B. The Right to Counsel

The Six Hour Bill says nothing about the right to counsel. In line with Rule 5(b), I think the respondent should be advised of his right to retain counsel. Perhaps he should also be advised of his right to request the *assignment* of counsel, as recently recommended by an Advisory Committee on Criminal Rules. See Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, page 2, December 1962. In my opinion, this is a fatal omission in the Six Hour Bill. We cannot ignore the inexorable trend of all of our local courts—and the Supreme Court—expanding the right to counsel.

One key case may be *In re Groban,* 352 U.S. 330 (1957), where four of nine justices dissented (Warren, Black, Brennan and Douglas) and said there is a right to counsel even when a fire marshal's questioning is involved in an administrative proceeding. Justices Frankfurter and Harlan concurred with the majority only because a fire marshal was involved. Now Mr. Justice Goldberg has succeeded Mr. Justice Frankfurter, which probably tilts the scales the other way. A fortiori, when a policeman is involved, the Supreme Court will find a right to counsel.

At the very least, the respondent needs an attorney for contempt questions. In addition, how does an untrained man know he is validly invoking the Fifth Amendment?

Discussions of an accused's constitutional right to the assistance of counsel may be found in the annotations in 84 Law. Ed. 383 and 1 Law Ed. 2d 1865 (in administrative proceedings).

Another fundamental question is whether any bar association should recommend legislation which weakens the right to counsel.

C. The Contempt Problem

The contempt proviso seems to create as many problems as it solves. As I read the cases, an open trial would be required

on any contempt charge. See *In re Oliver,* 333 U.S. 257 (1948), where a Michigan statute authorized judges to sit as one-man grand juries, with the usual grand jury powers, including the power to commit a witness for contempt if his testimony seemed false or evasive, subject to review only on such portion of the record as the committing judge may select. Under this statute a witness was summarily committed for contempt by a judge-grand jury because of the apparent inconsistency of his testimony with that of another witness. On habeas corpus the court considered only the testimony alleged to be false and evasive, not the whole record. The entire proceeding before the judge-grand jury, including the commitment as well as the investigation itself, was held in secret, and there was no special or separate hearing on the contempt charge.

The Court, in an opinion by Mr. Justice Black, held that such summary commitment constituted a denial of due process in violation of the Fourteenth Amendment on the grounds of (1) the secrecy of the proceedings and (2) the lack of reasonable opportunity to be heard on the contempt charge.

III. MATERIAL WITNESS BILL

The third bill provides for the detention of material and necessary witnesses to crimes if there is "reasonable probability" that such witnesses will not be available at the trial. It expands considerably a provision found in Section 4-144 of the D.C. Code.

I have yet to hear of any valid reason for this proposed legislation. I do not deny that a reason exists; I simply state that I have not heard of a reason.

It seems to me that this problem can be solved without additional legislation. Surely if there is some doubt that a witness will appear, he may be placed under subpoena by the court. If he does not appear at the trial the case may be continued and the matter cleared up at a later date.

A uniform law already exists whereby the United States Attorney may bring a witness here from some other jurisdiction. I refer specifically to Section 23-803 of the D.C. Code, which provides in essence that if any person in any state is

a material witness in a prosecution pending in the District of Columbia, or in a grand jury investigation, that witness may be taken into immediate custody to assure his attendance in the District of Columbia.

My superficial examination convinces me that Section 23-803 is effective. If it does not work, I would like to hear the United States Attorney explain why it does not work.

CONCLUSION

There is no doubt that the District of Columbia has a problem of adequate law enforcement, but I do not find the answer in the Committee's proposals.

It has been suggested that the police need some definite guidelines as to what they can and cannot do regarding detentions and arrest. I think the guidelines already exist. For many years our United States Court of Appeals has been telling the police when and how they may make arrests. There is no reason to conclude that the judges will terminate this process of judicial evolution, regardless of any statute which may be enacted. Perhaps everyone—even the police—will profit by following the inevitable process of judicial evolution.

Respectfully submitted,

JAMES J. BIERBOWER

Letter to Senator Bible

March 14, 1963

Honorable Alan Bible
Committee on the District of Columbia
United States Senate
Washington 25, D. C.

DEAR SENATOR BIBLE:

Some months ago the decision of the United States Court of Appeals for the District of Columbia Circuit in the case of *Killough* v. *United States* intensified public attention to what has become known as the Mallory Rule, an interpretation of Rule 5(a) of the Federal Rules of Criminal Procedure.

Believing that the legal profession owes to the public the duty of giving to this matter—and to the related problem of "arrests for investigation"—its best and most mature attention, the Board of Directors of this Association authorized me to appoint a special committee of outstanding lawyers charged with the duty of considering whether the rule in *Killough's* case required legislative modification; and, if so, the nature of such legislative action as they deemed to be required. The committee was established, not for research, but rather for deliberation and conclusion as to an effective statutory rule within constitutional limits relating to arrests, interrogation and confessions.

The committee has reported; and I enclose copies of its report, a brief statement prepared by its Chairman and of the three Bills drafted and recommended by the majority of the committee. I also enclose a copy of the single dissent.

The Board of Directors of this Association has considered the report and has unanimously recommended to the Association that the majority report be approved in principle. Until the Association acts, after publication to its members, at a meeting of the membership, neither the report of the committee nor the dissent is the recommendation of the Bar Association of the District of Columbia. However, the Board has authorized me to transmit the enclosures to you now because the subject

matter of the report is presently under active study by the Congress and the Commissioners and because the Board considered that the ideas embodied in both the majority and minority reports should be available to Congress without delay.

Most respectfully yours,

THOMAS S. JACKSON
President

TSJ:ap
encl.

Identical letters were sent to the House Representative McMillan, Chairman, United States District Committee; Walter N. Tobriner, President, D. C. Board of Commissioners; the Attorney General of the United States; and David C. Acheson, United States Attorney.

Action of Board

The Board of Directors at a special meeting held Wednesday, March 13, 1963, considered at length the report of the Special Committee on the Rule in Killough's case, and the dissent thereto.

The Board, with one negative vote, approved a motion that the President be authorized to release the report of the committee, together with the minority report, to the press and transmit copies to the appropriate committees of the Congress, the Commissioners, the Department of Justice and the United States Attorney, clearly stating that the report would not be an action of the Association until it had been submitted to and approved by the Association at a meeting of the membership. The Board also adopted a motion, with one member abstaining, that the report of the majority of the committee be approved in principle and recommended that the Association approve the enactment of the three bills favorably recommended by the majority of the committee substantially in the form as proposed.

Letter from Senator Bible

UNITED STATES SENATE

COMMITTEE ON

THE DISTRICT OF COLUMBIA

March 20, 1963

Mr. Thomas S. Jackson, President
The Bar Association of the District of Columbia
1044 Washington Building
Washington 5, D. C.

DEAR MR. JACKSON:

Please let me acknowledge and thank you for your letter of March 14, 1963, with enclosures, and I certainly appreciate your making available to the Committee, the special committee's report and recommended proposed legislation in connection with the Mallory Rule and Procedures for limited police interrogation.

I am well aware that legislation in this area of the criminal law is most difficult for the reason that the protection of the individual's rights must be balanced with the public interest in maintaining adequate law enforcement. However, I am sure that the task of the Committee will be lessened considerably by having the views and recommendations of the special committee of the Bar Association in this matter.

Since you have advised me that the members of the Bar Association have not had an opportunity to consider the report, I have instructed the Committee staff to treat the report as an interim and unofficial document until it is formally adopted by the Association and the Committee is so notified.

Cordially,

ALAN BIBLE

ATTACHMENT 2

REPORT OF THE COMMITTEE ON CRIMINAL LAW AND PROCEDURE

The committee on criminal law and procedure was called to order in the board room of the National Savings & Trust Co., at 4 p.m., on Monday, March 18, 1963. In attendance were Messers. H. Clifford Allder, Richard L. Braun, Edmond T. Daly, Frederick H. Evans, William E. Foley, DeLong Harris, Karl M. Kunz, Hugh J. McGee, Gerald S. Ostrowski, A. Kenneth Pye, Sylvan Schwartz, Richard J. Scupi, Joseph Sitnick, Robert L. Weinberg, Hal Witt, and Donald E. van Koughnet. Mr. Sitnick, vice chairman of the committee, presided in the absence of the chairman who was ill.

The committee proceeded to the consideration of several bills directed to the committee by Mr. Pratt, vice president of the association.

I. H.R. 1929

This bill contains two parts. The first section is based upon the provisions of the Uniform Arrest Act and permits a police officer to detain any person abroad whom he has reasonable ground to suspect is committing, has committed, or is about to commit a crime. The police officer may demand that he identify himself and explain where he is going. If he fails to identify himself or explain his action to the satisfaction of the office, he may be detained for a period not exceeding 6 hours. The bill further provides that this "detention" is not considered an arrest.

It was pointed out that members of the committee have for the last few years discussed and studied the problems of arrests for investigation, illegal arrests, the *McNabb-Mallory* rule, the *Killough* decision, the Uniform Arrest Act, and related matters.

Mr. Pye moved that the committee recommend that the association oppose section 1 of H.R. 1929. Fourteen members voted in favor of the motion; Mr. Daly and Mr. Braun abstained. No member of the committee voted in favor of the section.

Section 2 of the bill seeks to amend section 4–144 of the District of Columbia Code relating to the detention of material witnesses. The bill provides that whenever there is a reasonable ground to believe that any person may be a material witness to the commission of any felony, or attempt to commit a felony, and there is a reasonable probability that such person will not be available as a witness during the investigation or trial, the police may take the witness into custody and detain the suspected witness for not more than 6 hours. At that time the suspected witness must be brought before a judge or Commissioner who may require him to post bond or collateral to secure his appearance at the investigation or trial, or discharge him. Provision is made that the "detention" shall not constitute an "arrest." It is provided that the detention or confinement of the witness shall be in quarters other than those used for persons charged with crimes.

During the discussion several matters were pointed out. (1) There has been no showing that legislation of this type is needed; (2) an out-of-town witness might find himself in a situation where no local bondsman would post bond for him; (3) the provision in the original draft released by the Commissioners of the District of Columbia provided that nothing said by the witness during his detention could be used against him in a subsequent criminal proceeding. This provision has been removed from the bill under consideration.

Mr. Allder moved that the committee recommend that the association oppose section 2 of H.R. 1929. Fourteen members voted in favor of the motion; Mr. Daly and Mr. Braun abstained. No member voted in favor of the section.

II. H.R. 1930

H.R. 1930 is another form of the Willis-Keating bill which has been regularly introduced in the Congress since 1957. In pertinent part it provides:

"That 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."

The bill also provides that no statement made by a person during interrogation "while such person is under arrest" shall be admissible unless the arrested

person shall have been previously advised of his right to remain silent and that any statement made by him may be used against him.

It was pointed out that the implications of the *McNabb-Mallory* rule have been discussed in the committee, within subcommittees, and informally during the last few years. No member of the committee was aware of any new development which he deemed sufficiently significant to merit renewed discussion.

Mr. Evans moved that the committee recommend that H.R. 1930 be opposed. Fourteen members voted in favor of the motion, Mr. Daly dissented; Mr. Braun abstained.

III. THE 6-HOUR BILL

Mr. Pye invited the committee's attention to the so-called 6-hour bill, which apparently had been referred to the special committee appointed to consider the *Killough* decision, but had not been referred to this committee.

This bill, in substance, provides that when a police officer has "good cause" to believe that someone may have information concerning a crime, the prosecuting attorney may ask a judge to issue a subpena directing the respondent to appear forthwith. At that time the court has the obligation to inform the respondent that he is not required to incriminate himself. Respondent then may be committed to the custody of the police and may be held by the police at someplace other than the precinct for a period not to exceed 6 hours. During this period of time he is subject to interrogation. If he does not answer questions and fails to rely on his privilege against self-incrimination, he may be held in contempt. A transcript of his interrogation is required.

Several observations were made concerning the bill. (1) Evasion of the *Mallory* rule is made simple subpenaing the suspect instead of arresting him where there is probable cause; (2) there is strong reason to think that it is unconstitutional to detain a suspect where there is no probable cause to believe that he has committed a crime; (3) there is strong reason to believe that it would be unconstitutional to hold a suspect in contempt for failure to answer when he had been interrogated in secret without the aid of counsel to inform him whether the fifth amendment may be properly asserted; (4) it is undesirable to permit such a drastic change in the structure of American law as would occur through judicial intervention for the purpose of permitting secret interrogation of citizens without counsel under pain of contempt.

Mr. Pye moved that the committee recommend that the association oppose the bill. Fifteen members voted in favor of the motion; Mr. Daly dissented.

The committee considered several other bills submitted to it for consideration. A report in these matters will be submitted in the near future.

Mr. Evans moved as follows:

> The vice chairman is directed to transmit the report of the committee with reference to H.R. 1929, H.R. 1930, and the 6-hour bill to the president and the board of directors.
>
> The vice chairman is directed to request that the president refer the report to such persons as he directed the report of the special committee and in the same manner as he directed that report in order to dispell the apparent impression that there is almost complete unanimity within the association with reference to these matters.
>
> The vice chairman is further directed to request the president to bring the disagreement between the special committee appointed by him and this standing committee of the association to the attention of the association at the earliest possible time in order that these matters may be considered by the full association.

The motion passed unanimously. The committee was adjourned at 5:30 p.m.

Respectfully submitted.

A. KENNETH PYE, *Secretary.*

ATTACHMENT 3

Bar Association of the District of Columbia Committee on Criminal Responsibility

To the President and Directors of the Bar Association of the District of Columbia.

Your Committee on Criminal Responsibility respectfully recommends that the Bar Association adopt the attached Resolution to the effect that the Congress be requested to enact legislation defining criminal insanity and providing procedure for its application to trials in the District of Columbia.

Your Committee respectfully submits its report in support of said resolution. (ED. NOTE: Debate is scheduled at the September 15 meeting.)

RESOLUTION

The Bar Association of the District of Columbia recommends that Congress enact the following legislation:

In all trials for criminal offenses in the courts of the District of Columbia in which the defense of insanity is in issue, the jury shall be instructed to return a verdict of not guilty on the ground of insanity unless they believe beyond a reasonable doubt that the defendant is mentally responsible for such alleged offense.

The jury shall be further instructed that the defendant is not mentally responsible if at the time of the alleged offense the defendant, because of an impaired or defective mental condition, was substantially lacking either in his capacity to appreciate that his conduct was wrong or in violation of law, or in his capacity to conform his conduct to the right or to the requirements of law. An instruction in substantially these terms shall be sufficient in all cases.

Lay testimony and expert testimony as to the existence and nature of an impaired or defective mental condition and as to its incapacitating effect shall be freely received, but the jury shall be instructed that such testimony is not binding on the jury. If sufficient evidence is received as to the existence and nature of an impaired or defective mental condition for con-

sideration of the jury, the court shall leave to the sole determination of the jury the question as to the incapacitating effect if any of such mental condition, whether there has been opinion testimony regarding its incapacitating effect or not.

COMMITTEE ON CRIMINAL RESPONSIBILITY
SUMMARY OF REPORT

The test of criminal responsibility known as the Durham rule is not satisfactory and should be changed by statute. Legislation to effectuate the new test is also needed.

The Durham rule provides that a person is not responsible for a criminal act if the act was the product of a mental disease or mental defect.

There is no clear definition of mental disease or mental defect. Hence its meaning depends on psychiatric opinion. Psychiatrists do not agree on what the term means nor on its application in particular cases, and their opinion is subject to change overnight, as has actually occurred.

The causality or "product" part of the rule is also confusing. Although the Court of Appeals has reversed convictions because the instructions of the trial judges on causality were inaccurate or inadequate, it has not suggested an instruction as a guide for future cases, and the trial judges are left without a guide even on re-trials of the reversed cases.

An accused person may raise the issue of insanity by producing a minimal showing of mental disease without evidence as to whether the act was the product thereof. The government must then prove sanity beyond a reasonable doubt, or prove that the act was not the product of the disease. Psychiatrists are unwilling to give an opinion on this latter point, and the United States Attorney has lost prosecutions and abandoned prosecutions on that account.

The basic difficulty in the Durham rule is that it attempts to make the legal test of criminal insanity the same as the medical test of mental disease. The requirement of a fixed standard for a legal test, and the inevitable changes in psychiatric discovery and concepts, make any such attempt futile.

Furthermore, under both the pre-Durham rule and the Durham rule psychiatrists are required to answer questions in the very words of the applicable test: such as whether in their opinion the accused could distinguish between right and wrong, and whether the criminal act was the product of the mental disease. We believe that practice should be discontinued. There is no reason why in cases involving the insanity defense the expert witness should be required to give answers in the words of the legal test of responsibility, whose application is ultimately for the jury. There is no such requirement in other criminal cases, many of which also require the jury to pass on specific states of mind, such as intent to defraud. The legislation which we recommend is intended to provide a fixed test understandable to a jury and applicable to and sufficient for all cases, to give the expert witness freedom to testify as to the mental condition of the accused without being compelled to equate his opinion with the legal test; and to repose in the jury the ultimate function of applying the test.

Committee on Criminal Responsibility Report

The Committee on Criminal Responsibility of the Bar Association of the District of Columbia was created in June 1958 and charged by the Board of Directors with the duty of studying "insanity as a defense to criminal proceedings with the view toward recommending legislation which would define the words "criminal insanity." The Journal of the Bar Association of the District of Columbia, September 1958, Vol. XXV, No. 9, p. 474.

The Committee has conceived its function to be to consider the definition of insanity existing at this time in criminal proceedings in the District of Columbia in comparison with the definition which it replaced and with other existing and other possible definitions, and to recommend a change if and only if the present definition is not satisfactory and a more satisfactory one can be found.

The Durham Rule

The existing definition will be referred to in this report as the Durham rule. It means the definition of insanity which the United States Court of Appeals for the District of Columbia Circuit announced on July 1, 1954, in the case of *Durham* v. *United States,* 93 U.S. App. D.C. 228, 214 F. 2d 862, 45 A.L.R. 2d 1430, as that definition has been affected by subsequent decisions of the same Court.

The Durham rule may be stated as follows:

THE ACCUSED IS NOT RESPONSIBLE FOR A CRIMINAL ACT IF SUCH ACT WAS THE PRODUCT OF A MENTAL DISEASE OR MENTAL DEFECT. A MENTAL DISEASE IS A DISEASED MENTAL CONDITION WHICH MAY GET BETTER OR GET WORSE; A MENTAL DEFECT IS A DISEASED MENTAL CONDITION WHICH CANNOT GET BETTER AND CANNOT GET WORSE. THE CRIMINAL ACT WAS THE PRODUCT OF THE MENTAL DISEASE OR MENTAL DEFECT IF THE ACT WOULD NOT HAVE OCCURRED EXCEPT FOR THE DISEASE OR DEFECT; AND THAT IS SO WHETHER THE DISEASE OR DEFECT WAS THE ONLY CAUSE OF THE ACT, OR THE PRINCIPAL ONE OF SEVERAL CAUSES, OR ONE OF SEVERAL CAUSES.

The Pre-Durham Rule

The rule which the Durham decision replaced will be called in this report the pre-Durham rule. It is the irresistible impulse test superimposed on the right-and-wrong test of the M'Naghten case. The rule is stated in *Smith* v. *United States,* 59 U.S. App. D.C. 144, 36 F. 2d 548, 72 A.L.R. 654 (1929), which reversed a conviction of murder in the first degree for failure of the trial court to give a requested instruction in the terms approved by the Supreme Court in the case of *Davis* v. *United States,* 165 U.S. 375, 17 S. Ct. 360, 41 L. Ed. 750.

The pre-Durham rule may be stated as follows:

THE ACCUSED IS NOT RESPONSIBLE FOR HIS CRIMINAL ACT IF AT THE TIME OF THE ACT HE WAS

SUFFERING FROM A PERVERTED AND DERANGED CONDITION OF HIS MENTAL FACULTIES WHICH RENDERED HIM UNCONSCIOUS OF THE NATURE OF HIS ACT OR INCAPABLE OF DISTINGUISHING BETWEEN RIGHT AND WRONG AND OF KNOWING THAT HIS ACT WAS WRONG; AND EVEN THOUGH HE WAS CONSCIOUS OF THE NATURE OF THE ACT AND WAS CAPABLE OF DISTINGUISHING BETWEEN RIGHT AND WRONG AND OF KNOWING THAT HIS ACT WAS WRONG, HE IS STILL NOT RESPONSIBLE IF HIS WILL, THE GOVERNING POWER OF HIS MIND, HAD BEEN, OTHERWISE THAN VOLUNTARILY, SO COMPLETELY DESTROYED THAT HIS ACTIONS WERE NOT SUBJECT TO HIS WILL BUT WERE BEYOND HIS CONTROL.

The Nature of the Commitee's Study

The Committee studied some of the voluminous material on the subject; interviewed and met with outstanding psychiatrists; and availed itself of the combined experience of its membership, which included personal experience as counsel, observation of trial and hearings, and current word-of-mouth information from participating counsel in practically every District Court and Court of Appeals proceeding which has dealt with the Durham rule since it was announced in 1954.

There was a sharp difference of view among the psychiatrists with which the Committee met. One group was practically unanimous in the view that the Durham rule is not satisfactory. It was stated that ninety per cent of all persons who commit criminal acts are suffering from a mental disease of a greater or less degree which necessarily contributes in some way to the criminal act, and if the Durham rule were literally applied it would excuse nearly every one charged. Another group of equally distinguished experts was practically unanimous in the view that the Durham rule is working satisfactorily, pointing out that it conforms more closely to the realities of modern psychiatric discoveries and has at last permitted psychiatrists to

testify freely and fully instead of being restricted by criteria having no relation to their science.

In resolving these divergent views, we have felt secure in relying on the practical observations and experience of our membership to select the expert view that conforms to our lay knowledge and experience.

We believe that the Durham rule should be changed and replaced by a statutory definition of insanity.

We believe that the test should be stated in fixed terms understandable to a jury and applicable to all cases.

Meaning of Mental Disease

The Durham rule pitches excuse from criminal responsibility on the existence of a "mental disease" or a "mental defect" (plus causality, which will be discussed hereafter).

"Mental disease" is not defined except to the extent of being differentiated from "mental defect." Hence its meaning is left to the opinions of the particular psychiatrists who give testimony in a given case. Psychiatrists do not agree as to its meaning among themselves, and those who have opinions may change them overnight.

The term is borrowed from physical medicine and is not acceptable to all psychiatrists. "I will say there is neither such a thing as 'insanity' nor such a thing as a 'mental disease.'" (Dr. Roche, Tennessee Law Review, Vol. 26, No. 2, Winter 1959, p. 240.)

"Psychosis" is accepted as a synonym for mental disease, although it may not comprehend all mental diseases. But "psychosis" itself is not exact in meaning, since its definition involves extent and degree. In *Psychiatric Dictionary* it is defined as a mental disorder of a "severe" type. When does a mental disorder become a disease or psychosis? In one instance about to be mentioned, that change from disorder to disease, from sanity to insanity, took place in the middle of a criminal trial.

Hence the term mental disease is not precise in its meaning to psychiatrists.

In addition to its vagueness, the term is subject to change in

application. The same mental condition may be classified one day as not a disease and next day as a disease. For instance, psychiatrists recognize the term "sociopathy" to mean a mental disorder. Is this disorder also a mental disease? In a criminal trial in the District of Columbia under the Durham rule in which the psychiatrists described the defendant as a "sociopath," two psychiatrists from a government mental institution testified that "sociopathy" is not a mental disease and that the defendant was of sound mind; two days later a third witness from the same institution, a superior of the first two witnesses, testified that sociopathy is a mental disease. He testified that shortly before he came to court that day there had been a conference of officials at the institution at which it had been decided to change the classification of sociopathy from a condition not a disease to a disease. The defendant was acquitted by reason of insanity. Thus by administrative fiat a mental disorder which was not a mental disease became a mental disease, and a person responsible for his act became a person not responsible for his act. Under the pre-Durham rule and under the new rule which we recommend, before that defendant could be held not responsible for his act it would be necessary for the jury to consider not only whether he had a disease, but whether that disease affected his ability to control his actions.

It goes without saying that psychiatrists have the right and duty to differ among themselves and to change their views when intellectual honesty requires it. But the decision to punish or hospitalize the perpetrator of a criminal act should not depend on so uncertain a science.

The Causality or Product Part of the Durham Rule Is Confusing

The Durham rule is that the accused is not responsible for his criminal act if the act was the "product" of a mental diseast or mental defect. What does "product" mean?

In the Durham opinion the Court of Appeals suggested a sample instruction for a jury on causality or "product." However, when the trial judge gave that instruction to the jury in the case of *Wright* v. *United States* (1957) the conviction was

reversed because the Court of Appeals said the sample instruction did not deal adequately with the evidence in that particular case. The Court did not suggest a sample instruction to be given on re-trial of the case should the evidence be substantially the same as in the first trial. The Court did repeat and quote its explanation of the "product" requirement given in the earlier case of *Carter* v. *United States* and struck down the trial judge's instruction because it might have caused the jury to believe that Wright would not be excused from responsibility for his act unless his mental disease was the *principal* reason why he committed the act, which is not the law. "Without an explanation of 'causual connection,' the jury may have erroneously concluded that, though the shooting would not have occurred but for Wright's illness, the principal cause of the shooting was the rational one, i.e., his ill-feeling against his wife, and that, therefore, he ought to be held accountable for his act. * * *" *Wright,* 102 U.S. App. D.C. at 45.

The meaning of the "product" part of the Durham rule as explained in the *Carter* case and as repeated and quoted in the *Wright* case is as follows:

"When we say the defense of insanity requires that the act be a 'product of' a disease, we do not mean that it must be a direct emission, or a proximate creation, or an immediate issue of the disease in the sense for example, of Hadfield's delusion that the Almighty had directed him to shoot George III. * * *

"* * * 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. They mean that the facts concerning the disease and the facts concerning the act are such as to justify reasonably the conclusion that 'But for this disease the act would not have been committed.'"

This definition contains parts which might reduce the test to one of mere necessary co-incidence. Take for example the case of a person charged with assault with a dangerous weapon.

The defendant would have to have possession of a dangerous weapon in order to commit the act charged. "Except for" having possession of the dangerous weapon he could not commit the act; possession of a dangerous weapon was a condition "without which" he could not commit the act; "but for" possession of a dangerous weapon he could not commit the act; the possession of a dangerous weapon would have made the "decisive difference between doing and not doing the act." Yet obviously possession of a dangerous weapon was not an efficient cause of the act. If the defense was self-defense, the jury would be instructed that they should draw no unfavorable inference from the fact that the defendant had possession of a dangerous weapon (a distinct offense).

Other parts of the definition would seem to exclude possession of a dangerous weapon as a cause, or the assault as the "product." The possession of the dangerous weapon would not be critical in its *effect,* or *causal* in the usual sense, nor would the assault be the *result of* the possession of the weapon in the usual sense.

Hence it appears that for the trial judge to give the multiform definition of causality in the *Carter* case could be confusing to a jury; and it goes without saying that a trial judge who should venture to paraphrase the definition or select portions of it to give and portions to leave out would be inviting reversal.

Hence our trial judges are left without a guide for future cases, including re-trials of the reversed cases.

The lack of a legal definition of mental disease and its reliance on medical science to define and apply the term, and the confusing causality requirement and its uncertainty in application to various cases, make a change in the Durham rule desirable if one can be found.

Difficulties of the Prosecution

The Durham rule in application has caused the United States Attorney to lose and abandon prosecutions because psychiatrists would not give opinions on the "product" requirement of the rule.

The law presumes sanity. Hence the government in a crimi-

nal trial does not have to prove as part of its case in chief that the defendant at the time of the offense was sane. But once the issue of insanity is raised by the defendant the Government must prove sanity beyond a reasonable doubt. How much defense evidence is needed to raise the issue? It has been described as "some," and the decisions of our courts have interpreted this to mean very little. In the case of *Clark* v. *United States* no mention was made of the mental condition of the defendant until the defendant himself in the course of his testimony said he must have been "insane" when he shot the deceased. This evidence was held sufficient to raise the issue of insanity, and the failure of the defendant's attorney to pursue that defense caused a reversal of the conviction—presumably because the accused was thereby deprived of adequate representation.

The evidence which the defendant must produce to raise the issue of insanity does not have to include proof of causality but only proof of the mental disease. The government then must prove either that the accused did not have a mental disease or defect or that the act was not the product thereof. The United States Attorney has lost prosecutions and abandoned prosecutions because he has not been able to get testimony on this latter point, and he reports that most psychiarists are relucant to express an opinion.

Durham and Pre-Durham Compared

Putting aside the validity of the concepts of the Durham rule and the pre-Durham rule, it is a valid theoretical criticism of the Durham rule that it excuses the accused from responsibility for a criminal act which he knew to be wrong when he committed it and which he could have refrained from committing in spite of his mental disease. The pre-Durham test required a disease and disability by reason thereof from knowing that the act was wrong and from being able to refrain from committing the act. Durham requires a disease only and without reference to its great or trivial disabling effect, so long as the act would not have occurred without it.

Durham's Effect in Other Jurisdictions

While the decisions of other federal courts and of state

courts should not in themselves be determinative, it is perinent to observe the reception which the Durham decision has been accorded in other jurisdictions because (a) it is based on the decision of the New Hampshire Court in the *Pike* case in 1869, which was offered as a recognition by a court of the modern advances in psychiatry and (b) because the Durham decision has provoked wide-spread interest and enjoyed careful consideration and scrutiny. So far as known, it has not been accepted anywhere; and it has been rejected by the Circuit Courts for the Fifth and Ninth Circuits and by Indiana, Maryland, Massachusetts, Nevada and Washington.

Arguments for Durham

Some of the reasons for retaining the Durham rule which the Committee has considered will be mentioned and commented upon.

1. The Durham rule may not be perfect, but it is much better than the pre-Durham rule, and should be given a further try.

Comment: If the present imperfect rule can be changed to a better imperfect rule, that of course should be done. The Committee will not in this report compare the two rules, since we do not recommend a return to the pre-Durham rule.

2. In no event should a change be made by way of a statutory enactment. The adjustments necessary in the dynamic evolution of the test of insanity require the flexibility of trial court and review court procedures, and are impossible in a fixed statutory provision.

Comment: Order and equality in the law make a fixed standard desirable. A fixed standard is possible if it be fitted to the norm of social responsibility instead of the vagaries of a developing science. The degree of impairment and incapacity of a particular individual as related to the duty of all individuals to conform to the requirement of restraint for the common good is not so much a psychiatric question as it is a legal, moral, ethical, sociological question. It is not unlike the question of the extent to which a condition of intoxication should excuse one for a criminal act. The studies being made now in various other jurisdictions are directed toward legislative enactments.

3. The Durham rule conforms more faithfully to modern psychiatric knowledge than does the pre-Durham rule.

Comment: The same virtue was claimed for the *Pike* decision in New Hampshire in 1869, which recognized the advances in modern psychiatry since M'Naghten in 1843. Obviously the *Pike* test will keep abreast of advances in psychiatry, since it surrenders the legal test to psychiatry. But the courts have the duty to protect society as well as the duty to respect advances in science. Both these objectives can be accomplished if the test is in terms which do not undertake to reflect psychiatric knowledge ancient or modern; if the psychiatrist is permitted to testify freely in regard to his medical examinations and findings and opinion but is not required to give conclusions, especially conclusions in the words of the test; and if the jury is free on the basis of all the evidence to apply the test whether the psychiatric witnesses give conclusions in terms of the test or not.

4. The Durham rule has at last freed the psychiatric witness to give his honest and unhampered views which the pre-Durham rule restricted.

Comment: It must be conceded that psychiatrists are generally agreed on this. Without pausing to question the validity of the observation, it can be said that the degree of freedom allowed psychiatric witnesses has been largely a matter for the discretion of the trial judge, and judges differ in their views on what freedom should be permitted. The pre-Durham rule dealt with diagnosis of a mental condition as does the Durham rule. The "product" part of the Durham test is not a point on which psychiatrists are eager to give an opinion.

Regardless of what the test is, the psychiatrist would have freedom in his testimony if he were relieved from the necessity of adapting his views to the terms of the test. This is desirable. The psychiatrist should not impose his medical test on the courts, and the courts should not impose their legal test on the psychiatrist.

The Basic Difficulty

The basic difficulty in the Durham rule is that it makes the legal test of criminal insanity the same as the medical test of mental disease. These are constitutionally incompatible. The orderly and equal treatment of accused persons requires that they be subject to a fixed standard applicable to all cases. On the other hand, psychiatry must advance from case to case and by experimentation and adaptation, and change is of the very essence of its progress. Furthermore, the legal test which divides accused persons into those who are to be punished for their acts and those who are to be treated for their illness involves considerations beyond the competence of psychiatry.

A secondary difficulty, but one close to the interests of psychiatrists who have given actual testimony, has been the procedure in eliciting expert testimony. Psychiatrists have been required to answer questions as to whether the accused was capable of distinguishing between right and wrong; as to whether his will had been destroyed by his mental disease so that he could not control his actions; and as to whether the criminal act was the product of his mental disease. These have been objected to as calling for answers which psychiatry cannot supply. The requiring of such answers in cases involving the insanity defense has historical sanction; but there is nothing in the experience or information of our Committee which compels the practice, which is not followed in other criminal trials involving mental and personality questions.

The legal issue whether an accused person is guilty or not guilty of a criminal offense must always be determined on two questions: (1) whether he committed the act (or omitted the required act); and (2) whether at that time he had the requisite criminal intent. In criminal charges involving the so-called specific intent or knowledge, the jury must determine whether the accused formed an intent to kill, or an intent to commit a felony, or an intent to defraud; whether he had an evil purpose and motive; whether he "knew" that property which he received was stolen property; whether he intended to evade and defeat his legal obligations. In this connection the

jury must consider in certain cases whether the ability of the accused to have the requisite knowledge or intent was so affected by intoxication that he was not capable of performing these cognitive and volitional functions.

For centuries juries have confined or released their fellowmen by their answers to these questions. In some cases expert testimony was received. In many cases it was not. The verdict was for the sole determination of the jury, with or without expert testimony, and where it was given the verdict was in conformity with it or contrary to it, as the jury decided. Why should a different rule be applied to cases where the defense of insanity is raised?

The Rule We Recommend

The legislation which we propose is intended to put back into the test of insanity a legal standard of responsibility; to state that standard in terms understandable to a jury; to make that test applicable to all cases and sufficient for all cases; to permit expert witnesses to testify freely as to their examinations and findings regarding the mental condition of the accused, and their opinion as to its disabling effect if any, but not to require such witness to give his conclusions; and to leave to the jury the ultimate question of criminal responsibility whether experts have given conclusions or not.

Reference Is Now Made to the Resolution

The government's burden of proving sanity beyond a reasonable doubt is retained and re-stated.

"Impaired or defective" mental condition avoids the use of the medical term disease and covers any unsound mental condition of whatever origin and duration and whatever its psychiatric classification. It is later limited by its disabling effect.

"Substantially lacking" meets the criticism that the old rule of irresistible impulse required total incapacity, which psychiatrists say rarely exists in persons suffering from frank, seriously disabling mental disease.

"Appreciate" covers functions of the personality broader than cognition, to which "know" may be limited. It is said that very few insane persons do not "know" the nature of their conduct;

what they lack is a full comprehension of its significancee—an "appreciation."

"That his conduct was wrong or in violation of law." The word "wrong" has been criticized as involving a moral judgment which some persons do not indulge. It is a word that has a meaning for most jurors; for those who find it inept the equivalent "or in violation of law," is provided.

The remaining provisions, as the language shows, are intended to provide a fixed standard applicable to and so sufficient for all cases; to preserve the jury's right to accept or reject testimony, including that of experts; and to leave to the jury the ultimate decision as to the criminal responsibility of the accused without requiring expert testimony in the words of the standard or test.

Causality is not approached as a direct connection between condition and act, but as a connection between condition and disability in regard to the conduct of the accused and the time of the offense. Those few psychiatrists who have stated they might be able to express an opinion on causality have added the condition "if the examination of the subject could be made shortly after the crime." It is thus apparent that the conclusion is not a direct and "clinical" finding so much as an indirect conclusion from the concurrence in time of the disease and the act. The connection in our proposed test between the disease and the act in time, and the disabling effect of the condition in relation to the same time, are believed to be a sufficient connection to satisfy the test and invite psychiatric opinion also. But expert opinion as to such connection is not indispensable to put the issue of responsibility to the jury.

Respectfully submitted,

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A. Kenneth Pye
C. Frank Reifsnyder
James C. Toomey
Cecil R. Heflin
Edward P. Troxell
Hugh J. McGee, Secretary
Richard W. Galiher,
Vice-Chairman
Charles B. Murray, Chairman

Memorandum of Dissent

By ABE KRASH AND SELMA M. LEVINE

We dissent from the report and recommendations of the majority of our colleagues on the Committee on Criminal Responsibility.

The majority recommend that this Association should adopt a resolution urging Congress to abrogate the test of criminal responsibility promulgated by our Court of Appeals in 1954 in *Durham* v. *United States,* 214 F. 2d 862 (D.C.Cir. 1954). The Association is urged to support enactment by Congress of a new "statutory definition of insanity" devised by the majority. We do not agree that a case has been made out by the majority for abolishing the *Durham* rule. To the contrary, we submit that the *Durham* rule has worked remarkably well. Moreover, we do not believe that the novel and complex test proposed as a substitute by the majority would be more satisfactory. Many of the objections levelled by the majority against *Durham* would be equally applicable to the formulation proposed as a substitute. In addition, the majority's suggested rule would spawn a host of new and troublesome problems. In any event, we feel it would be unwise to freeze any rule in a statute at this time, during a period of transition and rapid developments in this field and before there has been a full opportunity to appraise the *Durham* rule.

The *Durham* test has been widely praised. It has commanded the support of a majority of our Court of Appeals for five years. It has been approved by the present Chief Judge, E. Barrett Prettyman; [1] by the former Chief Judge, Henry Edgerton; [2] by the Chief Judge of the Court of Appeals for the Third Circuit, John Biggs; [3] by the Chief Judge of the Court of Appeals for the Fourth Circuit, Simon Sobeloff; [4] and by Supreme Court Justice William O. Douglas.[5] It is approved by the overwhelming majority of psychiatrists,[6] and is strongly

[1] See e.g. *Carter* v. *United States,* 252 F. 2d 608 (D.C. Cir. 1957).

[2] *Durham* v. *United States,* 214 F. 2d 862 (D.C. Cir. 1954) (per Bazelon, Edgerton, and Washington).

[3] See Biggs, *The Guilty Mind* (1955).

endorsed by mental health specialists who have had the most intimate contact with the administration of criminal justice, including the country's two most eminent authorities, Dr. Winfred Overholser, Superintendent of Saint Elizabeth's Hospital and Dr. Manfred Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore.[7] The *Durham* rule is supported by a substantial number of practicing lawyers in the District. It should not be abandoned without clear and convincing evidence that it is not satisfactory, and without reasonable assurance of a more satisfactory test. The majority has failed to make a case on either of these grounds.

We are in agreement with the majority in two significant respects. *First,* the majority affirmatively and explicity recommends against a "return" to the tests of responsibility which the *Durham* rule superseded (Report, p. 11). We regard the pre-existing tests (which we discuss below) as inadequate, obsolete, and unjust. *Second,* the majority recognizes the desirability of permitting psychiatric experts to testify freely as to their diagnosis and opinions (Report, p. 12). This was perhaps the chief objective of the *Durham* test. We do not claim that the *Durham* formula is perfect, or that it is immune from criticism. We differ from the majority, however, in their critique of *Durham* and in the merits of their proposed statutory substitute.

We think it incumbent upon us, in light of the basic importance of the question[8] and the far reaching implications of the majority's report, to indicate the reasons which impel us to differ from our associates on the committee.

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[4] Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham and Beyond,* 41 A.B.A.J. 796 (1955).

[5] Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists,* 41 Iowa L. Rev. 485 (1956).

[6] See e.g. Roche, *Criminality and Mental Illness—Two Faces of the Same Coin,* 22 Univ. of Chicago L. Rev. 320 (1955); Zilboorg, *A Step Toward Enlightened Justice,* Id. at p. 331.

[7] Guttmacher, *The Psychiatrist as an Expert Witness,* 22 Univ. of Chicago L. Rev. 325 (1955).

[8] "[T]he question at bar, [i.e., the test for determining responsibility] far from being ordinary, is perhaps the most controversial problem existing in the criminal law today." Barnes, J., in *Sauer* v. *United States,* 241 F. 2d 640, 644 (9th Cir. 1957).

I

Background Developments

A brief consideration of legal and scientific developments is helpful in appraising the committee's report and recommendations.

1. It has been recognized for centuries that individuals should not be held responsible for criminal acts committed while they were insane. Our ethical and legal traditions forbid punishment of the mentally ill. "Our collective conscience does not allow punishment where it cannot impose blame. *Holloway* v. *United States,* 148 F. 2d 655, 666 (D.C.Cir. 1945).

2. The tests applied in determining whether an accused should be held accountable have varied. (At one time, for example, the test in England was whether the defendant could count to twenty, could tell who was his mother or father, or how old he was.) These varying tests have reflected developments in man's understanding of mental abnormality. They reflect the progress toward more enlightened and humane treatment of the insane and the historic trend toward greater individualization in the disposition of persons accused of crime.

3. In 1843 the House of Lords in England promulgated the so-called "right and wrong" test. *Daniel M'Naghten's Case,* 10 Cl. & Fin. 200 (H.L. 1943). The test of insanity to be applied in criminal proceedings was whether 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 wrong." This test was accepted in many jurisdictions in this country. See *Leland* v. *State of Oregon,* 343 U.S. 790, 800 (1954).

4. The "right and wrong" test was adopted in the District of Columbia by judicial decision and was formally applied as early as 1882 at the trial of President Garfield's assassin. *Guiteau's Case,* 1 Mackey 498 (D.C. Sup.Ct. 1882).

5. In 1929, our Court of Appeals supplemented the "right and wrong" test with the "irresistible impulse" test. *Smith* v.

United States, 36 F. 2d 548 (D.C.Cir. 1928). The Court felt that a change in the standard of criminal responsibility was required in view of "the great advancement in medical science as an enlightening influence on this subject." It concluded that an individual should not be held criminally responsible if his "reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, through knowing it to be wrong" (36 F. 2d at 549).

6. The "right and wrong" and "irresistible impulse" tests have been forcefully criticized by judges, commentators, and medical authorities. In a landmark report, a Royal Commission in England summed up the defects in these words:

"[T]he M'Naghten test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, and yet commit it as the result of the mental disease. * * * In our view the test of criminal responsibility contained in the M'Naghten rules cannot be defended in the light of modern medical knowledge and modern penal views. * * * The real objection to the term 'irresistible impulse' is that it is too narrow and carries an unfortunate and misleading implication that, where a crime is committed as a result of emotional disorder due to insanity, it must have been suddenly and impulsively committed after a sharp internal conflict. In many cases, such as those of melancholia, this is not true at all." *Report of the Royal Commission on Capital Punishment,* Cmd. 8932, pp. 80, 103, 110 (1953).

It is unnecessary for us to dwell upon the inadequacies of these tests, since the committee unanimously recommends against these tests (See Report, p. 11).

7. In 1954, our Court of Appeals, recognizing that the existing tests did not take sufficient account of "psychic realities and scientific knowledge", announced a new standard in *Durham* v. *United States:* "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The *Durham* case reflected the fact that in the century since the M'Naghten rules were announced there

have been immense strides in medical knowledge of insanity and mental abnormality. The almost universal recognition of the power of the unconscious to determine and influence human behaviour has had a profound effect upon criminology and accepted notions of punishment and blame. The *Durham* decision also reflected recognition that the incidence of mental disorder among persons charged with crime is high, and that existing procedures for dealing with such persons were not adequate. It is this test—the *Durham* rule—which the majority wishes to abandon.

II

THE DURHAM RULE HAS PROVED TO BE BENEFICIAL IN PRACTICE

A. The insanity issue may become relevant at different stages of a criminal proceeding. The Defendant's sanity is pertinent to his competence to stand trial. It is germane to the question of the Defendant's responsibility as of the time of the offense, an issue presented at the trial itself. It is also relevant in determining when a Defendant may be released from commitment after acquittal by reason of insanity. In short, it is relevant to pretrial, trial, and post-trial issues. See *Lyles* v. *United States,* 254 F.2d 725, 729 (D.C. Cir. 1957) (per Prettyman and Burger). The tests are different in each situation.[9] The *Durham* test is applicable solely in determining the Defendant's responsibility as of the time of the alleged offense.

The function of an insanity test for determining whether the accused was responsible at the time of the offense is to

[9] The test applied in determining the fitness of the Defendant to stand trial is whether he is "unable to understand the proceedings against him or properly to assist in his own defense" (18 U.S.C. § 4244). In deciding whether a person shall be released from a mental institution to which he has been committed following a verdict of not guilty by reason of insanity, the test is whether, in the opinion of the Hospital Superintendent and the District Court, "such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others." D.C. Code § 24-301 (Supp. VI, 1958). In *Overholser* v. *Leach,* 257 F. 2d 667, 670 (D.C. Cir. 1958), the Court of Appeals construed the foregoing provision respecting release to require proof of "freedom from such abnormal condition as would make the individual dangerous to himself or the community in the reasonably foreseeable future."

facilitate classification of those who should be held responsible and subjected to punitive-corrective sanctions from those who should be held not responsible and who should be hospitalized for medical treatment. The test must provide a workable standard for regulating the admission of evidence at trial. It must also provide the basis for instructions to the jury and for review of the jury verdict, when appropriate, by the trial judge and appellatee courts. W submit that the test should encourage the receipt of all relevant testimony relating to the Defendant's mental condition. It should be in harmony with scientific knowledge, and it should symbolize and implement the community ideal that punishment is not inflicted upon those who should not be blamed.

B. We submit that the *Durham* rule has been in accord with these objectives and that its net effect upon the administration of criminal justice in the District has been beneficial.

Before the *Durham* rule was announced the insanity defense was neglected and largely ignored in this jurisdiction. Pleas of insanity tended to be treated casually and superficially. The facts relating to a Defendant's mental history frequently were not presented at the trial, or were presented in a fragmentary fashion. Psychiatrists were deterred from participating in the administration of criminal justice by archaic rules. The result was injustice to the Defendant and defective protection for the community.

As a result of the *Durham* opinion and subsequent decisions in this field by the Court of Appeals, there is today widespread awareness and sensitivity to the problems of mental illness in the District. An insanity plea is given careful, painstaking attention by the United States Attorney's Office, by defense counsel, and by the trial courts. There has been a striking change in the mode of trials when insanity pleas are invoked. The facts relating to the Defendant's mental condition are presented at the trial in detail in many cases.

The *Durham* rule broke down the barriers to communications between mental health experts and the court. It permits physicians to testify freely and fully as to their diagnosis of the

Defendant's mental condition. They are at liberty to articulate their findings and opinions without artificial, arbitrary testimonial restrictions.

The dire predictions by some at the time *Durham* was announced have been proven baseless. Although there has been an increase in the number of insanity pleas, the number of acquittals by reason of insanity is still relatively negligible. According to statistics compiled by the Office of the United States Attorney, only 7 persons were found not guilty by reason of insanity in 1957, and in 1958 only seventeen.[10] In other words, less than 3.3% of all the terminated criminal proceedings in the District Court in 1958 resulted in an acquittal on grounds of insanity. Moreover, each of these individuals has been committed to Saint Elizabeth's Hospital for treatment. The protection of the community has been guaranteed by the mandatory requirement incorporated in a statute (D.C. Code § 24-301, Supp. VI, 1958) that individuals found not guilty by reason of insanity must be committed to Saint Elizabeth's. Such persons cannot be released until the Hospital Superintendent has certified and the District Court has found that the De-

[10]

Fiscal Years Ending June 30	*Verdicts of Guilty*	*Not Guilty Verdicts & Judgments of Acquittal*	*Verdicts of Not Guilty by Reason of Insanity*
1951	382	197	0
1952	359	170	3
1953	462	180	3
1954	433	190	7
1955	357	87	10
1956	334	93	15
1957	362	103	7
1958	398	121	17

SOURCE: Office of United States Attorney, as quoted in 58 Columbia L. Rev. 1253, 1266 (1958).

fendant has recovered his sanity and "will not in the reasonable future be dangerous to himself or to others." We have set out in the margin a table which demonstrates that the Hospital authorities are slow to release such individuals, and that relatively few of the persons who are treated and released have subsequently become enmeshed with the law.[11]

III

THE MAJORITY'S CRITICISM OF DURHAM

The majority report attacks the *Durham* rule principally on three grounds:

(i) The majority maintains that "the basic difficulty in the *Durham* rule is that it makes the legal test of criminal insanity the same as the medical test of mental disease" (Report, p. 13). The majority insists that "there is no clear definition of mental disease or mental defect" and that since psychiatrists differ among themselves there is uncertainty and inequality in the administration of the criminal law.

(ii) The majority claims that the "causality or 'product' part of the rule is * * * confusing" (Report, p. 2), and they feel the test deficient for the reason the United States Attorney has "los[t] and abandon[ed] prosecutions because psychiatrists

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[11] The practical results of acquittals under the Durham rule, July 1, 1954, to May 7, 1958, Column 1 shows the number of defendants in criminal cases acquitted by reason of insanity. Column 2 shows the number of these defendants who are still confined at St. Elizabeths hospital. Column 3 shows the number released from the hospital as recovered. Column 4 shows the number of those released who have since gotten into serious criminal trouble.

Crime	*Acquitted*	*Still Confined*	*Released*	*Later Serious Trouble*
Murder	7	6	1	0
Assault	5	3	2	0
Robbery	8	4	4	1
Housebreaking	8	2	6	1
Forgery	6	2	4	1
Auto theft	6	5	1	0
Others	6	1	5	0
Totals	46	23	23	3

SOURCE: The Washington Post, May 9, 1958, p. D3, col. 7.

could not give opinions on the 'product' requirement of the rule" (id. at p. 10).

(iii) The majority also finds it significant that the *Durham* rule "has not been accepted" by other federal or state courts (Report, p. 11).

We shall examine each of these objections in turn.

First. We think the majority mistaken in contending that the *Durham* rule equates the legal test of criminal responsibility with the medical test of mental disease. To be sure, one of the principal objectives of the Court of Appeals was to bring an obsolete legal standard into harmony with generally accepted medical opinion. But the *Durham* rule does not adopt a medical test; it does not, for example, provide that "all defendants diagnosed to be suffering from 'paranoid schizophrenia'" or that "all defendants diagnosed to be suffering from manic-depressive psychosis" shall not be criminally responsible. It sets forth a legal guide which allows psychiatrists to testify in their own terms about the defendant's mental state. Moreover, if the test were purely medical, the testimony of laymen presumably would be incompetent and irrelevant. However, testimony concerning the defendant's mental condition by arresting officers, acquaintances, and members of the accused's family is freely received. See *Carter* v. *United States,* 252 F. 2d 608, 618 (D.C. Cir. 1957). Finally, and fundamentally, the *Durham* rule does not disturb the basic principle that the jury should be the ultimate arbiter. The jury considers the lay and expert testimony in light of the legal test. As the Court stated in the *Durham* opinion:

> "[I]n leaving the determination of the ultimate question of fact to the jury, we permit it to perform its traditional function, which, as we said in *Holloway,* is to 'apply our inherited ideas of moral responsibility to individuals prosecuted for crime'." (214 F. 2d at 876).

The jury's verdict is final unless it is arbitrary.

We do not share the majority's view that the terms "disease" or "defect" are unduly vague. In the *Durham* case, the Court defined disease as "a condition which is considered capable of either improving or deteriorating" (214 F. 2d at 875). It de-

fined defect as a "condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease." Ibid.

"Disease or defect" are the terms commonly used to designate serious mental abnormalities. They are the terms employed in the test of criminal responsibility proposed in the Model Penal Code of the American Law Institute (A.L.I., Model Penal Code, Tentative Draft No. 4, Section 4.01). They are the same terms contained in the proposed statute recommended in New York by the Governor's Conference on the Defense of Insanity. We think these terms are intelligible to laymen. Certainly they are no more vague or incapable of precise definition than others juries are regularly called upon to apply, such as "reasonable man."

The majority report repeatedly stresses the uncertainty of psychiatric knowledge and the disagreements among psychiatrists when called as experts to testify. It is clear that "So long as the defense of irresponsibility by reason of insanity is recognized in any form, the law needs to be aided in its administration by expert psychiatric testimony." (Interim Report of Subcommittee of The Governor's Conference on Insanity, New York, May 29, 1958, mimeographed draft, p. 5.) We are well aware that psychiatry has many limitations and that there is no precise, universally accepted terminology. It is also true, of course, that in some cases psychiatrists differ in their diagnosis and conclusions. But psychiatrists are certainly not unique in this respect among experts who appear in Court. The disagreement tends to be exaggerated by the techniques of certain trial counsel. There is virtually no disagreement among psychiatrists in cases involving individuals suffering from a "mental defect" (e.g., idiocy). There is likewise almost no disagreement in cases involving organic brain disorders. Psychiatrists also rarely differ in cases involving prolonged schizophrenia. Disagreement may and does exist in cases involving psychopathic personalities and various borderline cases.

To the extent that disagreements among psychiatrists exist,

we fail to see that they constitute a valid criticism of the *Durham* rule itself, or bespeak the need for another rule. One of the professed objectives of the test recommended by the majority itself is to "permit expert witnesses to testify freely as to their examinations and findings regarding the mental condition of the accused, and their opinions as to its disabling effect if any * * *" (Report, p. 14). So long as psychiatrists are accorded free rein in this fashion, differences of opinion in the borderline areas may well occur no matter which test is in force.

Durham provided an impetus toward increasing use of psychiatric knowledge in determining the disposition of criminal offenders. We welcome this trend, since we believe that continued collaboration between law and psychiatry can lead to fruitful results.

Second. The majority condemns *Durham* on the ground that the "causality or 'product' part of the rule is * * * confusing" (Report, pp. 2, 8-9).[12] We believe that many of the difficulties have been resolved by the Court of Appeals in opinions subsequent to *Durham.* We are also of the view that the argument is essentially academic and theoretical in nature, and that in practice the objection has not proved to be serious or substantial.[13]

In *Carter* v. *United States,* 252 F. 2d 608 (D.C. Cir. 1957), the Court of Appeals clarified this aspect of the rule and pro-

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[12] This aspect of the rule has evoked criticism from other sources. See, e.g., *The Criteria of Criminal Responsibility,* 22 Univ. of Chi. L. Rev. 367 (1955), by Professor Herbert Wechsler.

[13] The Court of Appeals noted that " 'Mental abnormalities vary infinitely in their nature and intensity and in their effects on the character and conduct of those who suffer from them. Where a person suffering from a mental abnormality commits a crime there must always be some likelihood that the abnormality has played some part in the causation of the crime; and, generally speaking, the graver the abnormality, * * * the more probable it must be that there is a causal connection between them. But the closeness of this connection will be shown by the facts brought in evidence in individual cases and cannot be decided on the basis of any general medical principle.' " *Durham* v. *United States,* 214 F. 2d at 875, Note 49. Some psychiatrists maintain that an individual's conduct cannot be dissociated from his total personality. In other words, given "mental disease or defect," the crime is a symptom or manifestation of the illness.

vided specific and clear guidance for trial courts. As the Court put it (252 F. 2d at 617):

"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. They mean that the facts concerning the disease and the facts concerning the act are such as to justify reasonably the conclusion that 'But for this disease the act would not have been committed.'" (Emphasis supplied.)

The Court added that "The ultimate inferences *vel non* of relationship, of cause and effect, are for the trier of facts" (252 F. 2d at 617). We believe that confusion has arisen from failure to heed this admonition. In other words, whether the crime was a product of the illness so as to exempt the defendant from criminal responsibility is essentially an ultimate judgment to be reached by the jury on the basis of the entire record (See Note 12, *supra*). It is not essentially a psychiatric question, though the psychiatric testimony may bear heavily on it. It is the function of the psychiatrist to explain the dynamics of the illness and how it affects "the mental and emotional processes of the defendant." While lawyers have asked psychiatrists whether the crime is the product of the illness, and psychiatrists have replied, the question is not essential, and this practice may be objectionable as calling for a conclusion which is properly within the province of the jury.

So far as we are aware, the United States Attorney has not dropped cases because of his inability to obtain expert assistance on the "product" phase of the test. In some cases, pleas of not guilty because of insanity may have been accepted because the

insanity defense was so clearly established. Such defendants would be committed to Saint Elizabeth's.

As a practical matter, the basic controversy where an insanity plea is made is this: Did the Defendant suffer from a mental disease or defect? As to this issue, there is not the slightest indication that the prosecution has any difficulty in obtaining psychiatric assistance. All of the facilities of one of the greatest mental hospitals in the world, Saint Elizabeth's, are readily at its disposal. The vast majority of defendants—perhaps 95%—are indigent, and it is only proper and just in our view that the prosecution, with the enormous resources at its disposal, should bear a heavy responsibility for producing and presenting expert testimony respecting the accused's mental condition (see *Blunt* v. *United States,* 244 F. 2d 355, 364, note 23 (D.C. Cir. 1957).[14]

Third. We do not think any inference against *Durham* can logically or fairly be drawn from the action by courts of other jurisdictions. In most, the *M'Naghten* rule still prevails though that rule is thoroughly discredited. That these jurisdictions have chosen to retain an obsolete test is hardly compelling evidence of its soundness, nor does it constitute a cogent reason for discarding *Durham.* In any event, unique factors which are inapposite here were present in most such cases. Other Circuit Courts, for example, have held they were not free to follow *Durham* because they do not enjoy the same "autonomy" with respect to local criminal law as our Court of Appeals. *Sauer* v. *United States,* 241 F. 2d 640, 644 (9th Cir. 1957); *Howard* v. *United States,* 232 F. 2d 274, 275 (5th Cir. 1956). Some state courts have been inhibited by statutes defining criminal responsibility. *People* v. *Johnson,* 169 N.Y.S. 2d 217 (1957).

The fact is that no other court in the United States has subjected the question of criminal responsibility to the same intensive scrutiny as our Court of Appeals. Since 1954, the

[14] Many of the prosecution difficulties have been alleviated by a 1955 amendment to the District Code. The normal doctor-patient privilege does not apply in a criminal case where insanity is an issue as a result of a plea by the defendant, with the result that the prosecution may freely use the testimony of psychiatrists who have examined the defendant. D.C. Code § 14-308 (Supp. IV, 1957).

Court has rendered nearly fifty opinions touching nearly every aspect of the insanity defense, e.g., competence to stand trial, scope of the doctor-patient privilege, instructions to the jury, problems relating to release of a person from a mental institution, etc.[15] This corpus of law constitutes an outstanding contribution to enlightened judicial administration of the insanity defense.

The *Durham* test is substantially the same as a test promulgated some eighty years ago in New Hampshire. *State* v. *Pike,* 49 N.H. 399 (1869); *State* v. *Jones,* 50 N.H. 369 (1871). The test devised by the majority has not been sanctioned by any court, legislature, or commission which has studied the problem. The proposed test is patterned after the test recommended in the Model Penal Code by the American Law Institute, but it differs from the A.L.I. test in critical respects.

IV

Objections to the Majority Test

The committee majority accepts, at least by implication, the criticism of the pre-existing tests which prompted adoption of the *Durham* rule. Thus, the majority report acknowledges that it is "desirable" that the psychiatrist should be "free" in testifying as to the Defendant's mental condition (Report, p. 12). The majority report further reflects the change of attitude which has taken place since *Durham* in affirmatively recommending against a return to the pre-existing tests. But the test devised as a substitute for *Durham* by the majority is subject, in our view, to serious objections.

At the threshold, there is an objection of fundamental importance which the majority report treats lightly. The majority propose that the new standard of criminal responsibility be embodied in a statute. In the District of Columbia there is presently no statute defining criminal responsibility. The power

[15] Only a few of these cases have related to the *Durham* rule *per se.* Problems such as fitness to stand trial would exist under any rule of responsibility. For the most part, the decisions represent a long overdue review by the Court of procedural problems involved in administering the insanity defense.

to formulate and change the test has been traditionally vested in and exercised by our Courts. The "right and wrong" and "irresistible impulse" tests became incorporated in law as a result of judicial decision. On other occasions, the Court of Appeals has declined to adopt recommended changes. See e.g., *Fisher* v. *United States,* 149 F. 2d 28 (D.C. Cir. 1949), aff'd 328 U.S. 463 (1946); *Stewart* v. *United States,* 214 F. 2d 879 (D.C. Cir. 1954). The decision by the Court of Appeals in the *Durham* case thus represented the exercise of a traditional rule-making power. It was, as Judge Prettyman has stated, "a short, simple step, inevitable and evolutionary after the opinion of this court in Smith." *Carter* v. *United States,* 252 F. 2d at 616.

The majority recommends in effect that this long-settled practice be abandoned. We agree that compelling arguments can be advanced in support of codifying the substantive criminal law although we perceive no validity whatever to the suggestion that a rule promulgated by a court is not as "applicable to all cases" as a statutory rule. We do not believe, however, that it would be wise to crystallize the insanity test in a statute at this time.[16]

The insanity defense is presently the subject of widespread debate throughout the United States. Commissions are studying the problem in Massachusetts, New York, and Maryland. Various universities, including the University of Chicago and the University of Pennsylvania, have study projects in this field under way. In these circumstances, it would be premature to freeze any rule in a statute at present. The results of various studies should be awaited. Moreover, there should be a further period of trial with the *Durham* rule, and intensive study of the cases which have arisen under it. Experience under the *Durham*

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[16] In April 1955, a Committee on Mental Disorder as a Criminal Defense, appointed by the Council on Law Enforcement of the District, and headed by George L. Hart, Jr., now District Judge, recommended against a legislative definition. More recently, the Washington Psychiatric Society, by a mail poll taken in April, 1959, overwhelmingly expressed its opposition to the Davis Bill, H.R. 13492, 85th Cong. 2d Sess. (1958), which seeks, inter alia, to enact a statutory definition patterned along the A.L.I. test.

rule and related opinions is still too limited to permit definitive conclusions.

It is unnecessary to belabor the difficulties of effecting a change once a statutory test is enacted. In New York, where the "right and wrong" test is prescribed by statute, there has been agitation for reform, promoted by such leading figures as Judge Benjamin Cardozo, for more than thirty years, and no change has yet been achieved. (See Interim Report of Subcommittee of The Governor's Conference on Insanity, New York, May 29, 1958.)

Apart from this basic consideration, we believe a number of problems are raised by the majority's proposed test which reads as follows:

> "[T]he defendant is not mentally [sic criminally?] responsible if at the time of the alleged offense, the defendant, because of an impaired or defective mental condition, was substantially lacking either in his capacity to appreciate that his conduct was wrong or in violation of law, or in his capacity to conform his conduct to the right or to the requirements of law."

(i) The terms "right" and "wrong" embodied in the proposal do not appear in the A.L.I. test which is the model for the majority.[17] These terms, a relic of M'Naghten, are far more ambiguous and subjective in content than the terms "disease or defect" to which the majority takes exception. The terms "impaired or defective mental condition" in the proposed test are perhaps apt synonyms for mental defects (e.g., idiocy), but these terms do not, in our view, meaningfully describe most of the psychoses, such as schizophrenia or manic-depressive psychosis.

(ii) The majority deplores uncertainty under the *Durham* rule. But the same degree of uncertainty would exist with respect to the majority's proposal. Psychiatrists would differ as to whether "because of an impaired or defective mental condition" an individual "was substantially lacking either in his

[17] The proposed A.L.I. test 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."

capacity to appreciate that his conduct was wrong or in violation of law. * * *" The majority would exempt the defendant from criminal responsibility if he was "*substantially* lacking * * * in his capacity to appreciate that his conduct was wrong," etc. Questions of substantiality are necessarily questions of degree, and questions of degree invite disagreement.

(iii) The majority challenges the requirement in the *Durham* rule that the criminal act must be the product of mental illness. But the test devised by the majority would require proof of logical connection or relationship between (a) the impaired or defective mental condition and (b) the defendant's capacity to appreciate that his conduct was wrong. It would not be sufficient to prove "impaired or defective mental condition," that is that the Defendant was mentally ill. We believe the proposed test would also require proof of a connection between impaired capacity and the specific crime charged. Abstract proof of a lack of capacity to appreciate wrongfulness or to conform conduct to the requirements of law might well not suffice. The issue would be: "Did the defendant lack the capacity by reason of impaired or defective mental condition to appreciate that the *specific act* with which he was charged is wrong or in violation of law."

(iv) We do not think the majority's proposed formulation would be more intelligible or meaningful to a jury than the short, lucid *Durham* test. The *Durham* test phrases the ultimate question simply, directly, and succinctly. We think the majority test verbally awkward and complex.

(v) The test devised by the majority was never submitted to psychiatrists for their appraisal. The committee met with psychiatrists on two occasions. Every one of the psychiatrists agreed that *Durham* represented a notable advance over the pre-existing rules. A few of the psychiatrists felt there could be further improvement in *Durham.* Some of the physicians with whom the committee met were sharply critical of the test proposed in the Model Penal Code by the American Law Institute, which served as the model for the majority's proposal. We do not believe any test of criminal responsibility should be

proposed without careful consideration of the views of mental health specialists concerning the specific test proposed.

V

COMMENT ON OTHER RECOMMENDATIONS BY THE MAJORITY

In addition to recommending a change in the substantive test of criminal responsibility, the majority makes recommendations respecting (i) the permissible scope of examination of the expert medical witness, (ii) the type of instruction which shall be held legally sufficient, and (iii) the finality of the jury's determination of the issue of "incapacity." We partially concur and partially differ from the recommendations as we discuss below.

(i) The majority report is critical of the practice, which is apparently widely prevalent, of questions put to expert witnesses in the direct language of the *Durham* test itself. Both the prosecution and defense will explicitly ask the psychiatric witnesses: "At the time of the offense, did the defendant suffer from a mental disease or defect." The majority notes that questions phrased in terms of the ultimate standard of responsibility have been traditionally asked, whatever the standard. We think the majority mistaken in their assertion that the *Durham* rule requires such questions (Report, p. 2), but we agree with the majority in condemning this practice.

Questions phrased in the ultimate terms of the test are objectionable as calling for conclusions of law and represent an improper intrusion upon the jury's province.[18]

The function of the expert is to state his diagnosis; to describe the symptoms and characteristics of the disorder, if any; to indicate, if he can do so, the effect of such symptoms upon the individual's behavior; and to explain the methods he followed in arriving at his opinion. Some psychiatrists, for example, are

[18] This question is ably discussed in the brief filed with the Court of Appeals by Messrs. Howard C. Westwood and J. William Doolittle, Jr., designated by the court as attorneys for appellant in *Blocker* v. *United States*, No. 14,274, decided April, 1959.

of the opinion that a "sociopathic personality" constitutes a mental disease; other psychiatrists are of a different opinion. In our view, it is for the jury to decide whether, on the record, the defendant suffered from a "mental disease or defect" at the time of the crime so as to be exempt from criminal responsibility. If questions phrased in terms of the test are asked, we think it essential that the trial judge should charge the jury that the views of the psychiatrists as to this ultimate quesion are not binding upon it. We believe that this problem can be dealt with adequately by the Courts and that legislation is unnecessary.

(ii) The majority also recommends that "An instruction in substantially these terms [i.e., the terms of the rule proposed by the majority] shall be sufficient in all cases." We think this proposal could seriously prejudice the right to a meaningful jury trial.

The right of a jury trial necessarily implies that the jury shall be given adequate guidance. See *Williams* v. *United States,* 131 F. 2d 21 (D.C. Cir. 1942). The instruction must necessarily be shaped to the facts of each particular case. In *Carter* v. *United States,* 252 F. 2d at 618, Judge Prettyman pointed out, in speaking for the Court of Appeals, that "A trial judge faced with a defense of insanity in a criminal case ought not attempt to be brief or dogmatic. He ought to explain—not just state by rote but explain—the applicable rules of law and the duties of the jury in respect to the matter. He should explain not only in general terms but in terms applicable to the disease and the act involved in the case at bar. Because, after all, the jury must make its findings upon the facts in the case before it, not in some nebulous generality or supposition."

In some cases it would be appropriate for the trial judge, in assisting the jury, to point out areas of agreement or conflict in the expert testimony. See *Durham* v. *United States,* 214 F. 2d at 875, note 50. Elucidation by the trial judge might be essential in answering a juror's request for guidance. See *Wright* v. *United States,* 250 F. 2d 4, 11 (D.C. Cir. 1957).

The rule proposed by the majority would tend in time to

result in mechanical recitation *in haec verba* of the formula alone. It would drain the defense of vitality. The recommendation is contrary to the trend of permitting more liberal scope to the trial judge in commenting upon the evidence. We oppose this recommendation by the majority.

(iii) The majority also recommends that where "sufficient evidence," both lay and expert, has been received as to the nature and extent of the defendant's mental condition, the court shall leave to the "sole determination of the jury the question as to the incapacitating effect if any of such mental condition. * * *" This proposal would preclude a court from ever directing a verdict of not guilty by reason of insanity. While we think that the question of responsibility is primarily for the jury, we do not see any sound reason for depriving the court of its traditional prerogative of directing a verdict where the evidence so overwhelmingly points one way—in this instance, insanity—that reasonable men could come to no other conclusion. See *Douglas* v. *United States,* 239 F. 2d 52 (D.C. Cir. 1956). We therefore oppose this recommendation by the majority.

VI

Conclusion and Recommendations

In April 1955, a Committee on Mental Disorder as a Criminal Defense, appointed by the Council on Law Enforcement of the District, and headed by George L. Hart, Jr., now District Judge, submitted a report to Congress on the *Durham* rule. We are in accord with the conclusion of this distinguished committee.[19] (Senate Rep. No. 1170, 84th Cong., 1st Sess., p. 10):

"It is the opinion of the Committee that the test of criminal responsibility established in the Durham case represents a significant and desirable advance over the 'right and wrong' and 'irresistible impulse' tests, and is in the interests of justice.

"It is the opinion of the Committee that, while the Durham test is by no means the ultimate test or the perfect test, it would not be feasi-

[19] In addition to Judge Hart, the Committee included Donald A. Clemmer, Leroy H. McKinney, Hugh F. Rivers, and Vernon E. West.

ble, and, in fact, would be inadvisable to attempt a statutory definition of legal insanity. The witnesses who appeared before the Committee were almost unanimous in expressing their opinion of the infeasibility and undesirability of obtaining a statutory definition. Your Committee feels that no significant group of either physicians or lawyers would ever agree on any statutory definition.

"Lord Blackburn well expressed the difficulties involved more than 50 years ago when he said: 'I have read every definition (of insanity) which I could meet with and never was satisfied with one of them, and I have endeavored in vain to make one satisfactory to myself. I verily believe it is not in human power to do it.'

"It is the opinion of your Committee that, by leaving in the courts their common law power to establish legal tests of insanity, a desired flexibility will be possible in adapting legal tests to growing experience in the psychiatric field."

We accordingly recommend as follows:

1. That the resolution recommended by the majority should not be approved.

2. That a resolution be adopted recommending against any legislative change of the *Durham* rule at this time.

3. That this Association should actively join in supporting further study of the insanity defense. We respectfully submit that no change should be made without an exhaustive investigation of the entire question.[20] There are tremendous gaps in our knowledge of criminal behavior and mental disorder. Such a study would require the facilities of a trained, full-time staff, consisting of lawyers, psychiatrists, and criminalogists. We believe that the nature of the problem is such that one of the country's leading foundations, e.g., Rockefeller or Ford, might well be interested in helping to finance a study of the insanity defense in the District of Columbia. The opportunities for such a study are unique in this jurisdiction. This Association and this Committee could furnish invaluable assistance. We believe that a non-partisan, scholarly study of this character would be preferable at this time to any legislative action.

[20] We deem it important to underscore the limited function which the rule itself plays in the total process of administering the insanity defense. The attitude of the bench and bar and of the public generally toward insanity and criminal behavior, the availability of psychiatrists and hospital facilities, procedures for prompt mental examination of each defendant charged with a serious offense—all of these have a critical bearing upon the problem.

The CHAIRMAN. We will stand in recess until 10 o'clock tomorrow morning.

(Whereupon, at 1 p.m., the committee recessed to reconvene at 10 a.m., Thursday, October 17, 1963.)

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

THURSDAY, OCTOBER 17, 1963

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

The committee met, pursuant to recess, at 10 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.

Our first witness this morning will be Judge Holtzoff.

STATEMENT OF HON. ALEXANDER HOLTZOFF, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

The CHAIRMAN. Judge, we are very happy to hear you as our first witness this morning. I recognize that you have a number of commitments, and we will be very pleased to have you present your testimony at this time.

Judge HOLTZOFF. Mr. Chairman, may I say at the outset, that I do not appear this morning on my own initiative.

I am saying this, although it would have been appropriate for me to appear here on my own initiative, but I am appearing here in response to your courteous invitation conveyed to me through your counsel, Colonel McIntyre, and I would have considered it uncooperative on my part if I had not responded to the invitation.

The CHAIRMAN. Well, I recognize your position there, Judge, and we were very anxious to have your viewpoints and your suggestions and your analysis of title II of the House bill which deals with this problem of insanity. You are an expert in this field, and have a wonderful background, and for that reason we wanted the benefit of your views.

So we are very delighted that you do respond to our invitation and we are happy to have you here with us this morning.

Judge HOLTZOFF. It is a great pleasure for me to cooperate with this distinguished committee, especially since I greatly admire its work.

My remarks will be directed, as requested, to the rules relating to insanity.

They are found in title II of the pending bill, H.R. 7525.

In fact, if necessary, the sections comprising that title could be taken out and made a separate bill, because it may well be that some people will be in favor of title II, who might be opposed to other sections of the bill.

The basic provisions of title II, relating to insanity, are taken from the Model Penal Code of the American Law Institute, which was the product of several years of intensive study and work performed by a group of distinguished scholars, lawyers, and judges.

I am heartily in favor and support title II very largely because it is taken from the Model Penal Code of the American Law Institute, and because these provisions will completely solve some of our problems and meet some of our difficulties in connection with the defense of insanity in criminal cases.

While I am going to make my remarks very succinct and brief, because I know you have a number of witnesses, I do want to go back for a moment to highlight one or two matters of what might be called history.

We often hear criticism of the well-known *M'Naghten* case, decided in England over a century ago, in which the so-called right and wrong test was laid down, in which the test of insanity, for the purpose of criminal cases, was whether the defendant knew or was able to distinguish between right and wrong and, if he knew which was wrong, could he adhere to the right.

With the advance of the psychiatric science over the years many people recognized that that test was insufficient because there might be some insane people who knew that they were doing wrong and yet were unable to adhere to the right.

Now the Federal courts long ago abandoned sole reliance on the *M'Naghten* case. Consequently, it seems to me inappropriate, as many people have said, that the reason for the *Durham* case was because the *M'Naghten* was bad.

We abandoned the sole reliance on the *M'Naghten* case years ago.

The Supreme Court, in the *Davis* case, in 165 U.S. 373, at page 378, added to the right and wrong test the test known as the ability to adhere to the right, and it defined insanity, in connection with criminal cases as follows:

> The term "insanity" means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong or unconscious, at the time, of the nature of the act he is committing or, though conscious of it, unable to distinguish between right and wrong, and yet his will, by which I mean the governing powers of his mind, has been overcome and voluntarily so completely destroyed that his actions are not subject to it but are beyond his control.

Now, this test has prevailed in the Federal courts ever since the decision of the *Davis* case.

It still prevails in all of the Federal courts outside of the District of Columbia.

The bill that you are discussing really reenacts the same test in somewhat more modern language which, I think, is very well written.

It provides that 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 CHAIRMAN. At that point, Judge, would you permit an interruption?

I would like to have your views as to the difference between the language in H.R. 7525 and the language of the test which you have just read from the American Law Institute.

The House, in passing this bill, added two words. They added the words "either to know or appreciate."

I will have the staff show you the words that they have added and ask if you think that that makes a difference in the test.

What I am pointing out is that the language contained in the bill before us is not identical with the ALI test to which you have just referred.

Judge HOLTZOFF. Well, substantially, your bill is the definition contained in the American Law Institute code.

The CHAIRMAN. With the exception of the words "to know"?

Judge HOLTZOFF. Yes.

The CHAIRMAN. Would you point those out, please?

Judge HOLTZOFF. Yes. The words "to know", I think, are a desirable insertion although they are not a necessary insertion.

I think it makes it easier to understand the definition to know or appreciate the unlawfulness of his conduct, whereas the words "to know" are not in the penal code.

I do not think this changes the sense any, but I think it makes it easier to understand. So I would favor that change or modification.

Now, the *Durham* case, which was decided by our court of appeals in 1954, sought to abandon any definition of insanity and is to the effect that if a person, at the time of the commission of a crime, was suffering from a mental disease or mental defect, and the crime was the product of such mental defect or such mental disease, then he shall not be responsible for his criminal offense.

Well, the difficulty with that definition is not a theoretical one. It is a practical one.

It is so vague and general that it does not guide juries. What constitutes a product of a mental disease?

Even psychiatrists have frequently said, from the witness stand, "I do not know what you mean by 'product'."

Over the years I have acquired a mounting admiration for juries but, at the same time, juries need concrete guidance, and the difficulty we have had with the *Durham* case is because the format of the *Durham* case is so general as to be no concrete test and, for that reason, I hope that the Congress will enact the provisions of H.R. 7525.

There is another difficulty that we have had that really was due to something that happened at St. Elizabeths Hospital.

A person with a psychopathic personality had never been regarded as an insane person. He could not be committed civilly. He was not excused for any crimes that he had committed.

He was just a maladjusted person.

By the way, they have changed the term "psychopathic" to the term "sociopathic." Psychiatry changes its nomenclature very frequently.

In recent years there developed a school of psychiatrists who adopted the view that a sociopathic personality is a mental disease. Unfortunately, those in charge of St. Elizabeths Hospital became adherents to that view and several years ago, after the *Durham* case was de-

cided, overnight they made a public announcement that hereafter "we will testify that a sociopathic personality is a mental disease," although previously they testified otherwise.

Now, the result of that has been that many persons who used to be called "psychopaths" and now are called "sociopaths", and who were always regarded as mentally responsible for their crimes, are being acquitted on the ground of insanity because the psychiatrists from St. Elizabeths Hospital take the witness stand and say that this man has a sociopathic personality, that is a mental disease, and the crime was a product of his personality.

Now, other psychiatrists will testify otherwise.

The result is very incongruous. We get a group of people who are not regarded as insane, from the standpoint of civil law, who could not be committed to St. Elizabeths Hospital by a civil commitment proceeding, and yet who are acquitted of any criminal offense that they committed on the ground of insanity.

Now, the American Law Institute and your bill takes care of that and does away or makes it impossible hereafter to regard or classify a sociopathic personality as a person with a mental disease.

In subsection (2) of section 927(a), as amended, by section 201 of the bill, it is provided:

> The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

That would eliminate the sociopath as being a mentally diseased person. This would be very wholesome and salutary and a very necessary operation.

Now, there are two other matters that I want to refer to. One is the question of the burden of proof.

The burden of proof on the issue of insanity is on the prosecution in the Federal courts. In many States the burden of proof is on the defense to prove insanity as an affirmative defense.

In fact, the State of Oregon goes so far as to require that the defense is to be established beyond a reasonable doubt. Other States require it to be established by a preponderance of the evidence.

Now, it is almost an intolerable burden on the U.S. attorney's office to disprove an allegation of insanity because they have to get evidence to prove that on a particular date, some time ago, the defendant was not insane, and——

The CHAIRMAN. May I ask a question there, Judge?

Judge HOLTZOFF. Surely.

The CHAIRMAN. In an insanity case, what is the case law in the District of Columbia with regard to the burden of proof?

Judge HOLTZOFF. The case law now is that the prosecution has to prove beyond a reasonable doubt that the defendant was free of mental disease or mental defect on the date of the crime and, further, that if he did have a mental disease or mental defect that the crime was not the product of his mental disease or defect.

Now, that renders almost an intolerable burden on the prosecution, and I know there have been cases where defendants have been acquitted on the ground of insanity, not because they have been proven insane but because the Government was unable to prove that they were not insane.

Now, this is taken care of in the Model Penal Code and in your bill, in subsection (c), paragraph (1) of section 927, as amended by section 201 of the bill.

The provision in the bill is:

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

Now, that is a very necessary provision and, actually, it will not do any harm or cause any prejudice to a defendant who has a valid insanity defense.

However, it will prevent a situation in which at times a person, who may or may not be insane, is found not guilty on the ground of insanity, and I hope that this will be enacted.

One other feature to which I would like to advert for a moment is the requirement of notice.

The bill would require that a defendant, who relies on the defense of insanity, must give notice of that fact.

I think that is also found in the Model Penal Code. That is very necessary because frequently the Government is taken by surprise and is not in a position to adduce evidence on the issue at the last moment.

I am not appearing here in a representative capacity. I am appearing here as an individual judge, but I do want to say that from time to time my colleagues and I have discussed some of these matters, and I think I would be justified in saying that the majority of my colleagues have views similar to those that I have expressed this morning.

I do hope that title II of H.R. 7525 will be enacted because it is a much needed and highly desirable piece of legislation.

I want to thank you very much for your courtesy, Mr. Chairman, and it has been a pleasure to appear before your committee.

The CHAIRMAN. We very much appreciate having you with us here this morning, Judge. Thank you very much.

STATEMENT OF OLIVER GASCH, ATTORNEY, OF THE FIRM OF CRAIGHILL, AIELLO, GASCH & CRAIGHILL, WASHINGTON, D.C.

The CHAIRMAN. Our next witness is Mr. Oliver Gasch.

We are very happy to have you with us, Mr. Gasch.

For the record, Mr. Gasch is a practicing attorney in the District of Columbia. He is a former U.S. attorney of the District of Columbia and served in that capacity from 1957 to 1960.

He was principal assistant U.S. attorney for the District of Columbia at the time the *Durham* case was tried in 1954. He is an immediate past chairman of the Law Enforcement Council.

We are always delighted to have you with us, Mr. Gasch. Your judgment in these affairs is always appreciated.

Mr. GASCH. Thank you, Mr. Chairman.

I appreciate the invitation to appear as a witness, and I would like to say at the outset that the views that I express are my own personal views gained during the years that I was U.S. attorney and do not reflect the views of the District of Columbia Bar Association, of which I am an officer at the present time.

I listened, with interest, to Judge Holtzoff's statement and, as a result of a study of Mr. Acheson's testimony, I would like to direct my

views primarily to the *McDonald* case and the extent to which it does modify the *Durham* doctrine, and to my own view that the American Law Institute Code, as passed by the House, does represent a substantial step in the direction of criminal justice.

I nthe first place, it is important to note what *McDonald* does and what it does not do. I think it tends to restore the jury to the traditional place that it has had in criminal jurisprudence.

I said "tends to restore" because it certainly does not overrule the *Douglas* and *Wright* cases in which the court of appeals said that the jury was not free to ignore the testimony of the expert or psychiatric witness.

I do not read the *McDonald* case as taking that step. I think it does, however, indicate that the traditional function of the jury, in weighing the evidence, is somewhat restored.

It seems to indicate that the quantum of proof, which was established in the *Tatum* case, the some evidence quantum, which can be quite vague, is somewhat enlarged but the extent to which that important quantum of proof of the state of insanity or mental disease or defect must be established is still vague.

Now, reference is often made in the court of appeals decisions to the *Davis* case in the Supreme Court.

There are two *Davis* cases, because the first one (160 U.S.) represented a reversal of a conviction of first degree murder; whereas, the second *Davis* case (165 U.S.) was an affirmance of the second trial of the same man.

Judge Holtzoff has read to you, and I will not repeat it though I have the volume with me, the essential language from the second *Davis* case which does define "insanity."

I think it is important to realize that because it includes, among other things, this test which is implicit in the House bill and the American Law Institute formula which is capacity to control one's unlawful behavior.

Now, one of the greatest difficulties that we experienced in the U.S. attorney's office, during the 5 years that I was at the courthouse in the capacity of U.S. attorney, was the fact that this capacity to control one's unlawful impulses or inclinations to commit crime was not a part of the *Durham* formula.

The *Durham* formula basically is not a new formula. It was adopted only 26 years after the *M'Naghten* case in the *Pike* case in New Hampshire.

So it also is a product of the 19th century.

Let me state briefly the reason why I prefer the American Law Institute formula.

In the first place, this formula was worked out by some of the leading and most respected legal craftsmen in the country, people like Learned Hand, Judge Parker of the fourth circuit, Judge Fee of the ninth circuit, Professor Wechsler, now director of the American Law Institute and for many years professor of law at Columbia and Harvard, and a former Assistant Attorney General of the United States.

Those people were not under the pressure of deciding a given case for certain reasons that in that case seemed important. They were attempting to work out a code, you might say, in the cool of the evening where people could sit down and exchange views and experiences gained over a lifetime.

I think that that type of code is likely to be a more enduring document. I like the procedures of the code.

They are basically fair to the person accused and, at the same time, they are fair to the general public. And that balance is most important in achieving justice.

Now, what are the basic differences between the code and the law in the District today?

In the first place, the code requires notice of the defense of insanity. I do not think there is any real dispute about that.

I recall an occasion, not more than 4 or 5 years ago, when a group of students from the University of Pennsylvania came to the court of appeals for a moot court on insanity, and Judge Bazelon invited me to be one of the moot court judges, and I went up there and afterward we had a discussion on our respective views—which have not always been in harmony—and I indicated the importance of notice of the defense of insanity.

And Judge Bazelon, not to my surprise, did say that he saw no objection to requiring notice of the defense of insanity, so that there could be a timely examination of the person who seeks to interpose that defense.

I recall a case, the *Sweeney* case, when I was district attorney, in which this young college boy stabbed his sweetheart and she died.

We sought a timely examination of this boy to ascertain what the best judgment of the psychiatrists were as to his mental condition, as near the time of the commission of the act as possible, and we were held off by the efforts of defense counsel until an examination was no longer meaningful, although we applied to the court and sought consideration as expeditiously as possible.

Now, the ALI formulation would control that point, and I think it would be in the interest of justice to do so.

The CHAIRMAN. That is on the question of notice?

Mr. GASCH. That is right, sir.

The CHAIRMAN. Apparently this is one area where all the witnesses to date are almost in complete agreement.

I think everyone has testified to date that a requirement of notice was very desirable.

Mr. GASCH. Well, I would like to point out, sir, that that is one of the basic differences between a cohesive formula and code, which the American Law Institute has drawn, and the case-by-case method which we have developed in the District of Columbia.

The court of appeals can "legislate," if you want to use that term—

The CHAIRMAN. Well, I hope that is not what they end up doing.

Mr. GASCH. I do not mean to imply any criticism——

The CHAIRMAN. I understand.

Mr. GASCH. But when you do it on a case-by-case basis you do not always have the opportunity of stating that notice is an essential ingredient.

Of course, the Congress does have that opportunity in its legislative capacity, and I think that is one important thing that should be done.

Now, on this question of making insanity an affirmative defense. Judge Holtzoff has referred to that briefly.

I think it would be most desirable to make insanity an affirmative defense which the party, seeking to interpose the defense, must prove by substantial evidence.

I recall when that issue was discussed at the meeting of the American Law Institute in 1956—and I have the transcript of the meeting—here in Washington, at the Mayflower Hotel, two alternatives were proposed, each that it should be an affirmative defense.

One group supported the view that the House has adopted, that it be proved by substantial evidence, and the other group voted that it ought to be proved by a preponderance of the evidence.

In my view, the view which the House has taken and which the American Law Institute subsequently adopted, it simply gets us away from the old Tatum rule, which is a very vague quantum of evidence.

It does not necessarily mean that we have abandoned the present situation which requires the government to prove, as part of its case, once substantial evidence is interposed by the defendant, the insanity or the sanity.

The CHAIRMAN. Well, how much evidence is "substantial"?

Do we have case law that says what is substantial and what is preponderance and what is scintilla and what is not?

This is a very difficult area, it seems to me.

Mr. GASCH. It is a very vague area, sir. Let me define some of the cases under the "some" evidence rule.

In *Tatum* the only proof was by a member of the family that Tatum was not like other boys, and that he had some strange characteristics.

It was a very vague statement of evidence.

The CHAIRMAN. This was the insanity testimony that the defendant introduced at his trial, and then upon such testimony being received in evidence the burden of proof shifted to the government?

Mr. GASCH. That is correct.

The CHAIRMAN. Your point is that that is not sufficient?

Mr. GASCH. That is not sufficient.

The CHAIRMAN. All right. How much evidence would be sufficient?

Mr. GASCH. There was one case that I would like to refer to to show how far we have gone in that direction, in my experience.

I do not recall the name of the defendant, but I could get the name for the committee. His defense counsel was a man named Tom Ahern.

He did not believe that there was any insanity defense in the case, but while the defendant was on the stand, in an effort to explain his conduct, he let the words drop "I must have been crazy drunk."

The court of appeals, analyzing that offhand remark, said there should have been instruction on insanity and, absent instruction on insanity, the case had to be reversed.

That was some evidence of insanity as defined in that case by the court of appeals.

The CHAIRMAN. Did the defendant interpose an affirmative defense of insanity in that case?

Mr. GASCH. No, sir; the defendant did not wish to interpose an affirmative defense of insanity.

The CHAIRMAN. It just came up?

Mr. GASCH. It was a colloquial remark that this man made on the stand in an effort to explain his conduct.

The CHAIRMAN. Well, would this be a typical example?

Mr. GASCH. No, sir. This is not a typical example, but I think when we utilize the words "substantial evidence" which to me con-

notes some real testimony indicating that the defendant wishes to rely on insanity and that the man actually is suffering from a disease or defect, and he can prove it, I think until that is done the burden should not shift to the government to prove beyond a reasonable doubt that the man was not suffering from a disease or defect or, if he was, that the crime itself was not the product.

The CHAIRMAN. Are the words "substantial evidence" well defined in case law in this field of insanity in the matter of an insanity defense?

Is there a case law in the District of Columbia defining "substantial evidence," saying what is "substantial evidence" and what is not?

I do not know.

Mr. GASCH. Senator, to me it is a meaningful concept, but I have not researched the point.

I would think that it would mean that if you seek to interpose insanity as a defense you must show, by psychiatric testimony or by the testimony of lay witnesses, that this individual was at least the type of person who could be civilly committed.

The CHAIRMAN. Thank you.

Mr. GASCH. Now, the second point or the third point, rather, on which I feel the American Law Institute formula does add something to the administration of criminal justice is the manner in which it deals with the sociopath.

From the standpoint of the protection of the community and the people who are likely to be hurt by criminals at large, the sociopath is probably the most dangerous of this group of people whom the court in some cases has concluded are suffering from a mental disease or defect.

The sociopath, as the American Law Institute formula defines it, shall not be regarded as a person suffering from disease or defect if the only evidence of his sociopathy is continued criminal behavior.

That is to say, there must be something in addition to this series of criminal acts in order to show that he is within the protection of insanity as a defense.

Now, I can recall one case that I think illustrates that almost better than anything else.

I recall a number, but this is one case in particular.

This was the individual who was known as the "Bad Man of Swampoodle," Dallas O. Williams, and I have, in a statement that I would like to hand to the clerk, given the citation of the case in which the facts are set forth.

Williams had been convicted of a long series of crimes of violence, including murder.

The case was under consideration a number of times by the court of appeals and finally, because of the delay between the original indictment and the final trial, the conviction was reversed, the court interposed the speedy trial formula, and Williams was out and a free man.

The suggestion was made that we seek a civil commitment of Williams. I sought the assistance of psychiatrists from St. Elizabeths hospital.

They came over and the proof that I could get from the whole group of them amounted to an insufficient quantum to hold him.

He was not civilly committable.

We took the case to the court of appeals, following Judge Keech's adverse ruling. We had a hearing there that same late afternoon.

The court considered it but agreed with Judge Keech.

The point I am seeking to make is this, that this individual went out and when he sought to utilize the open area of a gasoline station as a men's room, the attendants objected, and he [Williams] pulled out his gun and shot two persons.

He is now behind the bars, and I hope he will stay there for a while. The community would be safer if he did.

But there are other sociopathic personalities——

The CHAIRMAN. He is behind what kind of bars?

Is he behind the penitentiary bars or is he committed to an asylum?

Mr. GASCH. No, sir; he is in prison.

The jury, in its wisdom, decided to reject his evidence of sociopathy and juries, as Judge Holtzoff said, often show very good judgment.

I think their inclinations ought to be respected.

And at that point let me say this: I remember studying this with some interest.

I do not have the transcript any longer because in private practice you do not keep all of those things, but the British Royal Commission, took the testimony of Mr. Justice Frankfurter as to the best insanity formula. I was impressed by what Justice Frankfurter said which is as follows:

> If you leave it up to the jury they will get the point, and I do not think it makes a great deal of difference what the formula is so long as you leave it up to the jury.

I think that would be in line with my experience, but I do feel that some other trend in our cases, for instance, the *Douglas* case and the *Wright* case, where the jury saw fit to reject this expert testimony, as juries have a right to reject expert testimony in any case, the trend was that the court held, in those cases, that they could not reject the testimony; that they were bound by it.

I do not believe that the *McDonald* case corrects that, though I think that there should be a basis wherein the jury is the judge and not the psychiatrists.

That is one of the objections I have always had to the *Durham* formula. I think the *McDonald* case tends to alleviate that difficulty, but I recall the correspondence that was printed in the appendix to the American Law Institute volume on this subject, by Doctor Guttmacher, who was one of your witnesses.

The CHAIRMAN. He testified yesterday.

Mr. GASCH. And Professor Wechsler, in which Dr. Guttmacher said:

> I can understand why you lawyers do not like the *Durham* formula. It tends to make the psychiatrist the arbiter.

That is precisely what has been done in many of these cases.

Now, *McDonald* does indicate a tendency to get away from that ruling, and *McDonald* does indicate the importance of the formula, capacity to control one's unlawful inclinations, and I think that is very important.

Now, one of the best tests, and this is in the third circuit, in my judgment, is embraced in the *Currens* decision. Chief Judge Biggs wrote that opinion.

That is very close to the American Law Institute formula. It is this:

> The jury must be satisfied that at the time of committing the prohibitive act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of law which he is alleged to have violated.

And Chief Judge Biggs, in quite an admirable way, set forth what the instruction should be in these cases.

As a former prosecutor, I always like to see the court tell both the prosecution and the defense what a proper instruction is. If you know what a proper instruction is then you certainly save a lot of time and a lot of headaches, and a lot of expense, incident to retrial of these criminal cases, and that is something that is very desirable to achieve.

I am not going to read this instruction, but it is set forth at 290th Federal Reporter, 2d series, at page 775.

The CHAIRMAN. The case was referred to by a witness yesterday. I am certain that it was incorporated in full in the record.

Of course, I think some of the testimony yesterday was to the effect that when you take the *Currens* case, and you read that side by side with the *Durham* rule, as amplified and supplemented by the *McDonald* rule, you have two tests that are very, very close together.

Now, I do not know. Lawyers seem to differ on this, and I understand that, but there was testimony to the effect that when you read the Judge Biggs' test, which I understand you to say seems to be a very fair test, and the *Durham* case, as supplemented by the *McDonald* test, that you have very close to the same test. I would appreciate your views.

Mr. GASCH. Well, at page 7 of the slip opinion in *McDonald*, you do have a recognition of this capacity to control one's unlawful conduct, which is the heart and soul of the American Law Institute formula and the American Law Institute formula was adopted by Judge Biggs in the *Currens* case.

Now, here is what the court said per curiam is the definition of "disease and defect." This is on page 7.

> Consequently, for that purpose 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 behavioral control.

Now, that is as far as the court has gone in that regard. I personally prefer the way that Chief Judge Biggs has stated it but, quite frankly, when I read Mr. Acheson's testimony I must respect his experience. He has been there during the last 2 years. I have not.

I have been concerning myself with civil cases except for an occasional criminal assignment, and I cannot say that I am as well up on these cases.

I am as well informed on the problem as he is, but I do feel basically, in conclusion, that when a group of respectable legal scholars get together and coolly figure out what these procedural steps should be, they are more likely to come up with a code that is in the interest of justice than if you have the case by case method to which we have in the District of Columbia heretofore been relegated, and that is basically why I feel that the American Law Institute formula, adopted by the House bill, is preferable and, of course, the three

points I made concerning notice, the affirmative defense, and the sociopathic personality, those are embodied in the code which I think is preferable to the state of the law that we have in the District at this time.

The CHAIRMAN. Well, I appreciate that, Mr. Gasch.

I would like to ask you the same question that I asked Judge Holtzoff.

Do you see any difference between the American Law Institute test and the test contained in title II of the House-passed bill, where the words "to know" are inserted by the House?

That is not in the American Law Institute test. The House has also inserted the word "wrongfulness" for the word "criminality" in the ALI insanity test.

Mr. GASCH. I do not have any strong feelings about that.

I think I would agree with Judge Holtzoff, that the addition of the words "to know" makes the formula a little more meaningful, generally more understandable to the laymen who sit on the jury.

Some psychiatrists seem to object to what they call the "cognitive test" because they feel that knowledge is only one aspect of the man's understanding.

They feel that to appreciate is a broader concept than to know, but if you have the two together I think it is a litle more meaningful, and I do not feel that it would be a serious mistake to strike the words "to know" if they are objectionable to psychiatrists or those who are oriented in that direction but, personally, I prefer to have the two words.

They are a little more understandable.

The CHAIRMAN. Now, let me ask you this further question because the history of the evolution of the definition of an instruction on insanity in the District of Columbia has come to this jurisdiction by way of case law.

Is that not correct?

Mr. GASCH. Yes, it is, sir.

The CHAIRMAN. Since the inception of the District of Columbia there has never been a code provision on this subject of insanity.

Is that correct?

Mr. GASCH. That is my understanding, sir.

The CHAIRMAN. That has been mine.

Mr. GASCH. We have some statutory procedure pertaining to mental competency.

The CHAIRMAN. I am not talking about the procedural part.

I am talking about the tests because I believe this is contrary to the usual practice in most of the States.

My State, for example, has the definition and the instruction insanity written right into the code, and I think this would be almost uniformly true of the other States.

Now, the purpose of my recitation of that background is to ask you whether you think it is preferable to rely upon case law as it now exists in the District of Columbia, *Durham* amplified by *McDonald*, or whether we should write the insanity test into law, whatever that test may ultimately be?

Mr. GASCH. Well, I prefer leaving statutory matters to the Congress of the United States and letting the judges decide the cases.

The CHAIRMAN. I asked the same question of the present U.S. Attorney and he said, among other things, that in his opinion the case law in the District of Columbia, as it now stands today in this question of the insanity test, is substantially the same as the American Law Institute test to which you alluded.

Now, I do not know whether you agree with that or do not agree with it, and I am not trying to pit you against each other.

All we are trying to do is work out a very difficult problem in a very difficult area.

My question to Mr. Acheson was, if the case law in the District of Columbia is substantially the same as the American Law Institute test, what is wrong with writing the American Law Institute test into the law?

Mr. GASCH. Precisely.

The CHAIRMAN. His answer to that was that if you write the insanity test into law then defense counsel will be bringing new cases before the appellate courts and the circuit courts to again test the instruction or the test.

Mr. GASCH. Well, I do not know that there is any final answer to the question of whether you should leave the judges the prerogative of rulemaking power or whether you should have Congress legislate in such a field as this.

It is a question of one's individual preference.

My preference is to have Congress lay down the rule, and I will tell you why I feel that way.

The case-by-case method is basically a wasteful method. You take the 80 or more cases decided in the Durham area. Each of them, as far as I can recall, represented the reversal of a criminal conviction and the expense and necessity for re-trying the case, and the fact that in some instances like in the *Dallas Williams* case, the man was given the opportunity of killing two innocent gas station attendants.

I do not like to legislate in that manner, if it can be avoided. I would much rather have the considered judgment of the Congress on what the rule should be.

The CHAIRMAN. Very well. Now, let me ask just a couple more questions, if you do not mind.

Your interpretation of the affirmative defense, which the defendant must establish by a showing of substantial evidence, do I understand you to mean that the burden of proof is in any way affected?

In other words if the defendant makes an affirmative defense then he must establish that affirmative defense by substantial evidence and once accomplished the burden of proof would shift to the Government.

Mr. GASCH. I would agree with you, sir.

The CHAIRMAN. As it does at the present time.

Mr. GASCH. Yes, sir.

The CHAIRMAN. To the Government to prove beyond a reasonable doubt that the defendant is sane?

Mr. GASCH. That is correct, sir.

The CHAIRMAN. Is that not true?

Mr. GASCH. Or that there was no—then you get to the second aspect of the Durham formula:

If it were shown that the defendant was suffering from a mental disease or defect then the Government could further prove its case by

showing beyond a reasonable doubt that there was no productivity between the mental disease and defect and the criminal act.

That is a very difficult thing to show beyond a reasonable doubt, and I think the virtue of the American Law Institute formula is that the defense would be triggered only by the defendant's adducing substantial evidence that he, in fact, was suffering from a mental disease or defect.

The CHAIRMAN. Does counsel have any further questions for Mr. Gasch?

Mr. McIntyre has suggested that I ask you as to whether or not you would favor an affirmative requirement that the defendant prove his insanity by a preponderance of the evidence without shifting the burden back to the Government.

In other words, you put the burden of proving the insanity completely upon the defense.

Mr. GASCH. I will try to find for my friend, your counsel, the transcript of the debate in the American Law Institute on that point.

My recollection is that originally the members seemed to favor making insanity an affirmative defense, which must be proved by a preponderance of the evidence.

The CHAIRMAN. That, of course, would keep the burden on the defendant?

Mr. GASCH. Keep the burden on the defendant.

Then I think it was Learned Hand who stood up, and he was an incomparable fighter, and he felt that the words "substantial evidence" were better than "by a preponderance of the evidence."

And he persuaded the American Law Institute to accept that particular phraseology.

Who am I to disagree with Learned Hand, but you asked my view.

The CHAIRMAN. Surely.

Mr. GASCH. I think that I would prefer that. Perhaps that is the stigma of having been a prosecutor.

Sometimes you cannot get rid of your background and, in this instance, I would prefer that if it were my own personal judgment, but I can well see the basis on which Judge Hands persuaded the American Law Institute to go along with this language.

I think it would be a definite improvement of the situation that we have at this time, and it would definitely clarify what we mean by "some evidence."

Now, before I leave that "some evidence" point——

The CHAIRMAN. Oh, I did not mean to cut you off on that "some evidence" point.

I am happy to have you amplify that in any way you wish.

Mr. GASCH. I have only this to say, sir.

The court of appeals frequently refers to the first *Davis* case, in 160 U.S., because the expression "some evidence" was used there.

I think you have to take into consideration what the Supreme Court was talking about and what the facts of that case were.

There had been a very acrimonious dispute between two farmers, and one of them was back in his cotton patch, picking cotton, and doing nothing to disturb the other fellow, but Davis got his gun and went to his neighbor's cotton patch and shot and killed him.

That is the kind of thing they were dealing with in that case.

And, as Judge Holtzoff read to you, and this is on page 378 of the second *Davis* case, in 165 U.S., the court decides "insanity" in terms that certainly would be quite different from some of the cases in which, like *Tatum*, the court was satisfied that insanity was triggered as a defense and the evidence simply was that he was not like other boys and that he got into disputes with his friends, and so forth.

I think it is important that when we deal with insanity we deal with it legitimately, that we know that there is a defense of insanity, that there be notice of it and when the case is tried there be evidence of it.

If you deal with that type of tangible situation then I think a great deal of the difficulty that we have had over the last 80 cases will be obviated.

The CHAIRMAN. Well, I appreciate your views very, very much, Mr. Gasch.

I would like to take this opportunity, as long as you are here, if I could, to ask you another question.

We have been confining ourselves entirely to title II during our hearing, and title V, which was the mandatory minimum sentence for crimes.

There was an area of difference of opinion as to whether it was helpful in law enforcement to have a mandatory minimum sentence or whether it was not helpful, and there was a divergence of views.

Now, if you would care to comment on it, I would be delighted to have your comment from your former position as a prosecutor.

Would it have helped you in prosecuting crimes to have a statute which set a mandatory minimum sentence of 2 years or 3 years, for example, in a housebreaking case, rather than the no-minimum statute?

I do not know whether this is going to help a prosecutor or not.

Mr. GASCH. Well, sir, I am very happy to testify on that.

I learned most of my criminal law from my predecessor, Judge Leo Rover.

The CHAIRMAN. Well, he was my criminal law professor. He was one of the best.

Mr. GASCH. He certainly was.

One point on which he and I agreed 100 percent, and there were many, was that mandatory minimum sentences are self-defeating. He felt very strongly on this.

He felt that the sentence that an individual is given should be the result of careful consideration of the facts and circumstances of that case by the judge, having received a report from the probation office.

He felt that if you take that power away from a judge and seek to impose mandatory minimum sentences it will basically be self-defeating and deny society the opportunity of rehabilitating many individuals who can be rehabilitated.

In this whole area I have always felt that we worried too much, we think too much about criminal rules, that is to say we wait until the individual has committed a serious crime and then we talk about the niceties of trial and ignore that which is basically more fundamental and more important; namely, the individual when he is in his formative years, when he is a juvenile.

We do not take that individual and seek to thrust him in the paths of righteousness, if you can use an old Biblical term which I strongly believe in.

We let him run in the streets. We let him associate with "bad boys." He gets in trouble and it is one case of trouble after another, until he is a dyed-in-the-wool criminal, and what people call a "recidivist" and too often we are confronted with that situation, and I do not think that you answer the problem by simply locking him up and throwing the key away.

I think you have to deal with each individual case and exercise our greatest imagination to rehabilitate these people before it is too late.

The CHAIRMAN. The Director of your institutions in the District of Columbia, Mr. Clemmer, was in complete agreement with what you are saying.

He said we do have, as you well know, several statutes in which there is a mandatory minimum sentence prescribed. In a conviction of that particular type of crime, where there is a mandatory minimum sentence, say, of 5 years, and the defendant knows that he has to remain in an institution for a period of a minimum of 5 years, Mr. Clemmer testified that he has more problems with that type of convicted person than almost any other type because the man has almost no hope and he is incorrigible and he shows very little chance of rehabilitation.

Now, I was amazed to learn from him of the high degree of recidivism in the District of Columbia.

I do not know how many are two-, three-, or four-time losers; I do not know whether that is a great pattern.

Mr. GASCH. I am afraid it is, sir.

I have talked to Jim Bennett about this on many occasions. He is much concerned about it.

Of course, Don Clemmer, and I worked together closely very many years, but I cannot emphasize too strongly the importance of emphasizing probation and parole as safeguarding instrumentalities of justice in the community.

In short, a prison is like a barrel of apples. If you have some bad apples in that prison those bad apples do not become good apples because some of the good apples have been sent down there.

They tend to rot the whole barrel, and when those people come out they are marked men, they have criminal records, they have difficulty getting jobs and very easily they turn to another incident of crime.

We have licked that problem but the difficulty is, both in the case of probation and in the case of parole, the number of persons that the probation officers and the parole officers have to supervise, which is unrealistically high.

It is about 80 individuals a month. Now, you cannot give meaningful supervision to 80 individuals a month.

If it were cut down to the point where it were no more than 20, perhaps, they could give good supervision to them.

I think it is much more important that those two aspects of our system be liberally utilized, and they have not been in the past.

The CHAIRMAN. In any event, is it your opinion that the writing in of a mandatory minimum sentence is not going to strengthen law enforcement in the District?

Mr. GASCH. No, sir.

The CHAIRMAN. Thank you very much, Mr. Gasch. I very much appreciate your courtesy.

You have always been most cooperative and helpful to this committee and to me personally, in trying to work out some of these problems.

Mr. GASCH. Thank you.

The CHAIRMAN. Thank you very much.

Your letter of October 16, 1963, will be inserted in the record at this point.

(The letter referred to follows:)

CRAIGHILL, AIELLO, GASCH & CRAIGHILL,
Washington, D.C., October 16, 1963.

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

DEAR MR. CHAIRMAN: This statement is presented in response to the committee's request for my views, which request was delivered to me by the committee's counsel, Mr. McIntyre. I should like to make it plain at the outset that the views which I am about to express are my views which I express as an individual. I am not testifying as an officer of the District of Columbia Bar Association.

It is my understanding that the committee is concerned at this stage of its hearings with the subject of whether it is desirable and in the public interest to make any legislative changes respecting the rule of criminal responsibility in the District of Columbia. Legislation patterned largely on the American Law Institute's formulation has passed the House of Representatives.

The *Durham* rule, substantially modified by the *McDonald* decision, is the law in the District of Columbia today on this subject.

Prior to the *Durham* rule, the *M'Naghten* rule which superseded the old right-wrong test, as subsequently modified by the *Smith* decision of 1929 (the irresistible impulse test was the law in the District of Columbia until the decision in the *Durham* case in 1954. The date of the *M'Naghten* formulation is approximately 1843. It antidated the basic language of the *Durham* rule which was taken from the *Pike* decision in New Hampshire of 1869.

Durham and M'Naghten, then, are both products of the 19th century. They are separated by approximately 26 years.

I have favored the American Law Institute's formulation for several reasons. In the first place, it is a coherent, cohesive, self-contained document. Oftentimes, procedures are most important in achieving justice. The American Law Institute's formulation specifies the procedures to be followed from the outset. Doubt as to when and under what conditions one charged with a crime should be examined by a psychiatrist is removed. I recall well the *Sweeney* case in which a young college boy had stabbed to death his sweetheart. The Government sought a timely psychiatric examination to ascertain the youth's condition as close to the critical time as possible. We encountered delay after delay until a psychiatric examination was no longer meaningful.

I should like to emphasize two points in the American Law Institute's formulation which seem of the utmost importance to me. The first is the recognition that insanity is an affirmative defense. It must be proved by substantial evidence. There should be no serious constitutional question respecting this point for the reason that the Supreme Court in *Leland* v. *Oregon* sustained the constitutionality of an Oregon statute which requires one asserting the defense of insanity to prove it beyond a reasonable doubt. One of the great difficulties respecting the *Durham* rule has been the "some evidence" rule adopted by the court in the *Tatum* case. "Some evidence" over the years proved to be a very vague and light quantum, but whenever there was some evidence of insanity, the burden was thrown upon the Government to prove either that the defendant was sane beyond a reasonable doubt or, in the alternative, to prove beyond a reasonable doubt that there was no causal connection or productivity between the mental condition and the criminal act.

To a degree the situation has been alleviated by the decision of the court of appeals in *McDonald*. Under this decision the jury has regained its rightful place in the evaluation of expert testimony. Under *Douglas*, the jury was re-

quired to follow psychiatric opinion or at least the Court said they were not free to reject it. It must be borne in mind that the jury has the opportunity of observing the psychiatrist, and the impression his testimony makes of them is important. I do not think *McDonald* changes *Douglas*.

One of the most controversial aspects of the long line of *Durham* cases, numbering between 80 and 100, is that which concerns the sociopath. Formerly it was the position of St. Elizabeths Hospital that the sociopath was not within the disease or defect coverage of the *Durham* rule. Dramatically, this was changed during the course of the trial of the *Leach* case. This issue is covered by the legislation which recently passed the House by saying "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." As I read this language, if the only evidence of mental disease or defect is that which relates to crimes or antisocial behavior, such an individual, if found guilty, would go to the penitentiary rather than a mental hospital.

The cases which have always concerned me to the greatest degree have been the borderline cases where the issue concerning mental disease or defect has been close. In such cases under instructions required by *Durham*, the jury may find the accused not guilty by reason of insanity. Once such a finding is made, the individual is mandatorily committed to a mental institution where he remains until the hospital certifies that he is no longer dangerous to himself or others. The hospital authorities feel that they are operating a hospital for the sick and not an institution of confinement. In pursuing a process of rehabilitation, they encourage the individual to progress from maximum security to minimum security. The more marginal his "mental illness" the more likely the hospital is to release him or to extend to him visitorial privileges. This progression often facilitates the "elopement," as the hospital authorities call it, of the mental patient who formerly was accused of crime and found not guilty by reason of insanity.

I noticed a rather meaningful statistic in the Star of October 2, concerning 94 releases from St. Elizabeths during the past year. Seventeen of them have committed crime since their release. It was reported that one of the crimes was murder.

It is quite true that some of the patients who are released either by the hospital or by the court at the hearing make an entirely satisfactory readjustment. I have in mind the case of the one who shot and killed a Voice of America employee by the name of Abdesheli. At the time of the killing, I was advised by two senior psychiatrists from St. Elizabeths Hospital that the accused was very sick and the probability was that the illness would become progressively worse and that she would probably never be released from the hospital.

The basic difference between the *Durham* rule, which has been the disease-product test, and the ALI formulation is that the former is couched in behavioral terms and is therefore attractive to psychiatrists, whereas the latter is couched in legal terms. It has been said that the *Durham* rule makes the psychiatrist the arbiter.

The important thing is that psychiatrists when called to testify be given the opportunity of testifying freely and without some of the restrictions formerly imposed upon them. The ALI code makes adequate provision for this.

In conclusion, I recommend passage of the American Law Institute's formulation for the reason that it represents a carefully thoughtout code for dealing with most of the issues which arise in a criminal case wherein the defense of insanity is interposed. Those who worked on this code are well known to this committee—Judge Learned Hand of the second circuit, Judge Parker of the fourth circuit, Prof. Herbert Wechsler, now director of the American Law Institute, Judge Dimock, of New York, Judge Fee of the ninth circuit, and many others. This was not case-by-case law, which sometimes produces a desirable result but which often does not, this was an effort on behalf of experienced, highly competent legal and judicial craftsmen to improve the administration of criminal justice.

As I have previously said, the *McDonald* case had modified the *Durham* doctrine. The extent to which the jury is bound by the conclusions of a psychiatrist depends upon the weight and credibility of the evidence. These normally are questions for the jury. *Douglas*, in which the court said the jury was not free to reject arbitrarily expert testimony, is probably still the law. No longer is the "some evidence" rule of the *Tatum* case controlling where insanity is or may be a defense. At least it does not require a directed verdict of not guilty by

reason of insanity when the Government lacks rebuttal evidence. These are steps in the right direction, but we should recognize insanity as an affirmative defense and the party asserting it should prove it at least by substantial evidence. In *McDonald* the definition of mental disease does approach the ALI criteria of capacity to conform one's conduct to the requirements of law as well as the *Currens* test of the third circuit.

Next, the case of the sociopath should be given consideration. It is in this category that we are most likely to encounter one capable of and likely to commit serious crimes of violence. There is general agreement among psychiatrists that sociopaths rarely improve. The law institute's formulation takes the position that the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. We had a classic example of such an individual in this jurisdiction. The bad man of Swampoodle, Dallas O. Williams, following a long career of crimes of violence, which included murder, had been released. Thereafter, upon being told that the could not utilize the open facilities of a gasoline station as a men's room, he shot and killed two of the attendants. Fortunately, he has since been tried and convicted of homicide, and it is hoped that his criminal career is as at an end.

Respectfully submitted.

OLIVER GASCH.

NOTE.—*Durham* v. *U.S.*, 214 F. 2d 862; *McNaghten's case*, 10 Cl. and F. 200; *State* v. *Pike*, 49 N.E. 399; *Leland* v. *Oregon*, 343 U.S. 790; *McDonald* v. *U.S.*, 312 F. 2d 847; *Douglas* v. *U.S.* 239 F. 2d 52; *Currens* v. *U.S.*, 290 F. 2d 751; *Williams* v. *U.S.*, 250 F. 2d 19.

The CHAIRMAN. Our next witness will be Mr. William K. Norwood, chairman, Public Protection Committee, Washington Metropolitan Board of Trade.

STATEMENT OF WILLIAM K. NORWOOD, CHAIRMAN, PUBLIC PROTECTION COMMITTEE, WASHINGTON METROPOLITAN BOARD OF TRADE

The CHAIRMAN. Mr. Norwood, we are happy to have you back here.

Mr. NORWOOD. Thank you, Mr. Chairman.

My name is William K. Norwood, 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 enterprises in the Nation's Capital.

The views that I shall express today represent the recommendations of the public protection committee and the law and legislation committee and have been adopted by our board of directors as the official policy of the board of trade.

We support the enactment of title II of H.R. 7525, the omnibus crime bill. The board of trade has previously supported the enactment of H.R. 1932 which contains approximately the same provisions as encompassed within title II of H.R. 7525 with, as we interpret them, minor changes.

Both of these legislative proposals adopt the American Law Institute's approach to a reasonable solution to the legal entanglements developed by the *Monte Durham* decision. Title II of H.R. 7525 is based upon the formulation recommended by the American Law Institute as the test of insanity as a defense in criminal cases, often referred to as the test of criminal responsibility.

This title is intended to apply to criminal cases in the District of Columbia, replacing the rest of criminal responsibility stated by the *Durham* rule. This new formulation in title II is intended, not so

much as a repudiation of the *Durham* rule, as an effort to develop it, give it more specific content, and establish criteria to provide guidance to trial courts and juries.

The *Durham* rule simply states—

that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

In that case the Court discarded a well established test of insanity as a defense that is the rule in the *M'Naghten* case. The *M'Naghten* rule held that a person was responsible for his criminal conduct if he possessed the capacity to distinguish between right and wrong.

By way of comment and observation, it is interesting to note that the *Durham* rule has been considered by a number of State and Federal courts. In every case it has been rejected by the courts. Twenty States place the burden on the defendant of proving insanity as a defense by a preponderance of the evidence. For example, the State of Oregon imposes upon the defendant the duty of proving such a defense beyond a reasonable doubt. Substantiation of this burden, as was mentioned earlier by Judge Holtzoff, has been upheld by the Supreme Court of the United States in *Leland* v. *Oregon* in 1952.

In the District of Columbia, there are shocking signs of abuse of the defense of insanity that can only be corrected by a change in the burden of proof rules. A particularly shocking example occurred recently in the testimony of the roommate of Paul McGee. McGee was acquitted by reason of insanity of armed holdup of the Apex Theater in the course of which McGee shot and wounded a police officer.

The roommate testified that he had discussed "jokingly" with McGee where a robbery should be committed by a thoughtful criminal and suggesting to McGee that he select New York as a community where his family might be most influential. McGee's reply was that he would select the District of Columbia because in the District of Columbia he could feign insanity as a defense and retain his freedom even though he might be apprehended.

Gentlemen of the Senate District Committee, this constitutes one more example of the prevalence of thought with the criminally inclined that the District of Columbia is "soft on crime" and a haven from prosecution and conviction for the criminal.

The CHAIRMAN. I have heard this a great deal, and I have asked the staff to check it out, because I was somewhat impressed with the testimony that we had yesterday that runs counter to the common misconception. (See p. 700 re statistics furnished by Judicial Conference of the District of Columbia Circuit on Committments and subsequent release from St. Elizabeths Hospital.)

Now, McGee, when he was acquitted by reason of insanity, was, of course, committed to St. Elizabeths.

And the testimony yesterday was, and I have not had the staff verify it, but my understanding was from the testimony yesterday that if you take it on a case-by-case basis you will find that the men who are acquitted by reason of insanity, here in the District of Columbia and are committed to St. Elizabeth's will actually be institutionalized for a longer period of time than if they had been convicted of the crime with which they were charged.

Now, this is something that I was not aware of until yesterday, but I am asking that they check it out and verify it, because I think the people of the District of Columbia should know this, because we are constantly told about the *McGee* case, that he was saying that he came here because the District of Columbia was "soft on crime."

But the plain facts of the matter are that as of today, at this very moment, he is still under the jurisdiction of the trial court, and if the testimony of yesterday was correct, and I am sure it was, and we are going to check it out on a case-by-case basis, I think it is helpful and reassuring to the people in the District to know that these people are institutionalized for a period of time.

Would you agree with that, Mr. Norwood?

Mr. NORWOOD. Yes, sir, I do, and I have heard that same statement. Of course, I have no definite proof of it. I have heard the same statement made.

But, on the other hand, it is true that because of this defense of insanity criminals are turned loose on the community to——

The CHAIRMAN. Well, how are they turned loose?

That is just the point I am trying to make.

How are they turned loose, because this is the common misconception.

I am just trying to run this down. Paul McGee, who was acquitted by reason of insanity, is still under the jurisdiction of St. Elizabeths Hospital. However, he is on conditional release from the hospital and subject to conditions specified by the court in ordering his conditional release.

Because we hear so much about Paul McGee, and I think we should, in fairness, say exactly what happened to him following his committment to St. Elizabeths Hospital.

Thank you. Pardon my interruption.

Mr. NORWOOD. Thank you, sir.

Prior to 1954, in the District of Columbia, a criminal defendant seeking acquittal by reason of insanity had to satisfy the right-wrong or irresistible impulse tests. Briefly stated, the right-wrong test is:

"Did the accused know what he was doing, and did he know that what he was doing was wrong?"

The irresistible test is:

"Was the capacity of the accused to refrain from committing the act so diminished by insanity that he could not resist?"

Some States and England utilize the right-wrong test as the only test of insanity. Other States, including the District of Columbia, have supplemented this with the irresistible impulse defense.

By decision of the U.S. Court of Appeals for the District of Columbia Circuit these tests were replaced by the Durham rule in 1954. The Durham rule provides simply that a defendant is not responsible if his act was the product of mental disease or defect.

Spurred by the Durham rule, the American Law Institute has given long and careful study to this problem. The American Law Institute's proposal would allow a successful defense if the accused, as a result of mental disease or defect, lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. This constitutes an updating of the tradi-

tional right-wrong and irresistible impulse tests. This proposal has been codified by the legislatures of Illinois and Oregon.

Arguments for *Durham* rule:

Proponents of the *Durham* rule appear to use three arguments in its support:

1. Courts following the right-wrong and irresistible impulse tests tended to exclude expert testimony on the nature of the mental illness, limiting psychiatrists to testimony whether the subject was capable of distinguishing right from wrong and of resisting impulses. Psychiatrists point out that these terms have no medical meaning, and it is undoubtedly true that restrictive rulings of judges kept relevant medical evidence from juries;

2. There was a general feeling that the traditional rules were construed too strictly, probably resulting in jail sentences for some persons who should, instead, have been committed to mental institutions; and

3. Psychiatry has developed immensely since the traditional rules were formulated, rendering those rules hopelessly obsolete.

A majority of observers believe that there is much justification for the first two objections. Both the *Durham* rule, which now applies in the District of Columbia, and the American Law Institute rule, which H.R. 1932 would substitute for the *Durham* rule, would seem to satisfy them.

The third objection probably reveals the true conflict between the *Durham* rule and the American Law Institute rule. When it is said that the traditional rules are hopelessly obsolete because of the advances of psychiatry, it is assumed that the traditional rules attempted to define mental illness. If the assumption is correct, the objection is valid.

But many observers believe the traditional rules did not attempt to define insanity; they merely defined the moral elements of punishability—which are not medical tests—and stated that if mental illness, regardless of what kind or the manner defined, negated the existence of the moral elements, the accused was not punishable.

The *Durham* rule makes no reference to any moral criteria. It provides merely that if a man is mentally ill, and the crime was a product of the mental illness, he is not punishable. The moral element is presupposed; it is assumed that anyone who is mentally ill, and whose act is the product thereof, is not morally blameworthy.

The American Law Institute rule, on the other hand, restates the traditional rules and preserves the moral test. It provides that if a man knew he was doing wrong and could have refrained, he acted with evil intent and is therefore blameworthy. This rule specifically renders the sociopath or the psychopath, whose abnormal behavior is manifested only by repeated criminal or otherwise antisocial conduct, responsible for his conduct.

In case of clearcut mental abnormality, both rules lead to acquittal by reason of insanity. But in borderline cases, where the mental illness is slight—for example, mildly sociopathic individuals—the *Durham* rule tends to lead to acquittal and the American Law Institute rule tends to lead to conviction, providing the jury feels the mental illness was not of sufficient severity to excuse the accused.

The American Law Institute leaves the decision whether to punish to the jury. The *Durham* rule leaves only the medical facts of mental illness and product to the jury; the moral decision is an automatic consequence of the medical findings.

It might be fair to summarize the *Durham* rule as a medical test, and the American Law Institute rule as a moral test. There is a sharp split on whether a medical test or a moral test is best.

Both views have respectable support. The fact of approval of the moral test by the American Law Institute is a factor not to be ignored. Consisting of outstanding attorneys, it is in a good position to weigh the rights of the individual and the public, and its deliberations have been thorough and scholarly.

Title II proposes legislation only for the District of Columbia. Any such legislation should constitute an effort to balance the interests of the public and the accused. Prior to the adoption of the *Durham* rule in 1954, according to a recent report, less than 1 percent of the criminal cases tried in the U.S. District Court for the District of Columbia resulted in verdicts of not guilty by reason of insanity.

And it was only yesterday testimony was given before this committee indicating that the current rate approaches 13 percent of all defendants tried.

The CHAIRMAN. Well, again, the point that I make and I am asking the staff to check through this very carefully, even though you arrive at these percentages, those defendants are still institutionalized at St. Elizabeths?

Mr. NORWOOD. That is right.

The CHAIRMAN. This is the point that I am making. They are institutionalized, and certainly society is safer from the particular individual during the time of incarceration, whether he is in the penitentiary or in an asylum.

Mr. NORWOOD. Well, I think the validity and the justifiction of the points that you are bringing up now will be covered and brought out later.

The CHAIRMAN. Yes, fine. Thank you very much, Mr. Norwood.

Mr. NORWOOD. Yes, sir.

Summary of the point by which title II of H.R. 7525 improves upon the existing law:

In the following respects, title II accomplishes a decided improvement over the existing law:

1. The *Durham* rule is too general in its definition of mental disease and defect. The proposed title II provides a working formula which has the approval of the American Law Institute.

2. Under the *Durham* rule and related cases, the "some evidence" rule imposes the impossible burden of proof on the Government. The proposed language places the burden where it belongs. It imposes upon the defendant the duty of establishing his defense by substantial evidence.

3. The present law does not require the defendant to give notice of his defense. The proposed title II places that burden upon the defendant. This will reduce the use of the defense of insanity in a justice-thwarting manner.

4. Under the *Durham* rule and other cases, the psychiatrist has become the arbiter. Under title II, as proposed, the factfinding function will be returned to the jury where it belongs.

5. The *Durham* decision and other cited cases permits ad hoc appellate treatment. Under title II of the bill, the standards will be so clear that there will be guidance from case to case, thereby improving the ad hoc problem.

6. Under the *Durham* decision the concept of personal responsibility for crime is subordinated to general notions concerning mental disease or mental defect. This title of the bill will return to the law the proposition that when a person is capable of controlling his conduct he is responsible for his crime. This return to ideas of personal responsibility is essential to law enforcement in the District of Columbia.

7. Under the *Durham* decision, there is little or no guidance regarding the meaning of the words "causation" and "productivity" as they are incorporated in the *Durham* rule. The proposed language will eliminate the confusion arising in this area by returning to the law the proposition that when one has a free will and is capable of controlling his activities, he is responsible for the wrongs which he commits.

8. Under the *Durham* decision, defendants such as Paul McGee may choose the District of Columbia as the place for their criminal behavior. Title II of H.R. 7525 will eliminate one basis for the selection of the District of Columbia as a place within which to commit crime.

Thank you, Mr. Chairman, for the opportunity to appear before the Senate District Committee today and express the views of the Metropolitan Washington Board of Trade in support of title II of H.R. 7525.

Just at this point I would like to give a quote from a recent television editorial on this general matter of crime prevention, and I have a comment on it.

> The police here need more tools, not less, to carry out their job in tracking down and questioning suspects, but they need something else and that is tangible public support.
>
> We have a situation in which victims, for fear of publicity, won't take their cases to the police, of witnesses who will watch but will not testify, of too many leaders who won't take a public stand and, consequently, of criminals assured in the knowledge that if caught they will probably never be convicted under the system.
>
> The cops have become their patsies. Those who are suffering are the decent citizens who want no more of living in the district.
>
> They are moving out, and the city's businessmen complain that suburban Maryland and Virginia families won't shop in this jungle, and that tourists are reluctant to visit here.
>
> They are right, but if the same businessmen will, instead of complaining about the chaos, if they will support the Washington Board of Trade and Police Chief Robert V. Murray in the belief of stronger law enforcement procedures then Congress in the omnibus crime bill may correct what is becoming a grim and sorrowful situation in the Nation's Capital.

Now, since our sessions last week on titles IV and V, I have heard several comments, and I believe you made the comment that you were surprised at the public apathy on these bills.

Since this hearing last Thursday at which I appeared I attended two organization meetings and one social gathering, and I had an opportunity to bring this matter up in a brief discussion of the crime situation.

I said that part of the problem is that "You folks, you intelligent citizens, when there is a hearing, you do not appear and you do not say anything about.

"If you did, I am sure that the congressional committees, the Senators, and the Representatives, as the case may be, will be impressed."

And here is the reaction that I got, right or wrong. Those who are Government employees, either District or Federal, said that they were afraid to come here. They did not know how the Hatch Act would apply to them.

They said they were afraid of reprisals either at the home location or in their offices. They were interested, and they would liked to have said something, but they were just afraid to do it.

The CHAIRMAN. Well, I am sure that they have no fears on that score. They are American citizens just the same as everybody else.

Certainly the Hatch Act does not apply——

Mr. NORWOOD. Well, there was that situation and it was amazing to me, the lack of understanding.

They were afraid that in their testimony they may say something that was contrary to Government policy or that might be interpreted as trying to tend to influence somebody unduly.

I tried to convince them that this did not apply but that fear was there and they were not going to take a chance.

The CHAIRMAN. Well, I have been in Government many, many years, and I have found many Government employees, both in politics and elsewhere, who are always happy to hide behind governmental immunity.

And I have always thought that Government employees, once they get locked in under the Hatch Act or under the civil service, they are scared to express themselves because it is just much easier to go along that way.

Mr. NORWOOD. That is true. They just were not going to take a chance, and I think that these people who were talking were sincere in their belief, right or wrong.

The CHAIRMAN. I am sure they were. One of the difficulties in this field, and I think we mustface it. We are all trying to work to help strengthen our law enforcement agencies, but certainly we must do it within the Constitution.

There are certain constitutional safeguards of which we are well aware, and we are guided by those.

You cannot just write any kind of a law you want and expect to get this problem solved, because the laws you write must pass constitutional tests.

There is no need of us passing laws when they are not going to be upheld by the courts.

This is one of the real problems that we have.

But I do appreciate your statement and your appearance here, Mr. Norwood.

I have at all times urged every citizen, Government employees, and those who think they are under the Hatch Act and those who do not, to take a more active part in Government on every possible level because this Government can be just as effective as the citizens who make it.

I would like to ask you this one question.

In reading your statement and your research paper, I do not see that you mentioned the *McDonald* case in any words along the way, and I am wondering if this statement that you have given me on behalf of the Washington Board of Trade was worked out prior to the *McDonald* decision. The testimony we have had to date and, of course, this is a recent decision, of October of last year, has been to the effect that the *Durham* rule has been considerably improved as a result of the *McDonald* decision.

Mr. NORWOOD. That is our understanding, that the *McDonald* decision has been a step in the right direction, which has implemented and cleared up some of the questions and the complexities involved.

The CHAIRMAN. Your prepared statement made no reference whatever to *McDonald*, and I thought quite possibly it had been prepared before the *McDonald* decision was decided.

Mr. NORWOOD. No, this statement was prepared within the last week or 10 days.

The CHAIRMAN. I understand.

Mr. NORWOOD. Yes, and I have just one other brief comment.

Some of these individuals that I was talking to said that it doesn't do any good for them to come up here.

"We do not represent an organization and they do not pay any attention to us."

And I said, "I think if you had appeared before Senator Bible last week he would have paid some attention to you."

The CHAIRMAN. I certainly would have. I like to hear from the citizens at all times.

Mr. NORWOOD. Thank you, Mr. Chairman, for allowing me to appear.

The CHAIRMAN. Thank you very much. We are always appreciative of you coming before us.

Our next witness is Col. William A. Roberts, president of the District of Columbia Federation of Citizens Associations.

The CHAIRMAN. Colonel Roberts, we are happy to see you again.

STATEMENT OF WILLIAM A. ROBERTS, PRESIDENT, DISTRICT OF COLUMBIA FEDERATION OF CITIZENS ASSOCIATIONS

Mr. ROBERTS. Mr. Chairman, for the record, I am presently president of the Federation of Citizens Associations, and my testimony today is for the purpose of bringing before your committee the report of action of the law and legislative committee of the federation itself, at its most recent meeting this year in regard to H.R. 7525.

For the information of the committee, my experience in connection with the District of Columbia dates back over 33 years as People's Counsel, Acting Corporation Counsel in connection with numerous civic matters.

Some 30 years ago I was, for two terms, president of the Federal Bar Association.

I have had a constant interest in connection with District of Columbia and Federal Bar Association matters with regard to problems of criminal and civil laws as applied to the District of Columbia.

The action of the federation, in condensed form, was presented in a letter which is in the hands of the committee and it was signed by U. H. Ulman, chairman of the law and legislative committee, and I would like to ask that that letter be made a part of your record.

The CHAIRMAN. That letter, addressed to me, under date of October 15, and signed, as you indicate, by Mr. Ulman, chairman of the law and legislative committee will be made a part of the record at this point.

(The letter referred to follows:)

FEDERATION OF CITIZENS ASSOCIATIONS
OF THE DISTRICT OF COLUMBIA,
October 15, 1963.

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

DEAR MR. BIBLE: I am writing to you to state for the record the position of the Federation of Citizens Associations on H.R. 7525. At the first regular meeting of the federation which was held Thursday evening, October 10, the full membership considered certain provisions of the bill and took the following action:

TITLE I

The federation voted to support the language of section 101(a) of the bill providing that confessions which are otherwise admissible shall not be considered inadmissible solely because of delay in arraignment.

TITLE II

Without suggesting specific language the federation voted to endorse appropriate legislation to restore the "right from wrong test" in criminal proceedings where insanity is raised as a defense.

TITLE III

The federation voted to endorse legislation to make investigative arrests available to the police department when the arresting officer has "probable cause to believe" the suspect has committed, is about to commit, or is committing a crime.

TITLE IV

The federation voted to endorse section 401 which adds "robbery" to the list of definitions of crimes of violence.

TITLE V

The Federation voted to endorse the increases in minimum sentences which are contained in the several sections of this title.

We regret the delay in reporting the position of the federation concerning this legislation but felt that because of the importance of the measure we did not want to state the position of the federation until after the full membership had had an opportunity to consider the bill as it passed the House of Representatives.

Sincerely yours,

LEWIS H. ULMAN,
Chairman, Law and Legislation Committee.

Mr. ROBERTS. Now, the action of the federation is directed to certain parts of the bill.

The federation took no action with respect to the omnibus bill as a whole, either affirmative or negative. It dealt with certain parts in which there was a very great interest, and I might say that no one could follow the affairs of the federation or of its 46 member bodies for the last several years without being aware of the extreme concern of the federation over the constant increase in crimes of violence in the District of Columbia and what, in their opinion, constituted inadequate methods for prosecution, conviction, and prevention of such crimes.

The federation is very highly concerned and it consists, to a great measure, of older people who have had occasion to note the lack of

security in their neighborhoods and they are very deeply impressed with the need for some kind of action which will improve the situation with regard to crime and danger in the District of Columbia.

With regard to the specific action in the letter it will be noted that under title I the federation addressed itself to 101(a), and it was the federation's position that they would support the language in that section providing the confessions, which were otherwise admissible, shall not be considered inadmissible solely because of delays in arraignment.

In other words, they confined themselves to the single question as to whether or not a mere delay in arraignment could cause a confession or similar evidentiary matter to be excluded from a prosecution of a criminal.

Without suggesting specific language, the federation, under title II, voted to enforce appropriate legislation to restore the right from wrong test as the federation termed it in criminal proceedings where insanity is raised as a defense.

In this connection I feel confident, from the debate—it was a majority determination and a strong one—they expressed great concern and confusion concerning the many different variations from the *Durham* rule.

Essentially, they are trying to return to *M'Naghten*, as it was originally enforced, substantially without modification, that is the moral test of right and wrong and without what they consider to be means of evasion available to a criminal under which he avoids responsibility for his action.

In the report of the law and legislative committee, neither the report of the law and legislative committee or the action of the debate of the federation went into the many provisions of the omnibus bill and attempting to clarify, if you choose, the *M'Naghten* rule or to modernize the *M'Naghten* rule and to provide protecting devices for the protection of the public from a criminal who might be acquitted by reason of insanity or who might be held not to be responsible by reason of insanity.

The CHAIRMAN. Well, of course, protection of the public.

A man who is found not guilty by reason of insanity, is committed to St. Elizabeths Hospital, and is that not protection of the public?

Mr. ROBERTS. Quite obviously, under the *M'Naghten* rule he was acquitted and he was freed because we did not have 200 years ago the means for mental care and the knowledge——

The CHAIRMAN. I am talking about the District of Columbia as of today.

Mr. ROBERTS. Under the *Durham* rule, as modified by the *M'Naghten* rule, the person charged with a criminal offense, and where there has been a failure to establish the fact that he is not insane, and he has alleged insanity, he is, of course, committed to St. Elizabeths Hospital.

In a very great measure, as is quite obvious to anyone who is aware of the situation, the difficulty which the public fears the greatest is not the fact that the man is put in an insane asylum, instead of a prison, but it is the fact that St. Elizabeths Hospital itself is not an adequate receptacle for either the custody or the improvement or the testing of the alleged criminal when he is confined.

The CHAIRMAN. Well, I suppose if that is true though, it is not the fault of the law.

It is probably the fault of the Congress, or possibly the District Commissioners in failing to provide sufficient money to adequately staff and give the facilities to St. Elizabeths that its needs.

Mr. ROBERTS. Mr. Chairman, there is no question about that fact, that St. Elizabeths has been overloaded for years and has never had its required appropriations for either physical facilities or, which is vastly more important, for the manpower at the present price of psychiatrists as compared with the price of psychiatrists before they became so popular some years ago.

The fear clearly is that it is insecure in two aspects, first, physically insecure, so that dangerous persons who are in fact, criminally confined, can escape and can again attack the population and, secondly, it is insecure in the sense that there is a lack of confidence in the test measures of the staff of St. Elizabeths as to the tests they apply in the final release of the prisoner.

I am sure that this very largely motivates the public.

The CHAIRMAN. I am interested in this field very much. I have asked the staff to check out every single case, since the *Durham* decision, as to what has happened to defendants who have been acquitted by reason of insanity, if they have been committed to St. Elizabeths, how long they have been held there, when were they released, and what test was applied when they were released. I was very much impressed yesterday by the testimony of Dean Pye, the testimony of Dr. Overholser, and Dr. Guttmacher, from Baltimore, and particularly Dr. Overholser to the effect that, statistically, that those committed to St. Elizabeths Hospital were institutionalized for a longer period of time than they would have been if they had been convicted of a crime as a sane person.

To me, this is a very interesting statistic, and I am going to ask the staff to check it out so we will have a case history of this, because I think this is a message that should go to the community as soon as we have established its veracity.

Mr. ROBERTS. Senator, I think that is of the utmost importance, and I would like to suggest, with reference to the environment in which most of the thinking, considering this legislation, has occurred.

For example, in U.S. News & World Report, the October 21 issue, which is coming out or was coming out at the time of your hearings, there is a many-page interview with Robert B. Murray, the Chief of Police——

The CHAIRMAN. Yes; I read it very carefully.

Mr. ROBERTS. And this, of course, sets forth, I presume, in the words of the Chief of Police, to a large degree that certainly to some degree, in the words of the writers of the interview, a very strong position which, in effect, says nothing at all about any inquiries into the criminal rate which may be available to the prosecution methods but, on the whole, attributes the entire increase in crime and the alleged desirability of the District of Columbia as a home for criminals to deficiencies in the system of judicial execution, to the improper conduct of the bar, and to the weaknesses of the system at St. Elizabeths.

I think that in order for the committee to fully consider the aspects of the omnibus bill the committee should realize, as I know it does, that there have been for several years now certainly since the *Durham* rule and before, a very strong and persistent publication of conclu-

sions with respect to criminal law, and to the care of criminals which is bound to be read, and it is bound to affect the opinions of the intelligent people in the District.

The CHAIRMAN. I agree with you.

Mr. ROBERTS. In that article I notice the Chief of Police said, concerning insanity—this is all a great discussion on the subject of the *Durham* rule about people who have never read it and about the whole treatment of this problem, and he says merely:

> Question. Have court decisions on insanity here affected law enforcement?
> He answered: 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.

One single question and answer directed toward something that is occupying or has occupied hundreds of columns of newspapers and editorial comments, which has agitated and disturbed citizens and which, I am sure, has affected the courts.

It seems to me that the publication of such articles on a nationwide basis, together with uncensored statistics therein contained, may account to a degree for the uncertainty of public opinion, and they certainly should not overaffect the determinations of the Senate and the Congress in applying criminal laws to the individual.

The CHAIRMAN. Well, I could not agree more with the section to which you have just referred.

I happened to read it before we started our hearings on Tuesday, and I specifically asked the Chief of Police the following question about the section to which you have just referred.

> Now, does that statement in the U.S. News & World Report correctly reflect your views on the present handling of insanity 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 by case law?
> Mr. MURRAY. Yes, sir.
> The CHAIRMAN. By the decision in the *McDonald* case?
> Mr. MURRAY. Yes, sir; that is what I meant.
> The CHAIRMAN. 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 do not make it as 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. This was Chief Murray's testimony on the day before yesterday, Tuesday, October 15.

Mr. ROBERTS. In that connection, I should make very clear that the position of the federation is that they want the law amended or the law defined to include the right-from-wrong test as stated in their resolution.

I call attention, however, that under title II the proposal of the bill is an attempt to place in statutory words the right-and-wrong test.

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 requirement of the law was impaired at the time of the criminal conduct, which is as near as I can determine a statutory effort to define the right-and-wrong test and the capacity to recognize right from wrong at the time.

As I look upon the statute it does more than merely clarify, however, the *McDonald* modification of the *Durham* rule and is more an attempt to reestablish, in modern aspect the *M'Naughten* rule than otherwise, as for example merely to say that the present court decisions do not impair criminal prosecution in the District of Columbia or successful criminal prosecutions, would not take away the desirability of the bill with regard to the precise standards that a person who has been acquitted by reason of insanity, to use a trite way of saying it, and has been confined in an institution, can then be released to the public.

The act was very useful to the extent in which it tries to place in a vague realm the jurisdiction of the psychiatrists and the doctors some rule for them similar to the rules that have for hundreds of years been applicable to the judges and the juries.

So I do not think that it is sufficient to say that there is no need for the bill or its provisions merely because there appears to be an adjustment to the methods of prosecutions where the allegation of the defense of insanity has been presented.

Mr. ROBERTS. The third matter that the federation expressed itself quite firmly on was the question of title III, with regard to investigative arrests in which the constitutional protections were invoked and administrative action taken in the District of Columbia to restrict the police from the so-called investigative arrests or arrests on suspicion.

They are satisfied with the language that where the policeman may make the arrest he has probable cause to believe that the suspect has committed or is about to commit or is committing a crime.

There were variations of that opinion expressed in connection with this matter, and I would attempt to substitute, in some instances, different language.

I think the determination of the federation, in accepting the language of the bills, is based on the great hazard involved in trying to set up new language for something that has been established by rulings of the courts for a great many years, and I think it is clearly understood what "probable cause" means.

It has been defined innumerable times in closely tried criminal cases.

There is no doubt of their position that they want to restore to the police the opportunity to be certain that they can make an arrest when there is probable cause, but I think they should be equally credited

with knowledge of the constitutional provision that, without any cause at all, the use of police-state methods would not be considered to be satisfactory to the federation.

Under title IV the simple statement is made that the federation voted to enforce section 401, which adds robbery to the list of definitions of crimes of violence.

That was the only action they took with respect to the section, and I have no comment upon it.

Now, as to title V, in a closely divided vote and after vigorous debate, the federation voted to endorse increases in minimum sentences and the establishment of mandatory minimum sentences as contained in several sections of the title.

That is the federation's action, and I am so reporting.

Reverting to the subject of the *M'Naghten* rule, or *Durham* rule, or whatever name you choose to apply to it, I believe the committee has had an opportunity to see an article entitled "M'Naghten Rule and Proposed Alternatives" by Jerome Hall, which appears in the current issue of the American Bar Journal.

I call attention to this authority, and he is an authority, and he is very skillful, and he ends up the review by saying "We ought to study it more" and I would like to make reference to that article in case——

The CHAIRMAN. It has been incorporated by reference in the hearings, Colonel, and it is our hope and our present understanding that the author of the article will appear before this committee personally.

Mr. ROBERTS. Fine.

The CHAIRMAN. Because Mr. Jerome Hall is recognized as one of the leading legal authorities in the very difficult area which we are holding hearings, and we do contemplate having him appear before this committee as a witness.

Mr. ROBERTS. I would like to conclude my statement by saying that the federation's general attitude on the subject of the omnibus crime bill is one of a very firm determination to aid the police organization of the District of Columbia and the processes of the courts in trying to get a correction in the prevalence of crime and to reduce the frequency of crime, unpunished crime and repetitive crime in the District of Columbia, very strongly, whether it be by increased appropriations, increased policemen, increased efficiency, or otherwise and, secondly, they are very appreciative of the length of time that has been allocated by both the House and now by the committee of the Senate to this subject and its cognizance of the constitutional provisions that govern.

The CHAIRMAN. Thank you very much, Colonel Roberts.

We always appreciate your appearance here as one of our witnesses.

Mr. ROBERTS. Thank you.

The CHAIRMAN. We will stand in recess until next Tuesday at 10 o'clock.

(Whereupon, at 12:10 p.m., the committee was adjourned to reconvene at 10 a.m., on Tuesday October 22, 1963.)

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

TUESDAY, OCTOBER 22, 1963

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

The committee met, pursuant to recess, at 10 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 E. Judd, professional staff member.

The CHAIRMAN. The committee will come to order.

This is a continuation of our hearing on H.R. 7525. Although we have not concluded our examination on title II, the so-called *Durham* rule, we will commence this morning with title I, with what is referred to as the *Mallory* rule.

We still have several witnesses to hear on the *Durham* rule, but they cannot be present today. We will hear them at a later time.

Our first witness this morning on title I will be Oliver Gasch, former U.S. attorney in the District of Columbia, and past chairman of the District of Columbia Law Enforcement Council.

Again my thanks and appreciation to you, Mr. Gasch, for your courtesy in appearing and giving us the benefit of your views on title I.

STATEMENT OF OLIVER GASCH, ATTORNEY, WASHINGTON, D.C.

Mr. GASCH. Thank you, Senator. I appreciate the opportunity of stating my views.

As was the case in my testimony concerning the American Law Institute formulation on insanity as a defense in criminal cases, the views I expressed are my own and are not to be attributed to the Bar Association of the District of Columbia, of which I am an officer.

This morning I should like to address my remarks to rule 5A and its interpretation in the *Mallory* case.

I think the key sentence in that decision is the requirement of rule 5A is part of the procedure devised by Congress for safeguarding the rights of the individual without hampering effective and intelligent law enforcement.

I say that that is the key sentence because I believe that sentence provides the basis wherein Congress may examine the effect of the

Mallory decision and make a determination as to whether in its judgment either the rights of the individual are being safeguarded or whether effective and intelligent law enforcement is being hampered by that decision.

In short, the Court recognized the need for a balance between these two competing forces—recognizing and safeguarding the rights of the individual on the one hand, and maintaining effective and intelligent law enforcement on the other.

I think it is important that we look into this situation insofar as it applies to the Nation's Capital, for recent statistics indicate that our city is either in the lead or is second in the Nation for cities of comparable size insofar as the crimes of robbery and aggravated assault are concerned.

It is not that I am less interested in safeguarding the rights of the individual than some others; it is that more emphasis seems to have been given this side of the balance than the side which pertains to the maintenance of effective and intelligent law enforcement—that I should like to speak about the latter consideration. I should like to emphasize that we are not seeking legislation for the benefit of the police; we are seeking legislation for the protection of the innocent, potential victims of these crimes in which Washington leads the Nation.

I think we should always bear in mind the situation which concerns the Miksa Mersons and the Newell Elliott, Juniors, and other people who innocently have walked the streets in the evening hours and have wound up victims of murder.

Now, some consideration has been given to the meaning and effect of rule 5A. And I agree that it is a very salutary provision to require the police to take the person arrested before a judicial officer without unnecessary delay.

I also agree that no person should be arrested or could be lawfully arrested in this jurisdiction unless the police had probable cause to believe that he was involved in a crime.

However, it is on the question of sanctions that I would like to direct these remarks. And I think in considering what Congress had in mind at the time it gave its authorization for the drawing up of the Federal rules, we should turn to the work of the Committee of the Supreme Court which drew up these rules.

In my prepared statement which I have lodged with the committee, I refer to the place in the records of the Senate where this information is specifically contained.

But in accordance with the testimony of Judge Holtzoff before Senator O'Mahoney's subcommittee of the judiciary, it appears that as that rule was first conceived, those who drafted it stated specifically that if testimony were procured in violation of the requirement that the individual be arraigned without unnecessary delay, that that testimony would be inadmissible in court.

When the full committee considered this proposed rule, it rejected it, Judge Holtzoff says, by a strong vote.

And as the sanction was deleted from the committee work, it was approved by the Supreme Court and acquiesced in by the Congress.

I think that circumstance is quite important, because it is with respect to the sanction that most of the difference of opinion exists today.

There are those—and I would say I have the greatest respect for them, both personally and professionally, like my friend Irving Furman of the American Civil Liberties Union—who feel that the sanction is necessary in requiring the police to conform to rule 5(a).

However, I would suggest for the committee's consideration that if the sanction is imposed and voluntary statements are excluded from evidence, it is the public that is penalized, not the police, and it is effective law enforcement that is penalized, not the police.

It is to the extent that we should try to make law enforcement as efficient as possible that we should reexamine the theory of the sanction.

It goes back to 1914 and the *Weeks* case. That was a search-and-seizure situation. And I am not going into a great deal of detail on that, other than to say that where you are dealing with one's home, and the opportunity of law enforcement to enter one's home, I think you are dealing with a substantially different concept than the question involved in the interrogation of one who has been believed to have been involved in crime.

The sanction has a tendency to immunize the individual accused of crime from the effects of his wrongdoing, and could have a very unfortunate effect if we had a police force other than as honest as I believe our police force to be, because if a police officer wished to confer immunity for one reason or another upon a suspect, all he would have to do would be to detain him longer than the reasonable period for interrogation, and then nothing the individual has said could be used against him in court. And there is a tendency, reflected in the *Killough* case, decided about a year ago, to extend the *Mallory* rule.

This involved a postarraignment, or postwarning confession, which some members of the Court felt very strongly should be admitted and considered by the jury. There is no question about the voluntary nature of it. But the majority of the Court felt it was tainted with the illegality of the first confession, and therefore it was excluded.

I have noticed in recent cases that this doctrine, by virtue of which the second confession was excluded in the *Killough* case, namely the fruit-of-the-poisonous-tree doctrine, the *Nardone* doctrine, that defense counsel have made a renewed effort to inject this doctrine into all facets of evidence learned as a result of detention, the legality of which they question.

I would like to say to the committee that during the time I was U.S. attorney I recognized the importance of having a series of lectures for the guidance of the police, for the information of the police, insofar as these decisions were concerned.

Those lectures have been printed and are available to the committee. The police made the suggestion originally that we have these lectures. And I think they have been very effective.

Also I would like to say we gave consideration to the Police Chief's request that we give suggestions to him as to how his work may be made more effective as a result of the impact of the *Mallory* decision.

I would like to file with the committee a statement which he has brought to my attention, which I gave him some 3 years ago for use with the Appropriations Committee on this subject.

In brief, I suggested more men, men better trained, men who understood the impact of this decision and who are prepared to work around the clock with it.

All this is costly. And I wanted the Appropriations Committee to know that. But I felt we had no alternative under this doctrine.

Now, in spite of the fact that he has received what he considers complete cooperation from the Congress, insofar as his appropriation requests are concerned, the crime rate still continues to rise, he still continues to have these problems. And it is in the area of interrogation of persons arrested that I think he does need some help.

I think that the statement made in title I respecting confessions and admissions otherwise admissible—by that we mean voluntary in character—shall not be deemed inadmissible solely because of delay between arrest and a preliminary hearing.

I think that would do much to take care of the problem with which we are confronted.

The CHAIRMAN. Well, at that point, Mr. Gasch, quite possibly you have covered it in your prepared statement—as you know, the Department of Justice and the U.S. attorney take the position that title I may raise constitutional problems.

Now, I recognize, and I would like to have your comments on that—I recognize the *Mallory* rule does not turn upon a constitutional provision, it turns strictly upon the interpretation of "without unnecessary delay" as written into rule 5(a).

The Department of Justice, in their letter to this committee, dated September 13, 1963, stated the following:

> 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 assures 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 committing 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.

I would appreciate your comments upon that particular portion of the letter that the Department of Justice forwarded to this committee concerning title I of the House passed bill.

If I understand you correctly it is your opinion that title I of the House bill would stand a constitutional test.

Mr. GASCH. Yes, sir. In the first place, I would emphasize that what the Supreme Court was concerned with in the *Mallory* case was an interpretation of a procedural rule, 5(a). There is no indication that the Court considered that they were dealing with a constitutional situation. That is true also in the earlier *McNabb* case, where they were dealing with certain statutes which required immediate arraignment.

They did not consider that a constitutional question was involved in that situation.

Now, of course, it is familiar doctrine that the Court does not go to the constitutional provision if it can decide an issue on other bases. And that is possibly what would happen.

But I would not assume or presume that there was a constitutional question here unless I had better indication than these facts seem to indicate.

Now, of course, what the Supreme Court may do in the future is something that is very difficult to forecast. But in the interests of the public, I would certainly not withhold the type of protection that I think title I gives because of the fear that the Supreme Court might subsequently make a holding—that is, of course, within their prerogative to do so.

I would point out simply that if we adhere to the provisions of rule 5(a), and if the court submits to the jury under proper instructions the question of the voluntariness of the confession, as I am sure they would, or the admission, that I do not see that you have a constitutional issue at that point. I would invite the committee's attention to the fact that the criterion of voluntariness is the traditional criterion that has been the basis of our decisions in this area since we have been a nation.

Voluntariness is the criterion in England.

Now, I think it is entirely possible that if the delay in the hands of the police amounts to unreasonable delay, that the court as a matter of law would exclude the confession.

I have had intimate experience, as the Senator knows, with the judges of our local court, and I know that they are most scrupulous in protecting the rights of the individual. And this was prior to Mallory as well. And certainly the judges of the appellate court are very careful to see to it that tainted evidence is thrown out and convictions which in any way flow from tainted evidence are reversed.

So it would be my view that the rights of the individual are adequately being protected under the legislation which is proposed.

The CHAIRMAN. Thank you. Thank you for your response to that question. I did not mean to interrupt you, Mr. Gasch.

Mr. GASCH. Well, I had practically concluded, sir. I think that one comment on the comparison that is made with the FBI and its work perhaps is indicated.

There are those who say that because the FBI is able to operate nationally without seeking such legislation, that it is not needed locally.

I think there is an obvious difference between a city police force, a good city police force like ours, and a national organization like the FBI.

The FBI handles a different type of crime generally than the common law crimes of violence that we are concerned with in this area. The FBI is able to select most carefully its agents. And the FBI, of course, has the benefit of the national resources, the international resources of that organization.

These mark the significant differences between the FBI and the local police force.

A local police force must operate within the confines of its jurisdiction. Because the FBI is able to operate without such helpful

legislation does not mean that it is not necessary for a local police force.

I repeat that it seems to me the essential question is the right of the individual to walk the streets in relative safety. In this jurisdiction today he does not have that right. We are leading the Nation insofar as these two particular crimes of violence are concerned—assault and robbery. And that is not a good situation for our Capital City.

I feel if the police had this additional opportunity of interrogating individuals that would flow from this legislation, that it would have a most salutary effect, and for that reason I do support it.

The CHAIRMAN. How far should such interrogation be permitted, Mr. Gasch? This seems to be the point on which all of this problem turns.

In reading the *Mallory* decision, which is simply an interpretation of rule 5(a), the Supreme Court's decision made it clear that following an arrest there is to be very little more done than actually taking a case history of the suspect. It would seem to me that is about all it permits.

Do you agree with that?

Mr. GASCH. Yes, sir—very little delay between the point of arrest and the time at which the individual must be taken before a judicial officer for warning as to his right is permitted.

The Court said that he may be booked and the usual police procedures followed. It also says that a brief delay is permissible for the purpose of checking his story.

I would say it involves a matter of a couple of hours perhaps, something like that. And if I may say so, Mr. Chairman, when I was U.S. attorney we had an arrangement whereby, where preliminary hearings under rule 5(a) were necessary, they could be held in the middle of the night, and they frequently were held in the middle of the night—where we felt we were absolutely dependent upon a confession or admission in a given case, and we wanted to minimize the opportunity of a reversal on this point.

The commissioner judge was gotten out of bed, and they were warned of their rights.

Now, I would say where every effort is made to expedite the judicial warning, that what transpires between the police officer and the accused person prior to that time should be admissible, even under the *Mallory* doctrine, provided, of course, the police are not seeking to delay this preliminary hearing.

It is a difficult thing. I hate to get judges and commissioners out of bed in the middle of the night—but we did so.

In the *Porter* case, Mr. Justice Reed, sitting on the circuit by designation, said it was not necessary. But there were differences of opinion among his colleagues on the court of appeal on that question.

And I sought wherever possible and wherever we thought it was necessary to have these preliminary hearings just as soon as possible after the arrest where we thought it was necessary to comply with the restrictions of the *Mallory* doctrine.

Now, while we are waiting for preliminary hearing or while we are complying with normal police practices, I think some questioning of the suspect is entirely proper.

I point out in my statement that some of the judges of our court of appeal seem to take the position of the *Trilling* case, the dissent there, that no questioning between arrest and the preliminary hearing is possible or is proper.

One of the difficulties, of course, with which law enforcement has been confronted is that there is a sharp difference of opinion, reflected in the *Trilling* case, reflected in the *Killough* case, as to what the meaning and effect of the *Mallory* doctrine is. That is one of the things with which the prosecution and the police are confronted. Because no one ever knows—at least I have never learned the secret of learning what panel you are going to get when you walk up to the fifth floor to argue an appellate case. You may have one panel, you might have another one. It would make all the difference in the world, depending on which panel you get.

The fact is there is a difference of opinion.

I think this legislation, this proposed legislation, would clarify that situation.

The CHAIRMAN. Of course the portion of the decision that disturbs me in the *Mallory* case is this sentence here. First I will read the preceding sentence:

> The arrested person may of course be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself even if not so designed to eliciting damaging statements to support the arrest and ultimately his guilt.

Now, my inquiry of you, if this is the law of the land, and it is the decision of the U.S. Supreme Court in construing 5(a) as it now exists, what can the police do with the suspect? What can they ask him, if officers are not permitted to question the suspect about the crime? That sentence disturbs me. What can they ask him?

Mr. GASCH. It is a disturbing sentence, there is no question about it, sir. I would agree with you.

I recall one case, I think it was the *Pearson* case—reference is made to it in an interrogation by Senator O'Mahoney in the hearings before his subcommittee of some of the witnesses—I think it was the *Pearson* case—in which Judge Curran ruled that delay of about an hour was adequate to throw out the admissions and confessions made for the reason that the police officer said "I took this man to headquarters to get a confession from him."

So I think that it is a question of the purpose for which the man was taken to headquarters. If he was taken to headquarters primarily for that purpose, then, of course, Judge Curran or his brethren might feel as though admissions or confessions made were unlawful, to be excluded.

On the other hand, if he was taken to headquarters for normal police procedures, such as booking and fingerprinting and the like, and incident thereto, while waiting for the preliminary hearing before the commissioner, there was conversation which resulted in admissions or confessions, then I think that circumstance would not necessarily exclude those admissions or confessions.

The CHAIRMAN. I would like your comment on a couple of other points made by the Attorney General in his official report to us. He

cites some of the extreme applications. He says, citing the *Jones* case and the *Muschette* case:

> 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).

It seems to me what the Justice Department is saying there is that rule 5(a) is not to be used to cut off interrogation by the police.

But where do you draw the line?

Mr. GASCH. Well, Senator, may I comment briefly on the importance of interrogation? I think it is the single most useful tool that the police have in solving crimes, particularly the type of crime that we get here in Washington—street crimes.

Justic Clark, I think it was, in *Crooper* v. *California* emphasized that point, and said, in the concluding paragraph of the opinion of the court, that to preclude interrogation by the police would have a devastating—that word is his word—devastating effect on law enforcement.

Now, on the question of whether legislation can set up appropriate standards for interrogation, I was impressed in reading over the testimony of Mr. Furman on that point—Mr. Furman of the ACLU—and his appearance before Senator O'Mahoney's subcommittee. He mentioned the judges' rules in England which had been set up for the purpose of deciding upon some standards for the control of the police in interrogating persons accused of crime.

I think, perhaps, those standards could properly be drawn by the judges. Certainly, the manner in which the standards are applied in England is quite reasonable. They are not rigidly applied. They have some flexibility—in accordance with what Mr. Furman said about them.

I recall my conversation with the English Attorney General when he was over here, perhaps 5 years ago, to address a bar association dinner. He said that these standards were applied, as he put it, with intelligence, and they did not constitute an impediment to effective law enforcement. He also was somewhat impressed by what I told him our restrictions were timewise, and he said in England, frequently, the delay between arrest and preliminary hearing amounted to a week. But he said, at the expiration of that week, their rules require that the Government divulge all its evidence to the accused and his attorney. So there was quite a meaningful pretrial at that point in the government's case. We have never gone that far, though there is a present tendency—witness the afternoon program of the Judicial Conference last year—to go into the question of criminal discovery.

But I see no reason why standards should not be established.

I think, perhaps, it would be more effective for the judges in this country to set up those standards as they have in England. But I think that if we get into the drafting of standards as I understand

the proposed Justice bill to do, we may have a situation that is comparable to an airplane that is built with such safety that it never gets off the ground.

It so happens, at the present time, I represent the aircraft builders, and I recently had occasion to go into the construction of landing-gear struts and that kind of thing in connection with an accident here locally. Metallurgists and engineers have assured me that you can build a strut so strong that it will never fail, but it will constitute such an impairment in the payload of the airplane that there is no point in designing such an airplane. I think, with legislation that writes in as many standards and safeguards as you can think of, it will not be very effective insofar as intelligence law enforcement is concerned.

The CHAIRMAN. What safeguards do you think should be written in to meet the constitutional test? Should not the defendant be advised of his right not to make a statement, but if he does that it might be used against him? I suppose you would certainly agree to that.

Mr. GASCH. Yes.

The CHAIRMAN. Do you agree that upon an accused being taken into police custody that he should be immediately told he has the opportunity to consult with an attorney?

Mr. GASCH. This raises a serious question. And I am thinking of the *Cicenia* and *Crooker* cases in the Supreme Court, in which that was the issue. Both these men demanded lawyers. One was a case in New Jersey—*Cicenia*. The *Crooker* case was in California.

I think it was in the *Cicenia* case that the courts said, "We have not gone so far even in Federal jurisdiction as to require that an individual be given the services of a lawyer at the police station." And I mention the *Cicenia* for another reason.

The CHAIRMAN. But should he be advised of his right to have a lawyer immediately?

Mr. GASCH. Well, I do not have any real objection to that. But I think that gets you into the point of the providing of a lawyer before there can be any interrogation. I think if you do that, you will find that there will be no interrogation, because any lawyer—any lawyer that I know—would certainly say first off to his client "Don't talk." That would be under the interrogation.

The CHAIRMAN. Well, what type of interrogation, then, would the police engage in view of the *Mallory* case? It seems to me the *Mallory* case allows the police to do very little except to get a biography of the man.

Mr. GASCH. The *Mallory* rule does not provide much of an opportunity.

The CHAIRMAN. For interrogation.

Mr. GASCH. That's correct. But it does provide some opportunity, and I think that opportunity should be preserved.

The CHAIRMAN. An opportunity to discover what, Mr. Gasch?

You pick up defendant X, and he is a suspect. Upon what can you interrogate him?

Mr. GASCH. Well, oftentimes you can find out where he has been, with whom he has been, what they have been doing, and you can establish a basis for further investigation of the case.

Now, I would agree with the *Mallory* case, as I said earlier, that the police should arrest only on probable cause. I do not disagree with the Horsky report on that point. Presumably, the police have before them one who has committed a crime, or at least who is presumed, who is believed to have committed a crime. The police have probable cause to believe he has committed a crime.

The CHAIRMAN. Well, that being true, why don't they take him immediately before the committing magistrate?

Mr. GASCH. Well, there is a difference, sir, between probable cause, the prima facie case which the police need for the presentation of the case before the grand jury, and guilt beyond a reasonable doubt, which they need to establish if the case goes to court. So even though they may have probable cause, additional investigation is necessary, and interrogation is part of that investigation, as I see it.

The CHAIRMAN. I realize this is a most difficult area.

Mr. GASCH. No question about it, sir.

The CHAIRMAN. I am just wondering if you can write it into legislation, the proper guidelines, to come up with a constitutional provision that adequately protects society and at the same time protects the constitutional rights of the defendant under the various provisions of the Constitution.

Your opinion is that the present title would be constitutional.

Mr. GASCH. That's my opinion.

The CHAIRMAN. Of the House bill.

Does counsel have questions?

You know Mr. McIntyre very well. He is a former assistant U.S. attorney. He suggests this question: Under the so-called Mallory provision contained in the House bill, statements and confessions would not be inadmissible because of delay in taking an arrested person before the commissioner. If this is so, what if anything would motivate the police to exercise any measure of expediency in taking an accused in their custody before a U.S. commissioner?

Mr. GASCH. Well, if the confession is the product of unreasonable delay, I would say as a matter of law the trial judge would exclude it. If there is an issue as to whether the delay is reasonable or otherwise, then it is for the jury. That is a proper safeguard, I think, to the rights of the individual.

The CHAIRMAN. Of course the present wording is, "because of delay," and as you very well recall during the hearings that were conducted before Senator O'Mahoney's judiciary subcommittee on the admission of evidence in 1958, there was written into this particular provision the word "reasonable delay."

Mr. GASCH. I have no objection to that addition. In fact, I think it is implicit in the language that it be there, because if the delay were other than reasonable, it would certainly bar the admission of the confession or admission.

The CHAIRMAN. Would you also favor a proviso being written into title I of H.R. 7525 that is similar to that which was written into H.R. 11477, 85th Congress. Such proviso reads as follows: "provided that such delay is to be considered as an element in determining the voluntary or involuntary nature of such statements and confessions." This proviso was added at conference. Then as you may recall the matter came back to the Senate side, it was late in the session, and the conference report with regard to H.R. 11477 was not adopted.

Mr. GASCH. There was a point of order raised.

The CHAIRMAN. That's right.

Mr. GASCH. I think this also is implicit. I do not think it is necessary to put that language in. It could be left in the committee report. But I think it is implicit that it is one of the elements to be taken into consideration.

I am sure that would be the first thing that any trial judge would think of, as to whether the confession or admission is the product of an unnecessary delay.

The CHAIRMAN. A further question.

Is it a fact since the *Mallory* decision was decided by the Supreme Court several cases decided by the U.S. Court of Appeals for the District have sanctioned the questioning of an arrested person prior to his being taken before a U.S. commissioner in order to verify his story concerning the commission of a crime?

Mr. GASCH. Yes, I think that's true.

The CHAIRMAN. And is it also true that they verify it through third parties, when they are available, as to the commission of a crime?

Mr. GASCH. Yes.

The CHAIRMAN. Does it appear that if the appeal court decision were to be extended any further in the matter of allowing police to verify an arrested person's story, that the questioning by police might assume the nature of a proceeding that would provide opportunity for extraction of a confession?

Mr. GASCH. Well, of course I think you cannot draw a line, as some of the legislation seeks to do, to say the police should have 6 hours or 12 hours, as Senator Butler's bill did some years ago. I think that the period of delay between the arrest and the preliminary hearing must be a reasonable delay, and if anything other than a reasonable delay is encountered, during that additional period the confession is obtained, then I would question whether the court would permit that confession to be considered by the jury.

The CHAIRMAN. Who determines the voluntariness of the confession in the District of Columbia, in the District courts? Is this determined by the judge without the jury?

Mr. GASCH. If there is no factual issue, it is determined by the judge.

The CHAIRMAN. In the absence of the jury.

Mr. GASCH. That's right, sir. If, on the other hand, there is a factual issue, the judge submits the question to the jury.

The CHAIRMAN. Thank you very much, Mr. Gasch. I certainly appreciate your continuing interest and valuable advice in this field. It is very, very helpful. We appreciate it a great deal.

Mr. GASCH. Thank you, sir.

(The statement referred to follows:)

CRAIGHILL, AIELLO, GASCH & CRAIGHILL,
Washington, D.C., October 22, 1963.

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

DEAR MR. CHAIRMAN: In response to the committee's request, I am pleased to present my views herewith. I should like to state the views which I express are my own personal views and I express them as an individual and not as an officer of the Bar Association of the District of Columbia.

Since the *McNabb* case approximately 20 years ago, interest and emphasis on the part of lawyers and judges has shifted to the rights of the individual accused of crime. Mr. Justice Frankfurter, who wrote the opinion of the Court in *Mallory*, recognized the importance of safeguarding both the rights of the individual and the balancing need for doing so in such a way as not to impair effective and intelligent law enforcement.

It is not that I am less interested than others in safeguarding the rights of the individual, it is only because I am convinced this aspect of the balance will be dealt with effectively by the courts that I should like to emphasize in this communication my views respecting the maintenance of effective and intelligent law enforcement. It is important to recall the admonition of the Supreme Court in the *Berger* case that the prime objective of the prosecutor should be to see that justice is done and that he should regard himself as the servant of the law, the twofold aim of which is that guilt should not escape nor innocence suffer (295 U.S. 78, 88).

Since the *Wan* case[1] in the early 1920's, courts and lawyers have been haunted by the fear of coercion exercised by unscrupulous police officers to the extent that there are some today who would do away with all interrogation.[2]

Interrogation is a vitally necessary tool in the solution of the most difficult types of crime; for instance, murders, rapes, yoke robberies, and crimes of violence in which the victim is either killed or so badly beaten as to be unable to assist in identifying the perpetrator of the crime. If a description is furnished at all, that description is likely to be meager and general. If the police are deprived of the opportunity of interrogation, our rising crime rate will certainly not be curtailed. On the other hand, it seems logical to conclude that if felons learn that they cannot lawfully be interrogated, it will have a devastating effect on law enforcement. The Supreme Court recognized this in *Crooker* v. *California* (357 U.S. 433, 441).

The stake of the innocent victim of violent crime is not alone his personal stake. It is closely akin to the rights of the people, generally, to use the streets in safety. We tend to lose sight of the rights of the people, generally, in our desire to safeguard the rights of those accused of crime. As Mr. Justice Frankfurter emphasized in the *Mallory* case, the delicate and difficult balance between safeguarding the rights of the individual without hampering effective and intelligent law enforcement is part of the procedure devised by Congress.

In the years directly following the *Mallory* decision, the U.S. attorney's office gave a series of lectures to the Police Department at the request of the Chief of Police on the effect of this decision on police procedures. These lectures are printed in the hearings before Senator O'Mahoney's subcommittee of the Judiciary Committee of the Senate: S. 2970 at page 396 (1958). Also filed by the Chief of Police with the House Committee on Appropriations on January 18, 1960, was a memorandum which I prepared for him setting forth the importance of increasing the size and training of the Police Department. A copy of that memorandum is attached hereto.

These detailed suggestions have conscientiously been followed but serious crime, particularly robbery and aggravated assault, has increased to the point that Washington either leads or is second in cities of comparable size in the Nation.

Whether there is a direct relationship between the restrictions imposed by the *Mallory* decision and the sharp increase in crime requires a wiser judgment than I am competent to make. Some of the other factors that have entered into the picture are: the unusual backlog of cases in the juvenile court which precluded the effective functioning of that court as a crime prevention agency; the closing of the Police Boys Club; the aggravated overcrowding in other sections of the city due to the Southwest redevelopment project; vast population shifts in and out of the city and the job dislocations incident thereto. It is also noted that nationally crime rates have risen.

The swiftness and the certainty of punisment has long been regarded as a crime deterrent. This more likely to be an acceptable conclusion insofar as robbery and assault are concerned than in the case of crimes of passion. The imposition of restrictions on police work which prevent interrogation or limit the extent to which it can be used do little or nothing to make law enforcement more efficient or effective. In some instance, particularly insofar as street

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[1] *Wan* v. *U.S.*, 226 U.S. 1.
[2] *Trilling* v. *U.S.*, dissenting opinion, 260 F. 2d 667, 686.

crimes are concerned, it may render law enforcement quite impotent. To say to a city police force: You must operate as does the FBI is no answer. The nature and character of the cases are different. The city police force lacks the trained personnel, the resources, and nationwide organization of the FBI.

What then does the *Mallory* doctrine require and what is the area within which Congress may legislate in the interest of improving and making more effective local law enforcement.

The *Mallory* case makes it clear that lawful arrests must be predicated on probable cause. To arrest without probable cause and on mere suspicion is unlawful. There has been an extension of the *Mallory* doctrine in the *Killough* case, decided about a year ago, in which a postarraignment confession was excluded because it was "tainted" with the illegality of the first confession. Efforts are now being made to apply the "fruit of the poisonous tree" doctrine to all evidence learned as a result of illegal detention. The courts have seen fit to impose sanctions for the reason that they have felt that it is the only way effectively to bring about compliance by the police force with the rules of arrest.

These sanctions actually penalize the public more than the police force. They have a tendency to insulate the criminal from the consequences of his wrongdoing. If the police force were less honest than I believe our police force to be, it could result in a calculated, deliberate move on the part of the police to protect by this expedient, criminals who otherwise would be prosecuted.

In this connection, I have emphasized to the Chief the necessity of continuing a series of seminars and lectures which were instituted during the time I served as U.S. attorney. It is absolutely necessary that the police know the decisions of the court, particularly the limitations emphasized in these decisions so that their work in the future will be guided by the teaching of these judicial precedents.

It is my feeling that more men, better educated in these decisions and better trained in procedures required to meet these decisions are necessary because of the impoct of these decisions and particularly the sanctions which are incident thereto.

In both the *McNabb* and *Mallory* decisions, the Supreme Court was careful to state that it was concerned with the enforcement of a procedural statute or rule. It was not concerned with a constitutional right. It is, of course, familiar doctrine that if a case can be decided upon other than a constitutional provision, the courts does so. Rule 5(a), which was involved in the *Mallory* case, requires that the arresting officer take the person arrested "without unnecessary delay" to the nearest available commissioner. Short periods of delay are sanctioned provided they stem from the need for verifying the story or for normal police procedures, such as booking and so forth, but the court has emphasized that it is unlawful to take the arrested person to the police station for the purpose of extracting a confession.

I have felt and I do feel that since the Supreme Court indicated that the basis of its decision was its interpretation of what Congress intended in authorizing such a rule as 5(a) that it is an area in which Congress may speak as to what its intention is.

When rule 5(a) was originally drawn by the Supreme Court's committee, the original draft contemplated the imposition of sanctions insofar as the introduction of evidence obtained in violation of the rule was concerned. The majority of the committee, however, did not go along with the imposition of sanctions and that language was deleted from the rule which the committee recommended and the Supreme Court adopted and the Congress approved. (S. Rept. 1478, p. 5.) It seems to me, then, that there is a proper basis for concluding that Congress did not intend that sanctions be applied whenever law enforcement failed to adhere strictly to the provisions of rule 5(a).

Legislation comparable in form to title I of H.R. 7525 has thrice passed the House. Once under the sponsorship of Senator O'Mahoney it passed the Senate in a slightly different form.

Such legislation would have the effect of tending to restore the balance between safeguarding the rights of the individual and maintaining effective and intelligent law enforcement.

It would still require the police to take the arrested person before the commissioner without unnecessary delay. But it would say to the courts: Congress in authorizing rule 5A does not condone the impositions of sanctions which have the effect of excluding confessions or admissions which are voluntary in character.

Respectfully submitted.

OLIVER GASCH.

The CHAIRMAN. Our next witness was to be Superintendent Wilson, chief of the Chicago, Ill., Police Department. I am advised he has run into some transportation problems and he will be somewhat delayed, so we will hear him at a later time, to suit his convenience.

Our next witness will be Col. Stanley R. Schrotel, chief of the Cincinnati, Ohio, Police Department, and immediate past president of the International Association of Chiefs of Police.

Chief Schrotel, we are very happy to have you with us this morning.

STATEMENT OF COL. STANLEY R. SCHROTEL, CHIEF, CINCINNATI, OHIO, POLICE DEPARTMENT

Chief SCHROTEL. Thank you very much, Senator. My comments this morning, sir, are addressed to title I and title III of the proposed bill 7525 dealing with the *Mallory* decision and an expansion of the arrest privileges as they currently are invoked in the District.

Our free society has created a system designed to identify the person who commits a crime and to give him a fair trial in which the truth of his guilt or innocence is to be established. This system is based on the principle that guilty persons should be adjudged guilty. The trial court is as ethically bound to ascertain the guilt of the guilty as it is to ascertain the innocence of the innocent. Rules that exclude material and relevant facts bearing on the guilt or innocence of the defendant are inconsistent with this principle and with the oath to tell the truth, the whole truth, and nothing but the truth. Since an invalid arrest may result in the exclusion of material and relevant facts, the liberalization of arrest privileges would lessen the likelihood of the exclusion of truth, and would also facilitate the apprehension of criminals and lessen the physical hazards of the police.

The rules that establish the validity of arrest, as well as the other police arrest privileges under discussion, should be established by legislation, as was proposed in 1942 by the interstate crime commission in its uniform arrest act. The courts may then rule on their constitutionality. The decisions would probably be favorable; the provisions of the uniform act have not been declared unconstitutional in any of the States that have adopted them.

Both unbounded liberty an its restriction place basic human rights in jeopardy. Unbounded liberty jeopardizes the security of life and property and, indeed, the security of our free society. Were this not so, there would be no need to place any restrictions on liberty. Restricting liberty, on the other hand, jeopardizes the basic human right to freedom in movement and conduct.

The problem, then, is to prescribe restrictions which will provide an acceptable degree of security without unduly infringing upon individual freedom. The restrictions on liberty now under discussion are adjusted by increasing or decreasing police arrest privileges. They must be so regulated that the price paid in inconvenience and restraint has an equal compensating value in the advantages of greater public security. To keep the scales of justice in balance, the advantages to a free society resulting from a reasonable degree of security in one pan must hold in precise equilibruim the other containing the disadvantages that result from such restrictions.

This means compromise; some liberty must be sacrificed for the sake of security. A compromise is a modification of opposing views so that they may blend to the mutual satisfaction of the opponents. The opponents in the issue under discussion are not the assailant and his victim but instead law-abiding citizens who differ in their appraisals of the danger of unbounded liberty on the one hand and the danger of bounding it on the other. The issue is not simplified by the fact that both groups would like to have at the same time both complete security and complete liberty. The impossibility of achieving both desires simultaneously is recognized, and each group makes a compromise it believes will provide a suitable balance between maximum security and minimum restriction on liberty. Were the appraisals by the groups identical, the problem would be solved. Since opposing groups make different appraisals, a reconciliation of the opposing views must be sought.

Compromise is a characteristic of a free society, the strength of which is derived from consolidating the most acceptable features of opposing views into a workable system. In compromise, each side appraises what it gains in advantage against what it looses in disadvantage; there is then a measure of give and take. The appraisal in a free society is participated in by the citizens with the legislature serving as the arbitrator to say, "This is the way it will be." This democratic process enables citizens to have their desires implemented by law.

In the absence of legislation bearing on some aspect of police arrest privileges, the appellate courts may make decisions that are as binding in their effect as legislative enactments. The process which results in an appellate decision is markedly different from the legislative process. The issue before the court relates to the rights of the appellant, who has been judged guilty by the most liberal system of criminal justice found anywhere in the world. The court considers whether the rights of the appellant have been violated, not by organized society, but by a policeman whose actions are often viewed with distaste because all of the facts which may have justified the action are not on the record. The court ponders the alleged infringement of the rights of the convicted person as a legal abstraction and feels obliged to consider the question as it would apply were the individual innocent. Finally, the desires of the general public for some reasonable measure of security and for a redress of the wrong done to the innocent victim of the criminal are not made known nor are they readily available to the court.

The issue before us does not jeopardize the integrity of the Constitution. Instead, it involves an appraisal of relative dangers, or advantages arrayed against disadvantages, which result from restrictions on liberty imposed by police arrest privileges. Statesmen representative of the people seem better qualified to make fair appraisals of public needs than appellate judges who, by virtue of their positions, are not so responsive to the desires of the public. The fundamental question is not a legal one after its constitutionality has been established. Instead, it is a philosophical problem in the science of government.

People on the whole want protection from criminal attack; they want to feel secure in their homes and on the streets from disturbances

and molestations. To meet this need, local communities in our free society have created uniformed bodies of police to prevent crimes and to bring to court those who commit them. Responsibility for the prevention of crime rests principally on city police forces, sheriffs' departments, and local detachments of State police.

A crime occurs when a person who desires to commit it discovers the opportunity to do so. Such unwholesome desires spring from and are a reasonable measure of criminality. The police cannot prevent the development of criminality, except as their contacts with potential and actual offenders may have this wholesome effect; nor are the police charged with this responsibility. Their basic purpose is to remove or lessen by both physical and psychological means the opportunity to commit crimes.

To prevent crime, the police must either stand guard at every point of possible attack, which is a physical and economic impossibility, or intercept the person with criminal intent before he robs, rapes, or kills. It is better to have an alert police force that prevents the crime than one that devotes its time to seeking to identify the assailant after the life has been taken, the daughter ravished, or the pedestrian slugged and robbed.

The task of the police in preventing crime is quite different from that of identifying the perpetrator and marshaling evidence to prove his guilt. To prevent crime by intercepting the criminal while he seeks his prey is not unlike hunting a predatory animal; prompt and decisive action is called for at a critical moment not of the huntsman's or policeman's choosing. The policeman who fails to act at the critical moment may nonetheless prevent an impending crime, but the criminal who more times than not is wanted for previous unsolved crimes, remains at large to continue his depredations. Restrictions on arrest privileges hamper the police not only in preventing crime but also in clearing cases by the arrest of the perpetrator and in marshaling evidence to suport prosecution.

The local police feel the restrictions imposed on arrest privileges more keenly than do the specialized police agencies. I am mindful of the question you put, Senator, to Mr. Gasch suggesting that some of the opponents to the proposed bill has indicated that Federal agencies such as the FBI have learned to live with the *Mallory* rule. Here we say that specialized police agencies, whose principal responsibility is the gathering of evidence to identify and convict persons after they have committeed a crime, rather than to prevent the act in the first instance.

These people do not feel as keenly as the local police restrictions that the *Mallory* rule imposes.

Frequently the criminal, whose act is within the jurisdiction of a specialized police agency, has already been arrested by local police who often apprehend him in the act or in flight from the crime scene. These are critical moments for police action. In cases where the culprit has not been arrested, the critical moment for arrest can often be set by the specialized police; it is planned after sufficient evidence is marshaled to justify the arrest which is often authorized by warrant. In contrast, most arrests by local police are made without warrant at a critical moment not of their choosing before they have had an opportunity to marshal evidence beyond what they personally observed at the time.

The typical citizen would feel that the police were remiss in their duty should they fail on their own initiative, or refuse on legal grounds, to investigate by questioning a person who was lurking in the neighborhood for no apparent reason. The disturbed citizen would expect the police to discover whether the suspect was armed and, if so, to disarm him and prosecute him should it be discovered that he was carrying the weapon illegally. Should the suspect refuse to explain what he was doing in the neighborhood, and the policeman apologized for questioning him and then went about his duties leaving the suspect to continue his lurking, the citizen would consider that he was not receiving a fair return on his tax investment for police services.

The typical citizen is surprised when he discovers that in many jurisdictions police arrest privileges are so carefully circumscribed by statutory and case law as to render the policeman virtually powerless to deal effectively and safely with situations that confront him almost hourly during his duty tour. The police action demanded by the citizen from his protector is illegal in many jurisdictions.

The police, under local control as in our form of government, are inclined to provide the protection their citizen-employers demand; otherwise the police fail to prevent crime and are subject to sharp criticism for their failure to protect the public. Also, since they usually act with courtesy, discretion, and good judgment, only infrequently is the legality of their acts questioned, and then by a citizen who fails to understand and appreciate the police motive or by a lawyer who uses the incident in the defense of his guilty client.

The discrepancy between what the people expect the police to do and what the police are privileged to do in protecting public peace and security results principally from a lack of understanding of the police purpose and of what the police must do to accomplish it.

The police must accept some blame for lack of public confidence in the means they use to achieve their purpose. Police abuse of their authority must be eliminated, not by withdrawing essential authority or by freeing the guilty criminal, but by raising police standards to a level of trustworthiness and by some action which will penalize the community that employs an officer who abuses his authority.

Police leadership has been dilatory in raising service qualifications and ethical standards. However, the police now have an acceptable code of ethics and their qualification standards are being raised from coast to coast. Each local community should insist on improvement in the quality of its police service until all have achieved professional status. The community that is penalized for abuse of arrest privileges will be likely to demand both higher standards and disciplinary action against the offending officer.

Lack of public understanding of the police purpose and what the police must do to accomplish it is accentuated by two circumstances that tend to cast the police in the role of agents bent on unnecessarily oppressing freedom. The first grows out of police responsibility in the enforcement of traffic and other regulatory laws sometimes violated by the most conscientious citizen, an enforcement that alines good citizens against the police. The other is ignorance of the facts involved in the war against crime in a free society. People are apt to fear and hate what they do not understand—and the hate is often stimulated by traffic violation experiences.

These misunderstandings continue unabated because the police are not a vocal, scholarly group that devotes much time to presenting in a favorable light the facts that bear on the problem. The literature in consequence is principally devoted to the case against the police; little has been written in their defense. The press, the literature, and even case law are all directed at incidents that discredit the police. Small wonder that those who read the papers or research the literature and case law conclude that the police are evil. Information on which a fairer judgment might be based is not generally circulated.

The CHAIRMAN. Chief, do you think that is a general impression? Do you think the American people believe the police are an evil influence?

Chief SCHROTEL. Sir, I am merely saying that the agnostic, who is exposed almost specifically or solely to the current literature, the current news media, entertainment media, sees the police characterized, in my opinion, in a rather unfavorable way.

The CHAIRMAN. I am sorry to hear that, because I did not think that was the common impression.

Chief SCHROTEL. Sir, you are invited to ride the police car, Senator, in these days and times and I am sure you will discover there is a frightening segment of our community who do not regard enforcement, or the symbols of authority, with the degree of credit that I think their office warrants.

The CHAIRMAN. Would that be true of professional people, business people, leaders in the community?

Chief SCHROTEL. No—these are knowledgeable folks. I would say not. I am talking about the large majority of those who do not understand, who are not informed, who are not knowledgeable in the ways of a police mission, and in a manner in which our objectives are at least supposed to be accomplished.

The CHAIRMAN. What would you suggest doing about it? Maybe you develop this a little further on in your presentation. Is this an educational program, where the people should be told more and more that you are the protectors of the citizens of the community, and that you are their friends? How do you get this message across?

Chief SCHROTEL. Well, I think we are here, Senator, seeking for a very effective way of getting this message across.

Let's use the simple illustration that I just alluded to previously, where the citizen who has very little contact with the police, who knows little about his mission, observes in a respected community setting, where they have had a series of burglaries, an individual behaving in a furtive manner, moving from post to post on the public way. But this citizen in the early night sees and observes this man and does what comes naturally—he summons the police. The police arrive, and within the law that is now circumscribed by Mallory and other restrictive devices upon police action, he says to the citizen demanding police service, "I am awfully sorry, but under the law I cannot question this man. He has committed no offense. True, there had been a series of crimes committed in this area, and true he may be the logical person in terms of identifying the perpetrator. But I cannot proceed."

I wonder if this information were generally known to our Nation at large, whether or not they would not hasten to provide more effec-

tive tools for meeting this kind of an emergency. And that is why we are here. I think that to the extent that we are restrained or impaired in containing crime by these restrictive devices, I think to this extent we are bringing more and more discredit to ourselves, because the public tends to look at us as the sole instrumentality in government for the containment of crime.

I know full well this is not so, that this burden is not properly ours. We labor a fair share of it. But in terms of explaining to the average citizen, the police agency is responsible for misconduct within the context of criminal behavior. And I am saying that we have—the police have not been vocal, we have not been articulate, we have not been able to bring intelligently to the minds of the community that should know the obstructions and the impairments that we face. I think having done this, we will win more support, and we will, I think, effectively cope with this grim specter of public disrespect that I mentioned.

The CHAIRMAN. What can you do with the criminal suspect you have so vividly described? Suppose one of the men under your command from Cincinnati, Ohio, would find this type of suspect on the streets of Cincinnati, and a citizen would come to him and do just exactly as you described—what would the police do?

Chief SCHROTEL. We would probably violate his constitutional rights and arrest him.

The CHAIRMAN. Well, you are not under the mandate of the *Mallory* rule, are you?

Chief SCHROTEL. Sir, we are feeling the full brunt of it, however.

The CHAIRMAN. Is that so?

Chief SCHROTEL. Yes.

The CHAIRMAN. What is the law in Ohio? Are you required to take a suspect before a committing magistrate without unnecessary delay? Is that what your Ohio law says?

Chief SCHROTEL. Well, it is not as stringent, perhaps, as the mandate expressed in the *Mallory* decision. We can bring him to trial at the next conference—the convention of the court the following morning.

The CHAIRMAN. You can hold him overnight?

Chief SCHROTEL. We can hold him overnight, or we can hold him in some instances for a period of 24 hours, until the court convenes. But we must charge him.

The CHAIRMAN. If you pick up a suspect on the street in Cincinnati, what do you do with him? Do you take him to the nearest police facility?

Chief SCHROTEL. Yes, sir; and interrogate him in reference to his identity. If you are referring to this illustration that I have just given.

We would interrogate him in reference to his identity, the purpose for his presence in that location, and having ascertained these, we would proceed, if we could, to determine his involvement in the offense, through this interrogation. He would be charged. If not, we would release him.

The CHAIRMAN. How would you book him on your police blotter? Would you book him for investigation? What is your procedure?

Chief SCHROTEL. Yes; we hold him for investigation.

The CHAIRMAN. You hold him for investigation.

Chief SCHROTEL. That's right; yes, sir.

The CHAIRMAN. When you pick him up, do you advise him that any statement he makes can be used against him?

Chief SCHROTEL. If he is willing to make a statement. This appears as the prefacing commentary on the formalized statement.

The CHAIRMAN. Is he advised that he has a right to counsel at that stage?

Chief SCHROTEL. No; we just advise him that he need not make a statement, but if he so chooses, that this statement will be used for or against him at the time of his trial.

Now, we do not advise him he is entitled to counsel.

The CHAIRMAN. Depending upon the result of the interrogation, do you take him before a committing magistrate the next morning?

Chief SCHROTEL. That is right, sir.

The CHAIRMAN. You do not get the magistrate out of bed in the middle of the night?

Chief SCHROTEL. No, sir; we have never had an occasion to do that.

The CHAIRMAN. Do you have legal problems on this question within Cincinnati, Ohio, similar to those that have arisen in the District of Columbia as the result of the *Mallory* case?

Chief SCHROTEL. The courts have suggested that they ought to be—the local courts—that they ought to be adhering more stringently to the spirit of the *Mallory* rule. So I suspect that unless the rule is modified, we will in Cincinnati, as in other urban centers, be faced with a more rigid adherence to that doctrine.

The CHAIRMAN. Thank you, Chief.

Chief SCHROTEL. Highly intelligent people ponder the police role as a hypothetical abstraction, in ignorance of the true facts, and conceive the police to be a potential instrument of tyranny which will destroy the essential freedom of a free society. Since their reading and research are restricted to incidents that discredit the police, they conclude that all police are bad. These citizens, as protectors of liberty and freedom, then aline themselves against the police without giving attention to the cost of criminal depredations.

There have been exceptions in which men whose integrity and judgment are respected have accompanied the police on their tours of duty in order to learn and report the true facts. Prof. John Barker Waite of the University of Michigan Law School and Sam Bass Warner of the Harvard Law School are two examples. Their experiences gave them a sympathetic understanding of the problems confronted by the police in consequence of antiquated rules governing the questioning and detaining of suspects, searching them for weapons when police safety is jeopardized, arresting them when conditions warrant such action, and the right of the suspect under some conditions forcibly to resist arrest by a uniformed policeman. These men have championed in books and articles the liberalization of arrest privileges because through their experiences they have gained a sound understanding of the handicaps of the modern policeman in his legal war against crime. On the basis of his police experiences, Professor Warner played the principal role in drafting the Uniform Arrest Act.

Law enforcement may be strengthened by legalizing common police practices, already legal in some jurisdictions, which would have the effect of facilitating the discovery of criminals and evidence of their

guilt and of lessening the exclusion of relevant evidence from their trials. The police should be authorized to question persons whose actions under the circumstances then existing are such as to arouse reasonable suspicion that the suspect may be seeking an opportunity to commit a crime. A police officer should be privileged to search such a suspect for weapons when the officer has reasonable grounds to believe that he is in danger if the person possesses a dangerous weapon, and, should the suspect be illegally armed, to arrest him for this offense. Should the suspect be unable or unwilling to explain satisfactory the reasons for his presence and actions, the officer should be authorized to take him to a police station and hold him while the investigation is continued, for a reasonable period without placing him under arrest.

The police should be privileged to release an arrested person without bringing him before a magistrate when their investigation reveals his innocence or when a drunk has become sober. The police should be authorized to hold an arrested person before bringing him before a magistrate for at least 24 hours, excluding days when courts are not in session. Magistrates should be authorized to order the defendant to be held for an additional period when good cause for such detention is shown.

The CHAIRMAN. If I understand you correctly, Chief, you said in Cincinnati, Ohio, you can hold a person only overnight.

Chief SCHROTEL. Until the next court session, sir. This may be even a shorter period than 24 hours. It may be 1 or 2 hours.

The CHAIRMAN. If it is over the weekend, it would be longer than 24 hours.

Chief SCHROTEL. That's right. It may be as long as 2 days.

Now, he is not deprived of his right for application to a writ.

The CHAIRMAN. I understand. But if you can hold him over a long weekend, where the courts are not in session, then have you any court test saying that this is or is not an unnecessary delay?

Chief SCHROTEL. We have not had any local rulings as yet. But I am sure that we will soon hear from our judiciary with reference to or in line with the spirit of *Mallory*.

The CHAIRMAN. It is surprising to me that over the years that some defense counsel has not raised this question in the courts.

Chief SCHROTEL. I am sure that they have done this in attempting to impeach the voluntary nature of the confession or admission that was obtained during this so-called protracted period of detention. But, Senator, I do not know how you can ignore the nature of man and the relation of this to police interrogation.

If you have a suspect that has committed a heinous offense, I think it takes a very skillful kind of interview, a proper kind of environment, in order to establish the rapport that is necessary to elicit from this man admission that may very well result in his incarceration for an extended perod of time, or in some instances even his electrocution or death.

I cannot conceive of anyone dealing with this problem in the abstract—when the police officer must first of all gain the confidence of the subject that he suspects of an offense.

Now, I am mindful of the court's intention to insulate the person who enjoys the abiding presumption of innocence against the abuse in the hands of the police. But again this confirms my earlier statement

that the police have been discredited so long in their contacts with the generally law-abiding public in the traffic context as such that policemen are looked at as those who might, given an opportunity, exploit the very authority that they ought to be protecting.

So it is just wishful thinking to suspect that a prisoner who is contacted perfunctorily by a police officer will just unburden his conscience and say, "You're right, officer, I have committed the offense"—rape, robbery, burglary, the whole gamut of predatory acts.

This is not so. In many instances it takes several hours to gain the confidence of the subject.

Now, the people suggest this is star chamber. But we live in an age where the technological advances have been tremendous. What is wrong with recording everything that the police officer says to the suspect? What is wrong with filming the entire interview—if there is some concern about a possible abuse while this proper kind of rapport is in the developmental stages? This can be done.

The CHAIRMAN. Isn't that actually done in certain instances?

Chief SCHROTEL. Sir, we go so far—in fact in the *Mallory* case—mindful of this grim specter of public criticism, they even took Mr. Mallory to a doctor to have him examined so that they would be in a position to say that he bears no particular marks of abuse or physical abuse at the hands of the police. The police constantly have to labor with this.

The CHAIRMAN. You have made reference to the taking of films during an interrogation. Is this actually done in any of your police work, so as to preserve the fact of voluntariness for the jury?

Chief SCHROTEL. When we want to buttress a confession—we have done this in our local jurisdiction—we have had the suspect reenact the crime, and we have filmed his reenactment. We have not gone far enough, because of monetary limitations, to do this in sound, but it certainly could be done. But I am suggesting that in the interrogation room, where you have something akin to a lawyer-client relationship, a doctor-patient relationship, the same kind of confidentiality must prevail if we are to elicit from this individual information that will result in his own undoing.

The CHAIRMAN. You may continue.

Chief SCHROTEL. A police officer should be authorized to arrest under a warrant when the warrant is not in his possession, to arrest without a warrant for any misdemeanor committed in his presence, and to arrest without a warrant for petty thefts and other misdemeanors not committed in his presence when he has reasonable grounds to believe that the defendant could not be found after the warrant was issued.

Suspects should be denied the right to resist illegal arrests by a person the suspect has reasonable grounds to believe to be a police officer. The police should be authorized and urged to use notices to appear in court in lieu of physical arrest in suitable misdemeanor cases when they believe the defendant will appear as agreed.

Persons the police have reasonable grounds to believe to be witnesses to crimes should be legally required to identify themselves to the police.

These are essentially the provisions of the Uniform Arrest Act. To them should be added authority for the police to search any convicted narcotic offender for contraband, without a warrant, when

his actions, under the circumstances then existing, are such as to arouse reasonable suspicion that the suspect may have contraband in his possession.

The reasonable arrest privileges mentioned above would facilitate the achievement of objectives in law enforcement desired by all persons except the criminals themselves. The privileges would enable the police to exercise such control over persons in public places as to enhance the peace and security of all citizens.

These privileges do not threaten the lives or health of the innocent; the inconvenience of 6 hours of detention short of arrest is experienced only by the innocent person who inadvertently or by poor judgment is found in a situation that arouses police suspicion and which the suspect is unable or unwilling to explain on the spot.

In view of the present jeopardy to public security, such inconvenience seems a small price to pay for the privilege of living securely and peacefully.

Police abuse of authority with criminal intent resulting in serious offenses must always be dealt with by criminal prosecution and disciplinary action. Establishing safeguards against abuse of authority by the overzealous policeman in the day-to-day performance of his duty presents quite a different problem. Safeguards that weaken law enforcement or free the guilty are socially undesirable; if possible the problem should be solved in some other way.

Civil suits for damages filed against the individual officer have not proved adequately effective in preventing police abuse of authority. Were this procedure effective, however, it would emasculate vigorous police action and law enforcement would be weakened at a time when it needs to be strengthened.

Negating police overzealousness by freeing guilty defendants violates the principle that the guilty should be adjudged guilty, punishes society rather than the policeman, rewards the guilty, and is a miscarriage of justice. Its effectiveness as a control of police abuse of authority has not been demonstrated.

The Committee on Criminal Law and Procedure of the California State Bar proposed that:

> * * * the answer might lie in a new kind of civil action, or better, a summary type of proceeding, for a substantial money judgment in favor of the wronged individual, whether innocent or guilty, and against the political subdivision whose enforcement officers violated that person's rights. After not many outlays of public funds the taxpayers and administrative heads would insist upon curbing unlawful police action (29 Cal. St. Bar Jour. 263–64 (1954).

Prof. Edward L. Barrett, Jr., of the University of California Law School, in commenting on this proposal, stated:

> Legislative action along these general lines gives promise of providing a more adequate solution than the exclusionary rule at a smaller social cost * * *. The remedy would be available to the innocent as well as the guilty, for the illegal arrest as well as the illegal search. The courts would have frequent opportunities for ruling on the legality of police action, for enunciating and developing the governing law. If in any community a substantial number of such actions become successful, the financial pressure on the police to conform more closely to judicial standards would doubtless follow.
>
> Finally, if a careful line is drawn between those situations where increased personal liability should be placed upon the individual policeman (basically those involving serious and intentional violations of law) and those where he should be immunized and sole liability placed upon the governmental agency, interference with the efficient functioning of law enforcement would be minimized (43 Calif. L. Rev. 465, 595 (1955).

The modernization of arrest privileges is needed to make them consistent with the conditions under which the police today must protect the public from criminal attack. The following advantages would be gained from liberalizing ancient rules of arrest based on conditions that no longer exist and from penalizing a political subdivision for abuse of authority by its police:

(1) Public peace and security would be increased by enhancing the likelihood of discovering persons seeking an opportunity to attack.

(2) The effectiveness of the administration of justice would be increased by facilitating the investigation of suspects, the arrest of criminals, and the collection of admissible evidence. By these means both clearance and conviction rates would be increased.

(3) The security of the police would be increased by permitting them to discover weapons that may be used to attack them and by making it illegal to resist arrest by a known peace officer.

(4) Higher standards of service and stricter adherence to the legal restrictions imposed on the police would result when a community or other political subdivision was penalized for abuse of authority by its police.

We feel all of these advantages will flow if, sir, you react favorably to the proposal that is before you.

The CHAIRMAN. Thank you, Chief. I certainly appreciate your coming before us and giving us the benefit of your experience in the law-enforcement field.

I note that you are the immediate past president of the International Association of Chiefs of Police. Are you having a problem nationwide with regard to the admissibility of confessions similar to the problem now being experienced in the District of Columbia?

Chief SCHROTEL. Yes, we are. In the urban centers throughout the country, crime is on the increase, and we are having more and more difficulty in approaching crime containment, because of the lack of adequate tools.

Of course the spirit of Mallory and the spirit of the restriction on investigative arrest is certainly felt in cities beyond the pale of the influence in the District.

The CHAIRMAN. The position the Department of Justice takes on these problems is that the title I, to which you are directing your testimony, is quite possibly unconstitutional. My concern, and I am sure it would be the committee's concern, is that the legislation we enact must stand a court test.

Now, do you, or your association have any guidelines for investigative arrest, and for the admissions of confessions, that would stand the constitutional test?

Chief SCHROTEL. Isn't the nub of the issue, though, in the word "unreasonable"—"without unreasonable delay." And if the court then examined the reason for delay, and the circumstances attendant to the inquiry, don't you think that reasonable minds might decide that the delay, even though extending for a matter of hours, was reasonable within the context of the circumstances of the arrest?

The CHAIRMAN. What you say may be correct.

Chief SCHROTEL. But isn't this the real issue in terms of tests for constitutionality?

The CHAIRMAN. Do you have any decisions that indicate that to be the case?

Chief SCHROTEL. No.

The CHAIRMAN. I felt possibly as past president of the international association that you might know what, if any, consideration your international association has given as to what can be done in the field of investigative arrests and in the field of admission of confessions as they relate to rule 5(a) without violating basic constitutional rights?

Chief SCHROTEL. No, sir; I am sorry, Senator, I do not have that.

The CHAIRMAN. The staff director of the committee has drawn my attention to something that you said just a little bit earlier that possibly needs some clarification.

When I was asking you about your arrest practices in Cincinnati, I understood you to say earlier in your testimony that you would probably violate the Constitution and arrest him.

Now, I do not know whether this is what you really meant. I think it probably needs some clarification, in fairness to your testimony.

Chief SCHROTEL. Perhaps I was somewhat facetious in this commentary.

The CHAIRMAN. I am sure you did not mean that you are going to deliberately violate the Constitution.

Chief SCHROTEL. We are empowered to arrest those individuals whom we reasonably believe have committed or are about to commit a felony. Now, this is a very elastic concept. We would have to relate the presence of this individual to the environmental pattern, to the history of crime in that area.

Now, this is a matter of reliance solely upon the judgment of the officer. It is a rather difficult thing for him immediately to determine whether he is functioning within the framework of this statutory right, insofar as the rights of this particular suspect are concerned—where great minds in an unemotional forum differ in 5 to 4 decisions. This places the judgment of the police officer on a rather high plane.

I was just suggesting that maybe he may be in error when he does that, when he brings this man into custody.

But I think that he has this concomitant responsibility, however, to respond to the taxpayer who summoned him for service, to provide some protection against an individual whom he feels is jeopardizing his own rights.

The CHAIRMAN. I think that clarifies the record. I probably should have picked it up at the time you were making your statement. I was positive that you were not advocating that the Constitution be violated. That you operate to the best of your ability in Cincinnati, Ohio, within the framework of the Constitution. Maybe it ultimately turns out you have violated some constitutional right, but you do not deliberately do so.

Chief SCHROTEL. Thank you for extricating me, Senator.

The CHAIRMAN. I certainly appreciate your coming here, Chief. We recognize you do have many problems. We also recognize the area in which you are working is a very difficult one. Thank you very much.

Our next witness will be Sheriff Canlis from San Joaquin County, Stockton, Calif., a member of the board of governors, National Sheriffs Association.

I also want to express my appreciation to you for coming here so that you might give us the benefit of your views on this very difficult problem.

STATEMENT OF SHERIFF MICHAEL N. CANLIS, SAN JOAQUIN COUNTY, STOCKTON, CALIF.; MEMBER, BOARD OF GOVERNORS, NATIONAL SHERIFFS' ASSOCIATION

Sheriff CANLIS. Senator, I am very deeply grateful to you for the opportunity you have provided me to express my views, and those I represent.

I think at the outset here, Senator, may I, for the record, submit a resolution passed by the National Sheriffs' Association in June at Portland, Oreg., at their annual convention.

The CHAIRMAN. The resolution will be received at this point in the record.

(The resolution referred to follows:)

THE NATIONAL SHERIFFS' ASSOCIATION,
Washington, D.C., October 22, 1963.

To: The Senate District of Columbia Committee.
From: The National Sheriffs' Association.

The attached resolution was unanimously adopted by sheriff delegates attending the National Sheriffs' Association's 23d Annual Informative Conference, July 15–17, 1963, in Portland, Oreg.

Respectfully submitted as part of the testimony of Sheriff Michael N. Canlis, Stockton, Calif., representing the National Sheriffs' Association.

Sheriff WILLIAM M. LENNOX,
Philadelphia, Pa., President.

A RESOLUTION RECOMMENDING THAT THE METROPOLITAN POLICE DEPARTMENT OF WASHINGTON, D.C., BE GRANTED SUFFICIENT TIME FOR INTERROGATION OF CRIME SUSPECTS BEFORE ARRAIGNMENT

Adopted by the National Sheriffs' Association, July 17, 1963, at its annual conference held in Portland, Oreg.

Whereas there became effective on March 15, 1963, a ruling by the District of Columbia Commissioners (appointed by the Nation's Chief Executive) upon the recommendation of Charles A. Horsky, Presidential adviser for District affairs (also appointed by the Nation's Chief Executive), that the Metropolitan Police Department of the District of Columbia cease and desist from the necessary proven law enforcement practice of interrogating suspects in a crime investigation; and

Whereas the Metropolitan Police Department of the District of Columbia operates under the jurisdiction of the Federal Government; and

Whereas the members of this police department before they may interrogate a suspect, must produce him (or her) before a committing magistrate and offer substantial evidence as to the reason for interrogation; and

Whereas this procedure works a hardship upon the officers dedicated to the protection of life, limb, and property resulting, in most instances, in the immediate release of the person or persons who may fall under general suspicion in connection with the committed crime; and

Whereas law enforcement officers are cognizant of the fact that many persons either suspected of being guilty, or who may be totally innocent of a crime having been perpetrated require a reasonable amount of time to interrogate and investigate in order to bring the guilty to justice and release of the innocent; and

Whereas decisions made in the case of handcuffing members of the Metropolitan Police Department of Washington, D.C., who, as previously stated, are under Federal jurisdiction and control, will probably be the pattern for all Federal law enforcement officers to follow; and

Whereas it is feared that this pattern may be adopted in State courts and thereby hamstring all law enforcement of this Nation which would redound to the benefit of the law violators: Therefore be it

Resolved, That the National Sheriffs' Association, in national conference, assembled in Portland, Oreg., this 17th day of July 1963, go on official record as opposing the recommendation of the Horsky committee and urge the Congress of the United States to rectify this situation in the Nation's Capital now styled as a "jungle of crime;" and be it further

Resolved, That appropriate and reasonable time be allowed the District of Columbia police to pursue their endeavors to remove the crime clouds now overshadowing the Nation's Capital; and be it further

Resolved, That a copy of this resolution be sent to every Member of the U.S. Senate and the House of Representatives.

RESOLUTIONS COMMITTEE,
Sheriff ROBERT JAMISON, *Chairman*,
New Brunswick, N.J.
Sheriff DONALD TULLOCH,
Barnstable, Mass.
Sheriff DENVER YOUNG, *Salem, Oreg.*

Sheriff CANLIS. Please let me state at the outset, that it is not my intention to in any way reflect discredit on any agency, or that my appearance here this morning be interpreted as interfering or injecting myself into the province of the fine Metropolitan Police Department of Washington, D.C., and its distinguished Chief, Robert V. Murray.

It used to be that Federal rulings influencing law enforcement eventually trickled down into the State and local law enforcement; however, it can now be described as a constant avalanche of interpretations so massive as to have completely depressed and dwarfed the effectiveness of law enforcement generally everywhere.

It is because of this that I have accepted your invitation in the hope that I might call your attention, the very great need for us all to have congressional understanding to stem the tide of legislation by judicial interpretation, and also the unwarranted restrictions on modern-day police.

Our sworn duty is to protect life and property, and to preserve the peace, and to prevent crime. Never, in the history of our society, however, has the principal purpose of our existence been so lost. Never, has there been such confusion concerning interpretation of the law. Never, have we created such an offensive image while in the proper discharge of our duty. Never, have we been so maligned and so substituted for the issues or the cause, or the social injury.

Our lot as you know, is to be damned if you do and damned if you don't. It is quite apparent that not what we do, but the manner in which we do it, makes it either acceptable to the community or the courts, or transfers the sympathy to the miscreant.

Respect for the law is diminishing rapidly, and those who seek illegitimate gain, hesitate less and less to commit grave, unprovoked assaults against their hapless victims, and law-enforcement officers, and even to sacrifice human life when it suits their purpose to do so.

Some of the High Court decisions describe the activities between the criminals and law enforcement, as if we were engaged in some sort of contest, with rules applicable to both, applied equally and fairly, as if we had chosen up sides.

Nothing could be further from the truth, and this is no game. The *Mallory* decision and its many interpretations, some of which are close decisions by the arbitrators or referees, if you will, the majority ruling being 5 to 4, has the effect of appropriating any success by law enforcement and transferring it to the defense or other side, with the further restriction that any subsequent score would be treated in the same manner.

The March 15, 1963, ruling by the District of Columbia Commissioners for the Metropolitan Police of this District, to cease and desist

from interrogating a suspect prior to his appearance before the magistrate, would appear to have completely emasculated their effectiveness. So I fear, as has been the case many times past, the pattern set for Federal law-enforcement officers to follow, will shortly be the rule for all of us.

The CHAIRMAN. What rule is followed with regard to investigative arrests in California at the present time?

Sheriff CANLIS. Reasonableness again is the measure, Senator. And we have no—in no event greater than 48 hours, excluding Sunday. But the reasonableness there is also examined by the courts in every instance.

The CHAIRMAN. Is this written into a statute?

Sheriff CANLIS. Yes, sir.

The CHAIRMAN. How has that statute been construed by the Supreme Court of California?

Sheriff CANLIS. It has been examined in some of the cases, and the reasonableness as applied has been judged by the courts in each individual case. There have been some reverses.

The CHAIRMAN. How about the admission of confessions?

Sheriff CANLIS. They are examined quite carefully, and they have been for many, many years, even in light of this rule, and, of course, as you are well aware there are many many safeguards, constitutional and procedural, about the admissions of confessions or admissions of damaging statements and the manner in which they are obtained, and these are subject to careful review by the courts. They have been for a great many years.

The CHAIRMAN. What is the statutory law in California on admission of confessions?

Sheriff CANLIS. Senator, because of the time element, I am ill prepared. I do not want to make a statement that is even partly incorrect.

The CHAIRMAN. We can have it checked. The staff can check it out, because the statute will speak for itself. I assume it probably follows pretty much the general law.

Sheriff CANLIS. Constitutional provisions, and its interpretation.

The CHAIRMAN. Should he be taken before a committing magistrate without unreasonably delay?

Sheriff CANLIS. Without unreasonable delay. And this is examined even in light of the fact that we are allowed or permitted by the statute no more than 48 hours, or excluding Sundays. The reasonableness is again examined on each occasion, and the manner in which the confession has been obtained.

The CHAIRMAN. Thank you.

Sheriff CANLIS. Generally speaking, law enforcement has not been so fortunate as other units of government in gaining new personnel, even in light of the ever-increasing laws. We are spread so thin that even a slight adjustment further restricting our operations will have an unsalutary effect on the peace of the community.

We have witnessed many times recently, and alarmingly with increasing frequency, some segments of our society acting as if they had already returned to the jungle.

Our function to protect life and property and to preserve the peace and to prevent crime, is not as uncomplicated as it sounds. As our society becomes more sophisticated, the laws which we are sworn to

enforce, have defined human conduct to where it is no longer a simple matter of right or wrong.

In some sections, misbehavior is governed by a complicated, almost impossible to understand statute, and this is further complicated by a judicial interpretation of the statute, and all too frequently the latter only holds for a very brief period of time before it is again reinterpreted, and I believe that the *Mallory* case has been already cited in 142 Federal cases on appeal, many of these in conflict with one another.

It is almost impossible to train an officer today to operate within the meaning of the statutes, let alone to educate them to understand the various interpretations that constantly succeeds the law.

It is not unusual for us to be called upon to interpret and apply to an active situation or social condition, constitutional provisions that have been and are at this very moment a subject of deep study and review by the best legal minds and students of government.

Most often the actor on our side is the rookie policeman on the street, with an immediate responsibility to discharge.

It is also unrealistic that our acts be reexamined and judged on the basis of the law or interpretation of the law that has not taken into consideration the developments of our social order and the present acceptable standards of conduct, or misconduct, if you will.

According to the record, our distinguished justices disagree as so do many of the accomplished members of the bar, both in practice and in the area of academic study, as to the meaning of statutes and interpretation of the statutes. Yet we, without the benefit of this great training and experience, are expected to identify the law and to stand accountable if it is wrong or if it is wrongfully applied or even if it is unacceptable in any given situation.

We are not lawyers, nor do we think we should be. Nor do we think it necessary in order to understand the rules of human conduct that our society provides through its government.

Some of the interpretations that have come down to us guaranteeing the rights of individuals by overcoming the statutory provisions as applied by the police, I am sure interfere with the paramount rights of society, who alone guarantee these privileges.

We believe, however, and we plead for your support, that the law and its interpretations should be sufficiently clear to be understood by all.

The CHAIRMAN. I think that is a very fine sentence. But I think we will be at the millennium if we ever get to a point where we can draw a law with which everyone is in agreement and the court becomes unanimous.

Humans being what they are, they are going to have differences of opinion as to the meaning of statutes.

I understand what you are saying, but I wonder how you overcame this problem.

Sheriff CANLIS. My prayerful hope is the Congress of the United States, and what you are doing here today in sifting out everybody's thinking, including the proponents and opponents of a thing like this, and the detail in which you are doing, and the graciousness with which you are encouraging this type of testimony, and really being interested in the problems of every segment of society.

I think you are making a far-reaching move to do this.

I think that in a case where you are now examining a procedural provision, not a constitutional provision—because I am conscious, Senator, of my oath to defend the Constitution of the United States, and I know you feel the same way. And, of course, we are here now determining how these procedural changes are creeping into constitutional interpretations. If this is true, I will back away.

The CHAIRMAN. This gets us right into the most difficult area. The enactment into law of a provision such as that contained in title I, that will stand the court tests.

I believe I understand what you are saying. You are hopeful that a statute can be enacted, and that we will get one final decision from the highest court of the land, and that decision will serve as a guide to every police officer. This is what you are saying, I think.

Sheriff CANLIS. This is what I am saying. And I will say it clear, too, Senator, because I think that we need this from you, from the Congress of the United States—that these directions be made.

The rules of conduct should be applied within the framework of the Constitution that will guide us in our operations.

The CHAIRMAN. Thank you.

Sheriff CANLIS. For the law enforcement officer, the time-proven deterrents to crime, are sure detection, swift apprehension, and certainty of punishment. Each is a necessary ingredient. However, if apprehension has to wait on a formal order and appearance, the modern jet engine and other forms of high-speed transportation relocates the defendant beyond reach, with the fruits of the crime and other physical evidence.

Crime knows no time table excepting that which describes its frequency of occurrence, and criminals too, like the weekend and the early morning hours, and in my 25 years, I don't recall very many active courtrooms or lighted chambers or recorded availability of the judge or commissioners during these periods.

It is incredible and unbelievable indeed, that men learned in the law, who are familiar with the activities of criminals, would propose that we should not question suspects at all. Yet this is the case. It is not inconceivable then that an innocent person who under the appropriate circumstances, such as to indicate to a reasonable man, that he could in fact be the person described by a victim, would suffer the indignity of being formally charged and eventually, we hope, released.

I have not found however, the description of time as applicable to the courts as it is applied to peace officers, although the Constitution specifically provides for speedy trials. It is not outside the realm of possibility and in fact it is reality, that some court proceedings take many days and many months, and it is further regulated in some areas as to not more than 30 days without consent of the defendant.

This is relevant then, because in a matter of a few hours of inquiry and interrogation, the true participation of a person could be determined and certainty of identity could be established or the victims can fail to identify or signify that they will refuse to prosecute, and the defendant will be immediately discharged.

You should also be aware that many, many people who come to the attention of the police, are never charged with a criminal offense as a result of their interrogation and the immediate substantiation of mitigating circumstances. Also close questions of law are usually

resolved to the benefit of the suspect and he is not arrested after detention.

Police operations under these rules established by the *Mallory* decision and the District of Columbia regulation, would necessitate their all being formally charged before a committing authority.

The harsh references to police in the dictum of the court decisions inferring and even accusing that the situation leading to the *Mallory* and *Killough* (1960) and other similar rules, was a police technique by design, of modern-day third-degree methods in order to obtain damaging statements and admissions and confessions.

I submit our record of solutions to crimes is not so good as to substantiate the accusations of the heinous practices that are attributed to us in these decisions. This archaic thinking must also be influencing many of the other court directives in the review of our activities on appeal.

It is a very dangerous doctrine to consider the judges as the ultimate arbitrators of all constitutional questions. It is one which would place us under the despotism of an oligarchy. Gentlemen, Thomas Jefferson wrote that to William Jarvis in 1820.

Article IV of the amendments to the Constitution of the United States, is familiar to us all. It is of very deep concern that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated.

However, I would like to misinterpret this as to be applied practically, and ask you how this guarantee is to be accomplished under the ever-increasing restrictions on the frontline force of Government.

The police, charged with the responsibility of preventing crime, are being rendered almost sterile by their obedience to the interpretations of the courts to the law of the land.

I submit justice is also the apprehension, detention, and punishment of the criminal offender who is a recipient of justice when held accountable for his criminality.

I respectfully urge, then, that this committee of the Senate look beyond the immediacy of this hearing and examine the whole spectrum of judicial law as it affects this vexing problem.

Law enforcement wants and desperately needs and will accept, workable rules that can be understood and applied to discharge their responsibility.

The CHAIRMAN. Sheriff, I certainly appreciate your presence here. I assume, from the general tenor of your very carefully worked out statement, that you are experiencing an upsurge of crime in California. Is that correct? How about your own town? Is crime up over a year ago?

Sheriff CANLIS. Upsurge just would not be adequate to describe it. It is a real threat to the peace of the community, Senator.

The CHAIRMAN. How many people do you have in San Joaquin County?

Sheriff CANLIS. 275,000.

The CHAIRMAN. Is your crime rate on major crimes—up from a year ago?

Sheriff CANLIS. Fortunately, in some areas it is not up as would make a great impression. But I can explain it better by telling you that in a county of our size we have 900 people in jail.

The CHAIRMAN. How many were there in jail a year ago, or 5 years ago?

Sheriff CANLIS. The high last year was about 1,200, and 5 years ago it was down to between 550 and 600.

The CHAIRMAN. Of course, 5 years ago you did not have 275,000 people.

Sheriff CANLIS. We are not the fastest growing area in the State, Senator, but we had 250,000.

The CHAIRMAN. Is it the feeling of your law enforcing officers in San Joaquin County that part of the increase in the crime rate in a county of 275,000 people is due to the restrictions that are placed upon the police in the matter of either investigation of crime, or the admission of confessions?

Sheriff CANLIS. There is no question about it, Senator. We are frequently faced with recharging a man who has been arrested a short while before with an entirely new offense.

The CHAIRMAN. If what you say is correct, isn't this based upon court decisions involving constitutional guarantees?

Sheriff CANLIS. Some of them are, yes, Senator, and some are—like the rule of discovery is not a constitutional question in California. But under the rule of discovery, which applies to us in California, the material that we have concerning a defendant is available to the defense.

The CHAIRMAN. This is a statutory provision?

Sheriff CANLIS. No; it is a ruling of the court.

The CHAIRMAN. This is a court rule of your San Joaquin County court system?

Sheriff CANLIS. No—the State of California.

The CHAIRMAN. The Supreme Court of California?

Sheriff CANLIS. I am not certain how extensive—where that rule originated. It may have come down from a Federal court. But it is there, and it applies to the entire State. Some of the recent things that we have done to overcome this is made the same application for the rule of discovery against the defense. In some cases it has been allowed, in some cases it has not.

The CHAIRMAN. On this complaint that you are making, do you take it before your State legislature in Sacramento, and ask for changes in the law?

Sheriff CANLIS. Yes, Senator; we are there constantly.

The CHAIRMAN. I take it that you do not reap the success that you think you should when going before the legislature for a change in the law.

Sheriff CANLIS. The law has been changed; it has been modified; and it has been then interpreted.

The CHAIRMAN. Your problem is that you still do not have the tools you believe you need to effectively work as a law-enforcement officer?

Sheriff CANLIS. I am certain that is true, Senator.

The CHAIRMAN. You think you could be supplied those tools by your California State Legislature and still remain within the provisions of the Constitution?

Sheriff CANLIS. I would insist that we stay within the provisions of the Constitution, Senator. I seek no escape from the Constitution of the United States.

The CHAIRMAN. I understand that. But this is where we get into this difficult area. If you start giving the police officers some of the tools that they are seeking, then we are told by the constitutional experts it would be unconstitutional.

I am wondering where you draw this line.

Sheriff CANLIS. It is a matter of realism, Senator. We have to examine this quite carefully to see whether or not, in effect, this is a matter of interpretation of the Constitution as it affects human conduct today. Things have changed radically over the time when previous interpretations of the Constitution were made.

Some of these questions that are being more closely restricted today were ruled on a long time ago, and they have been narrowed tremendously in the recent decisions as against previous decisions in interpreting constitutional provisions.

The CHAIRMAN. Well, I recognize that. Notwithstanding the statement that you attributed to Thomas Jefferson, we still rely upon courts to interpret the Constitution. They are charged with the responsibility of interpreting our Constitution. If they change, and narrow certain constitutional provisions, then I do not know what appeal you have from that. The court is the interpreter of the Constitution.

The only thing we can do, as I understand your statement, would be to change the Constitution itself.

Sheriff CANLIS. My statement, Senator, goes to the heart of the matter of congressional enactment of rules that would permit us to act that would be recognized by the interpreters of the Constitution, who are our courts. In 5A, in the *Mallory* decision, for instance, it is a very narrow rule. And of course the court said, at the time, that interpreting this they interpret it as to the meaning of the thing as it was written.

Now, certainly the interpretation of words, the definition of words, goes to the heart of this measure. And of course if Congress could extend this to what it, in reality, means, that a police officer has the right, under proper circumstances, and with the proper controls to interrogate, this forever then would set the court straight in interpreting this provision—because there are adequate remedies and guarantees and safeguards against what is alluded to in here as police abuses. Because, I repeat, Senator, if we were that good, we would not have this big a problem.

The CHAIRMAN. I think I understand the position you are taking, Sheriff. Again I want to express my personal appreciation for your coming here and giving us the benefit of your views in this very difficult area.

Sheriff CANLIS. I am grateful for the opportunity, Senator.

(Additional views subsequently filed with the committee by Sheriff Canlis follow:)

OFFICE OF SHERIFF-CORONER,
COUNTY OF SAN JOAQUIN,
Stockton, Calif., October 24, 1963.

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

DEAR SENATOR BIBLE: In response to a question that you asked me during my recent appearance before your committee concerning the *Mallory* rule and the Uniform Arrest Act, I feel that my answer was inadequate and not completely responsive to your inquiry as to what the situation was in California with regard to this law.

If you will permit me, I would like to elaborate on that answer to tell you the following:

A person under arrest has a right to be taken before a magistrate and arraigned without unnecessary delay, and in any event, within 2 days after his arrest excluding Sundays and holidays. This is set out by the California Penal Code, section 825 and partly in 849.

Penal code section 841 requires a person making an arrest must inform the person to be arrested, of the cause of the arrest, and upon request of the person he is arresting, of the offense for which he is being arrested.

Section 849 provides:

"(*a*) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person, must be laid before such magistrate.

"(*b*) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever—

"(1) he is satisfied that there is no ground for making a criminal complaint against the person arrested. Any record of such arrest shall include a record of the release hereunder and thereafter shall not be deemed an arrest but a detention only.

"(2) the person arrested was arrested for intoxication only, and no further proceedings are desirable.

"(3) the person arrested was arrested for a misdemeanor, and has signed an agreement to appear in court or before a magistrate at a place and time designated, as provided in this code (as amended Stats. 1957, ch. 2147, p. 3806, sec. 6)."

There are many sections in California law that are a result of codification of the decisions of the supreme court. One of these that has recently been rewritten after the original section was repealed, is section 647, which in several sections describes unusual conduct. Section (e) particularly, states: "Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." The penalty provisions of this section is, that every person who commits any of the acts which includes the above, shall be guilty of disorderly conduct, a misdemeanor.

I reiterate, that I share your concern about infringement on the Constitution and its guarantees, however, I do believe that Congress can make rules by codifying the decisions of the courts in their interpretaations of the Constitution. However, all things being equal, procedural rules and their interpretation should not be judged in the same light or with the same weight as constitutional guarantees. Congress has been eminently successful in this field, as witnessed by the many codes that now maintain us as the greatest government in the world, with the other two branches of government in support.

I was impressed and deeply grateful by the manner in which I was treated while testifying before you, and want to assure you that I would consider it a privilege to be of any assistance that you might request.

Very sincerely yours,

MICHAEL N. CANLIS,
Sheriff-Coroner, San Joaquin County.

The CHAIRMAN. Thank you very much, Sheriff.

As I indicated earlier, Superintendent Wilson had a transportation problem. He is not here right now. We will stand in recess until 2 o'clock this afternoon.

(Whereupon, at 12:10 p.m., the hearing was recessed, to reconvene at 2 p.m. on the same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

I apologize to our witness this afternoon for being a little late. We had a voting session in the Senate.

STATEMENT OF O. W. WILSON, SUPERINTENDENT OF POLICE, CHICAGO, ILL.

The CHAIRMAN. Superintendent Wilson, we are very happy to have you with us, and we will be very happy to hear from you at this time.

Superintendent Wilson is the chief of the Chicago, Ill., Police Department.

Do you go by the title of "Superintendent" or "Chief"?

Superintendent WILSON. "Superintendent" in Chicago.

The CHAIRMAN. "Superintendent"?

Superintendent WILSON. Yes.

The CHAIRMAN. Fine. Just be seated, and we will be delighted to have your testimony.

Superintendent WILSON. Senator Bible, I am pleased to appear before this distinguished committee, and add my voice to those of Chief Robert V. Murray and other distinguished law-enforcement officials urging the enactment of title I of H.R. 7525. Title I, as you know, deals with the application of the *McNabb-Mallory* rule in the District of Columbia.

It has been long my belief that the proponents of the *McNabb-Mallory* rule favor it out of a lack of understanding of the manner in which local police departments must function. I say "must function" advisedly because after pondering the problem on many occasions I am forced to the conclusion that there is no other reasonable way of carrying on local law enforcement than the traditional method commonly employed by local police of using in-custody investigation to solve a large proportion of their more serious crimes.

The CHAIRMAN. What do you mean by "in-custody investigation"? Is this taking the suspect off of the street and to the police station?

Superintendent WILSON. That is correct.

The CHAIRMAN. And questioning him and interrogating him for how long a period of time?

Superintendent WILSON. For whatever period of time may be necessary to accomplish the purposes that society has in mind in the operation of law enforcement agencies and the adjudication of criminal cases in courts. A reasonable period of time.

The CHAIRMAN. Operating in Chicago you have problems just as we have problems here in the District, and such as other cities of comparable size, but what do you do when you find a suspect on the street?

Superintendent WILSON. Well, it depends on the circumstances, obviously.

The CHAIRMAN. Yes, certainly.

Superintendent WILSON. If there are reasonable grounds to believe that this man has committed an offense he is taken into custody and brought to a police station.

The CHAIRMAN. After you get him to the police station how long do you hold him?

Superintendent WILSON. Until the next appearance of the court, the next court hearing, which would be the following day in most instances.

The CHAIRMAN. In other words, you could hold him overnight in that situation?

Superintendent WILSON. That is correct.

The CHAIRMAN. You could hold him over a long weekend?

Superintendent WILSON. That is correct. We have holiday court on Saturdays.

If he were arrested after a holiday court, he could be held until Monday morning.

The CHAIRMAN. Without a charge being filed against him?

Superintendent WILSON. Oh, he would not be booked unless a charge were filed against him.

The CHAIRMAN. Well, how do you book him? Do you book him for investigation?

That is not a charge in and of itself, is it?

Superintendent WILSON. Well, this is the bookkeeping process used by the police to record the arrest and, at the time of booking, a charge is made, not before court officials but the complaint is filed.

You could say that the complaint is filed as a part of the booking process.

The CHAIRMAN. I still do not quite understand you there.

Suppose John Doe is picked up on one of your streets in Chicago, and you have reason to believe that he is guilty of a crime of robbery and you take him to the nearest police station. Then what do you do?

Do you book him as "John Doe" for investigation for robbery?

Superintendent WILSON. No; if we have reasonable grounds to believe that he has committed a robbery we book him for robbery.

The CHAIRMAN. You book him straight out for robbery?

Superintendent WILSON. On the nose, as they say.

The CHAIRMAN. I see. But if you do not or if you were just acting on suspicion what do you book him for? Do you book him for investigation?

Superintendent WILSON. Well, I am not quite sure of what you mean by "suspicion."

We suspect him of having committed a crime. We have reasonable grounds to believe that he has committed this crime.

We may not have all the evidence necessary to bring a prosecution, but we will book him for the crime, whatever it might be.

The CHAIRMAN. I see.

This is all within the police station?

Superintendent WILSON. That is correct.

The CHAIRMAN. Now from the time that you pick him up on the street to the time that you take him to your police station and book him for robbery or assault or whatever it might be, do you at any time advise him of his rights?

Superintendent WILSON. No; we are not required by law to advise him of his rights.

The CHAIRMAN. Is he not told that he is free to make a statement but if he does so that it can be used against him?

Superintendent WILSON. No; he is not advised of that. This is not required by law but, effective January 1, we will have posted in all of our lockups this information, which is a section in the new code of criminal procedure adopted by our legislature at the last session, which becomes the law effective the first of January.

The CHAIRMAN. Effective the first of January 1964, what will be the procedure?

Superintendent WILSON. The procedure will be the same.

We are not required by law to tell him, "You do not need to reply to our questioning." But this information is contained in posters that will be on the walls of the lockup so that he will have an opportunity to read it.

All of his rights are outlined in the section of the code relating to his rights.

The CHAIRMAN. This poster, advising him of his rights, has been brought about by the enactment of a law in the State of Illinois?

Superintendent WILSON. That is correct.

The CHAIRMAN. Now, under the law can you hold an accused until the next convening of the court?

Superintendent WILSON. That is correct.

The CHAIRMAN. Is that written specifically into the law of Illinois?

Superintendent WILSON. Not in those terms. We are required to bring him before a magistrate within a reasonable period of time.

The CHAIRMAN. That follows pretty much the general law, requiring law-enforcement officers to take an accused before a committing magistrate without unreasonable delay——

Superintendent WILSON. Yes.

The CHAIRMAN. Or words to that effect?

Superintendent WILSON. That is right.

The CHAIRMAN. Thank you, Superintendent.

Superintendent WILSON. Should I continue with my statement?

The CHAIRMAN. If you would, please.

Superintendent WILSON. All right.

I do not contend that the police should violate the civil rights of an accused in investigating a crime but only that they must have authority to conduct in-custody investigations of persons whom they have reasonable grounds to believe have committed crimes.

I believe that in the *McNabb* and *Mallory* cases, reasonable grounds did exist for believing that both McNabb and Mallory had committed the crimes with which they were subsequently charged and convicted. It boils down to a question of the quantum of evidence needed by the police to take various steps in the law-enforcement process which leads toward the trial of a suspect.

The law-enforcement process in a municipality consists of three progressive steps, each being preceded by a decision as to whether it should be taken, based on facts which constitute some measure of probable cause or proof of the commission of a crime by a suspect. Each step in the series requires, for its justification, a greater degree of proof than the preceding one. The decision to take each successive step is based on the quantum of evidence at hand at that time. Each step may add to the quantum of evidence and thus justify the succeeding step.

The steps in chronological sequence are: first, the street stop and questioning of a suspect; second, taking the suspect to the police station; and third, booking the suspect on a definite charge.

The adjudication of the case similarly involves a progression of steps, each preceded by a decision requiring a greater quantum of proof than the preceding one. First, the decision of the prosecutor to present the suspect for prosecution; second, the decision at a preliminary hearing to bind over or to release; third, the decision by the grand

jury to indict or not to indict; and fourth, the decision at the trial to convict or acquit.

If society is to be protected from criminal attacks, its law-enforcement representatives must be authorized, in dealing with a person who the police have reasonable grounds to believe has committed or is about to commit a crime, to take certain steps even though they lack the quantum of proof required for a conviction or even to make a formal charge. Let us consider the need for each of these steps in the protection of our citizens from criminal attack.

The first step—the street stop and questioning:

When a policeman encounters someone on the street under circumstances that would lead a reasonably prudent policeman to suspect that something was amiss, he must and should stop the suspect long enough to ask a few pertinent questions. Perhaps the explanation of the person suspected may resolve all grounds for suspicion right then and there, thus terminating the incident.

The second step—taking the suspect to the police station:

The incident described above may not, on the other hand, terminate with the immediate release of the suspect. What he says or refuses to say, what the officer observes and what he learns from possible witnesses at the scene, may add to the reasonable grounds for belief sufficient to justify arrest and may provide evidence of the need for wider and more intensive investigation. While the quantum of proof may justify arrest, the officer may still lack the degree of proof needed for prosecution.

I maintain that these are necessary police procedures. I know of no alternative other than to take no action at all. Every citizen expects and demands that the police take action to protect him against prowlers and other suspicious persons, and yet some of our court decisions seem to deny that our police have this responsibility to stop and question a person observed under suspicious circumstances and in some cases to take him to a police station so that a decision may be reached by the officer's superior as to whether the third step should be taken.

The third step—booking the suspect on a definite charge:

Bringing the suspect to a police station affords the police an opportunity to discharge six important obligations which they owe to the law-abiding citizens of their community. In doing so, the police may discover facts which will provide the quantum of proof needed for the third step—booking the prisoner. This does not, however, relieve them of their six investigative obligations. They must continue their investigation in order to build up the quantum of proof needed to convict the criminal in court.

The first obligation—checking the suspect's story:

The police would be naive indeed, and subject to justifiable public censure, should they release a suspect who had just committed a heinous crime simply because of some unsubstantiated explanation given by the person suspected of the crime. The police have an obligation to corroborate the story given by the suspect—and should have a reasonable period of time to do so.

The second obligation—checking the identity of the suspect:

When the police have some reason for believing that the suspect may be wanted locally or in some other jurisdiction for the commission of a

crime, they should have a reasonable period of time to check their fingerprint and other files to ascertain whether the suspect is a "wanted" person. They would be justifiably subject to censure should they release from their custody one of the FBI's most sorely wanted criminals.

The third obligation—getting statements from victims and witnesses:

The victim of a criminal assault may be unconscious in a hospital. All witnesses to the assault may not yet be known to the police. The police have an obligation to search out witnesses and to obtain statements from them and the victim; they should have a reasonable time to do so before releasing the suspect when their is strong reason to believe him guilty of the assault even though they lack, at that moment, the quantum of proof required for his prosecution.

The fourth obligation—making laboratory analysis of physical evidence:

The suspect may have in his possession a substance which may be a contraband drug, or a firearm which may be a murder weapon, or a punch or other tool which may have been used in a safe burgulary or other crime. The police would look pretty silly to the public they are charged with protecting should they release a suspect, and then in a few hours learn from their crime laboratory that the firearm he had in his possession was used in a heinous sex-murder of a schoolgirl. The police have an obligation to make these laboratory tests and they should have a reasonable time to do so.

The fifth obligation—to search for the murder weapon and loot:

The investigation sometimes uncovers leads as to the location of a hidden murder weapon or loot that has been concealed or disposed of. Their recovery may provide the quantum of proof needed to justify prosecution. The police have an obligation to effect their recovery and should have a reasonable time to do so.

The sixth obligation—a lineup for victims and witnesses:

The police often arrest a person on probable cause and yet are not in a position to place a formal charge because the suspect has not yet been identified by the victim or witnesses. A reasonable delay is necessary in order to arrange for the victims and witnesses to view and identify the suspect. Moreover, a criminal often commits a series of similar crimes in such a manner and in such a chronological and geographical pattern as to justify the police in believing that all of the crimes were committed by the same man. When a suspect is in custody, the police have an obligation to bring in all victims and witnesses to observe him in a lineup. They should have reasonable time to do so.

Again, I maintain that these are necessary police procedures. I know of no other reasonable alternative procedure. What other course can the police pursue?

The police could release the suspect with the understanding that he make himself available for viewing by the victim at a time mutually convenient to all parties. This might be practicable if the suspect were a person well known in the community, a family man, or property owner who would be unlikely to flee. But robbers, burglars, and sex offenders are usually a different type of person. If you let them go today you would be unlikely to find them tomorrow.

The step-by-step process that I have described is recognized by Judge Burger, of the Circuit Court of Appeals for the District of Columbia, in his opinion in the case of *United States* v. *Goldsmith*, 277 F. 2d 335:

> At the risk of stating the obvious, we take note that the process of law enforcement must, of necessity, proceed step by step * * *. A vital factor to bear in mind is that as these steps progress the burden of the law enforcement agency increases. What may constitute probable cause for arrest does not necessarily constitute probable cause for a charge or arraignment * * *. Hence at each stage, and especially at the early stage, when little is known that is sure, police must not be compelled prematurely to make the hard choices, such as arraigning or releasing, on incomplete information. If they are forced to make a decision to seek a charge on incomplete information, they may irreparably injure an innocent person; if they must decide prematurely to release, they may be releasing a guilty one.

Questioning, which is reasonably necessary to decide whether to prefer charges or to release the suspect, ought not to be regarded as unnecessary delay. As Judge Burger said, it is undesirable to compel the police to prematurely decide, on incomplete information, whether to release or to charge a person who has been lawfully arrested. Police must have a reasonable opportunity to conduct an in-custody investigation in certain types of serious crimes in order to produce information on which they may decide whether sufficient grounds exist to subject the arrested person to the further hardship which inevitably results from being charged with the commission of a crime.

I do not want to be misunderstood as advocating prolonged detention. I argue only for the recognition that in-custody investigation is necessary for the proper performance of the police function in almost every case involving a serious crime. The only delay recognized under the *Mallory* rule is the delay necessary for the clerical procedures involved in the arraignment. I submit that this is not enough but I argue only for the additional delay reasonably necessary for the police to perform their proper investigative duties, no more, no less.

The CHAIRMAN. On that particular point, would you have any knowledge as to Illinois cases that sustain that position?

Your statute, as you have said, requires you, and I think this is fairly uniform in the States if I understand the rule correctly and the statutes correctly—your statute says that when an arrest is made without a warrant, either by an officer or by a private person, the person arresting shall, "without unnecessary delay" and most of these cases turn upon what is and what is not an "unnecessary delay."

And your point is that you should go a step beyond the delay recognized on the *Mallory* rule which I think you are correct in saying, which says the delay necessary for clerical procedures, but you are saying that you should go one step further and permit the police to perform their proper investigative duties.

This is the position you are taking?

I am wondering whether this is sustained in view of your Illinois statutes by the courts of Illinois.

Superintendent WILSON. Yes. There is an Illinois Supreme Court decision that bears on this question.

Unfortunately, I am not able to give you the citation. I will be glad to send it to you.

The CHAIRMAN. I think it might be helpful because in this area, which each of us recognizes is a difficult area in the determination of what is and what is not an "unnecessary delay." Any cases that you have in mind that you could cite or furnish to this committee would be helpful.

Superintendent WILSON. Well, this one supreme court decision bears on this question, and I will be glad to get you the citation.

(The citation referred to follows:)

OFFICE OF THE SUPERINTENDENT OF POLICE,
Chicago, October 25, 1963.

Hon. ALAN BIBLE,
Chairman, District of Columbia Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR BIBLE: Thank you again for the opportunity to appear before the District of Columbia Committee of the Senate on behalf of title I of H.R. 7525.

In support of my statement that Illinois law recognizes the authority of the police to conduct an adequate in-custody investigation, I cite *People* v. *Jackson* ((1961), 23 Ill. (2d) 274, 178 NE 299), in which the Supreme Court of Illinois said at page 280:

"The legislative directions that the accused be taken before a magistrate 'forthwith' or 'without unnecessary delay' cannot mean that police officers must forsake all other duties to comply, and neither can they mean that the police do not have reasonable latitude to fully investigate a crime."

Sincerely,

O. W. WILSON,
Superintendent of Police.

The CHAIRMAN. If I understand you correctly, it goes to the point that you can hold the suspect not only longer than necesary for clerical procedures but that you could hold him long enuogh to permit the police to reasonably perform their proper investigating duties?

Superintendent WILSON. This is what we do and this is my interpretation of the supreme court decision.

The CHAIRMAN. Within the constitution of the State of Illinois?

Superintendent WILSON. That is right.

The CHAIRMAN. Thank you, sir.

Superintendent WILSON. I note that opponents of title I argue that the *Mallory* rule applies throughout the Federal court system and that there is no justification for abrogating it in the District of Columbia alone. While I am opposed to the *Mallory* rule on principle anywhere it applies, I do not feel that it is illogical to outlaw it in the District of Columbia while it still remains in effect elsewhere. The District of Columbia is the only jurisdiction in which the Federal Government operates a local police department. The necessity for in-custody investigation is peculiar to local police agencies. It is not an equally compelling need to the FBI and other Federal law enforcement agencies. The police must patrol our streets and protect our lives and property. They are the first line of defense, so to speak, and it is they who are confronted on the street with the immediate hard choices as to whether to question or not to question, whether to detain or not to detain, whether to arrest or not to arrest. The investigations by the FBI, the Secret Service, and other Federal law enforcement agencies, by their very nature, are more deliberate in character. The identity and whereabouts of the subjects of their investigations are usually well known in advance. It is a matter of gathering evidence. Arrests can be delayed until all the facts are known. This is

not so with the police who usually must conduct their investigations on the spur of the moment and often when the accused is already in custody. There is a vast difference in such operations as these.

The CHAIRMAN. I think that point you make is an excellent one in distinguishing the application of Federal rule 5(a) in the District of Columbia as contrasted to its application elsewhere in the United States.

I call your attention to the fact that the Department of Justice, in writing an opinion which frankly is very critical of title I which we have before us, nevertheless, does recognize, as you do, that we have a different problem here in the District of Columbia.

This is what the Department of Justice said and it seems to me that it fits in very well with what you have just stated:

> 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, yoke, 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 reports, tax returns, etc.

The CHAIRMAN. Chief Murray is charged, in this Nation's Capital, with operating under the Federal rule very much with the same type of functions that you are charged with as the superintendent of police in the city of Chicago.

I think you have made a very fine distinction here, and I think it is one that is not quite often understood.

Thank you, sir.

Superintendent WILSON. There are those who seem to advocate that the police can perform their function without questioning suspects at all; that the solution of crimes is merely a matter of proper skill and training to find physical evidence at the scene of the crime. These same individuals argue that this is the practice routinely followed by the FBI and they ask rhetorically why the police cannot be equally skilled.

I submit that there is no substitution for questioning. Even in the relatively few cases where incriminating evidence is found at the scene of the crime, the evidence rarely speaks for itself. The testimony of someone, or an admission by the accused, is usually needed to tie the evidence to the accused and to make the physical evidence relevant as proof.

I cannot express this thought better than was done in the opinion in the case of *Trilling* v. *United States* (104 U.S. App. D.C. at 182):

> At least one of the prime functions, if not the prime function, of the police is to investigate reports of crime or the actual commission of crime. The usual, most useful, most efficient, and most effective method of investigation is by questioning people. It is all very well to say the police should investigate by microscopic examination of stains and dust. Sometimes they can. But of all human facilities for ascertaining facts, asking questions is the usual one and always has been. The courts use that method.

As I said before, I am against the *Mallory* rule on principle. I feel that the purpose of the machinery of criminal justice should be to ascertain the truth so that the innocent may be freed and the guilty punished. The *Mallory* rule arbitrarily excludes the truth on the peculiar theory that by doing so, the court can punish the police for what the court considers to be a violation of the rights of the accused. But it is society that is being punished; not the police. The only beneficiary is the criminal. As a consequence, crime is overwhelming our society.

The correct approach, it seems to me, is to raise the standards of our law enforcement personnel, to attract better personnel by decent salaries, to improve our training, and to hold individual law enforcement officers responsible, through criminal and disciplinary procedures and civil liability, for any violations of the civil rights of an accused, regardless of whether the accused is guilty or innocent.

This is the approach used by other common law countries—the United Kingdom, Canada, Australia, and New Zealand. These countries have not permitted themselves to become overwhelmed by crime and yet no one would say that their systems of criminal justice have any less regard than ours for the rights of the individual accused.

That concludes my statement, sir.

The CHAIRMAN. Well, thank you very much, Superintendent Wilson, for a very thoughtful and well-thought-out presentation.

Might I ask you a few questions about your Chicago police force?

No. 1, your jurisdiction extends over a city of how many people?

Superintendent WILSON. 3.5 million.

The CHAIRMAN. Your jurisdiction is for the city of Chicago.

Do you extend into the suburbs?

Superintendent WILSON. No, we are restricted to the city boundaries of Chicago.

The CHAIRMAN. Within the city boundaries you have approximately 3.5 million people?

Superintendent WILSON. That is correct.

The CHAIRMAN. How large a police force do you have?

Superintendent WILSON. Including civilians, about 13,000.

The CHAIRMAN. You said "including civilians." In what capacity do you use civilians?

Superintendent WILSON. Clerical, skilled positions, laboratory positions, programers, methods analysts, forms control, crossing guards—these are the principal ones.

We have a force of about 10,500 sworn personnel.

The remainder are civilians.

The CHAIRMAN. 10,500 is actually the police force?

Superintendent WILSON. Right.

The CHAIRMAN. Do you have a reserve force?

Superintendent WILSON. No, we do not.

The CHAIRMAN. What is your salary scale?

Superintendent WILSON. It is, in my judgment, quite inadequate.

A patrolman, after 5 years, gets $6,015 per annum.

The CHAIRMAN. What do you start out with?

Superintendent WILSON. Something in the neighborhood of $5,000.

The CHAIRMAN. After 5 years they get up to about $6,000?

Superintendent WILSON. Yes. This is the peak.

The CHAIRMAN. Do you have much turnover in your police department?

Superintendent WILSON. An attrition of about 40 per month, but only about 10 of these leave to seek employment elsewhere, not including those who leave on pensions.

The CHAIRMAN. What type of retirement system do you have? Is it an adequate retirement system?

Superintendent WILSON. After 55 years of age and 20 years of service a man gets—I have forgotten—something more than 50 percent of his salary, but precisely what amount——

The CHAIRMAN. After 20 years and 55 years of age?

Superintendent WILSON. Right.

The CHAIRMAN. I take it from your statement that you have experienced an increase in crime in the city of Chicago over the last few years.

Superintendent WILSON. Well, this is a difficult question to answer, Senator Bible.

We had a very large statistical increase following my arrival in Chicago 3½ years ago.

This statistical increase resulted from a change in reporting procedures, a centralization and adequate control, which was set up so that we could satisfy ourselves and the community that we are recording all crime that becomes known to the police.

This year we have enjoyed a slight reduction in total indexed crimes, and we feel that this trend will continue throughout this year so that we may end the year with about a 5-percent reduction.

The CHAIRMAN. Is there a feeling by you and by the police officers generally that the restrictions that are placed upon the police have accounted for the increase in crime in your city?

Superintendent WILSON. Yes; there is this conviction on my part and on the part of the members of the department, who are concerned with the analysis of crime in the administration of the department.

The citizens, however, I cannot speak for.

We have made some efforts to get some relaxation on the restrictions that have been imposed upon us in the State legislature, and some efforts to obtain weapons that we feel are essential in our fight against crime.

The CHAIRMAN. When you say "weapons" to what do you refer?

Superintendent WILSON. Well, the two specific things that I have reference to are two bills that we introduced in the last session of the legislature; one authorizing audio surveillance under court order or wiretapping, if you please, and the other, syndicated gambling, a bill not designed to deal with the player but the operator, the higher echelons in organized crime.

The first bill we failed to get out of the judiciary committee of the senate. The second bill, however, was reported out of the judiciary committee of the house of representatives unanimously. Something happened.

It never got considered on the floor of the house.

The CHAIRMAN. As a result of the *Mallory* decision do you sense more restrictions being imposed on the police by the courts under which you operate?

Superintendent WILSON. Nothing that I think I could trace specifically to the *Mallory* rule, but there is always lurking in the back of my mind the fear that the *Mallory* rule may one day be imposed countrywide, on all law enforcement agencies, placing the Chicago police in the same position that the Metropolitan Police are confronted with here.

I think this would be disastrous.

The CHAIRMAN. Of course, the *Mallory* rule is the rule of procedure pronounced by the U.S. Supreme Court, with regard to the Federal rule of criminal procedure.

I would not see how that would be binding on your State legislature.

It might have some effect on the courts of Illinois. They might be inclined to follow the *Mallory* decision.

Superintendent WILSON. Well, I think not only persuasive to the courts, but persuasive to the legislature also, in considering the application of similar rules in the State of Illinois.

That is, our State legislature could do exactly what Congress has done, and since, I presume, State legislatures look to Congress for guidance perhaps some of them may be tempted to apply the *Mallory* rule or your Federal rules on the local police.

This, I think, would be disastrous for our country.

The CHAIRMAN. I just wanted to clarify that.

You feel it would be harmful to you in two different ways, No. 1, on the part of the State legislature and, No. 2, on the part of the courts?

Superintendent WILSON. Right.

The CHAIRMAN. Thank you very much, Superintendent Wilson.

It has been very kind of you to come here and give us the benefit of your knowledge in this field.

Superintendent WILSON. Thank you, Senator Bible.

The CHAIRMAN. If we have nothing further this afternoon, we will stand in recess until 10 o'clock tomorrow morning.

Thank you.

(Whereupon, at 3:07 p.m., the committee was in recess, to reconvene at 10 a.m., Wednesday, October 23, 1963.)

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

WEDNESDAY, OCTOBER 23, 1963

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

The committee met, pursuant to recess, at 10 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.

Judge Holtzoff, we are delighted to see you back with us again this morning. As you know, we are probing the problems of title I, the so-called *Mallory* rule. We are happy to have you with us, sir. You are very patient, very kind, and very considerate to come back.

STATEMENT OF HON. ALEXANDER HOLTZOFF, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Judge HOLTZOFF. Mr. Chairman, I greatly appreciate your courtesy, and I want to express my pleasure in appearing before this distinguished committee and cooperating with it.

I would like to say, in order to make the record clear, if I may, that I am not coming here on my own initiative—because I would have some hesitancy about doing that. I am coming here at your very courteous request, conveyed to me through your counsel, Mr. McIntyre.

You asked me to discuss the rule of the *Mallory* case. May I preface my discussion by emphasizing something that perhaps is unnecessary, and that is that I have the highest respect and admiration for the Supreme Court. In my humble judgment, it is perhaps the greatest contribution made by the Founding Fathers to our political institutions.

But an expression of disagreement with a decision of the Supreme Court is not any disrespect for the Supreme Court. Some very great men in the past have on occasion expressed disagreement with the Supreme Court, and we think none the worse of them. For example, Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Theodore Roosevelt, and Franklin Roosevelt have all expressed disagreement on occasion with specific decisions of the Supreme Court. And there have been occasions in the past in which the Congress has taken

action to override some ruling or decision of the Supreme Court. That has never been construed as a showing of disrespect to that august tribunal.

If I may take one striking illustration—we would not have the income tax today if some very fine people, some very fine people who were leaders in Congress were not instrumental in securing the enactment of the income tax amendment in order to override a decision of the Supreme Court holding that under the Constitution, the Federal Government could not levy an income tax.

So it is in that spirit I am going to discuss the *Mallory* case, with all respect for the Court.

At the outset I want to say that the rule in the *Mallory* case—and I think this should be emphasized—is not a rule of constitutional law. It is a rule of evidence. And as a rule of evidence, it can be changed by subsequent decision of the Court, it can be changed by legislation.

The CHAIRMAN. Right at that point, Judge, I thoroughly agree with you that this is not a decision that hinges upon the construction of the Constitution. I think Justice Frankfurter made that very clear in his opinion.

But the Justice Department now, in their official report before us, states that any modification of rule 5(a) as proposed by title I of H.R. 7525, raises serious constitutional difficulties in dispensing safeguards which the *Mallory* rule assured to persons charged with crime.

Now, this is the current position of the Department of Justice, as evidenced by their official opinion, signed by Mr. Katzenbach, under date of September 13, 1963.

I would be pleased to have your observations on that position, because I agree with you that the decision of the U.S. Supreme Court in the *Mallory* case does not turn on a constitutional point; it turns on a strict interpretation of rule 5(a) of the Federal Rules of Criminal Procedure. I am sure you and I are in complete agreement on that.

But over and above that, do you have any doubt as to whether or not the present title I which is before us in H.R. 7525 would or would not be constitutional under the various provisions of the Constitution?

Judge HOLTZOFF. I respectfully disagree with the views expressed by the Department of Justice. But I do know this: The communications from the Deputy Attorney General which you have just read does not go so far as to say that the *Mallory* rule is a rule of constitutional law. It does not venture any further than to suggest that possibly there lurks a constitutional question. But even on that I disagree.

The CHAIRMAN. The point that concerns me in the *Mallory* decision, and in Justice Frankfurter's pronouncement, is this one sentence where he says:

> But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

Justice Frankfurter thereafter discusses the duty that is enjoined upon an arresting officer to arraign without unnecessary delay. In this regard he says:

> But the delay must not be of a nature to give opportunity for the extraction of a confession.

Now, I agree with you that he does not specifically point to any constitutional prohibition, and apparently it is a strict interpretation of a Federal rule. But it seems to me that there is inherent in this opinion, in those two sentences, the fear that unless such procedure is followed there may be a violation of a constitutional right.

Now, I would like to have your comment on that, because that is one of the problems that we have before this committee.

Judge HOLTZOFF. I venture to suggest that on analyzing the *Mallory* case—and I have had occasion actually in my work to read it several times, and other cases along the same line—I construe what I think Justice Frankfurter and some parts of the opinion makes clear: That what they are trying to do is introduce a means of enforcing, or a sanction for enforcing rule 5(a), which requires that a prisoner be promptly brought before a committing magistrate. Or to put it another way: They are imposing a penalty for failure to comply with the rule, so as to encourage compliance with it.

Now, the right to preliminary hearing is not a constitutional right.

As far as confessions are concerned, the rule up to the *McNabb* and *Mallory* cases was that an involuntary confession was inadmissible, a voluntary confession was admissible. And I think that is the rule in most of the States today. It was the rule of the common law, and it was the Federal rule until these cases came along.

I think as a result of some decisions the exclusion of an involuntary confession has become a matter of constitutional right, as a lack of due process, because it is apparent to us in this day and age that a confession should not be forced by torture, be it physical or mental.

Now, the rule of the *Mallory* case, however, excludes a voluntary confession—it excludes a confession merely if the defendant or the arrested person was not brought before a magistrate without unnecessary delay. Now the words "unnecessary delay" have been construed rather narrowly. Sometimes—well, the decisions have not been entirely consistent in the various circuits. The second circuit construes it much more liberally than, for example, the District of Columbia Court of Appeals. The District of Columbia Court of Appeals puts a very narrow construction on what is unnecessary delay. And that increases the problem here, because here the types of crimes that elsewhere are triable in State courts are triable in the Federal courts.

Now, it is for this reason that I am convinced that the proper construction of the Supreme Court opinion is that they were not endeavoring to promulgate a rule of constitutional law, but merely a rule of evidence. And of course, the Supreme Court has the right and power to promulgate a rule of evidence. And the Congress has equal power to repeal or abrogate it by legislative action.

Now, I think there is no doubt—and here I am drawing on my own experience in the trial of cases. I spend between one-third and one-half of my time on criminal cases. There is no doubt in my mind that prosecutions are hampered by the enforcement of the rule of the *Mallory* case, and that there are occasions where an otherwise guilty person, who has made a voluntary confession, is acquitted or found not guilty because the confession has to be excluded under the *Mallory* case, and there is not sufficient other proof standing alone to justify conviction.

Then we are troubled very frequently with borderline cases. For example, I had one case where confession was made after three-quarters of an hour, after a person was brought to police headquarters. In that case I held that was not an unnecessary delay. The court of appeals sustained me. Other cases where the delay might have been just a little longer, the confession has been held inadmissible.

I venture to suggest that so far as substantial justice is concerned, or abstract justice is concerned, the question as to whether a person was brought before a magistrate within an hour or 3 or 4 or 5 or 6 hours—that question has no bearing on the question of substantial and abstract justice, so long as the confession or statement is voluntary.

Now, of course, in determining whether or not a statement or a confession is voluntary, if the defendant has been held incommunicado all the time, that matter may be considered in determining whether the confession is voluntary. But mere delay I venture to urge should not be considered to be in and of itself sufficient to exclude a confession.

As I said a moment ago, if I may repeat, the requirements of substantial justice do not require it. As a matter of fact, substantial justice is at times defeated by the rule.

Now, title I of the pending bill, H.R. 7525, I venture to suggest adequately deals with the matter. Subsection (a) would do away with the rule promulgated in the *Mallory* case that delay alone in bringing a person before a committing magistrate may—is sufficient to exclude a confession made during the period of delay.

However, the defendant is safeguarded and protected by subsection (b) which provides that no statement made by any person during an interrogation by a law enforcement officer while such person is in custody shall be admissible unless he has been previously warned as to his rights.

As a matter of fact, a warning as to a person's rights has never been—has frequently been given by police officers, but was never required by law. This would add an additional safeguard to defendants by requiring such a warning.

Subsection (a) I think would be a step in the direction of progress in the enforcement of criminal law.

I very often like to refer to a statement made by Justice Cardoza in the leading case of Snyder against Massachusetts. He said in his inimitable manner, "Justice, though due to the accused, is due to the accuser also."

The CHAIRMAN. Thank you very much, Judge. I certainly appreciate your appearance before me this morning.

May I ask you just one question, because I think I understand you clearly. That is, whether title I, H.R. 7525 (secs. 101 (a) and (b), in your considered judgment would stand a constitutional test.

Judge HOLTZOFF. Oh, yes, in my opinion. May I add this observation. This bill is an omnibus bill, and it is possible that some parts of it will not appeal to some and others will.

Now, title I can be separated from the rest of the bill and enacted as a separate measure. I feel strongly that it is constitutional.

The CHAIRMAN. Thank you very much, Judge.

Judge HOLTZOFF. Thank you for your courtesy, Mr. Chairman.

The CHAIRMAN. The next witness will be Prof. Fred E. Inbau, Criminal Law Department, Northwestern University School of Law,

Chicago, Ill.; former director of the Chicago Crime Laboratory, author and lecturer on police practices and subjects.

At this point, I would like to have inserted into the record a short biographical sketch of Professor Inbau.

(The biographical sketch referred to follows:)

Professor of law, Northwestern University (since 1945); member of the bar of Louisiana and of Illinois; graduate of Tulane University (B.S. and LL.B.) and of Northwestern University (LL.M.).

From 1933 until 1938, a member of the staff of the Scientific Crime Detection Laboratory of Northwestern University.

After the transfer of the laboratory from the university to the Chicago Police Department, Mr. Inbau became its first director, and from 1938 until 1941 he served as director of the Chicago Police Scientific Crime Detection Laboratory. Based upon his crime detection laboratory experience, he prepared and published his book, "Lie Detection and Criminal Interrogation," a standard text on that subject.

Mr. Inbau is also author of "Self-Incrimination: What Can an Accused Person Be Compelled To Do?"; "Cases and Comments on Criminal Justice," a standard text in law for the teaching of criminal law and criminal procedure; and "Criminal Interrogation and Confession."

The CHAIRMAN. Professor, we are very happy to have you with us this morning.

STATEMENT OF PROF. FRED E. INBAU, CRIMINAL LAW DEPARTMENT, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CHICAGO, ILL.

Mr. INBAU. Thank you very much, Senator.

I appreciate your inserting my biographical sketch, Senator, because I am not here just in the capacity of a professor of law, but as one who has had some practical experience in the police field, and particularly with reference to the interrogation of criminal suspects and witnesses, both in the Chicago Police Department and the scientific crime laboratory when it was part of Northwestern University.

There is a cobweb of judicial misconception about this *McNabb-Mallory* rule. I would like to speak with reference to four of the principal misconceptions.

The first one is that when the Supreme Court of the United States laid down this rule initially in 1943 it was only effectuating a congressional intent expressed in an earlier congressional enactment. That is not so.

The second misconception to which I would like to address myself is that the third degree is widespread, and that the *McNabb-Mallory* rule is the only effective way of preventing such deplorable practices.

The third misconception is that the police can get along very well with this rule.

The fourth is that since the FBI and other national agencies function rather effectively, and they do, despite this rule, so can the police in the District of Columbia.

Now, with reference to the first misconception, I think we should take a look at the basis for the rule originally in the *McNabb* case in 1943.

Congress had enacted a statute in 1893 requiring the taking of an arrested person before the nearest Federal Commissioner for the pur-

pose—this is what was stated in Justice Frankfurter's opinion, at least what he thought the purpose of it to be—

To avoid all the implications of secret interrogation.

Now, Congress had enacted this statute requiring the taking of the arrested person before the nearest Federal Commissioner. But I submit that it was not for the reason ascribed to it by Justice Frankfurter in the *McNabb* case. Not only was that not the reason for it, but this statute initially said nothing about taking someone to the nearest Federal Commissioner without unnecessary delay. This particular statute that applies in the *McNabb* case made no reference to the time within which this was to be done.

This statute—and I traced the congressional history of it—was enacted for an entirely different purpose than the one ascribed to it in the *McNabb* case. It was actually enacted for the purpose of putting a stop to a racket that had developed between Federal marshals and Federal commissioners at that time. And you will find all this in the Congressional Record. It was not an order to protect the accused person from secret interrogations.

The original bill that was the basis for the *McNabb* case was an amendment to an appropriation bill in Congress.

Now, the reason that I mention all this is because the Court in the *McNabb* case indicated that it was only effectuating a congressional intent.

All right. If the court was wrong in that—in other words, this was not the intent of Congress—it seems to me that the present Congress is all the more privileged to set the records straight as to what this Congress intends. It certainly was not the intent of Congress, with this 1893 bill, and I hope this present Congress will make it clear that it is not the intent of Congress at the present time, that you do not approve of this rule which severely handicaps the police.

I like to put it in a little more drastic term—that handcuffs the police. And that is what is being done here in the District of Columbia.

Mr. Chairman, you asked Judge Holtzoff a question about the constitutionality of the proposed bill, and I would like to make some statement on that, if I may.

It is quite clear in the original McNabb bill, which laid down the rule that was only perpetuated in *Mallory*—the court made it quite clear that it did not found this rule on constitutional considerations; it was merely—it was laid down by virtue of the supervisory power over—within the Supreme Court over lower Federal courts. It was not based upon constitutional considerations. And the State courts have held unanimously that this is not binding on them, they are privileged to accept or reject it.

Now, I think that being so, if you have here a bill, as you do have, which would abrogate this rule, it seems to me that it is completely constitutional, and Congress has the privilege and I think the duty to enact this particular piece of legislation.

The CHAIRMAN. The citations of similar provisions in the State statutes; for example, on this subject, and particularly in my own State of Nevada the duty is expressed this way. "The defendant must in all cases be taken before the magistrate without unnecessary delay." I think that is fairly standard in many of the States.

Now, my question to you, as an authority in this field, would be this.

Have sections similar to the one I just quoted been construed by the State courts and the U.S. Supreme Court to be constitutional?

Mr. INBAU. Well, Mr. Chairman, let me put it this way. We recently had a decision from the Illinois Supreme Court in a case in which the police delayed in taking someone before a judge for arraignment or for the preliminary hearing. The police did delay. They did it for the purpose of completing an investigation, and also for the purpose of interrogating the accused. In other words, they delayed.

Now, the Illinois Supreme Court held that this was all right—even though we have a statute in Illinois saying that the arrested person must be brought before a judge without unnecessary delay. The Supreme Court of Illinois held that as long as the purpose of this was to complete the investigation, to question the defendant, and as long as they used proper means, no force, no threats, no promises, as long as they did that, and the time during which they did it was not unreasonable, there was a compliance with the statutory provision.

Now, what I am suggesting here is that if the question came before the Illinois Supreme Court, the constitutionality of a statute permitting the police to hold someone, say, for 3 hours, 4 hours, 6 hours, I have no doubt the Illinois Supreme Court would have sustained it in the light of what it said in this case, and I am referring to the case of *People* v. *Escobido*. That is a recent decision of the Illinois Supreme Court.

Now, other State courts have upheld the constitutionality of the Uniform Arrest Act. It is on the books in three States. And nowhere along the line has the U.S. Supreme Court said that the States are not privileged to do this, or that Congress is not privileged to do this, to give the police an opportunity to complete their investigation and to interrogate an arrested person. And I differ. I have not read the statement to which you refer, Mr. Chairman, but if it seems to imply that this is unconstitutional, I wholeheartedly agree with Judge Holtzoff—I do not think it is unconstitutional. I think it is a constitutional measure.

The CHAIRMAN. The statement to which I referred is contained in the letter of the U.S. Department of Justice dated September 13, 1963, signed by Mr. Katzenbach, and forwarded to this committee. I will now read the pertinent portion of the letter to you:

> 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.

Now, I assume that the Department of Justice is alluding to what Justice Frankfurter stated in the *Mallory* decision that persons under arrest be taken without unnecessary delay before a committing magistrate. In accordance with the *Mallory* decision about the only interrogation that was to be made was a routine interrogation, not a proceeding that was intended to lead to a confession.

Then the Department of Justice, in its September 13 letter, states this:

> 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.

Now, that is what I was directing your attention to.

Mr. INBAU. Well, Mr. Chairman, I have no doubt but that there are some members of the U.S. Supreme Court who would like to see, and who would impose, if they could, the *Mallory* rule upon the State as a constitutional requirement. The Court has not said that so far. And I would suggest to this Congress that this awesome responsibility be left up to the Court, and that Congress should not, by fear of possible constitutional invalidity, refuse to pass this bill. I think it is vitally necessary. And if the time comes when it is held to be a constitutional requirement, I would like to have the privilege of coming before the appropriate committee to suggest that we have a constitutional amendment to change it, for the simple reason that it is absolutely necessary for the police to have this opportunity to interrogate criminal suspects.

Now, with reference to the second misconception——

The CHAIRMAN. Before you get to the second misconception, may I rephrase my question a little and ask you this:

Do you know of any U.S. Supreme Court decision that would hold to be constitutional a provision similar to the one that we have before us in title I?

Mr. INBAU. No, I do not—except I think we have to go back to the *McNabb* case, the original case that laid down this rule. And in that case the Court very specifically disclaimed any constitutional basis for the decision. The Court said:

> We are laying this down only in the exercise of our supervisory power.

Now, if the Court wanted to make this a constitutional requirement, it had a wonderful opportunity in the *McNabb* case. It could have said so specifically in the *Mallory* case. But the Court itself has never said this.

The CHAIRMAN. I understand that the *McNabb-Mallory* line of decisions, are not based on constitutional grounds, rather they go to the construction of a rule of procedure. Is that correct?

Mr. INBAU. That's right.

The CHAIRMAN. But my question, aside from the Federal court system, is there any provision similar to the one that is now before us where it is indicated that evidence including but not limited to statements and confessions otherwise admissible shall not be inadmissible solely because of delay in taking the arrested person before the Commissioner?

Now, do we have any construction of a provision of that kind by the U.S. Supreme Court, to your knowledge?

Mr. INBAU. Not specifically on that. It may be this, Mr. Chairman, that the Department of Justice is referring to.

As we all know, the U.S. Supreme Court has imposed the exclusionary rule on all the States as a constitutional requirement. Now, you may deduce from what the Court did in the case that laid down this rule, that if the police delayed in bringing someone before a magistrate, in defiance of a State requirement, that then anything obtained during that delay is inadmissible because it would be unconstitutional to use such evidence. In other words, it laid down a rule of exclusion with respect to confessions as they have—as regards evidence of a physical nature, that has been illegally seized.

Now, again I say I have no doubt that several members of the Supreme Court would like to impose the *McNabb-Mallory* rule on the States as a constitutional requirement. I have no doubt about that at all. And it could be another one of these 5-to-4 decisions, holding this particular bill unconstitutional.

The CHAIRMAN. I understand the position you are taking. The Justice Department cites no specific authority. The Deputy Attorney General says in his letter that this would raise serious constitutional difficulties. It would seem to me as a lawyer, if they had a case that would point to these two sections being unconstitutional, they would have cited it. I suppose there is no such case, for the simple reason that probably none of the States have a provision comparable to the title now before us which says that a confession shall not be inadmissible solely because of delay in taking before the committing magistrate.

Mr. INBAU. The reason that you do not have it in the States is because the States do not have the *McNabb-Mallory* rule, anyway.

The CHAIRMAN. Since there is no State legislation comparable with legislation before us, then there probably is no final decision from the Supreme Court bearing on this particular point.

Mr. INBAU. That's right.

The CHAIRMAN. All right, thank you—and pardon my interruption.

Mr. INBAU. The second misconception that I would like to discuss for a few moments is that this notion that third degree practices are prevalent within police departments—and the only way to stop them is by rules such as the *McNabb-Mallory* rule.

Now, first of all third degree practices are no longer prevalent in this country. I knew what the situation was 15, 20 years ago. I know what it was in my own city of Chicago. I know what it is now. It used to be officially condoned. It is not officially condoned now in the Chicago Police Department and other police departments with which I am familiar.

Not only that, but if the police officer indulges in such third degree practices, severe disciplinary measures are taken.

Now, I think we ought to clear the air on that. We are not living in a time when the police are becoming more lawless than they used to be. They are becoming much more law abiding. And now is an inappropriate time to keep clobbering them with these rules that prevent them from functioning effectively.

I think what we have to bear in mind is that there are other ways of protecting the public from police abuses short of depriving them of the necessary opportunity to interrogate criminal suspects. The only way you ever do it is to pursue a practice of selecting better police, training them properly, seeing that there is a minimum of political interference—and by that I mean some ward committeeman and persons like that inducing them to do something wrong; to see to it that there is a promotion system based upon merit considerations and not political considerations. And also to see that they are adequately compensated. That is the only way we are going to protect ourselves from police abuses. We are not going to do it by any judicial decree. And I think the courts have stepped out of their traditional constitutional role, as a judiciary branch of the government, and they have gone into this executive area. I do not think it is the province of the courts to do that.

I would also say this to the people who are opposed to this present bill, those who favor the McNabb-Mallory bill. If you want to really put a stop to all police abuses, then outlaw confessions completely. Let's face up to it and outlaw them all. Let's don't fool around with these rules as we have been dealing with them up to now. Let's outlaw all confessions.

I would certainly urge anyone who is in favor of that to bear in mind the consequences of such a rule.

Crime right now is increasing four times faster than population. And I venture to say if you had such a rule as that it is going to increase tremendously faster. It would be inevitable. And I think some commonsense consideration will support that.

We could put a stop to all fatal accidents on the highway, practically all of them, if we required by Federal and State law that all automobiles have governors on them so they cannot go faster than 20 miles an hour. If you want to achieve this kind of objective, you want to get complete safety on the highways, that is one sure way to do it. But we would pay an awful price for safety on the highways if none of us could go faster than 20 miles an hour.

Again, I say if you want to put a stop to all police abuses, prohibit interrogations completely, don't let the police use any confessions. Just bear in mind what the consequences of that would be.

Now, this notion that the police can function effectively with the *McNabb* rule, that they can get along with it fairly well—you have heard from Chief Murray. He has told you what the situation is here in the District of Columbia.

Let me suggest this to you on the basis of my own experience and observation over the years—that most crimes can only be solved by the interrogation of criminal suspects and witnesses. And let me give you just a few simple illustrations of this.

A woman is walking down the street late at night. She is grabbed, taken into a dark alley, and raped. She knows this was a man, he looked big to her, about 6 feet tall, he had on a blue sweater or something of that sort. That is about all she can tell the police. He does not drop his hat at the scene of the crime with his name in it. He does not leave any other clues.

In that type of case you can bring the FBI laboratory to the scene and you would still not be able to find any clue leading to the identity of the perpetrator of that offense. The only way you solve those crimes is by picking up people on reasonable grounds, reasonable suspicion, and questioning them.

The CHAIRMAN. If you have a reasonable ground, at that point, why don't you take him before a committing magistrate and charge him with the crime, if he has reasonable cause to believe he has committed it?

Mr. INBAU. Mr. Chairman, you cannot support a charge before a Federal commissioner by an officer's reasonable belief that this man committed the crime. That may be adequate for the purpose of the apprehension. But if you take him before a Federal commissioner, you are going to be able to support the charge—he has not made an admission. And in those cases, unless you get an admission, and he tells you where he threw this woman's purse after he robbed her following the rape, or something of that sort—unless you get evidence

of that sort, you cannot support a charge before a Federal commissioner, you would not hold him on any charge.

In most of these cases unless you get a statement or confession from the suspect himself, you are helpless with the prosecution.

Let me give you another example. Take a robbery on the street. A man is walking down the street at night, someone comes up and hits him over the head, he is knocked unconscious, his wallet is taken away from him. Again there is no hat at the scene of that crime with the man's name in it. How else can the police solve these crimes without picking up individuals upon the reasonable belief that he may be involved in this, and questioning him.

But I want to make this perfectly clear. When I say interrogation, I do not mean the use of methods that are apt to make an innocent person confess. I am unalterably opposed to force, hitting an individual, threatening him, making promises of leniency to him. I am opposed to all of those methods.

But there are other psychological techniques and tactics that are usuable to get confessions from the guilty without endangering the rights and safety of the innocent people. And when I say the police have to resort to these interrogation devices, I mean that kind of an interrogation, and not the kind of 15, 20, or 25 years ago.

Now, another misconception——

The CHAIRMAN. It seems to me that that really gets to the heart of this problem. Witnesses have appeared before this committee, and indicated that it is difficult to spell out the type of police interrogation that you are speaking about.

Certainly, Justice Frankfurter, in construing rule 5(a), indicated that police officers could not take a suspect to police headquarters in order to carry out a process of inquiry that lends itself even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt. In the next paragraph he concludes by saying:

The delay must not be of a nature to give opportunity for the extraction of a confession.

Mr. INBAU. Mr. Chairman, when Justice Frankfurter talks about extracting a confession, it gives the impression that what the police do is to force confessions out of individuals, and that is the only way you can get confessions out of people.

Now, the years that I was at the crime detection laboratory, my special interest was in interrogation. I have written a book, two books on the subject—one as recently as November—in which I have described the methods by which you can interrogate people without it bordering on extraction.

You see, many of us have been reading too many detective stories and watching this stuff on television and the movies, where you can solve these crimes just by being very sharp in one respect or another. You do not solve crimes that way. People do not come in and blurt out a confession of guilt. They have to be talked into it, persuaded into confessing.

Now, this is not extraction.

When you sympathize with a person who killed another one, and you play upon his sympathies to get him to tell you the truth—in my judgment, that is not the extraction of a confession. That is obtain-

ing a confession. But it is not the extraction. You have not put him through the wringer to get it.

When you suggest to him that his partner has confessed the crime, and then he says, "All right, I will tell you," and then he tells you where the gun is, where the loot is, or where the body is—to me that is not extracting a confession; that is obtaining a confession.

When you use the word "extraction" it means that you put somebody through a wringer, you are putting him on the rack, you are threatening and abusing him in order to get him to tell you the truth. That is not what we are talking about. I know that Mr. Wilson yesterday did not have that in mind. The other people did not have that in mind. That is not what we are asking for.

What we are asking for is an opportunity to question people in a way that is not apt to bring forth a confession from an innocent person.

The CHAIRMAN. Is there any way that that theory and practice—it is a practice, that you are suggesting—is there any way that that could be defined and written out in cold print, saying, "Mr. Police Officer, you can interrogate this suspect in this manner." Of course, I realize this is hard to reduce to writing.

Mr. INBAU. I did it. I came up with what I thought was the only kind of advice that could be given to the police. I have analyzed all of these Supreme Court decisions, and the decisions of the State courts and the Federal circuit courts. And the only sensible guide I could come up with is to tell the police this. And after all, you cannot give them a Supreme Court decision and tell them, "This is what you are supposed to do."

As I view it, this is the way interrogation should be conducted, this is the way police should be instructed with respect to interrogation procedures. Ask yourself this question when you are ready to interrogate someone: "Is what I am about to do or say likely to make an innocent person confess?" If the answer objectively given is "Yes," don't do it. On the other hand, if you can objectively say: "What I am about to do or say is not apt to make an innocent person confess," then go ahead and do it.

You see, this was the rule until the *McNabb* case. This was the rule. This is the rule in England today. The test of voluntariness—not a test as to whether the police were naughty and delayed half an hour in getting somebody before a magistrate. The confession rule developed initially to protect persons from untrustworthy confessions. I think we ought to go back to that.

Justice Frankfurter, in the *Colum* case, which was a State case, once again said the test of confession admissibility is voluntariness.

Now, the Court has vacillated on that over the years. But some members of the Court cannot avoid trying to discipline the police by laying down these unrealistic rules, and ignoring the consequences of it insofar as the public welfare and safety are concerned.

Now, this I think brings me appropriately to this next point I wanted to make.

You frequently have heard it said, I know you have heard it here—"After all, the FBI does a fine job, and they are saddled with the *McNabb-Mallory* rule, so others can get along with it, too."

A comparable fallacy is for someone to say, "The British police do not have to do this kind of interrogation, so we can get along without doing it here, too."

Now, with respect to the second one, the British police—that is a completely fallacious notion. I can refer this committee to the references of two police officers in England, high-ranking police officers, in print, where they admit that they have to avoid the stringent judges' rules in England, which prohibit in fact an interrogation of someone after they are ready to charge him. They tell you how they circumvent it. They just postpone in their own minds the time when they are going to charge him with the crime. Or if they interrogate him, they are doing it to remove an ambiguity from his statement.

Now, with reference to the national Federal police——

The CHAIRMAN. You mean the FBI?

Mr. INBAU. The FBI, or other national police—the Treasury Department, and so on. When they are on a case, a Mann Act case, a counterfeit case, even an espionage case, that type of case lends itself to solution by investigative procedures short of interrogation. The FBI can build up a beautiful espionage case against someone without ever having talked to him. They can get somebody on a Mann Act case without ever having said hello to him.

Those cases are different, however, from what Chief Murray and his police are confronted with here in the District of Columbia. They do not have that kind of a case. They have got rapes in dark alleys, robberies on dark streets, burglaries, and crimes of that sort that do not lend themselves to solution by these processes.

Furthermore, they have thousands of cases to every one the FBI has.

Now, mind you, this is not to deprecate the FBI. I have the highest respect for it. But I think we are wrong when we say if the FBI can do it, Chief Murray here in Washington, D.C., can do it—he better go ahead and do it. You are dealing with two entirely different situations.

The CHAIRMAN. I think in fairness to the Department of Justice they make that very clear, in pointing out just exactly what you have pointed out. And I read it into the record yesterday, and will not read it into the record again, except to indicate that they agree with you that here in the District of Columbia the chief of police is more closely allied and similar to the chief of police that you have in the city of Chicago than to the FBI. The Department of Justice recognizes that. Of course, as you may remember, that was one of the points that was made, before the Judiciary Subcommittee on the general amendment that was proposed at that time to rule 5(a), and the majority report of the Judiciary Committee of the United States back in 1958 indicated very clearly, even though this problem was recognized, that they were not going to make a distinction and have one rule of evidence here in the District of Columbia and a different rule of evidence in the Federal court systems.

Senator O'Mahoney said that in the majority report which he filed accompanying the bill. So I think we do recognize the very difference that you comment on. And I think it is one that should be emphasized and reemphasized time and time again, because there is a difference. This is not the FBI operating here—this is in fact a chief

of police operating similarly to the chief of police in the city of Chicago.

Mr. INBAU. That's right.

Well, Mr. Chairman, I have taken up enough of your time.

I would, however, like to more or less summarize what I have been trying to say here—that the police in Washington, D.C., as in Chicago, or New York, or Los Angeles—they need time to interrogate criminal suspects; they need that opportunity. If the law-abiding public is going to be protected, that is an absolute necessity. Incidentally, it is fashionable now to talk all about individual civil rights—that's fine. There is a Bill of Rights, and for the record I am in favor of the Bill of Rights. But I also am aware of the fact that there is something in the preamble of the Constitution talking about the purposes of the Constitution to protect the public welfare and promote the public tranquillity.

We have got to look at the Constitution as a whole. It was not just a Bill of Rights. There is something else in there—it was designed for the protection of the public generally, and for the public welfare.

Now, the police also need, in the city of Chicago, Washington, D.C., the right to stop people on the street under reasonable circumstances. A man in a dark alley at 3 o'clock in the morning—they need the right to find out who he is, what is he doing there. And I would hazard a guess that the people who are opposed to giving the police this right would be the first ones who would insist it be done if their home had been burglarized, their daughter had been raped, or they had been robbed. They would expect the police to go looking for the man who did it, and to use these very processes that they are opposed to in principle.

The police also need the authority that is given them is this proposed bill for the detention of material witnesses. I think all of these as a package are deserving of favorable congressional attention.

Now, let us all bear in mind that we are not living in a vacuum, we are not living in a make-believe world, we are not living in a world where we can all do as we please without limitations or controls upon our individual conduct.

In driving a car, if I'm in a hurry I find it awfully annoying to stop for a red light, to stop for a stop sign. That is awfully annoying to me. I would prefer to do it another way. But I have come to recognize, as all of us have, that in the public interest, public safety, we have to have these kinds of controls and limitations.

As a businessman, if I were a businessman, I think I would find it very, very inconvenient to comply with the various Federal and States regulations and controls upon my business. I would prefer, as a businessman, I think, to go ahead and do it the way I please. But in the public interest, the businessman today is really handcuffed. I am not saying that is undesirable. I think it is desirable. But let us recognize there are other people than criminals who are being confined to adhere to and forced more or less into complying with rules that are absolutely necessary for our collective existence.

If I'm in a hurry at night, and I run down the street and take a short cut through an alley and a policeman stops me, wanting to know who I am, what I'm doing there, I would find it inconvenient to be detained for this purpose. But I hope I have sense enough to recog-

nize the fact that what he is doing is in the public interest and requires this kind of inconvenience on my part as on individual.

These are the prices we pay for the privilege of living in an orderly society. Everything we do as law-abiding citizens today is circumscribed by considerations of public welfare and public safety. We have accepted this.

I think we have a right, therefore, to require criminals or those persons who are reasonably suspected of being criminals to make a similar confession.

Thank you very much.

The CHAIRMAN. May I ask a question in connection with the concluding part of your very fine statement where you discussed title III of the bill.

Now, are investigative arrests sanctioned in the State of Illinois?

Mr. INBAU. In effect, they are.

The CHAIRMAN. In effect they are. Is it written into the statute?

Mr. INBAU. No, it is not in the statute, Mr. Chairman. But as I mentioned earlier, there is a recent Illinois Supreme Court decision, the case of *Escobido*, in which the Illinois Supreme Court recognized the fact that the police need this opportunity to complete this investigation after an arrest and before taking an individual before a judge for a formal charge.

The CHAIRMAN. I thought that case went to the admissibility of a confession.

Mr. INBAU. Well, it did. But the court very specifically said that the police need this opportunity. It stated that in the opinion.

The CHAIRMAN. If you have a citation that could be furnished to the staff, we would appreciate it.

In your opinion, is title III a constitutional provision?

Mr. INBAU. Yes, sir.

The CHAIRMAN. My understanding is the lawyers who have studied it rather exhaustively here in the District of Columbia seem to have grave doubts as to the constitutionality of this particular provision.

Mr. INBAU. The constitutionality has been upheld by a couple of State supreme court decisions in States which have the Uniform Arrest Act, after which this one is modeled. Now, it seem to me if you have the supreme court of a couple of States upholding the constitutionality of it, Congress is privileged to take a chance on its constitutionality, despite the fact that there are some lawyers who have grave doubts.

The CHAIRMAN. Would those State supreme court decisions find their way to the U.S. Supreme Court, and there be denied on certiorari?

Mr. INBAU. As a matter of fact, certiorari was denied in one of those cases. Now, that does not mean the U.S. Supreme Court approved it. The Court has always said that it is not to be accepted as an approval of what was done below—the mere denial of certiorari. But the Supreme Court did in one of those cases.

The CHAIRMAN. Well, in your judgment, based upon two or three Supreme Court decisions which hold the uniform arrest statute constitutional, you would think that the investigative arrest provision in title 3 would be held constitutional.

Mr. INBAU. It should be held constitutional. What bothers me, though, Mr. Chairman, is that there are some members of the Court thoroughly committed to labeling anything of this sort unconstitutional. I would hazard a guess there is going to be a 5 to 4 decision one way or the other.

Now, the trend—as you saw it recently—three Justices are now talking about holding it a violation of the Constitution to impose a death penalty. They spoke with reference to a rape case. So I do not want to be in a spot of assuring this committee what the Supreme Court is going to do. I do not know. What I am saying is in the light of the history back of these constitutional provisions, in the light of all that has been said by the Court thusfar, we have reason to believe that the Court should or would uphold the constitutionality of this. And I trust the Court will come around to doing that before the situation becomes so hopeslessly bad in the District of Columbia, for instance, that the force of those circumstances will compel the Court or compel constitutional amendments to give the police this privilege. It takes time to come up with a constitutional amendment. And meanwhile, I am seriously concerned as to the safety of the public of this country.

The CHAIRMAN. Thank you very much. I certainly appreciate your appearance before us today and obtaining the benefit of your views in areas that you are proficient.

Thank you very much.

Mr. INBAU. Thank you, Senator.

The CHAIRMAN. Our next witness is Mr. George Shadoan, of Washington, D.C., an attorney, adjunct professor of criminal law, Georgetown University.

STATEMENT OF GEORGE W. SHADOAN, ATTORNEY AND ADJUNCT PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. SHADOAN. Mr. Chairman and gentlemen, thank you for the opportunity of presenting my comments concerning titles I and III of H.R. 7525 to the committee.

I am George Shadoan. Until August 1 of this year I was an associate professor of law at Georgetown University Law Center and director of the Georgetown legal internship program. In that capacity I was an immediate participant in or supervised the handling of something like 1,500 criminal cases over the past few years, all on the side of the defense.

I would like to preface my remarks by saying that in the course of participating in or supervising the handling of 1,000 to 1,500 criminal cases in the District of Columbia, I have come to recognize a need for the police interrogation of suspects. I do not automatically oppose any bill which seeks to allow increased police interrogation of suspects. I believe that the bill advocated by U.S. Attorney Acheson sometime earlier this year warrants serious consideration, and I believe that with modification it would be acceptable to me and to most fair-minded people. I do not endorse H.R. 7525 which has been popularized as the omnibus crime bill. Looking over the list of imposing witnesses appearing before this committee to present their

views regarding the bill it is obvious that many competent men will demonstrate to this committee the specific advantages and disadvantages of this legislation. Therefore, I asked myself what I could say that would be helpful to the committee which would not be a repetition of other witnesses' observations. I concluded that some comments concerning the stated needs for this legislation might be helpful.

It seems to me there has been far too much reliance upon the opinion of experts and far too little attention to verifiable facts.

These facts, to the extent possible, are the ones that I would like to speak about.

It seems to me from what I read in the paper day after day that the public, and indeed the Congress, has been subjected to a campaign arising from fear and frustration, and the arguments which have been made to support this legislation are so obviously false as in my judgment to manifest an intellectual contempt for Congress and the public.

For example, these arguments may be summarized from the House committee report, that this legislation is needed, first, to protect innocent people from charges that would later be dismissed, leaving them with a stigma of a police arrest record; and, too, as Professor Inbau has just said, to catch and convict the guilty. And finally, of course, if this legislation is enacted, that famous telegram to the underworld that Washington is soft on crime will be retracted.

In my statement, which I have submitted——

The CHAIRMAN. And it will be incorporated in full in the record.

(The statement referred to follows:)

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Out of the fear and frustration of this emergency—and I recognize the emergency—otherwise responsible public figures have waged a campaign of hysteria. In doing so, they have used arguments so obviously false as to manifest an intellectual contempt for Congress and the public. The result is illustrated by the committee report of the present bill. It urges that the legislation is necessary (1) to protect innocent persons who would otherwise be charged with crime because of police inability to investigate and clear them prior to formal charge, (2) to catch and convict the guilty, and (3) to retract that "telegram" to the underworld that Washington courts mollycoddle criminals and are soft on crime.

Because of the deep emotion involved, I suggest that the Congress cannot rely upon opinions even of experts. The testimony of law enforcement officials before Congress has been so conflicting as to strain the credence of the most gullible. For example, Police Chief Murray told Congress in 1957 [1] "if the *Mallory* decision stands, it will result in complete breakdown in law enforcement in the District of Columbia * * * an overwhelming majority of these major crime cases, and maybe as much as 90 percent, are solved after the subject has been brought in and questioned."

And in 1958, the Chief stated to Congress [2] that "most of the murders, the rapes, and robberies that I have come in contact with would have gone unsolved and unpunished under the *Mallory* decision."

These frightening predictions did not move the Congress to legislation either year. Furthermore, they did not prevent the Chief from testifying at an appropriations hearing in 1961 that the police had improved their solution rate of criminal homicide and other major crimes between 1958 and 1959; and that in fact the Washington police solved twice as many of these crimes as the national average.[3]

Supporting the Chief's appropriations testimony are statements from former U.S. attorney, Mr. Oliver Gasch, and the present U.S. attorney, Mr. David Acheson. In 1960, the Washington Post [4] reported Mr. Gasch as stating in a speech that *Mallory* questions were of controlling importance in less than 5 percent of the criminal prosecutions. And U.S. Attorney Acheson, Mr. Gasch's successor, indicated in a 1962 television interview [5] that in only two cases per year did his Office drop a prosecution or lose a conviction because of the *Mallory* rule. Finally, even upon the executive hearings concerning the present bill, when presented with a letter critical of the police by Mr. Whitener, we find Chief Murray stating defensively:

"I would like to make a couple of comments. I have been appearing before committees of Congress for a number of years, and no one has ever heard me minimize the crime problems in the District of Columbia, but all large cities have these crime problems too * * *. And I think if you check the records, you will find our Department is second to none in the Nation in the clearance of crimes." [6]

I believe that this series of quotations alone should lead us to the conclusion that Congress must insofar as possible supplement such opinions with fact, and not to confuse the one with the other.

The factual evidence at my disposal indicates that the House report premises are false. Briefly, I should like to attempt to establish three points:

1. Measures allowing arrest without probable cause and subsequent detention and interrogation without the presence of counsel or presentment before a magistrate would not significantly aid the police in securing convictions of the guilty;

2. At the same time such measure would not result in the thorough investigation necessary to clear innocent persons faced with suspicious circumstances; and

3. The only telegraphic message to the underworld that Washington is soft on crime and that our courts mollycoddle criminals has been sent by anti-*Mallory* propagandists who transmit a false message.

With reference to the first point, the statistics from the Police Department's own files conclusively show the futility of allowing unfettered interrogation. In 1960, the so-called investigative arrest was in full flower. The police could arrest and detain for indeterminate periods without regard to the presence or absence of probable cause. And one legitimately asks how successful were these

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[1] Hearings before the Special Subcommittee To Study Decisions of the Supreme Court of the United States of the House Committee on the Judiciary, 85th Cong., 2d sess., pt. 1, at 42–43, as reported in Kamisar, *Public Safety* v. *Individual Liberties*, 53 Jour. Crim. Law and Criminol. 190 (1962).

[2] Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d sess., p. 124.

[3] Hearings on the District of Columbia appropriations for 1961 at pp. 619–620 as reported by Kamisar, supra, note 1, at p. 191.

[4] See Kamisar, supra, note 1, at p. 192.

[5] See report and recommendations of the Commissioners' Committee on Police Arrest for Investigations, July 1962, p. 17, which states that "the information was supplied by the U.S. attorney in a television interview. 'Dimension 4,' WRC–TV, Apr. 1, 1962, and was subsequently confirmed to the committee."

[6] Joint hearing before the District of Columbia Committees of the Senate and the House of Representatives on the increasingly serious crime situation in the District of Columbia, Feb. 6, 1963, p. 52.

unfettered interrogations? The police statistics anwer the question, and as far as I know their answer cannot be controverted.[7]

These statistics show that in 1960 one-third of all felony arrests were for investigation. That year, 1,356 people were detained for investigation for 8 hours or more. Of these 1,340 or all but 16, were ultimately released without charge of any crime. That means that only 1.2 percent were even charged with a crime. The same year, 690 persons were detained for more than 12 hours. Of these, only seven were ever charged with a crime. Again, in only 1 percent of the cases did detention and interrogation yield any measure of success to the police.

But what about the major categories of vicious crime for which detention and interrogation is said to be essential? In 1960, 221 persons were arrested for investigation of homicide—all but 1 were released. During the same period, 120 persons were arrested for investigation of rape—all but 3 were released without charge. And so it goes. Let me say again that so far as I have been able to determine, these facts are not subject to dispute. But police officials and others who must know of their existence have chosen to sluff over or ignore them in the widespread public hysteria of the day. Another point which officials have chosen to ignore is that the great majority of these so-called investigations occurred in secret without knowledge on the part of anyone that the arrested person was in custody.

Second, I would like to comment upon the bill's proponents' solicitude for the innocent suspect. They say that unless the police are allowed to detain and interrogate, many innocent persons will be charged with crime, and thus given a police criminal record, and also spend at least some time in jail before the case is kicked out of court. I may note parenthetically that the proponents' concern does not reach so far as to advise the suspect of his right to counsel nor to require an opportunity to contact counsel. Similarly, contrary to other recent legislative proposals, no provision for a verbatim recording of the interrogation is included. We are told that we can rely upon the discretion and self-restraint of the police to conduct a thorough investigation to clear the innocent and convict the guilty.

I must state initially that so far as I know it is true that alibis and identifications are checked out in the sensational cases. My remarks will relate to the run-of-the-mill armed robbery, street robbery, and aggravated assault which really make up our frightening statistics. In these cases my conclusion is that the common police approach is simply to get enough evidence to satisfy the prosecutor's and the committing magistrate's requirement of probable cause, and hopefully, enough evidence to convict. At that point the police investigation stops and the case is marked "solved" or "cleared" so far as their records are concerned. Any investigation thereafter is a matter for defense concern—and cooperation with the defense attorney's investigation is limited in most cases. Fairness requires the caveat that my conclusions are limited by my experience, which though fairly wide, cannot carry the weight of statistical fact. However, I am confident that my remarks would not be challenged by any knowledgeable attorney who has frequent occasion to defend persons accused of crime. Even in the short time since I received the unexpected invitation to appear here, I had no difficulty in recalling enough instances within my own experience to illustrate my remarks.

An example of the police "clearance" or "solution" philosophy may be found in the occasional lament of an assistant U.S. attorney that his case rests upon the "race to the hospital." Contrary to the pessimistic dictum of Ecclesiastes, apparently the Metropolitan Police do award the race to the swift. The injured party who first reaches the hospital is asked who cut or shot him and the named person is arrested and charged. No further investigation is conducted as this is "a matter for the defense."

An excellent example of the "race to the hospital" and the police clearance concept is found in the case of *United States* v. *Joseph Taylor*, Cr. No. 198–61. The charge was assault with a dangerous weapon. The complaining witness had been severely cut about the face with a broken bottle. When I first interviewed the defendant, he had already been in jail over a month since his arrest because of his inability to make bail. He told me that he had acted in self-defense against a drunken and unprovoked attack with what appeared to be a knife. The complaining witness fled the scene after being hit with a bottle which broke and cut his face. Shortly thereafter, the police arrived and despite

[7] See the analysis of the police records reported in the report and recommendations of the Commissioners' Committee on Police Arrest for Investigations, July 1962, pp. 39–40.

his protestations that an impartial eyewitness was in the room to prove his innocence, the police told him that this was a matter for the defense, took him to District of Columbia General Hospital for emergency treatment of his cut from the assault and then placed him in a cell where he had been until I was appointed to represent him. He had been arrested and indicted without further investigation solely upon the word of the complaining witness. Ultimately, I was able to interview the eyewitness named by the defendant. He was found in the presence of the complaining witness and his wife. All readily confirmed the truth of the defendant's story. The complaining witness said that he had made the false charges because he was drunk and angry at the time. Now he was afraid to change his story because he had sworn to the complaint. However, faced with the witness and his own wife, he agreed to tell the truth at trial. When he did, the case was dismissed. By this time the accused had spent over 2 months in jail. My recollection is that the accused's entire police record consisted of one previous charge of assault. The man upon whose word he was charged, in addition to being angry and intoxicated at the time he made the complaint, had a police record showing that he had been convicted of public drunkeness 17 times since 1945, of being disorderly 4 times in the same period, and had a simple assault charge and a charge of assault with a dangerous weapon dismissed for want of prosecution.

Similarly, in *United States* v. *William Kemp*, Cr. No. 1033–60, a gas station had been broken into, ransacked, and a car stolen. Within a short distance, two men were found in the car. One, William Kemp, stated that he had been picked up a short time before at his home, which was within about a block and a half of the arrest site. He said that numerous witnesses were there to corroborate his story that he could not have been present when the crime occurred. Notwithstanding the close proximity of the home and witnesses a few minutes away, no effort was made to check out the story. Even worse, no attempt was made to take any fingerprints at the scene of the crime. The officers testified that this was a matter for the defense. One can perhaps appreciate that with its limited force the police in the city cannot thoroughly investigate every crime. And if so, this should be clearly understood by the Congress and the public who make up our juries. But more serious in my judgment is the police philosophy that their job is to simply collect enough evidence to get by the committing magistrate's requirement of probable cause and to convict some suspect.

In *United States* v. *Ernest DuBose*, Cr. No. 152–61, the charge was that of street robbery with a butcher knife. In the early morning hours a powerful young Negro accosted a young white woman on the street, dragged her into an alley, and brandishing a butcher knife, he robbed her of what money she had on her person. In a pretrial motion to suppress the evidence of the girl's lineup identification, the police officer testified that 13 pictures had been taken to the girl's apartment and that from them she selected the picture of the accused. No attempt was made by the police to check out the five alleged alibi witnesses. At trial, the girl testified that she had been shown only one picture, the picture of the accused, and after hearing the five alibi witnesses testify, she drew aside the prosecuting attorney in the corridor and told him that she could no longer be sure of her identification. The case was then dismissed.

In discussing this matter, I wish that my concern were limited to the police "clearance" philosophy. In large part it is, but not entirely so. Among some policemen, I cannot say how many, there also exists what I would call a conviction philosophy. I mention this because of the House report's statement on page 19 that:

"This title will place considerably more reliance upon the voluntary and intelligent self-restraint of the police force than does the *Mallory* rule. The committee feels that such reliance is not misplaced."

For my part, until I am assured that my experience with the "conviction" philosophy is the exception rather than the rule, I must conclude that such reliance is misplaced. The conviction philosophy runs thusly. The policeman sincerely reaches his personal conclusion that the suspect is guilty. Then he feels justified in actively seeking a conviction, sometimes by questionable methods—the self-restraint relied upon by the committee is missing.

Consider for example the charges against two brothers in *United States* v. *Howard W. Lee and John Thomas Lee*, U.S. Nos. 1113–1117–62. An elderly grocer, along with certain patrons, had been held up in his store at gunpoint. The grocer's age and poor vision weakened his identification of the defendants. His vision was so bad that he sometimes had to feel the coins to determine their denomination. A teenage girl was so frightened at the time that she could afford

no help in identification. The only relatively calm and physicaly fit adult available to firm up the identification was a young white woman, Jacquelyn Moore. With the committee's permission, I believe that the transcript speaks best for itself at this point. The following colloquy took place between the assistant U.S. attorney and Miss Moore during direct examination:

Q. "Now, were these men just standing plain in this lineup or were they directed by the police to make certain movements or to say anything?

A. "They were directed to each one say, 'Get down on the floor lady,' because that is what the boy said to me in the store.

"That is all. They were just standing in a straight line.

Q. "And each one of them was asked this question?

A. "Yes.

Q. "Now, at what point was it then? Was it after they made this statement that you thought, you said you thought you could identify the voice of one of these parties, and so on?

A. "Yes.

Q. "And did the police use coercion at all to make you make this statement?

A. "What do you mean by coercion exactly? You mean try to persuade me?

Q. "Yes.

A. "Yes.

Q. "In what way did they try to persuade you?

A. "When they first asked me, you know, I was shown the boys, and each one said, 'Get down on the floor, lady,' the boys in the lineup, and they were directed to turn around with their backs to us. And one of the detectives said, 'Is there anybody here?'

"I said, 'No,' that I couldn't identify anybody right offhand.

"And then he said, 'Oh, come on, Jacquelyn.'

"Then I said, 'No, there is nobody here.'

"He went into another room. There's two rooms for the lineup, and he said, 'Are you sure there is nobody there? One has confessed.'

"But he didn't say which one, and he said, 'Well, this boy,' who was, I believe, Howard Lee, who was second from the right.

"I said 'His voice sounds like it.' That is all.

"He said, he did say this, 'What difference does it make, it's a couple more niggers.'

"Mr. DUNCAN (the defense attorney). I'm sorry, I did not hear that statement. Would——

"The WITNESS. I said the detective who said, 'Oh, come on Jacquelyn,' to me, when I said there was two boys in the lineup who looked like the ones in the store, he said, 'What difference does it make, it's just a couple more niggers.'

"By Mr. HOGAN.

Q. "What detective said this?

A. "Do I have to name him?

"The COURT. Yes.

"The WITNESS. Beltrante.

"By Mr. HOGAN.

Q. "Now, which detective said, 'Oh, come on now, Jacquelyn'?

A. "Beltrante.

Q. "Is that all he said before you identified that you thought Howard's voice was the one?

A. "Uh-huh. This was more or less, this is just an interpretation of mine, my interpretation. He was not so much trying to pressure me into it, I think; just his attitude, you know.

Q. "But this is all he said to you?

A. "Yes, sir."

Similarly, in *United States* v. *Eugene Evans* (Cr. No. 1062–60), the accused moved to suppress a *Mallory*-type confession. The police detective responded by testifying that the confession had been made right after the arrest while on the way to the precinct in the police cruiser. Of course, if true, this testimony evaded the *Mallory* rule by the "threshold" confession device. The defense attorney asked for a forthwith subpena of police records. These revealed that the defendant had not even been taken to the precinct in the detective's cruiser, but in fact had been transported there in a paddy wagon. The police officer driving the paddy wagon was called to support the records, and after he did so the confession was suppressed. The irony of this case is that it was later used as an example at Northwestern University to show the evil of the *Mallory* rule.

Let me repeat that it is not my contention that these cases reflecting the "conviction" and "clearance" philosophies are necessarily representative of general police atitudes in this city. They are selected from one man's experience and cannot be regarded as a meaningful sample. But they certainly are sufficient to make me feel very uncomfortable when a committee report speaks of reliance upon police discretion to protect the innocent. I would also repeat that there are large areas of this city in which I am afraid to walk alone, day or night, because of the criminal element. And I want action to remedy the situation. But I prefer additional men on the beat to increased police authority and discretion. And in the absence of any action I am not so frightened as to commit my freedom to the benign discretion of a benevolent police force.

Before leaving the committee report concern for the innocent, there is one further comment to be made. This bill will not eliminate the problem caused by police records of charges which have been dismissed. When the investigative arrest was still practiced, I once had a case in which the question of whether the prosecution would go forward or be dropped depended upon the police check of his investigative arrest record to see if his past arrests for investigation had been for the same offense. The only way to eliminate the enduring stigma of an arrest record is to provide that no record at all of the detention be made—no booking or any other notation. If this were done the citizen would be completely in the hands of the police. There would be no record of when he was picked up or why. We would be helpless. I have always assumed that one purpose of such records was to protect the arrestee. For my part, I would prefer the protection to the absence of stigma.

Finally, I'd like to say something about that famous telegraphic message to the underworld that "Washington is soft on crime." It is simply incredible to me that any responsible person would be willing to make this statement in view of readily available facts which demonstrate its falsity. The U.S. Bureau of Prisons statistics show that the sentences meted out by our courts are among the stiffest in the Nation, second only to Illinois. And the probation rate is among the lowest. Also there is a strict parole policy. When the strict parole policy is combined with the sentence imposed, one can make a meaningful judgment as to which jurisdiction keeps its convictees in prisons for the longest terms. In this, the District of Columbia is second to none. Our convicts serve more time than similarly situated convictees in any other jurisdiction.

When these facts are compared with the high conviction rate: a rate in excess of 90 percent in felony cases and. I believe, something around 80 percent in misdemeanor cases, it seems clear that our courts can not legitimately be charged with mollycoddling criminals.

Thank you.

Mr. SHADOAN. Thank you, Senator.

In this statement, I have attempted to select some of the most telling quotes from Police Chief Murray and other law enforcement officials, that from their own words demonstrate the inconsistency and conflict of the positions they have taken with reference to this problem.

One moment we are told there will be a complete breakdown in law enforcement if the *Mallory* decision stands, and a few years later we are told in another posture, and for another reason, by the same voice, that after all we face as a matter of fact—in the executive session held earlier this year—Police Chief Murray said after all we face the same problems as other cities, and our crime clearance rate is second to none.

I won't go into this, because what I have to say really does not rest upon the weakness or inconsistencies of the proponents of this bill.

I would like to suggest to the committee some facts which I believe tend to establish three points.

The first is that measures allowing an arrest without probable cause and subsequent detention and interrogation without the presence of counsel or presentment before a magistrate will not significantly aid the police in securing convictions of the guilty.

Now, I realize this is a most extreme sort of police freedom. I am not speaking about this bill. But even if we had that, I would like to

present some data that would show that this would not really solve the problem. And let me say again I recognize that there is a problem. I am not minimizing the crime problem in the city of Washington. I believe action is needed. But not this action.

Secondly, I would like to suggest to the committee why I do not believe these measures would aid the police or would result in the clearance of innocent persons who would otherwise be charged with crime. And I will support that with some specific instances which I believe can be checked out and verified.

Finally, the third point that I would like to make is that the only telegraphic message to the underworld that Washington is soft on crime and that our courts mollycoddle criminals has been sent by anti-*Mallory* propagandists who transmit a false message.

Looking at the first point, that is, that the police would be able to catch and convict the guilty if they only had these handcuffs removed. Well, in 1960 in this city we had what was known as the investigative arrest, it was in full force. There was no requirement that this arrest meet the requirement of probable cause. The man was not taken before a magistrate. The police could keep him as long as they wanted, apparently to interrogate him.

Now the statistics that I will refer to the committee here come from the Police Department's own files.

In 1960 one-third of all felony arrests were for investigation. In that year 1,356 people were detained for investigation for 8 hours or more. Of these 1,340, or all but 16, after that interrogation, were released without any sort of charge at all. That means that 1.2 percent were charged with a crime, after this prolonged detention.

The same year, there were 690 people who were detained for over 12 hours. Seven of these were ultimately charged. Again, in all 1 percent of the cases were the police aided in the solution of crime in any measurable way.

Now, Police Chief Murray at various times has told the Congress that most of the murders, the rapes, and robberies he has seen were solved because of interrogation that would not be solved if the *Mallory* rule stood. He has said different things at different times. But let's look at the statistics on these major categories of crime.

In that year, 1960, 221 persons were arrested for investigation of homicide. All but one were released without any charge. During the same period, there were 120 persons arrested for investigation of rape. All but three were arrested without any sort of charge. And so the statistics go.

The CHAIRMAN. The only point I would ask you, simply for clarification, is why you select 1960. You say that you select it because investigative arrests were in their full flower then. What was the statistical record in 1959 or 1961 or 1958?

Mr. SHADOAN. I select these statistics, Senator, because these are the statistics represented in the report to the Commissioners by the so-called Horsky committee.

Everyone is not allowed to go through the police files and find out what the facts are. I can only submit to this committee those statistics presented in that report.

This points up something that is very important, at least in my judgment

These statistics that I have presented, some of which are from 1961 and some of which are from 1959 in the Horsky report—naturally I pick out the statistics which seem the most dramatic. But they all basically are in this area. These have been available. People have known about them.

But otherwise responsible officials have continued to make statements who knew of their existence, they have sloughed off these things or ignored them. It seems to me they must be dealt with.

The CHAIRMAN. The year 1960, you say, is fairly representative of the actual statistical experience concerning investigative arrests in the Police Department in Washington, D.C. Is that the point you are making?

Mr. SHADOAN. Yes. I cannot say that 1960 is representative of every year. I do believe that the report shows that with some slight modification in the percentages, the area that was studied came up with about the same result.

Now, I would have to make this qualification.

This statistical report may not reflect those persons who confessed before they were charged or booked for investigation. But it does not seem to me this is a major qualification, because after all these people are not subject to the *Mallory* rule. This is not a real problem.

The CHAIRMAN. Very well. I understand the first point you are making.

Mr. SHADOAN. Now, secondly, I would like to comment upon the bill proponents' solicitude for the innocent suspect. They say that unless the police are allowed to detain and interrogate under the present restrictive procedures in the haste to get before the committing magistrate these people will be charged with a crime and thus when the case is later dismissed, they will be left with the enduring stigma of a police record. But if we have a sufficient time, the police will check out their story, verify it, check out the shaky identification, they will check out the alibi witnesses, et cetera, and if he is innocent he will never be charged with a crime and he won't be left with a police record.

We are told that we can rely upon the voluntary self-restraint and the discretion of the police to conduct such a thorough investigation which will clear the innocent and convict the guilty.

Now, with reference to that point I have got to say initially that so far as I know it is true that alibis and identifications are checked out in the sensational cases. My remarks will relate to the run of the mill armed robbery, street robbery, aggravated assault that really make up these frightening statistics.

In these cases it is my judgment that the common police approach is to secure enough evidence against a particular suspect to meet the requirement of probable cause before the committing magistrate, and to meet the evidentiary requirements of the prosecuting attorney so he won't kick the case out.

When they get that quantum of evidence, it is at that point that the police investigation stops. The crime is solved, the crime is cleared for the purpose of police statistics. And for the purpose of my remarks today, I will refer to this as the clearance concept.

Any investigation after that quantum is met is a matter for the defense, a matter for the defense attorney.

Again, at this point I would have to say fairness requires a caveat that my conclusions here are limited by my experience which although fairly wide cannot carry the weight of statistical fact. However, I am confident that my remarks would not be challenged by any knowledgeable attorney who has frequent occasion to defend persons accused of crime in the courts of the District of Columbia. But I am not going to leave the committee with conclusions. Even in the short time, last week, since I received this invitation, it was no difficulty at all for me to secure some representative cases to illustrate this concept from my own experience.

For example, I would first suggest the occasional lament that one hears from the assistant U.S. attorney that his case rests upon the race to the hospital. It seems that contrary to the pessimistic dictum of Ecclesiastes, the Metropolitan Police do award the race to the swift. The injured party of an altercation who first reaches the hospital is asked, "Who cut you?" or "Who shot you?" and the one he names is arrested and charged—that is it.

For example, in the case of the *United States* v. *Joseph Taylor*, Criminal No. 198–61, the charge was assault with a dangerous weapon. The complaining witness had been severely cut about the face with a broken bottle. When I was appointed, and I first saw the defendant in this case, he had already been in jail for over 30 days, because he could not make bail. And he told me that he had acted in self defense against a drunken and unprovoked attack, and that shortly after the man left, the police arrived, and when the police arrived he said, "Look, here is an impartial witness, eyewitness right here, that will tell you I acted in self defense."

The policeman said, "The complaint has been made. You can tell this to your attorney. This is a matter for the defense."

He was taken away, taken down to the District of Columbia General Hospital where he was given emergency treatment for his injury. Then he was placed in a cell where he remained until I saw him.

In checking out this story, I finally found the impartial witness he spoke about. He was in the presence at the time I found him of the complaining witness and the complainant's wife. All readily admitted the truth of the defendant's story. But the complainant was afraid to change his story because after all he had sworn to a complaint. He was afraid of the consequences if he changed his story.

But in view of his wife and the eyewitness he said, "Okay, I will tell the truth at the trial." And he did. And the case was dismissed at that point, the defendant having been in jail at this time for over 2 months. The only evidence against him was the statement of a single witness who was also a party to the altercation, who was intoxicated and angry at the time he made the accusation, and furthermore had a police record showing that he had been convicted of public drunkenness 17 times since 1945, disorderly conduct 4 times in that period, and had been charged with simple assault and assault with a deadly weapon himself, both of which had been dropped for want of prosecution. This was the evidence against the accused. The accused I think had had a charge himself of simple assault in South Carolina at some time.

I mention this case because I believe it is representative of the clearance philosophy.

There are numerous others.

Another one I have suggested here is *United States* v. *William Kemp*, Criminal No. 1033–60, in which the charge was housebreaking, larceny, and unauthorized use of a motor vehicle. There the car and the two defendants were found within a fairly short distance of the garage some time after the break-in. William Kemp said at the time:

> I was picked up in this car only a few minutes ago at my home. There are witnesses there, which is very close by, maybe a block and a half away, who will tell you that I could not have been present when this crime was committed.

But they were in possession, they were in the car, there was enough to make a charge.

The police did not expend the few minutes to go to the home to check out these alibi witnesses. They did not even take fingerprints at the garage to see if Kemp's prints were there. They had enough to get by the requirement of probable cause. They had enough, probably, to convict unless evidence came forward.

The defendant's evidence did come forward, I might add. And when the question as to this investigation was propounded at the trial, the officer said, "This is a matter for the defense."

Now, we heard the discussion or the suggestion about the street robbery, how this could not be solved without police interrogation. I would add my own remarks, that this is really the area where we have the most difficulty. There is no question about it. This fleeting glimpse of the back of the head that takes the purse and runs down the street, or as in the case of *United States* v. *Earnest DuBose*, Criminal No. 152–61, where the young white woman was dragged into the alley and the powerful young Negro, brandishing a butcher knife, robbed her of what money she had on her person. In this case, the police testified at the trial that they had gone to the girl's apartment and shown her 13 pictures from which she selected the picture of the accused. Later—this was at the pretrial hearing on a motion to suppress.

Later on the girl testified she had been shown one picture, the picture of the accused. After she heard the testimony of five alibi witnesses, she drew aside the prosecuting attorney and said she was no longer certain about her identification. These albi witnesses had not been checked out by the police. Again in my judgment that illustrates what I have labeled the clearance philosophy.

Now, it is true with the volume of crime that we have, and the number of policemen we have, that there is a limit to the amount of investigation that the police can conduct, and maybe they cannot check out the defense story. But if so, let's acknowledge that this is the case, and let's let Congress and the public, and I might add the public who make up our juries, know that that is the case—that these matters of defense are not investigated by the police, they do not have the men nor the time. And it is either done by the defense attorney or it is not done at all.

Now, in discussing this matter of reliance upon police discretion, which the House committee report—and self-restraint—which the House committee report says is not misplaced—I refer you to the quotation from page 19 of that report:

> This title will place considerable more reliance upon the voluntary and intelligent self-restraint of the police force than does the *Mallory* rule. The committee feels that such reliance is not misplaced.

As I say, I wish that my concern or my lack of reliance were limited to what I have suggested should be labeled the clearance concept. But it is not.

Among some policemen, I cannot say how many—but among some policemen there is also what is known or what I would call a conviction philosophy. That is the policeman, on the basis of some evidence, guesswork, or other criteria, sincerely reaches his personal opinion that the suspect is guilty of a crime. Once he does that, he feels justified in actively seeking a conviction, and sometimes by questionable methods, such as are illustrated by the cases I have here.

The first example is *United States* v. *Howard W. Lee and John Thomas Lee*, United States Nos. 113–117–62. In this case an elderly grocer, along with certain patrons, had been held up—armed robbery of the grocery—and there was a difficulty of identification.

The grocer, in addition to his age, had such poor vision at times he had to feel the coins to determine their denomination.

A young girl, 15 years old, had been so frightened that she could not make an identification.

The only adult and relatively calm witness to the affray was another woman who had been robbed, a young white woman, whose name was Jacquelyn Moore.

What happened here, after the police had determined, or the policeman had determined that the accused were in fact guilty, is best illustrated by a portion of the transcript itself.

In this portion of the transcript, which I refer to the committee, there is a colloquy between the U.S. attorney at the trial on direct examination of the robbery—not a cross examination by the defense attorney.

And Mr. Hogan, the U.S. attorney said:

Question. Now, were these men just standing plain in this lineup or were they directed by the police to make certain movements or to say anything?

A. They were directed to each one say, "Get down on the floor lady," because that is what the boy said to me in the store.

That is all. They were just standing in a straight line.

Q. And each of them was asked this question?

A. Yes.

Q. Now, at what point was it then? Was it after they made this statement that you thought, you said you thought, you could identify the voice of one of these parties, and so on?

A. Yes.

Q. And did the police use coercion at all to make you make this statement?

A. What do you mean by coercion exactly? You mean try to persuade me?

Q. Yes.

A. Yes.

Q. In what way did they try to persuade you?

A. When they first asked me, you know, I was shown the boys, and each one said, "Get down on the floor," the boys in the lineup, and they were directed to turn around with their backs to us. And one of the detectives said, "Is there anybody here?"

I said, "No," that I couldn't identify anybody right offhand.

And then he said, "Oh, come on, Jacquelyn."

He went into another room. There's two rooms for the lineup, and he said, "Are you sure there is nobody there? One has confessed."

But he didn't say which one, and he said, "Well, this boy," who was, I believe, Howard Lee, who was second from the right.

I said, "His voice sounds like it." That is all.

He said, he did say this, "What difference does it make? It's a couple more niggers."

Mr. DUNCAN (the defense attorney). I'm sorry, I did not hear that statement. Would——

The WITNESS. I said the detective who said, "Oh, come on, Jacquelyn," to me, when I said there was two boys in the lineup who looked like the ones in the store, he said, "What difference does it make? It's just a couple more niggers."

By Mr. HOGAN:

Q. What detective said this?
A. Do I have to name him?
The COURT. Yes.
The WITNESS. Beltrante.

By Mr. HOGAN:

Q. Now, which detective said, "Oh, come on now, Jacquelyn"?
A. Beltrante.
Q. Is that all he said before you identified that you thought Howard's voice was the one?
A. Uh-huh. This was more or less, that is just an interpretation of mine, my interpretation. He was not so much trying to presume me into it, I think; just his attitude, you know.

This, of course, is an unusual example. There are others. It does not stand alone.

You have got the case similarly of the *United States* v. *Eugene Evans*, Criminal No. 1062–60.

In that case there was a motion to suppress a *Mallory*-type confession. The police detective testifying sought to justify the confession and evade the *Mallory* rule by the Upshaw route—that is, it was a threshold confession. He testified that the confession was made in the police cruiser right after the arrest on the way down to the police station.

The defense attorney at that point asked for a forthwith subpena of the police records. They were brought in and they demonstrated that the accused had not even been taken to the station in the cruiser, but in fact had been taken down there by a uniformed officer in a paddy wagon. The uniformed officer was called, he verified the police records, and the case was dismissed.

It seems to me the irony of this case—this was later used at Northwestern University to demonstrate the evil of the *Mallory* rule.

Now, as I suggest, this conviction philosophy may not exist on a very wide scale. I am not aware of how wide it is. I do know it exists. It exists wide enough in my experience to make me feel very uncomfortable when I read in a House report that we should rely upon the discretion and voluntary self-restraint of police.

It may not be significant, but in the *Evans* case the detective who testified about the confession in the cruiser, that did not take place—it may be significant of police attitude that this case was reported in the newspaper, and it is my understanding that the detective was shortly after that promoted to lieutenant.

As I say again, I do not think I can emphasize too strongly that these instances may not in any way be a representative sample. They do illustrate, though, a problem, when we speak about relying upon self-restraint, discretion of police officers. We can make general arguments about the danger of this thing. But it seems to me it would be more profitable, rather in making generalized statements of the danger, to demonstrate by some specific cases what these dangers are.

The other thing that I would like to say, before we leave this clearing concept, and this does relate specifically to the bill, is that we face a rather difficult problem when we attempt to eliminate an arrest record and its stigma.

The bill provides that—title III provides no record will be made as an arrest under the detention. Chief Murray, I believe, says that the investigative arrest records are expunged. They may be expunged now, but in 1961 I remember a case in which I was representing a boy accused of a misdemeanor, peeping tom. The U.S. attorney and I had agreed that society would best be served if the case were continued and he were treated by a psychiatrist. But the execution of this was dependent upon the checking out of his investigative arrest record, to see whether or not he had been arrested for similar crimes in the past. The presumption was of course that if he had, he was guilty.

It really does not matter whether we call this a detention record, booking, arrest record, or what we call it—if there is any record kept, it will be available for this purpose. If no record is kept, it seems to me that the citizens are helpless, then. There will be no record at all of these interrogations, the investigations, how long they take.

I might note parenthetically at this point—contrary to some of the other legislative proposals, there is no suggestion here that a verbatim recording be made of the interrogation. There is no suggestion that the accused—it does not go so far as solicitude for the innocent as to advise the innocent he has the right to counsel or to allow him an opportunity to contact that counsel. And in this reference, it may be relevant to note the conclusion of the Commissioner's report, the report to the Commissioners, that in the investigative arrest statistics that I suggested earlier, the great majority of these were conducted without the knowledge of anyone that this man was in custody, arrested—not family, not friends, not attorney, not employer—he would just vanish from 8 to 12 hours.

Finally, I would like to make just a few remarks about that famous telegraphic message to the underworld that Washington is soft on crime.

It is incredible to me that any responsible person would be willing to make this statement in view of readily available facts which demonstrate its falsity.

The statistics on crime of course are rather sketchy. But if one goes to the U.S. Bureau of Prisons and inquires—and this has been publicized of course—what are the length of sentences that are meted out in the State-type crimes—not Federal crimes—State-type crimes, the length of the sentences, how many probations are given, what is the parole policy, and you take these statistics and put them together, and you can find out how long a convictee stays in jail in the District of Columbia. If you go and take comparable crimes in the States, and you take convictees in a similar situation—the only way to do it fairly, you have to have the same sort of crime, you have to have a convictee who is arrested and convicted the first time. You cannot compare a man that has been convicted five times with one who has been convicted the first time. You get a meaningful comparison. And in this comparison the sentences, the length of the sentences that are meted out in the District of Columbia are not quite as long as Illinois. Illinois is the only one that has a longer sentence. But we have a more restrictive parole policy. So that the average length of time for a first-time offender convicted of a felony, a State-type felony in the District of Columbia, is 41.5 months. There is no other jurisdiction, no other State jurisdiction that keeps convictees similarly situated so long in jail.

What about the conviction rate—that the police are hampered so much by the *Mallory* rule, and the courts are turning them loose. Professor Inbau has called this the turn-them-loose policy.

The conviction rate in the District court, as shown by statistics from the Administrative Office of the U.S. Courts, for felonies—take 1960 again, for a base year, that year there were 1,337 indictments, I believe, and there were 140 acquittals, 66 of those were for insanity. They went to St. Elizabeths. The remainder were outright acquittals. That means there is an acquittal rate of about 5 percent of the indictments, at least for that year. And I suggest that in any year the people that are indicted are convicted in about 90 percent of the cases. And I understand in the court of general sessions it is around 80 percent.

I suggest to the committee that this compares pretty favorably with the State jurisdictions who are not hampered by the so-called *Mallory* rule.

I have two other comments that I would like to make. I know that I have taken a lot of the committee's time.

The CHAIRMAN. That's all right. We are very happy to hear from you.

Mr. SHADOAN. First of all, one of the things the Senate has been concerned about, and I am sure this will be elaborated upon—is what is this constitutional problem. Well, I do not essay to speak for the Justice Department, nor do I suggest that I have made a study of this. But as I see that this is something that is of interest at the moment—I did not come prepared to discuss this, but I only want to make one observation.

The last sentence of the *McNabb* case holding by Justice Frankfurter went something like this—

> We hold only that the integrity of the judicial system will not tolerate the receipt of confession secured under circumstances such as these.

It may well be that when we are talking about the procedure necessary to protect the integrity of a Federal court, that this is something that inheres in the power of the court to determine. And there may be a constitutional question as to whether or not a legislative body can interfere with the minimal standards that a court will set to protect its integrity. This is just a suggestion, based upon this statement.

I would like also to point out that the States, contrary to Professor Inbau's statement, as I understood it, are not unanimous in rejecting the *Mallory* rule, although certainly the great majority do. But I would call the committee's attention to the 1960 case in Michigan, *People* v. *Hamilton*, 357 Michigan at page 410, where they adopted a rule similar to *Mallory*—even though they were not required to do so. They thought that maybe that was a civilized way to administer justice in the State of Michigan.

I would like only one other comment and that is this matter of the third degree that Professor Inbau spoke to you about this morning, and the fact that all you have to do is have this policeman say to himself. "Is what I am going to do going to make an innocent person confess."

There is no suggestion—and I have some familiarity with these techniques, as I had the privilege recently to review Professor Inbau's book "Criminal Interrogations and Confessions"—there was no sug-

gestion either in his testimony this morning nor anywhere else, that I have seen, of this psychological pressure that you bring to bear to get a recalcitrant person to confess affects only the guilty.

There is no suggestion, for example—I would remind the committee of the famous case of *Timothy Evans* in England, since English procedure has been called into question this morning, in which the man made two confessions that he had murdered his wife and child. At the trial it was shown he was of subnormal intelligence. He said, "I was afraid they were going to beat me up—that is the reason I confessed." In fact, of course, there was no danger of this. He was hanged. Six years later six other bodies were found in the same house. An investigation revealed that a man named Christie had killed them all and also confessed that he had killed the wife and son of Timothy Evans.

The point is that the psychological pressure that is used, I fail to see any evidence that it will affect the guilty person who wants to hide his guilt, but will not affect an innocent person who would like to demonstrate his innocence.

I would like to say, in closing, something about what these psychological techniques are. These can be found not only—well, the first time I saw them was in Professor Inbau's book. I had the uncommon privilege recently to cross-examine a polygraph operator in a special court-martial, who also had read the book and applied the techniques. They involve putting the suspect in a room where there are no windows, removing pencils and other tension relieving objects, sitting within a foot and a half or so of the suspect, constantly manifesting your confidence in his guilt, no matter what he says, maintaining psychological mastery of the situation, and finally convincing him that it is futile to resist longer. These are the techniques that are suggested in terms of psychological pressure.

The CHAIRMAN. Those psychological pressures, if they were used in securing a confession, would you hold those to be voluntary?

Mr. SHADOAN. The thing is that we have—you see, it is very rare—you don't have a verbatim recording, you don't have a witness other than the accused, and no one will believe—it is very difficult to show what happened in an interrogation room.

The CHAIRMAN. I know. But you are reciting something that I assume did happen.

Mr. SHADOAN. That's right. In this particular case this was a special court-martial—the interrogator admitted all of these things. He admitted that he used the results of the lie detector test to convince a woman it was futile to resist.

The CHAIRMAN. What did the court do?

Mr. SHADOAN. She was found not guilty. The confession was not suppressed in that case.

The CHAIRMAN. The confession was admitted.

Mr. SHADOAN. That's right.

The CHAIRMAN. I see.

Mr. SHADOAN. But there is some question as to whether or not in this particular case—whether or not the confession was a confession of crime in any event, because it was partially incriminatory and partially in exculpation.

So that the point I wish to make is that these techniques are coercive upon a weak person. And if a person is weak and subject to coercion,

phychological or physical, it does not matter a wit whether he is innocent or guilty, he will submit. And this is the reason that I suggest to the committee that any such bill—and I turn again to Mr. Acheson's bill, who it seemed to me made a serious attempt to provide the Congress with a good bill, had in it the requirement of a verbatim recording of what went on in the interrogation room.

There are other modifications.

I would close by saying again I recognize this has been a strong statement. I would like to close by saying again I recognize there is a crime problem, a serious crime problem. I am not impressed that it is just as bad in Chicago. The point is, it is bad here. Something should be done.

The CHAIRMAN. I think we all agree with that.

Mr. SHADOAN. Yes. But I want to make it clear despite my statement against this bill I agree with that. And I would like to see some action.

The CHAIRMAN. What kind of action would you like to see taken? As I understand your position you base your case almost entirely upon supplying more men to the police so that they can do a more thorough job in the field of investigation.

Mr. SHADOAN. Not entirely. I think this is essential. I would be glad to name another one. We need more U.S. attorneys here. They are overworked. They do a wonderful job, but they are not as prepared as they ought to be. They cannot be.

Similarly, in the Court of General Sessions we need more judges sitting in criminal. You cannot get a fair trial for the prosecution or the defense if the judge is watching the clock. He knows he has got to get that calendar out. And that is what is happening.

At the same time we have a delay, and we know delayed punishment weakens the deterrence.

So I would say we have to beef up these areas.

Now I believe a bill can be fashioned; this is the point that I want to make. I believe that I would be willing to support some legislation giving the police greater freedom in the interrogation of suspects.

The CHAIRMAN. How do you do that? This also comes down to the point you just put your finger on. You say you want to help the police, you want to give them more latitude in interrogation. How would you do it? Can you write this into a statute?

Mr. SHADOAN. Let me suggest, then, a bill which I believe that I might be willing to support as an individual.

Perhaps a bill which says the arrest shall be on probable cause. The suspect shall be taken before a judicial officer who will advise him of his rights, including advice that he has a right to counsel. Thereafter they can take him and interrogate him for 6 hours, not in a cell, and with a verbatim recording, preferably a tape recording of the questions so that a jury can understand what these pressures were. I would support a bill like that.

The CHAIRMAN. Well, on that point you have a vast experience, a very worthwhile experience in this field of defending criminals here in the District of Columbia. But, how does your proposed procedure help the police in their interrogation? It would seem to me if you took this suspect before a committing magistrate on probable cause, and he was charged, and he was advised of the right not to make a

statement, and also advised of his right to counsel, and following this if the suspect would say, "I want an attorney, I am not going to speak until you give me an attorney," how does this help the police in interrogation?

Mr. SHADOAN. Well, it helps them because then they can go in and interrogate for 6 hours. Your assumption, Senator, is he will be advised by the attorney not to talk and he won't, or after the warning he won't talk. This is the assumption of the police.

The CHAIRMAN. It would be my assumption, too. But I may be wrong.

Mr. SHADOAN. I think an appropriate analogy, and one which is useful, is to look at the experience in the Armed Forces. In the Armed Forces the suspect is told of his rights, article 32 has to be read to him. His right to remain silent, that anything he may say will be used against him, and under the case of I believe—I cannot recall the case right now, but a case in 1956—they must be advised of their right to counsel, if they talk to the staff legal officer, at least. And that does not seem—I do not think any of us are under the illusion that the armed services are unable to administer justice because of these handcuffs on the investigative forces.

But there is no question but what the bill I suggested is going to be more restrictive on the police than if they just can have carte blanche. The problem is striking an appropriate balance. And if the statistics that I have cited to the committee from the investigative arrest in 1960 are meaningful, I think we have to recognize that the help that flows to the Police Department, certainly it flows to them, is somewhat minimal, is not that 90 percent figure that we have heard, not when 1 percent are all that they even charged them with, after they hold them 8 to 12 hours.

The CHAIRMAN. I certainly appreciate your appearance. I just want to ask you one further question.

You made a considerable issue of this clearance policy. You put it on both extremes. You say one is the clearance policy and the other is the conviction policy. But it would seem to me that on this clearance policy, if the police had an adequate time to interrogate the defendant and check him out more thoroughly, they would avoid this clearance objection that you make.

Do I understand you correctly in this area?

Mr. SHADOAN. I believe that you have not fully grasped what I believe to be my position.

The CHAIRMAN. On the clearance.

Mr. SHADOAN. The problem with the clearance policy is not the time that they have to interrogate, but the absence of any interest in clearing the defense, a philosophy that this is not the job of the police. The cases that I have cited are cases in which the problem was not that he had to charge someone—there is nothing to prevent the police in those cases—there was no confession, there was nothing to prevent them from checking out the story. But they did not do that, because they did not, I believe, one, because they do not have the men. But more serious, they do not feel this is their responsibility. And as long as the police feel the responsibility is limited to getting enough evidence to hold someone, and then it is cleared, it is solved, then more time is not going to avail the innocent of any solution, because the

police; that is not their concern. They are concerned with if they have enough evidence.

I believe, as I have said—I believe the conviction policy I spoke of is fairly limited. I do not believe that is widespread. I like to think it is not, anyway. The clearance policy I believe is widespread.

The CHAIRMAN. Thank you very much. I certainly appreciate your appearance.

We will stand in recess until 2 this afternoon.

(Whereupon, at 11:55 a.m., a recess was taken until 2 p.m., the same day.)

AFTERNOON SESSION—2 O'CLOCK

The CHAIRMAN. The committee will come to order.

We are delighted to have you as a witness today, Senator Ervin. We know of your great interest in this field, the Committee that you Chair in the Judiciary Committee.

Yesterday we started our examination of title I and had briefly taken a look at title II, so-called *Durham* rule. We have also in the same instant hearing taken a look at title III on the question of investigative arrest.

We are looking forward to your testimony with a great deal of interest.

We are attempting to work in a very difficult area, as you well know.

STATEMENT OF HON. SAM J. ERVIN, JR., A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator ERVIN. Mr. Chairman, I certainly appreciate the opportunity to appear before this committee. I regret that I was a little late. I had to appear before another committee at 2 o'clock over in the Capitol.

The CHAIRMAN. I appreciate you taking time out of such a busy schedule.

Senator ERVIN. Mr. Chairman, I appreciate this opportunity to testify before the District of Columbia Committee on H.R. 7525, a bill designed to reduce crime and revise criminal procedures in the District of Columbia.

I would like to confine my remarks today primarily to titles I, II, and III. These concern, respectively, the *Mallory* rule, the *Durham* rule, investigative arrests, and detention for questioning material witnesses. The Subcommittee on Constitutional Rights, of which I am a member, has considered each of these subjects in connection with its continuing investigation of the administration of criminal justice, and all three were dealt with in detail during the subcommittee's hearings on "Confessions and Police Detention" and on "Constitutional Rights of the Mentally Ill: Criminal Aspects."

TITLE I

The *Mallory* rule and rule 5(a) of the Federal Rules of Criminal Procedure are subjects which have long been of great concern to me. It is my feeling that the crime rate in the District will continue to mushroom and effective law enforcement here will continue to be frustrated until legislation such as that contained in title I is en-

acted. For this reason, I have in this and previous Congresses introduced legislation to clarify rule 5. Mr. Chairman, I request that S. 1012, a bill concerning this subject which I introduced and which was cosponsored by Senators Byrd of Virginia, Eastland, Johnston, McClellan, and Talmadge, on March 7, be printed at this point in the record of the hearings.

The CHAIRMAN. Without objection, that will be done.

(S. 1012 follows:)

[S. 1012, 88th Cong., 1st sess.]

A BILL To make voluntary admissions and confessions admissible in criminal proceedings and prosecutions in the courts of the United States and the District of Columbia

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of rule 5 of the Rules of Criminal Procedure for the United States District Courts or any other rule or statute of like purport, a voluntary admission or a voluntary confession of an accused shall be admissible against him in any criminal proceeding or prosecution in the courts of the United States or of the District of Columbia, and the finding of the trial court in respect to the voluntariness of the admission or confession shall be binding upon any reviewing court in the event it is supported by substantial evidence.

Senator ERVIN. Although S. 1012 differs in language from title I of the legislation before you today, the effect would be the same no matter which measure is enacted. That effect would hopefully be to reverse the upward direction the crime rate has taken since 1957, the year the Supreme Court decided the case of *Mallory* v. *U.S.* (354 U.S. 449). Although I realize this is not the only factor influencing the crime rate, the *Mallory* rule certainly is a major factor for due to it self-confessed criminals are let free by the courts, and the police are hampered in their crime detection. Here, I believe it might be well to review the history of the case itself.

The *Mallory* ruling held inadmissible the voluntary statement of a convicted and self-confessed rapist because of the delay in taking him before a committing magistrate. The Court stated that a delay of 7½ hours in arraigning the prisoner violated rule 5(a) of the Federal Rules of Criminal Procedure which requires that an arrested person be taken before a committing officer without "unnecessary delay."

The *Mallory* ruling and the decision in the earlier case of *McNabb* v. *United States* (318 U.S. 332) have resulted in abolishing an old and fundamental rule of evidence regarding the admissibility of a confession. Prior to these decisions, the sole test of the admissibility of a confession was whether it was made voluntarily. Under this test, if a confession was freely and voluntarily made, it was deemed to be trustworthy. Of course, if there was a showing that the delay itself constituted sufficient inducement to confess, the court could, in its discretion, render such a confession inadmissible. But the point is that mere delay in itself was not enough to invalidate a confession.

In the *Mallory* case, time alone was the deciding factor. There was no showing that any duress was used in extracting the confession from the prisoner. Indeed, there was no allegation on the part of the prisoner that any force whatever was used to have him confess to the crime. There was nothing to indicate that the confession was anything but voluntarily given. Nevertheless, despite the voluntary nature of the confession and despite the fact that the confession was substantiated by all the facts of the crime charged against the prisoner, it was invalidated merely because of the passage of time.

The *Mallory* rule was extended even further in the decision of *Killough* v. *United States*, decided on October 4, 1962, by the Court of Appeals for the District of Columbia. In *Killough*, the prisoner had confessed two separate times to the murder of his wife, once prior to arrangement and once thereafter. Not only did the court use the *Mallory* doctrine to throw out the voluntary confession of the accused made prior to his arraignment, but the court extended this doctrine to invalidate an admission made after the arraignment. The court reasoned that the second confession was prompted by the first admission, which was illegal under *Mallory*. Judge Burger alluded to the departure from precedent and the ramifications of this decision in his dissenting opinion; he stated, as follows:

> The majority holding today is one of the most significant and far reaching of this court in many years. It goes far beyond the statute it purports to "interpret" and far beyond any prior opinion of this court or the Supreme Court. No statute remotely authorizes the holding. No one even suggests that any right under the Constitution is involved.
>
> The majority holding constructs an entirely new "statute" and takes a step neither contemplated by Congress nor remotely warranted by the *Mallory* case. The *Mallory* doctrine operated to exclude or suppress incriminating statements made during "unnecessary delay" before taking the arrested person to the committing magistrate. The entire rationale of *Mallory* is that the statements are barred because made while detention is unlawful—unlawful for failure to have a prompt hearing. Today's majority holding, carries the "fruit of the poisonous tree" doctrine to new lengths and means in effect, that statements made either before or after the hearing are to be excluded unless the statements are made with the defendants' lawyers at his elbow. For all practical purposes the majority bars any admissions except where the accused is advised and prepared to enter a guilty plea. It would be difficult to overstate the enormity and scope of this incredible "interpretation" of rule 5(e). *Mallory* to a large extent foreclosed police investigations prior to preliminary hearing; this holding eliminates any interrogation of an accused after he has had the judicial warning until he secures a lawyer * * *. In light of this holding it is ironic that in the *Mallory* opinion Justice Frankfurter characterized rule 5(a) as "a part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement."

Mr. Chairman, I contend that it is both unsound and unreasonable to apply time alone as a measure of admissibility. This subverts a rule of procedure relating to the duty of an arresting officer into a rule of evidence. Because a police officer fails to observe the requirements of rule 5(a) a self-confessed criminal may be turned back to society, even though he may have confessed again subsequent to his arraignment. In other words, the supposed sins of the policeman are visited upon an innocent society.

I submit that when Congress approved the promulgation of the Federal Rules of Criminal Procedure, it did not intend to throw on the scrapheap the time-honored test of voluntariness concerning the admissibility of a confession. I submit that Congress had no intention of making convictions impossible simply because a police officer failed to take a prisoner before a committing magistrate until 7½ hours had elapsed.

As chairman of the Subcommittee on Constitutional Rights, I am, of course, not unmindful of the many protections which the Constitution of the United States bestows upon the persons accused of crimes within our society. But, in the words of Judge Alexander Holtzoff, U.S. district judge for the District of Columbia, who testified at sub-

committee hearings on the subject of "Confessions and Police Detention," in 1958:

> We must bear in mind that the purpose of the criminal law is to protect the public. On the one hand, it is essential that no innocent person be convicted of a crime and that oppressive methods be not used against the guilty. On the other hand, it is equally indispensable that victims of a crime and potential victims of possible future crimes receive protection. The victim must not become a forgotten man. As was said by Mr. Justice Cardozo in *Snyder* v. *Massachusetts* (291 U.S. 97, 122), "Justice, though due the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

In considering the effect of these decisions, we should keep in mind that the Supreme Court did not base its decisions on any constitutional issue. It did not suggest that to admit Mallory's confession into evidence would be a violation of due process. The Court in both *Mallory* and *Killough* based its decision on its interpretation of the will of Congress as expressed in rule 5(a) of the Federal Rules of Criminal Procedure. I do not believe that the Court has correctly interpreted the will and intent of Congress in this matter. It is for this reason that I endorse title I, a provision to make voluntary admissions and confessions admissible in criminal proceedings and prosecutions in the courts of the United States and the District of Columbia.

When all is said, the *Mallory* case rests upon the conviction that voluntary confessions made by an accused before arraignment must be excluded because their admission might tempt arresting officers to extort involuntary confessions. This being true, the reasoning which underlies the *Mallory* case is really a throwback to the common law philosophy that the interests of parties to actions might tempt them to testify falsely and for this reason they should be prevented from testifying at all for fear that they might commit perjury. In other words, the *Mallory* case rests upon the proposition that arresting officers must be freed from temptations even if the process by which they are so freed results in the freeing of those who murder innocent victims or prey upon a society which the criminal law was designed to protect.

I might add that it seems to me that enough has been done for those who murder and rape and rob. It is time for somebody to do something for those who do not wish to be murdered, raped, or robbed.

Mr. Chairman, I would like to summarize the rest of my statement, and have the entire statement in respect to titles II and III printed in the record.

The CHAIRMAN. I will be happy for you to do that. Your prepared statement will be printed at the conclusion of your testimony.

Before you proceed, Senator, and while you are on title I, the Department of Justice, in their official report on title I, House bill 7525, takes the position that it raises serious constitutional difficulties in dispensing with safeguards which the *Mallory* case assured a person charged with a crime.

Now, I recognize, as you well pointed out, that the *Mallory* decision does not turn on an interpretation of the Constitution; it is a straight out interpretation of rule 5(a).

Now, my question of you would be if title I was enacted, do you believe it would be held constitutional?

Senator ERVIN. I do not think there is any question about it. I think the position of the Department of Justice as set out in the extract that you have read is totally unsound, because virtually every State in the Union, and every Federal court in existence prior to the *McNabb* case held to the common law rule of evidence, that a voluntary confession was admissible, and an involuntary confession was inadmissible. That being true, I do not believe, while I would hesitate to predict all of the things that the Supreme Court as presently constituted might decide—I do not believe they will go so far as to hold that the due process clause of either the fifth amendment or of the 14th amendment is violated by a rule of evidence which was recognized as a valid rule in all jurisdictions following the common law system.

In fact, I do not know any stronger evidence of a man's guilt than the fact that he voluntarily says, "I committed the crime charged." And of course you have to have independent evidence of the corpus delicti. So there is really no danger of misjustice on that basis.

I think any person who has done trial work in the courtroom, where witnesses appear, knows that a judge of any competence whatsoever has no difficulty ordinarily in determining whether a confession was voluntary or involuntary. I think we should—I would refer to this statute, return to the common law rule of evidence, allowing that matter to be determined by the judge.

But I would certainly go along with title I of this bill, because it would provide a remedy for a very grevious situation.

The CHAIRMAN. As you well know, because you were a member of the committee at the time, in 1958, the Judiciary Committee did report out a bill which was almost—not completely, but almost identical with the language that is now embraced in title I. I think the word "reasonable" was added to the 1958 bill, and I think in conference they added a proviso that delay could be considered as an element in determining the voluntary or involuntary nature of statements or confessions.

You are completely familiar with the history of that legislation. It passed the House, passed the Senate, went to conference and was lost on a point of order in the Senate at the very end of the session.

Senator ERVIN. Because the conferees—the Vice President held when the point of order was made that the language of the conferees went beyond the scope of the language of either bill.

The CHAIRMAN. This very proviso I think I referred to.

Now, how does the bill that you have introduced, that is now before your Judiciary Committee, differ from the bill that was passed by both Houses and lost out on the point of order back in 1958?

Senator ERVIN. The bill I introduced goes back to the common law principle. It provides that notwithstanding this rule, or any similar statute, that a voluntary admission of confession shall be admissible, and that an involuntary confession or admission shall be inadmissible. In other words, it just restores the rule which was developed by the experience of the common law.

The CHAIRMAN. You wanted to comment on title II.

Senator ERVIN. Title II.

I favor title II strongly. I have had a great deal of concern about the *Durham* rule. I have felt that the rule enunciated in the *Durham* case merely lets the jury go out and sail upon the sea without any

legal chart or guide to guide them, and without any standard to apply—to say that a man should be acquitted on the grounds of insanity if the act charged against him is a product of mental disease or mental defect, as stated in the *Durham* rule—that furnished the jury no guide whatever as to what a mental disease is.

I do not think the rule is improved very much by the language used in the *McDonald* case, because the *McDonald* case in one aspect of it virtually departs from insanity and makes a man's guilt depend upon his emotions. If he has an abnormal condition of mind, that causes his emotional processes to influence his behavior substantially.

I think that that is opening the door to a man who merely refuses or fails to discipline himself, as many people do, and makes his emotional processes rather than his inadequate mental processes a criterion. And I think this statute furnishes a very good criterion, because in effect it goes back and gets the substance of the rule in the *McNaghten* case and the substance of what we used to call the irresistible doctrine, and makes a very simple, direct rule which I think a jury can understand and gives them a standard by which to measure the man's capacity to commit a crime, and a standard by which his responsibility could be adequately measured.

I think it realizes what we necessarily have to realize, and that is that there is a distinction between a mental abnormality in the mind of medicine, which is interested in trying to alleviate or cure that condition, and the fact that the law must have some standard or accountability.

The rule is almost in—set out in title II, is almost the same rule that is in the model code, and I think it is good for that reason.

In addition, I am also glad to note that title II provides that insanity is an affirmative defense, except of course in those cases where there is a requisite mental intent as a part of the crime. That is the law in most of the States. It is the law I am familiar with in North Carolina—that the burden of establishing insanity is on the accused, and it is an affirmative defense to be interposed by him. I think that is good.

The CHAIRMAN. I thought the general rule was—and I can certainly stand corrected on this—that it is an affirmative defense which the defendant must establish, either by a showing of some evidence or substantial evidence. But I thought after you were beyond that point of raising it by some evidence or substantial evidence, as the case may be, that the burden shifted then to the State to prove the accused's sanity beyond a reasonable doubt.

Senator ERVIN. Well——

The CHAIRMAN. Isn't that the general rule?

Senator ERVIN. Well, I think it is a general rule that the burden—the courts—I mean in the different States they are divided. There are some courts that hold that after—as you state—that after the defendant has introduced some evidence, that the burden shifts to establish the possession of the requisite mental condition, to be accountable for crimes, to the prosecution. Though a great many States are on the contrary. The burden is on the defendant to satisfy the jury.

Now of course in all cases, in both of these jurisdictions, where there is a specific mental intent required as an essential ingredient of the crime, in that case the prosecution always has to—where it is called

into question by evidence, the prosecution always has to show sufficient mental power to be able to entertain that specific intent as a part of the case for the prosecution.

The CHAIRMAN. Thank you.

Title II follows the ALI test closely, except for the addition of the words "to know," and the substitution of the word "wrongfulness" for "criminality." Title II as the House passed it 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 know or appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

Now, the House saw fit to have the words "to know" added to the standard ALI definition. And there seemed to be some variance among legal experts who appeared before us as to whether this created a substantial variance with the ALI test.

Senator ERVIN. It would strike me that it does not substantially alter its meaning. In other words, if you substitute that word "know"—the words "or know"—in the American Law Institute draft, and substitute the word "wrongfulness" instead of "criminality."

The CHAIRMAN. That's correct—"wrongfulness" replaces "criminality" contained in the ALI test. Some of the lawyers simply thought the use of the words "to know" simply broadened the test, and that it made no material change to the ALI test.

Senator ERVIN. With reference to the provisions of title III, I have grave misgivings about the right to hold people for any definite period of time for the purpose of investigation. And I doubt whether you can square that with the Constitution.

In other words, it seems to me that it is a rather dangerous practice to allow a man to be held for any period of time merely for the purpose of investigating him and ascertaining whether there is reason to believe he is guilty or not. For that reason, I have misgivings about that provision.

I do think there are instances, referring to the part about material witnesses, where you do have to make some provision for the detention of a material witness when you have reason to think that he may flee the jurisdiction and not be available for trial. And I think the part of title III which deals with that subject is probably about as good a way to handle it as can be devised.

The CHAIRMAN. I certainly appreciate your views.

One of the witnesses, I believe it was the professor of criminal law at Northwestern, who testified this morning, seemed to indicate that the investigative arrest provision now in the first part of title III is very close to the Uniform Arrest Act, which has been held constitutional, he indicated, in a number of States. But many lawyers share with you your expressions that an investigative arrest is unconstitutional—very close to being unconstitutional.

Senator ERVIN. Yes. I take that view notwithstanding the fact of my own practice which, as far as criminal law was concerned, consisted of defending people charged with crime and not prosecuting them. I think that as a matter of fact that probably more people get turned loose without trial and without having great expense when the officers do certain questioning of them. That was one reason that always seemed to me unfortunate about the *Mallory* case from a prac-

tical standpoint. I think that officers turn loose more people as a result of the investigations than even as a result of the interrogation of those people, than they do get people wrongfully convicted—far more.

The CHAIRMAN. That was borne out this morning by a professor of law at Georgetown University Law School, who handled some thing in the neighborhood of 1,500 criminal cases when he headed up, or was in charge of their legal internship program, here in the District of Columbia. He said in 1960 one-third of all felony arrests were for investigation. That year 1,356 people were detained for investigation for 8 hours or more. Of these 1,340 or all but 16 were ultimately released without a charge of any crime.

In other words, the point that he was making was that approximately 1 percent of the cases that were picked up on an investigative arrest were held for further processing. He felt that aside from the constitutional feature, to which you allude, that it had a very ill effect in the District of Columbia in strengthening the arm of the police, because of the vast number they turned loose. I was surprised that they turned that many loose, but he said they did.

Senator ERVIN. I am surprised at the percentage also. But I was under the impression, just from observation, that a very substantial percentage of persons are released without trial as a result of investigations conducted by the police after their detention.

The CHAIRMAN. His figure was 1.2 percent charged with a crime.

Senator ERVIN. All these provisions of these three titles, with the exception—I do have misgivings about the detention for investigation—I certainly hope that the committee will take favorable action on them. I think too often we forget the great debt society owes to our law enforcement officers. And I think you have that particular problem here in the District owing in part to a small geographical area. It is much more difficult to enforce the law or apprehend criminals where you have a small geographical area because it is so easy to flee the jurisdiction. And I think that Washington is extremely fortunate in its Chief of Police—Chief Murray, I think, is one of the most enlightened officers I have ever been privileged to know. And certainly Congress ought to arm them with whatever assistance in the way of law that will enable them to do a good job, short of trampling into the constitutional rights of our citizens generally.

The CHAIRMAN. I certainly appreciate your taking time out to come and give us the benefit of your very valuable views, Senator. I know you are a jurist of great constitutional renown and I appreciate the viewpoints you have expressed.

Senator ERVIN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

(The statement previously referred to follows:)

Our next witness will be Prof. Yale Kamisar, School of Law, University of Minnesota, Minneapolis, Minn.; author and lecturer on investigative arrest practices and the *Mallory* rule.

We are delighted to have you with us this afternoon.

STATEMENT OF SENATOR SAM J. ERVIN, JR., ON H.R. 7525

Mr. Chairman, I appreciate this opportunity to testify before the District of Columbia Committee on H.R. 7525, a bill designed to reduce crime and revise criminal procedures in the District of Columbia.

I would like to confine my remarks today primarily to titles I, II, and III. These concern, respectively, the *Mallory* rule, the *Durham* rule, investigative arrests, and detention for questioning material witnesses. The Subcommittee on Constitutional Rights, of which I am a member, has considered each of these subjects in connection with its continuing investigation of the administration of criminal justice, and all three were dealt with in detail during the subcommittee's hearings on "Confessions and Police Detention" and on "Constitutional Rights of the Mentally Ill: Criminal Aspects."

TITLE I

The *Mallory* rule and rule 5(e) of the Federal Rules of Criminal Procedure are subjects which have long been of great concern to me. It is my feeling that the crime rate in the District will continue to mushroom and effective law enforcement here will continue to be frustrated until legislation such as that contained in title I is enacted. For this reason, I have in this and previous Congresses introduced legislation to clarify rule 5. Mr. Chairman, I request that S. 1012, a bill concerning this subject which I introduced and which was cosponsored by Senators Byrd of Virginia, Eastland, Johnston, McClellan, and Talmadge, on March 7, be printed at this point in the record of hearings.

[S. 1012, 88th Cong., 1st sess.]

A BILL To make voluntary admissions and confessions admissible in criminal proceedings and prosecutions in the courts of the United States and the District of Columbia

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of rule 5 of the Rules of Criminal Procedure for the United States District Courts or any other rule or statute of like purport, a voluntary admission or a voluntary confession of an accused shall be admissible against him in any criminal proceeding or prosecution in the courts of the United States or of the District of Columbia, and the finding of the trial court in respect to the voluntariness of the admission or confession shall be binding upon any reviewing court in the event it is supported by substantial evidence.

Although S. 1012 differs in language from title I of the legislation before you today, the effect would be the same no matter which measure is enacted. That effect would hopefully be to reverse the upward direction the crime rate has taken since 1957, the year the Supreme Court decided the case of *Mallory* v. *U.S.*, 354 U.S. 449. Although I realize this is not the only factor influencing the crime rate, the *Mallory* rule certainly is a major factor for due to it self-confessed criminals are let free by the courts, and the police are hampered in their crime detection. Here, I believe it might be well to review the history of the case itself.

The *Mallory* ruling held inadmissible the voluntary statement of a convicted and self-confessed rapist because of the delay in taking him before a committing magistrate. The Court stated that a delay of 7½ hours in arraigning the prisoner violated rule 5(a) of the Federal Rules of Criminal Procedure which requires that an arrested person be taken before a committing officer without "unnecessary delay."

The *Mallory* ruling and the decision in the earlier case of *McNabb* v. *United States*, (318 U.S. 332) have resulted in abolishing an old and fundamental rule of evidence regarding the admissibility of a confession. Prior to these decisions, the sole test of the admissibility of a confession was whether it was made voluntarily. Under this test, if a confession was freely and voluntarily made, it was deemed to be trustworthy. Of course, if there was a showing that the delay itself constituted sufficient inducement to confess, the court could, in its discretion, render such a confession inadmissible. But, the point is, that mere delay in itself was not enough to invalidate a confession.

In the *Mallory* case, time alone was the deciding factor. There was no showing that any duress was used in extracting the confession from the prisoner. Indeed, there was no allegation on the part of the prisoner that any force whatever was used to have him confess to the crime. There was nothing to indicate that the confession was anything but voluntarily given. Nevertheless, despite the voluntary nature of the confession and despite the fact that the confession was substantiated by all the facts of the crime charged against the prisoner, it was invalidated merely because of the passage of time.

The *Mallory* rule was extended even further in the decision of *Killough* v. *United States*, decided on October 4, 1962, by the Court of Appeals for the District of Columbia. In *Killough*, the prisoner had confessed two separate times to the murder of his wife, once prior to arrignment and once thereafter. Not only did the court use the *Mallory* doctrine to throw out the voluntary confession of the accused made prior to his arraignment, but the court extended this doctrine to invalidate an admission made after the arraignment. The court reasoned that the second confession was prompted by the first admission, which was illegal under *Mallory*. Judge Burger alluded to the departure from precedent and the ramifications of this decision in his dissenting opinion; he stated, as follows:

"The majority holding today is one of the most significant and far reaching of this court in many years. It goes far beyond the statute it purports to 'interpret' and far beyond any prior opinion of this court or the Supreme Court. No statute remotely authorizes the holding. No one even suggests that any right under the Constitution is involved.

"The majority holding constructs an entirely new 'statute' and takes a step neither contemplated by Congress nor remotely warranted by the *Mallory* case. The *Mallory* doctrine operated to exclude or suppress incriminating statements made during 'unnecessary delay' before taking the arrested person to a committing magistrate. The entire rationale of *Mallory* is that the statements are barred because made while detention is unlawful—unlawful for failure to have a prompt hearing. Today's majority holding, carries the 'fruit of the poisonous tree' doctrine to new lengths and means in effect, that statements made either before or after the hearing are to be excluded unless the statements are made with the defendant's lawyer at his elbow. For all practical purposes the majority bars any admissions except where the accused is advised and prepared to enter a guilty plea. It would be difficult to overstate the enormity and scope of this incredible 'interpretation' of rule 5(a). *Mallory* to a large extent foreclosed police investigations prior to preliminary hearing; this holding eliminates any interrogation of an accused after he has had the judicial warning until he secures a lawyer * * *. In light of this holding it is ironic that in the *Mallory* opinion Justice Frankfurter characterized rule 5(a) as 'a part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement.'"

Mr. Chairman, I contend that it is both unsound and unreasonable to apply time alone as a measure of admissibility. This subverts a rule of procedure relating to the duty of an arresting officer into a rule of evidence. Because a police officer fails to observe the requirements of rule 5(a) a self-confessed criminal may be turned back to society, even though he may have confessed again subsequent to his arraignment. In other words, the supposed sins of the policeman are visited upon an innocent society.

I submit that when Congress approved the promulgation of the Federal Rules of Criminal Procedure, it did not intend to throw on the scrapheap the time-honored test of voluntariness concerning the admissibbility of a confession. I submit that Congress had no intention of making convictions impossible simply because a police officer failed to take a prisoner before a committing magistrate until 7½ hours had elapsed.

As chairman of the Subcommittee on Constitutional Rights, I am, of course, not unmindful of the many protections which the Constitution of the United States bestows upon the persons accused of crimes within our society. But, in the words of Judge Alexander Holtzoff, U.S. District Judge for the District of Columbia, who testified at subcommittee hearings on the subject of "Confessions and Police Detention," in 1958:

"We must bear in mind that the purpose of the criminal law is to protect the public. On the one hand, it is essential that no innocent person be convicted of a crime and that oppressive methods be not used against the guilty. On the other hand, it is equally indispensable that victims of a crime and potential victims of possible future crimes receive protection. The victim must not become a forgotten man. As was said by Mr. Justice Cardozo in *Synder* v. *Massachusetts*, (291 U.S. 97, 122), 'Justice, though due the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.'"

In considering the effect of these decisions, we should keep in mind that the Supreme Court did not base its decisions on any constitutional issue. It did not suggest that to admit *Mallory's* confession into evidence would be a vio-

lation of due process. The court in both *Mallory* and *Killough* based its decision on its interpretation of the will of Congress as expressed in rule 5(a) of the Federal Rules of Criminal Procedure. I do not believe that the court has correctly interpreted the will and intent of Congress in this matter. It is for this reason that I endorse title I, a provision to make voluntary admissions and confessions admissible in criminal proceedings and prosecutions in the courts of the United States and the District of Columbia.

When all is said, the *Mallory* case rests upon the conviction that voluntary confessions made by an accused before arraignment must be excluded because their admission might tempt arresting officers to extort involuntary confessions. This being true, the reasoning which underlies the *Mallory* case is really a throwback to the common law philosophy that the interests of parties to actions might tempt them to testify falsely and for this reason they should be prevented from testifying at all for fear that they might commit perjury. In other words, the *Mallory* case rests upon the proposition that arresting officers must be freed from temptations even if the process by which they are so freed results in the freeing of those who murder innocent vicitms or prey upon a society which the criminal law was designed to protect.

TITLE II

Mr. Chairman, title II of H.R. 7525 represents a substantial improvement over the *Durham* rule, the existing test for determining responsibility for criminal conduct in the District of Columbia.

Section 201(a)(1) of the bill provides that criminal responsibility be measured by the following standards:

"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."

This rule establishes a specific test, on which a judge can instruct a jury and which a jury can understand. It is substantially similar to the provision recommended by the American Law Institute in its model penal code.

My objections to the *Durham* rule arise out of my experience as a trial judge in North Carolina. Under North Carolina law, the judge has an absolute duty to instruct the jury as to all of the substantial questions arising in a criminal prosecution, and it is error for him to fail to do so. I think that the *Durham* rule is inadequate because it establishes no definite tests to ascertain responsibility for crime. It would seem to me that under the *Durham* rule, the jury in effect is forced to try one of the crucial issues of the case; namely, a man's legal accountability for a crime, without any test that they can apply.

I do not think, as some have claimed, that the case of *McDonald* v. *United States*, 312 F. 2d 847, handed down last year by the Court of Appeals for the District of Columbia sitting en banc remedies the difficulties with the *Durham* rule. *McDonald* provides "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" (p. 851).

However, it is clear that this standard, while shedding some light on the problem of what constitutes a mental disease or defect still leaves the jury in the dark as to how that mental disease or defect must affect a defendant's conduct which is in issue at the trial.

McDonald does not change the "productivity" test established by *Durham*. Told that they must find that the crime was the product of a mental disease or defect, the jury, under *Durham*, is not told how the mental disease or defect must affect the conduct in question. Productivity is a psychiatrist's term. Laymen cannot readily relate criminal acts to mental conditions in terms of productivity.

I also want to commend to you section 201(c)(1) which makes the existence of a mental disease or defect excluding responsibility an affirmative defense. In my home State of North Carolina, as in many other States, insanity is ordinarily an affirmative defense. Under the North Carolina rule, the person who relies upon the plea of insanity is required to establish to the satisfaction of the jury that he is insane, subject to exception in cases which require a specific intent. In those cases, the burden is on the State to establish beyond a reasonable doubt the existence of criminal intent, and, of course, in connection with that, the State must prove that the man has the capacity to entertain criminal intent.

A rule which gives the prosecution the burden of establishing sanity beyond a reasonable doubt, as does *Durham*, puts too great a burden on the prosecution. *McDonald* does not change this rule substantially. It modifies only the degree of evidence which must be presented to inject the issue of sanity into the case.

I think that much of the confusion engendered in this area is due to the failure to recognize clearly that the function of the law is one thing and the function of psychiatrists is entirely a different thing in this area.

The law is trying to create a standard not to determine whether a person has one of the varieties of mental diseases or mental defects, but to determine whether the nature of his mental disease or defect is such that it would be unjust to punish him for an act which would otherwise be criminal in the average individual; whereas, the psychiatrist is concerned with the question of the nature and degree of his mental illness, not for the purpose of determining his legal or moral accountability but for the purpose of determining what means should be used either to cure him or to alleviate his condition.

The provisions of the bill relating to criminal responsibility which I have discussed, in my view, go far toward establishing the proper role of law in this area.

TITLE III

Title III of H.R. 7525 accords legislative sanction to the former police practice in the District of Columbia of arresting for investigation; that is, it provides for detention of persons when an officer has "reasonable grounds to suspect" he is committing, has committed, or is about to commit crime. The second half would add to the law new procedures for the detention of material witnesses.

While I endorse the principle of the provision regarding material witnesses, I cannot, in good conscience, endorse the section relating to investigative arrests.

There are constitutional as well as policy considerations that sometimes prevent lawmakers from legislating upon the theory that, in law as well as in geometry, a straight line is the shortest distance between two points.

In the matter of investigative arrests—and I do believe such dentention amounts to arrest, regardless of stipulations that it does not—our legislative road toward decreasing the crime rate in the District of Columbia is neither clear nor straight. Rather, it is marked by those constitutional guarantees which the Founding Fathers saw fit to incorporate in the Bill of Rights. The fourth amendment assuring the hard-won guarantee, deeply rooted in Anglo-American experiences, that there will be no seizure of persons without probable cause; the fifth amendment providing for due process of law, with all that has been held to include; the sixth amendment assuring the right to counsel—these are obstacles in the path of Congress which are not to be ignored. Incorporating some of the fundamental principles on which our society rests, these amendments were meant to guide lawmakers in the centuries ahead, and are so basic that they should not be overlooked in our effort to meet the exigencies of the moment.

This measure appears to establish a subjective test for apprehending suspects, a rule of thumb to be interpreted by every policeman patrolling his beat. In effect, by premitting the detention for 6 hours of a suspect when his replies to questions are not satisfactory to a policeman, this bill would, for the convenience of law enforcement officers, postpone that point at which all the procedural guarantees of the Constitution become operative for the individual arrested. As was stated by the Department of Justice report on the bills, this proposal provides "for a seizure of the person without probable cause, in violation of the fourth amendment, and accompanied by the consequences of a conventional arrest."

It would permit "a 6-hour police interrogation of a person suspected of committing a felony, without the assistance of counsel." Such a procedure, in the Justice Department view, "would be violative of the sixth amendment's guarantee that an accused shall have the assistance of counsel for his defense."

The constitutionality of this section, in my view, could not withstand judicial review.

I tend, futhermore, to agree with the opinion expressed by the U.S. attorney for the District of Columbia[1] that enactment of a workable bill dealing with the *Mallory* problem may obviate some of the need police feel for the provisions of title III.

Familiar as I am with the problems faced by law enforcement officials who must protect society from the criminal, I have always been willing to grant them

[1] House hearings, p. 144.

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

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

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

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

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

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

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

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

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

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

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

First of all——

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

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

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

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

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

Now, almost invariably the police will say, "We played checkers with him. We served him tea and crumpets." And the man will say, "They beat me half to death," or at least, "They shone bright lights on me." This happens again and again. We can see this in due process cases, such as *Ashcraft* in the early 1940's, where a man was held 36 hours and claimed the police did a great many bad things to him, and they said they didn't do anything at all.

Now, looking at it realistically—Senator Ervin said that the trial court does not have much difficulty resolving those disputes. I suspect not. I suspect he resolves them almost invariably in favor of the police.

The policeman has more prestige, his credibility is assessed higher. Very often there are four or five policemen against one suspect, so they have the advantage of numbers. Very often the suspect does not make a good witness; he is confused as to what happened; he has difficulty articulating it.

This problem of proof becomes increasingly difficult as the interrogators develop psychological techniques. No force—just psychology.

Now, this evidence of mental coercion may be especially elusive. Allegations of momentary tensions or underlying psychological deviation which may aggravate the suggestiveness of interrogation are difficult to substantiate. The Yale Law Journal in a very fine note back in 1959 said (note, 68 *Yale L.J.* 1003, 1022):

> The *McNabb-Mallory* rule is an attempt to avoid saddling the accused with an unconscionable evidentiary burden.

And that is what it would be if there were no *McNabb-Mallory* rule.

Now, another fine commentator, a Chicago lawyer named Bernard Weisburg, has pointed out the relationship between the interrogator and his prisoner inevitably invites abuse, not because policemen are any more brutal than the rest of us, but because the officers' natural indignation in crimes of violence, his position of relative control and mastery over the prisoner, the absence of disinterested observation, and, above all, the frustration of trying to get the answer—the whole process of questioning breeds a readiness to resort to bullying. (See Weisberg, "Police Interrogation of Arrested Persons: A Skeptical View," in "Police Power and Individual Freedom," 153, 180 (Sowle ed. 1962).)

If there is a right to an answer, there seems to be a right to expect an answer.

He says, and I think he's right, it is asking too much of men to grant virtually unlimited discretion to the interrogator in such a situation without the guidance and restraint of clear rules, disinterested observation, and eventual public scrutiny.

Now, I taught a seminar in criminal procedure, and most of my students felt the *McNabb-Mallory* rule was wrong. They felt that if the record shows the statement was voluntary, why not let it in?

One day I had a windfall—in a case called the *Biron* case, which has since been reversed by the Minnesota Supreme Court. It developed that by some accident the interrogation of this prisoner in the Minneapolis Police Headquarters was taped. There was some mixup. Some of the police officers thought this man would confess quickly,

and that they could use the tape to play to the other alleged coconspirators. Well, in the confusion some of the police officers left and others came in, not knowing they were on tape.

When I played that tape in my seminar—I wish you could hear it. This is a typical interrogation, no interrogator aware that he is being taped. The tricks they used, the deception. It is true there was no violence. We are past that stage, fortunately. The promises they made—which could not be kept.

Now, we do not very often have a tape. And that is the problem.

As far as I'm concerned, if a man's lawyer could just be given earphones and listen, and not be able to even appear physically, and not be able to say, "Stop"—just to listen, so we actually know what happened, on tape, the problem would be solved in large measure.

The CHAIRMAN. You say the problem would be solved just so long as the accused's lawyer knew what occurred at police headquarters?

Mr. KAMISAR. Well, the point is—all right. I am suggesting that if he could not be interrogated without some disinterested person listening, just listening—we remove the problem of proof. Now, it seems to me rightly or wrongly, whether we agree with the *McNabb* rule or not, that is what the Court is trying to do. It was just frustrated. It was convinced—and many commentators have said this—all the coerced confession rules in the world are illusory, as a practical matter, when the prestige of the police testimony prevails almost invariably.

Now, you may say the police do not do such things, they never do such things. I don't know how to resolve that problem. I think there is some evidence that some police do it often enough to make it a problem.

So I think that that is the basic problem, that is what the *McNabb-Mallory* rule is trying to get at.

Another problem the rule is trying to get at is the practice of arresting without probable cause in the first place. This is a point that Francis Biddle, as Attorney General, made back in 1943 when the hearings were held on *McNabb* (hearings before the Subcommittee on the Study of Admission of Evidence of the House Committee on the Judiciary, 78th Cong., 1st sess., sec. 12, at p. 30 (1943)). He said it fits perfectly, the whole idea is you cannot arrest a man without probable cause, you promptly bring him before a committing magistrate, and if there is no probable cause, let him go.

Now, the example Professor Inbau gave this morning—and I thought, Mr. Chairman, you hit it right on the nose when you said if you have probable cause, why don't you bring the man before the magistrate. And Professor Inbau said it would not hold up. Why wouldn't it hold up? Because there was no probable cause to arrest him in the first place. That's the problem. And the whole thrust of the *McNabb-Mallory* rule, another main thrust, is just this.

To make meaningful the protection against unlawful arrest the Court is saying, "Look, you cannot arrest a man without probable cause and then get him to give you enough evidence to give you probable cause." Now, that is really what Professor Inbau was driving at.

The troublesome cases are the cases where you do not even have probable cause to hold him in the first place.

Now, it seems to me it is kind of a strange logic to say if you illegally take a man into custody, you ought to have the power to make

it legal by holding him illegally. That is really what we are doing. That in a sense was Judge Prettyman's argument in the *Mallory* case below, before he was reversed. He argued if there was not probable cause to arrest the man, you could hold him long enough and question him long enough until you got probable cause to charge him. And the Supreme Court said you have to have probable cause in the first place, you cannot operate that way.

All right.

Now, looking at this bill, it is interesting to note that nobody is suggesting that we change the rules. No one is suggesting that we change the rules which say the police officer shall bring the arrested person before a committing magistrate without unnecessary delay. That will still be the law after this act is passed. And it will also be the law in the District of Columbia, under a special provision of the code, that an arresting officer must immediately, or without delay, bring that man before a magistrate. (See District of Columbia Code sec. 4–138, 4–140.) And the warrants will continue to issue, warrants for arrest will continue to issue, saying "Bring the man forthwith to the magistrate."

Now, the interesting thing is that we are not changing the rule itself. We are only changing—we are only trying to change the sanction.

The CHAIRMAN. Let me just follow you there.

Mr. KAMISAR. My point, Mr. Chairman, is it will still be a violation of rule 5(a) if you do not bring the man before the magistrate without unnecessary delay.

The CHAIRMAN. That is the general law today.

Mr. KAMISAR. That law will still be violated. All you are saying is that the violation will not matter. All you are saying is, even though it is a violation of a law you can still profit by it, you can still use the confession obtained in violation. But you are not changing that law. The same argument comes up in connection with the exclusionary rule in the search and seizure cases.

In Minneapolis until 1961 nobody paid any attention to search and seizure laws. We have a constitutional provision saying you cannot search or arrest without probable cause. Nobody cared whether the Constitution said it or not. All the police cared about was, could they do it and get away with it?

The amazing thing was when this matter came up in 1961, there was utter chaos in Minneapolis—and I think it is representative—they did not know there was a provision in the Constitution to that effect. They never had any occasion to read it. The Minneapolis city attorney said, "I haven't issued a search warrant in 10 years." The police said, "What do we do now?"

The exclusionary rule, the sanction, that is the rule, as far as these law enforcement people are concerned.

What we are suggesting here is that we keep the law, we will continue to have a rule 5(a), which we can talk about on Law Day or Constitution Day, and it says the arresting officer must take a man before the magistrate without unnecessary delay. But of course that won't mean anything any more, because if he does not do it, he can still use the confession.

In other words, the law will be unenforced because we want to give the police the power to violate that law. But it will be unrepealed, because we want to preserve our morals.

Now, I am paraphrasing Thurmond Arnold, but I think it is a fair commentary. ([Cf. "Arnold, the Symbols of Government," 160 (1935)].)

All right.

The CHAIRMAN. Let me follow you at that point. You take the suspect before the committing magistrate without undue delay. But this particular title would say that delay in itself shall not make the confession inadmissible. Doesn't it only go to the point of delay?

Mr. KAMISAR. My point is this bill says that you will be henceforth—you will be allowed to get into evidence statements obtained in violation of rule 5(a). That is the thrust of it. It does not say, it does not change the command. You see, it does not change the command, which will continue to exist in rule 5(a), that the police officers must take the arrested person without unnecessary delay. If he doesn't, he is violating that command. But this bill simply says, "So what?"

It says the admission of the statement obtained in violation will be allowed. My point is it is kind of an interesting way to go about it. Why don't we change the law? Why don't we say that a policeman is authorized to hold a man as long as he wants to? Why instead do we continue to have these laws which we are now saying the policeman can violate? That's my point. It is an interesting way to go about it. And it seems to me we go about it this way because everybody realizes that these laws do not mean anything without the sanction.

Nobody ever claimed we ought to repeal the search and seizure laws. All they claimed was we should not throw out the evidence once illegally-sized. Keep it on the books. But that is the amazing thing. What for? What good is it if you haven't got the sanction? That's the point I'm trying to make.

Next, we get to the question of, shall we say, the "sweetener" that no statement shall be admissible unless prior to such interrogation the arrested person had been advised that he is not required to make a statement, and so forth.

Well, this looks good at first glance—although what we are saying in effect is that the interrogator should protect the interests of the suspect, at the same time he is attempting to obtain enough damaging information from him to convict him.

Now, I frankly doubt that this is a substitute for the loyalty of counsel or disinterestedness of a judge.

But we are right back where we started, it seems to me, because if this is passed, the inevitable conflict will be: Did the police officer make the statement? When did he make the statement? How did he make the statement?

Now, I can make a statement, "Look, you might as well cooperate. You know it can be held against you, but you might as well cooperate." You can do it very perfunctorily, you can do it very routinely, sloppily. And the way you do it can affect the outcome immensely.

Now, you also have the problem that after the man has made a couple of oral incriminating statements, then, before he makes the written statement, you advise him of his rights. I have seen that happen in several cases. But the point is: psychologically "the cat is out of the bag." Once a man makes an incriminating statement, and then you say, "All right, you might as well reduce it to writing. Before we do,

we want you to know of your rights. We have a special form." The man is going to say, "I was broken; I was informed too late; the door was closed only when the horse was out of the barn."

It seems to me we are going to have tremendous evidentiary problems. So we are right back where we started.

The whole idea of the *McNabb-Mallory* rule was to avoid these problems of proof. The whole idea was to avoid the dispute over what happens, the inevitable evidentiary battles over what really happened behind the closed doors.

The theory was that if the policeman exists who is willing to violate the Constitution, he is also willing to perjure himself. Now, if that policeman exists, he is willing to perjure himself and say that he gave the suspect the warning.

Now, this is an illusory safeguard, I think. And the thing that is even more dangerous, it seems to me, is that when you read it together with title III—title I says, "A person under arrest shall be given this protection." But title III says, "A man can be detained for 6 hours and he shall not be regarded as under arrest." Does that mean that you can detain a man for 6 hours and not advise him of his right to remain silent and so forth, because he is not under arrest?

Certainly the way title I and title III now read, it is susceptible of that meaning.

If so, you hold a guy for 6 hours and you say, "We did not have to give him any warning; he was not arrested, he was only detained." And then after he has made some incriminating statements, we then arrest him, and then we give him the safeguard, when it is too late.

So I think that is a very serious problem which ought to be clarified.

Now, it is also interesting to me to note that in the 1957 House committee hearings, at page 37, I believe, the Chief of Police was against this caution. He said it couldn't work, nobody would make any statements. But what happened? The years since have demonstrated that it does work, because apparently it is standard practice to give this warning, and a great many statements are being obtained. This is not a substantial barrier after all.

But moving on to title III——

The CHAIRMAN. Before you move on to title III—the thing that puzzles me about this problem that we have if I understand your position correctly—what would the police do in the case of—and I am sure this happens in many places in the country, I assume it happens in Minneapolis—where you have a particularly atrocious sex crime within the city. I think it is customary for the police to go out and round up all known sex violators of the past, they have them fairly well cataloged. I assume under your theory the police could not do this.

Mr. KAMISAR. Senator, I state this categorically. I do not think there is a competent legal scholar in the United States who will say that that is constitutional. You cannot round up 100 or 200 people. How can you say you have probable cause?

The CHAIRMAN. They do it, though; do they not?

Mr. KAMISAR. The wide disregard of constitutional rights which exists is no reason to make the practices constitutional. Now, 30 years ago police interrogators were hitting guys with telephone books and blackjacking them, and that was common practice. That was common practice in 1930. We finally cleaned that up. But if the law

enforcement officials could say everybody was doing it, it's all right—it does not become constitutional because enough of them do it. And it seems to me—sure they do it. I admit it. I admit that in Minneapolis there are "arrests for investigation." But there is not a doubt in my mind it is unconstitutional. I mean we do a lot of things which are wrong, whether in this or other areas. There is a great deal of unconstitutional behavior going on in the South. It is still unconstitutional.

The CHAIRMAN. The point I am driving at is, then, that under your theory you would be able to——

Mr. KAMISAR. I would prefer to say under the Supreme Court decisions, as most people would read them—it is not my theory—I am simply reporting the Supreme Court law to the best of my ability. I do not think there is any doubt, the Supreme Court of the United States has made it crystal clear that you cannot go around "rounding up" people. That is the most spectacular, flagrant violation of the protection against unreasonable search and seizure there is. Sure, it happens. I understand that there was—I have not documented it, but I read it somewhere in a District of Columbia opinion—that 6,000 people were picked up in connection with a recent investigation involving four murders. (This "roundup" is referred to in *Jones v. United States*, 266 F. 2d 924, 930 n. 21 (1959).) Well, that may be speedy and efficient police work in a narrow sense, but that is unconstitutional.

The CHAIRMAN. What can you do, then, under your theory? What would you do to help strengthen the arm of the police? Because they do have these problems.

Mr. KAMISAR. For one thing, Mr. Chairman, I happen to believe that a substantial improvement might be worked if the police questioned more rather than arrested.

Now I understand the chief of police laughs at this and says some of the people he knows will just laugh in his face. Now my answer to this is this.

I don't think that most people are going to laugh in a policeman's face when he walks up to you and says, "Look, we are not arresting you, we are not putting you under restraint. We would like to have you cooperate."

Now, if the man is hardened enough and defiant enough that he is going to laugh in a policeman's face, then you are not going to get anything out of him if you question him 5 or 6 hours.

Now, to follow that point up—the FBI may be a different breed than most police forces. But the people they deal with are the same. And it is very significant to me that in the lectures that the U.S. attorney's office gave the District of Columbia police on several occasions, the U.S. attorney, then Oliver Gasch, made this point.

Now I read—these are the hearings of July 1958. (Hearings before a subcommittee of the Senate Committee on the Judiciary, 85th Cong., 2d sess., on H.R. 11477, S. 2970), and this is page 413:

> There may be other cases, of course, in which you follow the tactics that have been explained to me, and probably to many of you, by the FBI, in which you say to a man that you want to interrogate, "You are not under arrest, you are free to go at any time that you want to, but we are trying to solve such-and-such case, and I am working on that case, and I would just

like to see if I could not get a little help from you." Well, they tell me that in many of the cases in which they work that technique is effective, that technique has paid off, and that technique and that system will undoubtedly be a good basis for our arguing in court that such a man was very definitely not under arrest and that admissions he made during such questioning would not be subject to the strict qualifications of the *Mallory* rule.

And again on page 397 this point is dicussed. And on page 409:

I would like to emphasize what Assistant U.S. Attorney Tom [Flannery] said about the desirability of using new techniques to the extent possible insofar as questioning work is concerned. That it is a widely used technique by the Bureau. You never can tell whether it will work or won't work in your type of case until you try it. And if you get a break that way, you can remember the *Mallory* rule does not apply to a confession secured prior to arrest.

Of course, I was impressed by the fact that I went down to the FBI School at Quantico with Inspector John Layton and some others a year ago. We talked about this thing with the instructor at the school. He told me the way they usually handled a situation like that is when they go into a man's home they say to him, "I just want to talk with you about this situation. You are not under arrest, you are free to go, but I have talked to a few people and maybe you can help me solve this crime."

Now the instructor down there, a man of 15 years' experience, told me the technique has been found quite productive by their men in many different kinds of cases.

Now, there is no stigma—the man is not arrested. He has no record. He is not dragged down to headquarters. I happen to think the great majority of people will cooperate whether they are indirectly coerced or not—I think that is the normal reaction. The point is at least they have not been arrested. And I think that if the FBI can does this, so can all policemen.

The CHAIRMAN. That does not violate any constitutional guarantee?

Mr. KAMISAR. Absolutely not. It does not violate anything.

The CHAIRMAN. I say "Professor, I want you to come along. You and I are going to have a friendly talk. I just want to ask you a few questions."

Mr. KAMISAR. You can say this—"I cannot arrest you. I am not going to take you down to headquarters at this point. I may come back and do it later if I have enough information. I am just going to ask you whether you are willing to cooperate."

Now, I think most people will say, "Yes, I will answer the questions. Maybe I can help you."

Now, no one has ever forbade mere questioning. The main problem is the stigma of arrest—when you grab these guys and take them down and then question them later. It seems to be routinely done. But as Commissioner Duncan said a couple of years ago, he said—maybe it doesn't happen any more, but it happened in the old days—Negroes going to Howard University or Howard Law School or Medical School got picked up in a big roundup, and 15 or 20 years later, when some of them are lawyers and doctors, they are still trying to explain why they were arrested 15 years before.

It is a big difference from the point of view of the man being questioned. And apparently it has worked in a number of other jurisdictions. And I just throw that out.

I also suggest—well, to buttress the point I just made, it is interesting to note that in a number of recent *Mallory*-type cases, when a man is brought before a committing magistrate, and then put in the custody of the marshal or the warden, you must get him to sign a

consent before you can interrgote him further. In a number of cases, I would say over half of the recent District of Columbia Court of Appeals cases I have read, the police get that consent.

Now, if they can get the consent from a man in jail in writing, that he is willing to talk further—then, if ever, the blue chips are on the line—they do not need any greater power.

Now, if, as is another possibility, they deceive these people into giving their consent, then they should not be given the power, or any more power. I mean it seems to me you have to have it one way or the other. The fact is they are getting consent in writing.

All right.

Now——

The CHAIRMAN. Your theory is that the *Mallory* rule should remain just as it is.

Mr. KAMISAR. Well, I'm going to get to why I do not think it should be changed. I mean I admit it is much easier to counterpunch than to lead. And I am just here to counterpunch. I am against a specific proposal; I am just counterpunching.

Now, the fact that I may not be able to come up with a golden solution does not mean I can't say this one is not the golden solution.

I suggest that some clarification could be made as to the power of the policeman to interrogate a person after he has appeared before the magistrate and been given the warning, and perhaps had an initial contact with counsel.

Now, there have been cases in the District of Columbia, the *Goldsmith* case (277 F. 2d 335 (D.C. Cir. 1959)), where the judge ordered the man, after he was given the warning, back to the custody of the police and he confessed, and that was upheld. And it seems to me the *Killough* case is not inconsistent with that.

Now, I know that Senator Ervin read from the *Killough* dissent. But I think it is fairly obvious that dissents are not always the most reliable commentary on what happened. Dissenting judges sometimes get rather angry, and they tend to exaggerate.

You may recall some years ago the famous *Jencks* case (353 U.S. 658 (1957)), where Justice Clark dissented on the ground that:

> The Court has opened [the FBI] files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information (*Id.* at 681–682).

And that was not even remotely what the majority held.

The majority limited it to prior statements of those witnesses who appeared for the Government, only to prior inconsistent statements by them, and when the Congress of the United States got through considering the problem, in effect they reaffirmed the majority opinion. (See generally Note 67, Yale L.J. 674 (1958).)

Now, perhaps they thought they were preventing what the dissent was predicting. But that is an example of exaggeration.

Now, what happened in the *Killough* case—there is no question about it. Every judge on the Court agreed that the defendant was held flagrantly in violation of law—he was held 34 hours. Everybody agreed—even Judge Burger—that the first confession was illegal (*Killough* v. *United States*, 315 F. 2d 241 (D.C. Cir. 1962)).

Then what did the police do? When he appears before a magistrate, he is not told that the first confession cannot be used against him. All right. Here is a man who has made a confession, under illegal

circumstances. He is now given his warning that he need not make any statements, after he already has. And he goes to jail.

In comes the police officer and asks him—I am quoting from footnote 2 at page 243.

> He asked him if he remembered anything he had not told [him] in his [original] statement, to which he replied, "My statement is just about the same."

And then he goes over it all over again.

Well, if you can violate the rule flagrantly, and then when a man is in jail walk in and lead him to believe that the first confession is going to be used against him anyhow, and simply ask him to repeat it all over again, then there is no point having the rule. And it seems to me that is really all the *Killough* case stands for. It does not forbid interrogation after the man has been advised of his rights. It only forbids the unfair leverage, once a man has improperly been induced into confessing.

Now, there is one point that I would like to get into briefly before I go on to title III, and that is the question you have been asking about the constitutional difficulties.

I did not come prepared here to discuss that, but since I have been listening to you ask this question of other witnesses I have been thinking about it—all day.

A great many of these people, as I have indicated, are arrested without probable cause in the first place. That is why they are held—to get more information.

Now, the Supreme Court has come down with a decision this year, the *Wong Sun* case (371 U.S. 471 (1963)), which holds, as I read it, that in Federal cases, at least, incriminating statements obtained from an arrested person should be thrown out—I'm sorry—illegally arrested person, should be thrown out, just as physical evidence obtained from an illegally arrested person is thrown out. In other words, if you arrest a man without probable cause and you search him, you cannot use the physical evidence you find. If you arrest him without probable cause and he makes a statement, the court has now indicated you cannot use that either, because again we want to take the profit out of illegal arrest.

So you may have that problem.

I think that is a serious constitutional problem.

There is language in *Wong Sun* which indicates that no distinction is going to be made—at least in Federal jurisdictions, and at least when the statement is obtained by the arresting officer relatively promptly or a few hours afterward—no distinction between verbal and physical evidence. That is one problem.

The other problem may be—it is true, as Senator Ervin said, and Professor Inbau said, that prior to the *McNabb* case, no one even suggested there was a constitutional problem here. That's true. But the *McNabb* case is 20 years ago. That is the stone age as far as the history of criminal procedure is concerned. The developments in the last 20 years are, relatively speaking, fantastic. You just cannot go back to 1943.

Senator Ervin made a very, very fine speech in favor of overruling *Mapp* v. *Ohio* because the physical evidence obtained in violation of search and seizure is trustworthy—the old common law rule should come into play. We are not going to overrule *Mapp* v. *Ohio*. That

is here to stay. And so are some of the other developments in the confession area.

Now, as long as the *McNabb* rule was on the books, the Supreme Court had no necessity or occasion—in Federal criminal cases—to develop at what point the right to counsel begins, or whether self-incrimination exists at the police station and so forth. The Federal courts had the *McNabb-Mallory* rule. And contrary to what Professor Inbau suggested this morning, the last thing the Supreme Court does is decide a constitutional question, not the first thing. If there is a statutory way out, they will resolve it in terms of the statute. They do not want to get to a constitutional question unless they have to.

Now, if the *McNabb-Mallory* rule is repealed, they have to reach the constitutional question. We don't know what they would have done, because the whole development has been checked for 20 years under the *McNabb-Mallory* rule. But there has been a great deal of agitation about when the right to counsel begins. There are at least four, as I count them, perhaps five justices who have made sounds as if it might begin soon after a man is arrested. This obviously will affect the repeal of the *McNabb-Mallory* rule.

Certainly, the Supreme Court is finding that a delay of 1 or 2 days might be unconstitutional. In other words, there were times when a man was held incommunicado 25 days, and the Supreme Court found no violation of due process.

In a case last year, *Haynes* v. *Washington* (373 U.S. 503 (1963), 16 hours' delay, plus the refusal to let him see his wife and a little bit more, knocked out that case on due process grounds.

Now, I think that another possible suggestion is this:

The Chief of Police has said, at least in U.S. News & World Report (Oct. 21, 1963, pp. 92, 95), where he seems to be a favorite contributor, that it has always been the rule that when a man asks for a lawyer, you throw him a telephone book. Well, if that has always been the rule, I must confess I do not understand what the shouting is all about. Because if you give a man a telephone book as soon as he asks for a lawyer and let him call a lawyer, there goes your interrogation opportunity.

It may suggest that you are counting on the guys who are too dumb to ask for a lawyer, who don't know about their rights, or don't have any lawyer, cannot afford a lawyer.

Now, there was some suggestion in *Griffin* v. *Illinois*, more particularly *Douglas* v. *California*, dealing with the right to counsel on appeal, that this could conceivably—a distinction as to when the right to counsel "begins" drawn between a man who can afford a lawyer and a man who cannot afford a lawyer might be unconstitutional. The crucial period is at the beginning. And if a rich man can get a lawyer by naming one, as soon as he names one, and a poor man must wait, has nobody to get because he has no lawyer to name, this might raise some serious constitutional problems.

So I think there are some serious difficulties in this area, although I am not prepared to say that a repeal of the *McNabb-Mallory* rule would be unconstitutional.

Of course, it depends upon the fact situation.

You have to resolve this thing in terms of the actual case, the particular case. Suppose the man is held 24 hours or 22 hours, that

in itself might violate due process. It is just a question of the totality of the particular fact situation: if he is not warned, if his request for counsel is denied, if he is of subnormal mentality, these are all factors. I think it is fair to say the length of time a man is held incommunicado is becoming an increasingly significant factor in the court's overall assessment of whether or not due process has been violated in obtaining the confession.

Now, I have some doubts, some serious doubts, one way or the other, about whether you could constitutionally repeal this; and I must confess at the moment I would say you can. But I want to point out the law is moving. That is my only point. The law is moving. And we don't know what will happen, because there has been a constitutional void—if the *McNabb-Mallory* rule is repealed, the void will fill. All these years nothing has happened, nothing of constitutional dimensions in these Federal prosecutions, because you had the *McNabb-Mallory* rule. And undoubtedly the court will begin to develop the constitutional safeguards in this area, if and when you repeal the rule.

But I have no doubt that title III is unconstitutional. I will state categorically that that will never survive litigation. And if it does, I will give up teaching criminal law and teach property and trust and estates—a fate worse than death, to me.

Now this title III—as Prof. Caleb Foote of the University of Pennsylvania Law School has said of a similar measure—"this is Madison Avenue at its best"—[Foote, "The Fourth Amendment: Obstacle or Necessity in the Law of Arrest, in Police Power and Individual Freedom," 29, 30 (Sowle edition, 1962)]. The statement is, "may detain any person whom he has reasonable grounds to suspect."

Now that sounds very reasonable—"reasonable grounds to suspect." But no matter how many times you use the word "reasonable" in formulating the standard for detention or arrest—"reasonable suspicion," I have seen, "reasonable grounds to believe," "reasonable circumstances"—any standard less than probable cause is unreasonable in the constitutional sense.

I do not know what "reasonable grounds to suspect" means. I think I can say this much. The whole idea, the whole point of it is that it means something less than reasonable grounds. Otherwise there is no point putting it in there.

It is a very interesting thing, as Fred Inbau said this morning, a similar provision in a State code has been sustained. I know of one case where it was sustained. You know how? The Court said "reasonable grounds to suspect" means "reasonable grounds to believe," means "probable cause." They sustained it, all right. But they wrote out the whole purpose of the statute. (See Foote, supra, at p. 30.)

My only point is if "reasonable grounds to suspect" means something less than the constitutional standard for arrest—and obviously that is the intent—it just won't stand up.

The CHAIRMAN. Although Senator Ervin and you seem to have a difference of opinion on title I, I assume you are in complete agreement on title III, insofar as investigative arrests.

Mr. KAMISAR. Yes.

The CHAIRMAN. You both think it is unconstitutional.

Mr. KAMISAR. I think I am a little more emphatic about it.

The CHAIRMAN. What's that?

Mr. KAMISAR. I think I am a little more emphatic about it.

The CHAIRMAN. You are pretty emphatic about everything you say.

Mr. KAMISAR. Yes: I think we are in substantial agreement.

The CHAIRMAN. I always like to find these areas of agreement. This is a little difficult in this field.

Mr. KAMISAR. That's right.

The Uniform Arrest Act has been mentioned—people say, how can it be that a uniform act was proposed which is now unconstitutional? Well, the Uniform Arrest Act was the work of Sam Bass Warner and some other people back in the 1930's.

Now in its time it was "constitutional." But back in the 1930's no one suggested that an illegal arrest violated due process. I mean this is like saying back in the 1930's some authority had a certain view of the scope of the commerce power. Well, that is meaningless today. Again, we have gone eons since 1935. Now it is just hard for me to see how you can detain somebody for as much as 6 hours and say you have not arrested him.

Now, you know, "arrest on suspicion" or "false imprisonment"—these are dirty words, these are blunt words. But "detention" where there is "reasonable ground to suspect"—that is Madison Avenue. That is soft, that is clean; it doesn't sound too bad.

The CHAIRMAN. But you think it is unconstitutional.

Mr. KAMISAR. I think it is unconstitutional. I think it is kind of cute, you know. For, if you read it fast, it looks awfully good—"reasonable grounds to suspect." It seems pretty reasonable. But it is less than reasonable grounds.

The CHAIRMAN. Let me ask you this. We are faced with a problem, and the record is pretty clear that the District of Columbia has a very bad record on aggravated assaults, robberies, and housebreaking. If you were a legislator, what would you do to try to be of assistance to the police in this area? You have told me what was wrong with title I. You are a very capable and brilliant young lawyer, and you have spent a lot of time studying this. What would you do? People certainly have a right to be safe in their homes and safe on the streets. How would you make their homes and the streets safe?

Mr. KAMISAR. Well, I have a long answer, which would take about 15 or 20 minutes. The thrust of it is: To what extent is the *McNabb-Mallory* rule a major cause of the current crime situation in the Nation's Capital? And I think this is an important area, because everybody seems to assume this is so, that it is a major cause.

I spent a great deal of time, most of last night, going over these statistics, and I think I could establish it is not so.

The CHAIRMAN. You heard Mr. Shadoan this morning.

Mr. KAMISAR. Let me say this first of all. I agree with him on the statistics about holding people for more than 8 hours and only charging 1.2 percent. But I have other data than his.

Now as to that, there is no question about the reliability of that data. That was in the Horsky report, which has not been mentioned often enough. That was a distinguished committee. One of the members of the committee was former—or still present—personal counsel to the Chief of Police. Another member of the committee is now the Presidential adviser on National Capital affairs, one of the Nation's truly great lawyers, Mr. Horsky.

The police were given 6 weeks to answer that report. They filed a lengthy answer. They did not contest a single finding, at least along these lines. They did not challenge these findings. And this shows you the longer they hold a person, the less fruitful it is. If they hold him up to 4 hours, they charge 5 percent. If they hold more than 8 hours or 10 hours, they charge 1.2 percent; 1960 is a typical year. As a matter of fact, that really is what they are trying to do in title III—get that back in, get back to "investigative arrests."

This disurbs me because I think there has been a great deal of distortion about the ban on "arrests for investigation" in the press. For example this article in Look, "Portrait of a Sick City—Washington, D.C." (June 4, 1963, p. 15). It says:

A new city rule imposes additional restraints on Washington police. Arrests for "investigation," a fruitful source of information on crime, are now banned (p. 19).

Now, of course, the fourth amendment has always imposed this restraint on District of Columbia police. Legally they have never had the leeway to arrest on less than probable cause. And it seems to me that—if I may read a couple of paragraphs from the Horsky report. The Horsky Committee says this on page 68:

When we permit arrests on the basis of probable cause, we balance the unfortunate consequences to an individual as to whom this is probable cause—even though he may be innocent—against the consequences to society if such a person is not made available to stand trial for the offense of which there is probable cause to believe he is guilty. This balance has been struck, and the citizen is prepared to pay the price in individual hardship. And this is the balance which the Police Department should recognize. Where they have probable cause, they may arrest; they need not, of course, if they believe further investigation will change the picture. Where they do not have probable cause, they may not arrest, for "investigation" or anything else.

Now, the President of the Board of District of Columbia Commissioners, Mr. Tobriner, said this was a compelling, persuasive, and classic document. He said there was no doubt in any of the Commissioners' minds that arrests for investigation are unconstitutional.

The Corporation Counsel for the District of Columbia, Chester H. Gray, characterized the report as an exhaustive and excellent study of the problem, and he agreed that the conclusions that arrest for investigation are unconstitutional is founded on a longstanding and well-settled proposition of law. And I venture to say that I doubt that there is a lawyer on the Washington, D.C., District Attorney's staff, or any lawyer in the Department of Justice, who will argue to the contrary.

Those arrests for investigation, the men were brought down to headquarters, fingerprinted, booked almost invariably. To say that you can arrest for investigation on less than probable cause—and that this—fingerprinting, booking, and all that—is not really like an arrest—is unbelievable.

I would like to establish that "arrests for investigation" are not needed. As soon as the Horsky Committee was formed, the police cut back their arrests for investigation very drastically because they were afraid of publicity and when they cut back the rate for arrests for investigation drastically, they were still charging the same 5 or 6 percent, which is—and this is pointed out by the Horsky Committee.

"It is disturbing"—it says on page 68:

It is disturbing to find the police engaged in any practice which they are quick to modify when it is questioned. More importantly, the change in volume of "investigation" arrests goes very far, in and of itself, to destroy the argument of "necessity." * * * The decline in volume was not due to the elimination of what might have been considered the "fringe" situations. For example, essentially the same proportion of those arrested for "investigation" were charged in 1960 as in 1961 * * *. Whatever the standard for an "investigation" arrest may be * * * it does not appear to have tightened up in 1961. Rather, the decline was largely due to police forbearance. It has been a matter of concern to the committee that the practice can be curtailed by two-thirds in the space of months, since by the same token it can also be increased by two or three times, if the police conclude that their forbearance has gone too far.

Now, Chief Murray found comfort in the Horsky Committee conclusions that in the case of many arrests for investigation, although the standard of probable cause was not required, such cause actually existed. And if this is so and if nevertheless only 1 person out of 18 so arrested were charged, why should the standard of probable cause be lowered further?

It seems to me that in trying to demonstrate the legality of an investigative arrest as practiced, the Chief has come perilously close to conceding that the practice has little or no utility. And it just seems to me that to read about the ban on these arrests "crippling" the Police Department, to read this over and over and over again, this constant crying, this moaning—we can't go on—in the face of these Horsky Committee statistics—it is unbelievable. And everybody picks up this crying and just repeats it—but it has no meaning.

I don't think that "arrests for investigation" are fruitful or constitutional. It is possible that they are neither; I think they are neither.

Now, if I may get to the prime consideration in this area, and I think this is the big point—what we are doing today we did 5 years ago, we did 20 years ago.

I have got the hearings of 1943 [exhibiting] (hearings before Subcommittee No. 2 of the House Judiciary Committee, 78th Cong., 1st sess. H.R. 3690). Maj. Edward Kelly was then the Chief of Police in Washington, D. C., and you cannot tell him from Chief Murray in 1963.

He is crying, he is screaming, he is saying that there will be utter catastrophe, there will be a complete breakdown if *McNabb* is not repealed, they cannot go on—if *McNabb* is not repealed. *McNabb* was decided in 1943 and the biggest gains that the Police Department ever had they got under the *McNabb* rule.

The great myth is that *Mallory* is something new and different. As Professor Inbau himself said, he said it this morning, the *McNabb* rule was the rule since 1943 and all that *Mallory* did was to reaffirm the rule, and it has been reaffirmed several times.

Now, when you talk about the apparent relationship between the *Mallory* rule and crime—well, since 1943 crime has been going up and it has been going down, it was going up and down, I mean, how can you—what is the apparent relationship between the *McNabb* rule and crime?

It seems to me that there has been a great deal of distortion in the press so that the man in the street has an entirely erroneous concept of the crime situation in the Nation's Capital.

The CHAIRMAN. Whether he has an erroneous conception or not, I think it has been checked independently, and if you were to check with many, many people in the metropolitan area, I think you will find that they dare not go out on the streets at night.

And, of course, rightly or wrongly, they fear that they are likely to be molested or intercepted or yoked or a robbery would be committed or something of that nature.

Mr. KAMISAR. The Police Department's own statistics show that there is less rape today than there has ever been in the Nation's Capital. You check the figures and you will see that there is less rape today than there has ever been in the Nation's Capital. (See Joint Hearings Before the District of Columbia Committees of the Senate and House, 88th Cong., 1st sess. (1963) at pp. 14, 20.) You will never believe this. I was flying in here from Minneapolis last night and a lady said, "It is impossible, the raping going on."

I said, "Lady, you have never had it so good. There is less rape now than there ever was."

She said, "You don't read the newspapers."

I said, "No, thank God, I don't read the crime stories in the Washington newspapers."

I read committee hearings, and here it is, and you look and you will see that there has been a sharp drop.

Now, why? After all, *Mallory* was a rape case. Why weren't the rapists emboldened? Why didn't the rapists say after *Mallory*, "Well, gee whiz, we got off."

I was in Washington, D.C., at the time. The headlines were screaming, "Rapist Gets Off."

And you would think that if anything would go up after *Mallory*, it would be rape, but it doesn't; rape goes down drastically. It has never been so low—and nobody mentions that.

The CHAIRMAN. I understand your point. You think that the *Mallory* law is satisfactory and you believe that title III is unconstitutional. My only question of you is:

Do you have any suggestions to make as to what a legislative committee should do or can do to attempt to be of assistance to the Police Department—maybe you don't believe it should be of assistance to the Police Department. Perhaps you don't think that is important.

Mr. KAMISAR. Well, I think it is also important to be of assistance to those accused of crime.

The CHAIRMAN. How about also of assistance to those who don't feel safe going out at night?

Mr. KAMISAR. Yes, Mr. Chairman, yes; and one point—take those people—and there were more than 1,000 of them per year—who were held over 8 hours, but not charged.

Now, that is a very unpleasant ordeal. Now, what happened to those 995 people? Who were held over 8 hours, but not charged? Nothing. They went home. They nursed their wounds.

Now, what the professor from Georgetown said this morning—there is no doubt about these psychological interrogation techniques—Inbau has written this in his book and I reviewed it, and this is what the best police are doing.

These police, the best police, the police who read his books—all of these psychological things that he spelled out, he spelled out this morning—they are spelled out in the books as standard operating procedure. (See, e.g., Inbau & Reid, Criminal Interrogation and Confessions 14, 16, 27, 31, 58–59, 109 (1962).)

Now, it seems to me that, as a legislator, perhaps you ought to get some true information. I mean, it may be that the newspapers digest and redigest these crime cases until everybody has gone crazy—it seems to me that the question is not whether there is crime in the District of Columbia, but whether it is due to the *McNabb-Mallory* rule—and the House report says that it doesn't matter (Rept. No. 579 on District of Columbia Crime, 88th Cong., 1st sess. (1963) at p. 5), it doesn't matter whether it is good or bad elsewhere. But it does matter. Whether it is just as bad elsewhere—that is the whole point.

If it is just as bad elsewhere and nobody else has the *McNabb-Mallory* rule, how can you blame it on the *McNabb-Mallory* rule?

The CHAIRMAN. Well, assuming that they are not blaming it on *Mallory*.

Mr. KAMISAR. Well, if they are not blaming it on that, if they are not going on that, what is the—what is this big movement, the big movement to repeal the *McNabb-Mallory* rule? We have had it for 20 years.

The CHAIRMAN. Sir, I understand your point on the *Mallory* rule. All I am trying to solicit from you are suggestions as to how we can have better law enforcement.

Now, I am very well aware at this point that you are making, the point that the statistics compare favorably. Now, I don't know what the Minneapolis statistics are.

I don't think that that is getting the job done just making the point about favorable statistics.

Mr. KAMISAR. Well, I will suggest—I'll suggest what can be done, Senator, by putting it this way.

The CHAIRMAN. Not only what can be done, that is not exactly what I am asking you: What would you do?

Mr. KAMISAR. Well, I would say that it would be more profitable to turn our attention to the deep social factors which cause crime and stop making the Supreme Court of the United States and the Court of Appeals for the District of Columbia the scapegoats.

Now, nobody hates to be made a scapegoat more than a police department, and nobody resents being made a scapegoat more than a police department. And, now, when anybody suggests that there is crime, why don't the police put a stop to it—what is their answer?

Chief O. W. Wilson, of Chicago, has answered that a major source of antagonism toward the police is the tendency to blame policemen for a high incidence of crime instead of recognizing that there are many causes such as slum conditions, lack of parental responsibility, unemployment, cultural inequalities, and other social factors over which the police have no influence or control.

But in the same speech, he blames the Supreme Court. Now, the Supreme Court has no more influence or control over those factors than the police department and it is outrageous to blame this on the Supreme Court.

I say, look to the social conditions, look to the problem of school discipline, the dropout rate—39 percent in the Washington, D.C., schools. Illiteracy has increased in the last decade here while declining everywhere else in the United States.

One principal reported that only 13 percent of her kindergarten, first and second grade pupils, have anyone at home when they return from school.

There are more illegitimate births in this city than in any other city, in any other city of the same size. Girls in the city public schools under 15 gave birth to more illegitimate babies than anywhere else in any comparable city.

Who is going to blame this on the *Mallory* rule?

The District of Columbia venereal disease rate in the age group 15 to 19 is more than 10 times the national average. In short, it seems to me that we should stop looking for the easy answer.

You said this yourself at the joint hearings, as a former State attorney general, there is no easy answer, "Crime has many tentacles for causes" (p. 3). And that is my point.

If I accomplish nothing else—as you pointed out, there are many, many factors, and this is a very complex problem.

It seems to me that we are going off in the wrong direction. We are kidding ourselves. We are not going to solve crime by changing rules of evidence.

And it seems to me that until there is compelling reason to repeal the *McNabb-Mallory* rule, we should not, and I am willing to stand here at great length and show you that these crime statistics are phony, that they are misleading.

As a matter of fact, the clearance rate went up after the *Mallory* decision, and it had gone down before. You look at the figures in the joint hearings, and you will see that, that it dropped 6 or 7 points between 1955 and 1957. Then it went up 2 or 3 points in 1959, and then it drops again. (See table at p. 21 of the joint hearings.)

Now, if it dropped 2 years after the *Mallory* case, how can you blame it on *Mallory?*

Now, it seems to me, Senator, one more point——

The CHAIRMAN. I am not trying to blame it on *Mallory.* All I am trying to find out from you—if you have any suggestions. I agree with you that we have many problems, and there are problems not only here but in every big metropolitan city. Problems that go to the heart of education, welfare, better living conditions, of opportunities to work. Each of these are long-range objectives which we have to face up to. During this interim period, I am trying to find out what we can do, and that is why I want to know if you have any suggestions.

The suggestion has been made that we might add to our police force. Maybe we should and perhaps we should have more U.S. attorneys.

Mr. KAMISAR. I have heard those suggestions, and of course I agree with you, and of course I agree that the police should be paid more, and of course I agree that they should be better trained and better selected.

But I don't agree that that is the only thing that we can do in the meantime. And I see nothing inconsistent with adhering to the Supreme Court ruling in the area and at the same time moving ahead in

another direction, and it seems to me that you can have a better police department with *McNabb-Mallory* on the books. It seems to me that—there are statements made by Oliver Gasch (former U.S. attorney for the District of Columbia) saying that as a a result of *McNabb-Mallory* the police are preparing their cases better, and that they are not relying on confessional evidence as much, "extensive investigation prior to arrest * * * has resulted." (Gasch, "Law Enforcement in the District of Columbia," pp. 3, 4, unpublished address of Mar. 25, 1960, to 12th annual conference, ACLU Clearing House, Washington, D.C.)

Well, I would venture to say that the District of Columbia Police Department is a far superior police department because it has had to work with these restrictive rules and I venture to say that if we repeal the *McNabb-Mallory* rule we may cause more resentment and more crime, because—I come here, you know, simply to say—what is the case for repealing the *McNabb-Mallory* rule? I am not sure that there is any short answer. All I am saying is this bill is not the short answer.

All I am saying is that—for example, Chief Judge David Bazelon put it this way:

"Who bears the brunt? If you repeal the *McNabb* rule, who bears the brunt of police action, police conduct or misconduct? Not you or me," he said (Bazelon, "Law, Morality, and Individual Rights," pp. 9–10, unpublished address of Aug. 20, 1963, Juvenile Judges Institute, Minneapolis, Minn.):

> We should be aware that if the protections of the Bill of Rights are restricted we shall, in practice, be affecting directly the rights of only our more deprived population. When we talk about arrests for investigation, lengthy police interrogation prior to arraignment, and the like, the subject under discussion is not you or me. We don't get arrested without probable cause because, to put it plainly, we don't "look" as if we would commit acts of violence and we do look as if it might not pay to trifle with our rights. Nor would you or I be subjected to long interrogation by the police without the benefit of counsel. Nor do you and I live in neighborhoods where the police dragnet is used, and where suspects are subjected to wholesale arrest.
>
> So the issue really comes down to whether we should further whittle away the protections of the very people who most need them—the people who are too ignorant, too poor, too ill educated to defend themselves. Can we expect to induce a spirit of respect for law in the people who constitute our crime problem by treating them as beyond the pale of the Constitution?

I venture to say, when you round up 90 Negroes and hold 67 of them overnight and those guys go home, you have caused yourself more problems than anything else, that these people, they have every right to say, "The damn cops, they are our enemies." (Several years ago, in a hunt for three "stocky" young Negro robbery suspects, District of Columbia police rounded up 90 persons, holding 67 overnight. Another man, not one of the 90 arrested, was later charged. The incident is described in *Trilling* v. *United States*, 260 F. 2d 677, 690, n. 11 (D.C. Cir. 1958).)

And they do that, to the Negroes—they won't do it to the blue-eyed blondes—they won't round up 90 blue-eyed blondes—and it doesn't happen very often but it has happened. It has happened all over the United States.

It is the Mexicans, the Negroes, the Indians, the poor people—they are the ones that the police push around, and that is the problem. For they are also the ones who breed the most crime. And it may be that

by getting them resentful, getting them mad, they are going to breed still more crime.

Now, I suggest that this is just as plausible as some of the arguments you have heard about the *McNabb-Mallory* rule causing crime. It seems to me you might gain a greater respect for the police department and you might get better results in the long run if you stop giving the police more power, if you stop listening to them—I'm sorry, if you listen to them but stop going along with everything they say, everything they want.

Now, these police officers are sincere, but it seems to me that—I will put it this way: I was an infantry lieutenant in combat and I sincerely believed that if a man would not obey my orders and go up the hill, I could shoot him in the back of the head—I was prepared to do that.

Now, years later, I realized that that was indefensible—but I was too involved. I was sincere. I felt that the only way to prevent soldiers from "bugging out" was to shoot one of them, and I honestly thought that that was proper, at the time.

Now, I was too close to it. And it seems to me that—these policemen are experts, these men are specialists, but they are also very intensely involved. And it seems to me that because of their great expertise and because of their great drive and zeal, which makes them good policemen, it also raises some problems about their ability to take into account other values.

Now, we don't let our admirals and generals push us around. If they say that we should not make a nuclear weapons treaty, and they are admirals and generals, and they have a Congressional Medal of Honor, and eight rows of ribbons, we don't necessarily listen to them. They are too close to the problem, and we recognize it.

But for some reason, we recognize it less when it comes to a police officer. That is the point that I am trying to make.

I have long been a football enthusiast. The football coach, if he has his way, boy, there would be no standards. Any guy who could run the hundred in 9.5 seconds, he would be in school, and Minnesota would have a better team. Now, the coach gets annoyed and says that the faculty committee members are interfering by raising the standards. He says, "What do you guys know about football? I am the football coach."

And they say, "Yes, but we are running the university, and the president of the university and the faculty committee are better qualified to decide what the academic standards are for letting people play football on our college team than you are."

And it seems to me that we are running a society. There are other values than police efficiency. It seems to me that people who are not so deeply involved, people who can stand back and consider other values who have more perspective, are better qualified to decide about things like the *McNabb-Mallory* rule than are the police.

The CHAIRMAN. Thank you very much. You have been a very interesting, effective, and articulate speaker. It has been a pleasure to have you here with us and I appreciate your testimony, and you can rest assured that it will have the full evaluation of the entire committee.

Mr. KAMISAR. Thank you very much, sir.

The CHAIRMAN. Our last witness for the afternoon is Dean Pye, professor of law at Georgetown University. Professor Pye, or Dean Pye, we are happy to have you with us.

STATEMENT BY ASSISTANT DEAN KENNETH PYE, PROFESSOR OF LAW, SCHOOL OF LAW, GEORGETOWN UNIVERSITY; CHAIRMAN OF THE CRIMINAL LAW COMMITTEE OF THE JUDICIAL CONFERENCE FOR THE DISTRICT OF COLUMBIA

Mr. PYE. Thank you, Mr. Chairman.

Mr. Chairman, my association with this problem began originally when I was teaching criminal law and later as a teacher of criminal procedure. In addition, during the year 1960–61, I was director of the legal internship program and I exercised supervisory jurisdiction of approximately 700 cases which came into our office in one form or another during that year.

Since that time I have been a member of the criminal law committee of the judicial conference of the bar association and represented that committee in presenting its report in reference to the *Mallory* rule last year at the meeting of the entire association which was called to decide the association's position with reference to the bill.

Now, I shall not review all of my viewpoints on this rule. Much of what I would have had to say has been said by my colleague, Mr. Shadoan.

I think I agree with much of what Professor Kamisar has said. I find myself in disagreement with a great deal of what Professor Inbau has said.

As I see the rule, it has several purposes. One of them is to prevent inequality of access to evidence on the question of voluntariness, if a defendant is detained in secret by police officers, necessarily he will have only his testimony on the issue of voluntariness and they will have theirs, and in the ordinary litigation situation, the judge will not unreasonably believe them and not the defendant. And as a result, in the fairly rare case in which a confession has been obtained as a result of force, threat, or offers of leniency, he will not be able to assert his rights effectively.

Let me say that I cannot go along with either my colleague, Mr. Shadoan, or Professor Kamisar in any possible inclination that I think this occurs regularly in police interrogations in this city. My experience with the police and my experience with criminal cases has indicated that only on one or two occasions do I think that such confession was obtained, by improper offers or inducements.

The *Mallory* rule has other purposes as well as these purposes. However, these purposes, I do think, would be frustrated by the passage of this bill before the committee now.

The provisions in rule 5 calling for the presentation of the defendant, a defendant has the right to be admitted to bail, he is informed of his rights to trial, he is informed of his rights to counsel and in this jurisdiction, to be presented before a judge of our court of general sessions and counsel appointed for him if he is unable to procure counsel independently.

In addition, at that time he has the right to a hearing on the question of probable cause. These are broad constitutional rights of great meaning and they will be technically frustrated if the police are permitted to detain for an unnecessary period of time and then profit by the delay. And the bill which is before the committee would result in exactly that. And any protection given insofar as, under rule 5, the right of counsel, which is protected at the present time in the Court of General Sessions and the statute would be broadened by the proposed changes to rule 5 and 44 of the Federal Rules of Criminal Procedure and the only case which would be presented before a magistrate would be a case where they did not have proof of probable cause and the case would have to be dismissed, or a case in which they had obtained probable cause as the result of interrogation which took place during the period of unlawful detention.

The Justice Department presentation with regard to the constitutionality of this proposal was well founded, in my opinion. I don't think the proposal is constitutional on its face. I think it would be constitutional if applied to a situation where the defendant is lawfully arrested, that is, with probable cause and detained for a very short period of time and during that short period of time, voluntarily confesses.

Now, these are rare cases, however. The crying need of the Police Department is for an opportunity to interrogate people whom they suspect of crimes under circumstances where they do not yet have probable cause to believe the defendant has committed the crime. And this statute if applied to that kind of a situation would in my opinion violate the dictates of the Supreme Court in the *Wansung* case.

As I understand that case, it says that if a police officer arrests a defendant without probable cause, any confession which he may obtain as the result of that illegal arrest shall be suppressed not because of the *Mallory* rule but because of the dictates of the fourth amendment and the rules in support of that amendment. And insofar as this statute would attempt to permit these confessions to be admitted in evidence, I think it would be truely contrary to that decision and would be held in violation of the fourth amendment.

The other kind of situation is the case in which there has been a lawful arrest and a prolonged period of detention. If the period of detention is sufficiently long, it may be argued effectively that the causal relation between the illegal arrest and the confession has been dissipated and it would not prohibit the admission of the confession. The problem here is that in all probability the cases would fall under the due process cases including the confession as being "involuntary," and this would leave the statute, if passed, covering only those limited number of cases of lawful arrests and short periods of detention and periods of lengthy detention and confession would be suppressed under the due process cases and cases in which there is a prompt confession following illegal arrests would be suppressed under *Wansung* and in that sense I think the statute is too broad to be constitutional if applied to all cases that the police would like to have it applied to.

Let me say that I do not think the provision of the statute calling for the warning is anything more than a device to give the appearance of a meaningful right and presumably the House is aware of the fact that originally military law contained the very exact provision which

is contained in this statute and the experience during World War II showed that this was an utterly meaningless right.

Interrogation would be conducted of the suspect or the person who was detained without informing him of his rights. After he confessed, he would then be arrested and then informed of his rights.

Now, as the result, the Senate placed into the Uniform Code of Military Justice in 1950 a provision requiring anyone who was suspected of an offense to be informed of his rights to take care of just the kind of evils which had resulted from the statute which only required a warning to be given to people who had been placed in the state of arrest.

I think it is significant that the House chose the old statute and discarded the military law of the Senate in 1950 in order to pass the particular language contained in this act. I might add that the new section of the Uniform Code requires each individual who is suspected of an offense to be informed of his rights, has proved not very effective in practice. The number of confessions was the same, as always happens in the military simply because of the fact that the use of persuasive interrogation devices, such as those proposed by Professor Inbau, are such that the 19-year-old without any prior association with criminal law is unable to remain silent, even though he is informed by a police officer that he possesses that right.

I also have severe question as to the extent to which police efficiency has been impaired by the present ruling. Undoubtedly, there are occasions, cases which could be pointed to. I have great sympathy with the police feeling that, in order to educate younger officers, it is necessary to tell them how far they can go in the present state of the law and if this is not done, consequently, an officer does not know when he violates the law and I have a tremendous degree of sympathy for them there.

I think it is clear to everyone that as long as they interrogate only during the period of arrest, taking him to the precinct and only during the booking process, that it is admissible, and I think it is also clear that if they wait for more than 2 hours thereafter for purposes of interrogation, they would be inadmissible. To the extent that they desire to interrogate before booking, but before 2 hours, they could, of course, instruct officers not to interrogate after booking, but there is a natural reluctance to stop before they are required to stop when they are trying to do their duty in solving a crime.

There are undoubtedly cases which cannot be solved by the police unless there is a period of time in which the suspect might be interrogated in secret without the presence of his counsel. These are cases in which the identity of the defendant cannot be established by the prosecuting witness, and he cannot make a case without some kind of an admission. The *Killough* case, I think, is a pretty good example. The chief of police gives other examples and they are well taken.

On most of these cases, however, there are cases where the police may not lawfully arrest in the first place, because the reason why they cannot make the case is because they do not have probable cause and there are only two cases in my experience where they had probable cause for arrest and where the admission is absolutely necessary for the prosecution, but the vast majority of cases are cases which can be made if they had probable cause for arrest in the first place.

I have some concern that the Senate is being given the impression that our crime rate is on a great increase here. I will not attempt to duplicate statistics given by my colleague, Mr. Shadoan, but the annual report of the Police Department for the last fiscal year indicated that the crime in the District of Columbia, serious crime in the District of Columbia has declined during that fiscal year 1.2 percent, and although the crime rate has increased considerably since 1957, the serious crime rate in the District during last year was 12.5 percent below what it was in 1953.

I also understand, and this is a matter here of hearsay, and I am sure that the committee staff will be able to verify it, that the District of Columbia leads the Nation in the efficiency of the police, as judged by the percentage of closed cases. As I understand it, this clearance rate, as it is called, is the percentage of cases in which a file is begun and which is ultimately closed by arrests and it is my understanding—hearsay again—that the District of Columbia closed approximately 44 percent of the cases, whereas the national average is 27 percent.

While it may be argued that more cases would be closed without the *Mallory* rule, it does not appear that the *Mallory* rule is preventing them from doing an extremely efficient job.

I would like to have the information as to exactly how many cases have been lost because of the *Mallory* rule. I have never been able to get this information. One of my colleagues who at the present time has been directing the program and for the last 4 years was assistant chief of the court of general sessions, could recall only 3 cases of the approximately 30,000 with which he came in contact that were thrown out because of the *Mallory* rule. Undoubtedly there are a number of other cases in which confessions have been excluded from evidence in the district court and where the Government has lost the case, and there are four or five cases in the court of appeals reversed because of inadmissible confession, but I do not know how many cases have not been presented to the U.S. attorney's office because the police were unable to interrogate in such cases.

I would strongly suggest, however, that the number is not a very large number and one of the reasons is that the police are quite flexible and have quite a bit of ingenuity and in particular areas they are extremely intelligent and as a result they have found devices to avoid the exclusionary effect of the *Mallory* rule.

These devices are largely devices of violating the rule part way. They arrest the person without probable cause, or with probable cause, depending on whether they have it. You detain him clearly for an unnecessary period of time. He confesses. And in his confession you are able to determine not only perhaps the victim of this crime but the fact that he has committed other crimes. And so then you go to your unsolved crimes files and you produce those witnesses and at the trial you do not offer evidence that you illegally obtained your confession, you only offer in evidence the eyewitness testimony of the witness whom you have found as the result of the unlawful detention.

Now, this has been sustained by the Court. In the case of *Leroy Pane*, Pane had been detained 25 hours and ultimately he was tried for an offense other than the one for which he had been arrested because they could not prove the offense for which he had been arrested without violating the *Mallory* rule. But during the period of inter-

rogation he admitted another crime and the witness whom they needed in the other crime was found and only the testimony of this witness was offered.

In the *Smith* and *Bowden* cases handed down by the circuit in September of this year, we have the circumstance where the police detained an individual for 60 hours. As the result of his detention, one individual who was an adult and the other—an intensive interrogation of a juvenile for 35 hours, by a clear violation of the *Mallory* rule, they obtained knowledge of the whereabouts of a witness and at the trial they did not attempt to admit the confession of the juvenile which would be excluded under the *Mallory* decision, they produced only the testimony of the witness which had been found as a result of these unlawful detentions and that was sustained.

I am not prepared to argue before this committee that these things are right or wrong, but I do think that they indicate that there is a great deal more flexibility available to the police and that the committee would be wrongly advised if they thought that because there is a *Mallory* rule the police have stopped unlawful detentions—the unlawful detention may not be accomplished in a case where it may cost the case, but these decisions in the aggravated assault cases and the homicide cases are pretty good evidence, I think, that the police in important cases will detain unlawfully even with the *Mallory* rule, and may be very well able to make their case without the necessity of violating the *Mallory* rule simply by their reluctance to admit the confession.

As a defense counsel I have on occasion attempted to incite a prosecutor to offer a confession because then I would be able to establish the *Mallory* rule violation. The clever prosecutors will not do it, he has a witness, he uses the testimony of that witness that he has obtained for the purpose of conviction and the same phenomenon is noted, of course, in the *Goldsmith*, *Jackson*, and *Killough* cases where concededly the rule was violated and an admissible confession obtained and on the basis of this confession a subsequent admissible confession was obtained in *Jackson-Goldsmith* and an inadmissible confession in *Killough*.

I continue to be concerned over the problem in the District of Columbia. As the Senator has indicated, my mother is one of those ladies who will not go out on the street at night for fear of attack. I simply am not sure that her position would be changed if the Senate passes this particular bill, and that is the thrust of my comments before the committee today.

The bar of the District of Columbia is a bar which is acutely conscious not only of the pressure of business interests in the District but the pressure of their loved ones and the pressure of their clients, for something to be done about our crime rate.

Nevertheless, last year, when this matter was presented to the bar association at a meeting attended by over 900 members of the association, the vote was overwhelming against a statute such as this one which would effectively negate the protection given to defendants at the present time by the *Mallory* rule. And this was not just defense counsel assembled in high dudgeon. The bar of the District of Columbia has indeed very few defense counsel, there are a few like myself

and there are a couple of people from Fifth Street engaged in regular representation, and there was a substantial number of U.S. attorneys.

But the vast majority of these people were ordinary practitioners in the District and they came out and studied the matter and reached the conclusion that it was the better part of valor not to attempt to interfere with rules of evidence which had been proclaimed by courts of competent jurisdiction. The press reported it as being a 4-to-1 vote. My personal belief is that it was closer to 3 to 2 against it.

These matters are of concern to everyone who is involved in criminal processes. The American Law Institute has commissioned a study which will spend $250,000 studying the purposes of arrest, detention, search, and seizure during the next 2 years and the program is under the direction of Professor Sullivan, of the Harvard Law School, and an associate professor, Prof. Edward Barrett, of the University of California Law School. Hopefully, they will come out with some kind of a solution so that we will not be put into a position where we can simply say that *Mallory* should not be retained but we simply don't have any alternative to provide.

Now, I think there are some things that can be done in the District of Columbia at the present time to materially improve the administration of criminal justice and to assist the police. Obviously, the ultimate practice will depend upon matters which Professor Kamisar has described—we have got to do something about venereal disease, broken homes, discriminations, all of these other factors which are really within the purview of the factors of crime—but this is going to be 20 years from now.

During the next 5 years we will suffer from the fact that the District of Columbia only had one juvenile court judge at a time when our new criminals were being bred and we will also suffer from the school dropout rate. But we can do something.

One of the things that we can do is to engage in the kind of work that was begun by Dr. Gasch and continued by Mr. Acheson, instructing police in what they can do legally and how to do it effectively—the so-called prearrest interrogation technique in which, instead of putting the defendant under arrest and bringing him down to the headquarters to interrogate him there, you interrogate where you find him, on the street, and the only occasion that it is necessary to bring him down is when he won't answer and experience has shown that most people do answer.

You have the possibility here that the defendant will confess to something that he didn't know before, if he attempts to evade, being told that this evasion constitutes probable cause to justify his arrest, and a great deal more can be done in this area that has not been done before—it would probably be more convenient to the police officer to take him downtown and interrogate him in police facilities, rather than on the street——

The CHAIRMAN. I wonder if you could develop that point a little bit. This seems to be very similar to what Professor Kamisar discussed in his testimony.

Mr. PYE. Well, the law is unclear in this, Senator, because it is as yet just evolving as the result of, among other cases, the *Henry* case. The idea is this, that the police officer, when he sees someone who is behaving suspiciously or sees someone who is under investigation, his

conduct is under investigation, he approaches this individual and he talks to him and inquires concerning what facts he desires to know, and——

The CHAIRMAN. You mean, wherever he happens to intercept him?

Mr. PYE. Wherever he is intercepted. It could be a case where the police officer observes suspicious conduct on the street or the case where the officer goes to his home and he questions him, after having obtained entrance he questions him and he asks him those questions there.

It would appear that this is lawful. Now, on the second question, whether you can advise him to accompany you to a detention facility and interrogate him there, as long as he does not object, that seems quite clear. There is an opinion in the second circuit, *The United States* v. *Deka*, holding that this is legal, that the defendant who voluntarily accompanied the Federal Bureau of Investigation officers to a police station where he was interrogated for a period of 7 hours, had not been placed under arrest, and unless he had been placed under arrest the requirements of 5(a) did not apply and therefore there was no obligation——

The CHAIRMAN. Along that line is what Professor Kamisar suggested. Instead of arresting and then questioning you can elicit the same information by artful questioning before arrest.

Mr. PYE. That is correct. There is this exception, and this is a very real one, if the defendant says "No, I don't want to answer your questions," unless you have probable cause, you can do nothing except leave him.

The CHAIRMAN. Of course, under your theory and Dr. Kamisar's theory, as I understand it, you can't do it anyway, if they stand on the *Mallory* case.

Mr. PYE. Well, I am not sure that is true, sir. We have a period of time in which we know of no confession which has been excluded under *Mallory* in a time interval shorter than 2½ hours and the cases clearly establish that if you arrest a person and put him in a squad car and take him to the precinct and ask him questions en route to that precinct and he answers them, his answers are admissible and while you are going through the booking process, the answers are admissible and while you are fingerprinting him, they are admissible.

The cases simply hold that after you have completed the routing booking purposes you may not then continue if you have no other purpose than interrogation, at that stage you have the duty to produce him before a magistrate. There is some opportunity.

The problem is that while you are going through these stages you do not have the secrecy, nor do you have the inducive effect of a police detention facility which is more likely to encourage a confession, and it is undoubtedly true that a sophisticated criminal, if he knows you are going to have to produce it promptly, he is more likely to volunteer a confession than if he has reason to believe that you can detain him for some period of time without——

The CHAIRMAN. That was the point made in the *Mallory* case. There Justice Frankfurter stated that the arrested person may of course be booked by the police but he is not to be taken to the police headquarters in order to carry out a process of inquiry, so designed as to elicit damaging statements to support an arrest.

Mr. PYE. That is it, sir, but I think it has to be read in context with the decision in which the judge was speaking and as I understand the law, you may ask him an incriminatory question after you have put him under arrest, while you are waiting for the squad car, or in the squad car going down or during the booking process, at that stage you can put him formally under arrest and book him and after that stage you may not ask him any questions solely for the purpose of obtaining an incriminatory—the period between the completion of the booking process and the point of arrest should be regarded as a period of necessary delay and if it is a necessary delay the interrogation in this period is not illegal, it is only when the period of unnecessary delay begins after the booking process that interrogation would be illegal.

The CHAIRMAN. Is there anywhere that spells it out, so that the police can properly interpret when they can interrogate, and when they cannot.

Mr. PYE. Well, I think that the police are well aware that they can interrogate up to this stage at the present time and I know of no court that has suggested that a spontaneous confession in a squad car going down is suppressable. The problem is that the police want to extend the period after he is booked.

Now, how far can you go after he is booked, that is the period which is doubtful.

The CHAIRMAN. How long may they keep him before booking him?

Mr. PYE. This is not clear but I think it usually amounts to 2 hours or 2¼ hours. In the *Scheck* case it involved 45 minutes after his arrest and that confession was admitted. My bet would be that the court will not suppress any confession of less than 2 hours unless they find the police department dallying in the squad car and not taking him downtown.

The CHAIRMAN. As I understand it, if the police intercept a suspect on the street they can actually interrogate him until such time as the actual booking process is completed.

Mr. PYE. Assuming that they are not taking any deliberate steps to delay the ordinary booking process. I am sure that if they picked him up in the 2d precinct and decided to book him over in the 13th and walked him there for the purpose of putting him under interrogation, the court would make an exception, but I am speaking of a situation where the ordinary course of events is followed; where the officer picks him up and takes him down to the nearest precinct and books him and I don't know of any case where that would be held improper.

Now let me say that there are other things that I think can be done also. One of the problems which concerns all of us is the increase in the rate of police resignations. As I understand it, almost twice as many police officers resigned from the force during the year 1962, fiscal 1962, than did in fiscal year 1961 and I think we should try to examine into the reasons for that, the reasons for that.

The next factor which I think is serious enough to be given great consideration is increasing the police powers to arrest in certain offenses. In my opinion the police are substantially limited by the present law in the District of Columbia which does not permit a

police officer to arrest for a misdemeanor or simple assault, even though he has probable cause to believe that an offense has been committed.

A number of cases fall into this kind of a category and there I think the police should have that kind of authority. Now, I might add that——

The CHAIRMAN. Will you repeat that? Did I understand you to say that they cannot arrest with probable cause in the case of a simple assault?

Mr. PYE. Yes, sir.

The CHAIRMAN. Is that by court decision?

Mr. PYE. It is by statute, sir.

The CHAIRMAN. By statute?

Mr. PYE. Yes; by statute. The statute permits arrest for probable cause in felony cases and in certain specific misdemeanor cases included as a result of the omnibus crime law of 1954. Simple assault is not one of these categories, and I think it should be. I think this should be changed.

I think that serious consideration might be given to the policies governing the nolle prosses entered by the office of the U.S. attorney. I do not suggest, and I do not intend to suggest, that they are not doing the best possible job, but a former roommate of mine is a chief of that division which is engaged in those nolle prosses. The fact remains that almost two-thirds of the cases which are brought to his office by the police are not prosecuted, either because of shortage of manpower or the belief that the defendant would be acquitted or that the police believe that the defendant would be placed on probation, anyway, and that may have a distinct relationship to recidivism in the District of Columbia, the probationary policies, the strengthening of the probationary system here, so that the time of the police will not be spent trying to assist probation officers trying to find individuals who have breached probation.

We have an extraordinarily sad situation there, in my opinion. The average probation officer in the District of Columbia has over 84 cases entrusted to him for supervision each month and the idea of—trying to forward the rehabilitation idea is absolutely absurd when the officer has to spend—when he only has 10 minutes a month to spend with each person under his care, and that is about what it works out to, if my figuring is correct.

The provision that Chief Murray mentioned at the time of the Senate Appropriation Committee hearings earlier this year, the transfer of uniformed officers from clerical positions to positions on the street and replacement by clerical personnel or, in the alternative, the addition of more police officers—all of these will help the problem.

I do not think, however, that the passage of the bill in question will help and, in fact, it may hinder progress.

Witnesses before this committee yesterday spoke of the very unfortunate situation of police departments throughout the country being held in disrespect by substantial segments of the population. Well, that is true, and one of the reasons—one of the reasons, obviously, is the fact that when 20 people are arrested for investigation without probable cause and 19 of them are subsequently released, those 19 are less likely to respect the police than they were prior to its happening—

and this is particularly true where we know that 17 of the 19 were Negroes.

We cannot, I think, realistically avoid the fact that passage of this bill has grave racial overtones. If the records of arrests in the District of Columbia are reviewed, you will find a very high percentage of the people who were arrested are Negroes and what this bill will do is to permit the unlawful detention of these Negroes with no effective sanction against the police. I do not think any other alternative is clear, except for the fact that this will breed the kind of a feeling of discrimination and the kind of disrespect for law and law enforcement which is extremely dangerous to the entire community and I regret that I have to say this and it would not be true, perhaps, in another jurisdiction.

But this bill only applies to people who are unlawfully detained—and they are Negroes and already a white attorney who is researching the problem—cases in the 2d precinct and the 9th precinct and the 13th precinct—he says that he cannot get Negroes to assist him because once a Negro knows that he is connected with the law he has an attitude of "you are my enemy."

The arrest and investigation point is the beginning point to try to expel this attitude and to try to create a real equality before the law, which, hopefully, will result in a greater sense of civic responsibility and more respect for the institutions of the law, and to permit these unlawful detentions of these individuals will just be moving in the other direction. Thank you.

The CHAIRMAN. Thank you. You have certainly made a splendid statement and your presentation is among the best that I have heard in many a day.

Now, I would like to get back to one question that was prompted by the suggestion made by Mr. Katzenbach in his official report on H.R. 7525 on page 4 in the second paragraph where he says:

> As an alternative to H.R. 7525, we call your attention to the provisions of H.R. 7526 which was prepared by the U.S. attorney for the District of Columbia. Under H.R. 7526, 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.

This is the point I want to make. As I understood, part of the thrust of Professor Kamisar's statement was that we do not quite know what goes on during the period of interrogation, we cannot be quite sure whether inducements were offered or whether threats were made, but if you had an official recording, then you would have a record of that interrogation which would show whether it was legal or illegal.

Mr. PYE. Well, let me just say that I have not had a chance to study the bill as closely as I would have liked to, but that particular provision I would have no personal objection to if it were amended to provide, where he could not retain private counsel, counsel will be appointed for him. To inform him that he has a right to counsel is meaningless in 70 percent of the cases tried in this jurisdiction, and if we are going to implement this by providing counsel for him, then I have no objection to it.

My problem is this, Senator. That bill results in no interrogation, either. If you give him the right to counsel and if you give him counsel then counsel is going to tell him that he does not have to have interrogation. So while I have no objection to that proposal, I do not think you will accomplish his objective.

I am afraid that my proposition comes down to this—my position, rather, that even though there are some crimes that cannot be solved without interrogation in secret, this is a price which we have to be prepared to pay if we are going to achieve the greater objective which is the protection of the rights of the vast majority of defendants. I know of no way that we can give the police the right to interrogate in secret and not in some way interfere with the liberties, the individual liberties of the vast majority of people charged with crime.

The CHAIRMAN. But I am speaking about interrogating with a recording device.

Mr. PYE. Well, this is entirely new—and the only place that I know of where it has been done is in Israel. In Israel, the minute that the defendant enters the detention facilities, everything that occurs there is recorded.

Now, in the event that the Senate is disposed to pass on this bill I think that the addition of that requirement would be a substantial safeguard. What it does not cover is in the case of a defendant who has been illegally arrested, that detention is unlawful and the fact that you have evidence of the illegality is not very helpful, and I go back to the point that the great virtue of the *Mallory* rule is to provide protection against the original illegal arrest and I don't know how we can achieve that result other than by exclusion of the evidence. But I certainly agree that something similar to the Israeli statute of requiring verbatim recordings of all interrogations of individuals after they are placed in the arrest status is a considerably better alternative than simply to obtain any confession obtainable as a result of unlawful detention.

The CHAIRMAN. Thank you very much, your presentation is helpful to the committee.

We will stand in recess until 10 o'clock tomorrow morning.

(Whereupon, at 4:30 p.m., a recess was taken until 10 a.m., Thursday, October 24, 1963.)