAN. If there were a minimum sentence of 6 months for these other crimes you would then have no objection?

Mr. TOBRINER. That would depend upon the nature of the crime. I would say that generally would be true. I do not believe that constitutes any substantial impairment in the case of a felony in the court's discretion, which we believe should reside and remain with the judges.

The CHAIRMAN. Under the present sentencing system for burglary, if I understand it correctly, the present sentence for housebreaking is imprisonment for not more than 15 years. Is that the sentence that the judge would give, or would he impose one of 10 or 5 years?

Mr. TOBRINER. It would be within his discretion to give anything.

The CHAIRMAN. He can and does specifically set the sentence in the District of Columbia?

Mr. TOBRINER. Yes, sir.

The CHAIRMAN. Is that correct?

Mr. TOBRINER. Yes, sir. We have an indeterminate sentence law, if that is what you are driving at.

The CHAIRMAN. That is what I am driving at. The offender is convicted of housebreaking and he is before the judge for sentencing. Now, my question is, what type of a sentence can the judge impose?

Mr. TOBRINER. My recollection is, subject to correction, is that he sentences him for not less than nor more than.

The CHAIRMAN. So the judge himself then has a statute to which he can go permitting him to set the minimum?

Mr. TOBRINER. Within the confines of the sentence prescribed for the individual crime for which the sentence is imposed.

The CHAIRMAN. That is in the District of Columbia?

Mr. TOBRINER. I will have to refer to some of my lawyer friends here about that.

The CHAIRMAN. I am just trying to find out exactly how it works.

Mr. TOBRINER. I think that is true. Is Mr. Acheson here at the moment? Is that correct, Mr. Acheson?

The CHAIRMAN. Would you like to come forward? Maybe this is more properly in your province.

Mr. ACHESON. I will touch on that in my testimony.

The CHAIRMAN. We will ask you the question then at that point. Thank you.

Mr. TOBRINER. Section 504, generally relating to the bribing of persons participating in athletic contests, and offers to bribe such persons, replaces an existing provision of law having a similar effect. In general, this section of the bill appears to change existing law only to the extent of changing the penalty which may be imposed upon conviction of the proscribed offense, but otherwise to add nothing to existing law. Inasmuch as the Commissioners are informed that there appears to be no need for any change in existing law relating to this aspect of the problem, the Commissioners see no need for section 504. Accordingly they recommend against its enactment.

Section 505 has the effect of depriving the court of any discretion with respect to the imposition of an additional penalty for the offense of committing a crime of violence when armed with, or having readily available, any pistol or other firearm. Under existing law, if any person commits a crime of violence when armed with or having readily available a pistol or other firearm, he may, in addition to the punishment provided for the crime, be punished by imprisonment for an additional term of years, which I believe the statute says is 5 years. However, present law does not require that such additional term of imprisonment be imposed, but leaves the matter to the discretion of the court. Section 505 changes existing law in two respects. First, it makes it mandatory that the court impose an additional term of imprisonment when a crime of violence is committed while the offender is in possession of, or has readily available, a pistol or other firearm. Second, the section deprives the court of authority to suspend sentence or to place the offender on probation. The Commissioners question the desirability of depriving the court of discretion in matters of sentencing. Accordingly they are opposed to the enactment of section 505.

The Commissioners question the desirability of section 507 inasmuch as it has the effect of requiring the imposition of a minimum penalty upon conviction of a violation of section 825(a) of the act of March 3, 1901, prohibiting the placing of explosives at certain specified locations.

I shall now discuss section 508. For many years the police regulations of the District of Columbia included and presently include a provision prohibiting the making of a false or fictitious report to the Metropolitan Police Department of the commission of any criminal offense, knowing such report to be false or fictitious, or to communicate or cause to be communicated to such Department any false information concerning the commission of any criminal offense or concerning any other matter or occurrence of which the Metropolitan Police Department is required to receive reports, or in connection with which such department is required to conduct an investigation, knowing such information to be false. Section 508 of the bill is merely a restatement of the long-existing police regulation, differing therefrom only with respect to the penalty which may be imposed. The police regulation provides for a penalty of a fine not exceeding \$300 or imprisonment not exceeding 10 days. Section 508 contains a penalty of a fine not exceeding \$100 or imprisonment not exceeding 6 months, or both. We consider the proposed change in existing law both unnecessary and undesirable—unnecessary, in that the penalty presently prescribed for the violation of the police regulation is deemed adequate to the

need; undesirable, in that the proposed increase in the penalty for such offense will have the result of permitting persons accused of making false reports to demand trial by jury for what in many cases would not be considered a major offense. In view of this, the Commissioners recommend against the enactment of section 508.

The two titles of H.R. 7525 that I have been discussing attempt to deal, in a limited way, with the serious firearm problem which exists within the District of Columbia. Title IV, incorporating robbery in the definition of a crime of violence, has a limited effect on the problem. Section 505, making it mandatory that persons convicted of a crime of violence while armed be given an additional term of imprisonment and be precluded from receiving a suspended sentence or being placed on probation, also has a limited effect on the problem. However, as they have set forth at some length in their report on H.R. 7525, beginning on page 19, the Commissioners are of the view that the bill does not deal with the serious inadequacies in present law regarding the acquisition and possession of firearms. They believe that an appropriate means of dealing with this problem is that set forth in the draft bill forwarded to the Congress by the Commissioners on April 5, 1963. I submit for the record a copy of the Commissioners' draft bill, together with a copy of their letter of April 5, 1963, to the Honorable Lyndon B. Johnson, President, U.S. Senate.

The CHAIRMAN. Without objection, that will be made a part of the record at this point.

(The document referred to follows:)

APRIL 5, 1963.

HON. LYNDON B. JOHNSON,  
President, U.S. Senate,  
Washington, D.C.

MY DEAR MR. PRESIDENT: The Commissioners of the District of Columbia have the honor to submit herewith a draft bill "To amend the act of July 8, 1932, relating to the control and possession in the District of Columbia of dangerous weapons, and for other purposes."

The purpose of the draft bill is to reduce the rate of serious crimes in the District by more closely controlling the acquisition and possession of certain dangerous weapons, with particular attention to handguns, which the Commissioners feel are now too easily available to criminal elements in the community.

Crimes committed in the District, as elsewhere in the larger cities of the United States, have been steadily on the increase in the past few years. Many factors play their part in this trend. The Commissioners feel one factor has been the easy availability of the implements of crime and firmly believe that an important step in the direction of reducing the crime rate is to provide tighter legal control over the possession of firearms.

Police records give some indication of the seriousness of the weapons situation in the District. For example, more than 1,250 handguns alone have been confiscated and destroyed over the past 3 years. In addition, police have confiscated other firearms, such as rifles and shotguns, in possession of persons in trouble with the law. The Commissioners are informed that in more than half the cases in which these handguns were confiscated the persons from whom the weapons were taken were charged with assault with a dangerous weapon, armed robbery, or homicide. Recently, the Senate Subcommittee To Investigate Juvenile Delinquency focused attention on the easy availability of the so-called mail-order guns in the District, many of which have been confiscated by District police. It was noted at these hearings by Senator Thomas J. Dodd, chairman of the subcommittee, that an estimated 800 to 1,000 firearms of all types are confiscated in the District each year.

Part of the reason for the general influx of guns into the District, in the view of the Commissioners, is the existence of several serious inadequacies in present law regarding the acquisition and possession of firearms. Accordingly, the attached draft bill is designed to eliminate those features in existing law con-

sidered to be hindering the effective control of guns and at the same time tighten other features of the law relating to the control of dangerous weapons generally.

Weaknesses contained in present law allow persons to come into possession of handguns without an adequate investigation of whether they should have such weapons from the standpoint of their stability and lawful intentions. For example, anyone in the District may keep a gun in his home, place of business or on any other land he may possess without any requirement of any type of license whatsoever. A license is required at present only when a pistol is carried on one's person outside of his property (sec. 22-3204, District of Columbia Code, 1961 edition).

Another inadequacy in existing law concerns the provisions requiring a waiting period before a seller may deliver a handgun to a purchaser (sec. 22-3208, District of Columbia Code, 1961 edition). The purpose of the waiting period is to give the police an opportunity to investigate the potential purchaser to determine if any reason exists why he should not have the weapon. The required waiting period may be as brief as 42 hours. This, police officials have indicated, is far too short a period in most instances for a thorough check to be made. Further, the statute does not provide specific authority for the police to actually forbid the delivery of the weapon in cases when the potential purchaser is determined not to be qualified to possess one. In addition, existing law, as it relates to possession of handguns by minors, implies that any person under the age of 21 years is free to have such weapons except as restricted by general provisions contained in the statute. Although the law appears to allow such possession, it specifically forbids the sale or transfer of any handguns to minors except by parents or guardians (sec. 22-3207, District of Columbia Code, 1961 edition). This means that a minor may bring into the District and have in his possession a handgun purchased elsewhere but it not permitted to purchase a handgun in the District. The rationale of the prohibition against any such purchase in the District appears to be that possession of a handgun by a minor is considered undesirable. The Commissioners believe the law should clearly prohibit possession of handguns by persons under the age of 18 years, except to permit certain activities under proper regulations, as for example, the participation in target shooting at authorized locations.

These inadequacies are in large part overcome by the proposed amendments contained in the draft bill. Other features of existing law are also substantially strengthened. Briefly, the major areas of change proposed by the amendments would provide the following:

1. Require every person in the District (with exception of police, military personnel, and certain other groups that are specifically exempted or may be exempted under regulatory authority granted the Commissioners) to obtain a permit from the Commissioners or their designated agent in order to legally possess a handgun. When an applicant demonstrates that he is a person of good moral character and responsibility, the Commissioners or their designated agent are required to issue a permit for possession of a handgun to be kept in his home or place of business or on other land he owns or possesses. When an applicant meets similar standards, in addition to demonstrating a need for a weapon to protect his person or property, the Commissioners or their designated agent may in their discretion issue a permit to carry a handgun on his person.

2. Prohibit possession of handguns in the District by person under 18 years of age, but allowing the Commissioners regulatory authority to permit such person to engage in such activities as target shooting and competitive shooting matches under restrictions that they may impose.

3. Prohibit the carrying about of any rifle or shotgun anywhere in the District unless such weapon is unloaded, except that the possession of a loaded rifle or shotgun kept in one's home, place of business or on other land owned or leased by such person, is permitted.

4. Require closer surveillance by law-enforcement authorities over the importation and delivery of handguns into the District to insure that these weapons not get into the hands of unqualified recipients. The Commissioners or their designated agent are given clear authority to order that no delivery be made to such person. No delivery or transfer of any handgun would be permitted by any person unless he first obtains written permission to do so.

5. Require stricter licensing of manufacturers and dealers in weapons in the District, including those selling weapons at retail and wholesale and those in the business of repairing firearms, and require records to be kept and reports to be made to the Chief of Police concerning weapons sold and repaired and to whom sold and delivered.

6. Tighten existing provisions prohibiting the possession of a dangerous weapon with intent to use it unlawfully, including establishment of a presumption that the possession of certain weapons, including possession of a pistol without a license, constitutes possession of such weapon with intent to use it unlawfully.

7. Require any person desiring to purchase a pistol, machine gun, sawed-off shotgun, or blackjack within the District to first obtain a permit to purchase any such weapon.

This latter provision, contained in section 2 of the bill and amending section 8 of the act (sec. 22-3208, District of Columbia Code, 1961 edition), has a far-reaching effect in strengthening existing law and is one of the most important features of the bill. The requirement that any purchase of a pistol, or any other prohibited weapon listed, must be preceded by the granting of a permit to purchase such weapon brings the District within the provisions of the Federal Firearms Act (U.S. Code, title 18, ch. 18) governing interstate traffic of firearms. Section 902 (c) of such act provides that:

"It shall be unlawful for any licensed manufacturer or dealer to transport or ship any firearm in interstate or foreign commerce to any person other than a licensed manufacturer or dealer in any State the laws of which require that a license be obtained for the purchase of such firearm, *unless such license is exhibited to such manufacturer or dealer by the prospective purchaser*" [Italic supplied].

The Commissioners believe that the permit to purchase provision, in light of the above-quoted provision of the Federal Firearms Act, would eliminate in great part the serious problem of mail-order shipment of handguns to persons in the District. For example, any licensed dealer outside the District (or, in fact, within the District as well, since the Federal Firearms Act defines interstate commerce to include commerce within the District) would be required to see evidence of a permit to purchase issued by the Commissioners or their designated agent before shipping or transporting the weapon in question. Should a dealer fail to comply with this requirement, he would face prosecution under the Federal statute; in addition, under the language of the proposed bill, he would also face prosecution under the strengthened District dangerous weapons statute. The Commissioners have been informed that several States now require a permit (or some equivalent procedure) to purchase firearms bringing them within the Federal Firearms Act, including Hawaii, Massachusetts, Michigan, Missouri, New Jersey, New York, and North Carolina.

In developing the draft bill, the Commissioners' legal staff has had the close cooperation and assistance of various Federal officials, including the Internal Revenue Service which administers the Federal Firearms Act and the National Firearms Act. In addition, Mr. David C. Acheson, U.S. attorney for the District of Columbia, has aided in the drafting of the amendments. Mr. Robert V. Murray, Chief of Police for the District of Columbia, has also given personal attention to this matter and has been in communication with high-ranking officials of the New York Police Department concerning the effectiveness of such provisions as are now being proposed.

In summary, the Commissioners believe that a need exists at this time for strengthening the District's dangerous weapons statute. The bill would, on one hand, continue to allow the possession of firearms by those law-abiding citizens desiring protection of their property and persons, under proper regulation, so that no qualified citizen desiring possession of such weapon need go unarmed. But, on the other hand, the bill provides for close control over the importation and possession of weapons and thus enables the authorities to take necessary steps to prevent these weapons from falling into the hands of criminal elements or persons not qualified to possess them. Accordingly, the Commissioners most strongly urge the enactment of the proposed bill.

The Commissioners have been advised by the Bureau of the Budget that, from the standpoint of the administration's program, there is no objection to the submission of this legislation to the Congress.

Very sincerely yours,

WALTER N. TOBRINER,  
President, Board of Commissioners, District of Columbia.

A BILL To amend the Act of July 8, 1932, relating to the control of possession in the District of Columbia of dangerous weapons, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of the Act entitled "An Act to control the possession, sale, transfer, and use of pistols and other



dangerous weapons in the District of Columbia, to provide penalties, to prescribe rules of evidence, and for other purposes", approved July 8, 1932 (47 Stat. 651), as amended, is amended to read as follows:

"SECTION 1. When used in this Act, unless the context otherwise requires—

"(a) 'Pistol' means any firearm, by whatever name known, with a barrel less than twelve inches in length, which will, or is designed to, or which may be readily converted to, expel a projectile or projectiles by the action of an explosive.

"(b) 'Sawed-off shotgun' means any shotgun or any rifle with a barrel less than twenty inches in length.

"(c) 'Machine gun' means any firearm which shoots automatically or semi-automatically more than twelve shots without reloading.

"(d) 'Rifle' means a weapon, other than a sawed-off shotgun, designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

"(e) 'Shotgun' means a weapon, other than a sawed-off shotgun, designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

"(f) 'Switch-blade knife' means a knife which has a blade which opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife.

"(g) 'Gravity knife' means a knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force and which, when released, is locked in place by means of a button, spring, lever, or other device.

"(h) 'Sell' and 'purchase' and the various derivatives of such words shall be construed to include letting on hire, giving, lending, borrowing, and otherwise transferring.

"(i) 'Crime of violence' means any of the following crimes, or an attempt to commit any of the same, namely: Murder, manslaughter, rape, mayhem, maliciously disfiguring another, abduction, kidnaping, burglary, housebreaking, larceny, any assault with intent to kill, commit rape, or robbery, assault with a dangerous weapon, or assault with intent to commit offense punishable by imprisonment in the penitentiary.

"(j) 'Commissioners' means the Board of Commissioners of the District of Columbia, or their designated agent.

"(k) 'District' means the District of Columbia."

SEC. 2. Sections 3 through 14 of such Act approved July 8, 1932 (secs. 22-3203 through 22-3214, D.C. Code, 1961 ed.), are amended to read as follows:

"SEC. 3. (a) No person shall own or keep a pistol, or have a pistol in his possession or under his control, within the District, if—

"(1) he is under the age of eighteen years;

"(2) he is a drug addict;

"(3) he has been convicted in the District or elsewhere of a felony;

"(4) he has been convicted of violating section 1 of the Act entitled 'An Act for the suppression of prostitution in the District of Columbia' approved August 15, 1935 (49 Stat. 651), as amended, section 1 of the Act entitled 'An Act to confer concurrent jurisdiction on the police court of the District of Columbia in certain cases' approved July 16, 1912 (37 Stat. 192), or sections 1 and 3 of the Act entitled 'An Act to define and punish vagrancy in the District of Columbia, and for other purposes' approved December 17, 1941 (55 Stat. 808), as amended; or

"(5) he is not licensed under section 10 of this Act and he has been convicted of violating any section of this Act.

"(b) No person shall keep a pistol for, or intentionally make a pistol available to, any person referred to in subsection (a) of this section, knowing or having reason to believe that he is under the age of eighteen years or that he is a drug addict or that he has been so convicted. Whoever violates this section shall be punished as provided in section 15 of this Act, unless the violation occurs after he has been convicted of a violation of this section, in which case he shall be imprisoned for not more than ten years.

"SEC. 4. (a) No person shall within the District—

"(1) carry either openly or concealed on or about his person any deadly or dangerous weapon capable of being so concealed, except as herein provided;

"(2) carry either openly or concealed on or about his person or own or have in his possession or under his custody or control any pistol without a written permit therefor issued to him as provided in this Act;

"(3) have in his possession or under his custody or control, except in his dwelling house or place of business or on other land owned or leased by him, any rifle or shotgun, unless such rifle or shotgun be unloaded; or

"(4) own or have in his possession or under his custody or control any machinegun, sawed-off shotgun, or any instrument or weapon of the kind commonly known as a blackjack, slung shot, slingshot, sandbag, switch-blade knife, gravity knife, or metal knuckles, or any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearm.

"(b) Any person within the District carrying or having in his possession or under his custody or control any pistol for the possession of which a permit has been issued to him as provided in this Act shall have such permit on his person or within his immediate custody. Any person having such possession, custody, or control of a pistol shall upon demand exhibit such permit to a duly appointed law-enforcement officer. The failure of any person to exhibit such permit as provided herein shall be cause for the revocation of any and all permits issued to him under this Act.

"(c) If any person within the District voluntarily delivers to a duly appointed law-enforcement officer any pistol, machinegun, sawed-off shotgun, shotgun, rifle, or other firearm, or blackjack, slung shot, slingshot, sandbag, switch-blade knife, gravity knife, or metal knuckles, or any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearm, under circumstances that do not give reason to believe that any law other than subsections (a) or (b) of this section has been violated, the voluntary delivery of such weapon or instrument, attachment, or appliance shall preclude the arrest and prosecution of such person on a charge of violating any provision of such subsections (a) or (b) with respect to such item voluntarily delivered. In the case of a voluntary delivery of any such weapon, instrument, attachment, or appliance, such item shall be delivered to any police precinct between the hours of 7 antemeridian and 6 postmeridian, shall be securely wrapped and, in the case of a firearm, shall be unloaded, and the bearer shall not have on his person or in his immediate possession any ammunition for such firearm. Any person within the District may summon a police officer to his residence or place of business for the purpose of voluntarily delivering to a police officer any such weapon, instrument, attachment, or appliance which shall be securely wrapped, and if a firearm, shall be unloaded. Any such weapon, instrument, attachment, or appliance delivered to any police officer or to any law-enforcement officer shall be disposed of in accordance with orders or regulations prescribed by the Commissioners.

"(d) Whoever violates this section shall be punished as provided in section 15 of this Act, unless the violation occurs after such person has been convicted in the District of a violation of this section or of a felony, either in the District or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

"Sec. 5. (a) Sections 3 and 4 of this Act shall not apply to the following:

"(1) police, marshals, sheriffs, prison or jail wardens, or their deputies, or law-enforcement agents of the United States Government; and

"(2) members of the Armed Forces of the United States, the National Guard, or the Organized Reserves, while such members are on duty.

"(b) The Commissioners are authorized in their discretion to make orders or regulations exempting from any or all of the provisions of sections 3 and 4 of this Act any or all of the following classes of persons:

"(1) special policemen appointed pursuant to the Act approved March 3, 1899 (sec. 4-115, D.C. Code, 1961 edition), special privates appointed pursuant to sections 378 and 379 of the Revised Statutes relating to the District (sec. 4-113, D.C. Code, 1961 edition) or employees of the United States or of the District, other than police, duly authorized to carry weapons;

"(2) employees of any bank, public carrier, express, or armored-truck company organized and operating in good faith for the transportation of money or valuables;

"(3) persons licensed under sections 9 and 10 of this Act, and employees of persons so licensed, engaged in the business of manufacturing, repairing, or dealing in the weapons referred to in such sections;

"(4) regularly enrolled members of any organization duly authorized to purchase or receive firearms from the United States;

"(5) members of civil or educational organizations; and

"(6) persons engaged in target shooting at duly authorized or licensed shooting galleries or ranges, or persons engaged in the operation of such shooting galleries or ranges.

"(c) The Commissioners are also authorized to make orders and regulations to carry out the purposes of this Act, including, without limitation, orders and regulations prescribing the form, content, and requirements respecting the number of copies of reports, applications, permits, and licenses required under or authorized by this Act; providing for the keeping and disposition of records by persons selling, purchasing, manufacturing, repairing, transporting, or delivering weapons, instruments, attachments, and appliances covered by this Act; providing for the carrying of a pistol to and from a place of sale or repair or in moving goods from one place of abode or business to another; and further regulating the conduct of the businesses required to be licensed under this Act.

"Sec. 6. (a) (1) The Commissioners may in their discretion, upon the written application of any person having a bona fide residence or who conducts business within the District, issue a permit to such person to carry either openly or concealed on or about his person a pistol within the District if the Commissioners are satisfied that the applicant is a person of good moral character and is a responsible person in the light of his age, reputation, employment, medical history, experience with firearms, or other relevant matters, and if the Commissioners are satisfied that the applicant has a need for such pistol in order to protect his person or property.

"(2) The Commissioners shall, upon the written application of any person having a bona fide residence or who conducts business within the District, issue a permit to such person to own or have in his possession or under his custody or control a pistol, but may require such person to keep such pistol in his dwelling place or place of business or on land owned or possessed by him within the District. The Commissioners shall issue such permit if they are satisfied the applicant is a person of good moral character and is a responsible person in the light of his age, reputation, employment, medical history, experience with firearms, or other relevant matters.

"(3) Any permit issued under this section may include such restrictions and prohibitions with respect to the possession or carrying about of such pistol as the Commissioners may impose. Any permit issued under this section may be revoked by the Commissioners when they have reason to believe that the permittee no longer has the qualifications requisite for the issuance of such a permit: *Provided*, That such revocation shall be only upon written order, which order may be issued at any time during the period of the permit. Upon service on the permittee of an order revoking any such permit, the permittee shall immediately return such permit to the Commissioners. No permit shall be of any force or effect after service on the permittee of an order revoking the same.

"(b) The Commissioners shall require that each applicant for a permit under this Act, as a condition to being issued such a permit, be fingerprinted.

"(c) Each application for a permit, or a renewal thereof, under this section shall be accompanied by a fee in an amount fixed by the Commissioners but not exceeding \$5, which shall be retained by the District regardless of the action taken with respect to the application.

"(d) The Commissioners are authorized to prescribe the duration of such permit and to require renewals thereof at such times as they deem appropriate.

"SEC. 7. No person shall within the District sell any pistol to a person who he has reasonable cause to believe is forbidden by this Act to possess a pistol, and unless the purchaser is personally known to the seller or shall present clear evidence of his identity, and unless such person exhibits to the seller a permit issued by the Commissioners for the purchase of such pistol.

"SEC. 8. (a) No person, except marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other duly appointed law-enforcement officers, shall purchase any pistol within the District without first obtaining a permit from the Commissioners to purchase such pistol. An application for a permit to purchase a pistol shall be filed with the Commissioners who shall within a reasonable period of time cause an investigation to be made to determine whether the applicant is qualified under the provisions of this Act to receive, own, or

possess any such pistol. At the time of making a purchase of a pistol the purchaser shall exhibit to the seller a permit to purchase such pistol issued by the Commissioners and no seller shall deliver any pistol to any person unless such permit is exhibited to him and he makes a record of such permit to purchase, as may be required by regulation.

"(b) No person shall ship, transport for delivery, or deliver to any person within the District any pistol or any package which such shipper, transporter, or deliverer has reason to believe contains one or more pistols, without first notifying the Commissioners in writing of the name and address of the person to whom such pistol or package is being shipped or delivered and the place of delivery. Delivery to such person shall be withheld for such reasonable period of time as may be specified in writing by the Commissioners during which period the Commissioners shall cause an investigation to be made to determine whether such person is qualified under the provisions of this Act to obtain a permit to receive, own, or possess any such pistol. In the event the Commissioners determine that such person is not qualified under this Act to receive, own, or possess a pistol, they shall serve upon the shipper, transporter, and such person written orders prohibiting such delivery to such person, or if they determine that the person is so qualified they shall, in writing, so notify the shipper, transporter, and such person.

"(c) No person shall purchase any machine gun, sawed-off shotgun, or blackjack within the District of Columbia without first obtaining a permit from the Commissioners. No person shall sell or deliver any such weapon within the District, or ship or deliver any package within the District if he has reason to believe that such package contains any such weapons, without first obtaining written permission to do so from the Commissioners.

"(d) Whoever violates this section or any order served by the Commissioners pursuant to this section shall be punished as provided in section 15 of this Act, unless the violation occurs after such person has been convicted in the District of a violation of this section or of a felony, either in the District or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

"Sec. 9. No person shall within the District engage in the business of selling, or manufacturing, or repairing pistols, machine guns, rifles, shotguns, sawed-off shotguns, or blackjacks without being licensed as provided in section 10 of this Act.

"Sec. 10. (a) The Commissioners may grant licenses, effective for not more than one year from date of issue, permitting the licensee to sell at retail or at wholesale, or to manufacture or to repair, pistols, machine guns, rifles, shotguns, sawed-off shotguns, or blackjacks. Whenever any such licensee shall breach any conditions upon which his license was issued or upon violation of any provision of this Act or of any provision of section 7 of the Act of July 1, 1902 (32 Stat. 622, et seq., ch. 1352; ch. 23, title 47, D.C. Code, 1961 edition), which is applicable to any such licensee or of any applicable regulation made pursuant to such Acts, the license shall be subject to suspension or revocation and the licensee shall be subject to punishment as provided in this Act.

"(b) Except as otherwise provided in this Act, the provisions of section 7 of the Act approved July 1, 1902 (32 Stat. 622, et seq., ch. 1352; ch. 23, title 47, D.C. Code, 1961 edition), relating to the issuance, revocation, suspension, transfer, and assignment of licenses, and license taxes or fees, and the provisions of such section 7 relating to the supervision, regulation, and inspection of licensed businesses, shall be applicable to licenses authorized to be issued by this section and to the holders of such licenses.

"(c) The Commissioners are authorized and empowered to fix, and from time to time increase or decrease, fees for any services rendered under this section. The Commissioners shall increase, decrease, or fix fees in such amounts as will, in the judgment of the Commissioners, approximate the cost to the District of administering this section.

"Sec. 11. No person shall, in purchasing any weapon or applying for any permit or license under this Act, or in giving any information pursuant to the requirements of this Act, give false information or offer false evidence of his identity.

"Sec. 12. No person shall within the District change, alter, remove, or obliterate the name of the maker, model, manufacturer's number, or other mark or identification on any pistol, machine gun, rifle, shotgun, or sawed-off shotgun. Possession of any pistol, machine gun, rifle, shotgun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed,

or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District: *Provided*, That nothing contained in this section shall apply to any officer or agent of any department or agency of the United States or the District engaged in research or experimental work.

"Sec. 13. Nothing in this Act shall be construed to prohibit delivery, sale, or possession of any toy or antique pistol so constructed or in such condition as to be not usable as a firearm, except that no person shall within the District possess any such toy or antique pistol with intent to use the same unlawfully.

"Sec. 14. (a) No person, including those persons as may be exempted by subsection (a) of section 5 of this Act or exempted by the Commissioners from the provisions of subsection (a) of section 4 of this Act, shall within the District of Columbia possess, with intent to use unlawfully, any dangerous or deadly instrument or weapon, including, but not limited to, any pistol, machine gun, sawed-off shotgun, shotgun, rifle, or other firearm, or imitation pistol or firearm, or dagger, dirk, razor, stiletto, or any knife. The possession by any person, other than persons granted exemption by such subsection (a) of section 5 or by the Commissioners, or any pistol without a written permit therefor issued to him in accordance with the provisions of this Act, or of any machine gun, sawed-off shotgun, or any instrument or weapon of the kind commonly known as a blackjack, slung shot, slingshot, sandbag, switch-blade knife, gravity knife, or metal knuckles, shall be presumptive evidence of possession of such firearm or weapon with intent to use the same unlawfully.

"(b) Whoever violates this section shall be punished as provided in section 15 of this Act, unless the violation occurs after he has been convicted in the District of a violation of this section or of a felony, either in the District or in another jurisdiction, in which case he shall be imprisoned for not more than ten years".

Sec. 3. Such Act approved July 8, 1932, as amended, is amended by adding at the end thereof the following new sections:

"Sec. 18. (a) Any order or notice required by this Act to be served shall be deemed to have been served when served by any of the following methods:

"(1) when forwarded to the last known address of the permittee, as such address is recorded on the permit record on file with the Commissioners, by certified mail, postage prepaid;

"(2) when delivered to the person to be notified; or

"(3) when left at the usual residence or place of business of the person to be notified with a person of suitable age and discretion then resident or employed therein.

"(2) Any notice to a corporation shall, for the purposes of this Act, be deemed to have been served on such corporation if served on the president, secretary, treasurer, general manager, or any principal officer of such corporation in the manner hereinbefore provided for the service of notices on natural persons; and notices to a foreign corporation shall, for the purposes of this Act, be deemed to have been served if served personally on any agent of such corporation, or if left with any person of suitable age and discretion residing at the usual residence or employed at the usual place of business of such agent in the District.

"(c) It shall be the duty of the permittee to notify the Commissioners in writing of loss or theft of any pistol for which a permit has been obtained, the loss or theft of a permit, or of any change of address from that address recorded on the permit of such permittee within forty-eight hours following such change of address or discovery of such loss or theft.

"Sec. 19. The Commissioners are authorized to delegate any function vested in them by this Act and to provide for subdelegation of any such function: *Provided*, That the Commissioners shall not delegate the authority to make regulations pursuant to the authority contained in this Act.

"Sec. 20. This Act may be cited as the 'District of Columbia Dangerous Weapons Act'."

Sec. 4. The Act entitled "An Act to consolidate the Police Court of the District of Columbia and the Municipal Court of the District of Columbia, to be known as 'the Municipal Court for the District of Columbia,' to create 'the Municipal Court of Appeals for the District of Columbia,' and for other purposes", approved April 1, 1942 (56 Stat. 190, ch. 207), as amended (§ 11-772, D.C. Code, 1961 edition), is hereby amended by adding at the end of subsection (e) of section 7 of said Act the following new clause:

"(10) Any final decision or final order denying, suspending, or revoking any application, permit, or license, or renewal of any permit or license, issued or applied for under the District of Columbia Dangerous Weapons Act."

SEC. 5. Section 911 of the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901 (31 Stat. 1337), as amended (§ 23-301, D. C. Code, 1961 edition), is amended by inserting after the word "place" where such word first appears "any weapon, instrument, attachment or appliance possessed in violation of the Act approved July 8, 1932 (47 Stat. 650, ch. 465), as amended."

SEC. 6. Section 914 of such Act approved March 3, 1901 (sec. 23-304, D.C. Code, 1961 ed.), is amended by adding the following:

"If the property seized be a dangerous article declared to be a nuisance by section 17 of the Act approved July 8, 1932 (47 Stat. 654), as amended, such article shall be disposed of pursuant to such section 17."

SEC. 7. Nothing contained in this Act or in any amendment made by this Act shall be construed as diminishing power or authority vested in the Commissioners of the District of Columbia by section 4 of the Act of June 30, 1906 (34 Stat. 809, ch. 3932; sec. 1-227, D.C. Code, 1961 ed.), or by section 7 of the Act of July 1, 1902 (32 Stat. 622, et seq., ch. 1352; ch. 23, title 47, D.C. Code, 1961 ed.), to make and enforce regulations relating to firearms, projectiles, explosives, or weapons of any kind, but this Act and amendments made by this Act shall be deemed as supplemental to such section 4 of the Act of June 30, 1906, and such section 7 of the Act of July 1, 1902.

SEC. 8. The provisions of section 4(c) of such Act approved July 8, 1932, as amended by this Act, relating to the voluntary delivery of weapons to police, shall take effect upon the approval of this Act. The remaining provisions of this Act shall take effect on the thirtieth day following approval by the Commissioners of the District of Columbia of initial regulations made pursuant to the authority contained in such Act approved July 8, 1932, as amended by this Act, and on such effective date all outstanding licenses for the possession of pistols in the District of Columbia shall be of no force or effect.

SEC. 9. That the first section of the Federal Firearms Act (52 Stat. 1250; 15 U.S.C., ch. 18) is amended by adding at the end of the definition of the term "interstate or foreign commerce" the following sentence: "For the purposes of this Act the term 'State' shall be held to include the District of Columbia and the Commonwealth of Puerto Rico."

SEC. 10. Appropriations to carry out the purposes of this Act are hereby authorized.

MR. TOBRINER. This letter sets forth the need for the recommended legislation, and explaining its provisions, which, the Commissioners believe, would provide the District with a strong, enforceable law to deal with the dangerous weapons problem in the District of Columbia. The Commissioners desire at this time to recommend that the Congress consider the enactment of legislation substantially similar to that set forth in the draft bill which I have offered for the record.

So much then for H.R. 7525.

I shall now proceed to a discussion of S. 486, a bill to amend certain criminal laws applicable to the District of Columbia, and for other purposes. This bill, designed to strengthen certain existing provisions of criminal law in the District, broadens the law governing immunity of witnesses in certain criminal proceedings, and to make certain procedural changes, was drafted by the U.S. attorney for the District of Columbia with the assistance of the Corporation Counsel. The Commissioners recommend its enactment.

Briefly, the first section of the bill amends section 848 of the act of March 3, 1901, relating to the crime of malicious injury or destruction of property. Section 848 is broadened to cover malicious injury or destruction of all personal and real property, rather than being limited, as at present, only to the malicious injury or destruction of movable property. Also, at present section 848 makes it a felony to

maliciously injure or destroy property valued at \$50 or more. Section 1 of the bill increases this limitation to \$200 or more.

This is in line with current depreciation in values. The first section of the bill also revises the penalties established for such felonies by eliminating the mandatory maximum and minimum sentences of not less than 1 year nor more than 10 years' imprisonment, and substitutes instead a fine of not more than \$5,000 or imprisonment for not more than 10 years, or both. In addition, it increases the maximum fine for misdemeanors in such cases from \$200 to \$1,000, and provides that the penalty for a misdemeanor shall be a fine not exceeding \$1,000 or imprisonment not exceeding 1 year, or both. The Commissioners believe that these amendments will result in more effective prosecution of those offenses which would be affected by the amendments.

The second section of the bill eliminates from an existing provision of law relating to willful or wanton disfigurement of property (sec. 1 of the act of July 29, 1892), language relating to the destruction of property, inasmuch as all prosecutions for malicious injury to or destruction of property would, by the first section of the bill, be brought under the amended section 848 of the act of March 3, 1901.

Section 3 of the bill amends existing District of Columbia law relating to kidnaping by striking the words "for ransom or reward" and submitting in lieu thereof the words "for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof." The purpose of this amendment is to broaden the kidnaping statute, which now makes it unlawful only to hold a person for ransom for reward. The amendment would make the statute also applicable to those kidnaping cases in which the motive is lust, a desire for companionship, revenge, or some other motive not involving a desire for ransom or reward. However, in order to make the language of the statute inapplicable to cases involving the taking of a minor child by one of the parents of such child, the proposed amendment expressly excepts any such case from the operation of the statute. The Commissioners are informed that the proposed amendments of existing District of Columbia law will bring the District's law into conformity with the Federal statute.

Section 4 of the bill broadens immunity privileges now granted under the law to witnesses in cases involving civil actions relating to the abatement of disorderly house nuisances by authorizing the granting of similar immunity in criminal prosecutions for keeping such houses. Under this amendment the courts, upon application of the prosecutor, may compel a witness to testify in any such criminal prosecution notwithstanding his claim of privilege under the fifth amendment. Such witnesses, nevertheless, remain subject, under the amendment, to prosecution for perjury or contempt of court in connection with their testimony. It is expected that the broadening of the immunity statute to include cases involving criminal charges for keeping a bawdy or disorderly house will aid in the successful prosecution of such charges.

Section 5 of the bill amends the Healing Arts Practice Act by substituting the Corporation Counsel for the U.S. attorney as the official to conduct proceedings with regard to the suspension or revocation of licenses issued under the authority of such act. Similarly,

section 6 substitutes the Corporation Counsel for the U.S. attorney with regard to the conduct of proceedings leading to the suspension or revocation of licenses issued to nurses under the authority of the act of February 9, 1907.

Sections 7 and 8 amend existing law so as to designate the Corporation Counsel as the prosecutor of violations relating to the licensing of optometrists and accountants.

Section 9 repeals certain provisions originally enacted June 22, 1874, relating to the appointment and bonding of private detectives in the District. These provisions for a number of years have been considered as having been superseded by paragraph 41 of section 7 of the act of July 1, 1932, requiring the licensing of private detectives.

Section 10 of the bill substitutes the Corporation Counsel for the U.S. attorney in cases involving certain actions dealing with receivership of properties belonging to absentees or absconders. The amendment would, in effect, require that the District of Columbia, instead of the United States, be made a necessary party in proceedings involving receivership of such property when the absentees or absconders have left the District without making provision for support of a wife or minor children, or when such assets are to be treated as though the absentee had died intestate.

Finally, section 11 of the bill provides for the effective dates of the amendments of existing law made by the several sections of the bill.

In summing up my testimony on titles IV and V of H.R. 7525 and on S. 486, I desire to reiterate that the Commissioners favor the enactment of title IV of H.R. 7525 and the enactment of S. 486. With respect to the sections of title V which I have discussed for the reasons I have stated earlier the Commissioners object to those provisions which would have the effect of establishing a mandatory minimum penalty for certain offenses, or increasing an existing mandatory minimum penalty. Subject to the foregoing comment, the Commissioners favor the enactment of section 502 of the title, relating to burglary. The Commissioners see no good for the balance of the provisions of title V of H.R. 7525, and accordingly they recommend against the enactment of all of the sections of that title with the exception of section 502.

Thank you very much for affording the Commissioners an opportunity to express their views with respect to the merits of titles IV and V of H.R. 7525 and of S. 486.

The CHAIRMAN. Thank you very much, Mr. Tobriner. I appreciate your testimony. I have no questions to direct to you. I previously indicated that we will have our hearing on the *Mallory* rule, which presents many problems, either next Tuesday or the Tuesday after that, and we will, likewise, have a full week of hearings on the *Durham* rule. We will look forward to seeing you back on those two separate occasions.

Mr. TOBRINER. Thank you.

The CHAIRMAN. Are there any questions, Senator Dominick?

Senator DOMINICK. Mr. Chairman, I do not really have any questions, because I was unable to be here for the full testimony and have not had a chance to read it, but I do want to get clear what I understood from your last comment, Mr. Tobriner, and that is it is my understanding that you are against section V or all provisions at this point?



Mr. TOBRINER. We are, primarily, against those provisions of title V.

Senator DOMINICK. Title V, yes.

Mr. TOBRINER. Which either increase an existing mandatory minimum sentence or which provide for one where none previously existed. Our feeling is, Senator, that this is a matter which should fundamentally be left to the judgment and the discretion of the presiding judge who has before him the defendant, the witnesses, the record, and other circumstances which may or may not induce longer or shorter sentences. We feel that it is primarily a judicial function which can safely be left to the discretion of our judges.

Senator DOMINICK. Have you expressed an opinion in this with respect to your position on the so-called *Mallory* rule?

Mr. TOBRINER. No, sir.

The CHAIRMAN. If I may interrupt there, I am trying to break this hearing into three different sections. Starting next Tuesday we intend going in depth into the *Mallory* rule, through the balance of the week, and then the following week we are going into the so-called *Durham* rule. I have no objection to the Senator questioning about this at all, except that I am trying to divide it into three sections. And since there is great controversy over both the *Mallory*—both the *Mallory* and the *Durham* rules, it occurred to me—and the witnesses have indicated that it will take us 3 or 4 days on each one of those two phases of the bills—that we would get into title I, which is the *Mallory* rule in depth starting on next Tuesday.

Senator DOMINICK. Thank you, Mr. Chairman. What I really was trying to find out was whether in this statement the Commissioner had made any statement of opinion?

Mr. TOBRINER. No, there is no statement of opinion in the statement that I presented today.

Senator DOMINICK. Is this true as far as the *Durham* rule is concerned?

Mr. TOBRINER. That is also true. This relates solely to S. 486 and title IV and title V of H.R. 7525.

Senator DOMINICK. Did you express any opinion on the possible licensing of firearms?

Mr. TOBRINER. Yes, we did.

Senator DOMINICK. Are you in favor of that?

Mr. TOBRINER. Yes, we are.

Senator DOMINICK. Do you feel that this has been helpful in New York?

Mr. TOBRINER. Our information, obtained from the chief of police of New York, through our Chief of Police, is that it has been—the so-called Sullivan law.

Senator DOMINICK. Does the Chair, if I may ask, intend to go in depth into the specific provisions, other than the *Mallory* and *Durham* rules on this bill?

The CHAIRMAN. I will say to the Senator that today we are confining ourselves to title IV and to title V and on next Tuesday we will go in depth into title I which is the *Mallory* rule and title III of the House passed bill, which is detention on the reasonable grounds to suspect a person is or has committed a crime, as well as the detention of material witnesses section. And on the following Tuesday we will go in depth into the *Durham* rule.

Senator DOMINICK. Thank you.

Mr. TOBRINER. Senator Dominick, I will be happy to submit for the record the letter to which I referred from the Police Commissioner of New York City to our Police Chief, relative to the satisfactory working of the Sullivan law.

(The letter referred to follows:)

THE POLICE COMMISSIONER,  
CITY OF NEW YORK,  
March 13, 1963.

MR. ROBERT V. MURRAY,  
*Chief of Police, Government of the District of Columbia, Metropolitan Police Department, Washington, D.C.*

DEAR BOB: I am enclosing herewith a copy of the penal law of the State of New York, in response to your request relative to the subject of dangerous weapons. Article 172 entitled "Public Safety," beginning with section 1894 through 1899 relates to the so-called Sullivan law. On page 260 there are amendments to some of these sections, which were passed in the legislative session of 1961.

We have had very little opposition from law abiding businessmen and citizens of the city concerning the enforcement of these provisions relative to the possession and carrying of concealable weapons. We have consistently reduced the number of permits we issue and at this time there are only 17,207 in force.

We feel that this law is very desirable as it does keep guns out of the hands of criminal elements to a certain extent. Its effectiveness is undermined by the ease with which pistols and revolvers can be obtained in other jurisdictions. I am sure that the most effective method of control would be through a Federal statute.

It was a great pleasure to see you in Chicago and I am looking forward to seeing you again soon.

Sincerely,

MICHAEL J. MURPHY,  
*Police Commissioner.*

Senator DOMINICK. Let me make some comments on this and perhaps then to ask you some questions.

The Sullivan law has been in effect for a long time in New York. I have not seen any particular decrease in the crime rate in New York that can be attributed to the Sullivan law. But let me also say this, do you have any evidence through the police records or otherwise that the requirement of licensing of people who have guns decreases the number of people who hold guns for felonious intent?

Mr. TOBRINER. We have this evidence, sir, that a recent Senate subcommittee hearing on juvenile delinquency revealed that the police confiscate an estimated 800 to 1,000 handguns here every year.

Senator DOMINICK. Do you feel that this would make it more difficult for you to get those guns?

Mr. TOBRINER. I think, sir, if the proposal that we have suggested is passed it would bring the matter of shipping in guns into the District under the current Federal firearms law which would make it illegal for any dealer to consign or ship a gun to a person who is unlicensed, so that in that respect it would make the out-of-state shipment of guns into the District of Columbia subject to closer surveillance and inspection.

Senator DOMINICK. What do you plan on doing about those who already have guns in the District?

Mr. TOBRINER. We would ask those people to register their guns. This is not only a protection to the public, it is also in my opinion, sir, a protection to the person who owns a gun, in that if that gun is

stolen it can be more readily traced, and for that reason it seems to me he is better protected.

Senator DOMINICK. Do you propose to apply it to handguns or to shotguns or what?

Mr. TOBRINER. I said that the proposed statute has a very complex definition which I will be glad to read to you. The permit to possess guns will be confined to pistols which means any firearm by whatever name known with a barrel less than 12 inches in length which will or is designed to or which may be readily converted to expel projectiles.

Senator DOMINICK. In effect, it is confined to pistols and revolvers?

Mr. TOBRINER. Yes.

Senator DOMINICK. Thank you, Mr. Chairman. That is all.

The CHAIRMAN. Thank you. I would say to the Senator from Colorado that unquestionably we will be going into the firearm question further at another hearing.

Our next witness is Mr. David C. Acheson, U.S. attorney for the District of Columbia. I would ask also Mr. Clemmer to come forward. I understand that Mr. Clemmer has an emergency appointment of some kind. And with Mr. Acheson's approval I would like to hear Mr. Clemmer first. I think that we can have that and your testimony together. As stated, with your indulgence, Mr. Acheson, I will call on Mr. Clemmer to speak first.

Would you identify yourself for the record?

#### STATEMENT OF DONALD CLEMMER, DIRECTOR, DEPARTMENT OF CORRECTIONS, DISTRICT OF COLUMBIA

Mr. CLEMMER. Mr. Chairman and members of the committee, I am Donald Clemmer, Director of the Department of Corrections, and I speak in that capacity only.

I am also Chairman of the District of Columbia Law Enforcement Council, of which Mr. Acheson is the Vice Chairman, who will speak for the Council on several measures.

Mr. Chairman, my views as head of the prison system are very close to those expressed by Mr. Tobriner, and for very similar reasons.

Some of the measures and provisions we do not feel that we are competent to speak on.

I might say that as a former president of the Correctional Administrative Association of America, which is a group composed of 40 of the executives throughout the country in the Federal prison system, there is a strong opinion among these people and I know it because of long association with them, against mandatory minimum sentences. It is not unanimous in its opinion, but there is a strong opinion.

I happen this year also to be president-designate of the American Correctional Association which is a group of 5,000 people concerned with their prison probation and parole and there is a strong opinion in that body against mandatory minimum sentences.

The CHAIRMAN. Before you develop your position on title IV and the relevant sections of title V, would you indicate for the record exactly what your responsibility is as Director of the District of Columbia Department of Corrections? Are you, in effect, the Chief Parole Officer or are you the Board of Pardons and Paroles, or what?

Mr. CLEMMER. No, the prison system, Mr. Chairman, is a separate department that reports to the Commissioners, as I do. We have 5 institutions in the department with some 4,800 inmates now. We have the jail here in town near the stadium with some 1,100 men in it today, and then at a reservation 20 miles from the city in Virginia we have 4 other institutions, one a penitentiary known in the newspapers as Lorton, and another for felony offenders and another workhouse for misdemeanor offenders; another small women's reformatory for both felonies and misdemeanors; and the Youth Center. And I am in charge of those institutions. Not the parole function which is a separate agency.

The CHAIRMAN. You have nothing whatever to do with paroles?

Mr. CLEMMER. No, sir.

The CHAIRMAN. Who is in charge of that responsibility?

Mr. CLEMMER. Well, there is the Board of Parole made up of five people who report to the Board of Commissioners, and the Chairman is Mr. Jacoby, a local attorney, who is a nonpaid member. The parole executive is Mr. Hugh Rivers, who is an employee.

The CHAIRMAN. This is the Board that actually determines when a man should be released from the institutions over which you are the director?

Mr. CLEMMER. That is correct, Mr. Chairman.

The CHAIRMAN. And the Chairman of that Board is Mr. Jacoby?

Mr. CLEMMER. Yes. I do not recall his first name—I am informed that it is Herbert Jacoby. There are four nonpaid members, or members who are paid a minor honorarium, prominent citizens who are on the Board to give their time and talents to making these decisions. As an old prison man I know that the function of decision on who is to be released is a very crucial and very difficult one.

The CHAIRMAN. Do they ever call upon you for advice?

Mr. CLEMMER. Yes, sir.

The CHAIRMAN. As to why X, Y, Z, should be released?

Mr. CLEMMER. We submit reports. We call them parole progress reports. It summarizes an inmate's adjustment with us in terms of conduct and work and training and attitudes and so on.

The CHAIRMAN. How many men and women do you have institutionalized at the present time?

Mr. CLEMMER. 4,800.

The CHAIRMAN. 4,800?

Mr. CLEMMER. Yes.

The CHAIRMAN. How does that break down among the men and women?

Mr. CLEMMER. 271 women and the balance men.

The CHAIRMAN. How does it break down in age groups?

Mr. CLEMMER. In age groups, Mr. Chairman, 14 percent are between age 18 and 22, and the balance are adults. The average age of our felons, I can give you, is 31, a few months. The misdemeanors tend to be older. I cannot give you that figure right off. Many of them are alcoholics. They come back time after time and are older people.

The CHAIRMAN. How many do you have at the present time institutionalized for felonies?

Mr. CLEMMER. We have at Lorton as of today or a day or so ago, 1,505. We have at the jail under felony sentence, I would say, 90.

Among our women offenders we have 80.

So we are around 1,700 felonies.

Senator DOMINICK. Will you yield at that point?

The CHAIRMAN. Yes.

Senator DOMINICK. Do you also have a breakdown on racial groups?

Mr. CLEMMER. We do not keep it daily. It is about 75 percent Negro and 25 percent white.

The CHAIRMAN. Can you supply for the record how many you have institutionalized for murder in any of the degrees?

Mr. CLEMMER. Once again I am quoting from memory. We have from 90 to 100 serving murder, homicide sentences, first and second degree. There are some first degree life sentences.

The CHAIRMAN. A person convicted of murder in the first degree in the District of Columbia will serve approximately how many years of the sentence?

Mr. CLEMMER. The minimum is 20 years.

The CHAIRMAN. The minimum is 20 years?

Mr. CLEMMER. Yes. Before the Parole Board even considers him.

The CHAIRMAN. A mandatory sentence of a minimum of 20 years?

Mr. CLEMMER. Yes.

The CHAIRMAN. That means actually he has to serve the full 20 years?

Mr. CLEMMER. Twenty calendar years.

The CHAIRMAN. Twenty actual calendar years?

Mr. CLEMMER. And he does not get time for what is called good time credits, for good behavior, because that is the mandatory minimum of 20 calendar years.

The CHAIRMAN. A mandatory minimum is something new to me. In our State we have a minimum for even murder in the first degree, but in my State, a man would be eligible for parole after serving actually 7 years, which is less than it is here in the District of Columbia.

What would be the average sentence served by a man sentenced for a minimum of 20 years for first degree murder?

Mr. CLEMMER. Mr. Acheson has those figures. I think that he can give them to you.

I will say this in general that the residence of felons in the District of Columbia in prison is exceeded only by two States; namely, Illinois and Pennsylvania. Mr. Acheson's figures, which I just got this morning, reveal that. I think that he can comment on that.

There are occasional pardons and court reduction of sentences on murder charges which will tend to reduce the 20-year minimum.

The CHAIRMAN. Maybe I can more properly direct this to the U.S. attorney. In the case of a man who was sentenced for 20 years to life, what would be the average length of time that he would actually serve?

Mr. CLEMMER. I happen to know that unless it is a rare case that they parole them at the minimum.

The CHAIRMAN. I see. I think that is very helpful by way of knowledge. How long have you actually dealt with men in your penal institution who are in for felonies?

Mr. CLEMMER. For 19 years, Mr. Chairman, and altogether 32 years in the Federal system and the State of Illinois in the prison there.

The CHAIRMAN. Based on that, do you have any particular observation as to the value of the maximum minimum sentence or a mandatory minimum sentence?

Mr. CLEMMER. Mr. Chairman, it is a complex question, of course. I would say that there is a body of opinion—I am not sure that I share it—but there is a body of opinion among criminologists, so to speak, that the ideal sentence is 3 months to life for almost every crime. And some people even advocate that for everything. The point being that the trial court, the trial judge determines the guilt or innocence, and then modern penalology has disclosed that conditions are getting better as the years go along, that they can take women and men and train them and improve them to some degree. No one thinks that everyone can be helped. A lot of them cannot be helped. Some can.

The reason that 3 months is given is that it takes that long, at least, to study a person's personality and with a small minimum there can be a demonstration to the paroling authority of improvement. People can be released to the free community with less risk than if they serve a long time in prison. I think that we must all agree—and I have said it a hundred times—that prisons are bad—all of them are bad—even including those that I run and everyone else does, because of the evil influences that exist between inmates, and in spite of chaplains and training programs and progressive administration the entire action among people of this type tends to be debased.

The CHAIRMAN. Do you have any questions, Senator Dominick?

Senator DOMINICK. May I ask a question?

The CHAIRMAN. Yes.

Senator DOMINICK. I am sorry to interrupt you. Did I understand correctly that you said that in a murder case of one sort or another, in a manslaughter case, that a person with a minimum sentence of 20 years cannot have that reduced even for good behavior?

The CHAIRMAN. I think that he said in first degree murder. I did not think he said in manslaughter.

Mr. CLEMMER. First degree is 20 years. It is somewhat less for manslaughter, I think 15, is it not, Mr. Acheson?

Mr. ACHESON. In second degree murder.

Mr. CLEMMER. First degree murder is 20 years. And that is what I referred to.

Senator DOMINICK. And second-degree murder is what?

Mr. ACHESON. The sentence under the statute that may be given for second-degree murder is 15 years to life, but there is no time floor on the eligibility of the prisoner for parole.

Senator DOMINICK. He could be paroled in a year?

Mr. ACHESON. They frequently serve less than 15 years.

Senator DOMINICK. Is there time off for good behavior on any of these?

Mr. CLEMMER. Yes, except the 20-year minimum on the first-degree murder.

Senator DOMINICK. This is the only one with an absolutely fixed floor?

Mr. CLEMMER. Yes, that is correct.

Mr. ACHESON. To elaborate the earlier answer, Senator, in the case of second-degree murder, if the judge as he may, sentences under the indeterminate sentence statute, a sentence of 10 to 30 years, then the

prisoner is eligible for parole at the expiration of the minimum, which is 10 years. Under the statute the minimum is normally one-third of the maximum. Therefore, 10 to 30 would not be an uncommon sentence.

Senator DOMINICK. If you had such a sentence of 10 to 30 years is it possible for the prisoner to be eligible for parole before the expiration of the 10 years?

Mr. ACHESON. No.

Senator DOMINICK. Does the reviewing parole board ever have occasion to question the validity of this indeterminate action—have they asked questions about the inmates who seemed to be getting along fine in a prison but nevertheless are not eligible for parole?

Mr. CLEMMER. There is a provision in law by which an inmate may petition me for reduction of the minimum sentence. I cannot quote you the statute, but it can be easily supplied. My department then is called upon to appraise the person in terms of his training and treatment and attitude and conduct, and we make a report to the parole board. I might say that we make them by the dozens, because many men, naturally, are seeking release.

The parole authorities then weigh the situation, the personnel involved and the time and have the right to appeal to the trial judge for a reduction of the minimum. I happen to know of dozens of cases that have gone from my desk to the parole authorities but the parole folks have only gone to the trial judge a few times. I cannot tell you how many. It may be 8 or 10 or 12 or 5. In other words, such appeals are not very successful.

Senator DOMINICK. Thank you, Mr. Chairman.

The CHAIRMAN. I have one further question. Your testimony, if I understand it correctly, is that there are approximately 1,500 institutionalized at the present time from the District of Columbia for felonies. Is that approximately correct?

Mr. CLEMMER. Let us say 1,700.

The CHAIRMAN. Of those 1,700 how many are repeaters?

Mr. CLEMMER. We have a record on that, which is not recent, because we do not have enough budget to hire statistical clerks, but a few years ago 21 percent of those were technically first offenders which means they had not been in a major felony institution before, but it does not mean that they have not been in trouble with the law, such as probation or workhouse or juvenile institutions. The huge majority of our people have been in trouble before, upward of 80 percent.

The CHAIRMAN. What does that mean, that they have been in trouble with a prior felony?

Mr. CLEMMER. A prior felony, yes.

The CHAIRMAN. Prior felonies?

Mr. CLEMMER. Yes.

The CHAIRMAN. Eighty percent of the people that you have institutionalized have prior felony convictions?

Mr. CLEMMER. Yes. I could supply a table on that.

The CHAIRMAN. I think that it might be helpful.

Mr. CLEMMER. I can do that.

The CHAIRMAN. I think that you should supply that for the record. Pardon my interruption.

(The information referred to follows:)

DEPARTMENT OF CORRECTIONS,  
DISTRICT OF COLUMBIA GOVERNMENT,  
Washington, D.C., October 16, 1963.

Mr. CHESTER H. SMITH,  
Staff Director, Senate District of Columbia Committee,  
Room 6222, Senate Office Building, Washington, D.C.

DEAR MR. SMITH: Senator Bible asked me to submit for the record data indicating the length of residence of our prisoners in the District of Columbia prior to commitment.

I enclose herewith a study of February 14, 1957, and an up-to-date one dated October 15, 1963. Both of these studies indicate that the great majority of inmates we hold have lived in the District of Columbia for a substantial number of years.

Sincerely,

DONALD CLEMMER, *Director.*

[Bulletin]

INSTITUTE FOR CRIMINOLOGICAL RESEARCH,  
DEPARTMENT OF CORRECTIONS, DISTRICT OF COLUMBIA,  
Washington, D.C.

#### RESIDENTIAL TENURE IN WASHINGTON OF FELONS AND MISDEMEANANTS

Attention has been given to the length of residence in Washington of a representative sample of men and women in custody of the Department of Corrections in January 1957. The notion has existed in certain quarters that a goodly proportion of offenders are floaters or newcomers to the Nation's Capital. The records of 1,278 inmates in residence at the District's Reformatory, Workhouse, and Women's Reformatory have been studied in this regard with the following results:

*Reported length of residence in the District of Columbia of 1,278 inmates in the reservation institutions*

|                       | Number | Percent |
|-----------------------|--------|---------|
| 1 month or less.....  | 36     | 2.82    |
| 1 to 5 months.....    | 17     | 1.33    |
| 6 to 11 months.....   | 27     | 2.11    |
| 1 to 2 years.....     | 37     | 2.90    |
| 3 to 4 years.....     | 39     | 3.05    |
| 5 to 8 years.....     | 93     | 7.28    |
| 9 to 13 years.....    | 138    | 10.80   |
| 14 to 19 years.....   | 149    | 11.66   |
| 20 years to life..... | 315    | 24.65   |
| Life.....             | 427    | 33.40   |
| Total.....            | 1,278  | 100.00  |

The 1,278 cases scrutinized cover a reliable sampling of offenders and include male and female, felons and misdemeanants, and Negro and whites in realistic proportions.

It can be noted that contrary to popular opinion a heavy majority of inmates are long-term residents of the District of Columbia, with in excess of 80 percent having resided in Washington over 9 years, and over 50 percent in excess of 20 years, and with over a third having been born in the District. Contrariwise, less than 4 percent can be regarded as floaters and only some 7 percent as residents of less than 1 year.

The records of male inmates committed for intoxication also have been scrutinized in reference to total residence in the District of Columbia with the following results:



*Reported length of residence in the District of Columbia of 260 male inmates committed for intoxication*

|                       | Number | Percent |
|-----------------------|--------|---------|
| 1 month or less.....  | 7      | 2.70    |
| 1 to 5 months.....    | 3      | 1.15    |
| 6 to 11 months.....   | 13     | 5.00    |
| 1 to 2 years.....     | 6      | 2.31    |
| 3 to 4 years.....     | 8      | 3.08    |
| 5 to 8 years.....     | 21     | 8.08    |
| 9 to 13 years.....    | 23     | 8.85    |
| 14 to 19 years.....   | 29     | 11.15   |
| 20 years to life..... | 101    | 38.84   |
| Life.....             | 49     | 18.84   |
| Total.....            | 260    | 100.00  |

Once again, in slightly varying proportions, the total shows for intoxicants that for the most part they tend to have been long-term residents of the District with almost 19 percent being native born and 39 percent with residence of 20 years up to life. There are slightly more floaters among the intoxicant group than the large sample, especially of those who have been in residence for a year or less.

Length of residence data have also been tabulated for felony offenders as shown in the condensed table below. By and large, the same trends persist; namely, that the bulk of offenders are long-term or life residents of the community.

*Reported length of residence of 649 male felons in the District of Columbia*

| Length of residence    | Robbery,<br>burglary,<br>car theft | Homicide<br>and<br>assault | Narcotic<br>offenders | Sex<br>offenders | Other<br>offenders | Total  |         |
|------------------------|------------------------------------|----------------------------|-----------------------|------------------|--------------------|--------|---------|
|                        |                                    |                            |                       |                  |                    | Number | Percent |
| 1 year or less.....    | 22                                 | 2                          | 2                     | 2                | 12                 | 40     | 6.16    |
| 1 to 4 years.....      | 22                                 | 6                          | 6                     | 6                | 12                 | 62     | 8.02    |
| 5 to 13 years.....     | 50                                 | 21                         | 16                    | 20               | 8                  | 115    | 17.72   |
| 14 years and over..... | 79                                 | 47                         | 22                    | 21               | 34                 | 203    | 31.28   |
| Life.....              | 125                                | 23                         | 41                    | 17               | 33                 | 239    | 36.82   |
| Total.....             | 298                                | 99                         | 87                    | 66               | 99                 | 649    | 100.00  |

Publication D-1.  
FEBRUARY 14, 1957.

DONALD CLEMMER,  
*Research Coordinator (Director of Corrections).*

INSTITUTE FOR CRIMINOLOGICAL RESEARCH,  
DEPARTMENT OF CORRECTIONS, DISTRICT OF COLUMBIA,  
*Washington, D.C.*

**RESIDENTIAL LONGEVITY IN WASHINGTON, D.C., OF INCARCERATED MALE FELONS**

This is a followup of an earlier study<sup>1</sup> which dealt with the length of residence in the District of Columbia of a representative sample of male and female felons and misdemeanants in the custody of Department of Corrections, District of Columbia.

The current study is a 15-percent systematic random sample of felons presently serving sentences in the District of Columbia Men's Reformatory and the Youth Correctional Center at Lorton, Va. The sample includes 40 offenders from the Youth Correctional Center and 237 offenders from the Men's Reformatory.

<sup>1</sup> "Residential Tenure in Washington of Felons and Misdemeanants," Institute for Criminological Research, Publication D-1, February 1957.

The source of data was inmate records at the respective institutions. Birth-place is verified in practically all instances by data procured from the Bureau of Vital Statistics. Length of residence is based on presentence reports and classification summary information compiled by professionally trained personnel.

The current length of residence in Washington of felons at the above two institutions is indicated in the following table:

*Length of residence in the District of Columbia of inmates at the Youth Correctional Center and the Men's Reformatory*

|                                    | Youth Center |         | Men's Reformatory |         | Grand total | Grand percentages |
|------------------------------------|--------------|---------|-------------------|---------|-------------|-------------------|
|                                    | Number       | Percent | Number            | Percent |             |                   |
| Unable to determine.....           |              | 2       | 7                 | 3       | 7           | 3                 |
| 1 month or less <sup>1</sup> ..... | 1            | 2       | 5                 | 2       | 6           | 2                 |
| 2 to 5 months <sup>1</sup> .....   | 0            |         | 0                 |         | 0           |                   |
| 6 to 11 months.....                | 0            |         | 0                 |         | 0           |                   |
| 1 to 2 years.....                  | 1            | 2       | 7                 | 3       | 8           | 3                 |
| 3 to 4 years.....                  | 5            | 13      | 9                 | 4       | 14          | 5                 |
| 5 to 8 years.....                  | 1            | 2       | 24                | 10      | 25          | 9                 |
| 9 to 13 years.....                 | 3            | 8       | 23                | 10      | 26          | 9                 |
| 14 to 19 years.....                | 18           | 45      | 20                | 8       | 38          | 14                |
| 20 years to life.....              | 11           | 28      | 142               | 60      | 153         | 55                |
| Total.....                         | 40           | 100     | 237               | 100     | 277         | 100               |

<sup>1</sup> Transients (definition by length of residence).

The above data clearly establish that 78 percent of District of Columbia felons incarcerated have resided in the District of Columbia 9 years or more and that 69 percent have resided for more than 14 years with the greatest majority having spent 19 or more years as residents of the District of Columbia.

Particular note should be taken of the Youth Correctional Center felons of which 73 percent have spent practically their entire life in the District of Columbia. Substantiation of this fact is indicated in the below table giving the average age of felons in the above institutions:

*Average age and race of felons in the District of Columbia Youth Correctional Center and the Men's Reformatory*

|                                | Age, average (years) | Race (percentage) |       |
|--------------------------------|----------------------|-------------------|-------|
|                                |                      | Negro             | White |
| Youth Correctional Center..... | 20                   | 92                | 8     |
| Men's Reformatory.....         | 35                   | 87                | 13    |

The above findings conclusively substantiate the earlier study indicating that the very great majority of the District of Columbia inmates are long-term residents of the District of Columbia. Only 2 percent of incarcerated felons can be considered as transients.

These findings also indicate that recent felony offenders are for the most part lifelong residents of the District of Columbia. This is easily noted in the fact that 78 percent of the younger inmates are lifelong residents of Washington. This clearly demonstrates that criminality, as measured by incarcerated felons, is a local or community social problem.

WILLIAM NARDINI, Ph. D.,  
Chief of Research, Institute for Criminological Research.

OCTOBER 15, 1963.

Mr. CLEMMER. As I say, my competence to talk about constitutional issues here is obviously nil. The point I simply want to make as a prison man is that we do not favor minimum sentences, certainly high minimums, and have a selfish reason here. It makes it harder to run the prisons when we have a lot of people who have no hope—when

you give a man 20 years to life and he has no hope at all for the future, 20 years sitting in a prison is pretty bad. When I was in Illinois penology, in the early thirties, there was a rash of robberies, there were many bad ones, and the legislature passed what was called a 10-year-to-life law for robbery. And as the years passed it made it extremely difficult for prison officials to control these men facing a minimum of 10 years with no hope. Our legislature, I do not remember, in 1945 or 1943 or maybe in 1948, nullified that law. Now robbery is 1 year to life. That occurred in one State.

The CHAIRMAN. Let me get your views correctly. Do you oppose a mandatory minimum sentence, because you did say the prisoner who comes in with a mandatory minimum sentence is harder to control while he is in your custody?

Mr. CLEMMER. Yes, that is true. The higher the minimum the worse it is.

The CHAIRMAN. The harder he is to control?

Mr. CLEMMER. Yes; 1 year to 10 is not particularly bad because they expect that.

The CHAIRMAN. If he is going to be there a solid 10 years you cannot do anything to rehabilitate him but if you can do anything he will come out to be a better citizen.

Mr. CLEMMER. I am sure that it is the other way. It embitters him and makes him hostile and resistive to such treatment. Speak to prison people as I have all over the United States. The organization that I head shares this view very strongly.

The CHAIRMAN. I personally have heard the opposite said, that one of the great deterrents to crime is the certainty of punishment. If a man knows that he is going to receive a sentence and that he is going to be in the penitentiary for, at least, 10 years he will take cognizance of that fact before he commits a particular crime, whereas if he has an indeterminate sentence and he might be out in 10 months or in 1 year or 2 years, he may be more apt to go ahead and commit the crime. I take it that you do not accept that philosophy. I do not know whether it is right or not. I have heard it argued.

Mr. CLEMMER. The main fact is that we have no scientific data to know what deterrents are. And I think it is a logical argument. I would not be at all surprised that cases can be found among professional criminals, of whom there are really a few in the District of Columbia, who would reason that way, but for the most part I do not believe that a heavy sentence or severe prison treatment is a deterrent. That is my view after 30 years. There is no data on—nobody knows about this.

The CHAIRMAN. It is a difficult field in which to work.

Senator DOMINICK. Could I enlarge on that just a little?

The CHAIRMAN. Certainly.

Senator DOMINICK. This is a real interesting field. When I was in the State Legislature in Colorado we were debating the same thing. I feel right at home here.

You say that about 80 percent of the group that you have imprisoned at the present time have been in trouble on felony charges or convictions prior to this?

Mr. CLEMMER. Yes.

Senator DOMINICK. Would that indicate to you that the rehabilitation process is not very fruitful?

Mr. CLEMMER. It would indicate that to some degree, Senator, and it would indicate that when they return to the free community there is not a helping hand around. It would indicate that in some aspects of our free community the moral tone is pretty bad. It does not indicate that we did not reform them, but it indicates, perhaps, an unwise selection of the time of release. And it indicates, I think, that the prevailing moral tone of crime is rampant, is "get anything you can while the going is good," and that sort of thing, which is deplorable.

Senator DOMINICK. Are these groups that you refer to, who have been in trouble before, relatively young?

Mr. CLEMMER. As I say, our average of the 1,500 male adult felons is 31 years point some months. Of course, the big deterrent, the big falloff in crime comes with age. Crimes of a predatory nature, such as robberies, car theft, and the like, decrease pretty much after 39. The curve goes way down. The slick crimes, such as forgeries and swindling and that sort of thing go on forever and ever. The dangerous crimes of yoking and so on decrease with age.

Senator DOMINICK. Sometime ago it is my recollection that Wilmington, Del., had a law which permitted judges to impose a whipping sentence. Did you follow that?

Mr. CLEMMER. I know about it.

Senator DOMINICK. Do you have any comment on that?

Mr. CLEMMER. I would not agree with that at all.

Senator DOMINICK. Would you agree with that?

Mr. CLEMMER. I think it is undignified and unhumanitarian and does not take into account the causative factors of crime and individual free will and determinism and all of that.

Senator DOMINICK. When was that repealed, do you know?

Mr. CLEMMER. I think it is still on the books. I think I read in the spring that some judge ordered a Delaware man to be lashed and it was appealed and has never been settled.

Senator DOMINICK. What is the Delaware crime rate?

Mr. CLEMMER. No better than Washington.

Senator DOMINICK. Thank you.

The CHAIRMAN. The only other question that I would like to ask you, Mr. Clemmer, is this: You may be required to supply this for the record—it may not be handy to you right now—is there a breakdown of the origin and the home or residence of these 1,700 people—do they come from the metropolitan area or are they coming here because it has been said that the District of Columbia is soft on crime and they can get away with anything here which they cannot in other places—can you give us an origin background of the 1,700?

Mr. CLEMMER. Yes.

The CHAIRMAN. You can supply that for the record?

Mr. CLEMMER. We made a study of that some years ago and I could give you the fundamental facts, and give you that table. First of all, the data is open to some questions, because we have to take as gospel that the inmates were born where they say they were, but contrary to popular opinion the heavy majority of our felony offenders have been Washington born or have been in Washington for 20 years

or more. There were not more, for the most part, I think, 15 percent who were drifters. I recall I reported this fact around 1948 or maybe 1949 when the newspapers picked it up, because there was a prevailing opinion at that time that a lot of our criminals did drift in.

The CHAIRMAN. We hear this today. Of course, undoubtedly, when we get into the Mallory rule next week it may be said to be a haven for those who commit crime.

Mr. CLEMMER. At that time the facts indicated otherwise. A good majority of them were born here and had been here for 20 years or more, since babyhood and youth.

The CHAIRMAN. You are now talking about 1948 figures?

Mr. CLEMMER. I am talking about 1948.

The CHAIRMAN. Would you know from an examination of the record whether that holds true today? This is 15 or so years later.

Mr. CLEMMER. My hunch is that it holds true. We make a case history on every felon. We are not able to update the data as often as we should, but that can be done, and it will take some time.

The CHAIRMAN. I do not want to unduly burden you or the institution which is short of help right now. I assume this is usually true. I hear this report right along. I assume that it is probably correct. If you can furnish anything for the record along that line I will be happy to have it.

Mr. CLEMMER. I shall, Mr. Chairman.

Senator DOMINICK. I have no further questions.

The CHAIRMAN. Thank you very much, Mr. Clemmer. I am going to excuse you now, because I realize that you have an emergency appointment.

Mr. CLEMMER. Thank you.

The CHAIRMAN. We will now return to Mr. Acheson and hear your testimony, Mr. Acheson.

#### STATEMENT OF DAVID C. ACHESON, U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA

Mr. ACHESON. Mr. Chairman and members of the committee, I will try to avoid overlapping testimony of Mr. Tobriner, and with the indulgence of the Chair I would just orally edit the statement as I go through it.

The CHAIRMAN. It will be incorporated in full in the record and you can just highlight it, because some of it has already been covered.

Mr. ACHESON. Thank you.

(The statement referred to follows:)

#### STATEMENT OF DAVID C. ACHESON, U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA

I am appearing on behalf of the Department of Justice and the Council on Law Enforcement in the District of Columbia, of which I am Vice Chairman. My understanding is that the committee wishes to consider today the provisions of S. 486 and title IV and sections 501-505 and 507-508 of H.R. 7525.

#### S. 486

This bill is the product of joint discussions and joint drafting by representatives of my office, of the Corporation Counsel of the District of Columbia, of the staffs of the House and Senate Committees on the District of Columbia, and of the House Legislative Counsel. The bill was designed to make certain technical and clarifying amendments in title 22 of the District of Columbia Code and to

transfer certain civil and criminal enforcement functions of the District of Columbia government from the U.S. attorney to the Corporation Counsel. It seemed to all concerned more logical that these municipal enforcement functions should be performed by the office of the attorney for the city government rather than by me.

Section 1 of S. 486 enlarges the crimes against property covered in the District of Columbia Code 22-403 to include breaking and attempts to break, to cover public as well as private property, and real property as well as personal property. It raises the cutoff point between misdemeanors and felonies from \$50 value to \$200 value, consistent with the general change in dollar value since the statute was originally enacted. It adds a fine to the penalties imposed.

Section 2 of S. 486 eliminates duplicity between section 403 and section 3112 of District of Columbia Code, title 22. In their present form, both statutes prohibit injury or destruction to property. By eliminating those acts from the coverage of section 3112, which defines only misdemeanors, it will be clear that malicious injury or destruction of property may be a felony under section 403.

Section 3 redefines kidnaping under the District of Columbia Code, as it has been defined in the United States Code (see 18 U.S.C. 2101) to make any purposeful kidnaping a crime, regardless of whether monetary reward is the motive. Reward would no longer be an essential element.

Section 4. In existing law, witnesses in a disorderly house prosecution cannot be given immunity, and hence rest upon their fifth amendment privilege of silence. This commonly makes such prosecutions very difficult, if not impossible. By an anomaly, existing law permits witnesses to be given immunity in civil nuisance enforcement proceedings against disorderly houses. District of Columbia Code 22-2721. Section 4 of the bill would make it possible for witnesses to be given immunity in criminal prosecutions, with the consent of the Corporation Counsel. The purpose of providing for that consent is to give the Corporation Counsel a chance to make a determination whether his office might wish to preserve a disorderly conduct charge, a misdemeanor within his prosecutive jurisdiction.

#### *Enforcement of professional license statutes*

Section 5 transfers from the U.S. attorney to the District of Columbia Corporation Counsel the authority to conduct civil proceedings to revoke medical licenses or registrations and injunction proceedings. Section 6 transfers similar authority in connection with the professional credentials of registered nurses. Section 7 transfers the criminal prosecutive authority with regard to violations by optometrists, and section 8 with regard to violations by public accountants. Both types of violation are misdemeanors.

Section 9 of the bill repeals obsolete provisions of the District of Columbia Code relating to the licensing and bonding of private detectives. The practice of private detectives would be exclusively regulated by District of Columbia Code 47-2341.

Section 10 of the bill substitutes the Corporation Counsel for the U.S. attorney as the proper legal officer to prosecute petitions for the appointment of receivers for the property of absconding persons who fail to provide for the support of dependents.

These functions all appear to be much more closely related to the municipal authority of the District of Columbia Commissioners than to the principal enforcement duties of the U.S. attorney or the Department of Justice, and accordingly my office sought the transfer of these functions, with the consent and cooperation of the Corporation Counsel.

#### H.R. 7525

#### *Title IV*

Title IV is, I think, a desirable amendment to existing law. Section 3202 of title 22, District of Columbia Code, authorizes additional terms of imprisonment for the commission of crimes of violence with firearms, and title IV of this bill would add the crime of robbery to the definition of a "crime of violence" for the purpose of the sentencing authority contained in section 3202.

*Sections 501, 502, 503, 505, and 507*

Sections 501, 502, 503, 505, and 507 of the bill provide for mandatory minimum sentences in the event of conviction for felonious assault, burglary, robbery, an armed crime of violence, and the placing of explosives with intent to injure, respectively. The Law Enforcement Council and the Department of Justice are opposed to these provisions. We believe that full discretion should be retained by District judges to consider all of the highly individual circumstances of each crime as factors relating to sentencing. This is not only the trend in the law, but, we believe, a highly desirable trend. It is expressed in Public Law 85-752 (72 Stat. 845), approved August 25, 1958. It is expressed with considerable elaboration in the model penal code adopted by the American Law Institute. (See the criteria for different forms of sentencing spelled out in secs. 7.01-7.04 of ALI model penal code, proposed official draft, adopted at May 1961 meeting.) A few of these factors would include the age, character, and prior record of the defendant; the actual or probable consequences of harm resulting from the crime; the presence or absence of intent by the defendant to cause harm; personal factors making rehabilitation likely or unlikely; defendant's willingness to compensate victim for damage or injury; provocation for the crime; probability of recurrence of a similar crime; etc.

Provisions for mandatory minimum sentences seem to proceed from the assumption that the courts of the District of Columbia are soft on criminals. It is sometimes said that our courts mollycoddle criminals and that criminals feel that they may commit crimes without serious regard to the possibility of severe sentences. This assumption, and this type of public utterance, are simply not based upon fact. The facts are very plain and they show that the average sentence meted out by the U.S. District Court for the District of Columbia is substantially more severe in almost every category of felony than the average sentence meted out by other Federal courts and is substantially more severe than the average sentence meted out by State courts. I am attaching to this statement two tables which compare, by categories of felony, average sentences in the District of Columbia with average sentences in other Federal circuits and with average sentences in the States. These figures were supplied to me, at my request, by the Federal Bureau of Prisons. They appear also in the printed record of House committee hearings held on the District of Columbia crime bills this spring. (Hearings before Subcommittee No. 6 of the Committee on the District of Columbia, House of Representatives, on H.R. 1930, H.R. 5334, H.R. 5726, H.R. 1932, H.R. 1929, H.R. 5046, H.R. 5335, H.R. 5336, H.R. 1893, H.R. 4322, H.R. 678, and H.R. 5608, April 25, 30, May 1, 6, 7, and 14, 1963, pp. 160-161.)

*Section 504*

With regard to section 504 of the bill, I will rest on the comment at page 11 of Mr. Katzenbach's letter of September 13, 1963.

*Section 508*

With respect to section 508 of the bill, I speak only for the Law Enforcement Council. The Council's letter of September 12, page 3, states the principal objection to this provision. The section would magnify the punishment for false reports to the police, so as to convert that crime from a minor offense under police regulations, triable in the court of general sessions without a jury, to a misdemeanor crime that would require a jury trial under District of Columbia Code 11-715(a). Considering the frequently minor character of such offenses, the difficulties of proving intentional falsehood as distinguished from simple misinformation, and the delay and expense incident to jury trial, we do not believe that the public interest is served by the enactment of section 508.

I would appreciate it if the committee would include, as part of the permanent record of these hearings, this prepared statement, Mr. Katzenbach's letter of September 13, and my letter of September 12 on behalf of the Law Enforcement Council.

TABLE 1. - *Average sentence length of Federal prisoners received from court in fiscal year 1962, by offense and judicial circuit*  
 [Prisoners received from the District of Columbia include only Federal Code violators]

| Judicial circuit         | All offenses          |                               | Drug law violators    |                               |                       |                               | Forgery               |                               | Immigration           |                               | Liquor laws           |                               | Transportation,<br>etc., of stolen<br>motor vehicles |                               | Other offenses        |                               |
|--------------------------|-----------------------|-------------------------------|-----------------------|-------------------------------|-----------------------|-------------------------------|-----------------------|-------------------------------|-----------------------|-------------------------------|-----------------------|-------------------------------|------------------------------------------------------|-------------------------------|-----------------------|-------------------------------|
|                          |                       |                               | Marijuana             |                               | Narcotics             |                               |                       |                               |                       |                               |                       |                               |                                                      |                               |                       |                               |
|                          | Com-<br>mit-<br>ments | Aver-<br>age<br>sen-<br>tence | Com-<br>mit-<br>ments | Aver-<br>age<br>sen-<br>tence | Com-<br>mit-<br>ments | Aver-<br>age<br>sen-<br>tence | Com-<br>mit-<br>ments | Aver-<br>age<br>sen-<br>tence | Com-<br>mit-<br>ments | Aver-<br>age<br>sen-<br>tence | Com-<br>mit-<br>ments | Aver-<br>age<br>sen-<br>tence | Com-<br>mit-<br>ments                                | Aver-<br>age<br>sen-<br>tence | Com-<br>mit-<br>ments | Aver-<br>age<br>sen-<br>tence |
| District of Columbia     | 150                   | 56.9                          |                       |                               | 51                    | 82.4                          | 19                    | 30.2                          |                       |                               | 1                     | 12.0                          | 23                                                   | 30.8                          | 56                    | 50.5                          |
| Judicial circuits, total | 15,281                | 31.1                          | 198                   | 58.9                          | 991                   | 70.6                          | 1,685                 | 26.5                          | 1,436                 | 10.2                          | 2,007                 | 15.0                          | 3,261                                                | 33.7                          | 5,703                 | 34.0                          |
| 1st circuit              | 175                   | 26.0                          | 1                     | 60.0                          | 19                    | 65.8                          | 10                    | 14.0                          | 16                    | 5.0                           | 2                     | 1.5                           | 24                                                   | 28.7                          | 103                   | 22.6                          |
| 2d circuit               | 1,085                 | 27.6                          | 3                     | 44.0                          | 196                   | 67.9                          | 210                   | 19.2                          | 50                    | 6.5                           | 34                    | 7.7                           | 99                                                   | 25.7                          | 493                   | 19.0                          |
| 3d circuit               | 1,476                 | 31.8                          |                       |                               | 10                    | 63.6                          | 79                    | 21.5                          | 11                    | 6.5                           | 38                    | 15.2                          | 105                                                  | 32.7                          | 233                   | 37.4                          |
| 4th circuit              | 1,824                 | 25.1                          | 6                     | 40.0                          | 13                    | 56.5                          | 174                   | 24.2                          | 2                     | 7.5                           | 737                   | 15.5                          | 359                                                  | 35.2                          | 533                   | 31.1                          |
| 5th circuit              | 4,047                 | 27.7                          | 77                    | 53.9                          | 178                   | 65.3                          | 414                   | 28.0                          | 776                   | 10.6                          | 473                   | 15.2                          | 889                                                  | 31.9                          | 1,240                 | 33.0                          |
| 6th circuit              | 2,144                 | 27.1                          | 3                     | 64.0                          | 50                    | 68.5                          | 278                   | 23.0                          | 20                    | 9.5                           | 572                   | 14.9                          | 392                                                  | 31.4                          | 829                   | 32.6                          |
| 7th circuit              | 859                   | 36.9                          | 6                     | 74.0                          | 57                    | 74.2                          | 118                   | 30.2                          | 18                    | 13.6                          | 12                    | 19.7                          | 236                                                  | 32.5                          | 412                   | 37.1                          |
| 8th circuit              | 890                   | 36.0                          | 11                    | 66.5                          | 38                    | 82.4                          | 90                    | 25.3                          | 12                    | 4.1                           | 41                    | 11.0                          | 259                                                  | 33.5                          | 439                   | 38.0                          |
| 9th circuit              | 2,727                 | 38.1                          | 67                    | 56.8                          | 335                   | 70.4                          | 241                   | 34.9                          | 509                   | 10.3                          | 13                    | 7.2                           | 544                                                  | 38.0                          | 1,018                 | 41.4                          |
| 10th circuit             | 1,054                 | 39.5                          | 24                    | 79.8                          | 95                    | 85.2                          | 71                    | 32.4                          | 22                    | 10.2                          | 85                    | 14.7                          | 354                                                  | 36.8                          | 403                   | 36.8                          |

Source: Federal Bureau of Prisons statistical tables, fiscal year 1962, table 20.



TABLE 2.—Average time served, by offense, for felony prisoners released for the first time on their sentence from State institutions, and from District of Columbia<sup>1</sup> institutions, 1960

[Data excludes the State of New Jersey]

| Offense                     | District of Columbia |                                 | State institutions |                                 | Rank order of District of Columbia <sup>2</sup> |
|-----------------------------|----------------------|---------------------------------|--------------------|---------------------------------|-------------------------------------------------|
|                             | Number               | Average time served (in months) | Number             | Average time served (in months) |                                                 |
| All 1st releases.....       | 645                  | 40.4                            | 64,557             | 28.3                            | 3                                               |
| Murder.....                 | 9                    | 167.6                           | 1,659              | 121.1                           | 18                                              |
| Manslaughter.....           | 26                   | 63.7                            | 1,813              | 37.0                            | 3                                               |
| Robbery.....                | 96                   | 50.8                            | 6,819              | 42.3                            | 10                                              |
| Aggravated assault.....     | 65                   | 34.8                            | 3,595              | 24.8                            | 10                                              |
| Burglary.....               | 107                  | 41.1                            | 17,462             | 24.5                            | 1                                               |
| Theft, except auto.....     | 56                   | 25.5                            | 9,296              | 19.8                            | 9                                               |
| Auto theft.....             | 56                   | 26.7                            | 3,059              | 21.2                            | 5                                               |
| Embezzlement and fraud..... | 15                   | 17.1                            | 1,435              | 16.7                            | 17                                              |
| Forgery.....                | 56                   | 26.4                            | 7,966              | 20.3                            | 9                                               |
| Rape.....                   | 31                   | 62.8                            | 1,850              | 44.5                            | 6                                               |
| Other sex offenses.....     | 5                    | 47.6                            | 1,622              | 35.5                            | 8                                               |
| Drug laws.....              | 73                   | 46.7                            | 2,687              | 30.9                            | 2                                               |
| Weapons.....                | 7                    | 19.7                            | 338                | 22.5                            | 11                                              |
| Escape.....                 | 1                    | 37.0                            | 1,102              | 18.5                            | 4                                               |
| Other.....                  | 42                   | 22.5                            | 3,854              | 18.1                            | 15                                              |

<sup>1</sup> Felony prisoners released from District of Columbia correctional system.

<sup>2</sup> These figures indicate the rank order position of the District of Columbia, when the 50 jurisdictions are ordered, from high to low, by the average time served for each of the several offense categories.

Source: Prisoners Released From State and Federal Institutions, 1960, table 3.

Mr. ACHESON. A few words about S. 486: Section 2 of S. 486 was designed to eliminate duplicity between section 403 and section 3112 of the District of Columbia Code, title 22. In the present form, both statutes prohibit injury or destruction to property. By eliminating those acts from the coverage of section 3112, injury or destruction to property, which defines only misdemeanors, it will be clear that malicious injury or destruction of property may be a felony under section 403.

Section 3 of S.486 was intended to redefine the crime of kidnaping so as to be consistent with the Federal definition of kidnaping in title 18, United States Code, section 2101. Monetary reward is eliminated as a necessary element of the crime.

Section 4 of S. 486 was designed to correct an anomaly in the law, Mr. Chairman.

Under present law the statute provides for a nuisance proceeding, a civil proceeding against the maintenance of a disorderly house, and it also, of course, provides for criminal prosecution, but under the present statute the witness may be given immunity from prosecution only if the witness is called in the civil nuisance action.

This amendment will make it possible to give witnesses immunity in criminal proceedings so that those witnesses may be used to obtain convictions against the main defendants.

At the present time it is very difficult because the participants in a disorderly house usually take the fifth amendment.

Senator DOMINICK. Mr. Chairman, may I ask a question?

The CHAIRMAN. Certainly.

Senator DOMINICK. It is my understanding, from reading the testimony of Mr. Tobriner, that if that charge should be made the prosecu-

tor could compel a witness to testify in a criminal prosecution even though he has claimed the fifth amendment.

Mr. ACHESON. That is correct.

Senator DOMINICK. And what are the constitutional implications of that?

Are you not, in effect, saying that the fifth amendment does not mean anything any more?

Mr. ACHESON. No, there are many immunity statutes, Senator, both in the United States Code and a few in the District of Columbia Code, which provide for, in effect, making an exchange with the witness.

You remove his privilege of silence and you give him, in exchange, immunity against prosecution.

Senator DOMINICK. Well—

Mr. ACHESON. And the Supreme Court has often decided that such an exchange, by statute, is consistent with the Constitution. For example, *Ullman v. U.S.*, 350 U.S. 422.

Senator DOMINICK. But it is true, however, that this still leaves him subject to prosecution for perjury or contempt of court in connection with his testimony?

Mr. ACHESON. That is true.

Senator DOMINICK. So he does not have an immunity under the fifth amendment.

Mr. ACHESON. Well, he has immunity against disclosures that he is compelled to make. He does not have immunity to lie, that is true.

That exception, I may say, has not been thought to raise any constitutional problems by the Supreme Court.

Senator DOMINICK. Thank you.

Mr. ACHESON. I would like to deal with title IV and title V of H.R. 7525.

Title IV, I think, is a desirable amendment to existing law.

The purpose of it is this: Section 3202 of title 22 of the District of Columbia Code authorizes additional terms of imprisonment for the commission of crimes of violence with firearms.

Title IV of the bill would simply add the crime of robbery to the definition of a crime of violence for the purpose of the additional sentencing authority under section 3202.

Robbery seems to have been omitted as an oversight and, adding it there is really in the nature of a technical amendment.

Sections 501, 502, 503, 505, and 507 of the bill provide for mandatory minimum sentences in the event of conviction for felonious assault, burglary, robbery, and an armed crime of violence, and the placing of explosives with intent to injure.

Both the Law Enforcement Council of the District of Columbia and the Department of Justice are opposed to these provisions.

We believe—

The CHAIRMAN. May I ask you a question there simply for the record?

What is the Law Enforcement Council?

Mr. ACHESON. It is a statutory body, Senator, defined in the District of Columbia Code title 2, section 1901, made up of the heads of the law enforcement agencies, correction agencies, and legal offices, relating to the government of the District of Columbia.

The CHAIRMAN. And who is that?

Would you be a member?

Mr. ACHESON. Mr. Tobriner is a member. I am a member. Mr. Clemmer is a member.

The Chief of Police is a member. The Chairman of the Parole Board or a member of the Parole Board is a member. The U.S. Marshal is a member, and there are several more, such as a judge of the juvenile court.

The CHAIRMAN. You say the Law Enforcement Council is opposed to these provisions.

Does that mean that this is a unanimous decision from the Law Enforcement Council or is this a split decision?

How many members does it have?

Mr. ACHESON. Approximately 14 altogether.

The CHAIRMAN. Fourteen members?

Mr. ACHESON. And at the meeting at which we voted on this action there were, I think, 8 or 10 members there.

And I believe our action on these mandatory minimum sentences was a unanimous action.

The CHAIRMAN. Yes, I am just directing it to the mandatory minimum sentence question.

Thank you.

Mr. ACHESON. We believe that full discretion should be retained by District judges to consider all of the highly individual circumstances of each crime as factors relating to sentencing.

This is not only the trend in this law, but we believe a highly desirable trend.

It is expressed in Public Law 85-752, approved August 25, 1958.

It is expressed with considerable elaboration in the model penal code, adopted by the American Law Institute and in that code, sections 7.01 to 7.04, the model penal code spells out the different criteria which would apply to different forms of sentencing in great detail.

A few of these factors would include the age, character, and prior record of the defendant, the actual or probable consequences of harm resulting from the crime, the presence or absence of intent by the defendant to cause harm, personal factors making rehabilitation likely or unlikely, the defendant's willingness to compensate the victim for damage or for injury, the provocation for the crime, the probability of recurrence of a similar crime, et cetera.

Provisions for mandatory minimum sentences seem to proceed from the assumption that the courts of the District of Columbia are soft on criminals.

It is sometimes said that our courts mollycoddle criminals and the criminals feel that they may commit crimes without serious regard to the possibility of severe sentences.

This assumption, and this type of public utterance, are simply not based upon the facts. The facts are plain and they show that the average sentence meted out by the U.S. District Court for the District of Columbia is substantially more severe in almost every category of felony than the average sentence meted out by the other Federal courts, and is substantially more severe than the average sentence meted out by the State courts.

I have attached to my prepared statement two tables which compare, by categories of felony, average sentences in the District of Columbia with average sentences in other Federal circuits and in the States.

These figures were supplied to me at my request by the Federal Bureau of Prisons.

They were also included in the record of the House hearings held this spring.

Senator DOMINICK. Mr. Chairman, may I ask a question?

The CHAIRMAN. Certainly.

Senator DOMINICK. Mr. Acheson, during the process of our investigation of this in my own State one of the complaints that we constantly received from the inmates of the prison was that two people would be imprisoned for the same type of crime, let's say armed robbery.

One of them will have been there for the second offense or the third offense and will have been before a judge who has looked this over very carefully and has given him a sentence, we will say, of 3 to 10 years.

You will have another person, same age, same background, same type of crime, who has come before another judge on a first offense, and he will be given a sentence from 10 to 15 years.

And the question asked by the penologist was why and how do you expect us to rehabilitate these people when the man with the first offense has a far more severe sentence simply because he has come up before a different judge.

Now, it seems to me that there is a good deal of merit in this type of questioning and this type of criticism.

What suggestion do you have on that?

Mr. ACHESON. Well, this is a problem, Senator, in every court where there are multiple judges, and it is a problem, of course, here where we have a district court that has a great many judges.

An attempt to solve this problem was begun with the passage of Public Law 85-752 in 1958, which provided for sentencing institutes set up by the circuit council of each Federal circuit, the District judges and the members of the courts of appeals, which would pull in the U.S. attorneys and any Federal correctional officials in the circuit.

The purpose was to work out standards which would be acceptable to all members of that court, working toward the uniformity of sentences for similar crimes.

I have seen from time to time some articles written by Federal judges who have explained how this has worked in their circuits, and it seems to be working pretty well.

I do not think we are yet at the point where there is a perfect harmony of standards between individual judges.

Senator DOMINICK. But is it not the purport of your testimony to say that we should not have uniformity, that we should leave completely to the discretion of the judges?

Mr. ACHESON. Well, we should, I think, Senator.

If you have mandatory minimum sentences I do not think there would be any greater uniformity for a similar type of crime than there is now.

Senator DOMINICK. Well, at least all of them would be in there for a set period of time, to begin with.

Mr. ACHESON. Well, perhaps, but if, for example, you had a 10-year minimum for robbery—

Senator DOMINICK. Suppose you had a 2-year minimum?

Mr. ACHESON. Well, let's take a 2-year minimum.

That statute would require that the pickpocket robbery case, for example, which is a common type of crime, should receive the same minimum sentence as the violent case.

If both of them came before an easy judge the pickpocket could get 2 years because the judge had to give him 2 years, whereas the judge might otherwise have given him 6 months or something of that nature.

A 2-year minimum really would not do much to arrive at a uniformity standard for a third offender of robbery who had committed a crime of violence.

My point is that all a minimum does is tend to require that unequal cases be treated equally, which is, I think, as clear a case of inequality as treating equal things unequally.

Senator DOMINICK. Would you agree, however, that this is one of the problems that you have in the process of attempting any kind of rehabilitation?

Mr. ACHESON. Oh, I certainly would. I certainly would.

I do think that the Federal judges are on their way to working this out.

I think one of the problems that should not be overlooked is the very great effect that a standard of sentencing has on the moving of criminal traffic through a Federal court or a State court, for that matter.

A court in which all of the judges are thought to be severe and in which a plea of guilty does not get a great deal of consideration from the sentencing judge is likely to be a court in which the docket is very heavily backed up and every case tends to go to trial.

That kind of situation certainly, in a way, adds to the severity of the deterrent for criminals but it almost paralyzes the criminal justice machinery in the process and some fair compromise has to be worked out between a sentencing standard, which can move pleas of guilty at a desired rate, and a sentencing standard which, on the other hand, will really hold out a deterrent to criminals.

Senator DOMINICK. Thank you.

The CHAIRMAN. May I ask you a question at that point, Mr. Acheson?

Mr. ACHESON. Yes, Mr. Chairman.

The CHAIRMAN. Your table 2, attached to your prepared testimony, indicates, if I read it correctly, that in the District of Columbia for burglary the average time served in months is 41.1 months.

Is that correct?

Mr. ACHESON. That is correct.

The CHAIRMAN. And that 1 over to the right, on the rank order of the District of Columbia, means that the person or a person convicted of burglary in the District of Columbia serves more time than a person convicted of burglary in any State of the Union.

Is that what that number 1 means?

Mr. ACHESON. That is correct, Mr. Chairman.

The CHAIRMAN. Well now, this is a comparison made in 1960. Why was the year 1960 used?

What would be the case in 1959 or 1955 or 1958, or is this representative?

Mr. ACHESON. Well, I think this was simply the last full calendar year in which the Federal Bureau of Prisons had these tabulations prepared and ready for use.

The CHAIRMAN. Now, if I understand the minimum sentence proposed for burglary in the House bill, the minimum sentence proposed is not less than 5 nor more than 15 years.

Well, now, their 5 years is not a great deal of difference from your actual experience here in sentencing in the District of Columbia?

Mr. ACHESON. That is right.

The CHAIRMAN. If you are in prison that additional 19 months would look pretty long, but would it not have some effect if I knew that if I were convicted of burglary here in the District of Columbia that I would have to serve at least 5 years in the penitentiary?

You just do not feel that this helps?

Mr. ACHESON. I am speculating now because, as Mr. Clemmer says, and I feel the same way, we have very little data.

The fact that the District of Columbia is first in the severity of sentences for burglary tends to suggest to me that a more severe mandatory minimum sentence than this average of time served is not necessary or desirable.

Now, if it is necessary then the only conclusion you can form is that the other States are extremely lenient and rather out of line in the sentences that they impose.

I do not think that that is as likely as it is likely that we do not need a 5-year minimum.

The CHAIRMAN. Do you feel convinced that the placing of mandatory minimum sentences under any of these crimes is of no assistance to you as a prosecuting attorney here in the District of Columbia in attempting to stamp out crime?

Mr. ACHESON. Well, it would work the other way, Mr. Chairman.

The CHAIRMAN. Now, why does it work the other way?

Mr. ACHESON. It would make it quite difficult, certainly, in any case where no one was hurt in the course of a burglary.

It would make it very difficult to get a conviction from a jury.

The CHAIRMAN. You do not think a man would put a man away for 5 years because of that?

Mr. ACHESON. I do not think a jury would feel that the average burglary is worth 5 years.

The CHAIRMAN. Thank you.

I think you are probably down to section 504.

Mr. ACHESON. In relation to section 504, Mr. Chairman, I will just stand on Mr. Katzenbach's letter of September 13.

In relation to section 508, what I am going to say speaks only for the Law Enforcement Council. The Department of Justice has deferred to the Commissioners' views.

The section would magnify the punishment for false reports to the police so as to convert that crime from a minor offense under police regulations triable in the Court of General Sessions without a jury, to a misdemeanor crime that would require a jury trial under the District of Columbia Code, section 11-715(a).

Considering the frequently minor character of such offenses, the difficulty of proving intentional falsehood as distinguished from simple misinformation, and the delay and expense incident to jury trials, we do not believe that the public interest is served by the enactment of section 508.

Mr. Chairman, I would appreciate it if you would include this statement in full in the record.

The CHAIRMAN. I believe I have already made that order earlier.

Mr. ACHESON. As well as Mr. Katzenbach's letter of September 13.

The CHAIRMAN. That was previously introduced into the hearing record at the start of the hearing.

Mr. ACHESON. And my letter of September 12 on behalf of the Law Enforcement Council.

The CHAIRMAN. I believe that an order was made at the commencement of the hearing, incorporating that in full in the hearing record.

We are certainly all alarmed by this continuing upsurge of crime in the Nation's Capital.

We realize that possibly this follows a kind of a national trend and, certainly, the fact, as I have said so many times that we compare favorably with other cities is very, very small consolation.

Now, we are proceeding, in the course of the next 3 weeks, to examine the more controversial sections of this crime legislation that is before us, as passed by the House of Representatives, but I would be hopeful toward the end of this hearing, after we have finished our *Mallory* and *Durham* probing, that you would be in a position to make any additional suggestions as to what we can do, as a legislative committee, to strengthen your hand as a law enforcement officer here in the District of Columbia.

I know you have spent many, many hours in working on this problem, and I know you have some suggestions.

Mr. Tobriner made a suggestion in his statement about the registration of firearms. You may have some comments to make also in that connection.

I do not think this is the proper place to make them, but I would hope toward the end of our hearing, in some later session, that you would be prepared to make any additional recommendations that you wish.

Maybe there are none to be made. Maybe law alone does not correct this, but I would hope, in the next 2 or 3 weeks, you would give, as you have in the past, your intensive thought to this problem to see if there is not some way that we can be of help to you in strengthening your arm as a law enforcement officer.

Mr. ACHESON. I appreciate that, Mr. Chairman.

I do expect to have a proposal to make next Tuesday.

The CHAIRMAN. That will be fine.

Senator Dominick?

Senator DOMINICK. Mr. Chairman, I do not know why we should avoid at this time any question on the supposed licensing of firearms, because I think this is a pretty important point.

The CHAIRMAN. There is no intention to do that. I intended to go into that independently.

Senator DOMINICK. I see.

The CHAIRMAN. I am going to bring that into another hearing as well.

It was opened up by Mr. Tobriner in his suggestion, and I have no objection at all to any questions being asked now on it.

Mr. ACHESON. I am available now.

Senator DOMINICK. I will just ask a couple of questions on that then.

There are a great number of people who have pistols and sidearms of one kind or another, either as souvenirs from the wars or just because they want to use them for target practice or for shooting gophers or whatever it may be, and obviously this is going to put a lot of these people to a substantial—what would you say—irritation of some kind, at least, in getting licenses and getting them all registered and doing all that.

My concern about this has been based largely on the fact that whether this really does anything either by way of stopping crime or by assisting in discovering who has done a crime, because at least in the evidence that we produced during similar types of hearings in my own State, it became apparent that if you put a law of this kind in, that the people who are committing these crimes, with intent to commit a crime, would simply knock in the front door of a sporting goods store, swipe what they needed, and go off, or they obtain it through the underground and file the license number off.

So it really has not done any good.

Now, what is your general attitude on this? I do not mean to tie you down completely, but are these legitimate questions to raise?

Mr. ACHESON. Yes; I will be glad to deal with them, Senator.

I cannot say with certainty whether a registration statute for firearms would help stamp out crimes committed with firearms, but let's deal with probabilities now.

We do know that a great many firearms are in the hands of people who are likely to commit crimes.

We know that because in the average 6-month period the police confiscate about 300 or 350.

The CHAIRMAN. Over what period of time is that?

Mr. ACHESON. The average 6-month period, Mr. Chairman.

The CHAIRMAN. They confiscated 300?

Mr. ACHESON. They confiscated about 300 to 350 handguns in connection with arrests made for various felony crimes.

This suggests, of course, that there is a larger part of the iceberg that you do not see, that there are a large number of people who would use a handgun unlawfully if an opportunity arose to use it.

Now, it is obviously difficult to find a person who has a handgun, if he does not use it unlawfully.

But if a statute were passed, that required registration, the very least that we would accomplish would be that we would have the basis of a criminal charge against someone who has it unlawfully, and if the police, by breaking up a Saturday night fight in someone's home, discovered that there is a handgun in the home that is not registered, there is a basis there for a criminal charge against someone who is probably an irresponsible possessor of a handgun.

Now, the big problem in such a statute is to set up a standard which distinguishes between responsible citizens, who use them and know how to use them for sporting purposes, and the irresponsible citizens, principally teenagers or young people, who do not use them to shoot



gophers, who do not shoot gophers at all but who keep them in an apartment and carry them around on Saturday nights either to show off or to use them as a weapon in a robbery or something of that kind.

Now, in the draft statutes, submitted by the Commissioners, there was an effort to set up a standard which distinguished between responsible citizens and irresponsible citizens, and it set up, I think, a pretty good standard.

Senator DOMINICK. How do you tell until after the fact?

Mr. ACHESON. Well, you cannot, but by putting it on the basis of the likelihood of the responsibility of the citizen, in view of his employment, his medical record, his education, his age, family, circumstances, you can get some guidelines whether it is a stable situation in which a gun may safely be left in his home or whether it is an unstable situation where it might not be safe.

And in the one case the police or the Commissioner, under that, would deny a license and in the other case he would grant a license.

Now, we made every effort in that bill to make it easy for responsible people to keep handguns.

We made it mandatory upon the Commissioners to grant a license if those statutory criteria were satisfied.

And to me it is a bit like the question of requiring licenses for the operation of automobiles. Automobiles are dangerous. Guns are dangerous.

You require a license to drive an automobile. Now, this is a very considerable inconvenience for people to get. They have got to take a driving test and they have to fill out a form and they have to pay \$3.

In a sense, it discriminates against law-abiding citizens because they comply with it and other people who are not law-abiding get in a car and drive it around without a license.

But the thing you accomplish is that if you catch a person doing that and he does not have a license, you have a criminal charge against him.

Now, this is some deterrent to crime. It also takes him out of circulation for a while.

And in the case of illegal possession of handguns, I do not see why we should not approach it in much the same way.

Senator DOMINICK. In effect then, you feel that this might have some merit?

Mr. ACHESON. That sums it up very accurately, Senator.

I think it might have some merit.

The CHAIRMAN. Any further questions?

Senator DOMINICK. No.

The CHAIRMAN. I might say to my friend from Colorado that as we get into this firearms problem I would certainly propose to have some of the experts come in on the workings of the Sullivan law.

We have had all kinds of conflicts of opinion. We intend to have some law enforcement experts to give us their best judgments on that.

Mr. ACHESON. If I could say just one thing on that, Mr. Chairman—

The CHAIRMAN. Certainly.

Mr. ACHESON. I think the draft bill that was submitted is a fairer law to the citizenry than the Sullivan law.

There is a general, I won't say "propaganda," but a general misapprehension around that it is really a carbon copy of the Sullivan law, and that adds something to the predilections against it that a lot of people feel.

I would hope that we could have a very open-minded situation on that bill.

The CHAIRMAN. I am sure that we will.

Any further questions?

Senator DOMINICK. No.

The CHAIRMAN. Thank you very much, Mr. Acheson.

Our next witness will be the Chief of Police, Maj. Robert V. Murray.

**STATEMENT OF MAJ. ROBERT V. MURRAY, CHIEF, ACCOMPANIED  
BY JERRY V. WILSON, CAPTAIN, METROPOLITAN POLICE DE-  
PARTMENT**

The CHAIRMAN. Chief, we are very happy to have you and anyone that you desire to come to the witness table with you.

Chief MURRAY. Mr. Chairman, I have with me, Captain Wilson.

The CHAIRMAN. We are very happy to see again, Captain.

Chief MURRAY. Mr. Chairman, and members of the committee, I have a brief statement I would like to make.

Chief MURRAY. Mr. Chairman, according to the schedule furnished me, the committee today is considering title IV of H.R. 7525, which will classify the offense of robbery as a crime of violence, those parts of title V of that bill which deal with minimum sentences for certain criminal offense, and with false reports, and all of S. 486, which amends certain other criminal laws applicable to the District of Columbia.

If I may, I should like to address my remarks to each of those three items and conclude by briefly relating to the committee the current crime situation in the District of Columbia.

**ROBBERY AS A CRIME OF VIOLENCE**

In a letter dated May 1, 1963, to the House Committee on the District of Columbia, I suggested that, while that committee was considering dangerous weapons legislation, it might want to recommend amendment of section 22-3201 of the District Code to add the offense of robbery to crimes defined as "crimes of violence."

The code already includes within that definition the offense of assault with intent to commit robbery but, apparently from oversight, the actual offense of robbery is not included.

Because robbery is a major problem within the District of Columbia, and because it is a crime in which a weapon is often employed, I suggest that it would be logical and helpful to include that offense among the listed crimes of violence, thereby permitting imposition of additional penalties for commission of a robbery while armed with a pistol or other firearm.

## MINIMUM SENTENCES AND FALSE REPORTS

Mr. Chairman, as you and the members of this committee know, I am by training and experience a police officer and police administrator rather than a jurist or penalogist. In my statement to the House Committee on the District of Columbia, regarding H.R. 1893, the so-called four-time loser bill, I stated that I thought legislation which would apply possible irrevocable life imprisonment to the vast selection of criminal offenses included in the felony classification might not be in the best interests of the District.

I stated to the House committee and will repeat to this committee that, in general, the District Code authorizes additional penalties for repeaters.

But in the Police Department, in our interviewing of criminals and in our observations of repeaters, we have found that among criminals the thought seems to prevail, with some possible merit, that the criminal gets a better break in the District of Columbia than he does elsewhere.

The CHAIRMAN. That seems to be a point on which the U.S. attorney disagrees with you.

Chief MURRAY. Yes, I know he does.

The CHAIRMAN. If I understood his testimony correct, and I think I did, the table which he submitted does not seem to bear this out.

I do not know whether this is right or wrong.

Chief MURRAY. Could I depart from the statement a moment?

The CHAIRMAN. Yes, of course.

Chief MURRAY. We had a case right here in the District of Columbia, which I thought was an atrocious crime, just a few months ago where a man had been released from prison in Virginia.

He stopped off here in Washington and he held up two young ladies at the point of a gun. They had just come from a theater. He forced them into a car and drove around town, out in the counties, and back in here, for that 3 hours.

He raped one of the victims, and tied them up and went on.

First we had a police identification from the victims from a 7-year-old photograph that was in our gallery.

The next day the man was arrested in Philadelphia, where he had attempted to hold up two candy stores. He told the police in Philadelphia that he had shot and killed a woman and thrown her body into the river here in Washington and, in the meantime, we got the victims and detectives and sent them over to Philadelphia where they identified the man, and he told substantially the same story that the complainants had told about the crime, but he stated that the reason that he had told them the story about killing a woman and throwing her body into the river was he thought that he would get off easier here in Washington than he would in Philadelphia, but he is being held in Philadelphia and will later come here to be tried.

There are many other—

The CHAIRMAN. Is that a common experience?

Chief MURRAY. Well, yes; sir. I do not have it with me, but I would like to put into the record or furnish for the record the penalties for the offense of armed robbery in nearby Virginia and the State of Maryland.

Now, if I am not mistaken, the minimum sentence and minimum penalty in Virginia is 8 years. I do not think that they get less than 8 years for an armed robbery.

And I think it is just like that in Maryland, but I would like to put that into the record.

The CHAIRMAN. I think that we should have inserted in the record this information and this, I am sure, the staff people could do.

We should have inserted in the record a tabulation, which must be easily obtainable, of the minimum sentences in those States where they have minimum sentences, and the maximum sentences for all of the States.

I think it would be very helpful to run this out by way of comparing it with other jurisdictions.

Chief MURRAY. Yes, sir; I think it would.

The CHAIRMAN. The staff will do that. We will have them procure that information for us.

Chief MURRAY. All right.

(The documents referred to may be seen on p. 711.)

Chief MURRAY. I will state to this committee that I do believe that punishment of the criminal does deter crime, and I do think that crime prevention might be well served by an urging of the courts to impose greater penalties, under existing law, on criminal offenders, but I will leave it for the Congress to decide whether or not minimum sentences prescribed by law are the best method of obtaining adequate punishment.

The CHAIRMAN. I take it you do not take a position then on whether we should or should not have mandatory sentences?

Chief MURRAY. Yes, sir. I would rather leave that to the courts, to the district attorney, and the Congress.

The CHAIRMAN. When you wear a different hat and serve on the Law Enforcement Council, do you vote for or against the mandatory minimum sentence or—

Chief MURRAY. I was not present at that meeting, Mr. Chairman, and some of the other things that they voted for I take an exception to and I vote against, some of the other things that are coming up.

The CHAIRMAN. I understand. The mandatory minimum sentence, you take no position?

Chief MURRAY. No, sir.

The CHAIRMAN. You think that is a matter primarily for the prosecuting attorney and the courts?

Chief MURRAY. Yes, sir.

I feel, Mr. Chairman, that the Police Department's job is to arrest offenders and send them to court and hope that justice will be done.

The CHAIRMAN. If we were to write a mandatory minimum sentence into the statutes of the District of Columbia, do you believe that would cut down the crime rate here in the District?

Chief MURRAY. It might—

The CHAIRMAN. Would that deter the criminal?

Chief MURRAY. Yes; I think it might be a deterrent.

The CHAIRMAN. It might be a deterrent?

And I certainly agree that the punishment of a criminal does deter crime. I think that is certainly true.

I asked either Mr. Clemmer or Mr. Acheson—I have forgotten which one it was—as to their thinking on this point, of knowing that

you would be in a penitentiary for a definitely fixed period of time, if that would not deter you.

My own personal view is that it would.

I mean, it would seem to me that that would tend to deter me if I knew I was going to be in there at least 1 year or 2 years or 5 years rather than an indeterminate sentence subject to an earlier parole.

Chief MURRAY. I feel it would be a deterrent; yes, sir.

The CHAIRMAN. Thank you.

Chief MURRAY. It is important to mention, however, for the information of this Senate committee, that three of the criminal offenses affected by title V; namely, the offense of assault to rob, the offense of burglary, and the offense of robbery constitute the major crime problems in this jurisdiction. Both burglary and robbery have more than doubled during the past 6 months and both stand currently at extreme alltime highs.

Senator DOMINICK. Did you mean "6 months" or "6 years?"

Chief MURRAY. Six years, sir.

Did I say "6 months?"

Senator DOMINICK. You said "6 months."

Chief MURRAY. I'm sorry. I meant "6 years."

The CHAIRMAN. You did not completely finish your thought on that particular paragraph, if I understand you correctly, because these are among the three criminal offenses with which you have the greatest problem.

Do I take it then that it follows, as a logical conclusion, that it would be your thinking that if you had a minimum sentence for those crimes it would be helpful, a mandatory minimum sentence?

Chief MURRAY. I think it would be helpful.

I think, too, where there are multiple offenses that if they got some time on each offense—in other words, if we got a man for a series of robbery cases or a series of burglary cases, I have often heard them say, "Well, if I commit one crime I might as well commit crimes until I am caught because I won't get any more time."

Now, I have been working with the U.S. attorney's office for more than 30 years. They can only get indictments on a certain number of cases.

In other words, we have 50 offenses against a man, say. They cannot take 50 cases into court or 50 indictments, and prosecute them because they have found over the years that they get concurrent sentences.

So, therefore, they only put in a few of the best cases and the other cases are not prosecuted.

The CHAIRMAN. In this jurisdiction do the sentences run concurrently or what is the procedure used?

Chief MURRAY. Well, the judge can make a concurrent sentence or he can make it consecutive.

The CHAIRMAN. "Consecutive," that is the word I wanted.

Does a judge do that today if he finds a man guilty of two offenses? Can he make consecutive sentences?

Chief MURRAY. He can; yes, sir, or he can make it concurrent, and where—

The CHAIRMAN. The law does not need to be changed then in that regard?

Chief MURRAY. Sir?

The CHAIRMAN. The law would not need to be changed in that regard to meet your point then.

Chief MURRAY. No, it would not.

The CHAIRMAN. In other words, the judge today, if a man is convicted of two crimes, could impose consecutive sentences?

Chief MURRAY. He can do that if he wants to now.

The CHAIRMAN. Yes, but we cannot help you then in that regard?

Chief MURRAY. No, sir.

The CHAIRMAN. That is a matter for the judges.

Chief MURRAY. That is a matter for the judge.

It is not a matter for the U.S. attorney or for the Police Department.

The CHAIRMAN. Yes. I was not quite clear on that paragraph.

Thank you, Chief.

Chief MURRAY. Section 508 of title V codifies the provisions of the Police Regulations of the District of Columbia relating to the making of false or fictitious reports to the Police Department.

This police regulation provision has been very useful to us in our investigation of crimes and other matters within the purview of our responsibility.

I am informed that the penalties provided for this offense by section 508 will generate some problems for prosecution of these charges by permitting demands for trial by jury.

It is fitting that testimony on this potential problem come from the prosecutor rather than the police; therefore, I will confine my remarks to a comment that any dilution of the effectiveness of the existing regulation would certainly be harmful to law enforcement.

I think Mr. Acheson testified that jury trials would be harmful.

#### DAMAGE TO PROPERTY, KIDNAPING, AND PROSECUTIONS

As this Department understands it, S. 486 will make certain amendments to the statutes relating to damage or destruction of property, to kidnapping, and to prosecutions of certain offenses within the District of Columbia.

I believe that the changes in the statutes relating to damage of property and to kidnapping are logical and useful, and I would recommend their enactment by the Congress.

Since those provision of this bill relating to changes in prosecuting officials do not relate specifically to the duties of this Department, no comment from me would seem necessary on those subjects.

#### GENERAL CRIME CONDITIONS IN THE DISTRICT OF COLUMBIA

In February of this year, I made a full report to this committee, in joint hearings with the House Committee on the District of Columbia, on overall crime conditions within this city.

I do not want to take the time of this committee today to reiterate all of the points I covered in February. And, as the committee has scheduled for another date the discussion of *Mallory* and *Mallory*-related sections of H.R. 7527, I will not seek to justify those provisions today.

I would, however, like to inform the committee that the overall crime situation in the District has not become better since February. The trend of offenses has continued consistently upward, and it is note-

worthy that, with the close of September 1963, our total crime trend exceeded the previous alltime high of crime established in December 1952.

I would also like to mention that the House Committee on the District of Columbia published in its report on H.R. 7525 data furnished by this Department showing the clearance of part 1 felonies as related to the *Mallory* decision.

After that table was provided by us, the statistics for fiscal year 1963 have become available and, I might inform this committee, the trends established in previous years have been continued.

I have furnished today for each member of the committee copies of an updated graph and statistical table reflecting the foregoing data through the fiscal year 1963, and will be glad to provide additional data on whatever points the committee may want to cover.

That is the end of the statement, Mr. Chairman.

The CHAIRMAN. Well, both the "Part 1 Felonies in the District of Columbia" and the attached table, if it can be reproduced, and I imagine it can, will be made a part of the record at this point in your testimony and, very obviously, you will want to comment in depth on this, I am sure, when you are back before us next week—

Chief MURRAY. Yes, sir.

The CHAIRMAN (continuing). When we get into title I, which is the *Mallory* section of H.R. 7525.

Chief MURRAY. Yes, sir; I would like to come back next week.

(The documents referred to follow:)

#### PART 1 FELONIES<sup>1</sup> IN THE DISTRICT OF COLUMBIA; APPARENT

##### RELATIONSHIP OF "MALLORY" DECISION

Part 1 felonies in the District of Columbia reached a record low of 9,155 offenses for the fiscal year ending June 1957. Since that month there has been a relatively steady increase in those offenses to a high of 15,191 for the fiscal year 1963.

The following table reflects the number and percent of part 1 felonies reported and cleared for past fiscal years:

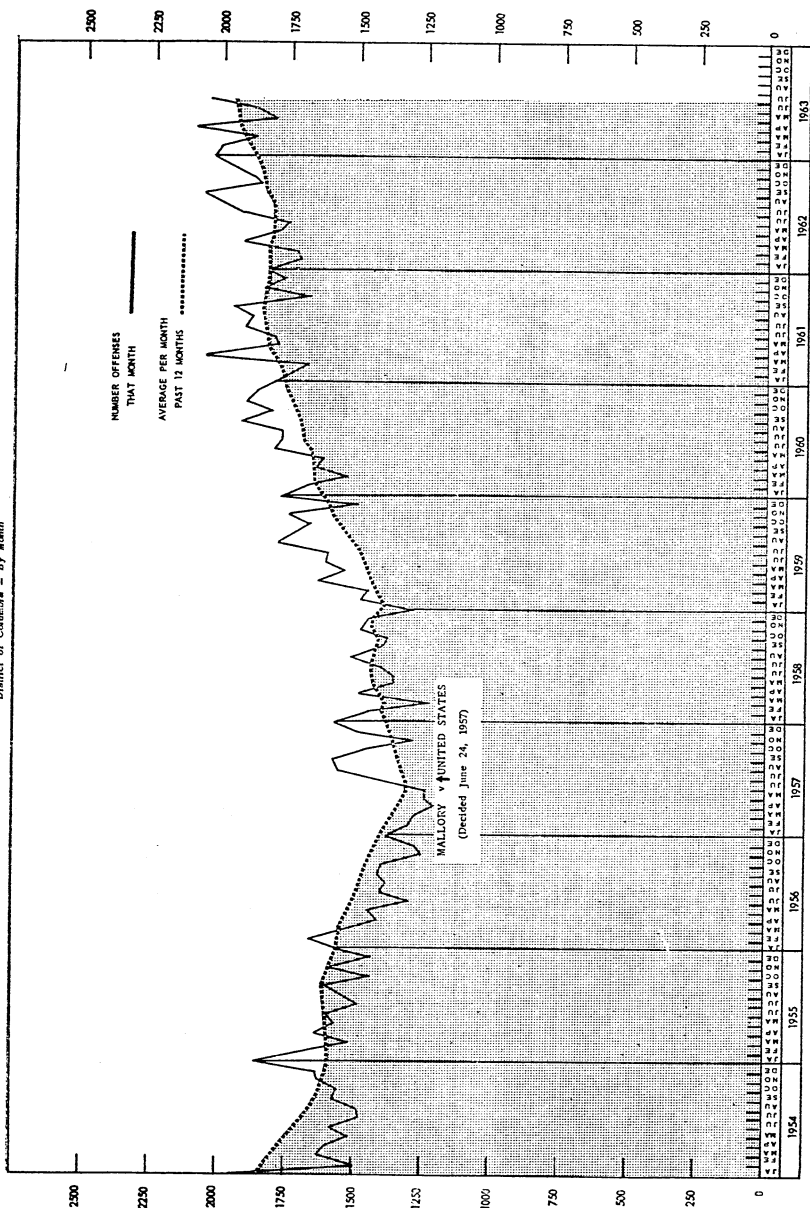
| Fiscal year | Number reported | Number cleared | Percent cleared | Fiscal year | Number reported | Number cleared | Percent cleared |
|-------------|-----------------|----------------|-----------------|-------------|-----------------|----------------|-----------------|
| 1952.....   | 14,066          | 8,197          | 58.3            | 1958.....   | 9,895           | 5,746          | 58.1            |
| 1953.....   | 15,251          | 7,798          | 51.1            | 1959.....   | 10,163          | 6,167          | 60.7            |
| 1954.....   | 11,917          | 6,989          | 58.6            | 1960.....   | 11,714          | 6,311          | 53.9            |
| 1955.....   | 11,488          | 7,453          | 64.9            | 1961.....   | 12,948          | 6,647          | 51.3            |
| 1956.....   | 10,048          | 5,996          | 59.7            | 1962.....   | 13,274          | 6,493          | 48.9            |
| 1957.....   | 9,155           | 5,304          | 57.9            | 1963.....   | 15,191          | 6,770          | 44.6            |

As the total number of offenses has increased, the total number cleared has also increased, but the proportion of clearance has, in general, fallen behind. The reasons for this are readily obvious: a general increase in total offenses at first brings with it a large number of crimes which are cleared on the scene when the report is made or which are relatively easy to clear; however, as the increase continues, the overwhelming workload begins to affect the number and proportion of clearances possible with a given number of personnel.

It is significant that, even with increased emphasis on detection operations, this department has not been able to attain in recent years either the number or proportion of clearances attained during the high crime years prior to 1957.

<sup>1</sup> Part 1 felonies includes all offenses in the part 1 classification except negligent homicide and attempt housebreaking (which together usually comprises only about 1 percent of the part 1 classification) and petit larceny (which usually comprises about 40 percent of the part 1 classification).

SERIOUS OFFENSES REPORTED  
District of Columbia - By Month





The CHAIRMAN. We are going to go into that later, and we have had a request from many witnesses both pro and con, and we will try to do a thorough job of going into it.

I have no questions on the phases of title VI and title V of 486 which you covered.

Obviously, we will have questions as we move into later hearings. Senator Dominick?

Senator DOMINICK. Mr. Chairman, will the Chief be available to discuss this question of licensing of guns?

The CHAIRMAN. Yes, he will. We will go into that later.

I have no objection to your asking him the questions now, however.

Senator DOMINICK. That is all right, I will defer the questions.

The CHAIRMAN. Thank you very much, Chief, and we will look forward to seeing you Tuesday morning at 10 o'clock.

We hope if the witnesses are available on that—they are out of town witnesses—to proceed with *Mallory*, but if they are not available we will proceed with *Durham* and have *Mallory* the next day.

We may have to reverse the order.

Chief MURRAY. I will be here both days, sir.

The CHAIRMAN. Thank you very much, Chief.

Our next witness is Mr. William K. Norwood, chairman of the public protection committee of the Metropolitan Washington Board of Trade.

#### **STATEMENT OF WILLIAM K. NORWOOD, CHAIRMAN, PUBLIC PROTECTION COMMITTEE, METROPOLITAN WASHINGTON BOARD OF TRADE**

Mr. NORWOOD. Mr. Chairman, and members of the Senate District of Columbia Committee:

My name is William K. Norwood. I am appearing here today as the chairman of the public protection committee of the Metropolitan Washington Board of Trade, an organization representing approximately 7,000 principal business, civic, and professional leaders, from more than 4,000 different enterprises.

The views that I shall express represent the recommendations of the public protection committee which have been adopted by our board of directors and hence are policies of the board of trade.

We are here today to support the proposed amendments to the District of Columbia Code as encompassed within title IV and title V of the omnibus crime bill, H.R. 7525, less section 507 which will be considered separately at a later date.

Title IV adds the crime of robbery to the present District of Columbia Code definition of "crimes of violence". Title V is composed of eight sections. Seven of these amend existing sections of the District of Columbia Code and one, section 508, codifies a police regulation. Generally speaking, all of these amendments amplify existing law and tighten the penalties applicable to certain crimes.

Each of these sections concern an area of criminal activity in which there has been a marked upsurge since the dramatic changes following the *Mallory* decision in 1957. These particular sections as amended, 501 concerning assault with intent to kill, rob, rape or poison; 502 concerning burglary; 503 dealing with robbery; 505 concerning addi-

tional punishment for committing crimes while armed; and 507 for placing explosives with intent to destroy or injure property, will strengthen the District of Columbia statutes applicable to these crimes and put teeth into our laws comparable to those of neighboring and adjacent States.

The Nation's Capital has acquired, deserving or not, the reputation within the criminal community of being soft on crime. Increasing the minimum and, in some cases, the maximum penalties for these crimes will demonstrate to the criminally inclined that the Congress and the law-abiding residents of the District of Columbia will no longer countenance the situation which has developed over the past decade. The passage of these proposed amendments will be of substantial assistance in correcting the direction of the pendulum of justice in the Nation's Capital.

And I would like to deviate from my formal text for just a few words, if I may.

The CHAIRMAN. Certainly.

Mr. NORWOOD. I am not a lawyer. I am not a penologist, and I have heard a good deal of direct testimony this morning somewhat contrary to what I have just recommended.

My interest, and it goes a little bit beyond the board of trade because I am a past president of the Federation of Citizens Associations, is to protect the law-abiding citizens of our community, and it is our opinion that these changes will assist in doing that.

I recognize that the accused has certain rights but it is our opinion, and it is also the general feeling of the community at large, that the pendulum has swung a little bit too far to protect the criminal and it is just common—I cannot say “common knowledge”—but it is common conversation that the criminal these days has more protection than the innocent.

Some crime figures were just released today, and I think Chief Murray referred to them, that September was the 16th month in succession where the crime rate has exceeded last year's.

The feeling has developed that Washington is soft on crime and that was very well indicated by the case that Chief Murray cited involving a crime here in the District and the man going up to Pennsylvania.

The public is very much concerned about that. Even though Washington is not the highest of the major cities in connection with crime, it is one of the largest and the fact it is not the highest, I think, is rather immaterial because Washington should be a showcase and we certainly are not in the line of crime.

And it is worrying our people.

I was talking to a former District Commissioner the other day about this, and talking about tightening up some crime laws, and he said that—

Well, the people are overconcerned about that; it really isn't as bad as they say, but if the people in the community are concerned about it and the women are afraid to go out on the streets at night, which is a fact—and it is not only confined to women, but it reaches to our diplomats, lawmakers, and the average citizen—something needs to be done about it, as soon as possible.

And we believe that stricter penalties will assist in advising the criminally inclined members of our community that we are just not going to put up with it any more.

As far as I know, from personal experience, the severity of the penalty can influence you.

A couple of years ago, a member of my family collected a few traffic points because he went over the lawful speed limit just a little bit, and the fact that, collecting a few more points, he was going to have his license suspended, resulted in the most careful driving that I have seen in many years.

And I think the same thing will apply to our criminal community.

And I urge you gentlemen, because you have the opportunity to help correct the impression that is being spread around the country about Washington and also help eliminate the feeling of fear that exists in so many of our members of our community, not only women but also men, to tighten up these laws involving crime.

I think that you will assist on both of those in correcting the impression that has been gained about crime here in Washington and also eliminating the concern on the part of our community, because I am interested in protecting the law-abiding citizen.

Thank you very much, Mr. Chairman.

The CHAIRMAN. I want to compliment you on your statement, Mr. Norwood. I think it is a very fine statement, and I think it was particularly fine when you started ad libbing.

I do not know that lawyers are trained penologists or police officers have any exclusive prerogative in this particular area.

I know that you express the alarm of the citizenry of Washington, and we are here to try to be of help to you and enact legislation which will be constitutional and which will help arrest this very alarming upsurge in crime.

We know it is here, and we want to do something about it, and what you have said has been very very helpful.

Mr. NORWOOD. Thank you.

The CHAIRMAN. The Senator from Colorado?

Senator DOMINICK. No questions.

The CHAIRMAN. Thank you very much, Mr. Norwood.

We will stand in recess until 10 o'clock Tuesday morning.

(Whereupon, at 12:13 o'clock, the committee was recessed, to reconvene at 10 a.m., Tuesday, October 15, 1963.)



## MALLORY AND DURHAM RULES, INVESTIGATIVE ARRESTS AND AMENDMENTS TO CRIMINAL STATUTES OF DISTRICT OF COLUMBIA

TUESDAY, OCTOBER 15, 1963

U.S. SENATE,  
COMMITTEE ON THE DISTRICT OF COLUMBIA,  
*Washington, D.C.*

The committee met, pursuant to recess, at 10:05 a.m., in room 6226, New Senate Office Building, Senator Alan Bible (chairman) presiding.

Present: Senator Bible.

Also present: Chester H. Smith, staff director; Fred L. McIntyre, counsel; Martin A. Ferris, assistant counsel; and Richard Judd, professional staff member.

The CHAIRMAN. The committee will come to order at this time for the commencement of the hearing on title II of H.R. 7525.

Our first witness this morning will be Maj. Robert V. Murray, Chief of Police of the District of Columbia.

Chief Murray?

### STATEMENT OF ROBERT V. MURRAY, CHIEF OF POLICE, DISTRICT OF COLUMBIA; ACCOMPANIED BY JERRY V. WILSON, CAPTAIN, POLICE DEPARTMENT, DISTRICT OF COLUMBIA

Chief MURRAY. Mr. Chairman, I have a very brief prepared statement which I would like to read—first, I would like to say that I have with me Captain Wilson.

The CHAIRMAN. Happy to have you present, Captain.

You may proceed, Chief Murray.

Chief MURRAY. Mr. Chairman, I am informed that today the Senate Committee on the District of Columbia is examining only title II of H.R. 7525, which is intended to apply to criminal cases in the District of Columbia and to replace the test of criminal responsibility stated for the District of Columbia in the *Durham* decision.

The *Durham* decision I think has had a detrimental effect on overall law enforcement in this city; however, the provisions of that decision are not directly applicable to police activities and are not encountered in the criminal processes until the case actually goes to trial. Therefore, I believe that Government recommendations on the *Durham* decision and on proposed remedies such as title II of H.R. 7525 should more appropriately come from the U.S. attorney than from the Chief of Police.

The CHAIRMAN. Thank you. My attention was directed, Chief, to the U.S. News & World Report which had an interview with you concerning the crime situation in the Nation's Capital and I think we would like to examine you further on that at such time as we get into the hearings on the so-called *Mallory* decision. However, I think that it is proper that I ask you a question today on your answer contained on page 95 of the U.S. News & World Report, which magazine bears the date of October 21, 1963, where the question was asked of you:

Have court decisions on insanity hurt law enforcement?

This was the question asked of you and this is your answer:

We think they did at first but after they got the law amended so that anyone pleading insanity would be committed and then brought back for trial if they recovered, the number of cases dropped off. I don't think it is a real big problem now.

Now, does that statement in the U.S. News & World Report correctly reflect your views on the present handling of the sanity cases in the District of Columbia?

Chief MURRAY. Yes, sir, it does, plus the fact that there was a change about a year ago in the *McDonald* decision, and in talking to Mr. Acheson, he says that has modified the *Durham* decision a good deal.

The CHAIRMAN. The answer attributed to you says, "after they got the law amended." I assume you meant by that, after the law was modified?

Chief MURRAY. Yes, sir.

The CHAIRMAN. By the decision in the *McDonald* case?

Chief MURRAY. Yes, sir, that is what I meant.

The CHAIRMAN. I am told that that was what was meant. Now, in view of what you have said in the U.S. News & World Report, would it be your judgment that there is or is not a need for a statutory provision such as is contained in title II of the House bill now before us?

Chief MURRAY. No, sir, I am willing to go along with Mr. Acheson, that the present court decisions did not make it too difficult as when the *Durham* case was handed down.

The CHAIRMAN. Yes. I am limiting myself entirely to the *Durham* problem, that is title II. But what you have said here is, "I don't think it is a real big problem now." That is the way you feel?

Chief MURRAY. That is correct, yes, sir.

The CHAIRMAN. On questions dealing with insanity, that the decisions in the District of Columbia do not hurt law enforcement?

Chief MURRAY. No, sir, not like they did when the *Durham* decision first came out.

The CHAIRMAN. I understand that the *Durham* decision was modified by the *McDonald* decision. Now, in the light of the *McDonald* decision I understand you to be saying that you do not think that the decisions on insanity pose any big problem as far as you are concerned, as a police officer, is that correct?

Chief MURRAY. That is correct.

The CHAIRMAN. Thank you, Chief. I have no further questions. We will be looking forward to seeing you back here again next week.

Chief MURRAY. Thank you, Mr. Chairman.

The CHAIRMAN. Our next witness is David C. Acheson, U.S. attorney for the District of Columbia.

## STATEMENT OF DAVID C. ACHESON, U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA

Mr. ACHESON. Mr. Chairman, I would like to discuss briefly the question of the standards to be followed by the courts in determining criminal responsibility, which is the most noteworthy feature of title II of this bill. This title is identical to H.R. 7052 of the 87th Congress that was reported by the House committee in June of 1961.

For a number of years prosecutors and judges in the District of Columbia have encountered difficult problems in trials of the insanity defense in criminal cases. These difficulties have largely arisen from the application of the so-called *Durham* rule, the rule laid down in *Durham v. United States* (94 U.S. App. D.C. 228, 214 F. 2d 862). That standard of criminal responsibility exonerated defendants who were suffering from mental disease or defect at the time of the crime, if the crime was a product of such mental disease or defect. The rule has been a subject of controversy for much of the period since 1954. Its strength was that it left the door open to much more exact, voluminous, and detailed medical evidence than did the law theretofore.

The problems *Durham* created were:

(1) The very slight quantum of evidence that was required of the defense to raise the insanity issue in the case;

(2) The near impossibility incumbent upon the government of the disproving beyond a reasonable doubt a causal connection between a mental illness and a criminal act; and

(3) The very uncertain criteria by which district judges were often compelled to direct verdicts in favor of defendants.

A vast quantity of writing has been devoted to the *Durham* rule, which should not appropriately be rehearsed at this time and place. For the further study of any member of the committee who may wish to examine a criticism of the *Durham* rule in more detail, I am submitting copies of an article that I was asked to write which appeared in the Georgetown Law Journal in the spring of this year.

The CHAIRMAN. The article will be printed at this point in the hearing record.

(The article referred to follows:)

### MCDONALD v. UNITED STATES: THE DURHAM RULE REDEFINED

(By David C. Acheson\*)

*Briefly examining the inequities which have arisen under the Durham rule of criminal responsibility, as developed in the District of Columbia, the author suggests that many of these imbalances have been eliminated by the recently decided McDonald v. United States. Mr. Acheson points out that not only have the problems presented the prosecution by the elusive product question been reduced, but also that under McDonald the defendant is much less likely to get a directed verdict of not guilty by reason of insanity merely because "some evidence" of insanity has been introduced and gone un rebutted. He concludes by stating that although McDonald can be expected to have little effect upon psychiatric testimony in criminal trials, it is nevertheless a significant step toward the achievement of a test of mental responsibility which is fair to defense and prosecution alike.*

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\*U.S. Attorney for the District of Columbia.

## INTRODUCTION

A few weeks ago the Temporary Commission on Revision of the Penal Law of New York asked me to submit to the New York state legislature a statement of our experience in the District of Columbia with the *Durham* rule of criminal responsibility.<sup>1</sup> In response, I put down my own views of the *Durham* rule, and the successor rules laid down in *McDonald v. United States*,<sup>2</sup> together with some thoughts on their relative merit or demerit versus the New York proposal, and what follows is substantially the text of the statement that I submitted. These observations will serve, I hope, as a useful review of local developments in criminal responsibility, of at least as much interest to the legal profession in the District of Columbia as to the New York legislature.

While this is not the place for theorizing, I would like to fix a starting point for what I have to say. It is important to be certain precisely for what purpose a rule of law is to be used. To me a rule of criminal responsibility ought to answer two purposes. First, it must be a test of *responsibility*. This means that we accept the axiom that some moral choice must be made between the guilty and the innocent, between those who are morally culpable and are to be punished and those who are not. If a moral choice is not to be made, it is nonsense to talk of criminal responsibility. And if responsibility is the blossom that we are trying to pick from the thorns, the test of responsibility must measure the degree of choice open to the defendant. A test of responsibility should not be shaped to irrelevant uses—such as determining merely whether the defendant needs mental treatment, or whether his mental condition made it more or less likely that he would commit the criminal act. Nor should we be diverted by the skepticism of psychiatrists toward the validity of the concept of moral culpability. We have passed beyond that crossroad, if we are at the point that we are looking for a rule of *responsibility*.

Second, the rule must be one that is not incomprehensible to juries. It must recognize the fact that the issue of responsibility is decided by the unscientific process of litigation, and the rule must define the issue in a way that permits jury determination in more or less familiar terms without throwing the ultimate issue open to hopeless speculation.

At the risk of slight over-simplification, I should like to emphasize that the *Durham* rule, as it is commonly known, is no longer the law in the District of Columbia. It was modified in basic part by *McDonald v. United States*,<sup>3</sup> decided by the United States Court of Appeals for the District of Columbia Circuit sitting *en banc*, on October 8, 1962. My discussion will take up *Durham* before *McDonald*, then the new rules laid down in *McDonald*, then the practical application of both standards by psychiatrists in the District of Columbia.

## THE DURHAM RULE

*Durham* is best understood as a shorthand expression for the basic rule of responsibility laid down in *Durham v. United States*,<sup>4</sup> as the court of appeals applied and interpreted it in eighty-odd cases over a period of eight and a half years, plus a number of subsidiary rules laid down in court decisions in which criminal responsibility was an issue. Space only permits a highlight examination of the sedimentary deposit subsequently added to *Durham* up to the time of *McDonald*.

*Durham* was decided in 1954. The rule of the case was, and is, that a person is not responsible for a criminal act if he suffered at the time from a mental disease or defect and if the act was a "product" of the disease or defect. On its face it would appear a reasonable rule calling for inquiry into mental affliction and its causal connection with the criminal act. But very serious problems have arisen in applying the rule over the years, to the point that it was not well focused as an inquiry into responsibility, it was confusing to juries, judges, and medical witnesses alike, and it set a series of traps in the path of the prosecution which, in my judgment, did not serve the interests of justice.

1. One major criticism of *Durham* has always been that "product" was too vague a term. "Product" in what sense? How should the trial judge explain

<sup>1</sup> The New York Legislature is presently considering a proposal to adopt the American Law Institute's formulation in lieu of the rather strict version of the *McNaghten* rule now obtaining there. This proposal is cast as an amendment of sec. 1120 of the Penal Law.

<sup>2</sup> No. 16,304, D.C. Cir., Oct. 8, 1962.

<sup>3</sup> *Ibid.*

<sup>4</sup> 94 U.S. App. D.C. 228, 214 F. 2d 862 (1954).



"product" to the jury in his instruction? What causal mechanisms should the medical witness describe to the jury and the jury search for in evidence? As practice developed, the juries could expect precious little guidance from the medical witness or the judge. Psychiatrists, of course, do not define the legal term "product." Many believe that it is impossible to say whether a particular act is the product of a mental disease and those psychiatrists customarily express no opinion on that issue.<sup>5</sup> One effort was made by the court of appeals to explain "product" in terms of a variety of causal synonyms:

"When we say the defense of insanity requires that the act be a 'product of' a disease, we mean that the facts on the record are such that the trier of the facts is enabled to draw a reasonable inference that the accused would not have committed the act he did commit if he had not been diseased as he was. There must be a relationship between the disease and the act, and that relationship, whatever it may be in degree, must be, as we have already said, critical in its effect in respect to the act. By 'critical' we mean decisive, determinative, causal; we mean to convey the idea inherent in the phrases 'because of,' 'except for,' 'without which,' 'but for,' 'effect of,' 'result of,' 'causative factor'; the disease made the effective or decisive difference between doing and not doing the act. The short phrases 'product of' and 'causal connection' are not intended to be precise, as though they were chemical formulae."<sup>6</sup>

This decision turned jury instructions toward circular definitions for a brief period, but these definitions were not widely followed by trial judges.

Some trial judges attempted to explain the "product" concept in terms of particular causal mechanisms of which there was evidence in the particular case. For example, in *Campbell v. United States*<sup>7</sup> the issue of "product" was tried by both sides on the question of the defendant's ability to exercise good judgment and his ability to control his conduct. The trial judge's instruction to the jury explained "product" in those terms—the terms chosen for litigation by the parties themselves. But a divided panel of the United States Court of Appeals for the District of Columbia (2-1) reversed the conviction, holding that the capacity-for-control test was only one type of the causal relationships that were possible under *Durham*, and that the instruction had erroneously narrowed the jury's understanding of "product" by excluding other possible causal standards. The majority did not attempt to point out what other types of causal connection was possible. Rehearing of the case *en banc* was sought, but was denied by a margin of one vote.

A related difficulty with the "product" concept is the attitude toward it that has evolved among medical witnesses. Their prevailing view is that, while occasionally one can say that an act *was* a product of mental disease, one can rarely if ever say that an act *was not* a product. To analogize, one can sometimes find a needle in the haystack, but one cannot find that there is *not* a needle in the haystack. The consequence of this view is that when the psychiatrist *can* come to a firm opinion on the issue of "product," it is almost invariably in favor of the defendant. No dice could be more loaded than this. It is not the fault of the psychiatrist. When the test of causal connection is as limitless and vague as the "product" concept, certainty can only exist on the affirmative finding, never on the negative.

Part of the problem is that medical witnesses are permitted under *Durham* to testify to an ultimate issue in the case, the "product" question. This practice carries both a legal and a practical evil. Legally, a witness is supposed to limit his testimony to fact or to expert opinion. "Product" is neither. It is a legal-factual ultimate conclusion, analogous to the issue of negligence, on which surely no witness would be permitted to speak. Practically, "product" is quite outside of the normal, expert frame of reference of the witness. It is a judgment that most psychiatrists do not make professionally in diagnosis or treatment.

2. A second major difficulty with the "product" rule has been a virtually automatic presumption, once mental disease is shown, that the act was a product of the disease. This presumption arises immediately upon a bare showing of mental disease, without *any* evidence of a causal connection. If the defendant can show "some evidence"<sup>8</sup> of mental disease, and if the medical witnesses say they don't know whether or not the act was a product, the government loses

<sup>5</sup> The effect of such a disclaimer is treated p. 583, *infra*.

<sup>6</sup> *Carter v. United States*, 102 U.S. App. D.C. 227, 236, 252 F. 2d 606, 617 (1956).

<sup>7</sup> 113 U.S. App. D.C. 260, 307 F. 2d 597 (1962).

<sup>8</sup> The phrase comes from *Davis v. United States*, 160 U.S. 486 (1895).

on directed verdict for failure to carry its burden of proof beyond a reasonable doubt. The rule that the defendant is required to raise the issue by showing "some evidence" of mental disease does not apply to the second prong of the responsibility test. Under the rule of *Frigillana v. United States* "some evidence" of causal connection or "product" is not necessary.<sup>9</sup>

Of course, there is a presumption of sanity in the District of Columbia, as elsewhere, but under the case law of which *Frigillana* was the most recent expression, that presumption is overcome by a showing of "some evidence" of mental disease. Thereafter, the government must prove beyond a reasonable doubt the absence of mental disease or that the act was not a product of the disease. The latter element cannot be proved in the typical case in which the psychiatrist will not or cannot express an opinion on the question. And so, as a practical matter, every case must be fought by the prosecution on the absence of mental disease, or not fought at all. "Product" is thus read out of the *Durham* rule in practice, by the automatic, trap-like operation of the presumption of a causal connection. The irony of this is particularly biting when one recalls that one of the chief arguments advanced for the *Durham* standard was that it took account of "psychic realities and scientific knowledge."<sup>10</sup>

Naturally, the presumption of causal connection has produced many situations in which either a verdict is directed against the government, or it is forced to go to trial before a judge, on a waiver of jury trial, and take an uncontested judgment of acquittal by reason of insanity. An interesting example of a directed verdict situation is the state of the record on the "product" question in *Wright v. United States*.<sup>11</sup> Eleven psychiatrists testified, all called by the defendant. No opinion was elicited by defendant from five. The opinions the others expressed on the "product" issue were in various shades of doubt. Two witnesses stated they had "insufficient data to support an opinion"; one said that it was "likely" there was a causal connection; another said there "could very well be" a causal connection and another that it was "surely possible"; one of the eleven answered "Yes" to a hypothetical question. The court of appeals, on this state of the record, held that the government failed to sustain its burden as a matter of law, and reversed the conviction. Such a state of the record is not unusual in the degree of its ambiguity on the issue of "product."

3. As a final criticism, the state of the law under *Durham* requires of the defendant too slender a quantum of evidence of mental disease, to overcome the presumption of sanity. "Some evidence" is the historic rule.<sup>12</sup> As interpreted in our circuit, this has been something akin to a "scintilla." As an illustration of how insignificant "some evidence" could be, one defendant took the witness stand and speculated that he "must have been insane." On cross-examination he testified that he was not insane, but would like to be because he preferred St. Elizabeths Hospital to jail. The court of appeals held that the presumption of sanity was overcome so as to raise the insanity issue, solely by virtue of this testimony.<sup>13</sup> Such a standard has often brought the issue of responsibility into the case when there was not enough evidence to litigate the issue intelligibly to a jury, and naturally has encouraged surprise tactics by defense counsel. Trials have frequently been chaotic and preparation has lost much of its power to forearm.

Believing that *Durham* and its subsidiary rules had become so capricious and burdensome as to be tolerable no longer, the U.S. Attorney's Office prepared and urged in 1962 a brief legislative act based upon a proposed section of the American Law Institute Model Penal Code.<sup>14</sup> Subsequently, the court of appeals handed down, *en banc*, a unanimous (for this purpose) opinion in *McDonald v. United States*.<sup>15</sup> In this decision, I believe, the law has taken a significant new direction, and much for the better.

#### THE NEW RULES

In *McDonald v. United States* the court of appeals reversed a conviction of manslaughter for a faulty jury instruction. Important new rules were laid down, which, since they were provided as guidance for a new trial, have stature

<sup>9</sup> 113 U.S. App. D.C. 318, 307 F. 2d 665 (1962).

<sup>10</sup> *Durham v. United States*, 94 U.S. App. D.C. 228, 240, 214 F. 2d 862, 874 (1954).

<sup>11</sup> 102 U.S. App. D.C. 36, 250 F. 2d 4 (1957).

<sup>12</sup> *Davis v. United States*, 160 U.S. 469, 486 (1895); *Durham v. United States*, 94 U.S. App. D.C. 228, 235, 214 F. 2d 862, 869 (1954).

<sup>13</sup> *Clark v. United States*, 104 U.S. App. D.C. 27, 259 F. 2d 184 (1958).

<sup>14</sup> Model Penal Code, sec. 4.01 (Proposed Draft, 1962).

<sup>15</sup> No. 16,304, D.C. Cir., Oct. 8, 1962.

far greater than mere dicta. A panel of the court heard argument, and rehearing *en banc* was ordered *sua sponte*. So far as the points under discussion here are concerned, the new rules were unanimously supported by the full court.

1. The court pointed out in *McDonald* that, contrary to the Government's contention, sufficient evidence of mental disease was present to require a jury instruction on criminal responsibility. The issue is raised by "some evidence" which must be "more than a scintilla, yet, of course, the amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal."<sup>16</sup> After *Clark v. United States*,<sup>17</sup> this statement would appear to tighten the standard of "some evidence" considerably.

2. Possibly the most significant portion of the court's opinion in *McDonald* dealt with the standards for directed verdict. The court firmly knocked on the head the notion that affirmative government evidence of responsibility is necessary to avoid a directed verdict. The court said:

"It does not follow, however, that whenever there is any testimony which may be said to constitute 'some evidence' of mental disorder, the Government must present affirmative rebuttal evidence or suffer a directed verdict. A directed verdict requires not merely 'some evidence,' but proof sufficient to compel a reasonable juror to entertain a reasonable doubt concerning the accused's responsibility. \* \* \* Whether uncontradicted evidence, including expert opinion evidence, which is sufficient to raise a jury question on the mental issue is also sufficient to require a directed verdict depends upon its weight and credibility. \* \* \* *Davis v. United States*, 160 U.S. 469, clearly supports this position. There the Supreme Court said that the jury, in considering an insanity plea, must weigh all the evidence, including the presumption of sanity. *Id.* at 488. Whether uncontradicted expert testimony overcomes the presumption depends upon its weight and credibility, and weight and credibility ordinarily are for the jury."<sup>18</sup>

As a practical matter this amounts to saying that every issue of criminal responsibility must go to the jury, a very great improvement in the law from a prosecutor's point of view and a rule that does neither side an injustice. Subsequent to *McDonald*, decisions of the court of appeals have made it clear that the court will not revert to an evidence-weighting process in passing upon appellants' claims that a verdict should have been directed. They have adhered to the approach expressed in *McDonald*.<sup>19</sup>

3. Perhaps the most significant part of the *McDonald* opinion is the court's handling of the causal connection problem. The court changed the standard of responsibility, in effect, from a two-step finding of (1) mental disease and (2) causal connection to a one-step analysis. This was done by a definition of "mental disease" in the following terms:

"[A] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus the jury would consider testimony concerning the development, adaptation, and functioning of these processes and controls."<sup>20</sup>

By this standard a mental condition must have behavioral consequences to qualify as "mental disease" for legal purposes. Thus, the psychiatrists' terminology does not control the question of "mental disease," but rather the consequences of the mental condition control it. "What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility."<sup>21</sup> The recognition of this dichotomy of the medical and legal standard is long overdue and the candid handling of it in *McDonald* should bring much clarity to the confusion wrought by medical witnesses' testimony. It may be, though the court has not yet so ruled, that it will be improper to put the question to a medical witness: "Doctor, on the basis of your examination of the defendant and his medical record, was he, on January 2, 1963, in your opinion, suffering from a mental disease?" Under the old *Durham* rules, this question was a common one, and an affirmative answer could wrap up the ball game.

While *McDonald* does not formally abolish the "product" element, it does reduce its significance. It is apparent that a finding of "mental disease," with the consequences required under *McDonald*, much reduces the significance of

<sup>16</sup> *Id.* at 3-4.

<sup>17</sup> 104 U.S. App. D.C. 27, 259 F. 2d 184 (1958).

<sup>18</sup> No. 16,304, D.C. Cir., Oct. 8, 1962, at 5-6.

<sup>19</sup> E.g., *Hawkins v. United States*, 112 U.S. App. D.C. 257, 310 F. 2d 849 (1962).

<sup>20</sup> No. 16,304, D.C. Cir., Oct. 18, 1962, at 7.

<sup>21</sup> *Ibid.*

a second-step finding that the crime was the "product" of the disease. Once the jury finds that the effects of the mental disease are present which *McDonald* requires, the issue of "product" relation with the crime will in many cases be virtually decided. If the jury finds the defendant suffering from a mental condition which impairs his control over his behavior, which is the *McDonald* standard, then it is an easy jump to the finding that the mental condition caused the particular behavior involved in the criminal case. The government's burden of proof is substantially redistributed—not reduced, but redistributed.

Under *McDonald* the government has the burden of proof beyond a reasonable doubt to show that the defendant was not suffering from a mental disease which impairs control of behavior, or that the crime was not a product of that disease. Where a defendant did in fact not suffer from *that kind* of mental disease, it will probably be less difficult for the government to carry its burden than it was under *Durham* to prove that the defendant did not suffer from a mental disease of *any kind*. But if the jury finds against the government on that issue—that is, finds that the defendant suffered from a mental disease which impaired his control of behavior—it will be *more difficult* under *McDonald* than it was under *Durham* to prove that the criminal behavior was not caused by the mental disease. If control over behavior in general is found to be impaired by the mental disease, it will be virtually impossible for the government to sort out the particular criminal act and show that it alone of the defendant's total conduct was not the result of that impairment. This is not to say that the *McDonald* standard makes the government's case harder, but only that the case will swing more completely on the issue of mental disease. As prosecutors, we are, on the whole, better off.

In this respect the *McDonald* rule is not dissimilar to the standard of responsibility proposed in section 4.01 of the American Law Institute Model Penal Code and proposed for New York. Under the ALI rule, there is no question of causal connection between mental condition and the particular crime, but only on examination of mental condition and its behavioral consequences. Under *McDonald*, the causal connection between mental condition and the particular act is still involved, but it is the caboose on the train. Its direction is determined by the finding of behavioral consequences of the mental condition.

#### MEDICAL PRACTICE UNDER "DURHAM" AND M'DONALD"

So much for legal experience under *Durham* and for the legal changes wrought by *McDonald*. It remains to examine the application of the two by the psychiatrists, chiefly those at St. Elizabeths Hospital, where most of the defendants are examined.

After pretrial mental examination under District of Columbia Code, section 24-301, the practice of both St. Elizabeths and District of Columbia General Hospitals has been to report to the court on mental condition and causal connection with the crime. The report identifies a mental disease, if any, and states an opinion one way or the other, or demurs, on the question whether the act was a "product." There is reason to believe that the more experienced doctors are reluctant to make a finding of mental disease without some evidence of its effect on conduct. They tend to look for behavioral consequences, as one element of mental disease, in rather the fashion suggested in *McDonald*. This was medical practice under *Durham* even before *McDonald*. The practice appears to have resulted partly from the native skepticism of doctors and partly from an awareness on their part that the "mental disease" finding was to be used for a criminal responsibility test and therefore should have a built-in relevance to responsibility for behavior and to the defendant's power of choice.

Such an approach to the finding of mental disease is not, in many cases, used by the more junior staff psychiatrists. On the contrary, many of the junior medical staff appear to approach the question from the opposite angle, and seem disposed to infer mental disease from the starting point of criminal conduct. The result of this approach, of course, is to resolve both the mental disease question and the "product" question against a finding of responsibility.

It is more owing, perhaps, to the liberal trend in medical analysis, than to the legal standards of *Durham*, that there has been a steady and rapid increase in

acquittals by reason of insanity in the District of Columbia. The statistical experience is as follows: <sup>22</sup>

| Fiscal year | Defendants tried | Defendants acquitted by reason of insanity | Percentage insanity acquittals of defendants tried |
|-------------|------------------|--------------------------------------------|----------------------------------------------------|
| 1953.....   | 1, 017           | 3                                          | 0.29                                               |
| 1954.....   | 600              | 9                                          | 1.5                                                |
| 1955.....   | 485              | 12                                         | 2.5                                                |
| 1956.....   | 503              | 21                                         | 4.2                                                |
| 1957.....   | 485              | 12                                         | 2.5                                                |
| 1958.....   | 570              | 21                                         | 3.7                                                |
| 1959.....   | 525              | 35                                         | 6.7                                                |
| 1960.....   | 438              | 36                                         | 8.2                                                |
| 1961.....   | 521              | 66                                         | 12.7                                               |
| 1962.....   | 516              | 67                                         | 13.0                                               |

One cannot say that the present rate of insanity acquittals is too high or too low, without a fixed standard of comparison and without knowing whether that standard is sound or unsound. Perhaps before *Durham* too few were acquitted, and perhaps now too many. Certainly even a prosecutor cannot proceed from the premise that the insanity defense should never succeed. However, it is likely that such acquittals, as a percentage of total defendants tried, is higher in the District of Columbia than in any jurisdiction in the United States.

A very significant fact that the statistics cited above do not reveal is that between two-thirds and three-fourths of our insanity acquittals are uncontested acquittals by the court sitting without a jury, upon waiver by both sides. Cases are handled in that fashion when the examining staff panel at the hospital is unanimous that the defendant had mental disease and that the crime was a product. When the Government lacks any contrary evidence and believes that the medical staff judgment is well supported, it simply submits its case-in-chief and offers, and indeed possesses, no rebuttal on responsibility. In cases of this kind, it would probably make little difference whether the District of Columbia had *Durham*, the American Law Institute proposal, or *McDonald*. Doctors who will not make a finding of mental disease without being satisfied that there is a substantial deprivation of behavior control would probably find the same way under all three tests. Apparently they were satisfied of this in these uncontested cases where the panel was unanimous. And in such cases, of course, one would expect the same result from the liberal medical school which tends to infer mental disease from criminal conduct.

In more difficult cases, however, amounting to one-fourth to one-third of the cases where the issue is raised, it may be that the more skeptical school of medical thought will find fewer cases of mental disease under *McDonald* than under *Durham*. It is too early in *McDonald's* career to know. I have my doubts. I think the same medical approach will be used as formerly. The behavioral consequence of mental disease is now part of the legal definition, but that fact will not much alter the analysis of a doctor who always used it, anyway. The real point is that the skeptical school of medicine appears to be dying out among the government staff physicians. This fact is far more important than the legal difference between *Durham* and *McDonald*. My own guess is that insanity acquittals will continue on the rise. It may very well be that the relevant question is not so much whether *Durham* or the Model Code is the preferable legal test of responsibility, as what kind of psychiatrists will administer either standard. I do not believe that the adoption of the Model Code provision in the District of Columbia would make nearly as much difference in the analysis of psychiatrists or in the acquittal rate as would a less liberal attitude on the part of the medical profession. But I should think that even the most liberal psychiatrist is closely harnessed by the *M'Naghten* standard, and that a change

<sup>22</sup> These figures relate to the U.S. district court only; municipal court figures are not included.

in jurisdictions which follow that standard to the ALI standard would greatly increase the acquittal rate. As I have said, this is not necessarily something to be avoided.

One final word on the subject of medical application of the *Durham* and *McDonald* rules. The matter of psychopaths is a difficult problem in the District of Columbia, and one on which doctors divide. Mere repeated anti-social conduct is normally not categorized as mental disease, but the difficulty arises when that phenomenon accompanies a "personality disorder," such as a diagnosis of "inadequate personality." Some doctors call it mental disease; others do not. Perhaps the matter can safely be left to the evidence in each case. But it should be noted that the exception in the ALI proposal for "repeated criminal or otherwise antisocial conduct" would not necessarily except a personality disorder diagnosed from psychological tests. Many doctors would call that disorder "mental disease" for medical purposes.

#### CONCLUSION

In summary, our experience in the District of Columbia under the *Durham* rule has been an unhappy one. From my point of view the legal changes in the standard of responsibility and in subsidiary rules, resulting from the *McDonald* decision, are highly desirable. The legal standards now obtaining in the District of Columbia under *McDonald* should result in a state of affairs satisfactory from a prosecutor's point of view. However, at the same time they will provide a standard that will be fair to defense and prosecution alike, and will permit the advantageous use of medical learning without permitting psychiatrists to run riot.

MR. ACHESON. Thank you, Mr. Chairman.

All three of these problem areas of the *Durham* rule were, from our point of view, favorably clarified in a decision of the U.S. Court of Appeals of the District of Columbia in *McDonald v. United States* (312 F. 2d 847 (1962)). Briefly, that opinion worked three significant changes:

(1) In order to raise the issue of insanity as a defense, a defendant must offer some evidence of a mental disease or defect, the precise quantum of evidence being more than a scintilla, though not so substantial as to require, if uncontroverted, a judgment of acquittal;

(2) The opinion dispelled the previous notion that, if the Government had no affirmative rebuttal evidence, it must suffer a judgment of acquittal. The court emphasized that the question whether expert testimony may overcome the presumption of sanity depends upon the weight and credibility of that testimony, and weight and credibility are for the jury. This, in effect, is to say that nearly every case, no matter how one-sided the evidence might appear, must go to the jury for an evaluation of the testimony supporting the defense of insanity.

THE CHAIRMAN. If I may interrupt you there, Mr. Acheson. I am not quite clear how that varies from the general rule of the law. I thought that the general rule of the law was that the weight or credibility of testimony or the credibility of witnesses always went to the jury. Does *Durham* raise a different standard?

MR. ACHESON. Well, prior to *McDonald*, Mr. Chairman, there were a number of cases in the court of appeals in which the court of appeals frequently divided panels of the court, held that evidence was so slight in favor of the Government on the insanity issue, that the trial court should have directed the verdict of acquittal by reason of insanity. One such case was *Wright v. United States*, 102 U.S. App. D.C. 36, 250 F. 2d 4 (1957), and there were many more along that line.

Prosecutors and district judges were never clear just how much evidence it took to rebut the insanity defense, to get to the jury.

Now, in *McDonald*, the unanimous court made it quite clear that except in a very rare case, almost uncontested the issue must go to the jury.

The CHAIRMAN. Thank you.

Mr. ACHESON. (3) The court redefined "mental disease or defect," the key phrase of the *Durham* rule, so as to leave the character of the mental disease less to speculation and less to the terminology of the medical witness. The definition is "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." You will see that in this definition is a new ingredient, the ingredient of the casual consequence of the mental condition upon conduct. This new ingredient thus limits the type of abnormal mental condition which will qualify as a mental disease. It limits mental disease in a particularly relevant way—by using the criterion of effect on conduct. This is particularly relevant because it is responsibility for conduct which is at issue in a criminal trial where the insanity defense is raised.

In formulating these new principles governing criminal responsibility, the court of appeals acted unanimously through all of its judges sitting en banc.

In our experience as prosecutors since the *McDonald* decision, the principles of that case have appeared to us to be workable, sensible, and intelligible to juries. The decision is only a year old. It has been applied more or less uniformly by district judges in instructions to juries and has considerably diminished the controversy over insanity instructions in the court of appeals. We suggest, therefore, and I speak for the Department of Justice and the Law Enforcement Council on this question, that the courts of the District of Columbia be allowed to gain further experience with the *McDonald* rules, without further changes by legislation at this time. We believe that under *McDonald* we are going in a direction that makes sense, and that our courts are developing promising jurisprudence.

In its effect, the test of criminal responsibility in *McDonald* is very close to that formulated in title II of the bill which, of course, is based upon the American Law Institute's model penal code. Both tests make exoneration from responsibility rest upon impairment of controls by a mental disease or defect. Thus, I believe that *McDonald* has accomplished the main objective of subsection (a) of title II of this bill.

The CHAIRMAN. At that point, Mr. Acheson, might I ask you how close title II of H.R. 7525 is to the model law suggested by ALI on the question of insanity?

Mr. ACHESON. It is identical, Mr. Chairman, except in one respect. If you look at the bill, title II, you see section (a), subsection (1).

The CHAIRMAN. Yes.

Mr. ACHESON. At line—

The CHAIRMAN. I am following it.

Mr. ACHESON. At line 18.

The CHAIRMAN. Well, let us read that sentence (a)(1) into the record, it is just one sentence and I understand that this is the heart of title II. Is that correct?

Mr. ACHESON. That is right. It reads:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to know or appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The CHAIRMAN. The House passed this section?

Mr. ACHESON. That is right.

The CHAIRMAN. That is the standard for insanity. Now, what does the ALI say?

Mr. ACHESON. The ALI, instead of using the word "wrongfulness," uses the word "criminality." As I recall, that is the only difference between the two paragraphs.

The CHAIRMAN. Someone handed me this from the ALI and I think I will read it into the record, and I would like to have you point out what the actual differences are. If I am correctly informed, the House action made a very radical change in the ALI model penal code definition—now, it may be right or may be wrong, but I would like to have you comment on it at this time realizing, of course, that this is a technical question in an involved and difficult subject. The ALI section reads as follows:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The House in formulating the insanity test as contained in contained in H.R. 7525, deleted the word "criminality," and in place thereof inserted the word "wrongfulness".

Mr. ACHESON. Well, Mr. Chairman, let me get my papers here from the back of the room.

The CHAIRMAN. It has been called to my attention also that in addition to that, another change by the House was the addition of the words "to know".

Mr. ACHESON. That is correct.

The CHAIRMAN. Now, what is the difference?

Mr. ACHESON. I think it is only a semantic difference.

The CHAIRMAN. Now, then, the minority opinion of the House says, and I am reading from page 91 of the House report on the bill:

The test contained in the bill has been presented by some as the American Law Institute test. The fact, however, is that it differs from the American Law Institute test in a critical respect. The phrase "to know" does not appear in the ALI test, which is set out in the footnote below. The committee has taken this part of the test from the long discredited "knowledge of right and wrong test" adopted by the English House of Lords in 1843 in the *M'Naghten case* (10 Cl. & Fin. 200 (H.L. 1843)). In other words, that part of the proposed test which provides that a defendant shall be criminally responsible unless he lacks capacity "to know \* \* \* the wrongfulness of his conduct" is an attempt to perpetuate the 1843 English rule—a rule adopted long before the rise of modern psychiatry.

Mr. ACHESON. Mr. Chairman, let me explain this clearly as I can. This is very convoluted.

The CHAIRMAN. Very what?

Mr. ACHESON. Very convoluted.

The CHAIRMAN. I still didn't get it; what kind of a word was that?

Mr. ACHESON. Convoluted, Mr. Chairman. The House committee—



The CHAIRMAN. You have me on that one. What does "convoluted" mean?

Mr. ACHESON. A very twisted and complicated area.

The CHAIRMAN. Oh, I see.

Mr. ACHESON. And the House committee, I think, is mistaken in its judgment of the effect of the——

The CHAIRMAN. You understand, this is the minority report of the committee that I read from.

Mr. ACHESON. Oh, I see.

The CHAIRMAN. This is not the majority view. This is the minority opinion or view.

Mr. ACHESON. Yes; I understand. If the words "to know" appeared there alone without the word "appreciate," then you would have this result:

If a man shot—if A shot B and at the time that A shot B he suffered from a mental defect or disease, as the result of which he thought that the gun was a banana and he was offering B a banana to eat, he would, of course, be acquitted by reason of insanity.

But if the words "to know" appeared there alone as they did under the ancient *M'Naghten* ruling, if A was perfectly clear that he was holding a gun and not a banana, the chances are that he would be convicted.

Now, when you add the words "appreciate the wrongfulness of the conduct," you eliminate the effect of the words "to know." If A in that case knew that he was holding a gun and not a banana, but at the same time he was suffering from a mental disease or defect so that he thought it was perfectly just to shoot B as a result of a hallucination that B was going to shoot him, then he would still be acquitted under the ALI rule, acquitted by reason of insanity.

Now, that illustration is intended to show the committee that by putting the words "or appreciate" in there, making the test one of understanding of conduct, you really eliminate the significance of the *M'Naghten* term "to know," which is here in the same rule—do you follow me?

The CHAIRMAN. No; I am not sure that I do, but I will read the written transcript and see if I do then.

But of this I am sure, that you do not agree with the minority report of the House insofar as it says that it differs from the ALI model law in a critical respect.

Mr. ACHESON. That is correct.

The CHAIRMAN. And you say this is not a critical defect.

Mr. ACHESON. That is correct.

The CHAIRMAN. And it is left in the alternative, "know or appreciate."

Mr. ACHESON. That is right.

Let me put it another way now, to make it clear, if I may.

By putting in the language "to know or appreciate" they are putting in a very stern test and a much more liberal test, both in the alternative.

The CHAIRMAN. It is an alternative test.

Mr. ACHESON. Yes. Now, if the defendant can satisfy the liberal test, he will be acquitted by reason of insanity and since it is much more likely that he will satisfy the liberal test before he satisfies the very stern test, then the effect of "to know"—it is almost meaningless.

The CHAIRMAN. If he satisfies this test.

Mr. ACHESON. That is right; and in 99 cases out of a hundred, he will be able to satisfy the requirement that he does not appreciate the wrongfulness of his conduct, much more easily than he can satisfy the test that he does not know what he was doing.

The CHAIRMAN. Thank you.

Mr. ACHESON. Now, Mr. Chairman, I have some figures on the number of acquittals by reason of insanity which I shall not read, except to say that they show that from 1954 that approximately 2 or 2½ percent of the defendants tried were acquitted by reason of insanity. And in 1955 that figure climbed and it climbed fairly slowly to 1960 and then it climbed very steeply so that in 1962 the figure of acquittals by reason of insanity was 13 percent of all defendants tried.

Now, the figures dropped again, they dropped from 67 acquittals by reason of insanity in 1960, to 50 in 1963 and in percentages it dropped from 13 to 11.2 percent.

I have checked that against the number of trials that we had in the same fiscal year.

The number of trials decreased 21 percent from 1962 to 1963; the acquittal figure is decreased by 25 percent.

Therefore I rather suspect, Mr. Chairman, that the decrease is a function of the lesser volume of criminal trials rather than the result of the new law; namely, the *McDonald* decision—but this is speculation.

The CHAIRMAN. Well, the figures certainly have some meaning.

Mr. ACHESON. I think—let me say this, Mr. Chairman: It is not necessarily a vindication of *McDonald* to have the insanity acquittals drop, though. I think they were too high before. But you can only say that an insanity acquittal was wrong if, in fact, the defendant was not insane. I am just unable to tell whether 57 acquittals by reason of insanity was too high in relation to the number of people that were really insane.

I think the number of cases in which the defense was fraudulent and successful was very, very slight.

The CHAIRMAN. I think that the burden of your testimony is that as the prosecutor for the District of Columbia you are satisfied that the condition of the case law as it is now as the result of the *McDonald* decision is satisfactory, in the definition of insanity, in the test required, and that you do not see the need for a statutory enactment. That is what you are saying, is it not?

Mr. ACHESON. That is absolutely correct. I would like to leave the door open, Mr. Chairman, however, to see how the *McDonald* rule is applied over the next 2 or 3 years. If we have the experience with it over that period that we had in the last year, I think that we could say that we would be entirely satisfied with the case law.

The CHAIRMAN. Do I understand you further, as a result of the *McDonald* case, the case law is substantially the same as that laid down by the ALI?

Mr. ACHESON. I believe it is very substantially the same.

The CHAIRMAN. Well, if that were true and if it is substantially the same, then what is the argument against writing it into the statute so that no one has any doubt exactly what it is?

Mr. ACHESON. Well, only this, Mr. Chairman: A unanimous court has, with very painstaking care, formulated a rule which it is prepared

to apply. They are happy with the rule. The Government is happy with the rule. The District judges appear happy with the rule.

Rather than disturb the application of that rule by changing the words on which it is based, I think the less agitating course of action would be to leave the courts to apply that rule in their own way.

I am afraid that a legislative act which changed the terminology, although slightly, would still give a foundation to judges to start tinkering with this unanimous rule that they laid down in *McDonald* and we would be back, I think, to very diversified and controversial disagreements in the court of appeals and in the District courts as to what the legislative rule meant.

The CHAIRMAN. Thank you, Mr. Acheson.

Now, the staff has suggested a number of questions to be propounded to you, and I would like to ask them of you, and if any of them will take any research on your part or any time, just take the time for that.

The first question suggested by the staff is: What is the insanity test in criminal proceedings in the District of Columbia at the present time?

I think you have already answered that the test is the test laid down in the *McDonald* case.

Mr. ACHESON. That is correct, Mr. Chairman.

The CHAIRMAN. And the test is essentially the ALI test?

Mr. ACHESON. That is exactly right, Mr. Chairman.

The CHAIRMAN. And the second question is: Even though the appeals court has set forth insanity rules in the *Durham* and *McDonald* cases, is it still permissible for the trial court where the testimony supports it, to supplement the insanity instruction in terms of irresistible impulse, the *M'Naghten* right and wrong test, and as that test was modified by the *Holloway* case?

Mr. ACHESON. Well, that is permissible only if the district judge makes it very clear that irresistible impulse is only one of a number of examples of the way that mental condition can affect conduct.

If he makes it a synonym, an illustration that is intended to be synonymous with *Durham* or *McDonald*, he will probably be reversed, even now.

The leading case on that proposition is *Campbell v. The United States*, 113 U.S. App. D.C. 260, 307 F.2d 597 (1902).

The CHAIRMAN. In your opinion, was the *McDonald* case decided by the appeals court as a supplement to the *Durham* insanity case in order to allow the jury to consider a defendant's mental capacity for choice and control? Do you wish to enlarge in that area?

Mr. ACHESON. It serves as a clarification of *McDonald*. I think it is fair to say that that is what it is.

The CHAIRMAN. Clarification of *Durham*?

Mr. ACHESON. I am sorry, of *Durham*. I don't believe it was intended to be of *Durham*, altogether. I don't—I am not privy to the secrets of judges, but I suspect that when they are trying to get a unanimous court to sign on to an opinion like the *McDonald* opinion, they cannot be too categorical in what they say it is going to do. I think it was intended by the full court to be a clarification—a supplement, using your phrase.

The CHAIRMAN. How many other Federal jurisdictions, if you know, follow the insanity test as it is now defined for the District of Columbia, how many follow the *Durham* and *McDonald* tests?

Mr. ACHESON. Well, now, the third circuit in a case called *United States v. Currens*, 290 F. 2d 751 (1961), followed the test whether the defendant is suffering from a mental disease as a result of which he cannot conform his conduct to the requirements of law, half of the American Law Institute test—this is in the *Currens* decision. I think the opinion was by Judge Biggs, one of the very distinguished judges of that circuit. It has the effect, I think, of *McDonald*.

Now, the seventh circuit in the case of *Dusky v. United States* indicated that it would not follow the *Durham* rule, as the *Durham* rule was prior to *McDonald* and stated that if the question came before it squarely it would be inclined to follow the American Law Institute's formula.

The CHAIRMAN. Do you know if other Federal jurisdictions which have abandoned the *M'Naghten* right and wrong test have adopted the American Law Institute insanity test? I think you have partly answered that.

Mr. ACHESON. Well, partly, but I cannot speak for the other jurisdictions, Mr. Chairman, I am not familiar with the case law. But, of course, the question arises so infrequently in the Federal court of appeals outside of the District of Columbia, because usually the insanity defense is made only in connection with crimes of violence. It is not made in connection with security frauds or post office swindles, that kind of thing, usually in a crime of violence, of course, the Federal courts in our district have jurisdiction, local jurisdiction over crimes of violence. But in other Federal district circuits it is only the rare case where a murder or a robbery or other crime of violence is committed on an Indian reservation or on a Federal reservation of some kind that would get the question into a Federal court.

So that the case law is very slight indeed outside of our district.

The CHAIRMAN. The next suggested question I think you have answered: Is it a fact that the insanity test for the District of Columbia has emerged from a number of court decisions and is not set forth in statutory form? The answer is probably "Yes"; I suppose.

Mr. ACHESON. Yes, they are and on that point I have a few comments on the remainder of title II—I don't know whether the committee wishes to hear them now.

The CHAIRMAN. We would be glad to hear them. Your prepared statement went only to the definition.

Mr. ACHESON. That is right.

The CHAIRMAN. And now you want to comment on the other sections of title II?

Mr. ACHESON. Yes, sir.

The CHAIRMAN. I think this could be the proper place for you to comment on those. Do you have a prepared statement on that?

Mr. ACHESON. No; I do not, but I can be very brief.

As I went into the rest of title II, it was clear to me that a great many of the provisions there are already taken care of in the District of Columbia Code or closely paralleled in the practice that we follow under our court rules. Now, there are exceptions.

On page 3 of the bill at line 16 the bill provides for written notice to the prosecution of the intention of the defense to rely on the insanity defense. We do not now have any such requirement. It is possible under our practice here for the defense, particularly if the defendant

is out on bond, to be examined by a private psychiatrist, prepare an insanity defense and come to trial at the last minute with medical witnesses, leaving the Government wholly unprepared to meet the defense.

The CHAIRMAN. So you like that section.

Mr. ACHESON. That is right, Mr. Chairman. Now, this is not a frequent problem, and I do not want to say that orderly progress of the trial depends on written notice in advance. But every now and then we run up against this problem and it would help if we had a statute requiring advance notice.

The CHAIRMAN. Just so that I can have that clear, with regard to section 201(c) (2)——

Mr. ACHESON. That is correct. Now, subsection (3) provides that the verdict shall state when the acquittal is on the ground of mental disease. That is now provided for substantially in the District of Columbia Code, title 24, section 301(c).

Now, the next page, under subsection (e), subsection (e) provides——

The CHAIRMAN. I don't know that I follow you there.

Mr. ACHESON. On page 4 of the bill, Mr. Chairman.

The CHAIRMAN. Yes, line 4.

Mr. ACHESON. That is right, line 4. Now, that subsection provides for the procedure for determining the competency of the defendant to stand trial, all the way over to page 6, down to line 10. Subsection (e) describes exactly what will be done to provide examination, hearings, the determination of competency by the court, et cetera.

Now, those provisions are pretty similar in the procedures that they require, to title 24 of the District of Columbia, section 301(a).

The terminology is different, but the procedures provided for are quite similar.

The CHAIRMAN. What you are saying is that subsection (e), proceduralwise, is already incorporated into the District Code?

Mr. ACHESON. It does not add much to what we already have.

The CHAIRMAN. Very well. It would not add anything?

Mr. ACHESON. That is right. Now, subsection (f) provides for a court hearing on the issue of competency to stand trial—that again is not a great departure from what we already have in 301(a) in title 24 of the Code. And that similarity will go down to page 7, line 12.

Now, beginning with line 12, on page 7, the bill provides for what shall happen when the defendant is committed to the hospital to be restored to mental competency and the steps there provided for are not a great departure from what we now have provided for in section 301(b) of title 24.

Beginning on page 8, line 9, subsection (4), there is a provision in the bill that in certain circumstances where the defendant is incompetent and has been in the hospital for a long period, the court may dismiss criminal charges and order him committed civilly.

We do not have the statutory provision like this. We do, however, have a practice which rather closely follows this.

In extreme cases, where it is clear that the defendant has suffered from mental incompetency for a long time and is likely to continue for a long time, we often dismiss the criminal charges against him

and move in the civil courts to have him committed civilly to a mental institution. We do it under other statutory provisions.

This subsection (4), therefore, while it would be a new statutory provision, unlike anything we now have, would call for a practice which we now follow and I think would add very little to our jurisprudence.

The CHAIRMAN. Well, what do you actually gain by dismissing the criminal charges, if he is going to be committed, what difference does it make whether he is committed civilly or under a charge of murder?

Mr. ACHESON. We are talking here about defendants who have never been tried. They are in the hospital awaiting trial, pending a restoration of mental competency. Under our law as it now stands, we cannot move in the civil courts for a civil commitment if there is a criminal charge pending against a defendant and, therefore, we must dismiss the criminal charges before we move for civil commitment and, of course, that is what this subsection provides. But I think it would add very little to the practice that we now follow, or our authority to follow it.

Now, at the bottom of page 8, in subsection (g) of the bill, there is a provision that the court may order a judgment of acquittal by reason of insanity solely on the basis of a medical report. I think there are risks in such a provision, particularly in a case where a medical report finding a defendant insane might be the result of a divided panel of doctors.

In cases where panels of examining doctors are divided, we usually take the case to a jury trial. It seems to me that a jury question is presented where doctors are divided and I would not like to see authority in the judge to override that division of medical view, and order an acquittal on the strength of his own selection of one medical view as against another.

I would just like to call the attention of the committee to this provision on page 9 of the bill, line 9 where it provides for the testimony of psychiatrists in trials. Under our present case law, notably *Jenkins v. United States*, 113 U.S. app. D.C. 300, 307 F 2d 637 (1962), a medical witness may be, not a psychiatrist, but a clinically trained psychologist. Under that decision, a psychologist who does not have medical training, but who is familiar with insanity cases and hospital work, familiar with the records, familiar with the psychological testing procedures, is allowed to come in to court in a criminal prosecution and express a view on mental disease or express an opinion or view as to whether the criminal act was the product of a mental disease. This statute would eliminate that, and limit expert testimony to psychiatrists.

I do not have any particular comments on the balance of this bill, Mr. Chairman, except to say that, on page 11, there is a provision beginning at line 7 for a hearing in court on the question of the release of the patient from a mental institution, and that in the procedure provided for here in the bill the court may appoint at least two qualified psychiatrists to examine the person.

Our procedure under our present law is very different from this. This would substantially change the procedure and I think would substantially involve us in more litigation over releases from hospitals, more than we now have, under our present procedure.

Under the present procedure the court may act on the certificate of the hospital unless the Government objects to a release recommended by the hospital, and in that case there is a hearing at which the hospital doctors who participated in the examination are called as witnesses.

Now, this bill would add to that procedure the appointment of additional outside doctors who would come in and give their testimony after examination and I think it would multiply the cases of divided medical opinion and would multiply the hours spent in court by doctors over the question of release from mental institutions.

One last comment—

The CHAIRMAN. Pardon me. I gather you are opposed to that section, are you not?

Mr. ACHESON. Yes, Mr. Chairman. I am opposed to it. I think it would be inconvenient, to say the least. It would be an additional burden on the staff of St. Elizabeths Hospital because, in almost every case where their view was that the defendant should not be released from the hospital, the defendant will attempt to invoke this procedure and have additional doctors appointed by the court and take the case to court. Not only the new doctors but the original St. Elizabeths doctors would have to come to court and testify.

And they spend so much of their time testifying now that I think they would be spending more time in court than in the hospital, under this provision.

On page 13 of the bill, and I am merely flagging it to the attention of the committee, page 13, line 11, there is a provision that the jury should not be instructed by the court of the consequences of a verdict of guilty, or acquittal by reason of insanity, that is, they should not be told that, if acquitted by reason of insanity, the defendant will go to the hospital instead of going free.

Under our present case law, in the case of *Lyles v. The United States* (103 U.S. App. D.C. 22, 254 F. 2d 725), the District judge must instruct the jury as to the consequences of an acquittal by reason of insanity, unless the defense affirmatively waives that instruction.

The CHAIRMAN. You say you are flagging that to the attention of the committee—

Mr. ACHESON. Well, Mr. Chairman, it does not make much difference to me whether the District judges give that instruction or do not. I think it is probably better that they should give it but I don't feel strongly about it, I just simply wanted the committee to know about this provision.

The CHAIRMAN. Is that an ALI recommendation?

Mr. ACHESON. This is an ALI recommendation also, and it is the only provision of the bill that radically differs from our present practice and, in fact, is opposite to it.

The CHAIRMAN. And your judgment on it is that—

Mr. ACHESON. Well, my judgment is, and I don't think it is a vital thing, but I think it is better that the jury should know the consequences of acquittal and the consequences of conviction. If the jury thinks, for example, that if acquitted by reason of insanity a defendant is on the street, the chances are that they may not acquit, in a case where the defendant really had a serious mental disease and really is not responsible for the crime.

The CHAIRMAN. But that is a requirement, is it, under the statutory law or case law?

Mr. ACHESON. Under the present case law.

The CHAIRMAN. Present case law but not the statutory law?

Mr. ACHESON. That is right, requiring the District judge to tell the jury that if the defendant is acquitted by reason of insanity he will not go free but will go under compulsory commitment to a mental hospital.

The CHAIRMAN. You say that you favor that instruction? Do I understand you correctly or do you not favor the instruction?

Mr. ACHESON. No, I favor that instruction.

The CHAIRMAN. Therefore, you would be opposed to this provision?

Mr. ACHESON. I am opposed to it. I do not feel deeply about it, Mr. Chairman, but I prefer our present practice to the provision of this bill.

The CHAIRMAN. Well, you say that is the only item that has a radical change, is substantially different, in title II?

Mr. ACHESON. That is right, Mr. Chairman.

The CHAIRMAN. But is different from your present practice or statutory law or case law.

Mr. ACHESON. That is right.

The CHAIRMAN. The definition of insanity by the ALI, their definition is very, very similar to the present case law as enunciated in the District.

Mr. ACHESON. That is right.

The CHAIRMAN. And this is the only change that you say varies from your present statutory or case law in the District of Columbia?

Mr. ACHESON. Under this bill I can imagine cases where the jury, not knowing that the defendant would go to a mental hospital, would convict him even though he is sick and so sick as to be irresponsible, and I would think that was an injustice.

Now, those are the comments that I have on the rest of the bill and if there are any questions on those parts, I would be glad to try to answer them.

The CHAIRMAN. Summing up your analysis of title II, I understand that section 201(a)(1), which is the definition section, of the House bill, in your opinion is not necessary because it is substantially the case law as set out in *McDonald*, is that correct?

Mr. ACHESON. That is right.

The CHAIRMAN. As to the balance of the sections under title II you feel that they are not necessary because they are already covered by either statutory law or case law in the District of Columbia. Is that correct?

Mr. ACHESON. Primarily statutory law.

The CHAIRMAN. You mean primarily statutory law with the exception of the sections 201(h)(4); 201(g)(1); 201(h)(2) and 201(i)(1)? It is my understanding that under section 201(i) the jury is not to be told of the consequences of a verdict of acquittal by reason of insanity. This provision in the bill varies from your present instructions given by the district courts in insanity cases, where they inform the jury of the consequences of an acquittal by reason of insanity. Is it my understanding that you favor the present instruction?

Mr. ACHESON. That is right.



The CHAIRMAN. And which is case law and not statutory?

Mr. ACHESON. That is right.

The CHAIRMAN. Therefore, as for the remaining sections of title II, you would be opposed, mildly opposed, let us say, to this particular section; is that right?

Mr. ACHESON. That is right.

The CHAIRMAN. Other than that there are no radical changes.

Mr. ACHESON. And just so it is clear on the record, on page 11 the provision beginning at line 7 I think would seriously complicate our present court procedures governing release from the hospital.

The CHAIRMAN. You would be opposed to that because unless it were properly qualified it would unduly encumber the present procedures, as I understand your testimony and you do say in that connection that if that were to become the practice in the courts that maybe the doctors would be in court even more often than they are now.

Mr. ACHESON. That is right.

The CHAIRMAN. Now, let me ask you just a few more questions, if you don't mind.

Mr. ACHESON. Yes indeed, Mr. Chairman.

The CHAIRMAN. You may or may not have this and if you do not you may supply it for the record—the suggested question is as follows:

Is it a fact that the vast number of the States have their insanity law set forth by statutes?

Mr. ACHESON. I don't know.

The CHAIRMAN. You do not know?

Mr. ACHESON. I do not know the answer to that.

The CHAIRMAN. Well, I am not asking you to research that.

Mr. ACHESON. I know that New York has its insanity test defined by statute and there is a big controversy going on at the present time there over whether they should abandon the McNaghten rule there and adopt something like the American Law Institute test.

The CHAIRMAN. Well, I know in my own State of Nevada, where you have a definition of insanity, that having the definition in a statute, the mere fact that it is set out in the statute, and you have changes in the words in the statute, it does not make it any less difficult than where you have a rule or definition of insanity not set forth in statutory form as in the District of Columbia.

Mr. ACHESON. That is a very, very difficult problem. And I think you put your finger on precisely the reason why one ought not to pass a statute even though it is like the case law test under *McDonald* because, as you say, you change the words in the statute and immediately you start a train of new jurisprudence and if you had a pretty good test before, you are likely to get it loosened up.

The CHAIRMAN. I would be glad to have you clarify this because the argument otherwise is that if you have the ALI test and that is substantially the test laid down by the case law in the *McDonald* decision, then there would be no harm in having a statutory definition.

Mr. ACHESON. I strongly disagree with that, Mr. Chairman.

The CHAIRMAN. Then you would be in disagreement to having the definition of insanity and the instruction to be given, set forth in statutory form.

Mr. ACHESON. Correct.

The CHAIRMAN. That is the point you are making?

Mr. ACHESON. Yes, sir.

The CHAIRMAN. The next suggested question—I think you have answered. The question is whether it would be desirable for the defendant to provide notice to the government of an intention to plead an insanity defense. I think you said that you liked that section of the suggested title II concerning written notice to the prosecution.

Mr. ACHESON. I like that, but the problem does not arise more than once a year or so, I would say, with us.

The CHAIRMAN. I see.

Mr. ACHESON. There is a problem also with that provision of the bill, as to how to enforce it if the defendant does not give the written notice. There seems to me at least to be a serious constitutional question whether you can deprive him of the insanity defense. And if you cannot deprive him of it, then that provision of written notice would have no sanction and would—

The CHAIRMAN. I thought that you were interested in having notice and that you would be in favor of that provision.

Mr. ACHESON. Well, it is a sanction that really ought to be directed against the lawyer and not against the defendant, as it is under the bill.

The CHAIRMAN. Well, one further suggested question: Does it appear desirable to have the defendant carry the burden of establishing his insanity defense by a preponderance of evidence? Where is that burden as of now?

Mr. ACHESON. Well, in the District of Columbia the government, if the insanity defense is properly raised by a showing, some evidence of mental disease, the government has the burden of providing beyond a reasonable doubt either that the defendant does not have a mental disease or that the crime was not a product of the mental disease.

The CHAIRMAN. And then the burden shifts, is that right?

Mr. ACHESON. Then the burden shifts. Now, under the law of Oregon, or certainly as it was a year or two ago, I am not sure now, under the law of Oregon the defendant had to show beyond a reasonable doubt that he was insane and not responsible. In about 22 States, Mr. Chairman, the defendant must show by a preponderance of the evidence that he was insane and not responsible.

So the answer to the question is that the States are divided on how they place the burden of proof on this issue.

The CHAIRMAN. Well, the suggested title II, subsection (c), line 6 to 10 on page 3 reads as follows:

Mental disease or defect is an affirmative defense which the defendant must establish by a showing of substantial evidence.

That places the burden on the defendant.

Mr. ACHESON. I don't believe that provision changes the burden of proof. I think it is intended only to require that the issue be raised initially by a showing of more than a scintilla of evidence.

The CHAIRMAN. Are there sections within title II that involve the burden of proof?

Mr. ACHESON. I think not, no. There are none, Mr. Chairman.

The CHAIRMAN. Then you say this is not a burden-of-proof section.

Mr. ACHESON. This is not a burden of proof section, it is a section only requiring that the defendant raise the issue, introduce the issue into the case by a showing of substantial evidence and if he does that, then the burden shifts, as it now is, to the Government to prove beyond a reasonable doubt the opposite of his contention.

The CHAIRMAN. Then if the section would become law it would have no effect upon the present case law in the District of Columbia as far as burden of proof is concerned?

Mr. ACHESON. That is right.

The CHAIRMAN. The burden of proof still starts with the defendant and after he has produced some evidence then the burden of proof shifts to the prosecution to prove the contrary?

Mr. ACHESON. That is right, Mr. Chairman. This provision would make it a bit more difficult for the defendant to raise the issue initially, but if he did the burden of proof would remain where it now is.

The CHAIRMAN. This question has just been suggested by the staff: Can you state in a sentence or two what the rule is in the District of Columbia on the question of mental disease or insanity or whatever you call it—do you have a sentence or a two-sentence definition that is the equivalent of the ALI rule on the question of criminal responsibility?

Mr. ACHESON. Let me read the crucial sentence from the *McDonald* opinion.

The CHAIRMAN. You are going to read now from the *McDonald* decision?

Mr. ACHESON. I am reading now from the *McDonald* decision of October 8, 1962.

The CHAIRMAN. Where is that found?

Mr. ACHESON. This is cited in my statement, Mr. Chairman.

The CHAIRMAN. Very well.

Mr. ACHESON (reading):

The jury should be told that a mental defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.

The CHAIRMAN. This is from the *McDonald* case and is given as an instruction in all insanity cases by a presiding judge or by a jury?

Mr. ACHESON. It is a mandatory instruction.

The CHAIRMAN. It is a mandatory instruction; and your further statement that it is substantially the same as the ALI instruction.

Mr. ACHESON. That is right.

The CHAIRMAN. Thank you very much, Mr. Acheson. You have done a good job and I appreciate it, your testimony has been very helpful.

Mr. ACHESON. Thank you.

The CHAIRMAN. Our next witness is Dr. Dale C. Cameron, Superintendent of St. Elizabeths Hospital.

Dr. CAMERON. Thank you.

The CHAIRMAN. You may proceed, sir.

STATEMENT OF DALE C. CAMERON, M.D., SUPERINTENDENT, ST.  
ELIZABETHS HOSPITAL, WASHINGTON, D.C.

Dr. CAMERON. Mr. Chairman, members of the committee, my name is Dale Cameron. I am Superintendent of St. Elizabeths Hospital, Washington, D.C. I deeply appreciate your invitation to present my views on H.R. 7525. Because of time limitations, the Department of Health, Education, and Welfare has not approved nor disapproved my statement. It will later submit its views in response to the committee's request for a departmental report on this bill.

H.R. 7525, an act relating to crime and criminal procedure in the District of Columbia, concerns itself, in title II, with modifications in the District of Columbia Code relating to "Insane Criminals." I shall limit my comments to that title. The proposed changes deal with such things as competence to stand trial, the definition of mental disease or defect excluding responsibility, burden of proof, and the legal effect of acquittal on the ground of mental disease or defect.

It is apparent that a very sound and long-honored concept underlies this act—that is sound insofar as it goes. That concept is well expressed by the quotation "our collective conscience does not allow punishment where it cannot impose blame."

The difficulty with this laudable, but limited concept is that it focuses attention in criminal procedures on the moral issue of blameworthiness to the almost total exclusion of what I believe to be at least equally important issues. It is to be hoped that at some future happy time "our collective conscience" in relation to criminal law will be as concerned with the prevention of unlawful acts resulting from mental disease and disorder and the treatment of mentally ill persons who have committed unlawful acts, as it now is with the determination of guilt and the appropriateness of imposition of blame.

If title II of H.R. 7525 is enacted in its present form—and I sincerely urge that it not be—it will perpetuate, but with substantial modifications of details, the present system that requires jurors to consider simultaneously two distinct and essentially unrelated but separable questions; namely (1) did the defendant commit the unlawful act charged, or as it is phrased with moral judgment connotations, "Is he guilty," and (2) if so, has the defendant an abnormal mental condition directly or indirectly so related to the unlawful act that he should, because of our "collective conscience," be excused from blame? The first is a question of fact, the answer to which may be and usually is expressed in moral terms, though it need not be so expressed. The second is both a medical and moral question; that is, Is he so sick (a medical question) and his illness so related to the act charged (a medical question with substantial moral overtones because of the unlawful nature of the act) that he should be held blameless (a moral question)? The second question is almost always answered in moral terms.

The unnecessary comingling of these essentially unrelated issues in a single question, (1) makes for a needlessly difficult answer, (2) tends to lead to unduly rigid disposition of "guilty but ill" defendants, and (3) introduces unfortunate complications into the process of answering the first or primary question of fact as to whether or not the defendant committed the act charged.

May I suggest that existing—and the proposed—procedures be so modified that jurors be concerned only with the first question of fact; namely, did the defendant commit the unlawful act alleged? If he did, then let the court or another dispositional body obtain, without a jury and in an informal manner, such medical opinion and its bases as may be necessary to assist the court in deciding on the most appropriate disposition of the defendant who has already been found to have committed the act charged. Proper disposition of such a defendant must take account of his particular problems and needs as well as those of society. In fact, it may be argued on philosophical grounds that unless society considers the needs of its members, its own ends are not well served.

If the defendant has a significant mental disorder, it matters little whether it is sufficiently related to his unlawful act to state formally that he should or should not be excused from responsibility for that act. I see no necessity that such a moral judgment be made, certainly not by a jury. It contributes nothing to what is to follow.

Rather, to repeat, I urge that his mental condition be considered by the court without a jury, or by another dispositional body, when deciding where, for how long, and in what manner the defendant who has been found to have committed an unlawful act will be under the management of society. In other words, medical opinion can be more helpful on questions of disposition than on those of commission of an act or of guilt.

The CHAIRMAN. Does this not take this question of insanity completely away from the jury?

Dr. CAMERON. It is my understanding that there have been attempts to obtain this in some of the States and to my knowledge it has not been achieved in any State. It is the common practice in several European countries.

The CHAIRMAN. Thank you.

Dr. CAMERON. The advantages of the concept and procedures proposed are several:

1. The competence of a defendant to stand trial would continue to be determined by the court without a jury after access to medical opinion and its bases.
2. The question of fact as to the commission of an unlawful act would be determined by a jury without the presentation of irrelevant medical issues in an atmosphere of moral judgment. A jury trial could, of course, continue to be waived.
3. Physicians would be spared unnecessary involvements in the adversary process to determine the factual and moral issues. They have no special skills or knowledge to offer on such issues.
4. Physicians would be able to make available to the court or another dispositional body their special knowledge about mental disorders in general, and the mental condition of the defendant in particular, in a nonadversary atmosphere, looking to questions of treatment and rehabilitation, if indicated, rather than to a factual and moral issue already settled.
5. The need for dispositional resources beyond those now available in the District of Columbia, would be highlighted. It is my own belief that persons who have committed unlawful acts and who require separation from society cannot properly be managed, as at present, in

but two basic institutional programs—prisons and hospitals. Human beings do not fit into neat compartments.

There are many different types of persons with all gradations between. Surely, there is a need for modes of approach other than those provided by prisons and hospitals as they are now operated in the District of Columbia—something inbetween. In fact, other countries and other jurisdictions in this country have developed some alternatives. The Netherlands, for example, has adopted the basic concept and procedures I have just set forth, and has several different types of facilities to which its guilty may be sent. Some States, for example, Maryland, have special institutions with well-developed security features in which programs are provided for persons involved in unlawful acts who are mentally ill, but who are not out of contact with reality.

I might say parenthetically that many of these patients in mental hospitals are out of contact with reality and therefore require a different type of a program than those who are in touch with reality.

Before turning to the specific provisions of H.R. 7525, let me observe that some of them clearly would be unnecessary were you to accept the concept and its related procedure that I have just discussed, and of which I strongly urge your favorable consideration. Decisions as to blameworthiness contribute little to the solution of the essential questions:

Was an unlawful act committed by the defendant?

If so, what is the proper disposition of him, taking account of the best interests of society and those of the individual involved?

The CHAIRMAN. Under your theory, Doctor, how would you determine degrees of murder?

Dr. CAMERON. Sir?

The CHAIRMAN. Degrees of murder, how would you determine it under your theory?

Dr. CAMERON. It would be irrelevant to me as to whether he—

The CHAIRMAN. In other words it is irrelevant whether he killed a man or did not kill a man?

Dr. CAMERON. If he is grossly psychotic and mentally ill, it is irrelevant whether it is first-, second-, or third-degree murder, unless you are preoccupied with the purpose of pinning a label on him.

What I am suggesting is that instead of being preoccupied with the label, let us let society be more preoccupied with the man and what ought to be done with him.

He has committed a murder. It is unlawful—it is an unlawful act. What should be done with this man?

It is—if it is determined that he is not mentally ill, then go ahead and apply first-, second-, or third-degree murder in any way you can, which is part of the moral judgment involved. But if he is mentally ill, then the question is, What do you do with him? Put him in a hospital? And if so, for how long and where and so on and for what kind of a program?

The fact that it is first-, second-, or third-degree murder contributes little to this solution.

The CHAIRMAN. Thank you.

Dr. CAMERON. I might say parenthetically that in many Federal jurisdictions where the *McNaghten* defense is often used, that many

persons are found guilty who are so obviously mentally ill that when they reach prison it has been necessary for the Federal Bureau of Prisons to build a mental hospital to take care of guilty people who are obviously sick.

I have spent the last couple of years working with the Director of the Federal Bureau of Prisons trying to help him design still another hospital.

Now here you see the moral sanction or the moral diagnosis of guilt had really very little to do with the kind of program needed by the person, and it was necessary within the prison system to develop something else for these obviously sick people.

The CHAIRMAN. Under your proposed procedure a commission or other dispositional body would determine responsibility once a jury has concluded that the defendant committed the unlawful act.

Dr. CAMERON. Yes, sir.

The CHAIRMAN. Under your theory—

Dr. CAMERON. Yes, sir.

The CHAIRMAN. You follow that up by saying that to determine the mental condition of the defendant, you would—you would put that up to the judge?

Dr. CAMERON. That is correct.

The CHAIRMAN. Well, is the judge qualified to act in this field? Would you say it should be the judge or would you say it should be a board of psychiatrists?

Dr. CAMERON. Well, I say the judge or other dispositional body.

The CHAIRMAN. Yes, that is true.

Dr. CAMERON. And that judge or other dispositional body would hear testimony from psychiatrists and other physicians solely around the question of whether or not the man was sick and what kind of treatment if any is indicated for him, and the medical testimony would then be presented in an atmosphere looking forward to the disposition of the man rather than, as now is the case, in an adversary atmosphere looking primarily to the question of did he do it and if he did do it, is he to be imprisoned?

The CHAIRMAN. And under your theory that would be after he had committed the unlawful killing and been found to have done so and—

Dr. CAMERON. Yes, sir.

The CHAIRMAN (continuing). And then you would bring it before a judge or dispositional body and at that time they would pass upon whether he has the mental capacity to commit the crime?

Dr. CAMERON. That is correct.

The CHAIRMAN. If he did not have the mental capacity to commit the crime that the jury says he did, then the judge should be the sole arbiter of that question?

Dr. CAMERON. As he now is under the law. I am sorry.

That is incorrect because under the current procedure if he finds him not guilty by reason of insanity, which is a euphemism for "he did it but he should be excused from blame," then there is a mandatory law which commits him to the hospital for treatment and that mandatory law would remain in effect that is, if it were to remain in effect, then after the jury said that he did it, the judge would determine after hearing medical evidence, as to whether or not he was so sick

that he might be excused, and if he were, he would still go to the hospital.

The CHAIRMAN. I wonder if your theory would require a change in the Constitution, under which certainly every man is entitled to trial by a jury of his peers, by 12 men tried and true and they are the ones who are supposed to determine this question—and you would substitute a judgment decision as to that, constitutionally—I am just wondering if your theory could be brought about without changing the Constitution.

Dr. CAMERON. Well, Mr. Chairman——

The CHAIRMAN. Of course, I understand that you are not posing as a constitutional lawyer.

Dr. CAMERON. I certainly do not pose as a constitutional lawyer, no, and I don't have any real opinion as to whether a change in the Constitution would be required, but if it is, I still think it would be useful in the interest of the proper disposition of these people.

The CHAIRMAN. And you think that would be a better way of dealing with these problems than we are dealing with them now.

Dr. CAMERON. I do.

The CHAIRMAN. You don't know whether the constitutional amendment is required or not to accomplish that; but you would prefer your proposed procedure.

Dr. CAMERON. That is right.

The CHAIRMAN. Thank you.

Dr. CAMERON. In discussing the specific provisions of H.R. 7525, I shall comment on only those sections of title II that have substantial medical aspects.

Subsection (a), paragraph (1) defines a person with a "mental disease or defect excluding responsibility" as one who lacks "substantial capacity either to know or appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." This is not a very helpful definition for the following reasons:

1. Physicians will have difficulty testifying, if requested, on the question of knowledge or appreciation of the wrongfulness of conduct since this is more a moral than a medical question. Physicians have no special knowledge or skill in relation to moral issues.

2. The meaning of capacity "to conform \* \* \* conduct to the requirements of law" is vague. Unless the legislative history makes the intent of this phrase quite clear, both jurists and physicians will have difficulty with it. It may be interpreted almost exclusively in relation to volition or will. If so, it is little different than "power to choose" or "irresistible impulse." If so interpreted, it deals only with a fractional part of the personality factors that may be involved in illness and affect vitally one's capacity to conform.

Now, I was present in the room when the U.S. attorney was testifying and it is obvious from his testimony that he would not interpret this section as being limited to volition and will. But I have talked with jurists who in saying what they understand the ALI formulation to mean, do interpret it just as I have described; that is, strictly in relation to will and this I think makes the point that Mr. Acheson is making, that you would now start all over with a new theory of judgment based on a new formulation which they are now operating on which comes to eventually the broader definition which I shall now comment on.



If it is interpreted broadly, as I believe it should be, recognizing that all facets of personality (not just volition or will) affect one's "capacity to conform," it is little different than "the product or result of" as set forth in *Durham* and clarified in subsequent decisions. I would urge the latter formulation if we must, in my view unnecessarily, commingle medical and moral issues while endeavoring to establish a question of fact. It is, in my opinion, the only legal test of mental disease or defect excluding responsibility of those now in use or about which I have read or thought, that clearly allows a physician to put before a jury all the pertinent medical information about a defendant. An intelligent juror might wish to be informed about this totality of information before being called on to exercise his awesome responsibility by casting his vote for or against guilt and blameworthiness. I believe that jurors, in such cases, should have all pertinent information before them, medical and otherwise, not just that part that is permitted to filter through the sieve of a limited legal definition of "insanity."

The CHAIRMAN. Doctor, if I may interrupt, my understanding of your analysis of the suggested definition in 201(a)(1) would be that you would leave it where it is as a result of the *Durham* and *McDonald* decisions rather than attempt to tamper with it by imposing a statutory definition?

Dr. CAMERON. That is correct. If you impose the definition proposed in this bill then it would immediately follow that there would be a series of test cases to find out whether it should be strictly interpreted as dealing only with volition or broadly interpreted as I just described and if broadly interpreted, then it is essentially in effect, as Mr. Acheson pointed out, the present situation under *Durham* and *McDonald*. And in my view there is no need, since we have reached the broad definition already fairly clearly, there is no need, since we have that broad definition under case law, to start all over again redefining it just to achieve the same purpose. Of course, I disagree with some of the processes of comingling—I believe it is unnecessary to do so, of the moral and medical issues.

The CHAIRMAN. Thank you.

Dr. CAMERON. Subsection (a), paragraph (2) states that—

The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

With this provision I strongly agree, and it should be retained as worded. However, in the introductory portion or caption of subsection (a) the following is stated:

\* \* \* sociopathic and psychopathic personality is not disease or defect \* \* \*

If this is intended to refer to paragraph (2), it will lead to needless inaccuracy and confusion. That paragraph, the content of which I believe is sound and desirable, is not a description of sociopathic or psychopathic personality. These essentially synonymous terms are a medical diagnosis. To make this diagnosis, a psychiatrist would ordinarily expect to find a characteristic pattern involving numerous positive signs and symptoms. Repeated antisocial behavior is not one of them, as far as I am concerned. True it is that sociopaths often are involved in criminal and other antisocial behavior, but not all sociopaths are so involved, nor is all crime perpetrated by sociopaths.

Therefore, I recommend that the first sentence of subsection (a) be revised to read "mental disease or defect excluding responsibility; repeated criminal or otherwise antisocial behavior is not mental disease or defect per se."

The CHAIRMAN. Doctor, at that point, just to help my own thinking, how would you define a sociopath personality?

Dr. CAMERON. Well, I can describe a sociopathic for you if you will permit me to. This is a list of some things that show the hallmarks of a sociopath, they are as follows:

1. An inability to put off present pleasure for future gain.
2. A lack of aim and foresight.
3. A failure to learn from experience.
4. Impulsiveness.
5. Egocentricity.
6. Lack of lasting emotional rapport with others.
7. Lack of sympathy.
8. General immaturity.
9. Little intellectual influence on behavior.

Now, I would like to call your attention to the fact——

The CHAIRMAN. Well, do you have to have all of those to be a sociopath?

Dr. CAMERON. No, Mr. Chairman, not all, but you would have the majority of them and in that pattern. But I would like to——

The CHAIRMAN. But you would have to have at least some of them.

Dr. CAMERON. You would have to have quite a few. And, Mr. Chairman, let me suggest that many criminals do not show at least six of the things I have mentioned—let me draw them, let me invite them specifically to your attention.

There are many criminals who do have the ability to put off pleasant pleasure for future gain. There are many who do have aim and foresight. There are many criminals who do learn from experience. There are a good many who are not impulsive and there are quite a few who are not immature, and there are quite a number who do regulate their behavior by their intellect, but purely in an unlawful way.

But I am trying to point out that the signs and symptoms that I describe which are those of a sociopath do not necessarily describe a chronic criminal and certainly—let me go ahead and make one other point.

I want to call your attention to the fact, Mr. Chairman, that I did not list antisocial behavior as one of the signs and symptoms because indeed it is not a medical symptom at all in the true sense. It is rather a sociophenomenon not peculiar or exclusive to sociopathy or any other form of mental disorder.

Now, the persons with the above-described symptoms and signs do often indulge in antisocial behavior, and that is not at all surprising but, however, the fact remains that not all sociopaths are involved in criminal behavior and not all criminal behavior is perpetrated by sociopaths.

And antisocial behavior is particularly troublesome if considered as a symptom since this leads to a peculiar form of circular logic which is as follows:

Anyone who commits an unlawful act must be crazy; anyone who is crazy is to be excused from what he does; therefore, no one is responsible for anything that he does.

And I think it is only those persons who get trapped in this remarkable circular reasoning are the people who tend to think of sociology as being defined primarily by antisocial and unlawful behavior and also to equate the lack of responsibility with the presence of mental disorder without the need to find any relation between the mental disorder and the event.

I think that I have perhaps taken an undue amount of time and—

The CHAIRMAN. No, not at all.

Dr. CAMERON. But the point is that this will lead to the most astonishing confusion in the courts if the law says that sociopathic and psychopathic personality is not a mental disease or defect and then define something else called, call it "antisocial behavior," as disorder—I think you would find very, very few physicians who would agree with that definition in the law.

The CHAIRMAN. Thank you. You may proceed.

Dr. CAMERON. Subsection (c), paragraph (1), makes "mental disease or defect excluding responsibility" an affirmative defense. While this is strictly a legal, not a medical matter on which a physician might be expected to comment, I would like to lend my support to the concept. Its adoption will help solve many of the problems that have been troublesome under the *Durham* decision and, in my opinion, will continue to be troublesome as long as the law requires the simultaneous consideration of medical and moral issues, and I think it will help some.

Subsection (d) puts forth the usual definition of mental disease or defect excluding fitness to proceed and is, from my point of view, as satisfactory as can be devised at this time.

Subsection (e), paragraph (1), indicates that upon request of the court, the Superintendent of St. Elizabeths Hospital, among others, may "designate at least one qualified psychiatrist \* \* \* to examine and report upon the mental condition of the defendant." This, again, is quite satisfactory.

Subsection (e), paragraph (2), relative to the nature of the psychiatric examination is also satisfactory. However, I should like to invite your attention to the fact that nowhere in title II is treatment explicitly authorized for defendants while in a hospital undergoing examination. Some such defendants will doubtless be ill and in need of treatment. Authority should be included to permit the use of such treatment methods as are accepted by the medical profession for the treatment of persons found to be suffering from a mental disease or defect while such person is hospitalized for examination.

Subsection (e), paragraph (3), indicates what shall be included in the report of the examination. I believe the court and the examining physician would be better served if it were reported that there be included in such reports at least a brief statement as to the basis of major opinions rendered. I need not repeat my comments on the nature of the tests of mental disease or defect excluding responsibility, which tests are stated in this and in preceding and subsequent subsections. Nor is it necessary to repeat, in connection with this and other subsections involved, my comments on the inappropriateness of psychiatrists being involved in the adversary process of factfinding with reference to the commission of an act.

Subsection (h), paragraph (1) would be improved by adding reference to hospitals having facilities for treatment as well as for the custody and care of the mentally ill.

Subsection (h), paragraph (2), provides that if the superintendent of the hospital to whom a person is appropriately committed is of the view that the person so committed "is no longer suffering from mental illness and may be discharged or released on probation without danger to himself or to others \* \* \*" [emphasis supplied] he shall make application for release, et cetera. Your attention is invited to the fact that this phrasing could be interpreted to set up two conditions for applications for release, both of which must be satisfied in each case before application for such release is made. The two conditions are (1) "no longer suffering from mental illness"—that is, full recovery, and (2) "without danger to himself or to others." Many persons may be improved to the degree that they are without danger to themselves or to others and yet not be fully recovered. A strict interpretation of this paragraph would preclude making application for their release. Still others may recover from their illnesses and yet be dangerous to others, but not because of mental illness. A dangerous criminal may become mentally ill, recover from his illness, and still be a dangerous criminal. A preferred working might be achieved by deleting the material between the word "subsection" in line 25, page 10, and the word "he", in line 3, page 11, and inserting in lieu thereof the following:

is improved to the degree that he may be discharged or released on probation without danger to himself or to others in the reasonably foreseeable future as a consequence of mental disease or defect.

This same paragraph also requires the superintendent to "make application for the discharge or release of such person in a report to the court by which such person was committed." May I strongly suggest that consideration be given to placing the power of discharge or release on probation from a hospital in a body other than the committing court. Such powers of discharge and release on probation are not vested in the sentencing court once a convicted person has been sentenced to prison. Rather, it usually is vested in a board of parole or of pardons. In my view, a body consisting of psychiatrists, attorneys, and perhaps others, should be established and granted powers of discharge and release on probation in connection with mentally ill persons committed to a mental hospital as a consequence of criminal proceedings.

Subsection (h), paragraph (2), further—

The CHAIRMAN. Is there any precedent for that, Doctor?

Dr. CAMERON. In the European countries, as I mentioned previously, this is the way it is done. While I have every confidence in the jurists and in the courts, if it should happen at some future time that there was a judge who happened to be particularly concerned about the release of people who had been in serious difficulty—take particularly, and this does not apply too much to the District, but assume if you will a judge in a small town where there has been a sex crime and he is under considerable pressure from the local community to retain in the hospital a man who is in serious trouble, and if the release of that person rests with the court, it may be on occasion rather hard to get him from the hospital after he has recovered.

Now, I say this not in relation to the courts in the District, but in relation to it as a matter of principle, and I think that the laws in the District should be somewhat of a model to other parts of the country.

I also base it on the assumption that if society and the legislative bodies of the country have decided that it is inappropriate to place

this power in the courts, the court which has sentenced the man to prison, it is equally inappropriate to place that power in the court for a person who is mentally ill.

Now, subsection (h), paragraph (2) further states that when the court receives a report from the superintendent of a hospital applying for the discharge or release on probation of a person in his custody, "the court shall thereupon appoint at least two qualified psychiatrists to examine such person and to report \* \* \*." [Emphasis supplied.] May I suggest that "shall" be changed to "may." It is the practice at St. Elizabeths Hospital for the Superintendent to receive recommendations from two or more qualified staff psychiatrists familiar with such person before making his own recommendation to the court. To insist that still other psychiatrists be required, after the recommendation is made, and as a matter of routine in all cases, to examine and report on the condition of the person recommended for discharge or release is burdensome and unnecessarily time consuming for both the person in question and the psychiatrists involved.

In summary, let me say I recommend for your serious consideration that in criminal cases involving questions of mental disease or a defect excluding responsibility, (1) the proceedings be so arranged that a jury be asked only to determine the question of fact as to the commission of an unlawful act by the defendant, and (2) that the medical issues be considered in relation to the disposition of a defendant who has been shown to have committed the act alleged. In any event, I urge against the adoption of the proposed new rule of law in regard to mental disease or defect excluding responsibility. The *Durham* decision, as modified particularly in the *McDonald* case, is a better solution. I understand that the Department of Justice and the Commissioners of the District of Columbia believe the present rules in this regard are satisfactory and should not be changed by legislation at this time.

Mr. Chairman and members of the committee, I appreciate your courtesy in inviting me to offer my views on this act, which is so important to the welfare of the mentally ill who are involved in procedures related to criminal law, and which is equally important to society. I thank you for the opportunity.

The CHAIRMAN. Thank you very much, Dr. Cameron. I have no further questions other than I have asked you in the course of your testimony.

Thank you very much.

Dr. CAMERON. Thank you.

The CHAIRMAN. Our next witness is Robert Kneipp, Assistant Corporation Counsel for the District of Columbia.

#### STATEMENT OF ROBERT KNEIPP, ASSISTANT CORPORATION COUNSEL, DISTRICT OF COLUMBIA

Mr. KNEIPP. Thank you, Mr. Chairman.

May I first say, Mr. Chairman, I want to express the regrets of the Commissioners at not being able to be present. Mr. Tobriner is not in the city and Mr. Duncan finds it necessary to involve himself in the administration of municipal affairs.

The CHAIRMAN. Well, that is all right, we always like to have them here but it is perfectly all right. You can present their views and make a statement in their behalf. We are always delighted to have the Commissioners here but if they cannot make it, we understand. We are very happy to have you here.

Mr. KNEIPP. Thank you.

The Commissioners appreciate this opportunity to present their views on title II of H.R. 7525.

The Commissioners understand that this title of the bill is patterned after the formulation recommended by the American Law Institute as a test of insanity as a defense in criminal cases, and is intended to replace the test of criminal responsibility stated for the District of Columbia by the U.S. Court of Appeals in the line of cases beginning with *Durham v. United States*, decided in 1954, and ending with *McDonald v. United States*, decided October 8, 1962.

The Commissioners are informed that the decision of the U.S. Court of Appeals in *McDonald v. United States*, considerably modified the so-called *Durham* rule, so that the rule now requires that the defendants bear the burden of proving that the alleged mental disease is one which had the effect of impairing control of his conduct. Further, *McDonald* has the effect of restoring to juries the function of evaluating the testimony of expert witnesses, and eliminates the practice of directed verdicts of acquittal by reason of insanity. In short, therefore, the Commissioners are informed that the application of the *Durham* rule, as modified by *McDonald*, has substantially the same result as the formulation recommended by the American Law Institute. In view of this, the Commissioners believe that the existing state of the law in the District of Columbia should remain unchanged. Accordingly, the recommend against enactment of title II.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Kneipp. I assume, you being in the Office of the Assistant Corporation Counsel that you do not get involved in insanity cases very often.

Mr. KNEIPP. I think that this kind of case is very rarely prosecuted by the Corporation Counsel. There may be some instances but it is primarily a matter that comes before the U.S. attorney.

The CHAIRMAN. I am sure of that. Is it your position that you have no firsthand working knowledge of the criminal law because that issue does not arise in your office?

Mr. KNEIPP. That is correct, it arises very infrequently.

The CHAIRMAN. Thank you very much for your statement.

We will stand in recess until 10 o'clock tomorrow morning.

Thank you, gentlemen.

(Whereupon, at 11:50 a.m., the committee was in recess, to reconvene at 10 a.m., Wednesday, October 16, 1963.)

# MALLORY AND DURHAM RULES, INVESTIGATIVE ARRESTS AND AMENDMENTS TO CRIMINAL STATUTES OF DISTRICT OF COLUMBIA

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WEDNESDAY, OCTOBER 16, 1963

U.S. SENATE,  
COMMITTEE ON THE DISTRICT OF COLUMBIA,  
*Washington, D.C.*

The committee met, pursuant to recess, at 10:05 a.m., in room 6226, New Senate Office Building, Senator Alan Bible (chairman) presiding.  
Present: Senators Bible, Dominick, and McIntyre.

Also present: Chester H. Smith, staff director; Fred L. McIntyre, counsel; Martin A. Ferris, assistant counsel; and Richard Judd, professional staff member.

The CHAIRMAN. The committee will come to order.

This is a continuance of our hearings on H.R. 7525. We have earlier heard testimony with regard to titles IV and V. We commenced yesterday to hear title II, the section that deals with the insanity rule for the District of Columbia.

We will continue tomorrow on hearing title II, and on Tuesday next we will commence hearings on title I, which deals with the modification of the so-called *Mallory* rule.

Yesterday I think it was very clear from the testimony of the U.S. attorney that he felt the *Durham* rule, as modified recently by the *McDonald* decision adequately defined insanity as a criminal defense in the District of Columbia.

We are very happy today to have one of the real experts in this field, Dr. Overholser, who has been here before this committee and the Appropriations Committee many times in the past, in his former capacity as Superintendent of St. Elizabeths Hospital, where he completed some 25 years of service.

He is a member of the Advisory Committee of the American Law Institute, and served with such committee when the American Law Institute criminal insanity rule was being embodied substantially in the House-passed bill. He is an author and lecturer on problems of criminal responsibility.

Dr. Overholser, it is always nice to see you back before a congressional committee. We look forward to your suggestions.

STATEMENT OF DR. WINFRED OVERHOLSER, FORMER SUPERINTENDANT OF ST. ELIZABETHS HOSPITAL

Dr. OVERHOLSER. Thank you very much, Mr. Chairman.

May I say, first of all, Mr. Chairman, I have no written statement.

The CHAIRMAN. Very well. I think maybe I can provide you some guidelines. I believe the testimony of witnesses that we heard yesterday will sustain the proposition that the *Durham* rule, as modified by the *McDonald* rule, is an adequate test and definition of insanity in the District of Columbia.

Mr. Acheson, the U.S. attorney, said that he felt the *Durham* case as it was modified recently by the *McDonald* case has provided the District with a fair and reasonable test of insanity.

He was asked the question as to whether or not it would be preferable to substitute the American Law Institute test, with which you are familiar, and which is substantially the same rule or test laid down in H.R. 7525, with the exception of the addition by the House committee of the words "to know" and the including of the word "wrongfulness" in place of criminality in the test as laid down by the American Law Institute. The insanity test laid down in the House bill before us for consideration reads as follows:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to know or appreciate the wrongfulness of his conduct or to conform his conduct to requirements of law.

That is the definition that we have before us in our consideration of the insanity portion of the so-called omnibus crime bill. Mr. Acheson's testimony was to the effect that the American Law Institute insanity rule is substantially the instruction that is given to the jury in the District of Columbia at the present time as a result of the *McDonald* decision, and as it supplemented the *Durham* rule.

This may be some guidance to you in your testimony. He also said—and I think this is important, as far as his testimony is concerned—that he felt there was no need of a new statutory insanity definition in view of the present state of the case law.

I do not know whether you would agree with that, or whether you would think there should be written into the statute the ALI test.

I would give that by way of preliminary, Dr. Overholser, and possibly as some guidance to you in your testimony.

You may proceed.

Dr. OVERHOLSER. Thank you, Mr. Chairman.

The CHAIRMAN. In the first place, what we are primarily interested in determining is whether or not there is a need and a necessity for writing into statutory law a provision such as I have just read to you.

Dr. OVERHOLSER. If I were asked that question, I should answer categorically "No."

The CHAIRMAN. And why?

Dr. OVERHOLSER. In other words, all of the tests of criminal insanity, if you wish to call it that, that have been laid down since about the time, I guess of Edward III, or thereabouts, have been laid down by courts. In some instances in this country legislatures have enacted into law what was the prevailing judicial determination at that time.



New York is an example of that. They are now trying to change the law in New York because psychiatry has passed the law by quite a way.

Once you get in the statute a definition of this sort, you are, so to speak, stuck with it for a long time; whereas in the course of the operation of the courts, there is an opportunity to yield, as the views of psychiatry and of medicine in general become generally accepted. That, of course, is what the New Hampshire courts did back in 1860, and it was what the District of Columbia Court of Appeals did something over 80 years later, by adopting the *Durham* rule.

The *McDonald* interpretation is, I think, in general an improvement. It clarifies some points which were not entirely clear in the operation of the *Durham* rule.

The American Law Institute, in which my colleague, Dr. Guttmacher, who is present here this morning, Mr. Chairman, and I had the honor of serving, on the advisory committee, together with Dr. Lawrence Freedman, now of Chicago, sat through all of the deliberations of the committee of the American Law Institute.

To my mind the definition of the American Law Institute has two objections, and I will, if I may, Mr. Chairman, file a statement which was published in the American Journal of Psychiatry, which Dr. Freedman, who I have already mentioned, Dr. Guttmacher and I all very happily signed, objecting to the formulation of the American Law Institute.

In the first place, that formulation is in many ways a change of language without change of idea, much of the *McNaghten* and irresistible impulse rule.

In addition, it makes what is to my mind a very serious error in legislating on a medical matter. In the bill which is before your committee now, you will note that the flat statement is made that sociopathic or psychopathic personality is not a mental disease or defect.

The views of the psychiatric profession are not perhaps unanimous. But certainly in the official nomenclature of the American Psychiatric Association you will find that this condition is mentioned under the general heading of mental disorder.

Furthermore, as a psychiatrist, I certainly do not know of any mental disease or defect which is evidenced only by repeated criminal or otherwise antisocial conduct. That is a very unsuccessful attempt to eliminate this particular diagnosis.

To my mind, the psychopath or the sociopath, the true one, is a sick person, mentally sick, and this should be taken into consideration and not struck out by statute.

So I think it is unfortunate if we get any legislation on this topic at all.

I think the judges should be given their heads, and I think that they, in the long run, will keep up with the margin of progress in other fields of science, including medicine, better than a statutory fixation which is likely to become pretty much fixed.

I note, too—not being a lawyer, I cannot say, and I hope that someone will refer to this—I note that under subsection (1) of section (c), page 3—that it is stated that the defense is an affirmative defense which the defendant must establish by the showing of substantial evidence.

How that gibes with the *McDonald* ruling I do not know.

The CHAIRMAN. At that point, Doctor—and I will let my legal men check me out—if I remember Mr. Acheson's testimony on that point correctly yesterday, he testified that such section is not a burden-of-proof section, but rather it is a provision of law requiring the defendant to raise the insanity issue by a showing of substantial evidence, and if he does that, then the burden shifts, as it now is, to the Government to prove beyond a reasonable doubt the opposite of his contention. I understood him to say this was substantially the practice in the District of Columbia at the present time.

Dr. OVERHOLSER. I hope that is the case.

The CHAIRMAN. This was the testimony, I believe, I will recheck it, since you have again directed our attention to this subsection. I believe this is what Mr. Acheson said. Reading from page 127 of his testimony yesterday, he said:

I do not believe that provision changes the burden of proof. I think it is intended only to require that the issue be raised initially by a showing of more than a scintilla of evidence.

Then I asked the question:

Well, are there sections within title II that involve the burden of proof?

Mr. ACHESON. I think not, no. There are none, Mr. Chairman.

The CHAIRMAN. Then you say this is not a burden-of-proof section?

Mr. ACHESON. This is not a burden-of-proof section. It is a section only requiring that the defendant raise the issue, introduce the issue into the case by a showing of substantial evidence. If he does that, then the burden shifts as it now is to the government to prove beyond a reasonable doubt the opposite of his contention.

The CHAIRMAN. Then if the section would become law, it would have no effect upon the present case law in the District of Columbia as far as the burden of proof is concerned?

Mr. ACHESON. That is right.

The CHAIRMAN. The burden of proof still starts with the defendant, and after he has produced some evidence, then the burden of proof shifts to the prosecution to prove the contrary.

Mr. ACHESON. To prove otherwise; that is right, Mr. Chairman. The provision would make it a little bit more difficult for the defendant to raise the issue initially. But if he did, the burden of proof would remain where it now is.

That was Mr. Acheson's statement as of yesterday.

Dr. OVERHOLSER. I simply hope that this was not an attempt to circumvent *Davis v. the United States*, which is still good law, as far as I know.

The CHAIRMAN. I do not think *Davis* has been reversed.

Dr. OVERHOLSER. Yes, sir.

I do not want you to think that I am opposed to everything in this section. I am opposed to most of it, Mr. Chairman. But I do agree with this matter of notice. The notice of intent to plead insanity as a defense—that is done in a good many States.

I think it is entirely fair to the defendant. There are enough safeguards as far as the discretion of the judge is concerned. But at times in the past in some cases, both here and elsewhere, the defense of insanity has been sprung, so to speak—taking perhaps the prosecution off base. After all, the attempt ought to be to get the facts on both sides, rather than to take one side by surprise.

The CHAIRMAN. Well, on that point, the U.S. attorney is in complete agreement with you. He favored the notice section. He did say, as a practical matter, it caused them no great problem in the Dis-

trict of Columbia, because apparently they did have notice in most all of the cases where insanity was to be raised as an issue. However, he favored the section.

He thought notice as provided by the House bill was a good thing, because it did do just exactly what you say, and that is prevent the prosecution from being taken by surprise.

Dr. OVERHOLSER. Thank you, sir.

On page 5, Mr. Chairman, in the paragraph at the bottom of the page head "D," I think again you are giving a good deal of authority to the psychiatrist on a topic which really is not entirely within his field, the capacity to know or appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law—and to what extent it was impaired. I think in general the attempt is made when opinions of that sort are given to answer as far as the psychiatrist is competent to answer. But I must say that psychiatrists are not always completely successful mindreaders, and some of this seems to call for knowledge which is over and above that which is really needed by the psychiatrist.

The CHAIRMAN. In other words, you think that that subsection (d) is unnecessary.

Dr. OVERHOLSER. Yes, sir.

The CHAIRMAN. Then I am a little troubled—

Senator DOMINICK. I did not get the witness' answer.

The CHAIRMAN. What was your answer to my question?

My question was, "I take it from what you say that subsection (d), lines 19 through 25, page 4 of the House bill, are unnecessary?"

Dr. OVERHOLSER. I think they are.

The CHAIRMAN. You think they are unnecessary?

Dr. OVERHOLSER. I do; yes, Mr. Chairman.

On page 9 of the bill, I take it that the prohibition against a psychiatrist who has not examined the defendant is intended to rule out any hypothetical question.

Of course, a psychiatrist always would prefer to testify about someone he has examined. These hypothetical questions are very often quite misleading, I think, to the jury. So perhaps if that is the aim, I suppose it is all right, although I can think of situations in which an adequate examination was not permitted by time, for example, to enable the psychiatrist to give an adequate opinion, except on the basis of a hypothesis. Maybe my reading of the—this is lines 14 to 19, on page 9.

The CHAIRMAN. That reads:

Both the prosecution and the defendant may summon any other qualified psychiatrist to testify, but no one who has not examined the defendant shall be competent to testify to his opinion as a psychiatrist with respect to the mental condition or responsibility of the defendant.

Dr. OVERHOLSER. Yes, sir.

The CHAIRMAN. Now, again your objection to that is what, Doctor?

Dr. OVERHOLSER. Well, it would seem that this would prohibit asking any psychiatrist a hypothetical question about the defendant, that he might conceivably not have seen him.

I think perhaps this is a very minor point, to be sure. But I raise that question, sir.

The CHAIRMAN. Thank you.

Dr. OVERHOLSER. Well, those are the principal points—except I just wonder—on page 12 of the bill, Mr. Chairman, I notice there is something said about the release on probation of a committed person. I suppose this refers to a person who has been committed after being found not guilty by reason of insanity, in which case it would seem really unfair and inconsistent to use a penal term in referring to him. The present statute of the District, which refers to the commitment, the mandatory commitment following an acquittal by reason of insanity, speaks of conditional or unconditional release, not of probation. This is merely perhaps a minor point in terminology, Mr. Chairman.

And then—

Senator DOMINICK. Do I understand from that, Doctor, that your objection is to the word “probation”?

Dr. OVERHOLSER. Yes, sir—because I take it this person has been acquitted, acquitted by reason of insanity.

The matter of whether or not—

Senator DOMINICK. Doctor, I wonder if I could ask a few more questions on that.

Is it your opinion, then, that if a person is acquitted by reason of insanity of a felony, that as soon as he is committed to a hospital, that the court no longer has jurisdiction over him?

Dr. OVERHOLSER. No, because after all, the court has sent him there, and there are provisions, of course, of habeas corpus, too, as well as conditional or unconditional release. It is merely the terminology that I raise a question about.

Senator DOMINICK. In other words, you think that it would be possible to release him under some sort of supervision.

Dr. OVERHOLSER. Yes, sir.

Senator DOMINICK. On a status similar to probation. And then if he violates the laws of the jurisdiction here, the court could immediately pick him up and recommit him to the hospital, even if the hospital authorities themselves felt that this was a mistake, is that correct?

Dr. OVERHOLSER. I think this is the status at the present time, Senator.

Senator DOMINICK. I wondered whether you had any objection to that.

Dr. OVERHOLSER. No—it is only the word I object to. Certainly not. I think that there ought to be a joint action between the court and the hospital in the matter of the release of these persons.

But there is provision now for an unconditional release, in which case of course neither the court nor the hospital has any control.

Senator DOMINICK. Now, in the paragraph above, starting on line 4, on page 12, it also says:

According to the determination of the court upon a hearing the committed person shall thereupon be discharged or released on probation, on such condition as the court determines to be necessary.

Now, this is a civil hearing, as I gather. And I would presume that this in turn—the word probation is also used on page 11 of the bill—that the civil hearing is designed to determine the degree of safety to the public in general if this person is allowed more freedom, is that correct?

Dr. OVERHOLSER. Yes, sir.

Senator DOMINICK. What is your objection to the use of the word "probation" which fits in with a good deal of existing procedures at least on releasing prisoners subject to good behavior?

Dr. OVERHOLSER. Because probation is a term which is used for persons who have been convicted or at least who have pleaded guilty to an offense. This man has been acquitted. Presumably, therefore, there is no criminal charge pending, except, of course, he has shown by his behavior at the time of the crime itself that he is unsafe to the public.

Now, he may recover from the condition which existed. But he has been declared not guilty. For that reason I question whether either "parole" or "probation" is a proper word, since those are both applied in a penal context.

Senator DOMINICK. What suggested terminology would you have?

Dr. OVERHOLSER. Well, I should just strike it out. He could be released "on such conditions."

Just strike out the words "on probation," just as is done now in the statute relating to the release of persons in the District who have been acquitted by reason of insanity.

Senator DOMINICK. Thank you, Doctor.

Dr. OVERHOLSER. I suppose that again this is a question which perhaps I am presumptuous to raise. There is on page 13 of the bill some language with reference to the frequency with which a person may be permitted to make application. Yet in the next paragraph—in two paragraphs down there is language saying that this shall not interfere with his right to a writ of habeas corpus.

I should suppose that there might be an inconsistency there.

I am not quite clear in my mind as to the proper policy—and this again is a matter of public policy and not a question of psychiatric knowledge—the question of whether the jury should be informed in the judge's charge what the disposition of the defendant will be if they find him not guilty by reason of insanity.

This question has come up a few times in the District already. What the case law is at the moment, I am not quite sure.

The CHAIRMAN. Would you repeat that statement again?

Dr. OVERHOLSER. Yes. On page 13, Mr. Chairman, lines 12 to 15: the jury shall not be informed of the result, if they find the individual—

The CHAIRMAN. My understanding of the case law, and Mr. Acheson testified on this point yesterday, is just the reverse of this proposed instruction to the jury. As I understand it, the case law in the District of Columbia today is that the jury is told of the consequence of a verdict of acquittal by reason of insanity. The House bill states the jury shall not be told of the consequences of a verdict of not guilty by reason of insanity. The district attorney said this provision in the House bill was undesirable, and that the case law which exists in the District of Columbia today is preferable.

Dr. OVERHOLSER. It is my impression that is the existing case law. I think it is quite correct. I think the jury is entitled to have that information.

The CHAIRMAN. The U.S. attorney thoroughly agrees with you on that point.

Senator DOMINICK. Why?

Dr. OVERHOLSER. I have an idea that a good many people, both in the District and outside, have an idea that if a person is found not guilty by reason of insanity, he is going to be put right out on the street; and for that reason, they would lean the other way—unless they knew that there was provision for him to be confined until such time as in the opinion of the hospital and the court he was fit to be released, without undue danger to the public.

Senator DOMINICK. Suppose the jury is told that a person who has just murdered three people has done so by reason of insanity. Suppose they are told that all they need to do is keep him in the hospital for 6 months, and then he is going to be turned loose on the public again. I would think that this would tend to make the jury find him not guilty—beg your pardon—make the jury find him not irresponsible within the terms of this law.

Dr. OVERHOLSER. Well, if they were told that, I think it would be misinformation.

Senator DOMINICK. Wouldn't they have to say he would be committed to the hospital, and that he could not get out until at least 6 months?

Dr. OVERHOLSER. Ordinarily, of course, it is a good bit longer than that.

Senator DOMINICK. I doubt very much whether they could be told that. The provision of the law is that he is committed until he is well and not entitled to be released for a period of 6 months.

Dr. OVERHOLSER. He will not be released except by the concurrent action of the hospital and the court. And I think that a hospital in general would be rather reluctant to make such a recommendation in so short a time.

Senator DOMINICK. It just strikes me, if I may say so, Doctor, that the purpose of having the jury here determine whether or not he should be acquitted by reason of insanity, and the question of what the policy is in the event that he is so acquitted, or is not, is in the statute and has nothing to do with the jury's determination.

Dr. OVERHOLSER. Psychologically, I am not so sure that it won't have anything to do with their determination.

Matters of this sort are decided by a good many people outside the realm of reason, on the basis of emotion. So I am afraid that there would be considerations, which were a bit adventitious, shall we say. I agree with you, of course, that the statute says certain things. It seems to me that the jury ought to know that at least this man is not going to be turned loose pronto.

Senator DOMINICK. In other words, you feel that if the provision stays the way it is, that the juries are more liable to find someone not guilty by reason of insanity.

Dr. OVERHOLSER. Where the other facts warrant, yes, I should say so.

Senator DOMINICK. Thank you.

The CHAIRMAN. You may proceed, Doctor.

Do you have further comments to make?

Dr. OVERHOLSER. I think not, Mr. Chairman.

I have two other things that I should like to provide the committee for the hearing record.

The CHAIRMAN. We would be very happy to receive them. Will you tell us what they are?

Dr. OVERHOLSER. I have spoken already about the article written by Drs. Guttmacher, Freedman, and myself.

The CHAIRMAN. As I understand it, that article says that the ALI test has weaknesses; is that correct?

Dr. OVERHOLSER. Yes, sir.

The CHAIRMAN. Is that a correct capsule expression of what this article says?

Dr. OVERHOLSER. Yes.

The CHAIRMAN. In other words, you three men, very eminent psychiatrists, do not agree with the ALI test?

Dr. OVERHOLSER. Yes, sir; that is correct.

The CHAIRMAN. You point out in this article why you do not agree with the ALI test.

Dr. OVERHOLSER. Yes, sir.

The CHAIRMAN. Why don't you agree with the ALI test?

Dr. OVERHOLSER. Well, I think that would trespass on the time of the committee, Mr. Chairman.

The CHAIRMAN. I thought you might capsule it. I am a little inquisitive at the present time, because I understood the U.S. attorney to say that the case law, *Durham*, as clarified or supplemented by the *McDonald* case, was substantially the test that is laid down in the American Law Institute test.

Now, I do not know whether you agree with that or not.

Dr. OVERHOLSER. No, sir; I do not agree entirely with that. I think the basic concept of the ALI rule is a melange of the *M'Naghten* rule and the irresistible impulse rule.

The CHAIRMAN. The *M'Naghten* rule is the "right and wrong" rule?

Dr. OVERHOLSER. Yes, sir; that it doesn't come to grips with the basic problem which was set up in the New Hampshire courts in 1870, and by the *Durham* rule here. And I do not think that basically *McDonald* did very much to change the basic concept about productivity.

It pointed out very clearly and very properly that the jury decides on the basis, hopefully, at least, of the evidence which is before the jury from experts. And it pointed out, too, that the evidence which is needed to shift the burden of proof must be something more than a scintilla. And I think that is proper.

I am not so sure that—just where the borderline comes in between scintilla, some evidence, substantial evidence, and preponderant evidence. Sometimes that is a bit difficult to determine.

Of course, what bothers me, and what bothers Mr. Justice Brennan, in the article which he wrote in the American Bar Association Journal 2 months ago, is that sometimes it will happen that the defendant, being indigent, cannot get the necessary support for his contention, perhaps, that he is mentally ill. And I think that is one of the weaknesses, perhaps, of administration of the criminal law, particularly in this country—that the indigent defendant perhaps does not get quite all his rights, whereas the wealthy one can bring in other evidence.

Senator DOMINICK. Now, Doctor, where do you get that type of information? I have seen these indigents brought in on accused crimes, at least in our State, and in many other areas, and they are supplied

by the court at State expense, if it is a State case, or at their own expense, if it is a Federal case, with a list of some of the most qualified lawyers in the whole area to defend them. I have yet to see anybody who got a better defense than an indigent defendant.

Dr. OVERHOLSER. I was speaking, sir, not of lawyers. I am well aware of what you say. I was thinking particularly of medical evidence. And Mr. Justice Brennan made an eloquent plea in this article to which I have referred for psychiatrists to be, shall I say, as generous with their time as lawyers are in cases of this sort.

Senator DOMINICK. It is my understanding that if a plea by reason of insanity they are represented by court-appointed psychiatrists in most jurisdictions, are they not?

Dr. OVERHOLSER. Well, I cannot say about most jurisdictions. I rather think maybe.

The CHAIRMAN. What is the situation here in the District of Columbia, in response to Senator Dominick's question?

Dr. OVERHOLSER. They are usually sent——

The CHAIRMAN. Is the indigent defendant provided with adequate psychiatric assistance?

Dr. OVERHOLSER. District of Columbia General Hospital or St. Elizabeths? I do not say this is right—but some defendants will get the idea that since the District of Columbia General Hospital and St. Elizabeths Hospital are arms of the Government, they do not have quite a fair shake.

The CHAIRMAN. In other words, what you are saying is that since they are an arm of the Government, they are more or less a branch of the prosecution, and therefore they are not completely independent of the prosecution.

Dr. OVERHOLSER. Yes, sir. I am sure there are some defendants who feel that way. I do not agree with them at all. But I am thinking now—because as Dean Pound said long, long ago, it is not so important that the courts shall do justice, but that the public shall be sure that they do justice. In other words, that the public and the defendant have that feeling.

Senator DOMINICK. I have never yet seen a defendant who thought he had justice if he was convicted, whether it is in a civil case or whether it is that criminal case.

Almost invariably they feel that they have been mishandled in one form or another. And the lawyer who is designed to protect their rights, and I have been in that position myself on many an occasion, does his best to convince the court that they have not gotten their rights, because this is his job, and he does a pretty good job of it.

But I cannot see that the question of whether the defendant feels that he has gotten adequate treatment or not really is germane to the issue of whether he has in fact gotten adequate treatment.

Dr. OVERHOLSER. Yes, sir, of course. I think the latter is much more important, Senator.

Senator DOMINICK. Well, I just wanted to set the record straight as far as the legal end is concerned. I think that the indigent defendant has extremely good care, just as I think in many cases the indigent sick person has very good care, too.

The CHAIRMAN. Your additional exhibits will be received and incorporated and made a part of the record, Dr. Overholser.



(The exhibits follow:)

Am. J. Psychiat. 118: 32-34, July 1961

# MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY<sup>1</sup>

## A PSYCHIATRIC VIEW OF THE AMERICAN LAW INSTITUTE: MODEL PENAL CODE PROPOSAL

LAWRENCE ZELIC FREEDMAN, M.D.,<sup>2</sup> MANFRED GUTTMACHER, M.D., AND WINFRED OVERHOLSER, M.D.

It is a truism that in any decisionmaking process the freer the flow of relevant information the greater the chances that the decision will be rational and just. Any impediment to pertinent communication increases the probability that irrational or, in the court of law, unjust decisions will be made. The clinical insights of psychiatry can accurately reflect the state of its knowledge and be efficiently utilized by courts only when the procedures for testifying do not suppress or distort the information. The fewer the restrictions imposed on the psychiatrist testifying in court, the greater the resources upon which the courts can draw.

Decisions concerning the legal criteria for excluding responsibility obviously belong to other members of this Committee. The considerations which we are presenting arise from and are restricted to our area of training, competency, and primary interest—mental disease and mental defect. Only so far as the proposal attempts to incorporate psychiatric disease need the Committee grant our advice any more weight than that of other interested laymen. However, so far as it does, we think it reasonable to hold that the unanimous opinion of the three psychiatric members of the Advisory Committee ought to be weighed as representative of the thinking of many of our colleagues in psychiatry upon whom the success of any formula depends.

There is now a body of experience based on the history of the MacNaughton formula which may guide us to avoid a repetition of difficulties arising from earlier efforts. For example, a serious impediment to meaningful communication between psychiatrists and lawyers in the MacNaughton formula is the psychiatrists' mistaken assumption that MacNaughton makes an attempt to define insanity which they consider in error. Lawyers see it as a statement of the conditions under which an accused person might be exculpated from guilt and from being stigmatized as a criminal.

The traditional reluctance of psychiatrists to testify in courts under the MacNaughton formula arises in large part from the frustration of language which the law requires of them. Many lawyers have failed to realize that freedom of psychiatric testifying is not identical with extension of psychiatric concepts in the procedures and decisions of the courts. Courts can only benefit from having the greatest possible clarity of exposition of psychiatric testimony, no matter what standards it sets for responsibility.

Section Four of the Model Penal Code of the American Law Institute,<sup>3</sup> devoted to Responsibility, has a dual function: It sets up the criteria by which, according to law, mental disease or defect may exclude responsibility. Responsibility is not a qualitative or quantitative intrinsic attribute of a person; it is, in this context, a legal judgment. Since, however, "the deed does not make the criminal unless the mind is criminal," the state of mind must be ascertained and a pathological state of mind is a psychiatric problem. However, the gauge for determining legal exculpation is not suitable for the differential diagnosis of psychiatric disability.

So, Section Four also sets up standards, it guides, and it limits the communications of the psychiatrists concerning mental disease and defect to the judge

<sup>1</sup> This is the minority report of the psychiatric members of the Advisory Committee to the American Law Institute preparing a Model Penal Code.  
The preparation of this paper was supported by the Foundation's Fund for Research in Psychiatry.

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<sup>3</sup> The proposed American Law Institute formula, Section 4:

1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

2. The terms "mental disease" or "defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

and the jury who are to make the legal decision. It is this second and to some extent competing function which concerns us. Confusion arises from this paradoxical effort to combine in one formula: (1) The criteria by which the courts will hold a man not legally responsible (*i.e.*, punishable); and (2) the conditions for the exposition of the psychiatrist's knowledge.

The question clearly should be: How may the courts optimally elicit testimony from the psychiatrist concerning psychopathology so that its own legal question concerning responsibility may be answered with maximum information at its disposal?

The two major formulae, competing to supplant MacNaughton, are the proposed American Law Institute prescription and the Durham Decision.<sup>4</sup> In our view both are refreshing and encouraging advances over MacNaughton and reveal significant agreement. The similarities between them might be summarized as follows:

1. Each is intended to free from responsibility a man who has committed an illegal act which is the result of, or the product of, mental disease or defect.
2. Each includes mental pathology—illness, disease, or defect.
3. Each rejects exclusively cognitive or intellectual approach.
4. Neither formula, presumably, is primarily concerned to define mental illness but rather to indicate what degree of severity of mental illness protects an individual against the punitive and stigmatizing impact of criminal law.
5. Each incorporates the concept of causality, with the words "product of" and "as the result of." Both "product" and "result" refer to the cause. Cause is the circumstance, condition, event, which necessarily brings about or contributes to a result.

Within this framework we state our reservations concerning the American Law Institute formula. We hold that the subtlety, complexity, and obscurity of its psychological entities and its actual intrusion into the field of psychiatric diagnosis unnecessarily limit the contributions of psychiatry, present and potential, and needlessly restrict the medical and psychological resources upon which the court may draw. The legal requirements concerning appreciation of criminality and conformance of conduct and the negative definition that repeated criminal or otherwise antisocial conduct is not mental disease effect a gratuitous entrance into medical and scientific arenas which is unnecessary and may be harmful to the law's purposes.

Specifically, "substantial" and "capacity" are psychologically vague, ambiguous, unclear, and complex quantitative concepts. More important, "to appreciate the criminality" is an involved cognitive phrase at least as likely to lead to confusion as "knowledge of right and wrong." Further, since criminality is an illegal act *with an accompanying mental state*, is there not a logical inconsistency or tautology here? For if the offender cannot "appreciate the criminality," then his act is not criminal, and if it is criminal then he must have "appreciated" it.

"To conform his conduct to the requirements of law" is an inverse restatement of irresistible impulse which has proven to be an almost unusable defense. To lack "substantial capacity to conform his conduct to the requirements of law" is to have an irresistible impulse.

The terms "mental disease" and "defect" specifically exclude "an abnormality manifested only by repeated criminal or other antisocial conduct." To refer to mental disease and then to limit its meaning is to rob the court of the worth of the psychiatrist's expertness precisely to the degree that it limits his ability to transmit clinical information. It predisposes to failure in communication. The phrase "mental disease or defect" should serve as a focus for the communication and description of the combined behavior, feeling, ideas, of a person so as to inform judge or jury.

If the courts wish to determine whether mental disease or defect exists, then the law must use not only the semantics but the substance of psychiatry. It cannot, for example, meaningfully adopt psychiatric words, and then appropriate to itself the right to establish psychiatric diagnosis criteria even by exclusion. It legally excludes forms of behavior which may themselves be symptomatic of pathology, for antisocial behavior may be the manifestation of illness. Repeated illegal or antisocial conduct is a manifestation of a personality, and this personality may be a sick one. There is a quality of behavior

<sup>4</sup> Durham Decision: An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect [94 U.S. App. D.C. 228, 214 F. 2d 862 (1954)].

referred to as alloplastic, most commonly found in the psychopathic personality in which the symptom of psychopathology consists in the *acting out*. The manifestation of a man's abnormality may consist precisely in his repeated or otherwise antisocial conduct. To exclude such conduct from "mental illness" is to make a psychiatric judgment eliminating behavioral or conduct disorders.

Apparently there is no insistence on legal formulae in diagnosing physical diseases, so why in this case? If the physician were similarly forbidden to use one outstanding symptom as criterion for physical illness, the absurdity of such an approach would become apparent, or if he were limited to two tests it would be considered unscientific.

If the intent is to exclude the so-called psychopathic personality from irresponsibility, it is hard to see how it can succeed in this way. If the Committee does not want to excuse as psychiatrically ill individuals the so-called psychopathic or sociopathic personality, this formula will not serve that purpose, for its use depends upon the testimony of psychiatrists; those who consider psychopathic or sociopathic personality a mental disease or defect will so testify and those who do not will not.

In summary, essentially the Model Penal Code formula has added to the cognitive criteria volitional criteria. It has eliminated behavioral criteria except when they are combined with other phenomena.

The Durham Decision permits free communication of psychiatric information and the American Law Institute creates roadblocks to such transmission. The Durham formula puts no limitations on psychiatric testimony except those which are implicit in the present state of the discipline. The American Law Institute formula requires psychiatric judgments as to substantial capacity, demands essentially cognitive criteria concerning capacity to control, and insists upon including legal criteria in the old tradition by attempting to eliminate the psychopathic personality.

Neither the Model Penal Code nor the Durham formula resolves the problems of psychiatry; no legal formula can. Psychiatry is an incomplete scientific and medical specialty. Indeed all medicine and science are developing and hence are incomplete. This is reason to encourage its contribution rather than to emphasize its limitations in the courts.

For these reasons, we recommend the adoption of the historic practice of the New Hampshire Court as recently reformulated in the case of *Monte Durham*.

#### CRIMINAL RESPONSIBILITY: A PSYCHIATRIST'S VIEWPOINT

In the first half of Dr. Overholser's article, he discusses the meaning of psychiatry, the makeup and development of personality, some of the disorders to which personality is subject, and the nature of a mental examination. With this as background, he proceeds to express his views as a psychiatrist about the various legal tests for determining criminal responsibility. Commenting with favor on the *Durham* rule (214 F. 2d 862 (District of Columbia Cir., 1954)), he states that the psychiatrist is interested in the very criterion outlined in the *Durham* case, namely, productivity. In his criticism of the *McNaghten* test, he refers to it as unrealistic and moralistic, and out of tune with psychiatric knowledge.

(By Dr. Winfred Overholser, St. Elizabeths Hospital, Washington, D.C.)

During the past decade or more, communication between the legal profession and the psychiatrists has become more active. Especially has this been true in the field of criminal law, and in that field hardly any question has been the subject of more interest, discussion and argument than that of criminal responsibility. It seems in order, therefore, for a psychiatrist to venture to a legal readership his views on this subject.

The disciplines of law and medicine deal with the behavior of people. The approach of the lawyer and the judge is bound to be different from that of the psychiatrist, yet it seems reasonable to suppose that some of the psychological facts now known concerning behavior may be of value to the legal profession and to the lawmaker as well in bringing about improvement, both in the protection of society and in the assurance of justice to the individual accused.

I write as a psychiatrist who has had fairly intimate experience with the courts over the past 35 years and who is reasonably familiar with the literature, both medical and legal, dealing with the psychology of behavior. Although the views I express are those of myself alone, I think that they are reasonably representative of those of psychiatrists in general, and particularly of those psychiatrists who have occasion to come into contact with the courts.

First of all, what is psychiatry? Sir David Henderson, the dean of British psychiatrists, defines it thus:

"Psychiatry is that branch of medicine which deals with those individuals who, from a combination of circumstances, constitutional or acquired, are unable to adapt themselves satisfactorily to their particular situation in life because of certain signs and symptoms, certain maladjustments which may or may not require treatment in the home, the school, the college, the factory, the clinic, nursing home, or hospital."

The breadth of this definition illustrates forcefully the great advances which have been made in the last half century, and it is a far cry from the days when the only interest of the psychiatrist was either in testifying in court or in sending to the "asylum" those who were "furiously mad". We have indeed learned much of the way the human mind operates, and substantial advances have been made in the line of treatment of mental disorder, both institutional and extramural as well.

The modern era of psychiatry begins with the work of Sigmund Freud. There were to be sure, pioneers like Pinel and Dorothea Lynde Dix, who did much toward alleviating the lot of the institutionalized patients, but until the time of Freud, psychiatry was on a descriptive level. Just as Copernicus and Galileo shattered man's notions that the earth was the center of the universe and just as Darwin showed that man is after all not a special order of creation but a product of evolution, so Freud demolished the idea that man is entirely a reasoning animal. Rather he showed that man does not live and act by syllogisms alone. He demonstrated the driving force of emotion and the important and dynamic effect of unconscious factors in behavior. The fact that the emotions may on occasion overcome sound judgment has long been recognized by the law in the "heat of blood" doctrine as affecting premeditation, but recognition of the importance of unconscious emotional factors in the mental life has lagged in general acceptance. This, however, is not to say that all conduct is entirely predetermined, that man is blind, a puppet. Man is capable, even though conditioned by what has gone before, of testing his impulses and desires by reality and of making decisions; the prospect of penalties for violation of the prevailing code of conduct is one of the elements of reality. Indeed, it is only because there is determinism that rules of conduct can be expected to have any effect, or that any sort of treatment for mental disorders can be helpful. It is not entirely accurate to consider that to the psychiatrist the sick and the wicked are equally free of blame.

#### THE MAKEUP AND DEVELOPMENT OF PERSONALITY

Perhaps a few words are in order concerning the makeup and development of personality and concerning some of the disorders to which it is subject. What we generally term "mind" is an abstraction, an inclusive word which signifies the sum total of the ways in which the individual acts as a whole in response to stimuli, external and internal, which are constantly playing upon him. Mental activity, in other words, is merely one aspect of biological functioning. The mind does not have a separate entity, nor does it exist in a vacuum somehow separately from the body. The various parts of the body are unified through the actions of the nervous system, the central organ of this system being the brain, a complicated structure which receives the stimuli from the outside world as well as from the body itself, responds to these stimuli by motor phenomena of various sorts, and stores the various impressions which it has received. This phenomenon of storing these impressions is referred to as memory, a most important function, by means of which the effects of training are accumulated and various associations set in motion; some of these associations at least appear to result in what is known as logical thought.

On the basis of these memories and previous impressions, judgment is developed. It follows, then, that damage to the brain may be expected to have an effect upon judgment and the other higher mental functions. The damage may be due to failure of development (a condition known as mental retardation),

or to external injury, circulating poisons in the blood stream, as from infection or drugs, and from degenerative changes due to tumor or arterial degeneration. Damage from any of these causes may be expected to bring about alterations, temporary or permanent, in the total functioning of the individual—in his conduct, his judgment, and his ability to respond to stimuli—in short, in his mind. A considerable part of the functioning of the nervous system is outside of voluntary control. The autonomic or vegetative nervous system controls such vegetative functions as the body temperature, the blood pressure, digestion and the various glands; it likewise acts as the mediator between the emotions and the functioning of the so-called involuntary organs. It is by means of this system that we experience, for example, "gooseflesh", blushing, pallor and sweating from fright, and through it the various symptom-complexes which are dealt with by the specialty of "psychosomatic medicine" are controlled.

No two persons are born identically alike, and everyone starts life with his own constitutional makeup, of which the temperament is a part. Everyone has experiences as he is growing up, not all alike by any means; some of these are pleasant and some of them unpleasant, but all have a bearing upon the development of his personality. No two persons have quite the same background of experience, and thus we properly expect wide variations in the behavior of individuals. Furthermore, it is well demonstrated that impressions, experiences, and teachings, many of them consciously "forgotten," are nevertheless stored in what is referred to as the unconscious. Unpleasant experiences may be repressed, yet many come out in disguised form in phobias, tics, dreams, anxieties, and various neurotic and even psychotic manifestations. These constellations, with a heavy emotional charge, are referred to as complexes. Everyone, of course, has them. It is how one deals with them or how they deal with him that is important.

The child soon learns to distinguish between himself and the outside world with its demands. He develops a sense of reality which is constantly in use throughout his life for testing his desires and instinctual drives. The human being, indeed, is in a constant state of conflict between his desires, such as those for sex and food, for acclaim, approbation, and power on the one hand, and the requirements of the reality situation on the other. Life is always a compromise and a process of adjustment, and not all the forces which are exerted upon any one person can be resolved. There are no iron men, and although most persons lead fairly comfortable and law-abiding lives, stress of one sort or another, internal or external, may drive a particular individual into a neurosis, psychosis, or some sort of conduct which is denominated by the law as a criminal.

May I make a personal statement of belief, which I think is representative of most of my colleagues, namely, that *most* persons fall within the category of "normal" and that many criminals are *not* in the legal sense "insane" or in the medical sense "mentally ill". I make this disclaimer because I realize that there are some persons who fear that psychiatrists if given their own way would find all offenders to be subjects for the mental hospital, and there are likewise those who even think that most psychiatrists consider the rest of the world deranged. Such is far from the case, even though as we look about us we note that everyone has his idiosyncrasies, just as others note them in us. Indeed, it may be said safely that without an idiosyncrasy or two an individual would be a dull person indeed. With all the individual physical, temperamental, and intellectual variations among people, and with the vast differences in individual experiences, particularly during the developmental period, it is not strange that some persons develop disorders of behavior.

#### PSYCHOSES AND NEUROSES

I have spoken already of the organic types of mental disorder, such as senile "organic brain syndrome," as it is called in the prevailing nomenclature. In addition, there are certain gross distortions of personality which we generally refer to as psychoses, notably schizophrenia and the involutional psychoses, the latter being those mental disorders occurring in the involutional period of life. In psychotic disorders, both organic and those without known organic basis (sometimes called functional) there is usually a considerable loss of contact with reality, or a marked elevation or depression of mood. It is of these types that people generally think when they use the words "mentally ill" or "insane." There is another large group of mental disorders, however, known as the neuroses, in which the individual is usually in substantial contact with his environment. He may realize that he is not well, but he may at the same time suffer from

various phobias, compulsive states, or dissociative states like hysterical amnesia. It is in these compulsive states particularly that we find what is known as irresistible impulse. Perhaps kleptomania is the best example of these compulsive neuroses so far as the law is concerned. The so-called psychosomatic disorders are not of particular interest in the criminal law, although they often are of concern in tort law, as in the case of traumatic neuroses.

There is another group of mental disorder, classified in the official nomenclature of the American Psychiatric Association as personality disorders. This includes, among others, the so-called psychopathic or sociopathic personality. The sociopath is characterized by lack of aim and of foresight, the failure to profit by experience, impulsiveness, egocentricity, a lack of emotional rapport with others, a lack of sympathy, a general immaturity and very little regulatory influence of intellect upon his behavior. A moderate proportion of criminals may fall in this group and some very decidedly do so. The notion that there is a "mental abnormality manifested only by repeated criminal or otherwise antisocial conduct" is, however, unpsychiatric. There is no such entity, even though the proposed Model Penal Code of the American Law Institute purports to exclude persons with a diagnosis of sociopathic personality. There are many criminals who are not sociopaths, but the sociopath who comes into conflict with the law has numerous symptoms in addition to his antisocial behavior, and is decidedly a mentally sick man.

#### THE NATURE OF A MENTAL EXAMINATION

Let us now turn to considering the nature of a mental examination. There may be a very few cases in which a glance even by an untrained person will satisfy the observer that the subject is mentally deranged, but these cases are rare indeed. A proper examination calls first of all for a physical examination and if possible an electroencephalogram to determine from what are colloquially known as "brain waves" whether or not there is a tendency toward epilepsy or some other gross abnormality of the brain. The presence or absence of gross neurological changes should be tested. A reasonably full history of the individual is essential, together with various psychological tests; the history should be obtained from the subject himself and from outside sources. No one is an entirely dependable source of information about his own conduct, particularly in criminal cases, where self-serving and self-exculpatory declarations are likely to be met. The psychiatric interview should include not only the history but the ascertaining of the presence or absence of delusions and hallucinations, evaluation of the judgment of the subject, his recognition of his relations with those about him or what we term orientation, his memory, his thought processes, and his emotional reactions, such as undue elation or depression or indifference. There is hardly any one symptom which can be said to be pathognomonic of mental disorder and except in unusual instances there is hardly anything so clearcut and obvious as, let us say, an X-ray of a broken bone.

Isaac Ray, the great American pioneer in medical jurisprudence, said many years ago, "Insanity is a disease and as is the case with all other diseases the fact of its existence is never established by a single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case." The psychiatrist, whether examining an alleged offender or a private patient in his office, will take into consideration the entire body of symptoms and signs in an attempt to understand why the individual conducts himself and feels as he does. For this purpose several interviews or a period of observation in a mental hospital may be necessary.

#### THE PSYCHIATRIST AND THE DURHAM RULE

From what I have already said it will be seen that the psychiatrist is interested in the very criterion outlined in *Durham*, namely, that of productivity. While being questioned under the *Durham* rule (214 F. 2d 862 (District of Columbia Cir., 1954)) he is thus speaking as a psychiatrist, and has full opportunity to outline the history, the whole development of the subjects' conduct, and the relationship of his mental disorder, if any, to the act with which he is charged. The problem of causation of conduct is within the psychiatrist's province, whereas the *M'Naghten* rule and the frame of reference in which the questions under that rule are asked pose a moral query which is not within the competence of the psychiatrist.

Space does not permit any discussion of the evolution of the so-called "tests of insanity." All of them, until the establishment of the New Hampshire rule in 1870 and the *Durham* rule in 1954, drew a sharp line of dichotomy between sane and insane, the latter implying total loss of reason. Yet the law itself in a number of states has recognized that there is a "gray" area between the black and the white. I refer to the establishment in certain jurisdictions of the so-called sex psychopath group. Although this group is not at all well-defined psychiatrically, the demand for such legislation arose as a result of public recognition of the fact that many persistent sexual offenders show themselves to be entirely unamenable to routine correctional treatment, that although they are not "insane" in the eyes of the law they are by reason of mental deviation not readily deterrable. Some of these offenders are sociopaths, more of them in my opinion are neurotic, but in any event the principle has been established that here is a group of something other than frankly "insane" persons who should be dealt with by an indeterminate period of detention and, where possible, treatment; actually a fair proportion of these offenders are amenable to psychiatric treatment. Although there is in the District of Columbia a sexual psychopath act, there is no question in my mind that under the *Durham* rule these persons could be acquitted as insane and confined, since their acts are quite clearly the product of mental disorder.

I have indicated already that I have some reservations, to put it mildly, concerning the American Law Institute formulation of criminal irresponsibility. The formulation appears to me to be a combination of the *M'Naghten* rule ("capacity to appreciate the criminality") and the irresistible impulse test ("conform his conduct to the requirements of law"). This formulation met the approval of the majority of the committee and has been adopted by the Institute; it is a fact, however, that all three of the psychiatric consultants on the committee take exception to it. I am not sure that a psychiatrist is competent to pass on whether or not the accused has "adequate capacity" to appreciate the criminality or to conform his conduct. Subsection (2) of 4.01, which purports to exclude sociopathic personality from the definition of mental disease or defect, fails to do so because it fails to recognize the fact that the sociopath has many other symptoms than the mere antisocial behavior.

So far I have endeavored to outline some of the psychiatric concepts underlying the testimony of the expert psychiatric witness. I have indicated, too, the objections of the psychiatrist to testifying under the *M'Naghten* rule. As a matter of fact, many patients in mental hospitals who by any test whatever would be considered to be "insane" have at least some glimmering and sometimes a strong sense of what is right and what is wrong. The test is unrealistic and moralistic, and is out of tune with psychiatric knowledge. It was attacked by legal writers as well as physicians soon after it was enunciated, and the literature is replete with criticisms of it. An interesting study could be made, perhaps, of the psychology of the reasons why the *M'Naghten* rule has appeared to be almost immortal in spite of all of the psychiatric progress that has been made in the last 117 years. Judge Doe, of New Hampshire, who is responsible for the so-called New Hampshire rule, arrived at his formulation after prolonged study, concluding as he did that the matter of the mental state of the offender is as much a matter of fact as his presence at the scene of the crime. He held, too, that the law had no call to attempt to define disease. He said:

"What is a diseased condition of mind is to be settled by science and not by law—disease is wholly within the realm of natural law or the law of nature. The municipal, civil law established by men for human government, does not declare what is disease of the mind any more than it declares what is disease of the lungs or liver."

The Court of Appeals of the District of Columbia in 1954, apparently by somewhat different reasoning, arrived at a similar result, namely that the proper test, if any, was whether or not the act was the product of mental disease or defect.

#### SOME DURHAM RULE CHARGES ANSWERED

One of the charges made against the *Durham* rule is that it is vague. Certainly the *M'Naghten* rule appears on the surface only not to be vague, although it is entirely out of tune with reality. But as Chief Judge Simon Sobeloff well says, "What we ought to fear above all is not the absence of a definition but being saddled with a false definition" (41 A.B.A.J. 793, 796 (September 1955)). The fuller meaning of "product" was clarified in the decision of *Carter*

v. *United States* (252 F. 2d 608 (D.C. Cir., 1957)) as meaning that the mental disease, or defect was decisive or critical in bringing about the act.

It is also alleged that the jury cannot arrive at a conclusion on such vague instructions. This seems to me a specious argument, for juries appear to have very little difficulty in deciding what is a reasonable man, what is due care, what is negligence, what is malice or premeditation, just as in other types of cases they seem to arrive at some conclusion about causation. Under the *Durham* rule, they can be given guidance by full psychiatric evidence. Certainty is an illusory virtue in any conclusions involving the behavior of human beings, and this is recognized by the American Law Institute formulation of "substantial" or "adequate" capacity. Very few things in this world are certain, and even the law does not demand more than a finding beyond a reasonable doubt.

Still another allegation against the *Durham* rule is that it will increase the number of acquittals by reason of insanity. I grant that the number has increased to some extent. From the date of the *Durham* decision (July 1, 1954) through November 16, 1960, two hundred twenty-nine persons have been found not guilty by reason of insanity and committed to Saint Elizabeths Hospital in accordance with the statute, with increases particularly in the past two years (59 and 100 respectively). This statute (D.C. Code § 24-301 (1961)), passed in 1955 after the *Durham* decision, provides for mandatory commitment to Saint Elizabeths Hospital until such time as the hospital finds and the court agrees that the offender has improved sufficiently to be released without danger to himself or others in the "reasonable future"; in such case he is entitled to a conditional release, or if he has recovered he is entitled to an unconditional release. Of these persons committed under this provision, forty-two have been released unconditionally and an additional sixteen conditionally; few, if any, of these persons have been returned to the hospital. Six others have been released on writs of habeas corpus, meaning that the court has released the patient without the contemplated certification from the hospital.

One fact which sometimes escapes attention when acquittals by reason of insanity are being criticized is that in a substantial number of cases the period of confinement resulting has been far greater than if an ordinary sentence had been imposed. Several persons have been committed to Saint Elizabeths Hospital after acquittal of such charges as threats, disorderly conduct, unauthorized use of automobile, or even drunkenness. In spite of the trivial nature of the charge, some of these persons have been found to be seriously ill mentally and potentially dangerous. After all, if an individual is mentally ill and dangerous, it would seem to be to society's advantage at least to keep him in custody until he can be released safely. I venture to suggest that the odds are in favor of a period of sequestration in the hospital that is longer than if a sentence were being served. As for the subject, he has the advantage of being given treatment for his mental disturbance if that is practical. When one considers the large number of criminal cases going through the courts of the District it hardly seems that the public peace and safety have been very greatly threatened. The provision for mandatory commitment has been sustained by the Court of Appeals (*Ragsdale v. Overholser*, 281 F. 2d 943 (D.C., Cir., 1960)). For a more detailed study of the operation of the *Durham* rule, see James Clayton's article in the June 1960 issue of the *Journal of the American Judicature Society*, and the study by Abe Krash in 70 *Yale Law Journal* 905-952, May 1961.

#### THE VIEWS OF CHIEF JUSTICE WEINTRAUB

The concurring opinion of Chief Justice Weintraub of the Supreme Court of New Jersey in *State v. Lucas* (152 A. 2d 50 (1959)) is one of the recent decisions upholding the *M'Naghten* rule. It is a thoughtful document and one entitled to serious consideration by psychiatrists, although I must respectfully disagree with some of the views expressed. There is no doubt, of course, that society must be protected from the insane as well as the sane; in the District of Columbia the legislation enacted by the Congress takes care of this matter fully as well perhaps as does the liberation of convicted persons by parole boards, and probably better. I doubt whether the implication that the psychiatrist would "discard all concepts of insanity as a defense and deal with transgressors as unfortunate mortals" is quite within the facts. There are a very few psychiatrists who might consider the criminal act as strong presumption of mental illness, but they are greatly in the minority. I doubt, again, whether the lack of existing psychiatric facilities is sufficient objection to the adoption of such a rule as *Durham*. After all, if further institutions or those of a different sort



are needed for the protection of the public and for justice to the offender, it is up to the legislature and the administrative authorities to see to it that those facilities are provided. With one of Chief Justice Weintraub's points at least I am in hearty agreement. He favors "the admission of full psychiatric testimony for the jury's consideration in determining whether a man should live or die." I would go further—if desirable in a capital case, why not in other prosecutions as well where the issue of sanity is raised? As a matter of fact, this is precisely what the *Durham* rule encourages.

A word may be said here in behalf of the Scottish and (now) English doctrine of diminished responsibility. In 1957 the Homicide Act of Parliament provided in part that an offender shall not be convicted of murder "if he was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing." This doctrine has been in force in Scotland for nearly one hundred years, and now has finally been adopted by the English Parliament. The principle has in practice been employed in some American trials in lowering the grade of the offense, although it was specifically rejected by the Supreme Court of the United States in the *Fisher* case (328 U.S. 463 (1946)). There are gradations in responsibility.

I am very glad that the *Durham* rule was adopted, and in my opinion it is working well. It has taken the psychiatric witness out of a straitjacket, it has given the juries an opportunity to be fully informed about the mental state of the offender, it has been fair to the offender who is mentally deranged, while at the same time the public safety has not suffered. The rule has been indorsed by many legal writers, and it is my hope as a psychiatrist that we may eventually see other courts follow the lead of New Hampshire and the District of Columbia. As the Court of Appeals said in the case of *Stewart v. United States* (247 F. 2d 42 (D.C. Cir., 1957)) :

"The rule laid down in *Durham* requires no different examination by the psychiatrist, but only a different examination of the psychiatrist by the lawyers. . . . (It) simply allows the psychiatrist to testify in terms of mental health or illness without being required necessarily to answer questions on what he may consider 'nonmedical topics [such] as "malice", "right and wrong", and "criminal intent"'. One of the purposes of the rule is to remove some of the 'barrier[s] to communication between lawyers and physicians'. It allows greater altitude for evidence which throws material light on 'whether the accused acted because of a mental disorder'."

In closing, may I quote Chief Judge John Biggs' dissent in *Smith v. Baldi* (192 F. 2d 540, 568 (3d Cir. 1951)) : "The rule in *M'Naghten's Case* was created by decision. Perhaps it is not too much to think that it may be altered by the same means."

Dr. OVERHOLSER. The other article, Mr. Chairman, is an article of mine which appeared in the American Bar Association Journal, which constituted an address I made before the Chief Justices of the United States 2 or 3 years ago, in which I tried to take up some of these problems as a psychiatrist sees them. And the most recent thing I have written appeared in a foreign journal, but that was in English, may I hasten to add, and I called it "Psychiatry and Some Problems of Criminal Responsibility," in which I tried to put the thing in a historical context.

The CHAIRMAN. It will be received. We are very happy to have your testimony.

(The article follows:)

#### PSYCHIATRY AND SOME PROBLEMS OF CRIMINAL RESPONSIBILITY

(By W. Overholser, Washington, D.C.)

It is a high privilege to have the opportunity to pay honor to Professor *Manfred Bleuler* on the occasion of his 60th birthday. Ever since he assumed the Chair at the University of Zürich, he has been an indefatigable contributor to psychiatric literature, an eminent practitioner and lecturer. He bears an honorable name and he does so with honor to himself and to the memory of his distinguished father.

Some remarks may be in order concerning the rôle of psychiatrists in assessing the punishability, the accountability, or the responsibility, as it may variously be termed, of the individual who offends against the criminal law. The mental state of the offender has long been of interest, both in the Continental and the Anglo-Saxon systems of law. *Ulpian*, the great commentator, who wrote soon after 200 A.D., stated that the madman, or the child, is not to be held accountable, "since a wrong is only able to exist by the intention of those who have committed it." In general, it may be said that the attitude of the Continental law was considerably broader and less restricted than has been the case in the Anglo-Saxon law. In the Belgian and French Codes, for example, it is held merely that the offender has not committed a crime if he was in a state of mental aberration (*démence*) without attempting to define the nature or extent of that aberration. The Swiss Penal Code has been somewhat more restrictive, stating (Section 10) that the offender is not punishable who by reason of mental illness, idiocy, or grave alteration of consciousness, did not possess at the moment of the action the ability to appreciate the illegal character of his act, or to conduct himself in accord with that appreciation. It is of interest to an American to note that the Swiss Code recognizes diminished responsibility, a concept which has only lately been scatteringly recognized in American law.

Another aspect of psychiatric testimony in the Continental law, as distinguished from the Anglo-Saxon, is the rôle of the psychiatrist as an advisor to the court rather than as a partisan. I shall speak more of these distinctions later on. It might be pointed out, however, at this point that the rôle of the physician has not always been clearly recognized as one of competence in this field. *Johannes Weyer's* views, which to us sound modern, were dismissed summarily by the Saxon Code in 1572, with the statement that since he was "merely a physician and not a jurist" his views were important, and *Weyer's* archenemy, *Jean Bodin*, made a virulent attack on him, even accusing him of being an instrument of the devil. *Paolo Zacchias*, however, the Protomedicus of the Papal Court, in the early 1600's, maintained that only a physician could evaluate for the courts the mental condition of an accused. On the other hand, *Immanuel Kant* and *J. C. Hoffbauer*, the eminent legal writer of the 18th Century, believed that the proper testimony on such topics should be given by a philosopher rather than by a physician.

I have mentioned very briefly some of the aspects of the Continental law regarding responsibility, merely to emphasize a few of the distinctions between the Roman and the Anglo-Saxon traditions.

The earliest systematic treatise in the Anglo-Saxon law is that of *Bracton*, who wrote in the 13th Century. He subscribed to the doctrine laid down by *Ulpian* much earlier; namely, that the madman and the infant are not to be held accountable for their offenses, unless there was an intent to injure. His statement is often quoted to the effect that the madman (*furiosus*) "does not know what he is doing, is lacking in mind and reason, and is not far removed from the brute." Starting with *Bracton* and coming down largely to the present day, it has been characteristic of the English and American law that judges in handing down their decisions through the years have attempted consistently to specify the type and degree of mental disorder which would exculpate the offender. The criteria of "insanity"; that is, of mental disorder which would excuse, varied, as was to be expected, from time to time with what little advance there was in those days of the knowledge of mental mechanisms. Lord *Coke* and Lord *Hale*, writing in the 17th Century, emphasized criminal intent as important, considering that if the mental disorder abolished this intent, then a crime had not been committed. There were distinctions at that time between total and partial insanity. Lord *Hale* suggested the test of understanding as being that possessed by a fourteen years' child. A century later we find the knowledge of good and evil required, but it should be pointed out that this meant good and evil in the abstract sense and not necessarily as applied to the act in question. At about this time, in 1724, the "wild beast test" was introduced. In 1800, delusion was laid down as the important test [1], but this test did not receive much later attention. The tendency in the English law seems to have been toward a broadening of the test, but any trend of this sort was nullified by the very strict interpretation given by the Judges of England in the case of *M'Naghten* in 1843[2]. In this case the defendant, obviously deranged, had been acquitted by reason of insanity after having killed the clerk of the Home Secretary. As a result of public furor, the House of Lords asked the *Judges* of England to state what the proper instructions to the jury would be in a case of this sort. The Opinion of the *Judges* has had a

most extraordinary life. Indeed, it is still the prevailing law in England and in most of the American states. Briefly, the opinion stated that in order to establish a defense on the ground of insanity, it must be proved that at the time of committing the act, the party accused was "laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." The Judges emphasized that this knowledge of right and wrong referred to the very act charged rather than right and wrong in the abstract, and not only to legal but probably also moral right and wrong.

A few very serious objections to the M'Naghten Rule may be mentioned: It operates with relation to psychopathological notions which are wholly at variance with present-day psychiatric conceptions; the criterion is basically an ethical rather than a psychiatric one, right and wrong being ethical questions. Finally, it deals only with disorders of the intellectual aspect of the mind, making no allowance whatever for aberrations characterized by deficiency of volition or other emotional factors. The test was attacked almost immediately after it had been enunciated, and it has been frequently since criticized by legal writers and psychiatrists, yet it still persists. The basic objection by the psychiatrist is that he is not asked a psychiatric question at all, but rather a moralistic one, a question in a field in which he has no special competence whatever.

Another so-called "test," evolved in the United States even slightly earlier than the so-called M'Naghten Rule (1834) is known rather loosely as the "irresistible impulse" test. According to this doctrine, the power to choose or forbear to do the act was necessary in order to establish criminal irresponsibility, or as an Ohio court phrased it, "Was the accused a free agent in forming the purpose to kill?" [3]. Some of the earlier cases seem to have linked this type of defect to knowledge of right and wrong, combining the two as it were, but later decisions seem to have recognized the volitional aspect as distinguished from the cognitive as sufficient in itself if impaired to warrant a defense of lack of responsibility. It was an advance, of course, to recognize the emotional elements in crime as against the intellectual, but here again the test called for one symptom rather than a totality. From the psychiatric point of view it is almost as difficult to say that the defendant labored under an uncontrollable impulse as it is to say that he lacked capacity to recognize the difference between right and wrong. The "impulse" test is recognized in about twenty of the American states.

Both of these so-called "tests," until the establishment of the New Hampshire Rule in 1869 [4], and the Durham Rule in the District of Columbia in 1954 [5], drew a sharp line of dichotomy between "sane" and "insane," the latter term implying total loss of reason. The New Hampshire Rule, enunciated in 1869, stood alone until the Durham Rule was adopted in the District of Columbia in 1954. Judge *Doe* formulated the rule after prolonged study, concluding that the matter of the mental state of the offender is as much a matter of fact and not of law, as, for example, his presence at the scene of the crime. He held, too, that the law should not attempt to define disease, saying that a "diseased condition of the mind should be settled by science and not by law. Disease is wholly within the realm of natural law or the law of nature." Both the New Hampshire and the District of Columbia rules, then, inquire whether or not the act of the accused was the product of mental disease or defect. If there is any question on which the psychiatrist should be competent to speak, it is the relationship between the behaviour of the defendant and any mental deviation from which he may be suffering. In other words, the psychiatrist under the Durham or the New Hampshire rule speaks as a *psychiatrist*. He has full opportunity and should use it to outline the history, the development of the subject's conduct and the relationship of his mental disorder, if any, to the act with which he is charged. The problem of causation of conduct *is* within the psychiatrist's province, whereas the M'Naghten Rule and the frame of reference in which the questions under that rule are asked pose a moral query which is not within his competence and under the "irresistible impulse" test ask a question which is extremely difficult, if not impossible, of answer from the evidential point of view.

The Durham Rule has not been adopted as yet, by any other jurisdiction, although a number of judges have gone out of their way to explain why they were not adopting it. Their principal objection seems to be that the Durham Rule is vague, whereas, say the judges, the M'Naghten Rule is definite. This definiteness is quite illusory, as well as wholly lacking in psychiatric reality. For example, there has been dispute on the meaning of so simple sounding a phrase as "nature and quality." As one of the eminent jurists, Chief Judge

Simon Sobeloff says, "What we ought to fear above all is not the absence of a definition but being saddled with a false definition [6]." Very few things are certain either in the law or in psychiatry, but it seems clear that the jury which may have to decide complicated questions of finance, of liability, of negligence, and so on, need have no fear of coming to a conclusion on a question of responsibility where they are guided by expert evidence and particularly by a full explanation by the psychiatrist of the case as he sees it.

The American Law Institute, in drawing up a Model Penal Code, has struggled with the problem of a definition of responsibility, a definition which to the author seems quite improper to be embodied in legislation, since it is properly a judicial matter. The "test" proposed includes, in somewhat changed language, a combination of the M'Naghten and the "irresistible impulse" rules. It is doubtful whether it is any advantage whatever over those two rules, both of which are subject to serious criticism. Another serious defect of the Institute's formulation is the vain attempt to exclude "psychopathic personality" as a defense by defining it as a "mental disorder manifested only by repeated criminal conduct or otherwise antisocial conduct." The inadequacy of this definition is presumably obvious to any psychiatrist. Qualifications of the Durham Rule have been suggested, notably by Chief Judge *John Biggs, Jr.*, in the Currens' decision [7], and it is safe to say that the last word is far from having been spoken [8]. Opinion seems to be unanimous that M'Naghten by itself ought to be abandoned, and in England, the doctrine of diminished responsibility (recognized in the Swiss law, and in the Scottish law as well), has recently been adopted by Act of Parliament. Under this provision, a person "shall not be convicted of murder if he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts and omissions [9]." The principle has been specifically repudiated by the Supreme Court of the United States (with three dissents [10]), although at least one State court has recognized it. As a practical matter, however, the various degrees of crime which are recognized in most of the American states furnish an opportunity for prosecution on a lesser charge if it is thought that there are extenuating circumstances, including mental disorder, of a degree less than is sufficient to warrant finding lack of responsibility.

A modification of diminished responsibility which is recognized in the American law consists in the existence of the so-called sexual psychopath laws. Although this group is not at all well defined psychiatrically, and there are certain objections to this type of legislation, the basis lies in recognition of the fact there are persistent sexual offenders who have shown themselves to be entirely unamenable to routine correctional treatment, but who are not "insane" in the eyes of the law. They are nevertheless, by reason of mental deviation, not readily deterrable. Some of these offenders are sociopaths (psychopathic personalities), more of them probably suffering from neurosis. In any event, here is a recognition of the principle that there is a group of offenders who are less than frankly insane but who should be dealt with by an indeterminate period of detention and, where possible, treatment. As a matter of fact, a fair proportion of these offenders are amenable to psychiatric treatment. It may be mentioned parenthetically here that under the Durham Rule in the District of Columbia, a considerable number of persons diagnosed as suffering from sociopathic or psychopathic personality have been acquitted by reason of insanity, and committed for an indeterminate period to St. Elizabeths Hospital. It would seem that this is a decided advance in the law from the days when it was thought that all offenders were either completely sane or completely insane. Psychiatrists agree that the persistent sexual deviate presents a psychiatric problem.

Granted that the law recognizes that there are mental disorders or deviations conforming to certain so-called tests which will exculpate from charges of crime, the question readily rises as to how the information concerning the mental state of the offender is to be presented to the court. It may be mentioned that in all felony cases the defendant in the United States is entitled, if he wishes, to a jury trial. This practice differs from that in vogue in some of the European states. Furthermore, in the European courts in general, the psychiatrist is an advisor of the court, an expert recognized as authoritative, and, at the same time, impartial. Such, unfortunately, is not the case in the United States and England. Until the 17th Century, it was the common practice for judges to call in medical men to advise them, or indeed, experts in almost any field, but since that time with the rise of the importance of the jury, the practice developed of summoning expert witnesses by the respective parties to the trial, just as is done with ordinary witnesses. In this way, the expert soon came to

bear the stigma of partisanship, and unfortunately at times was even accused of venality. At any rate, it must be obvious that the appearance of partisanship weakens the testimony of the expert. Furthermore, any possible deviations or differences of opinion between the two sides are readily emphasized by the respective lawyers in their methods of cross-examination and in their framing of the hypothetical question.

Another question may arise; namely, whether a defendant's mental deviation is recognized. It is indeed not impossible that a defendant may be mentally ill, though not conforming to the layman's idea of the "raving maniac," so that an injustice may be done him through failure to present the facts to the court concerning his mental illness.

Over forty years ago, the Commonwealth of Massachusetts devised a procedure known as the Briggs Law, whereby persons charged with certain types of offense, particularly capital offenses or cases of recidivism of felony, whereby the defendant was referred automatically to the Department of Mental Health of the Commonwealth for examination by psychiatrists. This report, available to both the prosecution and defense, to the court and to the probation officer, carries very considerable weight since it was obviously impartial and competent. The proportion of defendants found to be clearly mentally ill has been low, and indeed all the types of recommendations for commitment, observation, of suggestion of low intelligence, total less than 20%. Thus the lie is given to those who accuse the psychiatrists of wishing to make out all offenders as mentally deranged. It seems strange that after forty years, only two other states have adopted even in part the provisions of the Briggs Law. It is by far the most practical method yet devised of providing sound information to the court concerning the mental state of the defendant and insuring recollection of his mental deviation, if any.

As the frontiers of psychiatry are extended, as a greater knowledge of human behavior in its wellsprings becomes generalized, and as the public becomes more clearly aware of the fact that there are many so-called borderline cases, the line between criminal behavior and mentally abnormal behavior will not be so clearly drawn as some would like to think. There is every reason to believe that there will be a greater recognition in the courts of the contributions which psychiatry may make for a more enlightened dealing with the offender and thereby a greater degree of protection of society. Perhaps, indeed, we may look forward to the establishment of "treatment tribunals," as proposed by *Wharton* and later by *Sheldon Glueck*, leaving to the jury the question only of guilt of the act and making the matter of disposition a wholly administrative matter. Then, and probably only then, will it be possible to avoid such concepts as "insanity" and "responsibility."

#### REFERENCES

- [1] *Hadfield's Case*, 27 Howell St. Tr 1282.
- [2] 10 Clark & Fin. 200. For a general discussion of the historical development of these "test" see *Guttmacher M.*, *Archives of Criminal Psychodynamics* 4, 647 (Fall 1961).
- [3] 12 Ohio Reports 483 (1843) and *Wright's Ohio Rep.* 612 (1834).
- [4] 49 New Hampshire 399 and 50 New Hampshire 369.
- [5] *Durham v. U.S.*: 214 Fed. 2nd 862.
- [6] *Insanity and the Criminal Law: From McNaghten to Durham and Beyond.* American Bar Association Journal 41, 796 (1956).
- [7] *U.S. v. Currens*: 290 Fed. 2d 751 (1961).
- [8] See *Burger J.*: Dissenting opinion in *Comer Blocker v. U.S.*, 282 Fed. 2nd 853 (1961).
- [9] Homicide Act of 1957.
- [10] *Fishbein v. U.S.*, 328 U.S. 463 (1946). See comment by *Weihs H.* and *Overholser W.* 56 Yale Law Journal 959 (1947).
- [11] Ch. 123, General Laws, Sec. 100A. See *Overholser W.*, "The Briggs Law of Massachusetts"; A Review and an Appraisal. *Journal of Criminal Law and Criminology* 25, 859 (1935).

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The CHAIRMAN. If I understand you correctly, you say that the test that is now being developed by case law in the District of Columbia is an adequate test for insanity. Is that your opinion? You would not enact a statute to define insanity. You would depend upon the courts to lay down the test.

Dr. OVERHOLSER. Precisely, sir. Yes, sir.

The CHAIRMAN. Thank you.

Senator DOMINICK. If I might, Mr. Chairman, I would like to go into this a little more.

Doctor, I have great respect for your competence and ability. And I do not intend to be cross-examining you on any of these. But I want to see in what context we are talking.

Your general thesis, then, as I understand from your answer to the chairman's question, is that the court should determine what are the tests as to whether a defendant is sane or insane. Is that accurate?

Dr. OVERHOLSER. Yes, sir.

Senator DOMINICK. And in each court, of course, you have a different judge, and you have a different person. So therefore, the rules in each specific case might well be different, might they not?

Dr. OVERHOLSER. I should say in any one jurisdiction they ought to be uniform, just as there is here now by the decisions of the court of appeals—and the one case that has gone up to the Supreme Court of the United States.

Senator DOMINICK. But this takes quite a long time, to arrive at a uniform status for determining whether a person is sane or insane, does it not?

Dr. OVERHOLSER. The courts have been doing business for a long, long time. Some of them have not made much progress as far as keeping up with the findings of science, and particularly of psychiatry. I mean the *McNaghten* rule is still the predominant rule in the United States. There are many jurisdictions having also the so-called irresistible impulse rule. And then there is New Hampshire and the District, and so far those are the only two, which have adopted the so-called productivity test. And I think that at least one State, and maybe one or two more—Dr. Guttmacher may know—have adopted in essence the ALI formulation.

Senator DOMINICK. Now, Doctor, to lay the groundwork for this, I would say that the law is at best an inexact science. I do not know whether you would agree with this or not; but as a lawyer, and as a practicing one before I entered Congress, I would say that. Would you say that psychiatry is an inexact science?

Dr. OVERHOLSER. Yes, sir. I would agree with both of these statements.

Senator DOMINICK. If you then agree with both of those statements, and you add into it the element of different judges and different branches of the court, don't you get two elements of inexactness in trying to determine whether a person is sane or insane, within the terms of responsible conduct?

Dr. OVERHOLSER. I suppose that has been the case ever since the concept of criminal responsibility was developed.

Senator DOMINICK. What I am trying to bring out is that wouldn't we pyramid the doubts and confusion by simply leaving this up to the courts to determine, whether or not a person is responsible or not responsible for a felonious act?

Dr. OVERHOLSER. I think you would embalm them just the way a butterfly could be embalmed in plastic. There would be no chance of further change—for practical purposes, whereas the courts can change their minds, and sometimes do.

Senator DOMINICK. And then what happens if the courts do change their minds on people who have been acquitted or convicted on the basis of rules which have been reversed by the court?

Dr. OVERHOLSER. Reversed subsequently?

Senator DOMINICK. Yes.

Dr. OVERHOLSER. Well, of course, if they have been acquitted, there is nothing you can do.

Senator DOMINICK. That is correct. And they are released on the street, are they not?

Dr. OVERHOLSER. Not here. And in quite a number of jurisdictions—certainly not in England. There is a provision for confinement until the doctors and the courts have determined that the person is reasonably safe. And of course boards of parole make mistakes, just as psychiatrists do, as far as predicting behavior is concerned. At least so I have been informed by the newspapers.

Senator DOMINICK. That is all I have.

The CHAIRMAN. Thank you very much, Dr. Overholser. We certainly appreciate your testimony. The staff will get your exhibits.

Dr. OVERHOLSER. Thank you very much.

The CHAIRMAN. Thank you. Our next witness is Dr. Guttmacher, chief medical officer of the supreme bench of the city of Baltimore, member of the Advisory Committee on the Model Penal Code of the American Law Institute. And it has been called to my attention that you have been quoted on page 92 of the House report, H.R. 7525, with relation to the knowledge of wrongfulness test, having written in the Chicago Law Review, 1955.

We are delighted to have you with us, Doctor.

#### STATEMENT OF DR. MANFRED GUTTMACHER, CHIEF MEDICAL OFFICER, SUPREME BENCH OF THE CITY OF BALTIMORE

Dr. GUTTMACHER. I wish to thank you and the committee for having asked me to testify before you. This is a problem—

The CHAIRMAN. Before you get into the problem, I wonder if, for the record, you might not indicate what your responsibilities are as the chief medical officer of the supreme bench of the city of Baltimore.

Is the supreme bench of the city of Baltimore a trial bench, or an appellate bench?

Dr. GUTTMACHER. It is the trial bench. I have been chief of this facility since 1930, a psychiatric advisory office which examines cases that are referred to us by the court or by various agencies connected with the court. We render reports and frequently testify.

Our office consists of three half-time psychiatrists, including myself, four, actually, and two full-time clinical psychologists, a social worker, and a secretarial staff. We see all the cases where there is a not-guilty-because-of-insanity plea.

A good many cases are seen postconviction to advise the sentencing judge in regard to the personality makeup and the character structure of the individual with whom the judge is dealing.

Senator DOMINICK. May I interrupt there, Mr. Chairman?

The CHAIRMAN. Certainly.

Senator DOMINICK. I wonder if you could give us any idea from your experience, Doctor, as to the percentage of cases where a person is caught in a felonious act, as far as the actual conduct of that act is concerned, that plead not guilty by reason of insanity.

Dr. GUTTMACHER. The number that make the plea?

Senator DOMINICK. Yes, just a rough estimate.

Dr. GUTTMACHER. Yes. The figures run, I think, in Maryland, about 1½ to 2 percent of individuals who come to trial in the criminal courts are found not guilty because of insanity. I would say the plea is not made, perhaps, more than in 3 or 4 percent of the cases. That would be—I do not have any actual statistics to support that, but I think that is a fairly accurate guess.

Senator DOMINICK. Are we talking now in terms of percentages of the more violent crimes, or are we talking about the overall crime rate?

Dr. GUTTMACHER. Well, I deal only with the trial court level. We have not, up to now, been dealing with the police court type of case. So that there are, I think, about 5,000 to 6,000 individuals who come before the criminal courts of Baltimore, and this is the group with which I deal. The statistics that I give you would be in regard to that particular group of cases. These are the more serious crimes, as a whole.

Senator DOMINICK. Would the percentage that you quote be equally applicable to the class of cases where death is involved?

Dr. GUTTMACHER. Death is involved? No; the insanity plea is made more frequently in capital offenses than in any other type of case.

Senator DOMINICK. Do you have any idea what percentage that might involve?

Dr. GUTTMACHER. This, sir, is a guess. I would say that not more than 10 percent, at most. And the reason that the figure is relatively low in Baltimore is that these cases are frequently referred to our office for pretrial examination. I think that our office is sufficiently well established, and because of our neutral position, if we render a report saying that we feel that this man is not suffering from a definite mental disease, that most defense attorneys will drop the idea of making an insanity plea. I believe if you go to a jurisdiction that does not have the particular type of office which we have, you would find a greater percentage of not-guilty-because-of-insanity pleas in capital cases.

Senator DOMINICK. You do not happen to know what that might be in the District of Columbia, do you?

Dr. GUTTMACHER. No, sir; I am not familiar with that at all.

Senator DOMINICK. Thank you, Doctor.

The CHAIRMAN. We will ask the staff to secure that from the proper officials.

The U.S. attorney did testify yesterday, this is not completely responsive to the Senator's question, but he did testify that in 1962 the figure of acquittals by reason of insanity was 13 percent of all defendants tried, which would seem to be materially higher than you have experienced in Maryland, 13 percent of all defendants tried.

Dr. GUTTMACHER. Well, we have in Maryland the *McNaghten* rule. It has not been in any way amended. We must deal with the rule which we have. I have never been a proponent of that rule. I think that it doesn't administer justice as it should be administered.

I do not know, sir, how to proceed. The one question which has come up which I am afraid I cannot give any very authoritative opinion about is whether this great problem which has been a vexing one for so long should be settled by the courts or by legislative enactment.



I have talked with Chief Justice Brune, of our court of appeals in Maryland, a very respected jurist, who feels that it is a legislative matter.

I am not in a position to say, except that I have appeared before committees of the Maryland Legislature on various matters. As a matter of fact, I have appeared before them in regard to changing the *McNaghten* rule. And I must say that it has always impressed me that the caliber of mind which composes the appellate court judges is better equipped to deal with so complex a problem than the State legislators.

Now, that does not, of course, apply to the problem that you have, because you have an entirely different group of men who will be dealing with this problem.

But for my own State, I would far rather see the court of appeals deal with this very complex problem, than to see it left entirely to the State legislature.

Senator DOMINICK. If I may say so, Mr. Chairman, that was extremely gracefully put.

The CHAIRMAN. It certainly was.

Dr. GUTTMACHER. Now, if you permit me——

The CHAIRMAN. I see why you have been there since 1930.

You may proceed.

Dr. GUTTMACHER. If you will permit me, I listed what I thought were the good points in this bill, and then I have listed a few that I thought were not good points.

I think the first thing, that the appointment of a neurological expert whenever mental disease or defect appears likely to be an element in the case, is important. And I do not know—as a layman, it seems to me that this bill has particular importance, because I believe that the laymen in the United States look to the District of Columbia to have what seems to be model legislation. And I feel that it is very important that this bill be a model bill. And I think the fact that the appointment of a neutral expert, whenever the case—whenever the mental condition becomes a definite issue, is a real step forward.

I think secondly, that the report should be made available to all parties seems to be a very wise provision. I think there is too much tendency to play the game as if it were some sort of an athletic encounter rather than a seeking of justice. And it seems to me that this is best obtained when there is a frankness and an honesty about such involved and complex matters, and such serious matters as insanity in criminal cases.

I think that the third point, that no psychiatrist is permitted to testify who has not examined the accused, is a good point. I think Dr. Overholser had some reservations about that, I think, in regard to the use of the hypothetical question. I am, of course, not legally trained. My own experience with hypothetical questions has not been a happy one. I feel that in most instances the hypothetical question confuses rather than clarifies issues. And I think for a psychiatrist to come into a court and testify on a matter of this kind when he has never had the responsibility or opportunity of examining the man about whom he is testifying is not wise.

I think that the psychiatric testimony permitted to prove the presence or absence of a state of mind which is an element of offense is important, particularly in homicide cases.

I think the fifth point, that the bill does incorporate from the American Law Institute Model Code what seems to me an extremely important provision—and that is that the psychiatrist should be allowed to state fully his views and the basis for them. I think one of the most stultifying situations that one can find oneself in is when one gets on a witness stand and takes an oath, not only to tell the truth, but the whole truth, and then one has inept counsel, and inept counsel fails to ask the questions that are really germane to the issue. And I think one often leaves the stand under those conditions feeling that one really has not carried out one's responsibility, one has not been able to give the jury the full information that it requires.

So that I feel that the incorporation of this provision in the bill is extremely wise.

Then I think that—the sixth point—I think that a conditional discharge of the patient by the court is also a very wise provision. I agree with Dr. Overholser—the word “probation” has come to mean a criminal procedure. And I think releasing the patient on conditional release, or convalescent status, or whatever word one wants to use, would be preferable. But the principle is important.

The Sunday before last I went up to the State hospital in Pennsylvania, north of Scranton, to examine a man who had killed his wife and child some 7½ years before. The question came up whether this man is ready for release. I would be quite enthusiastic, quite ready to strongly advocate his release if the court were able to lay down certain conditions as to further treatment, observation, and living under certain conditions.

On the other hand, I have some serious misgivings about not releasing a man without such conditions.

I believe there are only three States where the release is conditional. And I think it is an important point, that this should be made.

The CHAIRMAN. Is it conditional in Maryland, by chance?

Dr. GUTTMACHER. No, we have nothing like that.

The CHAIRMAN. I see.

Dr. GUTTMACHER. Now, the two less important points, I think, are not good—I believe that the incorporation from the American Law Institute, the provision that the report is only to be used in relation to the mental condition of the accused and not used as to his general guilt or innocence, is a wise provision. Now, perhaps the case law in the District of Columbia, with which I am not familiar, makes it impossible to use revelations which might have been given psychiatrists during the course of an examination as evidence in the general question of guilt or innocence. But it seems to me that you are certainly much more likely to get the full cooperation of your patient if there is no probability of the use of this material as evidence in the court.

I also believe that denial of the right to inform jurors of the consequence of a not-guilty-by-reason-of-insanity verdict is not wise. I know that the point has already been raised. I think that I agree with Dr. Overholser that the general public thinks that as soon as a man is found not guilty because of insanity, this means that he just walks out of the courtroom, and he is a free man.

A good many years ago, Dr. William White, who was a great Superintendent at St. Elizabeths, made a careful statistical study of the time of capital offenders, that is, first degree murderers given life sentences, sentences in the penitentiary as compared to the time that these people spent in psychiatric hospitals. And as I remember it, quite definitely the average stay in the psychiatric hospital was longer than the stay in the penitentiary. Now, I do not mean to say that that is necessarily any longer the case. I think things have changed, and the figures may not be the same, but there are many people who stay in psychiatric hospitals for life who have been found not guilty by reason of insanity.

And I think it is only fair and wise that the jury have at its disposal all of the practical material which it really needs in reaching decisions. And I am sure that you gentlemen who have dealt with juries know better than I that often minor points of this kind, as much as we do not like to feel that these enter into the final decision, are things which really do make the decision.

Now, the definition, which is the important thing—I am not enthusiastic about this definition. I know that it is basically the American Law Institute definition, and Dr. Overholser has talked to the point, where he and Dr. Freedman and I were not favorable to this definition.

I feel that Durham, particularly with McDonald, is a very workable system. I think McDonald has been a very important decision, because the definition that it gives of mental disease is a functional one, it is not a technical one, it is not phrased in ethical terms. And furthermore, I think that it stresses the question of degree. And it has been brought out before, psychiatry is far from an exact science, and we cannot make an exact cutoff point of black and white. There is a continuum between health and disease. And I think the fact that the McDonald decision talks about the substantial—using this word twice—"substantial," I think is important.

Furthermore, I think that it does put the burden, it stresses the fact that this is a jury decision.

I have a reprint of an article I published this year, which I would like if possible to give to the committee, entitled "What Can a Psychiatrist Contribute to the Issue of Criminal Responsibility?" And in there, I point out that there is no such medical entity as responsibility. We have no X-ray of electroencephalograph or anything else that is going to determine this. This is a social concept that society places on an individual.

I think that psychiatry should not be made the 13th juror. I would far rather see the actual question not put to the psychiatrist, no matter how it is termed. I would rather see the psychiatrist merely state his analysis of the individual, whether he is suffering from mental disease, what the chief characteristics of this mental disease are, in what way the mental disease has affected the intellectual processes of the patient, and his social control. This is as far as I think psychiatry should go. I don't like to be cast in the role of the important individual in the whole process. I do not think this is a psychiatric decision. It is a decision that should be made by one's peers, by the community.

The CHAIRMAN. Don't you think the jury, though, leans very heavily on the expert advice of men in your field to make this all-important de-

termination as to whether or not the defendant did have the mental capability, or was mentally responsible for his act? It seems to me if I were in the jury box, I would look for guidance. I am not a man trained in this field. I am looking to you, Dr. Overholser, and other doctors, to try to indicate to me whether this defendant who is standing trial is responsible for his criminal act.

Dr. GUTTMACHER. Yes, I feel it should lean heavily, but not as heavily as it seems to me is often the case. It is a great responsibility to put on one individual.

The CHAIRMAN. You differ somewhat, then, with the testimony of the present Superintendent of St. Elizabeths, who testified yesterday, and took the position, rather novel, I think, that he would take this entire question of criminal responsibility away from the jury entirely; he would simply have them determine whether an unlawful act had been committed, and then either the judge or I think he called it a responsible body would then make the determination of whether the man was responsible for his act and what disposition should be made of him. This is a new concept.

Dr. GUTTMACHER. The idea of having a treatment facility, having the court decide whether the man carried out the act or not, and then having a board of so-called experts composed of sociologists, psychologists, and psychiatrists, determine whether the man should go in institution A, B, C, or D, and roughly for how long, this is not too novel an idea. Perhaps it has some merit to it.

I feel that our society is certainly not ready to give up the whole concept of responsibility.

I think that sometimes a psychiatrist is placed in a role that he does not have sufficient divine inspiration to play in these proceedings.

Now, in regard to the definition, my chief quarrel with the definition is this leaving out of the psychopath, just categorically deciding that this group of people, the sociopaths and psychopaths, that these people are to be put into a separate entity. From a practical point of view, perhaps this is not so unjust, if we deal with these people as we are now dealing with them in Maryland.

As I have told you, Maryland now has the *McNaghten* rule, and, of course, the psychopaths in 99 cases out of 100, I would say, are found responsible.

But Maryland has built a special institution where this group of offenders, who form so important an element in the recidivistic group, are sent for an indeterminate time—

The CHAIRMAN. Those are the ones that come back time and time again.

Dr. GUTTMACHER. That is right. They are sent to a special facility under an indeterminate sentence. We do not have a fourth-offender law in Maryland. This law, I think, is far better. And these people are dealt with in a very special category, and are under civil proceedings determined to be what we call in the Maryland law defective delinquents rather than sociopaths. And there they are sent to an institution which is midway between a hospital and a prison. It is administered by a psychiatrist, but it has a great wall around it and custodial staff, and a great deal of the discipline that goes with a prison. But these men are offered training in various fields, they are given a great deal of group therapy, and the general atmosphere of

the institution differs from that of the ordinary prison. We hope—and feel there is some reason to believe—that some of these people who have been among the most serious repeaters in our State will be rehabilitated.

If you are going to make provisions for this psychopath group, so that they are afforded treatment of a special kind, it seems to me that from a practical point of view this is not too important a dissent.

But I would refer you, and I am sure that you are well familiar with Judge Biggs' opinion in the *Currens* case, where I think Judge Biggs in a very masterly way takes up in a series of about four paragraphs this whole issue of whether the psychopath should be excluded from the possibility of irresponsibility.

The CHAIRMAN. How do you define "psychopath," Doctor?

Dr. GUTTMACHER. Well——

The CHAIRMAN. Who is a psychopath?

Dr. GUTTMACHER. Well, if you have the time, sir.

The CHAIRMAN. I would just like to know if I ran into one.

Dr. GUTTMACHER. I cannot do it in one word.

The CHAIRMAN. I realize this.

Dr. GUTTMACHER. I would like to——

The CHAIRMAN. We asked about sociopaths yesterday.

Dr. GUTTMACHER. I am sorry, sir, maybe I am confusing the issue. The psychopath is a special group, is a sort of subdivision of the sociopath. What we are really talking about is the same thing. The sociopath and the psychopath are to all intents and purposes for our proceedings here today identical. And if I am confusing the issue in that way, I apologize.

The CHAIRMAN. We had a definition yesterday of sociopath. And I think we had about nine categories in it, and if you had six of the nine, you were a sociopath. And it certainly looked to me like we had an awful lot of sociopaths running around the United States today.

Dr. GUTTMACHER. I am sure we have. And they are not all in prison.

The CHAIRMAN. I am sure this is true.

Dr. GUTTMACHER. That is why I think *Durham*, sir, is so important from the point of view of degree. I think there are degrees of sociopathy in some of my friends, and perhaps we should not exclude myself entirely. But at any rate, I think that this is a matter of degree. And I think that these people become incapable of controlling themselves, and this really is the basis for our decision whether they have the freewill, whether they have the ability to control themselves. I think that when this condition reaches a certain degree of malignancy, that their control system has entirely broken down. So I think it is a matter of degree. I think that this in general true of this whole problem of mental disorder.

The CHAIRMAN. Except this bill that we have before us, which is the one that we are probing at the present time, title II, says, on line 12(a):

Mental disease or defect excluding responsibility, sociopathic and psychopathic personality is not disease or defect.

Now, you take issue with that?

Dr. GUTTMACHER. That is right.

The CHAIRMAN. "Sociopathic and psychopathic personality is not disease or defect." If it is not a disease or defect, what is it?

Dr. GUTTMACHER. Well, it is a characterological deformity which has been present in the individual from childhood, but would not necessarily have been noticed until later years.

The CHAIRMAN. You would take that particular definition completely out of any proposed statute.

Dr. GUTTMACHER. That is right.

Of course, it is not in the *Durham* rule, and it is not in *McNaghten*, and it is not in a good many others. The ALI rule, of course, has gone out of its way to make this what I think is a gratuitous statement.

There are, of course, very, very few responsible psychiatrists who have had any kind of experience in this field—there are a few arm-chair theorists, perhaps—who would say that just the ordinary recidivist, the man who is dissocial, who has been raised in an environment which has given him poor ethical and social standards, that these people are indistinguishable from the group we call the psychopath. But the vast majority of psychiatrists, particularly those who have had any clinical experience in this field, I think, do not hold that.

I think that there are a group of people who are just ordinary recidivist, and I think there are people who, because of their character deformity, which has been for the most part produced by early noxious situations in which they grew up, that their character deformity is of such magnitude that they are quite incapable of deep-lying drives and attitudes and complexes, that they are not capable of conducting themselves as normal people.

Senator DOMINICK. Mr. Chairman, I wonder if I might ask a question?

It is my understanding—and if I am incorrect, I hope either the chairman or the witness would correct me—that this is a policy decision by the House of Representatives, and what the House, in effect, is saying is that history to date has indicated that sociopathic and psychopathic people should not be put into an institution for rehabilitation because up to date there has been nothing to prove that you can rehabilitate them, and that they can by virtue of their particular type of personality get released from a place like this, and immediately go ahead and commit the same crime again. So therefore, you ought to deter or try to deter them by punishment rather than by rehabilitation.

Dr. GUTTMACHER. As I said, sir, in my remarks a little while ago, from a practical point of view, if you intend to establish a special institution to deal with these people on a treatment basis, I do not think any great harm is done. But I would say that in 99 cases out of 100 these people are—well, that is a figure that perhaps is too high—but in 90 percent of the cases these people are not changed by the ordinary penal institution, and they come out, and they form the most serious group of criminals, or among the most serious groups that we have.

Now, what our batting average is going to be in a place like the Patuxent Institution in Maryland is too early to say.

If we are able to get 50 or 60 percent of these people to be law abiding it will be a triumph. Now, I cannot guarantee that the method we are using in Maryland is going to cure all these people. But I can say that is going to cure—at least in theory, and I believe

there is some suggestion in practice—that is going to cure a much higher percentage than the ordinary penal institution will cure.

So that if there is a special provision made for this group of people, I think that this is a workable scheme.

Senator DOMINICK. Well, suppose, Doctor, that you included them within the people who can plead not guilty by reason of insanity, and they proved to be psychopaths, and therefore they are put into a rehabilitation institution of some sort with all the others. Are they going to get the necessary treatment in there to do them any good, or are they simply going to be committed to an institution where they may do harm to some of the other inmates?

Dr. GUTTMACHER. Well, I think there are certain institutions which in our more enlightened States are now being geared to special treatment provisions for this group of individuals. I think ideally that if one is going to talk theory, that these people are really not responsible in the ordinary sense, because in extreme instances they do not have this free will which is the basis for our decision. Ideally we are talking about a philosophical principle involved—they should not be held responsible. If that is done, then I think that then there should also be special divisions or perhaps special institutions—but special divisions of institutions where they are dealt with.

I think that more of them are modified favorably in the ordinary psychiatric hospital than the ordinary prison. I think that this is considerably lower than it would be if we had special facilities for their treatment.

Senator DOMINICK. Thank you.

The CHAIRMAN. Thank you, Doctor.

Did you have anything additional?

I do want to at least adopt by reference the Biggs decision. I think we have that before us. It does not need to be incorporated in the record.

I very much appreciate your testimony.

The *Currens* case to which you refer is 290 Federal Second, page 751, Third Circuit decision, May 1, 1961. We can refer to the case by going to the casebook.

Now, as I understand it—and I want you to make it clear—if I understand your testimony, going to the heart of the House bill, the definition of mental responsibility and the question of insanity, is it your opinion that the test now laid down in the *Durham* case as amplified or supplemented by the *McDonald* case is a sufficient and adequate test in this area?

Dr. GUTTMACHER. I think it is the best we have, and I am sure I could not do as well. I mean I am sure I could not devise a better one. I think it is the best we have.

The CHAIRMAN. In your judgment, is the test fair to society, in dealing with people who enter pleas of guilty by reason of insanity? I mean, are we correctly probing this very difficult area, and would a jury be properly guided with regard to an insanity defense when instructed in terms of *Durham* and the *McDonald* case?

Dr. GUTTMACHER. I feel they are; yes, sir.

Senator DOMINICK. One question.

The CHAIRMAN. Senator Dominick.

Senator DOMINICK. The *Currens* case, according to the report on page 90—and I might add this is the minority report I am reading from—refers as follows:

"In doing so,"—and they are talking about the *Currens* case adopting a new test of criminal responsibility—"In doing so, the court of appeals flatly rejected the language contained in section 201(a)(2) of H.R. 7525," which can be found on page 2 of the present bill between lines 20 to 22, "which eliminates consideration of abnormality manifested by repeated criminal or otherwise antisocial conduct."

The fact of the matter is that the definition on page 2 eliminates this insofar as an abnormality is manifested only by repeated criminal or otherwise antisocial conduct. And this report does not include that word "only," which seems to me is fairly important.

Now, my question to you would be abnormality manifested only by repeated criminal or antisocial conduct—would this change your opinion as to whether this type of a definition is valid?

Dr. GUTTMACHER. No, sir; I think that "only" is a very desirable word to insert. I do not know just what it accomplishes. As I say, I do not think any reputable expert would say that such a person was a sociopath and could be considered in the area of responsibility. This seems to me sort of a gratuitous statement that sort of complicates things and really does not add very much, but use a footnote or something or other, or in some opinion, it seems to me it has a place. But that it should have so prominent a place in the statute when I do not think it really is necessary seems to me objectionable.

Senator DOMINICK. Thank you.

The CHAIRMAN. Thank you very much, Doctor.

Our next witness is Mr. Abe Krash, Esq., a member of the Washington, D.C., law firm of Arnold, Porter & Fortas.

Mr. Krash, we are very happy to have you with us.

#### STATEMENT OF ABE KRASH, WASHINGTON, D.C., LAW FIRM OF ARNOLD, PORTER & FORTAS

Mr. KRASH. Thank you, Mr. Chairman. My name is Abe Krash. I am of the firm of Arnold, Porter & Fortas, here in Washington, D.C.

My colleague, Mr. Fortas, was appointed as a counsel for Durham in the famous *Durham* case, and he invited me to collaborate with him in preparing the brief and argument in that case.

I was subsequently asked by the court of appeals to act as amicus curiae to the court, sitting en banc, in another insanity case, the *Stewart* case.

In 1959 I served as a member of the District of Columbia Bar Association Committee on Criminal Responsibility, and I am currently a member of the Judicial Conference Committee which is considering the problems of pretrial competence.

Finally, I should state, Mr. Chairman, that I am the author of a somewhat unreasonably long article on the *Durham* rule which appeared in the Yale Law Journal, and which Mr. Smith of your staff asked that I bring with me.

I have a prepared statement, but rather than read it—

The CHAIRMAN. We will refer to the article by reference, Mr. Krash.



Mr. KRASH. Rather than read the prepared statement, I would simply like to ask that you include it in the hearing record, and I will instead undertake to speak extemporaneously and answer the questions of the committee.

(The statement referred to follows:)

STATEMENT OF ABE KRASH

Nearly a decade has now passed since our court of appeals announced a new standard of criminal responsibility in the *Durham* case. I believe that it is a timely moment to reappraise the situation, and I believe that it is appropriate that this committee should undertake to make a study in depth of the troublesome and complex issues which arise in connection with judicial administration of the insanity defense.

I shall confine my remarks to some of the issues presented by title 2 of the bill pending before the committee—that is, to problems connected with the insanity defense in criminal cases.

I

At the outset, I should like very briefly to summarize the principles which I feel should govern consideration of the responsibility issue.

First, I assume that nearly everyone will agree that there are some persons who are so mentally disordered that it would be unreasonable to punish them. The Nazis believed in exterminating the mentally sick, but that idea is abhorrent to us—we believe that mentally ill persons should be cared for and treated. There are differences of opinion with respect to the standard of responsibility which should be followed, but there is virtually no dispute that persons who are not influenced in their behavior by the threat of punitive sanctions should not be punished.

Second, there is general agreement that the judgment as to responsibility should be made ultimately by a jury. Essentially we call upon the jury to make a moral judgment: Should this defendant be held accountable and punished? In order to make an informed judgment of this type, the jury should have the benefit of the greatest possible amount of data concerning the defendant's motivation. Since the issue of responsibility is to be decided by a jury, the test should be simple and intelligible to laymen.

Third, in administering a test of responsibility, the courts need the help of experts, specifically psychiatrists. Whatever the test, psychiatrists should be permitted to state all of their findings concerning the defendant in their own terms. I also believe that the test of responsibility should be consistent with generally accepted scientific theories as to the nature of mental disorder and its effect upon behavior. A test of responsibility which is scientifically absurd will quickly be discredited and, in practice, it will discourage the participation in criminal proceedings of competent medical men.

Finally, it is essential to bear in mind that persons who are found not guilty by reason of insanity are not turned loose in the District of Columbia. The governing statute requires automatic, mandatory hospitalization of all persons acquitted on grounds of insanity. They cannot win their freedom unless they can convince the District court that they no longer suffer from an abnormal mental condition and will not be dangerous to the community or to themselves if released.

As I shall discuss, I believe that the *Durham* rule satisfies the requirements for an acceptable test of criminal responsibility. I believe that it has had a profoundly beneficial effect on the administration of criminal justice. I do not regard the *Durham* rule as a definitive, ultimate solution to this difficult problem, but in my judgment it would be most unfortunate if the test of responsibility contained in H.R. 7525 were to be enacted into law as a substitute.

The *Durham* rule provides simply that an accused person is not criminally responsible if the illegal act was a product of mental disease or defect. In evaluating the implications of this rule, it is necessary to bear in mind the atmosphere that prevailed in the District in July 1954, when the *Durham* decision was announced.

The rules of criminal responsibility applied in the District at that time were the *McNaghten* test—which was first adopted by the House of Lords in 1843—and the irresistible impulse test, which became accepted at the turn of the century. Under *McNaghten*, the issue was this: At the time of the offense, was the

accused suffering from a defect of reason so that he did not know what he was doing, or if he did know the nature of his act, did he know it to be wrong? The basic trouble with this test is that it focused exclusively upon the defendant's intellectual capacities, and it ignored the emotional component of personality. To put it another way, most insane people know the difference between right and wrong in an intellectual sense; like children, they can give you the right answer, but they do not really feel the answer. They are incapable of controlling their conduct in conformity with their knowledge. The irresistible impulse test was unsatisfactory since it did not cover cases of a mental illness characterized by a long period of deterioration. In short, the two tests were too narrow; they did not cover many cases involving persons who unquestionably suffer from severe mental disorder.

I think it fair to say that the issue of mental illness in connection with criminal behavior was largely a neglected issue in the District before the *Durham* case. Neither the bench nor the bar seemed to be particularly conscious of the problem. For example, in 1953, the year before *Durham*, 2,559 persons were named as defendants in criminal cases filed in the district court; 1,017 defendants were tried but only 3 persons were found not guilty by reason of insanity. I do not think it can be seriously disputed that this abnormal situation was a result, in large part, of the obsolete and unjust standards of criminal responsibility which then prevailed in the District. There was, if you please, a kind of "wasteland" in this area of the law.

The *Durham* decision reflected, I believe, a conviction by a majority of the judges sitting on our court of appeals that mental disorder was a significant factor in criminal behavior in a substantial number of instances, and that the existing rules and procedures were totally inadequate for dealing with the problem. The *Durham* rule was primarily designed, I suggest, to produce a more just and accurate classification of defendants at the trial stage. In other words, it was designed to facilitate more accurate discrimination between those defendants who should be punished and those who should be absolved from responsibility and hospitalized. This objective was to be attained primarily through a test which would make it possible for psychiatrists to give a complete and honest report to the judge and jury of their findings with respect to the accused's mental condition—a situation that simply was not possible under the existing tests. An assumption underlying the *Durham* decision was that if a jury receives comprehensive information concerning the defendant, it will more likely render a just verdict.

As a test of responsibility, the *Durham* rule, it seems to me, has two great virtues: First, it focuses the jury's attention sharply and directly on the problem of the relationship, if any, between mental disorder and the alleged offense. Second, it has the virtue of simplicity; I believe that it is intelligible to jurors.

For me, the least satisfactory part of the rule is the "product" aspect. I think there is considerable force to the argument that this phrase is logically ambiguous. I recognize too that it has presented difficulties for the prosecution in some instances because psychiatrists who find a mental disease are reluctant to say that an act is not a product of the illness. A good deal of the difficulty has arisen, I believe, because the product issue is treated—erroneously in my view—as a psychiatric question. The psychiatrists are asked: "Was the offense, in your opinion, a product of the mental disease?" I believe this is an impermissible question. Whether the crime is a product of mental disease is an ultimate issue to be resolved by the jury on the basis of the totality of the facts presented.

Last year the court of appeals undertook to clarify the meaning of the phrase "mental disease or defect." In the *McDonald* case, the court said that "the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." I may add that I think one of the most important points about the *McDonald* case has been overlooked. The case involved a mentally retarded person with an IQ of 68, and I believe the case stands for the point that mental retardation is a defect within the meaning of the *Durham* test.

The *Durham* rule is consistent with the fundamental ideology of the criminal law. It does not alter the principle that a jury—12 laymen, good and true, chosen at random—determine whether the accused shall be held accountable. *Durham* does not change the principle that a person found to have criminal intent may be punished. Contrary to some things that have been said about it,

the *Durham* rule does not represent a radical departure from the historic traditions of the law.

It is true that a larger number of persons have been found not guilty by reason of insanity under the *Durham* rule than under the preexisting tests. But this does not prove that the rule is either a success or a failure. The optimum number of persons who should be acquitted of criminal charges by reason of mental disorder is not a legal or a psychiatric question—it is not a scientific issue—it is a moral question. We do not know whether all persons who should have been absolved of criminal responsibility in the District since 1954 have in fact been absolved. It may also be true that a few persons have unjustly escaped responsibility—that they have succeeded, as the prisoners in the District jail so inelegantly put it, in “bugging out.” It is my impression, however—and the hospital authorities could confirm this better than I—that persons who are presently being found not guilty by reason of insanity in the District are very sick people indeed.

It is also essential to keep the magnitude of this problem in a realistic perspective. The largest number of defendants acquitted in any one year on grounds of insanity was 67 in 1962. According to statistics prepared by the U.S. attorney's office, there were 1,493 persons charged in the District court with criminal offenses in that year. In other words, the percentage of persons found not responsible out of those charged was roughly 4.7 percent. I do not believe that this is an unreasonably high percentage.

It is, I think, significant that after a decade of living under the *Durham* rule, there are very few informed persons in the District who would favor turning the clock back to the *M'Naghten* and irresistible impulse tests. When such a proposal was made in effect to the bar association in 1959, it was turned down by a large majority of those voting. The *Durham* rule has been supported for 10 years by a majority of the nine members of the court of appeals, including three of the last four chief judges—Judge Edgerton, Judge Prettyman, and Judge Bazelon. There are, of course, some judges and lawyers who are dissatisfied with and critical of the *Durham* test. But I think it noteworthy that nearly everyone now agrees, in the light of a decade of experience, that the preexisting tests were inadequate and unjust.

## II

I should like to comment next—very briefly—on several of the provisions in title 2 of H.R. 7525.

First, the bill would establish a new test of criminal responsibility for the District. This test is set out on page 2 of the bill (lines 15 to 19). It has been stated that this test is based upon the formulation recommended by the American Law Institute in the Model Penal Code. For the convenience of the committee, I have prepared an exhibit which sets forth the various tests of responsibility which we are discussing. As you will note from this exhibit, the American Law Institute test does not contain the words “to know” which are a part of the responsibility test in H.R. 7525. This “to know” phrase can be traced back to the discredited *M'Naghten* test. I would reject the test set out in the bill for that reason alone.

Assume, however, that the “to know” phrase were deleted from the test in the bill so that the standard was identical with the proposal of the American Law Institute. Speaking for myself, I have no serious objection to adoption of the American Law Institute test. I do think that it is complex and rather awkwardly phrased. I am also impressed by the fact that the psychiatric consultants to the American Law Institute dissented from this test. If a change in the responsibility test in the District were now to be made by statute, I personally would prefer the test proposed by Chief Judge Biggs of the Court of Appeals for the Third Circuit in *Currens v. United States*. The test of responsibility formulated by him reads as follows:

“The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacks substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.”

I must say, however, that I do not think that any practical purpose would be served at this point in making this change in the District. I do not believe that the outcome of cases where the insanity defense is involved would be substantially different if the applicable test of responsibility in the District were the American Law Institute standard or the *Currens* rule instead of the *Durham* rule. I am reinforced in this conclusion by an observation of the very able U.S.

attorney for the District, Mr. David Acheson. In an article he recently published in the *Georgetown Law Journal*,<sup>1</sup> he has stated that between two-thirds and three-fourths of the insanity acquittals are uncontested cases where the hospital staff is unanimous that the defendant had a mental disease and the crime was a product. He has written that "in cases of this kind, it would probably make little difference whether the District of Columbia had *Durham*, the American Law Institute proposal, or *McDonald*."

I think it would also be inadvisable to freeze the responsibility test at this point in a statute. The whole field is presently in a great state of ferment. I believe it would be advisable to await experience with other tests.

Second, H.R. 7525 would make an important change in the rules of evidence which apply where insanity is in issue. Subsection (c) (1) [p. 3, lines 8-10] provides that "mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by showing of substantial evidence." In all Federal courts, including the District, it is the law that a defendant creates an issue as to responsibility by presenting some evidence of mental disorder. I am aware of no valid reason why this burden should be increased. It must be remembered that the vast majority of defendants in criminal cases are indigent and poorly educated or even entirely illiterate. The jury should not be foreclosed from considering the responsibility issue if there is some relevant credible evidence.

Third, another significant change in existing law would be made by section (i) which appears on page 13 of the bill (lines 12-15). It provides that "the jury shall not be told by the court or counsel for the defendant at any time regarding the consequences of a verdict of not guilty or acquittal by reason of insanity." The court of appeals has held that—unless the defendant waives the point—the trial judge must inform the jury that the defendant will be hospitalized until he is no longer dangerous in the event he is acquitted on insanity grounds. This instruction seems to me necessary and appropriate. Laymen commonly know the consequences of a guilty or not guilty verdict, but they are not generally familiar with the fact that a defendant acquitted on insanity grounds will be hospitalized. An insanity defense of great merit may be rejected by a jury influenced by the specter of lunatics turned loose on a community.

### III

Finally, I should like to say just a word about the relationship of mental disorder to the issue of the incidence of crime in the District.

I do not believe it can be seriously argued that there is any correlation between the crime rate and the existence of an enlightened rule as to criminal responsibility. I am not aware of any evidence showing that a substantial number of crimes have been committed by persons who believed they could escape criminal responsibility by invoking the insanity defense. To the contrary, there are many people who feel that confinement in a mental institution is a worse fate and carries a greater stigma than imprisonment. St. Elizabeths Hospital authorities have been very conservative in approving the release of defendants acquitted on insanity grounds. Various studies which have been made suggest that, given the same offense, the period of hospital confinement will probably exceed the time that would be spent in prison if the defendant were found guilty.

Some critics of the court of appeals have accused it of being tenderhearted and sentimental. I would say, on the contrary, that *Durham* is the product of a court willing to face the realistic fact that mental disorder in connection with crime is a serious problem; of a pragmatic court willing to experiment; of an open-minded court responsive to scientific development. Our court of appeals has given the issue of judicial administration of the insanity defense more intensive consideration than any other court in the English-speaking world. I would say that it has done a superb job. I do not think that a case can be made out for enactment of title 2 of H.R. 7525.

Mr. KRASH. What I thought might be helpful to the committee would be if I were to briefly serve as the development of the doctrine of responsibility and to indicate how the *Durham* case arose out of it,

<sup>1</sup> Acheson, *McDonald v. United States: The Durham Rule Redefined*, 51 *Georgetown L.J.* 580, 589 (1963).

and then briefly to discuss what has happened in the District of Columbia under the *Durham* rule, and why I think it is a satisfactory and adequate rule.

Perhaps during the course of that, I can comment on some of the questions raised by the chairman this morning, by Senator Dominick, and perhaps make some reference to the testimony yesterday of Dr. Cameron.

Let me say first of all I have prepared a brief exhibit for the convenience of the committee which lists the principal rules of responsibility under discussion.

The CHAIRMAN. That will be incorporated in full in the record. I think it will be very helpful.

(The exhibit referred to follows:)

#### VARIOUS TESTS OF CRIMINAL RESPONSIBILITY

##### 1. *The M'Naghten Rule* (The "right and wrong" test)—1843:

"[T]o establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." (*M'Naghten's Case*, 10 Cl. & F. 200, 209 (1843).)

##### 2. *Durham Test*, 1954:

"[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or defect." (*Durham v. United States*, 214 F. 2d 862, 874-75 (D.C. Cir. 1954).)

##### 3. *American Law Institute*, Model Penal Code § 4.01—1955:

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

"(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

##### 4. *Currens Test*, 1961:

"The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated." (*United States v. Currens*, 290 F. 2d 751, 774 (3rd Cir. 1961).)

##### 5. *H.R. 7525, Title II, Sec. 201*—(1963):

"§ 927. Insane criminals

"(a) Mental disease or defect excluding responsibility; sociopathic and psychopathic personality is not disease or defect:

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to know or appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

"(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

Mr. KRASH. Let me say first of all that I assume nearly everyone will agree—I am now stating what I think are three or four assumptions which I think ought to govern one's consideration of this question of responsibility.

First, I think nearly everyone would agree that there are some persons who are so mentally disordered that it would be unreasonable to punish them. The Nazis believed that you should exterminate the mentally sick, but I do not suppose that anyone would seriously in this country accept such a notion. And the question really is what should be the standard of criminal responsibility. As to that question, of course, there have been and are legitimate differences of opinion.

Secondly, it is my view that the ultimate determination of responsibility should be made by a jury. I have a strong confidence in the robust commonsense of juries in criminal cases. They represent a cross section of the community. And I believe they are the proper instrument to make that judgment.

Let me say in this connection that we do not ask the jury in these cases to make a medical judgment. The jury is being asked rather to make a moral judgment. And the psychiatric information, the medical data, is simply a part of the information which the jury requires in order to make an informed moral judgment.

As I shall indicate, one of the great virtues of the *Durham* test is that it allows the jury to have the full benefit of all relevant information with respect to the accused.

But I want to underscore my strong conviction in the desirability of allowing the jury to make this decision.

Now, third, in administering a test of responsibility—

Senator DOMINICK. Could I interrupt right there.

Mr. KRASH. Senator, I hope you will interrupt me at any point.

Senator DOMINICK. I would gather from what you said that you would disagree with the witness we had yesterday who indicated that the question of responsibility should be determined by a panel of psychiatrists.

Mr. KRASH. Yes, I would. Let me just comment for one moment, since you have raised the question of Dr. Cameron's point.

I read about it in the press. I just had a few minutes this morning to read his statement, which he was kind enough to send me.

I have a very high regard and admiration for Dr. Cameron. I think the community is fortunate to have a man of his great qualifications as the head of St. Elizabeths Hospital. But I disagree with his proposal. Let me explain why.

As I understand it, his idea is this—that the court would decide—the jury, at a trial, would decide whether or not the accused committed the act. And then there would be a second hearing at which there would be a determination made with respect to the accused responsibility or his mental condition as of the time of the offense and the disposition to be made.

Now, first of all, I think this reflects a psychiatric attitude and underneath it I believe is this point of view.

Many psychiatrists do not like to appear in court. They are cast in an uncomfortable role. They are in an advisory situation. They do not occupy the authoritative position they usually occupy.

Now, they are caught in a crossfire of cross-examination, and it is an uncomfortable position to be in.

So this idea, basically, I think springs from a desire to get psychiatrists out of this advisory arena.

But I think the problem is this: If there was a subsequent hearing, the defendant and the Government would clearly be entitled to cross-examine a psychiatrist. I cannot imagine any system of law in which a finding which is so critical to the disposition of the defendant would not be subject to cross-examination. And while I think that psychiatrists have been unjustly maligned frequently, that is the disagreements among them have been greatly exaggerated, nevertheless, the fact is that they may be mistaken, and they may have incorrect and improper diagnoses, and they obviously must be cross-examined.

So I do not think this proposal would really solve what I think may be in the back of Dr. Cameron's mind.

In the second place, I think this would raise the most serious constitutional question with respect to the right of trial by jury. A defendant is entitled to have the determination made by a jury.

Now, finally, I may say that I think in addition, this would only double or increase the time of trial.

But more basically, this really would result in a revolutionary change of our whole conception of what a criminal trial is about.

The notion of guilty and not guilty I think is deeply imbedded. And in addition I think we must recognize this fact.

A trial is a symbolic way of getting expression in a peaceful way to the community sense of wrong and injustice. And there has to be some way in which that can be expressed. And if you take away the notion of guilt or innocence, then you are going to, it seems to me, create many more problems than you will solve. There must be a forum where that determination can be made.

A trial is a kind of symbolic little play, as it were. And you cannot remove the notion, it seems to me, at least at the present state of our society, of this notion of guilt or innocence.

Now, I do agree with Dr. Cameron to this extent: I think that psychiatrists could be used more liberally than they are now with respect to the question of posttrial disposition of the defendant. That is, with respect to the question of sentencing. And I think in this jurisdiction a greater effort is being made to do that than is true in some places. So to that extent I would agree.

But I would doubt very much the wisdom of a two-step procedure at this particular point, and I think it would raise an enormous amount of difficult constitutional issues.

Senator DOMINICK. Thank you, Mr. Krash.

Mr. KRASH. Now, I want to say with respect to the test of responsibility, however, it seems to me that it is absolutely clear we must have the help of psychiatrists. Indeed, one of the principal objectives we advocated in the *Durham* brief in which I think the court of appeals has tried to articulate in subsequent cases is that the test of responsibility must be one which enables psychiatrists to state their findings in their own terms to the court and jury. Psychiatrists should be allowed to act as psychiatrists and not forced to answer ethical questions or questions for which they are not qualified. And the great virtue of the *Durham* rule is that it allows them to do that. I am very much in favor of that.

Finally, Senator Dominick—

Senator DOMINICK. I might say right there this bill does the same thing; does it not?

Mr. KRASH. Yes; it does. I do think the test makes it somewhat more difficult for psychiatrists. The test of responsibility is a more difficult one for psychiatrists to work with.

Finally—the choice here is not between a liberal or enlightened test of responsibility and turning defendants loose. In the District of Columbia every accused person who is found not guilty by reason of insanity is automatically and mandatorily committed to a mental institution, and he must remain there at the present time until the court is convinced by a preponderance of the evidence that he will not be dangerous to himself or to others if he is released.

Let me say that the hospital has been very conservative in recommending release, and the court has been very tough. Indeed some people feel that the court has been too tough with regard to releasing people who have been acquitted by reason of insanity.

Senator BIBLE. Is that factually correct? This is what the U.S. attorney indicated by some statistics he gave us yesterday, I guess. But it just seems to be the common impression that since this *Durham* rule that we are turning all kinds of people loose who should be either tried for the crime or should be committed to a mental institution.

Mr. KRASH. I think that impression is erroneous, Senator.

Senator BIBLE. Don't you think that is the impression?

Mr. KRASH. Yes; I think to some extent some people have that view. There is no doubt that every time, for example, there are occasions when people come out of the hospital, they commit a crime, and promptly you read in the newspaper that a person who is released from the hospital has committed an offense. But bear in mind two-thirds of all the people who come out of prison are recidivist. That is, they repeat crimes, too. I think you would find very few people who come out of the hospital commit further offenses.

I think you would also find—the studies I have seen indicate that the period of hospital confinement is longer, given the same offense, than it would be if a person was sent to prison.

The truth is that the court and the hospital are being very cautious, very conservative, about letting people go after they are found not guilty by reason of insanity and committed to St. Elizabeths.

Let me just give you an example with which I am familiar of how difficult it is to get someone out.

We represented Ezra Pound, the noted poet, who was indicted on charges of treason in 1945. He was found not competent to stand trial. He was held in St. Elizabeths Hospital for 14 years on the grounds that he was incompetent to stand trial. He suffered from paranoia, which was an incurable mental illness. And the hospital certified he would not be dangerous if released. And it was on that basis we went to the district court and asked the court that he be discharged. The hospital agreed that he would not be dangerous. The district court was satisfied he would not, and he was discharged.

Now, there are other cases I think of, of people who have been in the hospital for long periods. So I do not think this is really a serious problem. In other words, I do not think we are confronted here with the problem of turning people loose on the streets.

Now, let me go back, if I may, for a minute and just try to elaborate on how all this came about.

I would say that one could go back to the common law of England, as far back as the 14th or 13th century, and find the idea that there was no criminal responsibility if a man is mentally disordered. One time the test was whether or not a man could count to 20.

Then in 1843, I think you have really the first major development in this field of the law with the *M'Naghten* test. Essentially that test is whether the defendant knew the difference between right and wrong, and whether he knew the nature of what he was doing.

Now, the trouble with the *M'Naghten* test very simply is this. It emphasizes a defect of reason. That is, the intellectual capacities of the defendant. Whereas everything that modern psychiatry teaches,



everything that we know from observing people in mental institutions, from everyday observation, it is that the emotional component of personality is a determinant of conduct as much as reason.

If you talk to insane people in a mental institution they can verbally give you the right answer to questions you put. The trouble is they do not really feel the answer. They are like children who if you ask them a question, they can give you the right answer, but they really do not know it in the sense of really feeling it.

Put another way, the trouble—

Senator DOMINICK. In the case of small children, if they do not follow what they say, you whop them, or you should.

Mr. KRASH. You should do.

Senator DOMINICK. And the question is what you should do at this point.

Mr. KRASH. I think there is a very important difference between small children and the mentally insane. That is this—sane children will respond to the sanction, whereas frequently those people who are suffering from a severe mental disorder simply are not influenced by the criminal sanction. That's the whole point. We are trying to really reach people who are not deterred by the threat of criminal sanction.

Now, I can simply say that the *McNaghten* rule—the trouble is that it was much too narrow. There are too many people who suffer from severe mental disorders who are guilty under the *McNaghten* rule. And I can say only that such eminent judges as Justice Cardozo denounced it as not being in conformity with psychic reality, and Justice Frankfurter called it a sham. I think it was discredited by nearly every reputable scholar and authority in the field. There are a few who defend it, but not very many.

Senator DOMINICK. I think this is a good point that perhaps has not been brought up. If a person is put into a mental hospital and does not follow the rules of the hospital, he or she is disciplined.

Mr. KRASH. Oh, yes.

Senator DOMINICK. In order to enforce those rules.

Mr. KRASH. Yes.

Senator Dominick, I do not think there is any dispute between us that people ought to be disciplined, or that we ought to have a system of punishment at all. The *Durham* rule does not change that. It is not nearly so radical a rule as some people have suggested.

The question really is whether or not you ought to punish people who are not deterable, who are not influenced by criminal sanction.

Senator DOMINICK. But they do that in a mental hospital.

Mr. KRASH. What they do is they have certain rules that they try to get the people to adjust to. That's right. There is no doubt about that. But that is not really the question that I think reaches the problem we are dealing with here. Put it this way: we are dealing with people who are not influenced by criminal sanctions. Now, you can get certain people in a hospital who are just not influenced unless you have guards with them every moment. And of course in society we just do not have that. I do not think anyone seriously suggests for example if you are dealing with an extreme paranoid person who commits a crime, suffering from delusions and hallucinations, that even though that person may be subject to the discipline of a hospital,

that that is a person we ought to punish. No one really, I think, seriously is arguing that.

The real argument is coming about in more borderline kinds of cases. That is really where the argument is being waged. And the question is whether or not the *Durham* rule is taking up too many of those borderline cases. But these extreme cases, people who may be subject to discipline in a hospital, nobody really seriously argues that they should be held not criminally responsible. Some of those people are even reached under the *McNaughten* rule. Take those people, for example. They could be disciplined in a hospital. But everybody would agree they should be found not guilty by reason of insanity.

The situation in the District in 1954, was that we had the *McNaughten* test and we had what was called the irresistible impulse test. That is the test some of you may have seen in the James Stewart movie, "Anatomy of a Murder." He discovered this test one day in the law books. It is a very limited test. It is limited to cases of a sudden impulsive kind of act, and very inadequate.

Now, to give you some idea, Senators, of what the situation was in the District in 1954, let me say that the truth is there was a kind of wasteland in the law of criminal responsibility in the District. The truth is that the judges and the bar were by and large unaware, unconscious of this problem. And I think that the statistics bear that out to the hilt.

Let me just show you what those statistics are.

The statistics prepared by the U.S. attorney's office show that in 1953, the year before *Durham*, 2,559 persons were named defendants in criminal cases in the District of Columbia, and only 3 persons were found not guilty by reason of insanity.

Now, I do not think there can be the slightest question that that situation was a product of the fact that we just had obsolete, inadequate, unjust rules of criminal responsibility that just did not reach the problem. And that—lawyers pretty much concluded it was futile to attempt to present the defense, and judges were just not paying much attention to the problem.

The *Durham* rule then represented, I think, the recognition of the fact by the judges of the court of appeals that mental disorder in criminal cases was a serious problem.

I think that fact was clear to them from the fact that they were getting the record of all these cases from the district court, from their own observation. And the fact was that the rules we had in the District dealing with criminal responsibility simply were inadequate. The test for responsibility was inadequate, the pretrial procedures were inadequate, the posttrial procedures were inadequate. And the point about the *Durham* rule was that basically it was designed to enable psychiatrists to testify in their own language about the mental condition of the accused. In other words, it made psychiatry legitimate in a criminal case.

Psychiatrists previously were being asked "Does this defendant know the difference between right and wrong," to which their answer was "How should I know—that is not a question I as a psychiatrist can answer, that is an ethical question." Whereas under the *Durham* rule at least the psychiatrists who were allowed to testify on the basis

as a psychiatrist. And the theory was that if they gave the jury the benefit of what they knew about the accused, you would get a more just result. And I think that premise is fundamentally sound.

In other words, I think if the jury is more informed, has greater information concerning the defendant's emotional makeup, they are more likely to do justice in the particular case.

Now, the *Durham* rule has, I think, two great virtues. First, it focuses the issue very sharply on the question of mental disorder, and secondly I believe it is intelligible.

Now, I do think there is support to the criticism that the product phase of it is ambiguous, and I think it has presented some problems in some cases—I don't know how many—I don't think very many—to the prosecution. But I think most of those problems are probably now resolved by the *McDonald* decision.

The CHAIRMAN. Right at that point, I wonder why you do not include the *McDonald* case in your test of criminal responsibility. May-be you do not consider that as a test.

Mr. KRASH. That's right—I don't. It is really, to be accurate about it in my judgment—it is a clarification, it is a definition of the terms "disease or defect" in the *Durham* rule.

The law in the District of Columbia is the *Durham* test, as clarified by *McDonald*.

Now, let me say one thing about the *McDonald* test which I think has been overlooked.

The important point about the *McDonald* case is this—that the phrase "mental defect" is defined in such a way that it reaches the mentally retarded. Not just persons who are mentally diseased in the sense of being psychotic—but it reaches the mentally retarded. The case involved a mentally retarded man, a man with an IQ of 68. And in that sense it is a very important decision, because the President's Panel on Mental Retardation has indicated this problem is extremely important, and the *McDonald* case is designed to reach that situation.

Now, in that connection I would say this with respect to one section of the bill before the committee:

The bill would make an important change with respect to the evidence which must be produced. It would require in subsection (c) (1) that the defendant must establish by substantial evidence—the words "substantial evidence"—the defense of insanity.

Now, under the *McDonald* case, which simply repeats the law which the Supreme Court laid down in the *Davis* case, the defendant must produce some evidence, not substantial evidence—some evidence in order to create an issue. And once he has produced some evidence, the prosecution, which has the burden of proof on this issue from the beginning—the prosecution has the duty of going forward and must prove beyond a reasonable doubt that the defendant is mentally competent. So if the bill would change the existing law, it would increase the burden.

Now let me say, I think I would not be in favor of that, and very simply for this reason: Over 90 percent of these defendants are indigents. And many of them are illiterate and have been poorly educated. And while I would agree, Senator Dominick, with an observation you made this morning that indigent defendants are fre-

quently represented with great competence and devotion and skill by appointed counsel, the truth is that they are not so represented in all cases, and I do not think anyone would seriously suggest that if a man who has large sums of money or who had—could hire any lawyer—that he is in the same situation as a man who has no funds—who can retain psychiatrists, experts, and so on. There really is a disadvantage to the indigent defendants, despite the dedication of many lawyers particularly in the District, who serve without a fee in the Federal courts in case after case.

So that I do not think that it is reasonable to increase the burden on the defendants beyond some evidence. That is the law throughout the United States, and I see no reason why it should be changed here. I think the bill would change it. And I think it would be undesirable.

The CHAIRMAN. What is the case law in the District of Columbia at the present time?

Mr. KRASH. In the District of Columbia it is this: The defendant is presumed to be sane. If the defendant produces some evidence—

The CHAIRMAN. "Some" is the word used?

Mr. KRASH. That's right. I have the *McDonald* case before me.

The CHAIRMAN. In the *McDonald* case.

Mr. KRASH. In the *McDonald* case. It repeats the language of the *Davis* decision. If there is some evidence, then there is an issue. Now, some evidence does not justify a directed verdict. That is one of the points of the case. But if there is some evidence, then the issue must be put to the jury.

Now, the prosecution has, of course—the law then is that the prosecution, where there is some evidence, must prove beyond a reasonable doubt that the defendant did not suffer from a mental disease, or the act was not a product of his illness.

Now, it is true that a larger number of persons have escaped responsibility, if you want to put it that way, under the *Durham* test than was true before. No question about that. But that does not prove that the test is either good or bad.

What is the optimum number of people who should be found not guilty is, of course, not a medical question. It is really a moral question. There may be some people who should have been found not guilty by reason of insanity who have not been so found. It may also be true there are some people who have escaped responsibility under the *Durham* test who should have been found responsible.

My impression, however, is this, that the people who are being found not guilty by reason of insanity, and the hospital could really confirm this better than I, are really very sick people. In other words, in the District of Columbia at the present time we are not finding not guilty by reason of insanity people who would be regarded as sane. They are really sick. And the hospital psychiatrists who are the principal witnesses, both for the defense and the prosecution, are really quite conservative about this.

I think also you have got to keep the magnitude of the problem in perspective.

The largest number of defendants acquitted in any one year was 67, in 1962. In that year, there were, according to the U.S. attorneys office, about 1,493 people charged with a crime. So that what you are saying is roughly between 4 and 5 percent of the persons who are

charged with crime in the district court are being found not guilty by reason of insanity. I personally do not believe that is an abnormally high percentage.

In connection with the statistics, I would say this: sometimes you hear the statistics cited in terms of the percentage of persons found not guilty out of those who are tried. But bear in mind that the cases tried are the most serious. The great majority of cases are dismissed or nolle prossed, or they are pleas of guilty, and so on. So that you would expect to find a very high percentage, relatively speaking, of insanity cases with respect to the cases which are tried.

I do not think that the statistics are in any degree indicating that the *Durham* rule is a failure.

Now, let me say this, Mr. Chairman: We have had the *Durham* rule here for nearly a decade now. And I think it is significant—and I would emphasize this to the committee—that there are very few informed people who have dealt with this subject in the District who favor turning the clock back to the *McNaghten* rule and the irresistible impulse test. When such a proposal was made to the bar association in 1959 in effect it was turned down by a large majority of those voting. The *Durham* rule has been supported for 10 years by a majority of our court of appeals, including three of the last four chief judges—Judge Edgerton, Judge Bazelon, and Judge Prettyman. And, of course, there are judges and lawyers of great competence who are dissatisfied with it, and critical of the *Durham* test. I am critical of certain aspects of it myself. But I think it is noteworthy that nearly everyone now agrees today in the District that we should not go back to *McNaghten*, to where we were before.

The CHAIRMAN. Have other jurisdictions adopted this new test rather than the *McNaghten* test?

Mr. KRASH. No. As far as I am aware—I think that the Virgin Islands and I believe New Hampshire has it, maybe it is also adopted in Maine. I have not made a recent check on that. I undertook to do that in the article I wrote. I do not recall more than that.

There are changes going on throughout the United States in this. For example, there is the *Currens* test of Judge Biggs, which I happen to think is a very good test, by the way.

The point is there is no question that there is in many States for example, Senator Bible, many courts that are reluctant to change the law because they do not have automatic and compulsory hospitalization such as we do in the District. They may not have the hospital facilities that are adequate. Third, there are many places which feel that this change ought to be made by the legislature. And there is no question, there is a great deal of resistance to change in this area of the law. I think it is one of the tributes of the court of appeals here that it has pioneered this field. The fact is there is a great feeling throughout the country, I would say, among the informed people in this area dealing with problems of criminal responsibility that the law needs to be changed.

Now, there are differences of opinion about what the test ought to be.

I would say that the basic reason why I would not change the *Durham* rule here in favor of the American Law Institute test, for which I have no great objection—

The CHAIRMAN. May I ask you a question right at that point? Is there any substantial difference between the *Durham* test as amplified

or supplemented by the *McDonald* case and the ALI test? The reason I ask that question is this: In my questioning of the U.S. attorney yesterday he took the position they are substantially the same. I got the impression from Dr. Guttmacher and possibly from Dr. Overholser—at least from one of the two witnesses—that they did not feel they were the same. In fact, they have joined in writing a paper criticizing the ALI rule. Yet both psychiatrists testified this morning and stated they were in full accord with the *Durham* rule as modified by the *McDonald* case.

Mr. KRASH. Well, I think here you are in an area of mediphsics. I think they are very close. I think there is some difference between *McDonald* and the *Durham* test and the ALI test. I think the difference is this: the *Durham-McDonald* test may require a more direct focus on the relationship of the disease to the particular offense, whereas the ALI test I think would focus more generally on the defendant's capacity to conform his conduct to the requirements of law generally as opposed to the relationship of the illness to the particular act. And I think there is that shade of difference remaining. I think the reason that—the psychiatrists found the *Durham* test I think an easier test in terms of their discipline to work with. So there is that difference.

The point I just wanted to complete, Senator—

The CHAIRMAN. Pardon my interruption.

Mr. KRASH. I wanted to complete my answer to your question with this: One reason why I think that it would be—that there would be no real practical advantage in shifting to ALI, because as I say I have no great objection to it, or to *Currens*—which I think really is a better test than ALI—is this: I think under any one of those tests the practical results are going to be just about the same. That is, under *Durham*, *Currens*, or ALI you really—I would doubt very much if the results, the ultimate outcome in many cases would be very different. I think they would be pretty much the same.

I may say that the very able U.S. attorney, Mr. Acheson, in an article in the Georgetown Law Journal I think substantially agrees with that position, at least as to two-thirds or three-quarters of the cases.

The CHAIRMAN. Of course I asked him a question yesterday to arrive at the conclusion that the ALI test and the *Durham-McDonald* test are substantially the same—what is the objection of writing it into the statutory law rather than relying on case law? Would you give any opinions on that? He expressed himself on that.

Mr. KRASH. Well, Senator Dominick also asked one of the earlier witnesses I believe—

The CHAIRMAN. He touched on the same point a little earlier.

Mr. KRASH. Yes, he did. Senator Dominick—Senator Bible just asked me if the test, the *Durham* rule and the—as modified or clarified by *McDonald*—is the same test as the American Law Institute test, what objection if any would be to make that a part of the statute? And I believe that really touches a question which you were addressing to Dr. Overholser, and I think probably in the back of your mind was the idea that the criminal law ought to be a matter of statute law and not a process of judicial law. Let me say this as to that:

The reason I think I will be inclined to leave the situation as it is, at least for the time being, is that the law in this area, criminal re-

sponsibility, is in a very great state of ferment throughout the country. There are different tests being adopted and tried, some by courts, some by legislatures. And I think it would be desirable at least for the time being to let things remain as they are and see what is the experience that different jurisdictions have under different tests. It may well be that after a period of time you might want to codify the law of criminal responsibility.

I would say that at the present time I would not favor doing that in the District of Columbia. The court of appeals here has done a better job in this area of the law than any other court in the English-speaking world. It has written about 150 opinions on the law of criminal responsibility. It is an amazing, outstanding body of law which I think has evoked the admiration of legal commentators throughout the world who are familiar with this subject. Of course people disagree with different decisions. I do myself. But as a body of law in one area of the law; that is, with respect to the whole problem of judicial administration of the insanity defense, the court of appeals has done a superb job. And the law as laid down by them—it is as in a statute. That is, once you have a decision, all of the district judges and I think all of the panels of the court of appeals follow it.

Now, to be sure it can be changed by a court, just as Congress can change a statute. But I think there would be—I could see no particular advantage at this point in time in codifying the standard of responsibility in the District. And I see some advantage in leaving the situation where it now is; that is, somewhat open to change by the court of appeals.

This is a matter of course in which there can be differences of opinion.

The CHAIRMAN. Right on that point—and I asked Mr. Acheson identically this same question. As I indicated to you, he answered very much the same way. But he did advance an additional reason, and that was that if the American Law Institute definition would be written into the statutory law, even though he thought it was substantially the same as the *Durham-McDonald* decisions, and other lawyers might think it was substantially the same, nevertheless you would be right back in the courts for interpretation as to what the legislative intent was in enacting that particular statute. So that rather than crystalizing or clearing out an area of great controversy, you would really be putting it back in turmoil again, because you would have to go all the way back through the court process, where now you are relying upon, as I understand it in the *McDonald* case, a unanimous test in this area, that test agreed upon unanimously by the court of appeals.

MR. KRASH. I certainly agree with what you have said, Senator.

The CHAIRMAN. This is what the U.S. attorney said as the reason for not enacting the test suggested to us in the bill before us.

Senator DOMINICK. I just would like to comment on that, Mr. Chairman.

I think the point is arguable from the point of view that the courts have constantly been changing these tests in the District of Columbia for a considerable period of time. There is no reason to think we are going to stop at this point. And it seems to me with Congress considering a bill of this kind, if we should put in a statutory definition similar to the American Law Institute or incorporating in the *McDonald* portion of the *Durham* rule, it would seem to me that we would

be giving a lead to a great number of areas throughout the country to adopt similar standards so we have something that a fellow does not get tried under one set of rules in one portion of the country and another in this particular jurisdiction.

Mr. KRASH. Well, Senator, I might comment for one moment on your observation.

The fact is there really have not been many changes. The original test for responsibility in the District, the *McNaghten* rule, was adopted by the courts in the 1880's. And then the court of appeals adopted the irresistible impulse test I believe in 1927—I am not sure of the date. Then there was no other change until the *Durham* rule, and there was no other change after that until *McDonald*, which I do not think is really a change at all. It is only a clarification. So there have been very few changes relatively speaking. And during this same period, Senator, I think I should point this out—this has been a whole period of a tremendous change in development in psychiatry. One can really say, as a matter of fact, that all of modern psychiatry I suppose begins with the work of Dr. Freud at the turn of the century. So the last half century has been a field of great change in the field of psychiatry. It has been a period also of great change of public attitude toward the insane and toward the mentally ill. I think this is reflected by the President's proposal now before the Congress in this area. Our whole community attitude has changed, and I think the court of appeals here simply was reflecting the fact that science had developed, medicine had developed, public attitudes had changed, and the law changed.

Why should we have a test in 1963 which was the test in England in 1843, based upon the state of medicine which existed then?

Senator DOMINICK. Mr. Chairman, I wonder if I could ask just one more question?

The CHAIRMAN. Certainly, ask as many as you want.

Mr. KRASH. I would be glad to answer any questions at all.

Senator DOMINICK. This is on a different subject. This is in connection with your question on the word "substantial," and the definition.

In your prepared statement the use of the word "substantial" was part of the establishment of the defense, whereas the use of the word "some" which I thought was preferable was simply defined to create an issue, not to establish the defense.

Now, is there a legitimate distinction in there?

Mr. KRASH. No, I don't think so. Let me try to restate it, and perhaps maybe I can clarify it.

Point 1: We start with a presumption of sanity. And if nothing is said about it, the defendant is presumed sane.

Now, point 2: If the defendant produces some evidence, and, of course, you cannot quantify what you mean by some, but some credible evidence, some probative evidence that he suffered from mental disorder, proof, for example, that he has been discharged from the service on psychiatric grounds, proof that he had a previous record of hospital confinement, proof, for example, of some psychiatric testimony, which would be the best evidence.

But if he produces some credible evidence, then there is an issue which is created as to the insanity issue.



And by that I mean that the defendant is entitled to have the jury instructed to consider whether he is responsible under the *Durham* rule.

He is not entitled by putting in some evidence to a directed verdict of acquittal.

All that he is entitled to do is to get to the jury.

Now, of course, if his evidence, for example—if you have a situation in which the evidence by the defendant is very substantial, very great, uncorrected, psychiatric experts, a large number who testify unanimously that the accused is of unsound mind, the defendant then might be entitled to a directed verdict.

In other words, the defense would have been established as a matter of law so great that he would be entitled to a directed verdict.

But there will be very few cases which are so absolutely clear.

Senator DOMINICK. Well, Mr. Krash, I think you are missing my point. It seems to me that on page 3 what we are talking about is the ability of the defendant to establish this affirmative defense.

All he has to show is substantial evidence.

Mr. KRASH. Well, my point is that the issue goes to the jury by his showing some evidence.

In other words, that is the sense in which I use it. He has established a defense. That is what I mean by establishing the defense. By putting in some evidence.

Now, let me just quote the way the court of appeals puts it perhaps. The court of appeals said in the *McDonald* case:

Under Davis against United States if there is some evidence supporting the defendant's claim of mental disability, he is entitled to have that issue submitted to the jury.

And that is what I mean.

Now, I think what this C-1 in the bill is entitled to do is to mean that the defendant must produce substantial evidence. That is what I interpret the bill to mean.

Senator DOMINICK. Well, I am not sure I would agree with you.

Mr. KRASH. I certainly could be mistaken. That is my reading of it.

The CHAIRMAN. Might I ask your views on this.

You have indicated that you very much agree with the answer of the U.S. attorney that at this time the Congress should not enact an insanity statute that adopts the ALI test even though it is substantially the same as the *Durham* test as modified by the *McDonald* decision.

What would be your thought if you took the *Durham* test, an accused is not criminally responsible if his unlawful act was the product of mental disease or defect, and then add to it the additional sentence that is given by way of amplification in the *McDonald* case:

Consequently, for that purpose the jury should be told the mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.

Would there be any real gain in phrasing the unanimous decision of the circuit court of appeals into a statute?

Mr. KRASH. My answer is "No." I would not favor doing that. In other words, I make my point clear, I would not favor making the *Durham* rule as clarified by the *McDonald* test, incorporating that in a statute itself. Any more than I would favor making the American Law Institute test or the *Currens* Test. I don't think at this point in

time, Senator, that even though I think the *Durham* test as clarified is a good test. It is by no means a perfect test.

And I think probably as we go along we will find we can improve on it. And it is precisely because I think it probably can be improved and because I think that I believe that the processes of change are easier in the courts, which I think work with these problems day-to-day, and perhaps could do the job more easily than the Congress, that I would be inclined to leave it where it is.

I do not think, however, that would be a grave error on the part of the Congress by any means. I do think it would be a mistake to adopt the test contained in the bill specifically because primarily I may say because of the inclusion of the phrase "to know" which comes from the old *M'Naghten* rule.

In other words, the test in the bill, Senator Bible, is really the American Law Institute test modified or commingled with a part of the *M'Naghten* test.

And the *M'Naghten* test is so thoroughly discredited and is so objectionable to so many people that I think it would be a grave mistake to turn the clock back to that.

It is for that reason I would object to that.

Now, if you took out the phrase "to know."

The CHAIRMAN. Is it actually as discredited as you indicate? I mean, isn't it still the rule or the test for insanity in a great majority of our States?

Mr. KRASH. It sure is. But I would just say that Justice Frankfurter, for example, called it a sham. Judge Cardoza said it had nothing to do with psychic reality.

I think every committee which I am familiar with, which in recent years has studied it, the American Law Institute, the Royal Commission of England, has said it is a totally unsatisfactory, unjust, and inadequate test.

Now, that is what I mean. I mean it is discredited by the people, by commentators, by—

The CHAIRMAN. It hasn't been discredited by the State legislature that originally enacted it.

Mr. KRASH. No, it certainly has not.

And I should say it certainly does have its supporters in various jurisdictions.

The CHAIRMAN. What is the U.S. Supreme Court case on the *M'Naghten*?

Mr. KRASH. There is a case called *Leland* against Oregon, Senator, which really does not involve the *M'Naghten* test directly. The question there was whether or not a State which imposed a requirement upon the defendant to prove the defense of insanity—whether such a statute violates the due process clause of the 14th amendment.

The Supreme Court held that it did not.

Oregon at this time has the *M'Naghten* rule.

Now it is interesting to note that the Supreme Court has adopted a different rule for the Federal courts with respect to the burden of proof, namely, the "some evidence" rule.

In all Federal courts that is the rule.

But all the Court held in Leland against Oregon was that if a State chose to impose a greater burden upon defendants, that that was permissible within the meaning of the due process clause.

The Supreme Court has never, as far as I am aware, had any case in which the argument was made that *M'Naghten* was unconstitutional.

I believe there may be some attempt to do that.

I would think it would be very difficult to do. I don't think it is unconstitutional.

I just think it is a bad, unwise, unjust test.

The CHAIRMAN. Well, in summary you are going to the heart of title II—you would not enact it into statute. You would let it rest upon case law. You think that the *Durham* case as amplified by the *McDonald* case is the best test that has been devised for the giving of instructions to the jury on this difficult area of "not guilty" or "acquittal by reason of insanity" up to the present time.

Mr. KRASH. I think that is correct. You state my views very accurately, Senator.

One thing I would hope would be, and I want to emphasize, I don't regard it as a definitive, ultimate solution. I think it is capable of improvement.

I am not sure that, for example, the *Currens* test isn't in some respect even a better test. But it is a very operable test which has worked quite well.

The CHAIRMAN. The *Currens* test is really very close to the *Durham-McDonald* test, is it not?

Mr. KRASH. Very close.

The CHAIRMAN. There is a little change in phraseology. But it appears to me it is fairly minor.

Mr. KRASH. Very much so. You are absolutely correct, Senator.

At this point, if I may say so, I think we are in an area of what I would call legally esthetic. You are getting down to very precise differences and shades of meaning here which in terms of the rough and tumble of day-to-day trial practice in the trial courts, where this test is administered as a practical matter, I don't think we are talking about really important practical considerations.

I don't mean to suggest these are not important as a theoretical matter, and that the legal scholars and commentators and I included, will write long and dreary law review articles and make long speeches about how important it is to distinguish these.

All I am saying as a practical matter now, wherever, it concerns people who support that test, Judge Biggs' is, the American Law Institute test, *Durham* as modified by *McDonald*—the circle which we are all in is very close. We are all hitting at the same table.

The CHAIRMAN. Thank you very much, Mr. Krash. You have been an excellent witness and extremely knowledgeable in this very difficult field. I appreciate your taking time out from obviously what is a very busy practice to appear before us this morning.

Our next witness will be Dean Pye, associate dean of Georgetown Law School.

We would be very happy to have your testimony now.

I am sorry it has taken us so long to get to you.

STATEMENT OF A. KENNETH PYE, ASSOCIATE DEAN, GEORGETOWN  
UNIVERSITY LAW SCHOOL

Mr. PYE. My comments will be brief, because I agree in substance with almost everything Mr. Krash has said to the committee.

I agree with a great deal of what the U.S. attorney, Mr. Acheson, said yesterday also, and I shall try to avoid repetition wherever possible.

My views on the subject have been subject to considerable change during recent years.

I served with Mr. Krash on the bar association committee in 1959, which recommended something very similar to the bill that this committee has before it today.

At that time I favored the language which was contained in that bill, as distinguished from the *Durham* rule, as I understood it to be operative in the courts of the District of Columbia.

Mr. Krash indicated, the bar association did not approve its committee's recommendation.

Since that time, I have changed my views drastically. My viewpoint as to what is the appropriate test for responsibility in a criminal case is the same.

The difference is that the law as it has developed by judicial decisions has come around, at least in the way I read these cases, to be substantially what I think it should be.

The CHAIRMAN. By that you mean *Durham* clarified by *McDonald*?

Mr. PYE. *Durham* clarified by *McDonald*, and the practices which have developed in the courts as far as the understanding of testimony, the reluctance of the court of appeals to reverse jury verdicts.

I was originally concerned when *Durham* was interpreted in decisions such as *United States v. Wright* (250 Fed. 2d), that we might be leading toward an area in which the concept of freedom of will was being deleted from the fabric of our criminal law.

That we might be headed toward an area that just because an individual was ill he would be held not responsible for his acts.

Any doubts that I might have had in this particular have been solved, I think, by subsequent opinions of the court.

As I understand the rule at the present time, the test is a workable test, a test which indicates that a defendant should not be held responsible when his capacity to refrain from doing an act has been substantially impaired.

The advantages of the right and wrong test, and the irresistible impulse test are available in addition to this somewhat broader doctrine.

The CHAIRMAN. I don't understand that last statement.

Mr. PYE. The advantages of the recognition factor in the right and wrong test still exists in the law of the District of Columbia.

In an appropriate case the court would instruct not only on *Durham*, but also on *McNaghten*, and irresistible impulse.

The *Durham* test is not a substitute for these other two. It replaces it in those areas where right and wrong is not important.

But a jury would still be instructed in an appropriate case that they should find the defendant not guilty by reason of insanity if they determine that the effect of his disease was such that he could not distinguish between right and wrong.

The CHAIRMAN. Thank you.

Mr. PYE. I cannot go as far as Mr. Acheson in concluding that the test as it presently exists is the same or substantially the same as that embraced in H.R. 7525. I do not know.

My point is this: We have one opinion from a unanimous court. It seems to me quite likely that a case may develop that will result in the cleavages which existed in the circuit prior to this opinion.

I suggest the following possible case, in which a defense counsel requests an instruction that a jury should find the defendant not guilty by reason of insanity if they find that his act was the product of the disease, and that they should reach this conclusion even though they find that his capacity to refrain from doing the act has not been substantially impaired.

That kind of instruction would put it flatly to the court whether substantial impairment is a definition of what is meant by product, or definition of what is meant by disease. I am not at all sure the court will agree.

At the present time, however, the concept of substantial impairment is an important factor in the determination of who is responsible.

Psychiatric treatment is such that I am not sure that it would make any difference to the average psychiatrist whether his testimony is couched in terms of substantial impairment or in terms of productivity.

My major point is that this test has shown that through the decision-making processes, evolution can occur, that the circuit court is not unmindful of the problems which exist in the trial court. That it is able to clarify the law when it becomes evident that public welfare demands that it be clarified.

Three years ago, if I were before this committee, I would have to complain, as I complained before Senator Ervin's Subcommittee on Constitutional Rights, that one of the problems of the operation of the *Durham* rule was that cases were being taken away from juries and directed verdicts being granted against the Government simply because a defendant was able to admit some evidence of insanity, and the Government could introduce no evidence of noncausality.

This is no longer the case. *McDonald* has made it clear that when a defendant introduces some evidence, unless this evidence is of such overwhelming qualitative significance that a trial judge should not direct the case against the Government, it should submit it to a jury.

Experience has also shown that the problems of—

The CHAIRMAN. At that point, Dean Pye, the *McDonald* case came down in October of last year. Since that date, down to the present time, have we actual case examples in the District of Columbia where a defendant was freed by a directed verdict after he had produced some evidence of his mental condition?

Mr. PYE. I know of none, sir. Quite clearly, it would occur in a case where three psychiatrists testify that the defendant is psychotic, the Government does nothing about it.

This is the way the Government would handle the case in order to obtain the mandatory commitments features.

If the Government agreed that the defendant was psychotic and not responsible for his acts, it would not dismiss the indictment in order to obtain the advantages of mandatory commitment.

They would go through with the trial, and the Government would simply not oppose the insanity defense.

In that kind of case, there may still be directed verdicts.

I know of no case where the Government has had a verdict directed against it in a contested case where the Government simply was unable to produce a psychiatrist who would testify that there was no casualty involved.

This was occurring prior to *McDonald*.

The CHAIRMAN. I understand that.

But I am just trying to develop the facts that you are suggesting after the *McDonald* case.

And I would assume if the statement you are making is correct—and I don't question it—that the facts, if there are any that fall within this category in actual practice, would bear you out.

The CHAIRMAN. I will ask the staff to check that out. They may have cases that fall in this category, and there may not be.

This has only been a relatively short period of time, 13 months.

But I want to develop for the record what happens in the first case that you alluded to.

If I understand you correctly, we have a defendant charged with a crime. He interposes a defense of not guilty by reason of insanity. Three psychiatrists testify as to his mental condition, and they are completely unanimous on his mental condition, that he should be acquitted or found not guilty by reason of insanity.

I understood you to say that in that case the Government does not oppose the three psychiatrists—I understand that fact totally in that type of a case the judge would then commit this man to a mental institution; is that correct?

Mr. PYE. No, sir; he would direct the jury to return a verdict of not guilty by reason of insanity.

Upon receipt of that verdict, he would enter judgment of not guilty by reason of insanity, and then commit the defendant.

The CHAIRMAN. And then there would be the commitment.

Mr. PYE. Yes, sir.

The CHAIRMAN. I think this is very important, because I know there exists in the minds of many, many people, and probably in the minds of a great many people in the community, the impression that under a factual situation such as you described that this man is turned loose on the streets. This simply is not true.

Mr. PYE. That is absolutely correct, Senator. There is another misimpression that is even more dangerous, and that is that the individuals who are found not guilty by reason of insanity, and who are committed to St. Elizabeths Hospital, will promptly find themselves back on the streets in a position to repeat their criminal activity, while had they received prison sentences they would be off the streets and the public would be protected.

At the present time this data is under study.

The judicial conference of the District of Columbia circuit has for the last 3 years engaged in a project under the supervision of Professor Okun of our faculty, and under a judicial conference committee, with grants received from the Agnes Meyer Foundation, studying the subject of pretrial commitment for competency.

In the process of collecting this data, we have also concerned ourselves with what happens to an individual once he gets into St. Eliza-

beths. The results will not be released until the conference acts upon it.

I think it is a fair statement to say that anyone who is knowledgeable in this area, however, has reached the conclusion that the average person who is sent to St. Elizabeths Hospital will be released from St. Elizabeths Hospital considerably later than he would anticipate release had he been convicted.

And this is discounting the fact that one-third of the people who are convicted are placed on the streets immediately in a probation status.

This kind of information is unfortunately not generally understood by the public.

The CHAIRMAN. Several witnesses testified to the same effect as you have testified now.

I think this is very helpful for the record.

Mr. PYE. Indeed, the problem for defense counsel is just the converse of the problem suggested by Senator Dominick earlier.

If you were a defense counsel today, the *Durham* rule may loom as a formidable obstacle to doing what you think is best for your client.

To the extent that a psychopath may be found to lack criminal responsibility, he will also be found to have very little chance of responding to treatment.

As Senator Dominick suggests, we have not been very lucky in rehabilitating these people. This means for the defense counsel if his client is found not guilty by reason of insanity, he may never be released, where if he were convicted, he could look forward to probation in 1 to 3 years.

Returning to the subject of the statute itself, I am concerned with several specific sections of it which have nothing to do with the test.

The CHAIRMAN. If I understand— you are in agreement, as I understand, with the U.S. attorney and with Mr. Krash who preceded you, that—the test should best be left to the courts rather than to statutory law, and that the *Durham* rule as amplified or modified or supplemented by the *McDonald* test is the best test that can be designed to be given to a jury at the present time.

Mr. PYE. Yes, sir.

The CHAIRMAN. Is that substantially your view?

Mr. PYE. Yes, sir.

The CHAIRMAN. All right.

Now you might point to the other sections of title 2.

Mr. PYE. With reference to the subject of the necessity of filing advance notice of intention to assert the insanity defense, I personally think that this is a desirable kind of situation.

I question whether it is best done in a general statute of this nature, as distinguished from being done in the rulemaking power of the Supreme Court in the "Federal Rules of Criminal Procedure."

The Supreme Court advisory committee has under consideration at the present time whether advance notice of certain defenses should be required of defense counsel.

In the proposed amendment they have concluded that it would be advisable to require advance assertion of the alibi defense. They did not so conclude with reference to insanity.

This may be because it constitutes no substantial problem within the Federal system, although it might be a problem in the District of Columbia.

However, I think it is the kind of matter which deserves consideration, not in isolation of the insanity defense, but in connection with all other provisions relating to criminal discovery, including the defendant's right to learn from the Government what its case is going to be.

The CHAIRMAN. The U.S. attorney on that point said that he favored this section. He did not think it was absolutely required, because he very rarely ran into this type of a problem as a matter of practice.

But he said notice in order to prevent surprise is a good thing.

I understand your point to be that you agree that notice is a good thing, because it does prevent surprise, but it should be taken care of under the rulemaking authority of the courts rather than under the statutory making authority of the Congress.

Mr. PYE. That is correct, because there is an intimate connection between how much the defendant should have a right to know about the Government's case, when we are giving advance notice of the defendant's case to the Government.

I think this is best handled in the general context of criminal rules in general.

I agree with Mr. Acheson that it would be meaningless in this jurisdiction, in 95 percent of the cases, for the simple reason we are dealing with a predominantly indigent population, and even those that are not indigent can rarely afford the psychiatric advice of private practitioners.

As a result, to my experience at least, 90 percent of the cases which are tried, in which the defense is asserted, are cases where evidence of psychiatric disorder is learned through pretrial mental commitment.

The Government receives notice of this, the Government receives a copy of the report. They have advance notice, in all except the most unusual case where you are representing a wealthy individual who is able to hire a psychiatrist on the sly and be examined without the Government finding out about it.

Now, this is a disadvantage. But we are bound to have some disadvantages in any system.

The Government under the case of *Hughes v. The United States*, 306 Fed. 2d, has a right to obtain an advantage over the defendant in a few cases by sending in a Government psychiatrist to examine a defendant immediately after he is arrested, and not provide a report of this examination to the defendant.

Now, neither of these would be good in a perfect system. I question whether it is desirable to pass a statute to take care of such unusual possibilities.

I might add with reference to this statute, the statute presumably wishes to give legislative endorsement to the result of the *Hughes* case.

There is a provision in the statute which would permit the Government not to utilize the usual procedure of impartial examination, but would permit the Government to send its own psychiatrist in immediately after arrest and examine the defendant.

This could be very important, because of the delay factor.



Psychiatric testimony of a doctor who has examined the defendant immediately after an offense is apt to be more persuasive than an examination of a doctor who did not see the defendant until months thereafter.

If the defendant is required to utilize the procedure provided for in this statute, it would only be after indictment, the appointment of counsel, the assertion of the intention to rely on the defense, that the examination would be made.

The Government in the meanwhile could have had him examined by a private psychiatrist at a much earlier date.

I don't think that discrepancy is desirable.

The sanction provided for by the statute in paragraph c(2) on page 3, also causes me some difficulty.

It is suggested that evidence would not be admissible at trial if the defendant failed to assert in advance of trial his intention to rely on this defense.

I respectfully suggest that if a trial judge refused to permit evidence that a defendant was insane at a criminal trial, the appellate courts would not have much trouble in finding out that the conviction ought to be reversed.

I invite the attention of the committee to a recent case in Colorado, *French v. The District Court*, which is still in the advance sheets.

Under Colorado procedure, the defendant is remanded to a State mental institution for psychiatric examination, where he is supposed to cooperate. This defendant did not cooperate. Because he did not cooperate, they refused to permit him to admit evidence of insanity at his trial.

The Supreme Court of Colorado in a unanimous opinion reversed, the case, saying that regardless of the desirability of his cooperation, they could not permit a judgment to be entered of guilty against a man who might be insane.

I suggest that the same result would follow if this particular statutory sanction was invoked.

The CHAIRMAN. The same problem that you present troubles the U.S. attorney as well.

He indicated if there was any sanction, it should probably be against the lawyer and not against the defendant.

I don't know whether you have any comments on that.

Mr. PYE. I am Chairman of the Judicial Conference of this Circuit's Committee on Federal Criminal Rules.

With reference to the alibi defense, we tentatively explored the possibility of providing a sanction against the attorney similar to the sanctions provided for in rule 11 of the Federal Civil Rules.

Now, this is the rule that requires or provides that the signature of an attorney constitutes verification of what is contained in the complaint and the answer, and that the court might exert disciplinary sanctions against an attorney who files a false complaint or false answer.

We are unable to find any cases in which this has ever been done, however, and I strongly suspect the result would be the same in the criminal area.

The CHAIRMAN. Thank you.

Mr. PYE. I think I disagree with Mr. Acheson's testimony with reference to the provision in paragraph c(1), on page 3, lines 8 through 10, with reference to the language of the act which would make language of mental responsibility an affirmative defense, and require that the defendant must show this by substantial evidence.

I think that this would constitute a considerable change in existing law in the District of Columbia.

It is my understanding that this particular provision originated in the ALI as a result of a compromise between individuals that didn't like the some evidence rule, and individuals who wanted to adopt a statute such as the Oregon statute in *Leland v. Oregon*, placing the burden on the defendant to establish insanity.

The result was a statute which, as I read it, is ambiguous. You cannot tell whether the defendant has to establish the existence of a mental disease by a preponderance of the evidence.

It is clear, however, that he has to produce substantial evidence. Substantial evidence might well be interpreted to mean something different than some evidence. Some evidence has a judicially defined meaning now, as a result of almost 50 years of case law since the *Davis* opinion.

To change the word "some" to "substantial" would give rise to a feeling on the part of some people that the defendant has to produce at least a preponderance of the evidence.

I think it is reasonable to assume he has to produce something more than some, if not a preponderance.

In any case, I see no advantage to confusing the law, unless we are in a situation where substantial detriment is being sustained by the Government in meeting the insanity burden.

As I understand from Mr. Acheson's testimony and his article in our law review of last year, this is not the case.

The fact that the Government has the burden of proceeding as a result of the introduction of some evidence does not at the present time place any severe limitation on the Government; they are able to meet it.

If this is true, I see no point in trying to adopt new statutory language, when the old language is doing the job.

I am particularly concerned with the provisions in paragraphs d to g, which cover pages 3 to 10 of the act. These are the provisions that set forth details of the scope, manner, form, and effect of the pretrial examinations.

This is the very subject which the judicial conference of this circuit has had under study for 3 years. This conference appointed an eight-man executive committee, retained the full-time services of a project director, and obtained \$50,000 of funds in order to conduct the study.

Every case which has involved the assertion of a claim of incompetency to stand trial since 1953 has been studied. The records of St. Elizabeths Hospital have been studied, the court records have been studied, questionnaires have been sent to lawyers and attorneys throughout the country.

This May the committee will report to the judicial conference making recommendations.

Some of these recommendations may constitute substantial changes in existing procedure as to pretrial commitment, what should be in

the examination, what the responsibility of the court should be in dealing with the doctors who have determined that he is competent or incompetent, and perhaps dealing with release procedures.

The CHAIRMAN. Much of this, as I understand it, is already covered by existing statutes in the District of Columbia.

Mr. PYE. That is correct.

The CHAIRMAN. Statutory law—and this is what you are examining in your judicial conference.

Mr. PYE. Yes, sir.

In substance we shall be in a position, if the conference approves the report, of making recommendations to this committee for such changes in the existing provisions of title 24301 of the District of Columbia Code as should be desirable.

It may be that we will recommend the same language which is in the present act.

I simply suggest that there is much in favor of the committee deferring action upon it until it has the benefit of a substantial staff study.

I have one further comment with reference to the language that a defendant who has been released from a hospital following a verdict of not guilty by reason of insanity should be put on a probation status.

I agree with the preceding witnesses that this language is undesirable, but for somewhat different reasons.

At the present time a person who is on a conditional release status is subject to a redetermination of his status by the court upon proper application by the Government. He is subject to supervision by the court.

The court usually imposes conditions that require him to report or undergo treatment from the hospital.

This, to my mind, is a better method than putting him on probation, if by probation we mean putting him under the supervision of a probation officer.

At the present time, in the District of Columbia, our officers have a caseload of over 84 cases a month. It is quite obvious that the extent to which they can supervise or provide treatment for people is limited.

When you have 84 of them a month to take care of, I think the hospital is a better place, and the direct supervision of the court is a better place from the point of view of the protection of society as well as for the rehabilitation of the individual than any transfer of this type of individual to the probation service.

Thank you, sir.

The CHAIRMAN. May I ask you just one further comment. A number of witnesses have commented on the jury instruction, found at page 13 of the bill. It reads as follows in the proposed bill before us:

The jury shall not be told by the court or counsel for the Government and for defendant the consequences of the verdict of not guilty or acquittal by reason of insanity.

My understanding of case law in the District of Columbia at the present time is that it is just the reverse, and that the jury is told the consequences of a verdict of not guilty or acquittal by reason of insanity.

Would you favor this or would you not?

Mr. PYE. I would oppose this, sir, for this reason:

As other witnesses have testified, the average juror comes into a criminal case with the belief that if the defendant is found guilty he will go to prison; if he is found not guilty he will go free. If he goes free he may constitute a menace to society.

I think a totally rational view on the part of a juror in a serious case would be that, "If I have a reasonable doubt as to whether this man is insane, but I am sure he is a dangerous individual, I will convict rather than find him not guilty, because that way I am certain that society will be protected. Where, if I find him not guilty by reason of insanity, he may be free to prey on the public again."

This instruction which is presently being given dispels this kind of attitude. I think it is more important that an instruction of this type be given in the District of Columbia rather than in some other place. As everyone is aware, a number of our citizens do not come from the District of Columbia originally.

Even well-informed citizens from other States would not know the mandatory commitment law, because other States do not have the mandatory commitment law.

All that this instruction does is permit the jury to determine whether the defendant is mentally responsible in a realistic posture.

If he is sick, and the sickness caused the disease, he will go to a hospital.

If he is not sick, or if the sickness did not cause the disease, he should go to prison.

In neither case will he go free unless they find him not guilty.

I think instructions that put the case to the jury in that posture are quite reasonable.

The CHAIRMAN. Thank you, Dean Pye.

I certainly appreciate your courtesy in coming here and appearing before us this morning.

Again I want to thank you for your patience in waiting such an unseemingly long period of time to give your testimony.

Mr. PYE. Thank you, Senator.

The CHAIRMAN. Before we recess, I would like to include in the hearing record a letter and attachments from Mr. John H. Pratt, president of the bar association of the District of Columbia, dated October 10, 1963.

(The letter and attachments follow:)

THE BAR ASSOCIATION  
OF THE DISTRICT OF COLUMBIA,  
Washington, D.C., October 10, 1963.

Re H.R. 7525, omnibus crime bill.

HON. ALAN BIBLE,  
Chairman, Committee on the District of Columbia,  
U.S. Senate, Washington, D.C.

DEAR SENATOR BIBLE: We appreciate your invitation for the Bar Association of the District of Columbia to express its views on H.R. 7525, relating to crime and criminal procedure in the District of Columbia. Unfortunately, the association is not in a position to take any formal position on the entire bill, since neither the board of directors nor the membership has approved any policy declaration on it. We are pleased to communicate certain information based on past association consideration of related matters, however.

## TITLE I—"MALLORY" RULE

As you know, title I of the bill would modify existing law (interpretation of rule 5(a) of the Federal Rules of Criminal Procedure) to prevent the courts from disqualifying statements and confessions solely because of delay between the arrest and arraignment of a suspect. The Supreme Court in *Mallory v. United States*, 354 U.S. 449 (1957), and the earlier decision in *McNabb v. United States*, 318 U.S. 332 (1943), placed limitations on the use of confessions under certain circumstances of delay between arrest and arraignment. The U.S. Court of Appeals for the District of Columbia circuit applied the *Mallory-McNabb* rule in *Killough v. United States*, 315 F. 2d 241 (D.C. Cir. 1962) resulting in much discussion of the rule by the bar and the public. The Deputy Chief of Police appeared before the bar association and discussed problems of the Police Department in investigations and prosecutions under the rule.

Thereafter the president of the association appointed a committee of experienced lawyers (some very experienced in the criminal field and others less experienced in that field) to study the matter. On March 7, 1963, the committee submitted its report recommending (with one dissent) four bills or legislative enactments. The first recommended bill would deal with the *Mallory* rule and is generally consistent with title I of H.R. 7525, except that it would provide certain additional safeguards not included in H.R. 7525. A copy of the committee report is forwarded herewith as attachment 1. The board of directors of the association unanimously approved the report in principle.

The association's committee on criminal law and procedure on March 20, 1963, adopted a report opposing the report of the special committee and specifically opposing H.R. 1930 to amend the *Mallory* rule much as title I of H.R. 7525 would do. The committee's report is enclosed as attachment 2. Because of this position the matter was scheduled for consideration and debated at the regular meeting of the association held on April 16, 1963. The association membership voted down the special committee's recommendation by a standing vote of the membership (30 Journal of the Bar Association of the District of Columbia 263, 268). That position of the association has never been reconsidered. However, the matter is now referred to the association's criminal law and procedure committee for recommendation.

## TITLE II—"DURHAM" RULE

Title II of H.R. 7525 would abolish the rule on criminal responsibility applied in *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F. 2d 862 (1954), and other cases, and would provide that insanity is an affirmative defense to be asserted and proven by the accused.

The association has never been able to reach agreement to support similar proposals. As is noted in House Report 563, 87th Congress, 1st session, page 20, in September 1959, a proposal to abolish the *Durham* rule and substitute a statutory rule dealing with insanity as a defense in a criminal case was voted down by the membership (26 Journal of the Bar Association of the District of Columbia 301, 316, 448-449). A copy of the 1959 committee report and dissent are enclosed as attachment 3.

In connection with H.R. 7052, 87th Congress, our mental health committee carefully studied the problem anew in 1962. The exhaustive studies resulted in a majority report of some 50 pages and a minority report of some 15 pages, each of which were transmitted to you by letter from the association's executive secretary, on April 12, 1962, for assistance and guidance of your committee and its staff in considering the *Durham* rule legislation. We refer you to those reports as the product of hours of study by informed lawyers rendering a public service. The association has no further position on this matter.

## TITLE III—DETENTION FOR INVESTIGATION

The association's special committee on the *Killough* case considered this subject in its report (see pp. 6-7). Likewise, the committee on criminal law and procedure considered it in its adverse report (pp. 1-3 on H.R. 1929). The vote of the association rejected the special committee's report which recommended legislation similar to title III. The association's position remains unchanged.

## TITLES IV AND V—AMENDMENTS CONCERNING SPECIFIC ACTS OR CRIMES

These two titles deal with proposals to amend the statute with respect to robbery, burglary, corrupt influences in connection with athletic contests and indecent publications. No policy position has been formulated, to date, on these provisions, either by the association or its committees. H.R. 7525 is being studied by our committee on criminal law and procedure. If views which have proper authorization and approval of the committee, the association's board of directors or its membership are arrived at before your present hearings close, we shall be pleased to communicate them to you.

Again let us express appreciation for your keen interest in the District of Columbia and its laws.

If we can be of further assistance, please call on me or Robert W. Barker, Esq., chairman of our committee, on pending legislation.

Sincerely yours,

JOHN H. PRATT, *President.*

## ATTACHMENT 1

Report of the Special Committee for Consideration  
of the Rule in Killough's Case and Related Matters

March 7, 1963

Thomas S. Jackson, Esquire  
President  
Bar Association of the District of Columbia  
1044 Washington Building  
Washington 5, D. C.

Dear Tom:

This letter and the enclosures constitute the report of the above committee.

We agree unanimously that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Killough v. United States*, . . . . U.S. App.D.C. . . . ., represents merely an application of the McNabb-Mallory rule and as such does not merit prolonged attention. Some of us are of the opinion that the Court of Appeals overturned too readily the finding of the trial judge that there was no casual connection between the two confessions but we do not think that any legislative or other corrective action is called for in this regard.

We have construed our appointment as requiring us to go further than a consideration of the Killough case itself and have conducted our proceedings accordingly. The problem that faces the community arises out of the necessity of reconciling protection of individual rights with the public interest in adequate law enforcement. The nature of the problems that arise and the division of opinion that inevitably results are well illustrated in the decision of the Supreme Court of the United States in *In Re Groban*, 352 U.S. 330, 1 L.Ed.2d 376, 77 S.Ct. 510 and *Anonymous v. Baker*, 360 U.S. 287, 3 L.Ed.2d 1234, 79 S.Ct. 1157, in each of which the Justices divided five to four. After consideration of what we deem all of the relevant factors, the undersigned recommend that the Bar Association of the District of Columbia sponsor the enactment by Congress of the three bills that are attached.

The first, which relates to the admission in evidence of certain confessions in criminal cases, contains in sections 1 and 2 substantially the provisions that appeared in Senate 525 offered in the 86th Congress 1st Session by Senator Keating and others. Sections 3, 4 and 5 of the attached bill have been devised by your committee.

The second bill, which would authorize judicial officers to require the giving of evidence relating to crimes committed in the District, is based upon the bill prepared for the Commissioners and submitted by them to the Bureau of the Budget early in January but contains a number of additions and changes made by the committee with a view to making the bill both more effective for its intended purpose and also to afford greater protection of individual rights.

The third bill, relating to material and necessary witnesses to crimes committed in the District, is likewise based upon a bill submitted by the Commissioners to the Bureau of the Budget in January but contains certain changes sponsored by the committee.

Respectfully submitted,

MILTON W. KING  
DANIEL W. DONOGHUE  
EDMUND D. CAMPBELL  
GEORGE E. C. HAYES  
FREDERICK A. BALLARD  
JOHN J. WILSON  
WILLIAM S. THOMPSON  
JOHN E. POWELL

JEP/a  
Enclosures



## A BILL

To provide for the admission in evidence of certain confessions in criminal cases in the District of Columbia and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That

1. In any criminal trial in the District of Columbia evidence, including statements and confessions, otherwise admissible, shall not be inadmissible solely because of delay in taking an arrested person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States, unless the effect of the delay is to render the confession involuntary.

2. Notwithstanding the provisions of section 1, no statement, admission, confession or other evidence obtained from the defendant in an interrogation of him shall be admissible, unless immediately prior to any such interrogation the defendant is plainly advised that he is not required to make any statement and that any statement made by him may be used against him.

3. Nothing in this Act shall be construed to limit or abridge the privilege against self-incrimination.

4. In any criminal trial in the District of Columbia, if the trial judge is of the opinion that a statement or confession has been obtained by the Metropolitan Police from the accused in violation of any constitutional provision, statute or rule of Court, he shall direct that the relevant portions of the transcript and his observations thereon be forwarded by the court clerk to the Commissioners of the District of Columbia.

5. Upon receipt of such a transcript, the Commissioners shall promptly forward the same to the Special Police Trial Board created by Reorganization Order No. 48, dated June 26, 1953, as amended, for prompt trial of the police official or officials allegedly involved in the violation referred to in section 4. The trial board shall have the powers described in Chapter 6, Title 4 of the Code of Law for the District of

Columbia in addition to any others lawfully conferred upon it and the findings of the board and the action ultimately taken, exonerating, reprimanding, disciplining or otherwise punishing the police official or officials involved, shall in due course be communicated by the Commissioners to the Clerk of the court from which the trial transcript was forwarded.

#### A BILL

To authorize judicial officers to require the giving of evidence relating to crimes committed in the District of Columbia.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That (a) In any investigation by a member of the Metropolitan Police force or by any Federal law enforcement officer (hereinafter called investigating officer) of a crime committed in the District of Columbia which is punishable by imprisonment for a year or more, on a showing of good cause to believe that a person may be able to give evidence relating to such crime, any judge of the District of Columbia Court of General Sessions or the United States Commissioner for the District of Columbia (hereinafter called judicial officer) may, on the application of the appropriate prosecuting attorney, issue a subpoena commanding such person (hereinafter called respondent) to appear before a designated judicial officer forthwith or at any time specified in the subpoena. The subpoena may be served by an investigating officer or by the United States Marshal or a deputy United States Marshal. If the subpoena requires the appearance of the respondent forthwith, the person serving the subpoena shall bring the respondent before the judicial officer; provided, however, that if the investigating officer has reasonable ground to believe that any such respondent may not be readily available if the foregoing procedure is followed, he may hand to respondent a subpoena previously issued in blank by the Clerk of the District of Columbia Court of General Sessions or by the United States Commissioner for the District of Columbia, requiring the respondent to appear forthwith before a judicial officer, and the investigating officer serving such subpoena shall bring the respondent forthwith

before the judicial officer, who shall determine whether or not there is good cause to believe that respondent may be able to give evidence relating to such crime; and if the judicial officer does not find that good cause exists, he shall forthwith discharge respondent; provided further, however, that no statement or evidence given by respondent prior to his appearance before the judicial officer may be used against him in any criminal proceeding.

(b) The judicial officer shall inform respondent of the purpose of the subpoena, that he is not required to make any statement or give any evidence that may incriminate him, and that any statement or evidence given by him may be used against him in any criminal proceeding. Thereafter the judicial officer may require respondent to give evidence to the investigating officer or officers at a specified time for a period not exceeding six hours, and at a specified place or places other than a police station, cell block, or other area normally used for detention of arrested or convicted persons. If the respondent willfully refuses to give evidence he may be prosecuted as provided in Title 23 of the Code of Law for the District of Columbia and, upon conviction, may be fined not more than \$500 or imprisoned for not more than 60 days. *Provided*, That nothing in this Act shall be construed as being in derogation or limitation of respondent's privilege not to be a witness against himself in a criminal case or of any privilege respecting his testimony to which he is otherwise entitled by law. At the conclusion of the detention, as herein provided, the respondent shall immediately be brought again before a judicial officer who shall both inform respondent of his right to make a statement with respect to anything that occurred during the detention and afford him adequate opportunity to make one.

(c) A detention, as herein provided, of any person shall not constitute an arrest within the meaning of that term as used in any law, rule or regulation.

(d) In every case of a respondent who is required to give evidence pursuant to this section, all proceedings before the judicial officer shall be transcribed verbatim or recorded elec-

tronically, and the investigating officer or officers shall make and preserve an electronic recording of all questions asked of the respondent and of all answers and statements made by him and shall make and preserve a detailed record of all documentary and other evidence given by him; and anything occurring upon such occasion, if not so recorded, shall not be used against him in any criminal proceeding. Such recording and any such documentary or other evidence may, for good cause, be ordered by the court to be produced at a trial or hearing in any criminal proceeding or for inspection before trial. The recording and documentary or other evidence referred to in this subsection shall be preserved for a period of not less than three years and for such longer period as the appropriate prosecuting attorney shall direct in writing.

#### A BILL

To amend the law relating to material and necessary witnesses to crimes committed in the District of Columbia.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That section 401, the Revised Statutes of the United States, relating to the District of Columbia (D. C. Code, sec. 4-144), is amended to read as follows:

"Sec. 401. (a) Whenever, in a criminal case, there is reasonable ground to believe that any person is a material and necessary witness to any crime or attempt to commit any crime punishable by imprisonment for one year or more and there is a reasonable probability that he will not be available to testify at the trial of the person charged with such crime, the person so believed to be a material and necessary witness may be taken by a member of the Metropolitan Police force or by a Federal law enforcement officer, without unnecessary delay, before a judge of the United States District Court for the District of Columbia or a judge of the District of Columbia Court of General Sessions or a United States Commissioner (hereinafter called judicial officer). If the judicial officer, after

a hearing at which testimony shall be given under oath, is satisfied that the person is a material and necessary witness and that there is reasonable probability that the witness will not be available at the trial, he may require such witness to post bond or collateral as security that he will appear and testify at such trial, or upon his failure to post such bond or collateral after a reasonable opportunity to do so, may order his further detention until such time as he appears and gives testimony at the trial or until the trial has been finally disposed of otherwise. The detention, as herein provided, of any such witness shall not constitute an arrest within the meaning of that term as used in any law, rule or regulation. No statement made by such witness in the course of his detention as authorized by this section shall be used in a prosecution against him for the commission of any crime, unless he shall have been previously informed by a judicial officer that he is not required to make any statement or give any evidence that may incriminate him and that any statement or evidence given by him may be used against him in any criminal proceeding.

(b) The Board of Commissioners shall provide suitable accommodations within the District of Columbia for the detention of persons who are unable to furnish security for their appearance as witnesses, as provided in subsection (a). Such accommodations shall be separate and apart from quarters used for the confinement of persons charged with crime. The Commissioners may, in their discretion, enter into agreements with any Federal Agency, including the United States courts, for the use of suitable space in a building under the jurisdiction of any such agency, and such agency is hereby authorized to permit the use of such space for the purpose of providing the accommodations required by this subsection. In carrying out the purposes of this Act, the Commissioners may utilize any appropriate space in any building which is owned or leased by the government of the District of Columbia.

In the case of any witness detained by an officer other than an officer or member of the Metropolitan Police force, the District of Columbia shall be reimbursed for the accommodations furnished such witness at rates to be determined by the Commissioners."

Sec. 2. District of Columbia appropriations shall be available for carrying out the purposes of this Act.

March 12, 1963

MEMORANDUM for Board of Directors  
Bar Association of the District of  
Columbia

Re: KILLOUGH COMMITTEE

This memorandum supplements the Committee's report dated March 7, 1963.

The first bill referred to in the report, entitled "A bill to provide for the admission in evidence of certain confessions in criminal cases in the District of Columbia" would accomplish two purposes. Paragraphs 1 and 2 would amend the McNabb-Mallory rule and would restore the law more or less to the situation that existed prior to the Supreme Court's adoption of the exclusionary rule as its chosen method of enforcing the injunction of Rule 5(a) of the Federal Rules of Criminal Procedure that an officer making an arrest shall take the arrested person "without unnecessary delay before the nearest available" judicial officer. These paragraphs 1 and 2 are substantially the same as those approved by the Judicial Conference at its session on May 8, 1958.

Paragraphs 4 and 5 of the proposed bill are intended to provide an alternate method for policing and enforcing the mandate of Rule 5(a) quoted above. They incorporate a suggestion made by Judge Burger in his dissenting opinion in *Killough v.*

*U. S.* (slip opinion page 34, Note 5) which was adopted by Judge Youngdahl in his memorandum opinion filed October 23, 1962 in *U. S. v. Smith and Bowden*, Criminal No. 324-62. These paragraphs of the bill are also designed to make clear that there is no intention of countenancing so-called third degree methods.

The second proposed bill entitled "A bill to authorize judicial officers to require the giving of evidence relating to crimes committed in the District of Columbia" is intended to furnish a substitute for the arrests for investigation that were condemned by the Horsky Report and to establish a carefully circumscribed procedure that would permit limited police interrogation without an arrest. This bill would apply the subpoena to new uses; the bill thus seeks to build upon existing law and practice. As noted in the original committee report dated March 7, this bill is based upon that submitted by the Commissioners to the Bureau of the Budget in January but contains certain additions and changes proposed by the committee. The most substantial additions appear on page 1, line 19 through line 11 on page 2; lines 3 through 11 on page 3; and lines 19, 20 and 21 on page 3. Other departures from the Commissioners' bill have been made for purposes of readability and clarification.

The third bill entitled "A bill to amend the law relating to material and necessary witnesses to crimes committed in the District of Columbia" is likewise based upon a bill submitted by the Commissioners to the Bureau of the Budget in January. The additions proposed by the Committee are to be found in lines 15 through 20 on page 2. Other changes have been made with a view to increasing readability and clarity. The existing statute, which the bill would amend, has been on the Statute Books for eighty-five years but has been little used because of its limited provisions. The proposed bill represents an attempt to revise this statute so as to make it a useful adjunct of law enforcement which at the same time affords protection to the citizen witness.

JOHN E. POWELL  
*Chairman*

March 13, 1963

### Dissent from Killough Committee Report

I agree with the Killough Committee that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Killough v. United States*, . . . U.S. App. D.C. . . . , . . . F.2d . . . (No. 16398, Oct. 4, 1962), represents only an application of the *McNabb-Mallory* rule and that the Committee should make no specific recommendation with respect to that case. As we said during our deliberations, *Killough* is a matter for "judicial evolution."

I respectfully dissent from all other recommendations of the Killough Committee.

The Committee has submitted three legislative proposals and has recommended that all three be *sponsored* by the Bar Association of the District of Columbia. The first two proposals urge drastic changes in criminal procedure in the District of Columbia—changes which may restrict rights guaranteed by the Constitution. One who sponsors such legislation has a heavy burden to prove both need and legality. I do not think that burden has been met. The third proposal—while less drastic—is not supported by a demonstration of need.

The three proposals will be discussed in order.

#### I. ANTI-MALLORY PROPOSAL

The first bill provides in essence that a confession shall not be inadmissible in evidence solely because it was obtained during a period of unnecessary delay between arrest and arraignment. This is an elaboration of the so-called Keating Bill and similar proposals which have been debated extensively for a number of years in the Judicial Conference, this Bar Association and Congress. The premise of this proposal seems to be that Rule 5(a) of the Federal Rules of Criminal Procedure has not been construed properly by the courts. It is an attempt to eliminate the *McNabb-Mallory* rule via legislation.

This is not the place for a detailed analysis of the *McNabb-Mallory-Killough* cases, but some brief reference appears in order.



Rule 5 (a) provides that a police officer who has made an arrest shall take the arrested person before a magistrate without unnecessary delay. Rule 5 (b) provides that the magistrate shall inform the defendant of the complaint against him, of his right to retain counsel, of his right to a preliminary hearing, that he is not required to make a statement, and that any statement made by him may be used against him. Rule 5 imposes no sanction on the police for a violation of the rule.

The *McNabb* decision interpreted the statutory antecedents of Rule 5 (a). It merely decided that any confession obtained during a period of illegal detention cannot be received in evidence. *McNabb v. United States*, 318 U.S. 332 (1943).

The *McNabb* rule itself is not a constitutional doctrine. It is a rule of evidence established by the Supreme Court in the exercise of its supervisory authority over the administration of criminal justice in the federal courts. The facts in the *McNabb* case itself, and in other cases involving application of the *McNabb* rule, raise constitutional questions as well because protracted secret questioning by the police may, at least under some circumstances, also constitute a violation of due process. When the *McNabb* doctrine is applied, however, the constitutional questions need not be reached, and they were not reached by the Supreme Court in the *McNabb* case.

The *Mallory* case simply interprets when the *McNabb* rule is violated. *Mallory* was arrested around 2:30 P.M. The police then had insufficient evidence to take him before the Commissioner. He made a series of confessions late that night and was arraigned at 10:00 o'clock the next morning. The Court held the confessions were improperly admitted at trial because Rule 5 (a) had been violated. *Mallory v. United States*, 354 U.S. 449 (1957).

The *Killough* case involved a situation in which there had been a *Mallory* violation in that the police had obtained a confession during a period of illegal detention. The defendant was then arraigned and the police later obtained a reaffirmation of the earlier confession. At the trial the prosecutor used only the reaffirmation. The *Killough* case simply holds that the reaffirmation has no validity unless the accused has received

the advice of counsel prior to the reaffirmation.

The literature on this subject is extensive. See, for example, Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Geo. L.J. 1 (1958). Our Junior Bar Section prepared an extensive analysis of the *McNabb* rule in 1957, while *Mallory* was pending in the Supreme Court. See "Report to the Council on Law Enforcement on the Meaning and Application of the McNabb Rule."

As I recall, former United States Attorney Oliver Gasch once reported that *Mallory* questions (confessions and admissions) are of controlling importance in probably less than five percent of criminal prosecutions in the District of Columbia. He also once dismissed the suggestion that the *McNabb-Mallory* rule affected the crime rate as "much too speculative." This suggests the need for a clear demonstration that drastic legislation is in order. The Killough Committee has not made such a demonstration.

There may be added problems raised by *Wong Sun v. United States*, . . . . U.S. . . . . (1963), U.S. LAW WEEK, p. 4079, Jan. 14, 1963. Even before *Wong Sun*, the illegality of an arrest excluded *tangible* evidence. There was, however, some controversy as to whether a confession or admission obtained as a result of an illegal arrest could be excluded as a violation of the Fourth Amendment. In *Wong Sun*, the Supreme Court found there had been an arrest without probable cause and extended the doctrine to confessions and admissions. The Court said:

"Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. See *Nueslein v. District of Columbia*, 115 F.2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence." Slip Opinion, p. 14

The *Wong Sun* case probably means that the legality of an arrest will be in issue in every confession case. It may even exclude some "threshold" confessions, which have been admissible in D. C. courts under *United States v. Mitchell*, 322 U.S. 65 (1944).

The *Wong Sun* case serves to illustrate that the problem goes beyond an interpretation of Rule 5(a). Even if Rule 5(a) were abolished, the courts may be forced to decide whether the Fourth Amendment has been violated in Mallory-type cases. The courts may also reach questions under the Fifth Amendment (whether liberty has been lost without due process of law), the Sixth Amendment (rights to notice of the charge, confrontation, and counsel), and the Eighth Amendment (right to reasonable bail).

In the final analysis, I think any bar association should be very careful in advocating the abolition of a rule which has been in effect for so many years and which has been interpreted on so many different occasions. Further, I think any bar association should be extremely cautious in proposing legislation which may restrict rights guaranteed by the Constitution.

## II. SIX HOUR BILL

The second bill would authorize judicial officers to require the giving of evidence by providing that a person may be subpoenaed and interrogated for six hours. In the Killough Committee we have called this proposal the "Six Hour Bill."

More specifically, this bill provides that when any law enforcement officer has "good cause" (not probable cause) to believe that someone (a "respondent") may have information concerning a specific crime, the prosecuting attorney may ask a judge to issue a subpoena directing the respondent to appear forthwith. The judge tells the respondent that he is not required to give evidence which may incriminate him, but the respondent is not given counsel. The respondent is then taken away (to some place other than the precinct) where he may be interrogated, in the absence of judge and counsel, for six hours. If he is not willing to talk, he may be held in contempt. A transcript is made of the respondent's testimony.

This bill was discussed rather extensively during Committee meetings and I shall now set forth my general objections as expressed to members of the Committee.

### A. Is the "Respondent" Arrested?

The first problem seems to be whether the "respondent" is

arrested when the police take him away with a subpoena. If an arrest is involved, it is unlawful without probable cause. If probable cause exists, the entire exercise is unnecessary. If it is *not* an "arrest" or "seizure," what is it?

One authority has said: "... [I]n most instances the [state] courts have not even discussed whether in-custody investigation by the police is legal." Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 22 (1962). We know that the courts of the District of Columbia will discuss the problem, and I think we should try to predict what they will say and do.

My prediction is that our courts will find there has been an arrest. See, for example, page 20 of Judge Youngdahl's opinion in *United States v. Smith and Bowden*, Criminal No. 324-62, U.S. District Court for the District of Columbia. I predict our Court of Appeals and the Supreme Court will also find there has been an arrest. See *Coleman v. United States*, 111 U.S. App. D.C. 210, 295 F.2d 555 (1961).

The suggestion has been advanced that the presumption of constitutionality of a statute would be sufficient to tilt the scales in favor of constitutionality of the Six Hour Bill. I doubt that the presumption is sufficiently strong to overcome constitutional objections.

One suggestion has been made that an attempt could be made to adopt the Six Hour Bill on the basis that it involves a civil proceeding rather than a criminal one. There may be a dispositive analogy in the Fifth Amendment language that no person shall be required to testify against himself "in any criminal case." The courts said at an early date that the protection of the Amendment would be an empty gesture if it was literally applied. For this reason, courts long ago concluded that it must be given a comprehensive application, and thus must prevent compulsory incrimination in *any* proceeding. This is a broad construction of the constitutional language but perhaps it is required for accomplishment of the basic objective of that language.

The *Wong Sun* case, *supra*, is also pertinent to any consideration of the Six Hour Bill.