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

THURSDAY, OCTOBER 24, 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 continuance of the crime hearings. We are still on title I, involving the *Mallory* rule, title III, the so-called investigative arrest provision, and the second part of title III involving detention of material witnesses.

Our first witness this morning is Hon. Robert McLaughlin, president of the Citizens Crime Commission of Metropolitan Washington, a very distinguished Washington citizen, former Commissioner, Chairman of the Board of Commissioners.

Always glad to see you back in these familiar surroundings.

STATEMENT OF ROBERT E. McLAUGHLIN, PRESIDENT, CITIZENS CRIME COMMISSION OF METROPOLITAN WASHINGTON

Mr. McLAUGHLIN. Thank you, Mr. Chairman. I should come up here more often.

The CHAIRMAN. It was always a pleasure to work with you during the time you served as Chairman of the Board of Commissioners.

Mr. McLAUGHLIN. Mr. Chairman, I wish to thank the committee for the opportunity of presenting the position of the Citizens Crime Commission on the so-called *Mallory* rule, the Uniform Arrest Act, and the detention of material witnesses to a crime.

First, may I state for the record that the Citizens Crime Commission of Metropolitan Washington is a voluntary citizens' organization, established in 1936 upon the recommendation of a House Crime Investigating Subcommittee, chaired by the Honorable Jennings Randolph, who is now serving as a distiguished Member of the Senate.

I might also add here, Mr. Chairman, the Citizens Crime Commission is the organization which was originally known as the Washington Criminal Justice Association.

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An act of Congress has actually brought us into a sort of semiofficial status in that the Citizens Crime Commission places one member on the Council of Law Enforcement, by statutory provision of the District of Columbia Code.

This organization's work has been principally in the field of investigational research; however, it is now also approaching the serious problems of crime in this area by mobilizing the cooperation of the hundreds of citizens' organizations with the purpose of mounting an areawide attack on lawlessness, particularly street violence.

The Citizens Crime Commission has taken official positions on each of the three subjects under discussion today. In general, I may state that this organization, after giving careful and extensive consideration to the crime situation that has developed here since 1952, takes the definitive position that crime has increased in volume and violence because the word has got around among criminals, and people who are criminally inclined, that Washington has become soft on crime. This commission equally concludes that this impression is largely the result of a series of legal developments, including the *Durham* ruling, the *Mallory* and *Killough* decisions, the 1957 Report on Prisons, Probation, and Parole, and the recent order against investigatory arrests.

While we feel that these local events have a direct bearing on the buildup of crime here, we recognize that they cannot all be reversed. We believe that any arrest without probable cause is in violation of the constitutional rights of the individual. We cannot, therefore, go along with the Uniform Arrest Act as we read it in section 301 of H.R. 7525.

However, we feel differently about section 302 of the bill dealing with the detention of material witnesses to the commission of a felony. In the earlier days of the criminal law of England, when a peace officer sounded the "hue and cry" in pursuit of a suspected criminal any citizen bystander was required to join the pursuit and assist the officer in effecting the arrest.

Failure to do so was an indictable offense. We feel that the citizenry of today are seriously at fault in this area in that they do not cooperate properly with the police to bring criminals to justice. Too often they fail to notify police of crimes committed in their presence. They refuse to give information to the police when they arrive on the scene. They are uncooperative when they reach the courts.

During my tenure as a District Commissioner, there were occasions when we were required under section 4–144 of the District of Columbia Code, to provide lodging facilities for material witnesses who were being held in default of bond. We realized that the existing statute should be improved, and set about to do something about it. The present law goes back to 1878 (and probably beyond that time). The question in my mind was: Where do they get the authority to detain these people?

In our opinion, section 302 would confer such authority. Furthermore, we do not feel it to be unconstitutional. These witnesses are not being required to give evidence against themselves. This is merely a reasonable exercise of the police power for the restoration of peace and good order in the community. In the complex community in which we live today criminal activities cannot be adequately dealt with to protect the public while material witnesses are free to drop out

of sight or leave town to avoid their civic responsibilities. Such parties may, of course, be compelled to attend court and testify in a criminal trial where the defendant is not compelled to testify.

It is our opinion that there is nothing unreasonable about their being required to cooperate with the investigative authorities who are endeavoring to solve a crime and restore peace and good order in the community. It is of great importance to the enforcement of the law in this city that material witnesses not be permitted to obstruct justice by absconding from the jurisdiction.

The Citizens Crime Commission also endorses section 101 of H.R. 7525. The *Mallory* rule has crippled our police in their efforts to protect the community. It increases the difficulties of law enforcement, and also encourages increased lawlessness. Section 101 simply returns the courts to the general tests for coercion with respect to defendants' statements and it requires the warning concerning the rights of the individual to stand mute. Section 5 of the Federal Rules of Criminal Procedure was created by action of the Congress. It is a rule of criminal procedure, governing the admission of evidence in a trial, and it is clear that it can be constitutionally explained or amended by the Congress. The crime commission feels this to be of extreme importance to the enforcement of law in the District of Columbia.

Mr. Chairman, I have sought to avoid repetition of the testimony of other witnesses, but I shall be glad to respond to any questions you may wish to ask.

The CHAIRMAN. I appreciate your appearing and providing the committee the benefits of your views. I know of your fine reputation, not only as a public official, but you are equally a splendid lawyer, and your views are very helpful to us.

There seems to be general agreement on the investigative arrests. Most of the witnesses who have appeared have cast doubt on the constitutionality of the provision. They have taken the position similar to yours. Senator Ervin, who appeared before us yesterday, and who is really an expert in the field of constitutional law, took the same position.

Now, as you say, in the *Mallory* rule, it is a Federal rule, it does not involve, as indicated in Justice Frankfurter's decision, a construction of the Constitution.

Is it your opinion if title I was enacted into law, that it would stand a constitutional test?

Mr. MCLAUGHLIN. That is our opinion.

We have a very good committee on policy and legislation in this organization, some experts in this field, and we are all of the opinion that that would, Mr. Chairman.

The CHAIRMAN. This is an area, of course, in which there is some difference of opinion. Some people feel if you were to enact title I, and it was to find its way to the U.S. Supreme Court, that there would be certain constitutional objections raised on the grounds that you had not built in adequate safeguards for the accused.

This is very much the position of Mr. Katzenbach of the Department of Justice, in his official opinion, just a month ago, to this committee.

Of course, he will be before us as soon as we can conveniently arrange it with him, and we can explore his views at that time.

There is a difference of opinion as to whether or not title I, that we are now considering, as passed by the House of Representatives, would stand this constitutional test.

As a lawyer I recognize lawyers themselves have differences of opinion about this. It is your judgment that title I would stand a constitutional test?

Mr. McLaughlin. In view of the fact that it is merely a rule of criminal procedure, yes; that is our opinion.

We are not saying that people may be held for indefinite periods of time. I mean that is a matter for substantive law. We still have, among other things, the right to go in with a habeas corpus.

I mean we are dealing here merely with the rules for admission of evidence. And if a suspect is held too long, this will all be brought out in the trial.

This merely says that the statements that he makes or the evidence related to the delay may not be kept solely because of the delay, itself, out of testimony in the trial. And we feel that much more good than harm will come from it, and that it is not unconstitutional as merely a rule of admission of evidence.

The Chairman. We appreciate your views. Just one further question:

You may not desire to comment on it, because it is beyond the purview of your statement.

Title V of the bill before us provides mandatory minimum sentences. And I am wondering if you have any expression as to whether this would be a deterrent to the criminal or not.

Now, you may not have had opportunity to examine the subject, and if not, certainly say so.

Mr. McLaughlin. Mr. Chairman, I have thought of it. But I will probably testify later in some of your other hearings. And I would rather respond at that time.

The Chairman. I want to give you the opportunity to study it. We seem to have had, I would think, a fair amount of agreement on the subject of the mandatory minimum sentences. In general, I think it is fair to sum up the testimony that has been given to date. The testimony coming from the present U.S. attorney, and the former U.S. attorney, Oliver Gasch, the parole, and probation people, and lawyers as well, seem to indicate that they doubt mandatory minimum sentence served any useful purpose in deterring crime. There was some testimony to the opposite. But I think the preponderance of the testimony has been to the effect that mandatory minimum sentences would not deter the criminal.

Mr. McLaughlin. I will go into this, Mr. Chairman, in my next appearance.

The Chairman. We very much appreciate your appearance.

Our next witnesses are Mr. DeLong Harris and Mr. James Heller of the National Capital Area Civil Liberties Union.

Are you speaking from a prepared statement?

Mr. Harris. I have a prepared statement, Senator.

However, I will not speak from the prepared statement.

The CHAIRMAN. The prepared statement will be received and incorporated in full in the hearing record. Suppose you highlight your prepared statement.

First identify yourself. Is one speaking for both of you?

Mr. HARRIS. Both will speak separately.

STATEMENT OF DeLONG HARRIS, CHAIRMAN, DUE PROCESS COMMITTEE, AMERICAN CIVIL LIBERTIES UNION, NATIONAL CAPITAL AREA

Mr. HARRIS. My name is DeLong Harris. I am the chairman of the Due Process Committee of the National Capital Area, Civil Liberties Union, a past president of the Washington Bar Association, a member of the bar of the District of Columbia for the past 19 years, and engaged in the general practice of law, about 50 percent criminal practice.

The CHAIRMAN. How long have you been in practice of law, Mr. Harris?

Mr. HARRIS. Nineteen years, sir; ever since I was 22 years old.

The CHAIRMAN. Very well.

Mr. HARRIS. This statement is given on behalf of the National Capital Area Civil Liberties Union.

The CHAIRMAN. For the record, why don't you tell us about the National Capital Area, American Civil Liberties Union?

Mr. HARRIS. Mr. Heller is a member of the board of directors in a higher echelon in the Civil Liberties Union.

The CHAIRMAN. I think it would be helpful to have this information in the record.

People might say, "What is this organization?"

STATEMENT OF JAMES H. HELLER, SECRETARY AND MEMBER OF EXECUTIVE BOARD, NATIONAL CAPITAL AREA CIVIL LIBERTIES UNION

Mr. HELLER. I am James H. Heller.

I am a Washington attorney as well. I am the secretary and a member of the executive board of the National Capital Area Civil Liberties Union. It is the American Civil Liberties Union affiliate for the Washington metropolitan area, which includes, of course, the District of Columbia as well as Prince Georges and Montgomery Counties, Md.; Alexandria, Arlington County, and Fairfax County, Falls Church, Va.

We were organized approximately 2½ years ago. We are a rather new affiliate, but quite a large one. We have about 2,300 members.

Our principal business in this world is to defend people whose cases, or represent them, whose cases we believe involve civil liberties implications on a local basis, and secondly, to appear in such cases as this, where we believe that legislation or public action involves civil liberties implications for this area.

We do try and keep out of purely national civil liberties issues, because there is a Washington office of our parent body, the American Civil Liberties Union, and Mr. Lawrence Spizer ably represents them

normally before Congress and the executive departments on nationwide issues.

The CHAIRMAN. Do you pay dues to belong to this National Capital Chapter?

Mr. HELLER. It is a dues-paying membership organization. We pay dues to the American Civil Liberties Union, which then splits its dues between the affiliate and the parent body. The dues are a minimum of $2, and go up as high as people wish to contribute.

The CHAIRMAN. Thank you. I think that is very helpful for the record.

You say you have approximately 2,300 members in the metropolitan area.

Mr. HELLER. 2,200 or 2,300. We usually are a little sloppy on membership just as some other organizations.

The CHAIRMAN. Thank you very much for that information.

Mr. HARRIS. My primary concern, Mr. Chairman, will be with the *Mallory* aspects—that is the part of the bill having to do with unnecessary delay in arraignment.

Of course, the committee has heard a huge volume of testimony concerning this matter. But this view, taken by the American Civil Liberties Union, we believe fundamentally that the *Mallory* decision should not be disturbed and we believe that sincerely, because of a number of reasons, a few of which I will now attempt to delineate.

The *Mallory* decision, first of all, did not represent a new departure or something novel insofar as the Supreme Court was concerned—when there was the *McNabb* decision. The difference was that when *McNabb* was handed down, there was not in existence the new rules of criminal procedure. However, without the new rules of criminal procedure, and before that day, *McNabb*, the Supreme Court reached the almost same conclusion, arrived at the same point based upon fundamental rights rather than upon the interpretation of a rule.

Now, *Mallory*, as the Supreme Court announced, is, or concerns itself with an interpretation of rule 5(a), the text of which I am sure the Senators are familiar with.

Rule 5(a), of course, being promulgated by the Supreme Court, and enacted by Congress as statutory law—that came to the Supreme Court in the *Andrew Mallory* case, a means of enforcing this rule.

Now, throughout the criminal rule, and as is the case in a number of procedures of criminal rules, there is no announced policy of enforcing that rule.

Now, the Supreme Court did not say so, but Judge Cahan, in California, had perhaps the best method of expressing that concept when California decided to accept the *Weeks* doctrine in the State Court of California.

And he says this:

> When law-enforcement officials disobey a command of the criminal procedure rules or the law itself, there must be a penalty assessed, and frequently it is impossible or impractical to assess the penalty against the police officer, and the penalty must be assessed against society itself.

So, applying that same line of reasoning to *Mallory* here, we have rule 5(a), and the police officer doesn't obey it, so society will be penalized for that transgression by that law-enforcement official, because the Supreme Court says if you fail to bring the suspect before

the tribunal, or before the magistrate, or before the judge without unnecessary delay, and if in the interim you have gotten valuable information by way of an otherwise valid confession, we are going to remove that, we are going to take that away from you, and it may be that perhaps the citizens in the long run might suffer, as far as that particular case is concerned.

This philosophy again is not new. It was first enunciated, as far as I can remember, first in *Weeks*, in 1914—49 years ago; and as is now the case, in 1914 and for a number of years thereafter, it was hard for law-enforcement officials to reconcile good law-enforcement practices with a doctrine that said if law-enforcement officials didn't obey certain commands of the fourth amendment, that evidence would be excluded and thereby vicious criminals might be turned loose upon the street.

Perspective, of course, is always very valuable in considering any sort of legislation.

Forty-nine years ago *Weeks* seemed to be a most horrible sort of decision on the part of the Supreme Court. No one believed that you could really suppress certain crimes if by certain then acceptable means of police practice good evidence otherwise admissible was brought for the conviction of a known and sometimes even a vicious criminal if it were thrown out.

In 49 years America has marched on. The country has not been taken over by criminals. Law has been enforced rigorously. And, we say, very satisfactorily.

And indeed, as I mentioned before, California, about 5 years ago, adopted the *Weeks* concept, and as I now understand it, the majority of the 50 States also subscribe to that concept, and if they did not, in the recent *Mapp* case the Supreme Court issued a decision which would cause them to have to follow on that.

We are now here concerned with a similar analogous proposition.

There is no rational connection between, on the one hand an otherwise valid confession, and on the other hand, the taking away of that otherwise valid confession from the law-enforcement officials and saying to them that you cannot present it to the jury.

And as Judge Cahan said, and as is the rationale and the theory of this type of procedure, if society is punished often enough, they will have police officials and law-enforcement officials who will obey the command of those rules. And if they don't, of course, they will be replaced.

We are then faced with the question as to whether or not the enforcement of law is actually hampered, hamstrung, or thwarted by the enforcement of rule 5(a).

Of course, again perspective is important, because the individual who is taken away from his home, wife, and family, and placed in a cold and often strange environment of the best of police precincts, is under a psychological strain the likes of which cannot be described adequately, and cannot be really felt unless you have actually undergone that particular type of pressure.

Now, if the police officials believed that in order to thoroughly suppress crime they must be given the privilege of detaining or holding a man, without charging him for any crime, for the simple purpose of interrogating him, and if that practice were directed against every

citizen in America, there would not be any question but that there would be no such proposed law as we are now here before this body to discuss, because the personal equation would then enter into it.

However, we look back upon the statistics that have been presented here by eminent law-enforcement officials, including our own chief of police, and including, I believe, Prof. Fred Inbau of Northwestern University.

I have already presented our basic view.

I do not believe that statistics will be of great value to this committee because statistics can be used according to the viewpoint that you take to prove almost anything that you undertake to explore.

If you say that crime, percentagewise, has increased in the District of Columbia since 1957, when *Mallory* came out, it is a fallacious type of logic, and certainly is not a correct reasoning.

It is a nonfollowing conclusion that *Mallory*, ergo, must have had something to do with it. Because during that same period rents have gone up, automobile production has gone up. And of course, those things are absurd to consider, whether or not *Mallory* had anything to do with this.

The concept that the criminal now knows that he is entitled to be brought immediately before a committing magistrate, and that he is not compelled to testify against himself, that knowledge permeated in American law, spread across this Nation, causes crime to rise, is something that I cannot comprehend—because some of these concepts are based in the very Constitution itself.

If you say that Congress, in its wisdom, many years ago said that I am not compelled to testify against myself, is it not also a corollary of that constitutional rule that if I am not compelled to testify against myself, then I should not be compelled to be subjected to that type of psychological strain that would have the same effect.

I notice from the press that Prof. Fred Inbau said that police now have psychological methods of interrogating witnesses. And I say yes, that is true; that certainly is the truth. And of course one of the greatest psychological weapons of the police department, again, is nothing novel, nothing new. If you take a man and put him in a small, dark, cold room and keep him for a number of hours, his mind is affected, he is subjected to a pressure, a psychological pressure, that may be turned against him.

I agree with the professor that the third-degree methods that were in vogue 20 years ago are becoming almost nonexistent. Now you don't have to take a rubber hose and beat a man 6 hours. You can keep him for 3 days, give him no cigarettes, give him no water, give him no food.

And you can take about 2 dozen police officials or police officers and interrogate that man, and keep him awake for 3 days. And at the end of 3 days, he is almost ready to confess murder of his mother.

If you don't believe it, try staying awake for 3 days; and at the end of that time, you would almost give your birthright for just 1 minute's sleep.

Now, I don't say that the officials who advocate the emasculation of the *Mallory* decision also advocate this type of subtle third degree. But I believe the purpose of the Supreme Court in the enforcement of the rule by this method is to not allow them that much leeway.

Of course I think the best expression on that particular subject—and I have forgotten the decision—but Justice Douglas has said—it was in the *McDonald* case, which arose in this jurisdiction—power in the hands of the police is a very heady thing. Of course, power in the hands of almost any given group of people or a given individual sometimes tends to go to their heads.

We believe that one of the most effective methods of this enforcement is that devised by the Supreme Court.

Let us look, then, as to the effect of some of the—well, some of the ramifications of persons who are arrested and who, for some reason no charges are placed, and they are set free.

Now, at some previous hearings on similar type of legislation, it was set forth by certain police officials that the arrested citizen would be in a better position without the *Mallory* decision because the citizen could be arrested and not actually charged with any crime, but he could be then interrogated, and that would not be as vital to his personal situation as under the *Mallory* decision, whereby he would possibly be charged.

I call to the attention of the committee the U.S. Civil Service Form 57, which no doubt the committee is familar with, and there is a question in all of those forms 57 that, as I understand it, all applicants for Federal employment, and all Federal employees, civil service, and even some of the non-civil-service employees, must answer.

Now, that question does not say whether or not you have been ever convicted of a crime. It asks, "Have you ever been arrested, charged, or convicted?"

Now, the citizen must then explain why he was arrested. It could very well be that he was arrested in a dragnet, or he might have been arrested as was the case here in the District where a Marine was murdered on 14th Street, a brutal sort of crime, about 7 years ago, and I understand, to use something I don't advocate all the time—but some 4,000 people were arrested in connection with that murder. I think Colonel McIntyre probably was in the district attorney's office at that time, and I think the colonel can tell you they never solved that crime—although 4,000 people were taken into custody for periods of time ranging from a few minutes to a few days.

The Police Department had the widest of latitude. There was not in effect any *Mallory* decision. No confessions were gotten, because no leads were obtained, and the murder has not been solved.

More recently, less than 2 years ago, out in what is called No. 14 Precinct in Washington, there was a brutal sex crime murder of a little girl. I don't have the exact figure, but I understand many hundreds of people were arrested, and this was after *Mallory*—many people were interrogated. But the crime was not solved.

One Supreme Court Justice says, insofar as the task of the police official is concerned, if the police official desires to arrest and interrogate without limit, maybe that would be helpful—and unquestionably if you can arrest, to make it absurd, 50 percent of all of the populace of a given city of, say, a thousand, and knowing that one of them must have committed it, and if you are permitted to interrogate them long enough, you will always come up with the confession.

But this Supreme Court Justice says perhaps if rather than going out and working in the sun, if he could at leisure, in the shade of a

tree, take his suspect and rub pepper in his eyes, then his task might be made a lot lighter.

Now we recognize, of course, the task of a police officer is, to quote "The Mikado," quite an unhappy one, and quite a serious one in many respects, and we sympathize with them.

However, we do not believe that the rights of the citizens should be sacrificed to the comfort of the police officer in the accomplishment of his task.

We believe that *McNabb* as followed in *Mallory* is good for the District of Columbia. We do not believe that it will increase crime. We believe that it might cause more work on the part of the police officials, and indeed it might even cost money because it might cause the hiring of more policemen.

We believe that this is a small price to pay for human liberty.

Thank you.

(The complete prepared statement previously referred to follows:)

STATEMENT OF AMERICAN CIVIL LIBERTIES UNION, NATIONAL CAPITAL AREA

Ever since *Mallory* v. *United States* (354 U.S. 449; 1 L. ed. 2d 1479, June 24, 1957), there has been much said by many groups, individuals, and organizations, all seeking to demonstrate that the Supreme Court was ill-advised in that decision whereby the Supreme Court undertook to treat of the effect of an unreasonable delay in arraigning a suspect when it appeared that there was no valid reason for such a delay and where during the delay, the suspect was subjected to lengthy interrogation, to a lie detector test and, after detention for a considerable length of time, made a confession, the validity of which was the subject of the proceeding. Because law enforcement officials have been so loud in their condemnation and because they have been more effective in lobbying for legislation which would destroy the effect of *Mallory*, it is sometimes necessary to delineate the Supreme Court holding so that persons considering the need, or lack of a need, for action by Congress to modify by legislation the judicially pronounced rule of evidence announced in *Mallory* might be advised. In the words of the Supreme Court:

"The case calls for the proper application of rule 5(a) of the Federal Rules of Criminal Procedure, promulgated in 1946, 327 U.S. 821. That rule provides:

"'(a) Appearance before the commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.'"

The Court then discussed the statutory and judicial antecedents used as guides in the application of rule 5(a) including *McNabb* v. *United States* (318 U.S. 332). In *Mallory* we are told that: In *McNabb*, "in order to adequately enforce the congressional requirement of prompt arraignment, it was deemed necessary to render inadmissible incriminating statements elicited from defendants during a period of unlawful detention."

It is believed that the many bills introduced in this session of Congress aimed at the emasculation of the law as set forth in *Mallory* have been so introduced without consideration of the real and basic holding in *Mallory* and in disregard of the true purpose of that decision.

The *Mallory* decision recognizes the intent of rule 5(a) of the Federal Rules of Criminal Procedure which requires the prompt arraignment of the suspect: "It aims to avoid all the evil implication of secret interrogation of persons accused of crime." Further it protects the innocent and law-abiding citizen from being held for unreasonable lengths of time who has been arrested without probable cause in the first instance but merely upon bare suspicion and who, in many instances, has been arrested merely for the purpose of seeking information concerning the crime being investigated and for the purpose of obtaining leads as to other possible suspects.

If the Congress was right in requiring that the arrested citizen be promptly arraigned, and if rule 5(a) of the Federal Rules of Criminal Procedure is a rule good for citizens in general, then there should be some method of enforcing the rule. No civil or criminal sanctions can be invoked against the peace officer or official who willfully and deliberately violates the law as set forth in rule 5(a). The Supreme Court, therefore, by the promulgation of a rule of evidence, seeks to enforce rule 5(a) by the assessment of a penalty against the Government in instances where this law has been violated. That penalty is simply the refusal to admit into evidence statements or confessions obtained during the period of unlawful detention without regard to coercion or lack of coercion.

All that the Supreme Court is saying in this regard is this: Rule 5(a) provides for the arraignment of arrested citizens without unnecessary delay. This is the law. Unfortunately there is no means of enforcing this rule. Because unnecessary delays invite and encourage extensive, unwarranted and secret interrogation of arrested citizens and possible employment of "third-degree" methods of obtaining information and confessions, we had devised a rule of evidence that will not only discourage the violation of the law contained in rule 5(a) by police officers but will, indeed, effectively remove the reason for such unnecessary delay (i.e. the desire to delay arraignment while a confession is extracted). This rule of evidence is quite simple and most effective: if officers fail to cause the suspect to be promptly arraigned, statements or confessions obtained during the period of unnecessary delay may not be used in evidence against the suspect. The rule is enforced through the penalty.

In *Mallory* the Supreme Court says this to the peace officer:

(1) You must not arrest a citizen without probable cause for his arrest in the first instance;

(2) If you have arrested a citizen upon what you believe to be probable cause, take him promptly before a committing magistrate, judge, or commissioner who under our system of jurisprudence, will judicially determine if there is in fact probable cause. If you are correct in your original assumption, the citizen will be held and bail bond fixed. If you are not correct, the citizen will be released.

(3) If you have arrested a citizen without probable cause, you have no right to hold him for the purpose of questioning concerning your suspicions and if, by chance, you are correct in your suspicions and after a long delay before arraignment the defendant confesses his guilt you will have thwarted your own purpose, for you will then be unable to use the confession in evidence against the defendant upon his trial for the offense.

The effect of that directive by the Supreme Court to the peace officer, once he understands it and as soon as his superiors cease complaining that they are hampered in law enforcement by *Mallory*, will be to compel him to employ more efficient methods of crime detection. The peace officer will realize that where a crime has been committed and he has suspicions concerning possibly a dozen persons but no probable cause to charge any single one of the dozen with having committed the crime, he can no longer arrest all 12 of the citizens without probable cause and for the purpose of questioning them at length and by that method derive his probable cause against one of them (or, possibly with the result that the whole 12 have been arrested in vain), but he must seek to discover some individual together with sufficient evidence of his guilt to constiute probable cause before making any arrest.

Many persons have erroneously interpreted *Mallory* to hold that a confession or statement obtained during a long delay before arraignment is presumed to be involuntary. Nothing could be further from the truth. Under *Mallory* whether or not a confession or statement is involuntary or coerced is not germane to the issue. *Mallory* does not say that such statements or confessions are presumed to be involuntary. That decision merely holds that as a rule of evidence and as a means of enforcing the prompt arraignment requirement of rule 5(a) of the Federal Rules of Criminal Procedure, a confession obtained during the period of unnecessary delay before arraignment is inadmissible. The question as to whether or not such statement or confession is voluntary or not is closed and of no importance. Such statement or confession is not admissible as a rule of evidence whether involuntary or voluntary.

In order to enforce the fourth and fifth amendments to the Constitution the Supreme Court formulated the Federal exclusionary rule in *Weeks* v. *United States* (232 U.S. 383 (1914)). The purpose of that rule is: "To remove the temptation to ignore constitutional restraints on search and seizure, evidence

obtained in violation thereof is made inadmissible against an accused in Federal courts." Although the rule as set forth in *Weeks* case was at the time of its promulgation contrary to the law in effect in most of the States and although the Supreme Court has itself said that the *Weeks* doctrine is not a command of the fourth amendment but is a judicially created rule of evidence which Congress could overrule, Congress has not overruled the *Weeks* doctrine during the now 49 years that it has governed the law of search and seizure in Federal courts. During these 49 years the enforcement of Federal criminal law has not been hampered thereby. And today, as at all times since 1914, we must look to the courts to determine what is a reasonable search and what is an unreasonable search under amendments 4 and 5. No one can deny that the courts have done a most effective job in this regard.

If the United States for the past 49 years relied upon the judicially created rule of evidence that was first set forth in the *Weeks* case for the enforcement of the rights of citizens under the fourth and fifth amendments without legislation to circumscribe, define, modify, or emasculate its provisions, without any hampering of law enforcement and without any general failure to bring criminals to justice, it seems to me, that since the provisions of the fourth amendment have been enforced for 49 years by the rule rending inadmissible evidence seized in violation of the fourth amendment, certainly rule 5(a) of the Federal Rules of Criminal Procedure could be enforced by this very similar judicially created rule of evidence as set forth in the *Mallory* decision. This could be accomplished without legislation to circumscribe, define, modify, or emasculate its provisions. I sincerely believe that this will not result in any hampering of law enforcement officials who desire to proceed in a lawful fashion, nor will it result in an inability of the police to bring criminals to justice as heretofore.

Mallory was decided June 24, 1957. In the some 6 years since the law as set forth in that decision has been in effect, there has been nothing in the records of the Police Department in the District of Columbia to indicate that policemen have been hindered in their job of causing the legal arrests and convictions of criminals. Perhaps the job of the policeman has been made not as easy as it was before, but on the other hand, it is perhaps also true that great numbers of citizens have been spared the inconvenience, humiliation, and chagrin of having been unlawfully arrested and having been unlawfully detained for varying lengths of time while being interrogated extensively concerning the crimes that they did not commit.

The majority of the persons complaining of the *Mallory* decision are policemen. The policemen do not admit it, but what they really desire is a right to arrest citizens without probable cause and without penalty of any sort. If we interpret the fourth amendment to mean that a citizen may not be arrested without probable cause, why should we accede to the demands of policemen, who for all intent and purposes really seek to violate the constitutional command? The legislation sought will implement the desire of policemen to arrest without probable cause.

Prior to the *Mallory* decision in the District of Columbia a very large percentage of all arrests were arrests made on the so-called charge of investigation. Since there is no such crime and no such charge known to the law, naturally all of these arrests for investigation were illegal arrests. In other words, many policemen follow the policy of arresting first and investigating later. Seems to me, it should be the other way around. Now, because to some limited extent *Mallory* compels policemen to investigate first and arrest later upon the basis of the investigation, the policemen complain that they are hindered in the performance of their duty. This is not so. Officers can do their duty just as effectively under *Mallory* as before. There can be no doubt, however, that they must work a bit harder and perhaps even a few more officers might be needed. Certainly this price is not too high for the preservation of the rights and liberties of the individual that have been the heritage of Americans through the years. The citizen who is arrested and charged with investigation will have his reputation damaged to the same extent as the citizen who is arrested, charged, and promptly brought before a judge, committing magistrate, or commissioner for arraignment and preliminary hearing. He would be discharged if there be no probable cause for his arrest. In this regard it is interesting to note that the form 57 that job applicants for almost all types of Federal employment must execute, contains the following question:

"33. Have you ever been arrested, charged, or held by Federal, State, or other law enforcement authorities for any violation of any Federal law, State law, county, or municipal law, regulation, or ordinance?

"Do not include anything that happened before your 16th birthday.

"Do not include traffic violations for which a fine of $25 or less was imposed. All other charges must be included even if they were dismissed."

The Federal job applicant must explain all arrests. He must explain even if the charges were dismissed. This is probably true in job applications for most responsible jobs in private concerns as well. The reputations of a far greater number of innocent citizens would be preserved by the enforcement of *Mallory* because that decision certainly will deter and curb arrests without probable cause. Officers will not be very prone to frequently arraign persons without probable cause when they come to know that arraignments without probable cause will result only in the release of the persons arrested and a loss of time by both officer and citizen.

Some policemen have complained because, they say, a commissioner or committing magistrate is not always available. In the District of Columbia there are 15 judges in the U.S. District Court for the District of Columbia, exclusive of 3 retired judges who serve part time. In the District of Columbia Court of General Sessions there are 15 judges exclusive of 1 retired judge who serves 3 months per year. All 34 of these judges may issue warrants, arraign, commit, discharge, or fix bail for persons brought before them charged with offenses against the United States. In addition to the 34 judges there is a U.S. commissioner who is also empowered to perform these duties. There should, therefore, be no lack of a judicial officer for the purpose of arraignments in the District of Columbia at any time.

Many years ago Congress recognized the fact that in some instances arrested persons were being detained in the District of Columbia for unreasonable lengths of time without formal charge. Congress enacted what is now title 16, section 805, District of Columbia Code, which provides as follows:

"16–805/24: 205/. Right to true copy of commitment—Forfeiture.

"Any person committed or detained, or any person in his behalf, may demand a true copy of the warrant of commitment, or detainer, and any officer or other person detaining him who shall refuse or neglect to deliver to him a true copy of the warrant of commitment or detainer, if there be any, within 6 hours after the demand, shall forfeit to the party so detained the sum of $500 (Mar. 3, 1901, 31 Stat. 1372, ch. 854, 1147)."

While on its face this statute merely provides for the obtention of a true copy of the warrant of commitment or detainer, its real purpose was to effect the release within 6 hours of persons detained without formal charge. In the District of Columbia there has come to be known among criminal lawyers what is called a 6-hour writ. When a client has been arrested on the so-called charge of investigation and is being held without being charged with any crime, the lawyer will serve upon the officer in charge of the precinct where the client is detained a formal demand for a true copy of the warrant of commitment or detainer pursuant to the aforesaid statute. Under this practice the police officers must then charge the client with some offense formally or release the client. The police officers release or charge such prisoners after such demand because of the forfeiture provision. This might be a somewhat effective method of preventing long unlawful detentions but for the fact that in practice there is required a formal demand in writing which cannot be effected by the prisoner himself and for the further reason that the arrested person seldom knows of this statutory provision and, certainly he is not told of its existence. The result is that the remedial feature of the statute is available only to those persons who have friends or relatives able to employ an attorney. This statute contemplates no penalty against an officer who holds an arrested subject for several days without charge and without arraignment provided that within 6 hours after receipt of the formal demand, he either formally charges the prisoner or releases him. Moreover, in event of a formal charge being placed against the suspect after service of the formal demand or 6-hour writ there is nothing to compel the officer to arraign the prisoner. True enough, in the practice in the District of Columbia if the charge is placed against the suspect during the nighttime hours, the Chief of the Detective Bureau or some police official is empowered to fix the amount of bail bond. This is a judicial function. But aside from all of these matters, the important thing to be considered is that Congress recognized a need for some method of compelling the release of unlawfully detained persons. Because of these reasons it is plain that this provision is woefully inadequate. This statute is in effect only in the District of Columbia and has no application to the States.

We say that the method of enforcement of rule 5(a) of the Federal Rules of

Criminal Procedure set forth in the *Mallory* decision is the most effective method, a method that has been tried in the enforcement of the provisions of the fourth amendment and has proved to be most effective during the past 49 years. We say that Congress should not permit itself to be stampeded into hasty enaction of legislation designed to nullify the effect of that decision without sufficient time to properly ascertain and evaluate the effect of that decision upon law enforcement generally and the protection of the rights of citizens specifically. Further, it must be considered that *Mallory* has now been in effect for more than 6 years without appreciable effect upon law enforcement. We, therefore, urge that no legislation be enacted to modify the law as set forth in the *Mallory* decision.

The CHAIRMAN. Thank you very much, Mr. Harris.

Let me ask you two questions.

No. 1, if title I in the bill now before us for consideration was enacted into law, do you believe that it would be a constitutional enactment?

Mr. HARRIS. I do not believe that it would be constitutional. I say that for several reasons I won't go into now. However, I say this, Mr. Chairman:

The *Mallory* decision was not based on any constitutional considerations.

The CHAIRMAN. I understand that. Of course, the point has been made repeatedly, and there is a difference of opinion in the witnesses who have appeared before us.

Some say that title I, if carried up to the U.S. Supreme Court, would stand the constitutional test. Other witnesses say that it would not, because it would violate various provision of the Constitution.

I was just asking for your opinion. You are a lawyer who has practiced here 19 years, and you say half your practice is involved in criminal law. So you would have some familiarity in this particular field.

Your opinion is it would be unconstitutional.

Mr. HARRIS. And I would say that my basis would be amendment 5, rather than amendment 4, because, as I mentioned briefly in my statement, it would be a form of compulsion of testimony.

I say that if the Congress says in amendment IV that I am not compelled to testify against myself, a corollary of that rule is that the police official or the State or the United States is not entitled to place me in a situation where I would give a statement against myself, ostensibly voluntarily, but as we know, caused by the psychic and psychological pressures by an unlawful detention.

The CHAIRMAN. My second question is this:

There seems to be, threading through all of the testimony on both sides, actually, in our hearings thus far, on title I, the objective the police are trying to reach, which was expressed, I think very well yesterday, by Dean Pye, assistant dean at Georgetown Law School. He said the crying need is for interrogation.

In your opinion, how far can the police go in interrogating a suspect?

Mr. HARRIS. While in custody or while out of custody?

The CHAIRMAN. Well, when they first pick him up—find a suspect, and they intercept him in Washington, D.C., a police car intercepts him. At that point, from there on, how far can police go in interrogating that suspect? The very time they pick him up.

Mr. HARRIS. There is no limit to how far they can go in interrogating him. There is no limit whatsoever—provided that they had probable cause to arrest him in the first place.

You see, *Mallory* doesn't say, and nobody advocates the fact that a police officer cannot question anybody. *Mallory* is trying to enforce 5(a), which in turn, in a left-handed sort of way, is trying to say that a police official should arrest with probable cause.

If I am arrested with probable cause, you have a right to ask all the questions you see fit, as long as within a reasonable time you take me before the U.S. commissioner. Now, a reasonable time might be 1 hour, 1 minute, or maybe in some instances, several hours, or half a day.

During that time, it is not unconstitutional, it is not against the law to ask as many questions as you see fit.

Now, I say that that has one limitation. The suspect or the arrestee should be advised of his constitutional right to refuse to give self-incriminatory testimony.

The CHAIRMAN. Any statement may be used against him.

Mr. HARRIS. That is correct.

The CHAIRMAN. That is the second part of title I as it now is before us. Of course the statement has been made that that is a little sugar coating, that actually this is something that would be pretty hard to determine in any event, as a matter of proof.

Mr. HARRIS. That is correct. And as a matter of my experience in the trying of criminal cases, I have never experienced, nor have I ever heard of a police official, a police officer, coming down and saying that "I did not advise the suspect of his constitutional rights."

Now, I must imagine that in the normal course of events somebody, in the normal course, might have forgotten. But I have never heard it said in court.

The CHAIRMAN. In other words, you sometimes question whether it is done.

Mr. HARRIS. That is correct. And also sometimes it can be done in a fashion, while the actual words and phrases are used, the suspect is led to believe that a contrary result is true. And that can be done by a skillful officer, and the suspect would admit that these words were used. But he would get a feeling that by his cooperation certain things, certain benefits would inure to him that otherwise would not.

This sometimes happens when a man is sentenced and he is brought in the District of Columbia before the district court. Here now of late they must always be asked: "Have you ever been made any promises?"

Now, these law-enforcement officers don't make promises, and sometimes they do tell a suspect, "You know, anything you say may be used against you, but I want you to tell me this," and then they go on from there. But see, the phrase can be given and then nullified by the subsequent conversation.

The suspect often is an unlettered man, very little academic skill, and when asked, "Did Officer X say to you that anything you say may be used against you?" he would say, "Yes."

And then the next question—he never gets a question to say what Officer X told him after that—if he told him so and so he probably would go free, or words to that effect, or leading the suspect to believe it.

I don't believe that we—when I say "we," I mean the citizens of

America—should be left to that type of power, as described by Justice Douglas, that heady power in the hands of a policeman, to come down and testify that he did give the magic words.

I don't agree that that will be a bulwark against the evil that it seeks to prevent.

The CHAIRMAN. Thank you.

I think I understand the position you are taking. I do appreciate your statement a great deal.

Now, Mr. Heller, we would be happy to hear from you.

Your prepared statement will be incorporated in full in the record.

In looking at it from here, I note that you are directing your attention to title III.

Mr. HELLER. That is right, Mr. Chairman.

I wonder if I might approach slightly on your time to talk about quickly two other provisions on which we did not want to send a separate witness up here; namely, you asked about mandatory minimum sentences.

We oppose them. And I think we add very little, however, to the statements that have already been made by the Justice Department particularly. We think they are very bad psychology. We do recall that Representative Whitener, in the House hearings, talked about the psychology of despair, of a man who gets a mandatory life sentence. We think this psychology works in a lesser degree or a mandatory minimum sentence.

And we think it does make prison administration harder. Of course, the ACLU is not principally concerned about prison administration from that side. But we think it is a pragmatic reason for not favoring these sentences. We think the judge ought to have discretion to view the man before him and treat him as he sees him.

Secondly, I did want to very quickly comment on section 509, which is the false report section, only very quickly.

We would hope that the committee would not act on this.

Mr. Harris' committee of our affiliate, the due process committee, is right now contemplating a study of the use of false report charges to cover up police misconduct. We don't know whether this exists or not. We have got some idea that false report charges are pressed against people who are prepared to complain about police mistreatment or brutality.

We think if it is left in the current regulations, there is authority to punish people who make false reports.

But the Commissioners will have some discretion to consider this problem more comprehensively in the future, since that seems, in our reports from individuals who complain of mistreatment, to be tied up with their charges of mistreatment by the police.

Now, then, I am not going to take a lot of your time on investigative arrests, because I heard your statement to Mr. McLaughlin, that by and large, there seems to be general agreement that this is an invalid proposal.

We certainly subscribe to that, and the written statement sets out some of the reasons. The only thing I might add to that is, we stand pretty squarely on the report and recommendations of the Commissioners' Committee on Police Arrests for Investigation, which led the Commissioners to forbid them—the so-called Horsky report.

We don't want to burden your record; if it has not been placed in the record, we can do so.

The CHAIRMAN. It will be adopted by reference. We won't incorporate it in full, but it will certainly be referred to by reference, because this is the basis of the termination of the so-called investigative arrests in the District of Columbia.

Mr. HELLER. We think section 302, the material witness section, is in effect an alternative means of making arrest for investigation as it is now drafted. And this concerns us just as greatly as section 301, which actually is a sort of a Uniform Arrest Act provision, and allows arrests for investigation.

I might just start with this by saying that while this is conceptually distinct from the *Mallory* rule, it is in very sharp pragmatic fact closely related to it.

The problem of the *Mallory* rule in one sense, the proposal to repeal it in title I, is in effect, we think, a proposal to repeal criminal rule 5(a) without saying so.

Title III would do so in effect—would quite clearly repeal criminal rule 5(a) for the District of Columbia alone. That bothers us somewhat as an organization which is concerned with the District's right to self-government, and as long as it doesn't have it, to at least be treated the same as other Federal jurisdictions in criminal matters.

But it is true, in a sense, that if you repeal the *McNabb-Mallory* rule legislatively—and I agree fully with the statements that have been made that there is a constitutional basis for it—what you in effect do is repeal criminal rule 5(a), you in effect tell the police that they are free to disobey the rule. That is really the only purpose of repealing *McNabb-Mallory*.

It is transparently what the police want. I am not charging them with bad faith or anything. I think they have simply put their testimony on a better ground than we would. But what it does is that it simply says criminal rule 5(a) is of no great concern to you, at least the unnecessary delay phrase of it. You may now question at the police station, and all that will be left to consider is whether you gave the proper warning and voluntariness is involved in any confession.

Now Judge Fahy of our court of appeals has expressed his concern in a case which I am afraid I cannot remember the citation of, about trials in the police station. And that is what title III really is concerned with, and it is what *McNabb-Mallory* is concerned with.

We are concerned about trials in the police station. We recognize the hopelessness of the task of the criminal defendant to come in later into court and say contrary to the testimony of five or six policemen—who obviously have records as fine public servants, as far as the jury knows, and generally this is true, no doubt—that he was mistreated, or he was pressured. This is a hopeless task for a court to resolve any way but one; namely, in favor of the police.

So it is in a sense a meaningless form for people to be warned and then detained in the police station. That is what section 301 would have done. And now, as I want to state, it is what section 302 will do.

The Horsky report, at a page which I cannot find any more, did say that there were problems with the existing material witness statute

of the District of Columbia. It did say that it was so cumbersome that it could not be used. We take that to mean that the phrase requiring that material witnesses be held in separate premises—the word "premises" I emphasize—apart from criminals, or people accused of crimes, is the difficulty here.

What part of section 302 would do, would allow them to be kept in a separate room, but on the same premises; namely, in the jail, or in the lockup, or in a precinct lockup, wherever it proves fruitful to hold them.

If this is the question, if this is the proposal, the problem with the material witness statute as we now have it, and the proposal is to change it for this reason alone, then we think it can be done a great deal more narrowly, and it doesn't present the kind of problems which I am about to talk about.

I want to call your attention to the fact that Mr. McLaughlin said that while there is this statute for the detention of material witnesses, there is in their opinion, the opinion of the Crime Commission, no authority to stop them in the first instance, to hold them. But there is. There is Federal rule of criminal procedure 46(b), which flatly, specifically allows the detention of a material witness during the pendency of a case.

This is the limitation which we think should be imposed on any statute for allowing the detention of material witnesses. It must be tied to a case which is pending.

The CHAIRMAN. At that point, Mr. Heller, I assume you would agree very largely with the official position of the Department of Justice on section 302. They say it in two or three sentences.

While for these reasons we must oppose section 301—

which is the investigative arrest section—

We fully recognize the necessity for securing the appearance of material witnesses which is the subject of section 302. In this connection, we call your attention to S. 1148, a bill prepared by the District of Columbia Commissioners to amend the law relating to material or necessary witnesses to crimes committed in the District of Columbia. We believe that bill represents a sounder approach to the problem of material witnesses than does section 302.

I don't know whether in the course of your preparation, speaking on section 302, you have examined S. 1148 or not.

Mr. HELLER. I believe, Mr. Chairman, that I did look at it sometime in the past, and I am frank to tell you that I cannot now recall whether it is limited to the detention of witnesses in a case which has already been begun in court. If that is so, this is a basic limitation.

The real danger of section 302 is that it is wholly directed to the detention of witnesses during police investigations. And Mr. Harris just told you about several investigations that have gone on for years in a technical sense because the crime has never been solved.

This, in other words, allows the police to hold up to 6 hours, and without court approval, and thereafter with court approval during the pendency of a police investigation—a wholly vague and unlimited concept.

It seems to me that it is an element of—I hate to use drastic language in a very polite hearing—police state methods, that men can be picked up off the street, or women, and held for 6 hours, with nobody knowing about it and then thereafter by a judge if they cannot

produce a bond satisfactory to him for as long as the police go on investigating a crime, because their testimony might in the future prove useful.

Of course, the statute as drafted, section 302, doesn't refer just to witnesses as such, the people who get up and testify to crime and say, "I saw it happen, sir."

It particularly permits the holding of the person who may later become the defendant. And this is very clear. The House committee deleted a proposal from one of the bills that was before it, one of the specific bills, that the man be informed of his rights, that he need not testify against himself.

We think the deletion of that proposal was somewhat significant, because it shows that there was in mind the idea that people who might become defendants, not mere witnesses, could be held by the police.

Of course, as I have told you already, we think that warning doesn't satisfy the problems of a man held incommunicado. But nonetheless, the deletion even of the warning provision suggests to us that the House committee did contemplate that defendants, future defendants, would be held in this manner.

Now, this is a pretty frightening prospect.

The police can pick up a man without relation to a pending case, they can hold him for 6 hours without telling anybody about it, he has no line to the outside world. They can continue to hold him if, being a poor person, he cannot produce a bond. And it goes on so long as a police investigation goes on. And this man apparently is not even to be informed that he need not testify against himself.

And we have no doubt, frankly, that this will be used by the police to get around the ban on investigative arrests. At least we have no doubt that unless the law is concretely tied to a witness in a pending case in which there is already a defendant charged, that possibility will continue to exist as long as the law is on the books as drafted.

Now, we think it wasn't an accident that the dissenters in the House committee said this is one—perhaps the most dangerous single provision of H.R. 7525, because it is a legislative wolf in sheep's clothing. Perhaps that language is colorful, but we think it is not too far off the mark.

So I am in here today to stress as strongly as I can—if you agree that section 301 is no good, is invalid, if you decide not to recommend such a provision, but if you recommend section 302 in its present form, you have done the same thing by the back door.

And we are in very, very serious trouble.

You have had testimony about the grim specter of public disrespect for the police by a Cincinnati police chief who is apparently not subject to the Federal Constitution in the sense that our officials are. You have had testimony that today a citizen does not have this right to walk the streets of Washington primarily because police may not interrogate suspects.

The truth of the matter is if you hear the complaints of the people in the parts of town where investigative arrests and material witness detentions would be made—and we know, by the way, that members of this committee would not be the people subject to this, even if they

were suspected of a crime—if you hear their complaints, we know very well why there is disrespect for the police in a large part of this town.

There is disrespect for the police because the police have a certain degree of disrespect for the Constitution themselves in their past practices. And this has gone on too long. And it has created an atmosphere of official lawlessness in this District, which has incurred private lawlessness.

Now, the police have a very difficult problem. And it is an excellent police force—probably no more honest and zealous one in the country. But zeal on the policeman's part is just the advocate of a man who would go as far as he could in getting the crime solved.

Now, long ago, of course, and I am not accusing Chief Murray or any of his subordinates of suggesting this again today—but long ago, when inquisitions were stopped, when the rules that a man had to confess against himself or else there could be no valid basis for conviction, was abolished, there were cries by law enforcement officials that this would stop the solution of crimes.

There is not a lot of difference in quality, although there is a great difference in degree in the protestations being made today.

We are anxious that the police not feel paranoid in this city. But we are anxious that they do abide by the law, and we think the constitutional basis for saying that a person arrested must be taken without unnecessary delay before a magistrate, told of his rights, allowed bond, granted counsel, all that can be found in the decisions construing the Constitution of the United States.

(The complete prepared statement of James H. Heller follows:)

VIEWS OF THE NATIONAL CAPITAL AREA CIVIL LIBERTIES UNION

Mr. Chairman, members of the committee, my name is James H. Heller. I am a Washington attorney. I am also secretary and a member of the executive board of the National Capital Area Civil Liberties Union. On behalf of that organization, I ask this committee's rejection of title III of H.R. 7525, the so-called omnibus crime bill. This title is in two sections. One would openly revive and attempt to legitimatize the recently banned police practice of making investigative arrests. The second section would accomplish very much the same result but under the semantic device of detaining material witnesses for questioning.

It is this second section of title III to which we wish to call particular attention today, for the minority of the House Committee on the District of Columbia rightly underscored its view that, "Perhaps this is the most dangerous single provision of H.R. 7525 because it is a legislative wolf in sheep's clothing." (H. Rept. 579, 88th Cong., p. 99.)

First, however, let me turn to section 301 which directly revives investigative arrests under a procedure of 6-hour detention by the police in their own discretion. It cannot be any secret that an American Civil Liberties Union affiliate opposes this authoritarian and unconstitutional practice. Let me state our major objections to the practice.

My task is made very simple by the published "Report and Recommendations of the Commissioners' Committee on Public Arrests for Investigation," the so-called Horsky committee report of July 1962. It was this report which led to the Commissioners' ban on investigative arrests in March 1963. I hope I need not commend the Horsky report to this committee beyond pointing to the credentials of the report's authors, the thoroughness of their inquiry, and the fact that no lawyer has yet risen to oppose the report's factual and legal conclusions. I would add this: Here was a carefully documented, cogently written, and long debated report commissioned by our own local chief executive, the Board of Commissioners. To ignore or override their action based on that report would debase and mock even our present semicolonial system of government in the District.

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

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

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

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

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

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

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

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

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

yet it is proposed to give them a new one without any comparable protection to the individual.

Section 302, like criminal rule 46(b), contemplates that the arrested person may be released on bail, which is a severe hardship to the poor who cannot secure bail. But even if this were construed to allow personal recognizance there would be no possibility of release during the first 6 hours, before the man was brought to court. Beyond this, consider the idea of requiring a man to post bail because the police are investigating a crime and think he may be a material witness someday. This could go on for years if a court did not release him on habeas corpus or invalidate section 302 itself. Of course, we believe that courts would either invalidate both these provisions or else construe them as going no further than existing arrest authority. This committee, we believe, should not approve laws which are either unconstitutional or merely redundant.

It is small wonder that last April one of the largest membership meetings of the Bar Association of the District of Columbia ever held overwhelmingly condemned the very kind of proposals which now go to make up title III of this bill. Actually the proposals put before the bar association contained guarantees which this bill does not incorporate. The committee is already aware of the opposition of the Justice Department and the District Commissioners to these provisions.

To put it simply, these provisions are anathema to our rights. They are surely unconstitutional for the largest part. They import a statutory authorization of police-state methods into our local laws. They use semantic devices to relabel illegal arrests. They have nothing at all to commend them to such good protectors of our rights as the members of this committee have shown themselves to be. We ask the committee to reject them in toto.

Thank you very much.

The CHAIRMAN. That is a very effective statement, Mr. Heller.

The Justice Department indicates Senate 1148 is patterned after rule 46(b) of the Federal Rules of Criminal Procedure. I am advised by Mr. McIntyre 46(b) is a section that was very seldom used in the past in the District of Columbia, as a section for the detention of a material witnesses.

Now, are you in favor of section 46(b)?

Mr. HELLER. We are in favor, with one limitation, Mr. Chairman.

We dislike, and most of the organized bar of the District of Columbia Bar, I think, is beginning to suspect that the problem of bail in the traditional sense is a tremendous hardship on poor people. If this is construed to allow personal recognizance when a man is to be released, if the magistrate or judge thinks this is satisfactory, then we believe there is a proper rule, rule 46(b). It may be construable that way today.

Secondly, let me say we think there ought to be some maximum time limitation on detention, because calendar delays ought not to keep an innocent man who is merely a witness in jail.

We are a Federal jurisdiction. A man who flees this jurisdiction can be brought back from almost anywhere under a Federal subpena.

Now, there is the problem that rule 46(b) doesn't cover the general sessions court. We recognize that. We are in favor of a similar rule in the general sessions court, and we are in favor of amending the detention statute, section 4144 of the code, so it is not quite as cumbersome to hold a man.

However, once again, the fact that rule 46(b) is not much used suggests to me one of two answers to that problem. Either the detention statute itself is too cumbersome, although I doubt it applies in the Federal district court over rule 46(b) itself, or the police really don't want this for witnesses, and really don't need it for witnesses—they want it for potential defendants. I am forced to say that.

The CHAIRMAN. I understand your position.

You are saying that 301 is invalid—and as I have indicated, the testimony seems to be almost unanimous it is an unconstitutional provision. But if we went ahead and enacted 302, you say we would be doing something indirectly that we would do under 301.

Mr. HELLER. Yes, sir.

The CHAIRMAN. I think I understand you very well.

I certainly appreciate your testimony. Thanks to both of you gentlemen.

Our next witness is Mr. Philip Schwartz, member of the board of directors of the Americans for Democratic Action.

STATEMENT OF PHILIP SCHWARTZ, MEMBER, BOARD OF DIRECTORS, WASHINGTON CHAPTER, AMERICANS FOR DEMOCRATIC ACTION

Mr. SCHWARTZ. Mr. Chairman, we have passed out our written statements already to the clerk.

The CHAIRMAN. Very well. I have it before me. It seems to be a reasonably brief written statement. You can either read it in full or highlight it.

Mr. SCHWARTZ. I will go through it rapidly.

The CHAIRMAN. Very well.

Mr. SCHWARTZ. Mr. Chairman and members of the committee, my name is Philip Schwartz. I am an attorney and a member of the board of directors of the Washington Chapter of Americans for Democratic Action. It is a pleasure to again come before you and to have this opportunity to present the views of ADA on an extremely far reaching piece of criminal legislation.

We have prepared a statement of our position on the bill's provisions affecting the *Mallory* rule, detention for investigation, and detention of material witnesses.

By way of prefacing my remarks on these matters, I would like to comment upon the underlying philosophy which motivates our views.

The enormous extent to which H.R. 7525 would affect the enforcement of the criminal law in the District of Columbia and thus the lives and liberty of all its residents and the many thousands who work in it and visit it, places upon you a responsibility of historical importance.

The cold bare words of H.R. 7525 sound ostensibly plausible. But we must remember that the Congress is attempting here to revise a delicate segment of virtually the oldest of manmade civilizing institutions—the criminal law, man's groping attempt to enforce divine precepts of man's responsibility toward his fellowman. Implicit in this codification of society's mechanism for insuring the respect of the person and property of others are other basic human concepts, which in the Western World of Judaeo-Christian philosophy and of democratic society are deemed inalienable rights of every person.

This means, in the context of criminal law, that regardless of the assiduousness in enforcing the codified moral responsibilities by the governmental institutions, certain paramount human rights must be respected and any encroachments upon these rights by the powerful public enforcement institutions are inherently wrong unless such encroachments serve some higher purpose of society.

This is basically the problem we are faced with in this bill. Where, how and to what extent can basic rights be invaded by the enforcement institutions of society? And further, how can a citizen's rights be protected against overzealous application of the desire to serve the higher purposes of society which transcend individual rights?

We must be careful here not to engage in circuitous logic and presume that the mere allegation of a violation of society's laws permits the deprivation of the accused's rights to liberty and freedom from forcible societal restraint, for this precociously invokes the presumption of "higher social purposes" where the individual accused cannot satisfactorily prove the negative to accusations laid against him. Thus we reach the counter principle that stands high in our hierarchial order of freedom—that each man's freedom is sacrosanct and he shall not be required to prove his freedom from criminal guilt; and his accusers cannot restrain or restrict his freedom without carrying the highest burden of responsibility that they are doing so with probable cause, nor given such probable cause should the accused be insulated from legal counsel or be coerced to waive his right to not make a statement.

When we speak in these terms we are essentially giving voice to, and real meaning to, the sanctity of human dignity due each person regardless of his station in life and that "innocent until proven guilty" is a vital principle that cannot be circumvented by indirect techniques which aim to prove "guilt" out of the mouth of the accused.

Let me turn first to the so-called *Mallory* rule, or more properly to my mind, the *McNabb-Mallory* rule.

We flatly oppose the provision of title I, section 101 of H.R. 7525 which seeks to vitiate the principles laid down in the *McNabb* and *Mallory* decisions of the U.S. Supreme Court.

The bill, by declaring that delay before an accused is brought before a committing magistrate shall not alone make inadmissible any evidence, including confessions acquired beforehand, would permit and encourage third degree and subtle pressure techniques. Police authorities, regardless of their sincerity and desire to be fair, must be restrained in their interrogation to protect those arrested from waiving their constitutional right not to speak, out of fear or intimidation.

I am not referring here to physical intimidation or brutality in the usual sense. The picture I am attempting to draw is basically one of the less-fortunate member of our society, who because of his low economic state or his deficiency of education is somehow transformed in the minds of many persons bearing symbols of authority into a person whose rights, feelings, and sensibilities are not deserving of the same measure of respect as others. Such an arrested person, not willing to buck the all-powerful authorities, becomes easy prey for the necessary intimidation attendant upon secret, prolonged interrogation in surroundings not conducive to objective eliciting of facts.

Without discoursing on the decisions in *McNabb* and *Mallory*, which I am certain you are thoroughly familiar with, you must also be aware that the Supreme Court has not barred all confessions. It has not, moreover, said mere delay before arraignment is fatal to the Government's case. Therefore *Mallory* is not so all inclusive as its vociferous critics have shouted.

The requirement that arraignment of an accused man must be had without unnecessary delay, as stated in rule 5(a) of the Federal Rules of Criminal Procedure, is a codification of procedural due process of law. It serves to insure that all persons irrespective of their knowledge of their rights and regardless of their fear of exercising their rights will be insulated from pressure techniques. The magistrate's function in this regard is to make known to the accused his rights and that the police cannot force him to prove their case from his words.

That is to say, arrests must constitutionally be made upon probable cause and probable cause should not be developed subsequent to the arrest from statements made by the accused. If there was no probable cause prior to the arrest, then the arrest was constitutionally unlawful. As has been stated many times by the Federal courts, the police cannot make arrests without probable cause and then submit the "fruits" of such arrests to prove guilt.

To say that title I of H.R. 7525 would not permit the admission of coerced confessions, as many proponents of the bill have said, is to state a naivete.

The CHAIRMAN. Why is this true? I thought if the confession was coerced, it would be involuntary. This would be the case even under title I?

Mr. SCHWARTZ. The point I was trying to make, Mr. Chairman, is that the fact that there was delay to our mind is in fact coercion.

The CHAIRMAN. Title I of H.R. 7525 would not permit the admission of coerced confessions.

Mr. SCHWARTZ. Yes. I am not quite sure I get your point, Mr. Chairman.

The CHAIRMAN. My point is, if under the rule of voluntariness and involuntariness as a criterion for the admission of confessions, the statement has to be voluntarily made. If a confession was coerced, it would not be admissible, no matter what the time limits were. Isn't this true?

Mr. SCHWARTZ. That's right.

The CHAIRMAN. Well, then, why is that a naive statement?

Mr. SCHWARTZ. Well, the point is that——

The CHAIRMAN. Maybe you explain it a little further on in your testimony.

Mr. SCHWARTZ. The point I am trying to make is perhaps the word "coerced" there was used in the classical sense of actual coercion; but to our mind, the delay is in effect a coercion.

The CHAIRMAN. You are saying delay itself is coercion, you are using coercion in that sense, rather than in the sense of forcing, intimidating, or beating a confession out of somebody.

Mr. SCHWARTZ. That's right.

The CHAIRMAN. I understand. Thank you.

Mr. SCHWARTZ. Title I, if passed, would create the needed protection to the police to carry on the most intense and extended interrogation under the coercive atmosphere of a police station and gives no protection to the frightened suspect who would find it almost impossible to later substantiate any claims he might have to pressure tactics against the full array of police witnesses denying any coercion.

Furthermore, title I would, in our opinion, be ultimately held unconstitutional. An arraignment before a committing magistrate with-

out unnecessary delay is per se a constitutional right according to the Supreme Court. Therefore any confessions adduced during such period of illegal detention would be excluded from evidence. Title I permits admission of such confessions, regardless of the length of delay between arrest and arraignment. Clearly this is violative of the Constitution.

There have been several statements made in regard to *Mallory*, and the former District Commissioner testified earlier to the point that Washington has become notoriously a soft touch for criminals.

The CHAIRMAN. A number of witnesses have said that.

Mr. SCHWARTZ. I do not know whether this is true or not—whether this has caused a greater influx of criminals to this community. But if there is a greater influx of criminals, I do not necessarily attribute it to the fact that the law itself is soft, but merely that the opponents of *Mallory* have spread this opinion that *Mallory* is creating a soft area for criminals, and if criminals are reacting to that, they may be coming into the area—I do not know if they are. I do not say it is because of the law itself.

The CHAIRMAN. The charge has been made. I do not know whether it is correct or wrong. It has been made by some, it has been denied by others. Those who deny it have pointed to statistics indicating that a great percentage, the exact percentage slips my mind, of crimes committed here in the District of Columbia, were committed by people who practically lived here all of their lives, right in the metropolitan area. This was used in refutation of the statement that the word had gone out that Washington was soft on crime, and therefore criminals from all over the United States were flocking here, because they could get away with more here than they could in any other area.

Now, the opponents to that contention point out this simply is not statistically true, because a great percentage of the crimes are committed by people who were either born or spent practically all of their lives here. This was used by way of refutation. This is one of the areas of distinct conflict in the evidence and testimony that is before this committee.

Mr. SCHWARTZ. Turning to a problem closely related to the issues by the *Mallory* rule, I direct your attention to the insidious consequences of section 301 of title III of H.R. 7525; namely, the section dealing with detention for investigation of a person on suspicion that he is committing a crime, has committed one, or is about to commit one.

We confront again, as under title I, constitutional difficulties. The fourth amendment permits no arrests unless there is probable cause. The restraint imposed by detention for investigation constitutes an arrest per se and certainly an arrest without probable cause.

Thus, though the "suspicion" of the police must be based on a "reasonable ground," the bill attempts to raise suspicion to the same level as the constitutional "probable cause."

While this bill imposes a 6-hour limit on the detention, that is, arrest, it in effect forces a suspect to prove the negative of guilt to the police to avoid being charged. Is this not an arrest without probable cause and thus unconstitutional? Is this not another device to circumvent the *Mallory* decision against arrests followed by unnecessary delay before arraignment?

Section 302 of the same title III purports to insure the availability of material witnesses in felony cases.

It is clearly a detention device. It permits up to 6 hours of detention by the police during which time interrogation can be pursued without recourse to a presentation before a judicial officer. Release of the witness does not preclude another detention, or let's say it—arrest. It is an arrest, notwithstanding the bill's assurance otherwise. What is more, this arrest of a material witness can be had even in a matter where another person is being held as a suspect and is being investigated under section 301. The Federal Rules of Criminal Procedure now demand the sanction of a judicial officer to detain material witnesses in these cases.

While the material witness held under section 302 can be released when brought before a judge or commissioner, he must post bond or collateral—another imposition on the impoverished if he is not released on his personal recognizance. And where is his right to counsel protected? And where is his right to not be detained unreasonably if he cannot meet bond or collateral requirements? And where is his protection against the use in a criminal prosecution against him of incriminating statements made by him during this so-called detention.

I would like to digress a moment here, Mr. Chairman.

We are concerned about the casual way that some witnesses have treated 302, claiming that it is a necessity to insure that witnesses needed for criminal prosecutions won't abscond.

It is clearly to our mind an arrest, no matter what you call it and we do not believe that section 302 adequately protects people from the possibility of use of information in a future criminal prosecution, and also blemishing their record, as one of the ACLU men mentioned earlier—it was unavoidable that one must include such detention in a form 57 application for the Government.

Gentlemen, I am hopeful that the considerable volume of testimony you have heard so far will convince you that H.R. 7525 resorts to tinkering with the criminal law of the District of Columbia in a way which can lead to disastrous results.

Broad statements that the "innocent have a right to be protected from vicious criminals" or that "criminals are released on mere technicalities" or the "Supreme Court's decisions hamper effective police work" tend to obfuscate the true issues and, to me, evidence an inadequate understanding of the democratic society and of the constitutional principles which support our way of life.

Encroachments upon constitutional individual rights by the police, as I said in my introductory remarks, are intolerable even if encroached upon to a slight degree. Even if the individual in reality is guilty, the situation is not different, because the only way to prevent illegal affronts to our rights by the police is to impress the police with the idea that where they act unconstitutionally, whether such acts be arrest, seizure of evidence, or acquisition of a confession, the fruits of such acts shall not be admissible in a criminal prosecution.

Through this stringent restraint upon the great potential powers possessed by the man with a badge, we are enhancing the sanctity of each person and his property against the eagerness of the police acting on less than probable cause. We cherish the certainty that we will not be molested, interfered with, or oppressed without good reason by the

police even if in having this assurance the police are hampered in investigating a crime or a guilty person goes unpunished.

Thank you very much.

The CHAIRMAN. We appreciate very much your statement, Mr. Schwartz. It will be very helpful to the committee.

Our next witness is Mr. Joe Rauh, Jr., vice chairman of the Democratic Central Committee for the District of Columbia.

STATEMENT OF JOSEPH L. RAUH, JR., VICE CHAIRMAN, DISTRICT OF COLUMBIA DEMOCRATIC CENTRAL COMMITTEE

Mr. RAUH. Mr. Chairman, thank you very much for this privilege of testifying before you, and also I thank you very much for the interest which you have displayed in this problem.

Just sitting here this morning—I think it is wonderful that you are giving your time to really going after this very serious problem. But that is not surprising to those who know the interest you have put into the District of Columbia generally, sir.

The CHAIRMAN. Thank you.

Mr. RAUH. I have a very short statement.

The Democratic Central Committee strongly supports the *Mallory* rule and opposes the pending legislation to repeal it.

Just as our party has always stood up for the civil rights of minority Americans, so we seek to defend and protect the civil liberties of all Americans. The pending legislation would weaken civil liberties in the District of Columbia by encouraging the police to hold suspects for intolerable periods of questioning instead of taking them promptly before the committing magistrate.

I might interject here, Mr. Chairman, that I think Mr. Schwartz was right in the sentence you questioned, but I think he was right for a little different reason, when he said it was naive to think you would keep out coerced confessions. I think that is correct, as a matter of practice. It is naive to think you can prove the coercion.

In other words, this *Mallory* rule is a substitute for proof of coercion. It is terribly hard to prove what went on in a police station. And therefore when a fellow says it is naive to think that you can keep out the coerced confession if you do not have the *Mallory* rule, I personally very much think that is correct.

Of course, if a fellow is beaten—the original case in the Supreme Court is *Brown* v. *Mississippi*. There the man was beaten to a pulp. It was admitted he was beaten. That is one kind of coercion.

But the ordinary coercion cannot be proved in the courtroom. And I must respectfully suggest that that is the real basis for what we believe in.

A police station is not a picnic ground. Honest but over-zealous policemen, striving for the solution of crimes through confessions, too often use methods bordering on the third degree. The only way to forestall such conduct is to deny the police the use of confessions extracted during periods of unnecessary delay at the station house. We cannot expect the police to punish the offending officer; the *Mallory* rule denying the officer the use of the wrongfully obtained confession is society's only means of ensuring civilized police conduct.

The CHAIRMAN. A suggestion has been made by some of the

witnesses—and I think they pointed to practice in Israel where, if I understand it correctly, there is either some type of recorder or a disinterested witness who becomes a part of the interrogation procedure, so that one could determine whether or not there had been undue influence or coercion or involuntariness, or undue time, simply as a matter of proof.

Now, this has been suggested as a method that would determine the fairness of the interrogation.

I do not know whether this works or not. It has been suggested. I do not know anything about the practice in Israel.

Mr. RAUH. I am sure I don't know. The only Israel trial I ever saw anything about was the Eichmann trials, and I am quite confident that was not a typical trial. So I have no experience in that myself. My own feeling is that would be an improvement, but not a substitute for the *Mallory* rule.

There is something to my mind wrong about getting the proof out of the fellow's own mouth. It is true if he is bubbling over with talk as he is arrested, that's all right, I understand that. But when he is resisting, if he does not give it to them in the ride to the station, or immediately, he is obviously resisting. And I think then he ought not to be forced by delays to do it, even in front of a third party—although I agree it would be better to have a third party than nobody.

The CHAIRMAN. Thank you.

Mr. RAUH. I would just like to say a word here, if I may, on the subject—I think there is bipartisan opposition in the District of Columbia. I think it would be helpful if this could be put on the record, Mr. Chairman.

Many times, at least several times, when I have spoken with Mr. Shipley in the same places on these District questions, Mr. Shipley, who is, as you know, the chairman of the Republican Party here, has taken the position that he, too, favors the *Mallory* rule and opposes legislation.

Now, I notice he is not on the list of witnesses. But in view of the fact that he has taken that position——

The CHAIRMAN. I do not know how he feels.

Mr. RAUH. I think it would be very helpful. I believe there is bipartisan opposition to changing *Mallory*. And I thought possibly an inquiry might get this. I always think that in those few occasions when we have bipartisan positions here it would be very helpful to the committee to know that.

The CHAIRMAN. I have noticed that occasionally you men come in marching arm in arm. Of course, several times I find you do have differences of opinion.

Mr. RAUH. When we are arm in arm, I would like to bring it forward, and see if it can be helpful to the committee.

The CHAIRMAN. I appreciate your suggestion. The staff will note it.

Mr. RAUH. While we oppose any change in the *Mallory* rule, we yield to no group in our desire to reduce the crime rate in the Nation's Capital. Exaggerated though our crime situation often is, we support all reasonable measures to deal with the admittedly high crime rate, including measures both to frustrate crime and to reduce its causes.

I do not think the list suggested by me here for either frustrating crime or reducing crime, reducing its causes—that these are by any means the full list. I think many, many things can be done. I simply, in my own suggestion, would say let's put our emphasis on this kind of a method in the District of Columbia:

First, we support expansion of the police force so that the authority of the law will be more visible in the difficult areas of the city;

Second, denial of pistols to all persons within the city limits except for those few who obtain permits based on justified need. I must say I have always been surprised why the police do not support this proposal of limiting small arms. Small arms are not ways of shooting ducks. I really feel that there is much to be said for trying to keep these concealed weapons away from people in this area;

Third, more complete integration of the police force in the interest of efficiency and public confidence;

Fourth, improved education, housing, employment, and welfare throughout the city; and

Fifth, a District of Columbia fair housing regulation, and a District of Columbia fair employment practices regulation, both long overdue, to make it possible for every District resident to have the housing he can afford and the job he can do.

Methods such as these are the American way of fighting crime. Let us reduce the crime rate by raising standards throughout the city, not by lowering them at the police station.

In conclusion, may I say a word of commendation of Chief Murray and his colleagues. Our disagreement over *Mallory* must not obscure our deep debt of gratitude to him and to the entire Metropolitan Police force for the magnificent way in which they handled the August 28 march on Washington and our two local marches. The splendid cooperation of the police force with the leadership and citizens of the community on those occasions points the way to future cooperation in other areas. One can only hope that the spirit of cooperation during the marches can now be applied to reducing the crime rate here in our Nation's Capital.

I strongly feel, Mr. Chairman, that there is much that can be done between the police force and the citizenry that has never been done.

I was terribly heartened by the way that they did have this cooperation in the marches.

People have said to me, How do I look on the racial tensions in the city of Washington today? And I said that I thought the situation had improved considerably. And they say to what fact, would you say—what was the one fact which has had the best effect on racial tensions in the city of Washington? In my judgment, it is the fine way in which the police cooperated with those marchers and made the Negro population feel that there were times at least in which the police force was not just on the other side. Therefore, I would sort of like to take the spirit of the way the police handled those marches and apply it to the crime situation generally. And I think a great deal can be done, a lot more can be done today, in my judgment, and the judgment of our local Democratic Party, than by changing the rules to make confessions easier.

The CHAIRMAN. Thank you very much, Joe. I appreciate your statement a great deal.

Our next witness is Mr. William K. Norwood, chairman of the public protection committee of the Washington Metropolitan Board of Trade.

We are happy to see you again, Mr. Norwood.

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

Mr. NORWOOD. Thank you, Senator.

Mr. Chairman, I am William K. Norwood. I am appearing here today in my capacity as chairman of the Public Protection Committee of the Metropolitan Washington Board of Trade, an organization representing approximately 7,000 of the principal business, civic, and professional leaders from more than 4,000 enterprises in our Nation's Capital. The views I shall express represent the recommendations of the Public Protection 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 I and title III of H.R. 7525, the omnibus crime bill.

Title I of H.R. 7525, would qualify and amend the *Mallory* rule by providing a rule of evidence for the courts of the District of Columbia. This proposed rule provides that a statement or confession made by an arrested person shall not be excluded from evidence solely because of delay in taking such an arrested person before a committing magistrate. The rule also provides that such a voluntary statement or confession shall not be admissible in evidence unless the officer of the law warns the arrested person both that he is not required to make a statement and that any statement made by the arrested person may be used against him.

At this point, we would like to note that legislation essentially the same as title I of H.R. 7525 with minor and inconsequential language changes has been passed previously by the Senate and by the House of Representatives. In the 85th Congress, H.R. 11477 passed both the House of Representatives and the Senate, in amended form, by an overwhelming majority and went to conference. Agreement was reached and the conference report was adopted by the House of Representatives, but Congress adjourned prior to final action in the Senate.

Again, in the 87th Congress, a bill—H.R. 7053, identical to title I of the present bill, was passed by the House, but did not receive final consideration in the Senate prior to adjournment. As one can readily see, the case of Andrew Mallory is not new to either body of the Congress.

Andrew Mallory was convicted of rape in the U.S. District Court for the District of Columbia. This conviction was subsequently upheld by the Court of Appeals for the District of Columbia but was reversed by the Supreme Court in 1957. The facts of the case reveal that the rape occurred at approximately 6 p.m. in the basement laundry of an apartment house inhabited by the victim. The defendant—Mallory—lived in the basement with his half brother who was employed as the janitor for the apartment house. The victim sought help in connection with malfunctioning laundry equipment and Mal-

lory responded to the call in the absence of his half brother. Mallory left the laundry room, but shortly thereafter the victim was confronted by a masked person who criminally assaulted her.

A brief time after the commission of the crime, the defendant and one of his nephews left the apartment house. Mallory was apprehended the following day at approximately 2 p.m., and was taken to police headquarters with two nephews who were also suspects. All were questioned for slightly over one-half hour and were held until 4 p.m., when they were asked to submit to a polygraph examination to which they agreed. Mallory was then questioned for approximately 1½ hours shortly after 8 p.m. Finally he admitted his guilt. At 10 p.m., he repeated his confession to other police officers and a fruitless effort ensued on the part of police officers to reach a U.S. commissioner in order to arraign the defendant. Mallory consented to a physical examination by the coroner who found no indication of physical abuse or psychological coercion. Confronted by the victim at approximately midnight, Mallory once again admitted his guilt, repeated his confession, and dictated it to a stenographer. The defendant signed the confession and he was arraigned the following morning.

Following Mallory's conviction and the appeals leading to the Supreme Court reversal of the conviction, the case was remanded to the district court where the indictment was dismissed and the defendant released.

An interesting and significant facet to the case is that at no time during the course of the pretrial or the trial proceedings did Mallory deny his guilt.

We understand that as a result of the *Mallory* rule over 140 cases of appeal have been brought to our higher courts in the past 5 years, many in direct conflict with one another. Without question, the District of Columbia has felt the greatest impact of the ruling in the *Mallory* case. Common law crimes, over which the Federal Government has jurisdiction within the District of Columbia, makes this the case in contrast to the States where Federal statutes apply less broadly. Local law enforcement agencies, in most cases, handle these crimes in the various States.

The Supreme Court in its opinion referred to rule 5(a) as being a part of the procedure devised by Congress to safeguard individual rights without hampering effective and intelligent law enforcement. This last provision is the basic premise for the proposed legislation encompassed in title I of H.R. 7525.

Earlier this week we heard a knowledgeable and respected law-enforcement official, referring to the *Mallory* rule, describe it as possessing the capacity to wield a disastrous influence upon our Nation if allowed to thwart justice in the States in the fashion that it has in the District of Columbia. This same official offered convincing justification for the need of a reasonable period of time for the police to perform their investigative functions prior to the arraignment of an individual on a specific charge.

Interpretations and decisions based upon the Constitution have narrowed tremendously in recent years. Probably the most significant of these decisions has concerned Andrew Mallory. It would be completely absurd to advance the thought that the learned men who framed our Constitution over 170 years ago had in mind preserving the

liberty of men such as Mallory, who have admitted their culpability, only to be released on legal technicalities, and providing them with the further opportunity to bring harm to society.

I would like to repeat that they are released on legal technicalities, legal theorists, and bleeding hearts without any regard to facts would turn these criminals loose on society to continue their career of crime.

A Nation, State, or jurisdiction basing its determination of an individual's guilt or innocence upon an overly lenient interpretation of a rule of criminal procedure is deserving of the description of being "soft on crime."

To provide a further example of the ridiculous extremes to which the *Mallory* rule has been extended, we need only consider the *Killough* case which departed substantially from previous decisions in application of the *Mallory* principle. Killough beat and strangled his wife and then carried the body after dark to the city dump where he hid it under a pile of rubbish. Five days later Killough told the police that his wife was missing. He then left town without keeping an appointment with police to give them more information. After 5 days, he returned home and the police questioned him about his missing wife for a full day without making a specific charge. At the end of the day he was booked and held. The following day he took police to the body and signed a confession to the murder. He was then charged and taken before a U.S. Commissioner for a hearing under rule 5(a). This procedure shows an obvious violation of rule 5(a) under *Mallory*. Accordingly, the judge had no other alternative but to exclude the written confession.

The following day, at the District jail and not in police custody, Killough reiterated the essentials of the crime to a police officer who came to receive instructions from Killough as to the disposition of his wife's body. The second confession was allowed in evidence as a voluntary statement made after Killough had been duly warned and advised of his rights under rule 5(a).

The majority of the court held in substance that the second confession, which was admitted in evidence, even though it was voluntarily made following the presentation of the defendant before a U.S. Commissioner, who advised him of his rights, was inadmissible in evidence under the theory that it was the fruit of the first confession and therefore was improperly admitted at the trial because the first confession had been given during a period of illegal detention.

In the course of its reasoning, the majority of the court made a comparison of the relationship between Killough and the receiver of his confession and the situation existing between parties possessing a confidential relationship and between whom there is a privileged communication such as a confession made to a clergyman or statements made in private to a doctor or lawyer. In commenting upon this comparison, the minority in its dissent likened the effort of the majority to equate Killough's confession made to a member of the clergy or statements to a doctor or lawyer as a "red herring." The suppression of the statement is not in any sense comparable to the common law or statutory privilege which leads to the exclusion of revelations of privileged communication to lawyer, doctor, or clergyman. This type of relationship simply does not exist between the police and accused persons.

This is typical of some of the travesties on justice which are permitted under the *Mallory* law.

With the two historic cases of *Mallory* and *Killough* hovering in the background to impede swift and certain justice to criminals in the District of Columbia, it is not startling that this city has witnessed a marked rise in crime since the *Mallory* ruling in June 1957. From 1952 to 1957 there was a continuous and sharp drop in serious crime in the District of Columbia. The actual figures were from a high of 2,300 in December 1952 to 1,300 in June 1957. From the date of the *Mallory* ruling, however, there has been a continuous and sharp increase in serious crime in the District. For the first 6 months of the current year, Washington stood eighth in the 16 cities with populations between 500,000 and 1 million in population. It should be noted, however, that in 1957, we were in 12th place on the same comparative basis. From 1957 to 1962, serious crime in these other 15 cities showed an overall increase of 21 percent, while in the District of Columbia in the same 6-year period, it increased by 48 percent, moving the Nation's Capital 4 notches up the crime ladder. Significantly, since 1960, the District's rate of serious crime clearance has also declined. As the total number of offenses has increased from 1957 to date, the total number cleared has also increased, but the proportion of clearance has, in general, fallen behind. Even with increased emphasis on detection operations within the Metropolitan Police Department since 1957, that Department has not been able to attain either the number or proportion of clearances attained during the high crime years prior to 1957.

Continuing this alarming crime pattern, it should be noted that for the first quarter of 1963, the District of Columbia has had a 19-percent crime increase over the first quarter of 1962 as compared to a 7-percent increase for the remainder of the country. Furthermore, recently released statistics indicate that figures for the Nation's Capital show an increase for the 17th consecutive month. At this time in our Capital City, it appears that the representatives of law and order are equipped with an 18th century stagecoach in hot pursuit of the recidivist criminal element operating a 1964 Cadillac with radar equipment.

There exists another ramification of the *Mallory* rule not too often considered in discussions of the effect of the Court decision. When police officers are hurried in the conduct of their official duties and are required to arraign persons with reference to whom there may be probable cause for arrest, it is possible that many innocent persons might be arraigned and charged with crimes as a result of the peculiar circumstances surrounding their location and conduct. The *Mallory* rule has the effect of providing an unhealthy acceleration to police work to such a degree that the opportunity for exculpatory questioning is seriously diminished. Accordingly, revisions in the *Mallory* rule as encompassed within title I will have the effect of protecting the innocent.

Paragraph (b) of section 101 of title I specifically sets forth safeguards to protect the person who may be subject to interrogation. It provides that no confession shall be admissible unless prior to such interrogation the arrested person was advised that he was not required to make a statement and that any statement made by him may be used against him. With this one major qualification and limitation on the police officer, title I is designed to restore the law to its posi-

tion prior to the *Mallory* decision; that is, to insure the admissibility of confessions which are freely and voluntarily made. Of course, this excludes confessions which result from improper compulsions.

In our investigation and subsequent support of title III, we have discovered that the laws of many States relating to the apprehension, detention, and questioning of persons held on "probable cause" in connection with a crime, and the practice of local police departments in the various States under the authority of the respective legislatures, contain one essential uniformity. This uniform element is that all jurisdictions permit and practice the detention of persons after "probable cause" for interrogation during investigation and solution of the crime. The length of the permissible period varies widely. Expert testimony developed earlier this week before this committee revealed that the statutory law in San Joaquin County, Calif., permits the detention of a suspect for investigation for a period of 48 hours including Sundays; in Chicago, Ill., the suspect may be held until the next court session which, in some cases, may run over a weekend. The few States whose laws appear to be most nearly alike, were those States which have adopted the provisions, with minor modifications, of the Uniform Arrest Act. The language embodied in title III, H.R. 7525, incorporated from H.R. 1929, 88th Congress, which we supported, applies the substance of the Uniform Arrest Act to the District of Columbia.

Under the amendments to the police regulations of the District of Columbia which became effective on March 15, 1963, the language of the regulation now states, "arrests shall not be made for investigation." Under section 301(c) of title III, H.R. 7525, a period not to exceed 6 hours would be provided in the police regulations for detention for interrogation and investigation. And that is not the 3 days referred to by a previous witness, but 6 hours.

At the end of this period, the person shall be released or arrested and charged with a specific crime. The detention shall not be recorded as an official arrest in any records. This allowance of 6 hours places the suspect in a much more favorable position than many other States and jurisdictions throughout the Nation.

The effect of the *Mallory* decision has been felt, to some extent, throughout our Nation by those bodies vested with the responsibility of upholding the law and developing effective prosecution in criminal cases. By far the greatest influence has been in the District of Columbia where the effect has been to seriously impede crime detection and ultimate conviction. Today's police need modern tools to combat the cunning and knowledgeable modern criminal. The legislation now before us will, if enacted into law, be a tremendous stride in a positive direction in the battle to balance the pendulum of justice more equally between the rights of society and the rights of the criminal in the District of Columbia.

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

The CHAIRMAN. We are very happy to have you before us, Mr. Norwood. You have been very faithful in giving us your views on these problems that arise under H.R. 7525. I appreciate the interest

not only of you, but of your Public Protection Committee of the Washington Board of Trade. I thank you very much.

Mr. NORWOOD. Thank you, Mr. Chairman.

The CHAIRMAN. The committee will stand in recess until further order of the Chair. We still have two or three expert witnesses in the field of title II of the so-called *Durham* rule. We then want to hear the official witnesses.

We have had some difficulty in working out a satisfactory date with Mr. Katzenbach, the Chief Deputy Attorney General of the United States, who is the author of the official position of the Department of Justice. As soon as we can work out a date that does not conflict with his prior commitments, we will hear him as well as other witnesses.

We will hear Mr. Acheson again, and we will hear Mr. Tobriner, in order to secure the Board of Commissioners' position. Of course we will obviously hear Mr. Murray, the Chief of Police and any of the men that he desires to have accompany him.

We cannot pinpoint the exact date at this time. I would hope that it would be sometime the week after next. It will be impossible to schedule it next week. But I would hope we could make some further progress in this field the week after that. We are pointing toward the date of November 4 or 5 or 6.

Subject to the call of the Chair, we will stand in recess.

Thank you.

(Whereupon, at 11:55, a.m., the committee was in recess, to reconvene subject to the call of the Chair.)

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

TUESDAY, NOVEMBER 5, 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: Senators Bible, McIntyre, and Dominick.

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 continuance of the hearings on H.R. 7525. This morning we are examining title I and title III of this particular legislation.

Our first witness is Mr. Nicholas deB. Katzenbach, Deputy Attorney General. We will be pleased to hear from you at this time, Mr. Katzenbach. The official report of the Department of Justice has been made a part of the record earlier in the hearings.

STATEMENT OF NICHOLAS deB. KATZENBACH, DEPUTY ATTORNEY GENERAL; ACCOMPANIED BY DAVID ACHESON, U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA

Mr. KATZENBACH. I have with me Mr. David Acheson, who is the U.S. attorney here in the District of Columbia. I have a short prepared statement.

The CHAIRMAN. Why don't you proceed to develop your position by reading the statement.

Mr. KATZENBACH. I am pleased to respond to your invitation for me to state the views of the Department of Justice with respect to title I of H.R. 7525, relating to the so-called *Mallory* rule. This rule, and what, if anything, to do about it, has been the center of much controversy.

In arriving at any conclusions upon which to base legislative action, it is essential that all persons charged with the responsibility of considering the legislation or making recommendations with respect to it should agree on just what the rule is.

It is generally agreed that it is a rule of evidence, stemming from the Supreme Court opinion in *Mallory* v. *United States*, 354 U.S. 449 (1957). That rule of evidence is, in turn, a judicial sanction through

which rule 5(a) of the Federal Rules of Criminal Procedure may be enforced. As you know, rule 5(a) requires that an arrested person shall be taken "without unnecessary delay" before the nearest available commissioner or before any other officer empowered to commit persons charged with offenses against the laws of the United States.

In *Mallory* the Court held that if an arrested person is not brought promptly before the nearest available commissioner but is held and interrogated by officers for the purpose of eliciting self-incriminating statements, such statements may not be received in evidence at the subsequent trial. It should be emphasized that the *Mallory* rule is in no way concerned with whether or under what circumstances a policeman may make an arrest. It stands merely for the proposition that a confession obtained from an arrested person before his arraignment will not be received in evidence in a criminal trial if obtained during a period of "unnecessary delay."

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 eye witnesses and independent evidence.

It is quite common in cases of homicide, yoke robberies, rape, and certain other crimes that there is no third eye witness, and it is often difficult for the complaining witness to make an identification. Of course, in homicides there is no complaining witness. Thus, in such cases, confessions assume far greater significance as evidence of guilt, and it becomes important to defendants to have their confessions excluded in the courts of the District of Columbia. Second, by contrast, most Federal criminal cases in other jurisdictions involve frauds, mail thefts, narcotic violations, and the like, where there is substantial evidence apart from a confession; i.e., contraband property, financial records, tax returns, et cetera.

Therefore, it is reasonable to consider the problems in the District of Columbia as being rather unique with respect to the *Mallory* rule and deserving of congressional consideration in legislation limited to its application to the District of Columbia.

In my opinion, the *Mallory* rule is a good one. Through it, the Supreme Court made clear its intention to prevent law enforcement officers from delaying preliminary hearings for the purpose of eliciting confessions. This is as it should be.

The problem which gives rise to the legislative proposal before the committee lies not with the *Mallory* rule but with its application in the District of Columbia.

In a number of cases in the District of Columbia "unnecessary delay" has been interpreted and applied to make it virtually impossible, I am informed, for investigating officers to speak with arrested persons with any assurance that resultant confessions will be acceptable in the courtroom.

For example, in *Elsie V. Jones* v. *United States*, 113 U.S. App. D.C. 256, 307 F. 2d 397 (1962), the defendant was arrested at 4:25 of a Sunday morning, confessed 3½ hours later, and was brought before a committing magistrate at 9 Monday morning. A divided court held her confessions inadmissible.

In *Charles S. Coleman* v. *United States*, 114 U.S. App. D.C. 185, 313 F. 2d 576 (1962), a delay of 2 hours and 5 minutes was, again by a divided court, held fatal to the admissibility of the conviction.

In *Tony A. Coleman* v. *United States* —, U.S. App. D.C. —, 317 F. 2d 891 (1963), a divided court permitted the conviction on one count to stand although based upon a confession given 1 hour after the arrest, but reversed the conviction on other counts based upon confessions given 2 or 3 hours after arrest.

Most recently, in a dissenting opinion in *Robert A. Muschette* v. *United States*, D.C. Cir. No. 17410 (July 25, 1963), it was contended that a confession obtained 25 minutes after arrest and 1 hour and 50 minutes before the arrested person was presented to the committing magistrate should be excluded.

This past summer, in *United States* v. *James J. Jones*, Criminal No. 366–63, the trial judge excluded a confession which occurred within 15 minutes after arrest and prior to presentment of the arrested person to the committing magistrate. The dissent in the former case and the ruling in the latter case were based on the ground that no interrogation of any length is permissible and, indeed, an arrested person is not to be taken to the precinct or to headquarters for booking and fingerprinting, but is to be taken before a magistrate forthwith. Thus, "without unnecessary delay" was considered to mean "without any delay."

Obviously, such an interpretation of the *Mallory* rule changes it from a rule of reason to an absolute prohibition of interrogation following arrest. In my opinion, this goes far beyond the evil against which the Supreme Court spoke out in *Mallory*.

As I indicated in my written report to the committee, dated September 13, 1963, interrogation itself is not a violation of due process or of other constitutional rights. Free of abuse, interrogation is a valuable investigative tool for arriving at facts.

The only safeguard in title I is that the arrested person must be advised he is not required to make a statement and that any statement made by him may be used against him. The dissents of four justices in two Supreme Court cases (*In re Groban*, 352 U.S. 330 (1957); *Anonymous* v. *Baker*, 360 U.S. 287 (1959)) suggest that such a warning is not adequate.

In the view of these justices, compulsory interrogation in camera, without permitting the arrested person to be accompanied by counsel, amounts to a denial of due process of law.

If, therefore, this committee concludes that some corrective legislation is necessary, it is my recommendation that at a minimum four essential safeguards of defendants' rights must be incorporated in it. In addition to expressly preserving the rule against unnecessary delay, the legislation must provide for—

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

(2) The arrested persons being afforded a reasonable opportunity to notify a relative or friend and consult with counsel of his choosing;

(3) A maximum of 6 hours elapsed time between arrest and completion of the confession; and

(4) A responsible witness, other than a law enforcement officer, observing the questioning, or a verbatim transcript or recording of the interrogation.

The above-mentioned safeguards are contained in legislation which was introduced in the House last April as H.R. 5726. That measure was prepared by the U.S. attorney for the District of Columbia.

Thank you very much. I shall be pleased to respond to any questions you may have.

The CHAIRMAN. Thank you, Mr. Katzenbach. I think several questions do suggest themselves. Your original report on this bill, dated September 13, 1963, among other things, says in regard to title I of the bill:

> However, it raises serious constitutional difficulties in dispensing with safeguards which the *Mallory* rule assured to persons charged with crime.

This is part of your opinion of September 13, 1963. I am sure you are very well aware that title I is now before us for consideration, has passed the House of Representatives in essentially its present form on at least four different occasions. In 1958, the Senate, by a vote of 65 to 12, passed a version almost identical with that contained in the House bill which we now have before us for consideration, except for the addition of the word "reasonable" before the word "delay." This was added by the Senate Judiciary Committee. When the bill went to conference, the Senate and House conferees accepted the word "reasonable" but also added a proviso in the proposed legislation that had the effect of making delay a matter to be considered in determining the voluntariness of the confession. I think it is fair to state that this proviso which was added to the amendatory language to rule 5(a) by the conferees in 1958 was ruled out on a point of order raised at a very late hour in the 1958 session of the Congress. So actually the amendment to rule 5(a) was not enacted into law. But in view of this legislative history, I would like to ask you what position the Department of Justice would take with regard to title I of the pending bill, if it were to pass in its present form.

Mr. KATZENBACH. If that legislation were to pass in its present form we would defend its constitutionality in the courts.

The CHAIRMAN. What recommendation would the Department of Justice make to the President?

Mr. KATZENBACH. Did you say to the President?

The CHAIRMAN. To the President, yes. Would you recommend that the bill be signed or would you recommend that the bill be vetoed?

Mr. KATZENBACH. I don't believe it proper for me to state at this time what recommendation the Department of Justice would make to the President, Mr. Chairman.

The CHAIRMAN. Why would that be? I am raising the question because your own opinion says that it raises serious constitutional difficulties.

Mr. KATZENBACH. I think that it does.

The CHAIRMAN. Would those constitutional difficulties be such that you would feel it was unconstitutional and recommend to the President of the United States that it be vetoed?

Mr. KATZENBACH. I believe that there are serious constitutional questions, Senator, and I can discuss those with the committee if you wish. If you are suggesting hypothetically that it would pass in this precise form now, I suppose that we would call those constitutional difficulties to the attention of the President. Whether we would recommend a veto or not is not something that I am prepared to say at this moment. I would say that I don't believe our report says it would be my opinion that the provision as it now stands is clearly and unequivocally unconstitutional.

The CHAIRMAN. It does not say that and I haven't suggested it.

Mr. KATZENBACH. It would raise serious constitutional questions that it seems to me Members of both Houses should consider this in terms of their legislative responsibilities. I am sure the President would consider those as well and I am sure that a report written to him by the Department of Justice would draw his attention to those difficulties, and also the fact, as I have just stated, that such a statute is more clearly unconstitutional.

The CHAIRMAN. I am not trying to do anything except to arrive at sound conclusions as to how we handle this particular problem. As you say, this is a highly controversial problem. It is one that has been before the Congress many times. There are divergent views as to whether it is or is not constitutional. All we are attempting to do is to arrive at a result that would be of some assistance to law enforcement here in the Nation's Capital. This would be my view as the chairman, at least speaking for myself. But I would have considerable concern if we were to enact legislation which the Department of Justice as the legal adviser for the President of the United States would feel was unconstitutional. This is all I am trying to determine.

Mr. KATZENBACH. Let me stand on what I have already said. I have not said that this legislation is unconstitutional. I have said that it raises serious constitutional questions, and I have attempted to give you the reasons, and I can put those at more length as to why it does. I do not know how the Supreme Court would hold in this case.

The CHAIRMAN. I recognize that the Department of Justice and the Attorney General cannot, of course, speak for the court. If the Congress should pass the legislation then let the courts determine its final legality. I recognize they are the final authorities as to whether an act is unconstitutional or whether it is constitutional. I would call to your attention that in 1958 the Attorney General in the Department of Justice, under date of August 18, 1958, stated this, and I think this should go into the record. It is directed to the law enforcement problem, speaking on legislation then before the Judiciary Committee in amendment of rule 5(a):

> It is directed to the law enforcement problem raised by the Supreme Court decision in *Mallory* v. *U.S.* (354 U.S. 448). Its scope is narrow. It is aimed at one legal problem. Its effect may be anticipated. In the *Mallory* case, the Court ruled inadmissible a confession made during a delay between arrest and arraignment which the Court considered to be unnecessary. The bill would provide for evidence including the statement and confessions otherwise would not be admissible solely because of reasonable 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. We have no objection to the enactment of this bill.

This was the position of the Department of Justice in 1958.

Mr. KATZENBACH. I think, Mr. Chairman, the record should also show that in 1959 the Supreme Court made another decision relevant to this problem in *Anonymous* v. *Baker* (360 U.S. 287).

The CHAIRMAN. What is the citation of that case?

Mr. KATZENBACH. 360 U.S. 287.

The CHAIRMAN. I mean the name of the case?

Mr. KATZENBACH. *Anonymous* v. *Baker*.

The CHAIRMAN. Yes. Your position is that the decision in 1959 would somewhat change the decision of the Department in 1958?

Mr. KATZENBACH. My point would be that in that case again four Justices on the then Court suggested that compulsory interrogation in camera without permitting counsel would be in violation of the Constitution, in violation of the due process of law. The composition of the Court has since changed.

The CHAIRMAN. The Senator from Colorado.

Senator DOMINICK. Thank you, Mr. Chairman.

Mr. Katzenbach, as usual, it seems to me you have given a very good statement here.

Mr. KATZENBACH. Thank you, Senator.

Senator DOMINICK. Just a few questions that I have. On these cases that you cite on page 4 as giving the situation in which confessions were ruled inadmissible, and that any conviction based on that should be reversed, now in those cases did the persons who were doing the interrogation, in fact, warn the defendants of their legal and constitutional rights to have an attorney, and that statements would be used against them, that they didn't have to make any statement at all, or is that not clear in the case?

Mr. KATZENBACH. I believe in at least some of those cases such a warning was given: is that correct?

Mr. ACHESON. That is right, Senator. The warning was given in all of those cases as I recall. That is a standard appurtenant to the regular form of interrogation.

Senator DOMINICK. So that in the normal course of events, absent the *Mallory* case then, these confessions would have been ruled as voluntary legal confessions, in your opinion?

Mr. KATZENBACH. Yes; I think they were voluntary. I don't think there was an coercion, and I think there was a warning. The point that we are trying to make in this is that the *Mallory* case as has been interpreted here in the District of Columbia has undoubtedly raised law enforcement problems, and the Department of Justice is much in sympathy with efforts to clarify the procedures and avoid the kind of situation that arose in the cases which we have put here. One of the principal problems in this is that you really don't know when you are prosecuting a case in Mr. Acheson's office whether or not a confession admitted by the trial court as it would be in all of these cases is or is not going to be overruled by the court of appeals.

In part this depends upon the composition I think of the court of appeals, and it is very difficult for us at least to guess, and that is almost what it is, as to whether or not such confession is going to be ruled out in that trial. Now very often there is probably enough evidence in this case, apart from the confession, to successfully prosecute. But the confession itself, where there is no coercion involved, is

really the best evidence. It satisfies perhaps the general public as well as the jury more than any other thing one can think of where it is voluntary and the person admits it. Subsequently to have this reversed some time later in the court of appeals and have to retry the case raises difficulties of time involved, and, of course, in recent cases there has even been a suggestion if you got the confession and then got other evidence as a result of it, that was tainted, and by giving the confession there might virtually be an immunity. Maybe the thing for criminals to do is to confess quickly in this situation and then have the court find that the confession is no good, and any leads that are gotten from it are no good. I am not being entirely facetious when I say that.

I also think as a matter of wisdom when I raise these constitutional questions that it seems to me fairly clear that there are four Justices still sitting on the Supreme Court who think that there are serious constitutional questions raised if you are not permitted to have counsel, and by the fact of interrogation. I find nothing of this kind in the *Mallory* case itself when I read it. I find it to be quite a reasonable decision in this respect. The facts were very different from the facts of these cases. The confession was for longer delays. The questioning made was of a far longer period of time. It involved some rather tricky questioning, the use of a polygraph and lie detectors, and in Mr. Justice Frankfurter's opinion there is a suggestion that it would not be an unnecessary delay if, for example, a witness volunteered a story which could easily be checked through going to third persons, and other normal police techniques. Now our concern is that if you simply modify directly the *Mallory* rule as this proposed title I would do, that that will be really an invitation to the Court to go along with the four dissenting Justices and to hold it unconstitutional. We believe that the reason behind the *Mallory* rule was the safeguards, the warning that had to be given and the additional safeguards of being able to contact a friend or contact a lawyer, to have the questioning witnessed so that you have independent verification of the process of questioning that there was no use of improper police techniques and that the confession was voluntary, and that given that kind of safeguard in the legislation the possibility of holding that legislation unconstitutional would be greatly minimized.

I would think that that would be the wise course of action to take. To simply modify the rule and to modify the decision would seem to me to be an invitation to have further constitutional discussion of this problem which might well go along the line of the dissenting opinion and leave the situation more difficult from the point of view of law enforcement than it presently is. That is the sum and substance, really, of the Department's position.

Senator DOMINICK. Mr. Katzenbach, in these cases they are all court of appeals cases. At least two of them are specifically referred to as a divided court.

Mr. KATZENBACH. Yes.

Senator DOMINICK. I don't know whether the *Jones* case was a divided court or not. I gather it is your feeling that the Court of Appeals has expanded the *Mallory* procedural or evidential rule and there were constitutional issues far beyond its originally intended scope. Now the question that I have in my mind is has there been any indication in the Supreme Court cases that the Court of Appeals extension of

the *Mallory* rule goes along with the Supreme Court philosophy as the Court is presently constituted.

Mr. KATZENBACH. There has been no disposition on the part of the Supreme Court to review any of these cases.

Senator DOMINICK. Have they denied certiorari on any of them or denied appeal?

Mr. KATZENBACH. Do you know the answer to that, Mr. Acheson?

Mr. ACHESON. My recollection is, Senator, that in the last year or two, perhaps the last 2 or 3 years, at least one case involving a *Mallory* question was sought to be reviewed in the Supreme Court and certiorari was denied. I know of no case in which the Supreme Court has confirmed or disavowed the rather extreme line of rulings that we cite here.

Senator DOMINICK. All right. Now, if I may, could I just ask you a couple of questions about your recommendations on adding certain safeguards to the proposed *Mallory* rule. You obviously would have the legal question right away under Recommendation No. 2 as to what is or is not a reasonable opportunity, to notify a relative or friend or consult counsel of his choosing.

Might you not get into the same bind on that as we are as to whether there is a reasonable or unreasonable delay in the *Mallory* ruling to begin with?

Mr. KATZENBACH. I would think, Senator, that whether or not there was a reasonable opportunity there would be a question of fact for the trial court, and the trial court could make a finding of fact in that respect.

Senator DOMINICK. One would surmise that this would be also true in the trial court ruling on whether a confession has been obtained with or without a reasonable delay?

Mr. KATZENBACH. It is without an unnecessary delay.

Senator DOMINICK. Doesn't the trial court make a finding of fact on that?

Mr. KATZENBACH. When it admits—yes, it does; when it admits the confession.

Senator DOMINICK. And in each of these cases presumably it made a finding of fact that this would not constitute an unnecessary delay and then the court of appeals reversed it?

Mr. KATZENBACH. I think it might be desirable for the legislation to state what a reasonable opportunity was.

Senator DOMINICK. How did you happen to pick 6 hours, in No. 3?

Mr. KATZENBACH. Like any period of time, it is somewhat arbitrary. We thought it ought to be on the short side. One of the things that lies behind the *Mallory* rule, I don't think it is the essence of it, though, is the coercion aspect. It seemed to us that a 6-hour delay, in the light of the cases and of experience would scarcely result in coercion, yet would be sort of fast enough to be reasonable.

By that I mean I was thinking in terms of an arrest late at night and how quickly can you get them before a magistrate. It seemed to us that 6 hours, if you took into consideration the nighttime problems, was a reasonable length of time, and 12 hours seemed to us rather too much, and 4 hours seemed rather too little.

Senator DOMINICK. Of course your recommendation of 6 hours' elapsed time between arrest and completion of the confession does not say anything about arraignment?

Mr. KATZENBACH. No. We have thought the validity of the confession really thought to be measured from the time of arrest to the time of confession. I think that is by and large consistent with the cases and even with the extreme cases here.

Senator DOMINICK. But the *Mallory* rule deals with not the time of confession but that deals with between the time of arrest and getting of a confession sometime during that period and the time of arraignment?

Mr. KATZENBACH. Yes; it does in a sense, Senator, but the *Mallory* case put a great deal of emphasis upon the fact that a number of hours after the arrest—and I have forgotten what it was, 12 or 14 hours.

Mr. ACHESON. About 11.

Mr. KATZENBACH. Eleven hours after the arrest the confession was obtained. And then after getting the confession, they went on to get several more confessions, and then eventually got him arraigned. But I thought and I believe that the whole thrust of that case is upon the time between arrest and the time of confession rather than the actual time of arraignment. This is why the one instance to us of a confession 25 minutes after arrest one judge felt was too long an elapsed time to us to represent a rather different philosophy approach than what I get from a reading of the *Mallory* case.

Senator DOMINICK. Wouldn't you feel that the 6-hour period if it was incorporated in the law would become kind of a flag which would be used by the arresting officer to hold all prisoners 6 hours before they took any action as far as arraignment is concerned?

Mr. KATZENBACH. I think that is a possibility, Senator, and I think that is one of the difficulties. On the other hand, if you are interested as we are interested in knowing whether a confession is certainly going to be thrown out or not, there was, it seemed to us an advantage in stating an absolute bar and an absolute rule so that you would at least have that part of it as firm as possible. It could be regarded in that way, although we would also support keeping the rule as it is, to say that he should be arraigned without unnecessary delay.

Senator DOMINICK. My previous question concerning the difference between the time of arrest and the time of confession, the time of arrest and the time of arraignment, is brought in by in part your statement on page 4 with reference to the *Jones* case, because in this the defendant was arrested at 4:25 of a Sunday morning, which I suppose means 4:25 a.m. on Sunday.

Mr. KATZENBACH. Yes.

Senator DOMINICK. She confessed 3½ hours later, but she wasn't brought before the committing magistrate until more than 24 hours after that period, after the confession. I have not read the case and therefore I don't know whether any point was made of this, but a point seems to be made of it in your statement.

Mr. KATZENBACH. I wonder whether I stated the facts correctly there and whether that should be Monday morning. I believe that that is an error in my statement there, and that the 4:25 should be of a Monday morning, as well as the 8 a.m.; is that correct?

Senator DOMINICK. Yes; Mr. Acheson?

Mr. ACHESON. May I clarify that? The confession that was involved in the *Jones* case was the written confession, not the initial oral confession. The first confession was made quite soon after arrest.

It was subsequently transcribed and confirmed in writing, and the morning of the following day the defendant was brought to arraignment before the Commissioner.

Senator DOMINICK. So that there was a rather substantial delay between the time of the confession and the time of arraignment. This is the point I was making.

Mr. ACHESON. That is correct. And Senator, you might have had occasion to notice the case, the decision of *United States* v. *Mitchell* in the Supreme Court 322 U.S. 65, which I think dates from about 1956. That makes it clear that the delay that takes place between the time of confession and the time of arraignment is really immaterial for purposes of application of the *Mallory* rule. It is the delay that produces the confession which is the significant thing. The *Mitchell* case makes that quite clear, and I don't know of any case that indicates that thinking has been reversed in the Supreme Court.

Senator DOMINICK. All right. Now on your fourth recommendation you say:

> A responsible witness other than a law enforcement officer should observe the questioning, or the recording of the interrogation.

Who do you mean or what type of person? Are you thinking of a court reporter, a stenographer, or are you thinking of a lawyer on behalf of the defendant or are you thinking of a friend or a relative on behalf of the defendant or what?

Mr. KATZENBACH. That or a person of good reputation in the community, a priest, a minister.

Senator DOMINICK. If you arrest someone at 4 a.m. Sunday morning you are going to have kind of a hard time unless someone is connected with the case in getting anybody down to court, aren't you, or to go to a police station?

Mr. KATZENBACH. I don't think that is necessarily true, Senator. In the area in which I lived in Chicago before I came with the Government here, the police within that area always secured, when somebody was arrested, an independent witness to look at the questioning, and it was extremely helpful in terms of credibility of what happened during the questioning to have a person unconnected do that. A number of citizens were quite happy to volunteer for this and to make sure that any questioning, any interrogation was fair in this respect.

Senator DOMINICK. Was this a matter of a law or was this a matter of procedure?

Mr. KATZENBACH. It was a matter of procedure and practice, and I think probably it was confined to one or two precincts in Chicago, the university area where I lived. This has been suggested as a means of insuring that any claims that any confession was coerced could be rebutted, and the police in these precincts at least followed that practice with some regularity.

Senator DOMINICK. Are you recommending under No. 2—and I might say in passing that I think your procedural statement of what the police did is most helpful. I think if we could get that moving in other jurisdictions it might be a real help, but are you recommending under No. 2 that the relative or friend who is notified, and the consultation with counsel of his own choosing should take place during the questioning by the police or prior to the start of it?

Mr. KATZENBACH. It should take place prior to any interrogation

of the witness. I would assume in the normal course of things that the man is taken into custody and that when he arrives at the precinct station, he should be given this opportunity to make a phone call to a relative or to a friend or to a lawyer.

Senator DOMINICK. At least one of our witnesses has indicated that if these people do get counsel, the counsel will tell him to say nothing, which is the general role of a counsel defending a defendant.

Mr. KATZENBACH. That is certainly Perry Mason's constant advice.

Senator DOMINICK. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. The Senator from New Hampshire.

Senator MCINTYRE. I understand, then, that you feel the *Mallory* rule is a good rule, generally speaking?

Mr. KATZENBACH. Yes, I do.

Senator MCINTYRE. Do you understand also that it does pose some problems for the District of Columbia in its enforcement of law and order?

Mr. KATZENBACH. I think the *Mallory* rule as it has been interpreted by the court of appeals here in the District does pose such problems.

Senator MCINTYRE. Are you suggesting to this committee that there are four areas where you feel that the law if passed in its present form might very well raise some serious constitutional objections?

Mr. KATZENBACH. That is correct, Senator.

Senator MCINTYRE. What I would like to be informed about is this: As I look over these four provisions, What is the accepted practice or what is required by the law today here in the District of Columbia when an arrest is made? If an arrest is made can a man be brought to the police station and immediately shoved into a chair and the interrogation commence or does he have to have these things? Is this accepted practice or is it required by law that first of all he be informed that he need not make any statement at all. Is this being done or isn't it?

Mr. ACHESON. At the present time, the procedure is, Senator, that, of course, probable cause is required to justify the arrest. After the arrest is made, the case law provides that there are certain administrative steps that are entirely justifiable and even necessary which call for the taking of the defendant to the police station, the precinct, or the headquarters where he will be fingerprinted, photographed, and a lineup sheet involving his vital statistics, prior record, and all that filled out, and when that is accomplished, he may be briefly questioned to determine whether he has got any statement to make on the case.

He may not be held for a long period for the purpose of interrogation, because *Mallory* forbids that. But he may be initially interrogated to see whether he has a statement to make or an alibi or anything which, on its face, would tend to exculpate him. In connection with that interrogation defendants frequently confess. This is called a threshold confession, and it has been in the past allowed to be introduced in evidence by the District judges and by the courts of appeals. We are now reaching the point where successive opinions of the court of appeals have tended to shrink the period in which a threshold confession may be elicited. This initial interrogation is

beginning to be squeezed away. Now as far as the four elements here are concerned, the safeguards proposed in the bill H.R. 5726, the police at the present time do warn the defendant that he need not make a statement.

Senator McINTYRE. This is just the practice?

Mr. ACHESON. That is a standard practice.

Senator McINTYRE. Not required?

Mr. ACHESON. I won't say it is not required, Senator. I think if they stop doing it, and if they elicited confessions, the courts would probably exclude them. It is an absolutely uniform practice. It is done in every case, so far as I know.

The CHAIRMAN. Might I interrupt at that point for a question?

Senator McINTYRE. Surely.

The CHAIRMAN. On this first safeguard that you are testifying to, do you run into problems when you actually get to court in accurately ascertaining whether a warning was or was not given to the defendant? It occurs to me that this first safeguard that you suggest might lead to considerable areas of controversy. I have always thought it is a fairly standard practice everywhere in the United States to give this warning about any statement being used against you. But don't you run into the problem of the police saying, "Yes, we gave the warning," and the defendant saying, "No, you didn't tell me a thing about it"?

Mr. ACHESON. Not very frequently, Mr. Chairman. I think it is known to the courts that this is such a standard practice that unless there is some solid evidence that the warning was not given, they assume it is. Now in the case of a written confession, the warning is right there in print on the statement which is subscribed by the defendant, and almost in no case is there any rebutting evidence that it was not given in that situation.

I do not feel it is a device. I think the warning is given. The police do comply with this condition in a bona fide way. And as far as I am aware, and I think I would know if it were otherwise, it is standard practice.

Senator McINTYRE. You were going to talk about the second element.

Mr. ACHESON. As to the second element, occasionally a relative of the defendant does come down to the police station when they are notified that the defendant is being held there. Occasionally they will retain counsel for the defendant and counsel will come down to the police station. When that happens, it is commonplace for the counsel or the relative to be allowed to speak to the defendant at some point during the proceedings. But there is no fixed practice, of course, that the interrogation must be suspended until a lawyer or a relative arrives.

Senator McINTYRE. Let me interject this question. If a lawyer arrives, is there any attempt by the police to keep this lawyer from the suspected criminal until they have had a chance to get this threshold confession of which you speak?

Mr. ACHESON. I think there are situations where the lawyer arrives at a time when the interrogation is actually going on. Under those circumstances, I doubt very much if the interrogation would be interrupted. I hesitate to generalize there, Senator, there is such a variety of facts in the situations that come up here.

Senator McINTYRE. Yes. Well, what I was mostly concerned with was that the practices that I have seen are followed here in the District of Columbia. In other words, the attorney comes in, interrogation is going on, the attorney is allowed to instruct the witness in the Perry Mason formula?

Mr. ACHESON. Oh, yes.

Senator McINTYRE. This is very important.

Mr. ACHESON. Where he arrives timely, where the interrogation isn't completed by the time he arrives, I am sure that is the practice.

As far as element No. 3 is concerned, I think in some very high percentage of the cases a confession is made if it is going to be made at all, within an hour or two, perhaps 3 hours after arrest. I don't believe for that reason that the 6-hour detention would become standard in every case. In the great majority of cases a confession is made fairly promptly after arrest. Of course, a confession is withheld because the defendant thinks the police have nothing on him. When he finds out they do, he very frequently confesses. You get some cases like *Killough* in which the police can not get anything on him and he will not confess even though he is held for a few days. We certainly don't suggest that there is any legislation that is practicable which would cope with a situation like that.

Senator DOMINICK. Would the Senator yield at that point?

Senator McINTYRE. Yes, I would be happy to yield.

Senator DOMINICK. I would just like to get your estimate of the likelihood of this. If this becomes a part of the written law; namely, a maximum of 6 hours, isn't it entirely possible that the at least hardened criminals would take this into account and simply wouldn't open their yap until more than 6 hours had gone by, and then it wouldn't make any difference what they said? Any confession or anything that they said would be ruled out?

Mr. ACHESON. Senator, I think that is attributing a degree of sophistication to even a hardened criminal that very few of them seem to possess. At the present time for all practical purposes if he can hold out for 2 hours, 2½ hours, he is pretty well in the clear, but very few of them do.

Senator DOMINICK. So your answer to the question is that you don't think that this would give them an additional escape hatch?

Mr. ACHESON. I do not.

Element No. 4, just to finish this, goes back to your question, Mr. Chairman. The witness or transcript or recording which is called for in element No. 4 would prevent the very controversy that you suggest from coming into a trial and being taken seriously where there was not factual support for it as to what happened at the interrogation.

Senator McINTYRE. Who would normally be this responsible person? Where would you find such a responsible person, go out in the street and get him?

Mr. ACHESON. It is in the alternative here, Senator. The probability is that the practice would be to set up a transcription system or a reporting system instead. Where there was a responsible person in the shape of a relative or counsel that happened to be there, they might prefer to protect the interrogation in that fashion.

Senator McINTYRE. Is this responsible witness—I take it the answer is obvious—is this responsible witness or verbatim transcript or recording not a customary practice in the District of Columbia today?

Mr. ACHESON. I don't believe so, but I would prefer to leave that question to the Chief of Police.

Senator McINTYRE. Do I understand that it is an accepted practice that the suspect be given an opportunity to telephone his friends or relatives or his attorney?

Mr. ACHESON. There again I think he is. Usually, Senator, these people don't know a lawyer.

Senator McINTYRE. I appreciate that.

Mr. ACHESON. They may have a relative.

Senator McINTYRE. I appreciate that, but it is the opportunity?

Mr. ACHESON. They are offered the telephone. I think a classic situation here is the famous defendant Killough in a murder case, who was offered the telephone. He did not make use of it. He didn't know a lawyer to call. But he could have called a relative or called anyone he chose. I think the answer is "Yes," as far as I know, they are allowed the opportunity.

Senator McINTYRE. Of course, I realize the practicalities of this thing in going down the drain but of course we are interested in the opportunities for protection of these rights that are so important. Of course I am not familiar with the problems of a tremendous big city like Washington. Do the police offer to this person names from the Legal Aid Society or other opportunities for counsel or names of attorneys, just a list?

Mr. ACHESON. I think the police with some reason feel that it would be quite improper for them to select counsel for defendants, and I believe that the legal agency at the present time is not authorized to accept the call of the police to represent defendants in the custody of the police.

Senator McINTYRE. Nothing in my question was meant to indicate that I thought the police should select counsel.

Mr. ACHESON. I understand.

Senator McINTYRE. In a smaller city you would just give them a list of attorneys. One thing I wanted to get straight in my mind is this: In looking over these decisions that you indicated here, I realize you are compressing the facts down to a number of hours, but certainly in these cases there must be something that goes to the voluntariness of the confession. Are these facts all that are necessary, two or three and a half hours are sufficient to throw the question out?

Mr. KATZENBACH. That is right, Senator. There is no question in any of these cases as to the voluntariness of the confession.

Senator McINTYRE. No question at all as to the voluntariness?

Mr. KATZENBACH. No, sir.

Senator McINTYRE. This is a safeguard written into this *Mallory* rule which indicates that a delay of time is an implication that there may be some undue force at work.

Mr. KATZENBACH. I think that is one of the reasons in the *Mallory* rule, but only one. I don't think—they do go back to *McNabb*. In the *Mallory* case and they do talk about that, but the test is not whether or not the confession is voluntary. It is far more automatic even in the *Mallory* case. They say rule 5(a) was not complied with

in this case, and if it was not complied with as a method of forcing the police to comply with the rule of the Court requiring prompt arraignment, they are going to exclude the confession no matter how voluntary, no matter how true, no matter how accurate that confession is, if there is a suggestion that the confession was obtained during a period of time which constituted an unnecessary delay prior to the arraignment. I don't believe—well, one of the bases for the rule 5(a) may have been, and it is suggested again in *Mallory*, that the longer the delay, the more opportunity for improper police conduct. I don't believe that the *Mallory* rule rests entirely on that. It is a way which the Court has chosen, the Supreme Court chose in that case, of making sure that the rules of the Court were complied with by putting a sanction upon the prosecution in the form of excluding any confession which was obtained.

It is for that reason that it would be our view that if other effective means of insuring that the proper safeguards were in fact complied with, that the constitutionality of some questioning during that period would be preserved. But if the law contains no safeguards in this respect except the safeguard of voluntariness, it is our suggestion that the Court might find some of these other safeguards ignored or jeopardized, and thus elevate the *Mallory* case which is presently simply a rule of evidence, into a constitutional decision. Would you agree with that?

Mr. ACHESON. I would agree with that.

Senator MCINTYRE. It is pretty hard for me to understand why the common law test, the real essential test of a confession, got so out of whack, here with this Federal procedure. Is it criminal procedure, that an arbitrary determination of a number of hours should be sufficient to rule out the confession so long as the confession is free and voluntary. I would say yes, 14 hours, 16 hours or something like that, where there are circumstances showing that a delay went to the essential elements of the confession, but I don't see one and a half hours or 30 minutes. This doesn't make very much sense.

Mr. KATZENBACH. That certainly doesn't make very much sense in terms of voluntariness and I think that is why the courts did not put that on the basis of voluntariness. What the court is suggesting is that there are other rights in addition to the right to be protected against a coerced confession. There is, for example, the right to consult counsel, the right to know what it is you are charged with which is what you get on the arraignment and prior to that that may be just a little bit vague as to just exactly what it is you are charged with.

Those would be primary other rights in addition, I suppose to the voluntariness not to be tricked into a confession, not to be coerced, not to be misled by the police in terms of just get it off your chest and nothing serious will happen to you, or something of that kind. I am not suggesting that does occur. I am only suggesting that absent a record of what does occur, there is always the possibility that, one, that it could occur and, secondly, that the defendant would claim that it has occurred. But it is not really simply a test of voluntariness, and I don't think the court of appeals has any idea that these confessions are not voluntary in the usual sense of the word. In fact, in the 25-minute business, the theory I think of the judge who took that view is that since you then had all the evidence that you needed to arraign this person, it was improper to ask him any questions.

Senator McINTYRE. One final question. Taking into account all the crimes that are committed in this district, do both of you feel that a substantial number of criminals evade punishment because of this?

Mr. KATZENBACH. I don't know of any facts that could be cited that would lead to that conclusion.

Senator McINTYRE. I take it your answer means that you do not believe there are a substantial number of criminals that evade punishment because of the *Mallory* rule?

Mr. KATZENBACH. I phrased it as I did, Senator, because people whose judgment I respect do take the view that there are. I simply don't know of any way of establishing that by——

Senator McINTYRE. There are no statistics on it?

Mr. KATZENBACH (continuing). By factual evidence that would lead anybody to that conclusion.

Senator McINTYRE. Of course, the question is directed to you more as an opinion as an expert. May I ask this same question of Mr. Acheson?

Mr. ACHESON. Senator, let me answer by indicating the disposition of some of the defendants whose cases are cited here in Mr. Katzenbach's statement, because I think they are typical of the way the normal *Mallory* reversal by the court of appeals is ultimately disposed of.

Elsie Jones pleaded guilty, after the reversal of her conviction, to manslaughter, and received a sentence of imprisonment from 1 to 4 years commencing January 11 of this year.

Senator McINTYRE. Just a minute. I don't know what she was charged with here. What was she charged with in the first instance?

Mr. ACHESON. She was charged with murder.

Senator McINTYRE. Well, that is not bad, reduction from murder to manslaughter. All right.

Mr. ACHESON. Charles Coleman entered a plea of guilty to unauthorized use of a vehicle, and was sentenced in May to imprisonment for a period of 8 months to 2 years. As I recall, he was charged originally with robbery, and murder.

Senator McINTYRE. And he pleaded guilty to what?

Mr. ACHESON. Pleaded guilty to unauthorized use of a vehicle. Tony Coleman, of course—now his conviction was reversed on six counts but affirmed on one, and the six counts that were reversed were dismissed. By the time the appellate reversal came down, he had already served the sentence on the one count that was affirmed, so that he is now out of custody.

It is the practice, of course, of this court, as you may know, Senator, this District court, in most cases to enter judgment of sentence on multiple counts which are concurrent sentences rather than consecutive.

Now there is another case pending which I wouldn't want to comment on in detail now, the *Killough* case. I don't know how that will end. But I would say, to generalize, that a number of defendants have escaped the punishment that they deserved, certainly the punishment which was sought to be imposed upon them, because of the *Mallory* case. I think very few were turned loose in the street as a result of that decision.

Senator McINTYRE. Then I take it your answer is that because of the *Mallory* rule there is not a substantial number of criminals who

evade punishment. They may in some instances evade the punishment they deserve. They usually end up with some.

Mr. ACHESON. That is correct.

Senator MCINTYRE. Thank you.

The CHAIRMAN. The Senator from Colorado.

Senator DOMINICK. I would just like to ask again as a couple of experts in this situation here, your opinion on the following. I have a basic feeling that the more legislative standards you put into the law which must be complied with prior to a conviction, the more shillelaghs you give to a defendant attorney to say that they haven't been lived up to. What would be your feeling on the constitutionality of the law if you just put in 1 and 2 of your recommendations as opposed to all four of them?

Mr. KATZENBACH. I would think that would go a long way toward solving the constitutional difficulties. At the same time something would have to be set to make sure that the present practice was not continued. I take it you assume this would be with a modification of rule 5(a).

Senator DOMINICK. Yes.

Mr. KATZENBACH. I think that would go a long way toward doing it. I would think that as far as requirement four there was concerned, that I doubt—I don't know the cost of it but I would doubt—that apart from the cost that would be a very burdensome requirement on the police.

Mr. ACHESON. That is correct.

Mr. KATZENBACH. It would seem to me, one that they might be quite willing to undergo. I believe that the conduct of the police, I am sure here in the District of Columbia, and I think in many other cities, is professional, exemplary professional conduct.

I think one of the problems is that there has been enough talk about rubber hoses and clubs and improper police practices that there is sort of a mythology about this that I think influences the opinions of at least some judges that are not really familiar with what actually goes on. I would think that requirements such as we have suggested, that that would be one way of showing the general public and the courts that what is done is done in a decent professional way.

Senator DOMINICK. Now one more question, and then I think I am through. On the top of page 6 you talk about the dissents of the four Justices in the two Supreme Court cases which you mentioned, *Groban and Anonymous* v. *Baker*. Is it your feeling that if the proposed change in rule 5(a) is made without at least 1 and 2, that the dissents of the four Justices might become the majority opinion of the Court?

Mr. KATZENBACH. Those four Justices are still on the Court. It needs one more to make it the decision.

Senator DOMINICK. But I am in effect asking you whether you think that this would——

Mr. KATZENBACH. I think it is quite possible, Senator, yes.

Senator DOMINICK. To shove over a couple more to their side.

Mr. KATZENBACH. That is right. I think that it might, and that I suppose would guarantee written into the law that the risk of that kind of holding is unconstitutional along with an opinion that really put them in as a constitutional matter would be minimized.

Senator DOMINICK. Thank you.

The CHAIRMAN. Very much in line with the questions which Senator Dominick was just asking you about the first two safeguards, it also occurred to me that if we built in all four of the safeguards which you suggest, you might be hamstringing the police more than you are helping them.

Would you have any views on that, Mr. Acheson? I understood Mr. Katzenbach to say if you put in the first two safeguards in his opinion it would be constitutional. Do I correctly understand you?

Mr. KATZENBACH. I think it would help a great deal in that respect, yes.

The CHAIRMAN. It would help a great deal. If you put all four in, are your standards going to be so rigid and so fixed that it is going to handcuff the police more than they claim they are handcuffed now by the *Mallory* decision, because this is their claim. It is just that simple.

Mr. ACHESON. I would not think so, Mr. Chairman.

The CHAIRMAN. You don't think so. Well, we are going to have the Chief of Police next, so we will get his views.

Mr. KATZENBACH. Requirement No. 1 is pretty much the practice now. Requirement No. 3, as I indicated, is not really a terribly important factor in the normal case that involves 1 or 2 hours. I should not think requirements 2 or 4 would be terribly burdensome, but of course I don't speak for the Chief on that.

The CHAIRMAN. I understand. He is the next witness, and we can solicit his views on that.

Our staff has suggested questions that I would like to ask you. As you know, one is the former assistant U.S. attorney here in the District of Columbia with some 10 years of experience, and the other staff member is a former assistant U.S. attorney in Maryland. These are some questions that they have suggested.

Is it a fact that in a great number of criminal cases occurring in the District, the accused are not brought before a committing magistrate without unnecessary delay as defined in *Mallory*, but rather they are held in police custody for hours awaiting the convening of the court or the availability of the U.S. commissioner? Would you know, Mr. Acheson?

Mr. ACHESON. Well, I think the regular practice in night arrests where a confession is not an essential element of the case against the defendant, is to arrest him, charge him, fingerprint him, photograph him, and then put him in the lockup for his appearance before the commissioner at 10 o'clock the following morning.

If he is arrested during court hours, he has his appearance usually very promptly. If he is arrested at night, it has always been thought legitimate and in full compliance with the provisions of the law to bring him before the magistrate when court opens in the morning.

Where a confession is an important element of the case, and it is thought important to protect that confession, he is normally arraigned before a magistrate at some nighttime arraignment. The magistrate is called out of bed frequently or away from dinner or whatever, at the request of the prosecutor.

The question, if I may say, rather presents the same legal issue that we are talking about.

The CHAIRMAN. I understand.

Mr. ACHESON. Is the defendant held with unnecessary delay? Well, if he is held for 2 hours, I would say no. Perhaps some judges might say yes.

The CHAIRMAN. It seems to me the question also poses the additional thought, if I understand you correctly, that if you tried to get the confession, then you follow the practice of taking him before a committing magistrate without unnecessary delay, but if you don't think you are going to get a confession, you follow a little different rule.

So the poor defendant, in whose case you don't have to rely on a confession, spends a longer time in jail before he goes before the committing magistrate. Is that a fair statement?

Mr. ACHESON. Senator, I think everyone involved would be complying with the law if all defendants who are arrested at night were properly charged, locked up overnight, and presented at 10 o'clock in the morning. Now if more speedy presentment is accomplished in the case of some defendants, I should not think it was a prejudice to the rights of the others.

The CHAIRMAN. Fine. Thank you.

It was suggested by Assistant Dean Pye, of Georgetown University Law School, who appeared here several days ago, he informed the committee that the American Law Institute was undertaking a 2-year study of arrests, detention, and search and seizure problems.

In your judgment should actions on titles 1 and 3 be delayed pending a study of the American Law Institute's findings in this respect?

Mr. ACHESON. Would you like Mr. Katzenbach to answer that?

Mr. KATZENBACH. I have the greatest respect for the American Law Institute, but I don't see any reason why Congress should delay action that it feels is necessary pending study by that body. You can always consider their recommendations subsequently, and amend any laws in the light of anything that they come up with.

The problem here in the District of Columbia has been urged by those responsible for law enforcement that it be an urgent one, and I think they state that with good faith and conviction, and I would not feel that there was any reason to await a study by an outside body of a more general problem.

They are concerned after all with this problem in all of the States, and I am sure, as you are aware, Mr. Chairman, the State courts and the practices in the States of the United States are not that of the District of Columbia, because there is no *Mallory* rule applicable in the State court proceedings, that being a rule of evidence in Federal cases.

The CHAIRMAN. I recognize that this is a Federal rule. However, we heard testimony from various chiefs of police throughout the country that the *Mallory* rule was having its effect even upon State decisions.

I think it has been indicated that the *Mallory* rule has now been cited in some 150 cases, some such number that have occurred in various places both in Federal courts and State court levels recognizing it is not binding on a State court, but they are moving more and more toward the *Mallory* rule.

Mr. KATZENBACH. I have no doubt that would be true, Mr. Chairman, but I think probably Chief Murray would be happy to change places with virtually any other police chief with respect to the interpretation of the *Mallory* rule.

The CHAIRMAN. Well, I have heard him many times. I would not be surprised that this is a correct conclusion.

Mr. ACHESON. Mr. Chairman, it might not be inappropriate to just flag for the record, just one example of a State having an almost duplicate of rule 5(a), and the question arose in a case in which a confession was obtained whether a ruling like the *Mallory* ruling should be employed by the State court to enforce that rule of speedy presentment and exclude the confession in the case.

The Supreme Court of Oregon held that they would not follow such a rule in *State* v. *Shipley*, 375 Pacific 2d 237. It is an interesting discussion of a problem that perhaps illustrates the division of philosophy between some of the State courts and the Federal courts.

The CHAIRMAN. The Supreme Court of Oregon said they would not follow the *Mallory* rule.

Mr. ACHESON. That is correct, even though they did have a counterpart of rule 5(a) in the State code.

The CHAIRMAN. I understand. May I ask just one final question. During some of the earlier testimony it was stated by one of the witnesses that the U.S. attorney's office has done a wonderful job, but that the number of assistants were inadequate and that more assistants were needed to carry out the day-to-day assignments. This should probably be directed to you, Mr. Acheson. Would you care to comment upon that particular statement?

I think all attorneys, the U.S. attorneys and assistant U.S. attorneys say they are overworked, but do you have a sufficient number of U.S. attorneys and assistants to handle the job in the District of Columbia?

Mr. ACHESON. In a job that is as hectic as mine perhaps the best distinction one can hope for is to be one public official that did not ask for a larger office. We try to take care of our manpower problems within the Department on a when, as, and if needed basis, and I think at the present time we are staffed adequately, even though it does involve a heavy pressure on the assistants.

The CHAIRMAN. You think you are adequately staffed?

Mr. ACHESON. Yes. They work hard, perhaps too hard, but I would not want to say that they can't do the job.

The CHAIRMAN. One of my own personal observations in the field of the U.S. attorneys and their assistants is that they are not paid a sufficient amount of money, and this is nationwide. I am not confining this to the District of Columbia.

My experience has been that they start an assistant U.S. attorney out at, I think this is correct, $6,000 or $6,500 now I think, and then after a year they are raised to $7,500. This will attract a young attorney who wants the experience for about 2 years. As soon as he gets this experience to where he is helpful, he moves on into private practice.

Of course, I think this is a nationwide indictment of the system. It should be moved up so that you can have the best possible legal talent in the various U.S. attorneys' offices. Mr. Katzenbach might like to comment on that.

Mr. KATZENBACH. I agree with you, Senator. I think that we have improved in the last 2½ years the situation with respect to the pay of assistant U.S. attorneys, and, of course, have had some improvement within the Department of Justice as well.

We have a problem in the U.S. attorney's office and to a degree, quite a considerable degree, within the Department of Justice itself where it is extremely hard under the present circumstances to hold the really able young attorneys and to keep them as career attorneys.

I believe that we should look for career attorneys equally in the U.S. attorneys' offices and in the Department of Justice. I think to operate efficiently, particularly in the larger offices, you do need a cadre of experience that U.S. attorneys who would maintain that position on a permanent basis, irrespective of changes in administration.

It has too often been the practice in the past in the U.S. attorney's office for there to be virtually a complete turnover of personnel with the incoming U.S. attorney. Not always by any means is it his choice.

I think in the bigger offices such as that of Mr. Acheson's, the southern district of New York, or any of the other big offices, a new U.S. attorney coming in, whether he be a Republican or a Democrat, would just be delighted to keep any experienced personnel that he has, irrespective of their political affiliations.

The CHAIRMAN. Thank you very much. You have been most helpful and most patient in answering our questions.

Mr. KATZENBACH. Thank you.

(The prepared statement submitted by Mr. Acheson follows:)

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

My prepared remarks are addressed to title III of H.R. 7525, since the Department of Justice has, through Mr. Katzenbach, expressed its views and my own on title I.

Title III contains a section providing for detention of suspects and a section providing for the detention of material witnesses.

The former, section 301, is based upon the Uniform Arrest Act. As Mr. Katzenbach's letter of September 13 stated, those provisions purport to authorize arrests without probable cause, contrary to the fourth amendment. The provision in subsection (c) to the effect that detention is not to be an arest would not control in any analysis of whether the fourth amendment barred such detention.

Section 301 raises difficult questions of denial of fifth and sixth amendment rights, since it appears to deny access to counsel during the 6-hour detention, and deprives an arrested person of bail, communication, habeas corpus, and impairs his privilege of silence during the period of detention. For these reasons the Department of Justice opposes section 301.

Section 302 in our judgment requires amendment, but has a useful purpose. Properly amended, it does not appear to raise insuperable constitutional problems. We believe amendment is necessary for the following purposes:

1. To eliminate 6-hour detention and provide for presentment to a magistrate without unnecessary delay.

2. To require the magistrate to determine whether the witness is material and whether there is a reasonable probability he will be unavailable.

3. To provide discretionary authority in the magistrate to release a witness on personal bond if he is financially unable to post bond, or modify bail.

4. To provide for depositions of witnesses who are committed, in the fashion provided by rule 15(a), of the Federal Rules Criminal Procedure.

5. To provide that the witness should have the right to consult counsel and should be advised of this right.

We have developed these and other proposed amendments at greater length in Mr. Katzenbach's letter of September 13, and we suggest that the committee consider S. 1148 as a preferable starting point for a satisfactory material witness bill.

I have also been asked to present the views on title III of the Council on Law Enforcement in the District of Columbia of which I am vice chairman. The council opposes the enactment of section 301 of title III, since a majority of the members believe that this section is merely a reinstitution of arrests for investi-

gation, inconsistent with the provisions of the fourth amendment to the Constitution of the United States.

The council supports the enactment of section 302, provided it is amended in the fashion recommended by the Department of Justice and the Commissioners for the District of Columbia.

The CHAIRMAN. Our next witness will be Police Chief Murray.

STATEMENT OF ROBERT V. MURRAY, CHIEF, DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT; ACCOMPANIED BY JOHN B. LAYTON, DEPUTY CHIEF OF POLICE, CHIEF OF DETECTIVES; AND JERRY V. WILSON, CAPTAIN, BUDGET OFFICER

Mr. MURRAY. I have with me Deputy Chief Layton and Capt. Jerry Wilson.

The CHAIRMAN. We are very happy to have both witnesses accompanying you.

Mr. MURRAY. I have a statement which I would like to put in the record.

The CHAIRMAN. Without objection you may incorporate your full statement in the record at this point. You may highlight it in any manner.

(The statement referred to follows:)

STATEMENT OF ROBERT V. MURRAY, CHIEF OF POLICE

Mr. Chairman, titles I and III of H.R. 7525 are designed to fulfill the three paramount needs for legislation to improve law enforcement in this city. Altogether, these two titles would provide for—

1. Clarification of the intent of Congress as expressed in rule 5(a) of the Federal Rules of Criminal Procedure;
2. Legislation in the nature of the Uniform Arrest Act, as an alternative to the now prohibited practice of investigative arrest, to empower police officers to detain probable felons for questioning; and
3. An effective statute authorizing the detention of a material witness to the commission of a felony.

Mr. Chairman, from the standpoint of police operations, these three items are the outstanding legislative needs of this city; I would rank them by importance in the order I have just listed them.

As I have frequently reported to the Congress, under the hampering effect of the *Mallory* ruling and corollary decisions, our rate of offense clearance has decreased and the related effectiveness of swift arrest and punishment and of removing criminals from the streets has been diminished. I have previously furnished to this committee a table with an explanation showing the readily apparent relationship of the *Mallory* decision to the clearance of part I felonies in the District of Columbia; for the convenience of members of the committee, I have furnished additional copies of that material for their examination today. This table reflects the fact that, for the fiscal year 1963, our rate of clearance of part I felonies stood at 44.6 percent, the lowest rate for any of the past 12 years.

Second only to the need for legislation to broaden police authority and police procedures under rule 5(a) is the need for a statute to empower police officers of this city to detain probable felons for questioning. As this committee is aware, since March 15, 1963, arrests for investigation by the Metropolitan Police force have been prohibited by order of the Board of Commissioners.

I have furnished today, for the information of the committee, a table comparing our crime clearance rates, by months, for the calendar years 1960, 1961, 1962, and 1963. These data clearly reflect the adverse effect which changed policies on arrest for investigation have had on the clearance of crime in this city. For the calendar year 1960, before the Commissioners' Committee began its study of arrests for investigation, this department cleared 59 percent of the serious (crime index) offenses reported in this city. In March 1961, when the study by the Committee began, the rate of crime clear-

ance immediately declined, and for that calendar year our rate of clearance for serious offenses dropped to 51 percent. This decline in rate of clearance continued through the calendar year 1962, and for that first full calendar year after the examination of investigative policies was begun, our clearance of serious offenses dropped to 45 percent. Comparison of data for the first 9 months of 1962 and 1963 will clearly show you that our clearance rate for this calendar year is likely to be even lower.

On the subject of detention of witnesses, in its printed report, the Commissioners' Committee on Police Arrests for Investigation pointed out that the present statute governing detention of material witnesses in the District of Columbia is so cumbersome that it is of no practical value to the police and is almost never used. The Committee recommended reexamination and possible improvement of the statute and regulations on that subject. I am in full accord with that particular recommendation of the Committee.

I want to emphasize to you, as I did to the House District Committee, that any material witness legislation, to be effective for the police, must, as the Commissioners' Committee on Police Arrests for Investigation put it, "Play its proper function in insuring that persons who have knowledge of a crime will not disappear before a trial of the offense can be had."

To serve that function, the statute must be applicable to material witnesses before, as well as after, formal initiation of proceedings by the criminal courts. Section 302 of H.R. 7525 does fulfill that purpose.

Mr. Chairman, opponents of legislation to negate the *Mallory* rule and of legislation in the nature of the Uniform Arrest Act have put forth several arguments in support of their opposition. Four principal arguments are, first, that the current rules governing detention of suspects by the police prevent police brutality; second, that increased efficiency of the police force would obviate the need for legislation to overcome the *Mallory* ruling; third, that increased reliance by the police on scientific investigative techniques would overcome the problems imposed by prohibitions against questioning of a suspect, and fourth, that crime rates and crime clearance rates of the District are really not too bad in comparison with other cities and that, therefore, legislation regarding *Mallory* and the Uniform Arrest Act is not actually needed.

The premise regarding police brutality is an obviously fallacious one. First of all, police brutality had nothing whatever to do with the *Mallory* ruling; not the slightest suggestion was made that Mallory was physically abused by the police. I would also add a doubt that any citizen familiar with our operations believes that this department employs so-called third-degree methods. And certainly, even if police brutality in the questioning of criminals were a problem in this jurisdiction, society should be able to find many alternative solutions to that problem which would not, as the *Mallory* ruling has done, shackle the hands of the police in the investigation of crime.

On the subject of police efficiency, I think I can proudly state that, except to the extent we are rendered ineffective by restrictions such as the *Mallory* rule, inefficient police operations are not adding measurably to the crime problems of this city. We have made great strides in improving our operations during the past decade, and I believe that the effects of our efforts are reflected by the reduction of crime in this city from 1952 through 1957, when we dropped from 3d place in serious offenses per thousand population to 12th place among the 16 cities in our population group. Like any organization, large or small, there is always room for improvement in our department, and we are constantly working toward changes which give promise of better operations, but I assure you that there are no changes or improvements within logic or reason which can effectively offset the encumbrances imposed upon us by the *Mallory* ruling and corollary decisions.

On the subject of increased use of scientific detection techniques, I can assure this committee that we are relying on those techniques to the fullest extent possible. But too many of our serious crimes are committed at locations or under circumstances where scientific crime detection techniques are not applicable. For example, I might cite the case of the so-called butcher knife bandit who robbed some 50 business establishments in this city over a period of almost 3 years, using a butcher knife to threaten his victims. True, he was finally apprehended when he carelessly left a fingerprint on one of his discarded weapons, but only after he had committed about 50 robberies with the resulting fear, loss, and danger to his victims.

Another case which I believe will illustrate our problems under the *Mallory* ruling, involves one of these misguided youths who has developed into a predatory criminal in the midst of society.

This particular individual was born about 26 years ago. In 1954, at age 16, he was arrested and charged with 15 housebreakings into private homes in the Northwest area; he admitted his guilt in these cases and was committed to the National Training School for Boys for a period of nearly 4 years.

In 1958, shortly after his release from custody, he was again arrested by this department, this time on a charge of housebreaking with robbery by force and violence. I would like to read, for the consideration of this committee, the statement of facts in this case:

The complainant, a 70-year-old woman, reported that at about 3 o'clock in the afternoon a colored man knocked on her door and asked if the elderly man who had just left the house lived there. He stated that the elderly man had just been hurt down on the corner. As she went from the door to get her coat, he asked for a glass of water, which she gave him. He drank the water, and he then grabbed her around the neck, choked her, and beat her in the face and removed a $10 bill from her pocket and about $20 from her purse.

The then 20-year-old criminal admitted his guilt in this case, and was indicted by the grand jury on this case and three other cases involving housebreakings, robberies, and assaults. In February 1959, he was sentenced to serve 18 to 54 months.

Three and one-half years later, in late August 1962, this individual was released from prison. On September 9, 1962, he committed another housebreaking and robbery, following his adopted modus operandi. In this case the complainant, an 82-year-old woman, reported that at about 4 o'clock in the afternoon she answered a knock on her door. A Negro man asked her if she knew a man, whose name he mentioned, but the complainant could not remember it. The man then pushed the complainant against the wall and stated, "All I want is your money, don't get excited, I'm not going to hurt you." The criminal took a box holding five church envelopes, each containing about $3; and then went into the living room where he took a black leather identification folder containing papers, and a change purse containing about $1.

In this particular case, we were fortunate enough to find and identify a palm print obtained at the scene of the crime. The subject was arrested and charged, even though he denied the offense. In October 1962 he was indicted by the grand jury on the charge, but, because of the subsequent death of the complainant from natural causes, the indictment was dismissed, on motion of the Government, in January 1963.

By May 1963, he had resumed his criminal activities. On May 13, 1963, we received a report of a housebreaking and robbery offense against a 71-year-old woman; on May 20, 1963, we received a similar report involving a 63-year-old woman, on May 29, 1963, we received a report of assault (with apparent intent to rob) from a 67-year-old female complainant.

The modus operandi and general physical description in these cases clearly indicated to us that the previously described criminal could be responsible for these housebreakings, assaults, and robberies. But we were unable to find fingerprints or other scientific evidence at the scenes of these crimes. I might interject that our "uneducated" subject had learned well the crime lesson of his arrest on fingerprint evidence; one of this new victims reported his wearing gloves (in May) and another his wiping his fingerprints from all articles he handled. The photograph of this suspect was shown to each victim and to whatever witnesses were available in the several cases, and the witness and one victim seemed to think that he was the assailant involved, but none could make a positive identification. These several tentative identifications, in addition to the modus operandi, seemed to us to provide probable cause for arrest of this criminal, and we discussed with an assistant U.S. attorney the issuance of a warrant for his arrest; however, because not one of the witnesses was able to make a positive identification which would be adequate for a conviction, our request for a warrant was refused.

As we were, therefore, unable to issue a lookout to the force authorizing the arrest of this individual, we followed what we considered to be the next best course open to us and issued to the force a confidential memorandum outlining his suspected activities and his description, and a directive that, if he or any other suspicious subject was observed around any apartment building occupied by elderly women, he be kept under surveillance and that the Detective Division be notified.

On June 11, 1963, this criminal struck again, this time breaking into the home of a 72-year-old woman, choking her, and robbing her of $17.

Again, on June 29, 1963, over here on Capitol Hill, he forced his way into the apartment of a 59-year-old woman and robbed her of $137. While he was in the apartment, two visitors to her apartment knocked on the door, and he left through the frontdoor, passing the visitors on his way out.

Fortunately, these witnesses were able to identify the criminal from his photograph, and a warrant for his arrest was then issued by the U.S. Commissioner at about 10 a.m. on July 2, 1963. A lookout was sent to all units of the Department, and soon afterward this criminal, who had been preying on the elderly women of this community for nearly 2 full months, and who had committed at least two serious offenses after we had come to the conclusion that he was guilty of the previous three offenses, was in custody of this Department.

I might add that, of the five victims, only the victim and the witnesses in the last case were able to positively identify the accused, but stating, "You got me good; I might just as well get all of them straightened out," he confessed to all five of the crimes.

He was subsequently indicted and recently was sentenced to imprisonment for from 3 to 9 years.

Mr. Chairman, I don't want to belabor the point or waste the time of this committee by pursuing too long a single line of testimony. But I think these cases, and particularly this last criminal I have described, show what the police of the community are up against. I submit that at least after the commission of the first three of these cases, there was, from the modus operandi and general physical description alone, adequate evidence to create in the mind of a reasonable and prudent man probable cause for the arrest and questioning of this known criminal. But, just as certainly, without a statement from the defendant, there was not sufficient evidence to arraign and convict him.

Mr. Chairman, I submit that the last two victims of this criminal enjoyed in theory only their right to be secure in their persons and houses.

Mr. Chairman, I can honestly testify to this committee that, even today, we have walking in the streets of this city, criminals who, we have ample reason to believe, have committed series of crimes, but who we cannot arrest, because they have not been careless enough to leave fingerprints behind, and who will continue in their criminal careers until they become careless with their fingerprints or until their criminal act is witnessed by someone who can testify against them.

Mr. Chairman, it is true that, in terms of current nationwide crime rates, the District compares favorably. For the period January through June 1963, among the 16 cities in our class of 500,000 to 1 million population, the District ranked 8th in total serious offenses, 6th in murder, 9th in rape, 2d in robbery, 1st in aggravated assault, 7th in housebreaking, 12th in larceny, and 9th in auto theft. It is also true that overall crime in the District of Columbia is now about average in comparison with other large American cities.

On the other hand, it is important to remember that our crime rate has increased by 56 percent since 1957 to an alltime high as of last month; that our ranking among cities in our population group has increased from 12th place in 1957 to 8th place for this year, and that the rate of increase of our crimes since 1957 has steadily outstripped that of other American cities and is still rising sharply. I would ask this committee and the opponents of this legislation, "Must we wait until the District of Columbia is first in crime before providing the metropolitan policeman with statutory tools already possessed by other police officers throughout the United States?"

Mr. Chairman, some time ago I wrote to most of the major cities throughout the Nation to inquire regarding the rules of arrest under which they operate. I have brought with me today copies of the replies from those cities which I will make available for study by this committee. I can assure this committee that none of those cities is hampered in crime investigations by a restriction even nearly approaching the stringency of the *Mallory* rule.

Mr. Chairman, I have been repeatedly advised by legal experts that no constitutional question is involved in the *Mallory* ruling. Its proponents claim that it is needed to protect the guilty from the police. Mr. Chairman, I submit that the innocent also deserve protection from the predatory and that, if more protection of the criminal is needed than existed in 1957, which I doubt, then some other device, which strikes a better balance between the rights of the criminal and the rights of the law-abiding citizen, should be found.

One of the opponents to a change of the *Mallory* rule, in his appearance before the House District Committee, called upon a quotation from Professor Wigmore to support the *Mallory* rule. He quoted Wigmore as saying:

"Any system of admission which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. the inclination develops to rely mainly on such evidence and to be satisfied with an incomplete investigation of the other sources."

Actually, that quotation did not deal specifically with exclusionary rules such as *Mallory*, but Professor Wigmore did elsewhere write forcefully on the subject of such exclusions. In Wigmore on Evidence, third edition, section 851, he discussed at length the need for questioning of criminals under arrest and also referwred to the potential abuses which can conceivably occur as an outgrowth of such questioning. As an alternative, he suggested that private questioning of suspects under arrest might be done by a prosecutor or a magistrate, an alternative I do not now specifically propose, but one which I acknowledge would merit consideration. My point at this time, in referring to that writing, is to quote his concluding paragraph. Professor Wigmore wrote:

"* * * it follows that the attempts, legislative and judicial, to exclude entirely confessions obtained by questioning of persons arrested and in seclusion represent simply a misguided solution of the problem."

Mr. Chairman, I personally favor the present language of title I and title III of H.R. 7525 as practical provisions which will provide this Department with authority to cope with our current crime problems. I realize, of course, that alternative provisions are likely to be proposed to the Congress and that some of those will be intended to alleviate our problems in these areas while, at the same time, possibly meeting some major objections of the opponents to the legislation in its present form.

I recognize, therefore, that it may be necessary to consider some compromise provisions, which do not impair excessively the effectiveness of these proposals, in order to obtain early legislative relief in some form.

Because of the dire need for some such relief, I urge the Congress to act on these problems as quickly as possible.

Mr. MURRAY. Mr. Chairman, title I and title III of H.R. 7525 are designed to fulfill the three paramount needs for legislation to improve law enforcement in this city. Altogether, these two titles would provide for—

1. Clarification of the intent of Congress as expressed in rule 5(a) of the Federal Rules of Criminal Procedure;

2. Legislation in the nature of the Uniform Arrest Act, as an alternative to the now prohibited practice of investigative arrest, to empower police officers to detain probable felons for questioning; and

3. An effective statute authorizing the detention of a material witness to the commission of a felony.

Mr. Chairman, from the standpoint of police operations, these three items are the outstanding legislative needs of this city; I would rank them by importance in the order I have just listed them.

As I have frequently reported to the Congress, under the hampering effect of the *Mallory* ruling and corollary decisions, our rate of offense clearance has decreased and the related effectiveness of swift arrest and punishment and of removing criminals from the streets has been diminished. I have previously furnished to this committee a table with an explanation showing the readily apparent relationship of the *Mallory* decision to the clearance of part I felonies in the District of Columbia; for the convenience of members of the committee, I have furnished additional copies of that material for their examination today. This table reflects the fact that, for the fiscal year 1963, our rate of clearance of part I felonies stood at 44.6 percent, the lowest rate for any of the past 12 years.

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To serve that function, the statute must be applicable to material witnesses before, as well as after, formal initiation of proceedings by the criminal courts. Section 302 of H.R. 7525 does fulfill that purpose.

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In this particular case, we were fortunate enough to find and identify a palm print obtained at the scene of the crime. The subject was arrested and charged, even though he denied the offense. In October 1962 he was indicted by the grand jury on the charge, but, because of the subsequent death of the complainant from natural causes, the indictment was dismissed, on motion of the government, in January 1963.

By May 1963, he had resumed his criminal activities. On May 13, 1963, we received a report of a housebreaking and robbery offense against a 71-year-old woman; on May 20, 1963, we received a similar report involving a 63-year-old woman; on May 29, 1963 we received a report of assault (with apparent intent to rob) from a 67-year-old female complainant.

The modus operandi and general physical description in these cases clearly indicated to us that the previously described criminal could be responsible for these housebreakings, assaults, and robberies. But we were unable to find fingerprints or other scientific evidence at the scenes of these crimes. I might interject that our "uneducated" subject had learned well the crime lesson of his arrest on fingerprint evidence; one of his new victims reported his wearing gloves (in May) and another his wiping his fingerprints from all articles he handled. The photograph of this suspect was shown to each victim and to whatever witnesses were available in the several cases, and the witnesses and one victim seemed to think that he was the assailant involved, but none could make a positive identification. These several tentative identifications, in addition to the modus operandi, seemed to us to provide probable cause for arrest of this criminal, and we discussed with an assistant U.S. attorney the issuance of a warrant for his arrest; however, because not one of the witnesses was able to make a positive identification which would be adequate for a conviction, our request for a warrant was refused.

As we were, therefore, unable to issue a lookout to the force authorizing the arrest of this individual, we followed what we considered to be the next best course open to us and issued to the force a confidential

memorandum outlining his suspected activities and his description, and a directive that, if he or any other suspicious subject was observed around any apartment building occupied by elderly women, he be kept under surveillance and that the Detective Division be notified.

On June 11, 1963, this criminal struck again, this time breaking into the home of a 72-year-old woman, choking her, and robbing her of $17.

Again, on June 29, 1963, over here on Capitol Hill, he forced his way into the apartment of a 59-year-old woman and robbed her of $137. While he was in the apartment, two visitors to her apartment knocked on the door and he left, through the front door, passing the visitors on his way out.

Fortunately, these witnesses were able to identify the criminal from his photograph, and a warrant for his arrest was then issued by the U.S. Commissioner at about 10 a.m. on July 2, 1963. A lookout was sent to all units of the Department, and soon afterward, this criminal, who had been preying on the elderly women of this community for nearly 2 full months, and who had committed at least two serious offense after we had come to the conclusion that he was guilty of the previous three offenses, was in custody of this Department.

I might add that, of the five victims, only the victim and the witnesses in the last case were able to positively identify the accused, but, stating "you got me good, I might just as well get all of them straightened out," he confessed to all five of the crimes.

He was subsequently indicted and recently was sentenced to imprisonment for from 3 to 9 years.

Mr. Chairman, I don't want to belabor the point or waste the time of this committee by pursuing too long a single line of testimony. But I think these cases, and particularly this last criminal I have described, show what the police of the community are up against. I submit that at least after the commission of the first three of these cases, there was, from the modus operandi and general physical description alone, adequate evidence to create in the mind of a reasonable and prudent man probable cause for the arrest and questioning of this known criminal. But, just as certainly, without a statement from the defendant there was not sufficient evidence to arraign and convict him.

Mr. Chairman, I submit that the last two victims of this criminal enjoyed in theory only their right to be secure in their persons and houses.

Mr. Chairman, I can honestly testify to this committee that, even today, we have walking in the streets of this city criminals who we have reason—ample reason to believe have committed series of crimes, but who we cannot arrest because they have not been careless enough to leave fingerprints behind, and who will continue in their criminal careers until they become careless with their fingerprints or until their criminal act is witnessed by someone who can testify against them.

Mr. Chairman, it is true that, in terms of current nationwide crime rates, the District compares favorably. For the period January through June 1963, among the 16 cities in our class of 500,000 to 1 million population, the District ranked 8th in total serious offenses; 6th in murder, 9th in rape, 2d in robbery, 1st in aggravated assault,

7th in housebreaking, 12th in larceny, and 9th in auto theft. It is also true that overall crime in the District of Columbia is now about average in comparison with other large American cities.

On the other hand, it is important to remember that our crime rate has increased by 56 percent since 1957 to an alltime high as of last month, that our ranking among cities in our population group has increased from 12th place in 1957 to 8th place for this year, and that the rate of increase of our crimes since 1957 has steadily outstripped that of other American cities and is still rising sharply. I would ask this committee and the opponents of this legislation: "Must we wait until the District of Columbia is first in crime before providing the Metropolitan policemen with statutory tools already possessed by other police officers throughout the United States?"

Mr. Chairman, some time ago I wrote to most of the major cities throughout the Nation to inquire regarding the rules of arrest under which they operate. I have brought with me today copies of the replies from those cities which I will make available for study by this committee. I can assure this committee that none of those cities is hampered in crime investigations by a restriction even nearly approaching the stringency of the *Mallory* rule.

Mr. Chairman, I have been repeatedly advised by legal experts that no constitutional question is involved in the *Mallory* ruling. Its proponents claim that it is needed to protect the guilty from the police. Mr. Chairman, I submit that the innocent also deserve protection from the predatory and that, if more protection of the criminal is needed than existed in 1957, which I doubt, then some other device, which strikes a better balance between the rights of the criminal and the rights of the law-abiding citizen, should be found.

One of the opponents to a change of the *Mallory* rule, in his appearance before the House District Committee, called upon a quotation from Professor Wigmore to support the *Mallory* rule. He quoted Wigmore as saying:

> Any system of admission which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly on such evidence and to be satisfied with an incomplete investigation of the other sources.

Actually, that quotation did not deal specifically with exclusionary rules such as *Mallory*, but Professor Wigmore did elsewhere write forcefully on the subject of such exclusions. In "Wigmore on Evidence," third edition, section 851, he discussed at length the need for questioning of criminals under arrest and also referred to the potential abuses which can conceivably occur as an outgrowth of such questioning. As an alternative, he suggested that private questioning of suspects under arrest might be done by a prosecutor or a magistrate, an alternative I do not now specifically propose, but one which I acknowledge would merit consideration. My point at this time, in referring to that writing, is to quote his concluding paragraph. Professor Wigmore wrote:

> * * * it follows that the attempts, legislative and judicial, to exclude entirely confessions obtained by questioning of persons arrested and in seclusion represent simply a misguided solution.

Mr. Chairman, I personally favor the present language of title I and title III of H.R. 7525 as practical provisions which will provide this department with authority to cope with our current crime problems. I realize, of course, that alternative provisions are likely to be opposed to the Congress and that some of those will be intended to alleviate our problems in these areas while, at the same time, possibly meeting some major objections of the opponents to the legislation in its present form.

I recognize, therefore, that it may be necessary to consider some compromise provisions, which do not impair excessively the effectiveness of these proposals, in order to obtain early legislative relief in some form.

Because of the dire need for some such relief, I urge the Congress to act on these problems as quickly as possible.

The CHAIRMAN. Thank you, Chief. You heard the testimony of both Mr. Katzenbach and Mr. Acheson. I am sure you were here throughout most of their testimony.

Mr. MURRAY. Yes, sir.

The CHAIRMAN. You state that your legal experts have said that there is no constitutional question involved. Of course it is very clear from what Mr. Katzenbach has told us that he thinks serious constitutional questions and constitutional rights may be involved. This is his opinion as the Attorney General of the United States. You heard his testimony in this respect?

Mr. MURRAY. Yes, sir.

The CHAIRMAN. Now you also heard his suggestions that if this committee were to enact legislation, that they should build in certain safeguards. I think you heard what those safeguards are. The first one was the plain warning to the defendant.

Now, this is already included in section 1(b) of the bill before us, so I assume you have no objection to that.

Mr. MURRAY. No, sir.

The CHAIRMAN. The second suggested safeguard was that the arrested person be afforded a reasonable opportunity to notify a relative or friend and consult with counsel of his choosing. You heard Senator Dominick's questions to Mr. Katzenbach, what would his position be (1) if the first and second safeguards were written into this legislation. Do you have an opinion on that?

Mr. MURRAY. Mr. Chairman, I would see no objection to notifying a relative, but notifying a friend might be notifying a confederate or accomplice, and I dont know whether this would be good or not. He may find someone who is going to dispose of some loot for him.

Now, over the years if a man was arrested and said "I want a lawyer" he was given an opportunity to call a lawyer. I heard Mr. Katzenbach mention about a practice in Chicago where a third party is brought in. Well, this has been done many times in very important cases back over the years in our department too.

For instance, if it is a homicide case, a reenactment may be in the presence of an apartment house manager or apartment house janitor. A third and distinterested party has been used many times, and we think this is a good idea.

The CHAIRMAN. That is at least in part his fourth safeguard. It is a little broader, I think, than that. It has an alternative suggestion

to it. It is a responsible witness other than a law enforcement officer observing the questioning or a verbatim transcript or recording being made of the interrogation. That is the fourth safeguard suggested by the Department of Justice. What would your comment be with regard to that?

Mr. MURRAY. That is a recording you are speaking of?

The CHAIRMAN. He puts them together. He says it is an either/or proposition; either a responsible witness other than the law enforcement officer observing the questioning, or a verbatim transcript or recording of the interrogation.

Mr. MURRAY. I would not have any serious objection to that at all.

The CHAIRMAN. If that was built into the law?

Mr. MURRAY. Yes, sir.

The CHAIRMAN. Then you would have no objection to the fourth safeguard?

Mr. MURRAY. No, sir. I think that perhaps would work to our advantage at the trial as it has in many other cases where we had a homicide case or a rape case where we used a third party.

The CHAIRMAN. Now the third safeguard he suggests, Chief, is a maximum of 6 hours elapsed time between arrest and completion of the confession. That is the third safeguard suggested by the Department of Justice.

Mr. MURRAY. I think, Mr. Chairman, there are many cases that can be ready for court in much less than 6 hours, but as the Senator from Colorado mentioned, if a criminal knows that all he has to do is sit tight for 6 hours, he may sit tight for 6 hours and not say anything. I think a time limitation should be decided by the judge, if it is a reasonable length of time.

The CHAIRMAN. Please correct me if I am misstating your position in any respect. The Department of Justice suggests four safeguards be built into corrective legislation if the Congress, in its wisdom, sees fit to enact corrective legislation because of the *Mallory* rule.

The first one is the question of plain warning, which is very similar to 1(b) now before us, and I understand you to say that you would see no objection to the first safeguard. Do you or do you not follow this practice at the present time?

Mr. MURRAY. We do follow this practice.

The CHAIRMAN. So obviously you have no objection to No. 1?

Mr. MURRAY. No, sir.

The CHAIRMAN. No. 2, if I understood you correctly, it says the arrested person being afforded a reasonable opportunity to notify a relative or friend and consult with counsel of his choosing.

I understood you to say that you objected, that you thought his being given the opportunity to notify a friend might cause difficulties because it might be a confederate or an accomplice and he could warn them to dispose of the loot or something like that.

Mr. MURRAY. I think to notify an attorney or a relative would be all right. I would not object to that. But I think they could go fairly far afield on notifying friends.

The CHAIRMAN. Then No. 3, you just stated your objections to the third safeguard, which is a maximum of 6 hours elapsed time between arrest and the completion of the confession.

You stated if I understood you correctly that the fourth suggested safeguard of having a responsible witness other than a law enforcement officer observing the questioning or a verbatim transcript or a recording of the interrogation, would not be objectionable to you.

Mr. MURRAY. I have no objection to that.

The CHAIRMAN. You have none to that. Then it boils down to your objecting to the maximum 6 hours of elapsed time, and the opportunity of notifying a friend, is that correct? Those would be your two objections to the suggestions made by the Department of Justice for building safeguards into the bill which is now before us for consideration.

Mr. MURRAY. Yes, sir. I think that if it is left without unnecessary delay, in other words, the trial judge can determine whether there was any unnecessary delay. Sometimes I think a case would be prepared in 2 or 3 hours. Sometimes it may take as much as 6 hours.

The CHAIRMAN. Might I ask you just a few more questions, Chief.

Mr. MURRAY. Yes, sir.

The CHAIRMAN. I will hurry along on these. These questions are prompted by testimony that we have had from some other witnesses, and I think in fairness to the record that you should be given the opportunity of making any statement you want on them.

On October 23, certain witnesses indicated generally that some segments of the population of the United States viewed the police with disrespect and, an evil force. This was said rather emphatically by the chief of police of Cincinnati, the sheriff from California, from San Jose, I believe, San Joaquin County, and also from the superintendent of police, Chicago, Ill.

Now what is your view on this matter? Does the Metropolitan Police Department have the respect of the citizens of the District of Columbia?

Mr. MURRAY. I think, Senator, that there has been an effort in some quarters to create disrespect for law enforcement perhaps nationwide over the years. I think that locally the Department is held in a little higher regard now than it has been.

The CHAIRMAN. I would hope that that is a correct statement.

Mr. MURRAY. I think it is, yes, sir.

The CHAIRMAN. I think the Department is held in very high regard by the citizens of this community. At least this is my personal opinion.

Mr. MURRAY. I think it is held in a higher regard than it has been for some time.

The CHAIRMAN. I am glad to hear that. I certainly hope that is correct.

Now at least two or more witnesses who testified at our October 23 hearing stated it was wrong for persons to allege that Washington, D.C., is soft on crime. In support of their view they provided statistics that showed first that an accused convicted of felony in the District receives in the District on the average 41.5 months imprisonment which is greater than any State jurisdiction except one or two, and that the *Mallory* decision while causing much adverse comment in the District has caused comparatively few reversals and acquittals of defendants in the District. Would you care to comment on that particular statement?

Mr. MURRAY. Yes, sir. First I would like to make it very clear, Mr. Chairman and members of the committee, that I have never privately or publicly been critical of our trial court judges. I feel that we have had some appeals court decisions that did not set too well with me or with other police officers, but I have never been critical of our trial court judges.

Now, what was the second part of your question?

The CHAIRMAN. The other part of my question was concerning the statement that Washington, D.C., was soft on crime. We have heard this repeatedly. It has received widespread publicity in national periodicals. Two of the witnesses testified that this wasn't true, that in the District of Columbia a convicted felon averaged 41.5 months imprisonment, which was greater than any State jurisdiction except one.

That was used by way of refuting the statement that Washington, D.C., was soft on crime. I would ask for your comments.

Mr. MURRAY. Since the 23d of October I have gone back to the office and checked up on some of the sentences, and I feel the sentences are a little more substantial now than they may have been some years back.

We have an account of everyone who is released and how much time they served, and I think that sentences have been a little more substantial in late years.

As to being soft on crime, I think that some restrictions have been placed on law enforcement. The fact that crime has gone up 56 percent since the *Mallory* decision was handed down in 1957, I think that has done a great deal to cause the thought that there is a lot of crime here.

I have mentioned several times that I have never minimized the amount of crime in the District. I think there is too much crime here, but there is too much crime in all large cities. But the fact that we have gone up 56 percent since 1957, I think it is more than just a coincidence. May I show the committee this chart?

The CHAIRMAN. I think that leads into the next question that I was asking. And I know that you have repeatedly said that since the *Mallory* decision crime has increased, and you relate the increase in crime to the *Mallory* decision.

Of course, we have had statements by other witnesses that there has been comparatively few reversals and acquittals of defendants in the District of Columbia because of the *Mallory* decision. I would be very happy to have you say anything you want on that because this is always your major premise. Your major premise is that crime has increased in the District of Columbia because of the *Mallory* decision decided on June 24, 1957. I would be very happy to have you sustain that premise.

Mr. MURRAY. Yes, sir. I don't say that the *Mallory* decision is the sole cause.

The CHAIRMAN. I don't want to indicate that it is.

Mr. MURRAY. That crime has gone up, but I think it is more than a coincidence that it has gone up 56 percent. We had crime at a low point for 10 years back in June of 1957 when the *Mallory* decision was handed down, and it started to climb that very month, and it has been climbing ever since, and at that same time the clearance of crime has started down. In other words, where we had a high rate of clearance, it has fallen off.

The CHAIRMAN. Will you pardon an interruption. Senator McIntyre had a question.

Senator MCINTYRE. What is the dotted line on the chart?

The CHAIRMAN. Would you indicate what the dotted line is?

Mr. WILSON. That is the moving annual average of crime, Senator. The other line shows the monthly totals, and the dotted line shows the moving average annual.

The CHAIRMAN. What moving annual average?

Mr. WILSON. This is the total crime for the 12 months ending in each month. It takes out the seasonal variations which you can see in the various months.

Of course, we have a great deal of seasonal variation in crime because some crimes are more prevalent during the summer months, others in December. But this dotted line removes the seasonal variation and gives us an annual average or a crime trend.

Senator DOMINICK. In the District alone?

Mr. WILSON. In the District alone.

The CHAIRMAN. Pardon the interruption, Chief. I wish you would make abundantly clear how you tie the increase in crime to the *Mallory* decision. I recognize you say this is not the sole factor, but that it is one of the major factors.

Mr. MURRAY. I think the very fact that crime is at a low point in June 1957, since that time we have had added 350 policemen to our force. We have added equipment, we have added the canines. We have added lots of things that should have made crime go down, but instead of that it has gone up 56 percent. So I say that these restrictions are responsible for that to a large extent.

The CHAIRMAN. The Senator from Colorado.

Senator DOMINICK. Just one question there. How much has the population gone up since that time?

Mr. MURRAY. It has gone down.

Senator DOMINICK. Since 1957?

Mr. MURRAY. Yes, sir.

Senator DOMINICK. In the metropolitan area?

Mr. MURRAY. Not in the area; no, sir. I think the census for 1960, it has fallen off more than 50,000 within the District of Columbia itself.

Senator DOMINICK. A great many of these crimes within the District are done or accomplished by people who move in and out from the suburbs.

Mr. MURRAY. Well, of course, they claim in the suburbs that our criminals go out there and commit crimes.

The CHAIRMAN. I think it is correct that within the limits of the District of Columbia the population has shrunk slightly. Of course, it has expanded tremendously in the metropolitan area, and I suppose there is some causal relationship to an area that is this close together, because I suppose the metropolitan area must have doubled in population.

Mr. MURRAY. I think it is about 2 million population.

The CHAIRMAN. It is about 2.2 million now. What was it in 1957 roughly, the metropolitan area that includes, Arlington, Alexandria, Silver Spring, Bethesda, and Chevy Chase?

Mr. MURRAY. We have got 1950 figures and 1960 figures.

The CHAIRMAN. This may hold fairly constant. What was the 1950 figure for the metropolitan area?

Mr. WILSON. To put it simply, Senator, the metropolitan area total increased by 26 percent from 1950 to 1960. It increased to 2.1 million.

The CHAIRMAN. What was the figure in 1950?

Mr. WILSON. 1,464,000.

The CHAIRMAN. It increased from 1,464,000 to approximately 2.2 million in 1960?

Mr. WILSON. Yes; an increase of 26.8 percent.

Senator DOMINICK. 26.8 from 1,400,000 to 2.2 million.

The CHAIRMAN. I think he said 50 percent. Maybe I misunderstood him. What was the percentage increase?

Mr. WILSON. 26.8. It is an increase of 537,000.

The CHAIRMAN. That would sound to be more than 26 percent.

Senator DOMINICK. If you are going from 1.4 to 2.2 million, you have got 800,000 in any arithmetic I have ever done.

The CHAIRMAN. Why don't you check that out and supply it for the record.

Mr. WILSON. Yes.

The CHAIRMAN. The Chief, I think, wanted to respond further.

Mr. MURRAY. It is true, Senator, that you will have safemen, housebreakers, who will operate in the District and nearby Maryland and Virginia. They don't stop at the District line. We do have them operating in all these jurisdictions until they are caught.

The CHAIRMAN. Another point that was made on this question of softness on crime, Chief, and this is something that we have heard many times. Some witness somewhere during the course of these hearings indicated, and I think it was possibly a chief of a penal institution here, Mr. Clemmer, if that is the correct name——

Mr. MURRAY. Mr. Clemmer.

The CHAIRMAN. I believe he indicated that the great percentage of the felons convicted in the District of Columbia were born and raised here and lived here their entire lives. This was a little surprising to me. I am sure this is what he testified to.

Mr. MURRAY. I believe a survey that was made some years ago did indicate that most of the criminals in our penal institutions were right from the District of Columbia.

The CHAIRMAN. The point that they were trying to establish was that the District of Columbia had this nationwide reputation for being soft on crime, and still the statistics did not bear out the fact that the District was attracting criminals from other areas.

I have heard your testimony on various occasions, and you have indicated that word has gone out to the underground that the District of Columbia is soft on crime.

Mr. MURRAY. There has been some of this; yes, sir.

The CHAIRMAN. You have said there were instances of this.

Mr. MURRAY. There has been.

The CHAIRMAN. You named somebody from Philadelphia. He was very anxious to get out of the clutches of the Philadelphia police officers or the sheriff's department because he would rather come to Washington, D.C., because he would have an easier chance of getting off. I think this is in substance what you said.

Mr. MURRAY. That happened this spring. This fellow held up two young women at 10th and G Streets, forced them into a car at the point of a gun and made them drive around the city and finally raped one of the young women.

He made good his escape and went to Philadelphia and attempted to hold up two candy stores over there, and was arrested over there. Well, he told the police that he had killed a woman here in Washington and had thrown her body in the river.

Well, our detectives took our witnesses over there, and they immediately identified him as being the assailant of the night before here in Washington. But he told them, he told the police that the reason that he had given the story about killing a woman and throwing her body in the river was that he felt he had a better chance of getting off easier down here than he did in Philadelphia.

The CHAIRMAN. I don't know whether that is an isolated instance or how credible the witness was.

Mr. MURRAY. Getting back to your percentage of cases that had been lost, Mr. Chairman, there are many cases that have not been presented because the *Mallory* problem was raised.

Now, one case where a baby was found in a locker over at Union Station, I think this woman from the time of her arrest to arraignment, 3 hours had elapsed. But it was decided that they could not prosecute the case, and the case was thrown out. It was only 3 hours.

We had another case where a 19-year old was surprised in the act of ransacking an apartment, and he stabbed a woman to death. From the time of arrest until arraignment, 2 hours 40 minutes had elapsed. He was finally convicted, but they would not let us use the reenactment of the crime. We took him back to the apartment where he reenacted the crime, but we couldn't use that. The only thing we could use was his confession immediately after he was arrested, 2 hours 40 minutes was too long. So I think that is drawn a little bit too fine.

The CHAIRMAN. Chief, you cite this one instance. Do you keep records in your Police Department indicating the number of cases that were presented to the U.S. attorneys where acquittals resulted because a confession was excludable or excluded under the *Mallory* rule?

Mr. MURRAY. I don't think we do. We don't have any statistical records of that; no, sir.

The CHAIRMAN. The advantage of such a record would of course help to prove, beyond any doubt whatever, that your statement about crime being on an increase is attributable to the *Mallory* rule. This could be demonstrable if you had the records that would indicate this.

Mr. MURRAY. No, sir; we could get together a lot of cases that were not prosecuted because they felt too much time had elapsed, and sometimes they think 2 hours is too much time.

The CHAIRMAN. This I understand. Do you have statistics that would reveal in 1962 that 1,000 cases were not prosecuted or were not presented to the U.S. attorneys office because of the fact that a confession would be excluded under the *Mallory* rule. Are there statistics of that kind?

Mr. MURRAY. No; we would have to go through our cases and pick them out. We don't have any statistics on those.

The CHAIRMAN. I am not suggesting that you make a study of this going back to 1957. If you did have these statistics, it would be very helpful in indicating just exactly how many cases were not presented to the U.S. attorney because of the restrictions that you claim come about because of the *Mallory* rule.

Mr. MURRAY. Mr. Chairman, in all homicide and rape cases, where an arrest is made during the night, the U.S. attorney has a list of assistants on call, and as soon as arrest is made, we call the next man in line and from the time the arrest is made we go along with whatever he says should be done.

If he says a man should be put in a cell, don't talk to him any more, that is what is done. That is in all homicide and rape cases.

The CHAIRMAN. Of course, your No. 1 is what, aggravated assaults?

Mr. MURRAY. Yes, sir; we are No. 1 in aggravated assaults statistically; yes, sir.

The CHAIRMAN. And as I understood you, you say this is the area where you are having your greatest problems.

Mr. MURRAY. Yes, sir.

The CHAIRMAN. In aggravated assaults. I have a few further questions, but I want to defer to my colleagues. First the Senator from New Hampshire.

Senator MCINTYRE. I just wanted to ask you, Chief, you are describing a situation where a young man was ransacking an apartment. He was surprised, he committed murder. An arrest apparently was made. One of these threshold-type confessions you spoke of was made and 2 hours 40 minutes later he was taken to the scene and reenacted the crime.

Mr. MURRAY. Yes, sir; 2 hours 40 minutes from the time he was arrested he was brought by this apartment on the way down to headquarters where he described the apartment and reenacted the crime. He was taken to headquarters.

A statement was taken from him, he was fingerprinted and photographed, and taken to the U.S. commissioner, and the time elapsed was 2 hours 40 minutes from the time he was first picked up until he was taken before the commissioner. But the reenactment, everything except his original threshold confession was thrown out. They didn't use it. They thought too much time had gone by.

Senator MCINTYRE. I don't want to pursue this too much, but do I understand that the reenactment took place before the confession?

Mr. MURRAY. No; he confessed at the station house, but then on the way to headquarters they stopped by the apartment house where the murder had been committed, and he reenacted the crime there.

Senator MCINTYRE. Thank you.

The CHAIRMAN. The Senator from Colorado?

Senator DOMINICK. Chief, there are only two things that I have to ask about. In your statement you say here that the proponents of the *Mallory* rule claim that it is needed to protect the guilty from the police. I don't really think that is true.

I think what they say is to protect the people who have been arrested, because a person still is presumed to be innocent until he has been proved to be guilty. So I don't think they are saying that you are going to protect the guilty.

Mr. MURRAY. Well, they are presumed innocent until they are convicted in court.

Senator DOMINICK. Again just to reemphasize what the chairman said, as far as you can see right now, recommendations one and two of Mr. Katzenbach would not impose any particular difficulty in your procedure as long as you eliminated the word "friend."

Mr. MURRAY. Yes, sir; that is correct.

Senator DOMINICK. This would be true even if that were interpreted to mean that before you could cross-examine a prisoner, he would be entitled to consult an attorney of his own choosing?

Mr. MURRAY. Well, yes. But I have never run into an attorney yet that would not advise his client not to talk to the police. We know when an attorney comes in that his client is not going to talk to the police about the case. He is going to advise him not to incriminate himself.

But at that same time, Senator, I know that when I worked in homicide 20 years ago that we had a person in there and he said, "I want a lawyer," why there is no use wasting time with him. Just get him a lawyer. Let him call a lawyer.

The CHAIRMAN. At that point, what if he does not ask for a lawyer? Do you advise him of his rights to have an attorney?

Mr. MURRAY. He is advised that he doesn't have to make a statement.

The CHAIRMAN. That wasn't my question.

Mr. MURRAY. No, sir.

The CHAIRMAN. You do not advise him?

Mr. MURRAY. No, sir. If he asks for a lawyer, he is given a telephone book, or if he knows a lawyer he can call a lawyer.

The CHAIRMAN. But he must initiate the request?

Mr. MURRAY. Yes, sir.

The CHAIRMAN. The police do not suggest it?

Mr. MURRAY. That is right.

The CHAIRMAN. The answer is "No," is that correct?

Mr. MURRAY. That is right.

The CHAIRMAN. The Senator from Colorado?

Senator DOMINICK. That is all.

The CHAIRMAN. The Senator from New Hampshire?

Senator MCINTYRE. Shifting to title III for a minute, just one thing bothers me and that is the opportunity for abuse on these investigative arrests. How would the police department go about making certain that no abuses followed under this title III?

I will explain myself a little better. I don't care how good a police force you have, you are always bound to get one or two that have got some sort of tendency or characteristics, and I feel that the investigative arrest gives an opportunity for abuse and for mistreatment of some individuals that this particular police officer may have it in for. Now what precautions can you take as Chief of Police to keep this as a very limited occurrence?

Mr. MURRAY. Senator, we certainly would not stand for anyone using their office as police officer to bring someone in to carry out a grudge against anyone. I am sure that we would not stand for anything like that.

Back in 1957, they had what was called a dragnet arrest where about 90 people were arrested. A woman was beaten up and robbed in the place of business, and without any authorization either from me or anyone else at headquarters on a precinct level they went out and arrested about 90 people, and we have been hearing about it ever since.

The CHAIRMAN. We have heard about it.

Mr. MURRAY. Yes, sir; ever since. That is 6 years ago. The next day the President of the Board of Commissioners, Mr. McLaughlin, criticized it publicly and I did too. We didn't condone this, but it was done on a precinct level. But you would think that I had claimed the whole thing because as I say I have been hearing about it for 6 years.

Senator MCINTYRE. I just offer that. I feel the investigative arrest can be utilized by certain police officers.

Mr. MURRAY. Senator, I would like to mention too, this is a question that comes up quite often where someone feels they have been abused by the police, they have redress by going to the U.S. Attorney's office. They can go to the Civil Rights Division of the Department of Justice. They can go to the Commissioner's Office or they can come to my office, and they often do any one of these. So there are many roads open for any abuse of any prisoner.

Now I understand that some of our friends over here have testified that this would not be constitutional, that this Uniform Arrest Act, well, if it won't be constitutional, of course, I guess we will just have to give up the idea, because we don't want to do anything that is not constitutional.

The CHAIRMAN. I think, going even further than that, Chief, on title III on the investigative arrest, I don't think there has been one single solitary witness that has appeared before us that has said it was constitutional. I will have to check the record.

I don't want to be relying completely on my memory, but I think without exception the witnesses who have appeared before us, the law professors, for example, Senator Ervin who is an expert in this field of constitutional rights within the Judiciary Committee of the U.S. Senate said in his opinion it was clearly unconstitutional. I don't think we have had anyone to testify it was constitutional.

If I am in error I may certainly be corrected. The Minnesota University Law School professor testified that in his opinion it was not constitutional. I want the record clear on that.

Mr. MURRAY. Mr. Chairman, I could not really argue with anyone because I am not an attorney. I have dealt with attorneys for about 34 years, but I could not tell you whether it would be constitutional or not.

The CHAIRMAN. I think the great preponderance of the witnesses who have appeared before us today have thrown serious constitutional questions on investigative arrest provision.

The Senator from New Hampshire.

Senator MCINTYRE. That is all.

The CHAIRMAN. I have just a few other questions, all suggested by some of the earlier testimony.

During the hearings that we have held on the *Mallory* rule, several of the witnesses have indicated that better training of officers and detectives on the police force is one way to offset the adverse effects

of the *Mallory* rule. They explain that this can be done in a number of ways; namely, prearrest interrogation. We have constantly heard this word "prearrest interrogation."

Now, might I ask you, Chief, what instructions do your officers receive about attempting such interrogations?

Mr. MURRAY. Well, we realize, Mr. Chairman, that we can no longer bring people in for investigation of a crime, that greater efforts must be made to question them in the field, and a great deal of that is being done.

The CHAIRMAN. It has been suggested by a number of witnesses, and I am sure you are aware of this, you have read the testimony, that the FBI makes great use of this prearrest interrogation.

Mr. MURRAY. Yes, sir. I think, though, that they would be the first to tell you that their type of enforcement is altogether different from ours. We have a common-law type of crime—homicide, rape, robbery, and so on—which they don't have.

Theirs is more in an investigative field, and we work very closely with the FBI and get along very well with them. But our type of work is quite different.

The CHAIRMAN. I think that is correct, and I think that Mr. Katzenbach made that abundantly clear in his statement today. He certainly made it very clear in his official report which is filed with this committee, but there is a distinction in the application of the rule of criminal procedure 5(a) in the District of Columbia and elsewhere around the United States.

Mr. MURRAY. Mr. Chairman, could I ask permission to put into the record, furnish for the record, a statement on our training program which I think is a very good training program, and also a statement replying or rebutting a witness who testified here some days ago.

The CHAIRMAN. Certainly. The record will be kept open for that purpose.

Now, how many detectives do you have in the Police Department?

Mr. MURRAY. 370. That is in the Detective Bureau and in the District.

The CHAIRMAN. 370, Chief?

Mr. MURRAY. Yes, sir.

The CHAIRMAN. Now, how many of these work on each shift?

Mr. MURRAY. They are split up into three tours of duty. We have representatives from each squad, whether it is homicide, robbery, sex squad. They are on the street 24 hours a day. We have representation there.

The CHAIRMAN. Do you need more detectives?

Mr. MURRAY. I guess Deputy Layton would say we did, but I don't think we do right now.

The CHAIRMAN. How many detectives did you have in 1957?

Mr. MURRAY. I would have to get that figure for you, Mr. Chairman.

The CHAIRMAN. It can be supplied for the record?

Mr. MURRAY. Yes, sir.

(The figure referred to follows:)

1957-- ---------- 330 detectives

The CHAIRMAN. Now, do you have any extensive program where you require foot-patrol officers or squad-car officers to work at least one shift per month with the Detective Bureau?

Mr. MURRAY. We have men from the precincts that fill in on the midnight tour of duty and in the precincts for 1 week. That is sort of a training program.

The CHAIRMAN. A further question prompted by one of the witnesses appearing in the October 23 hearing expressed concern that this committee was being given the impression that the crime rate was on a great increase here in Washington.

In support of this position, the witness informed the committee that serious crime in the District has declined during the last 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 12½ percent below that which it was in 1953. Is that statistically correct?

Mr. WILSON. Mr. Chairman, he was citing fiscal year 1962 statistics. Of course, this slight decline for 1962 is reflected on this chart.

The CHAIRMAN. Compared with 1953, he indicated that it was 12½ percent below what it was in 1953.

Mr. WILSON. And for the 1962 data he was correct, but since then, as you can see, the crime has swung upward again, and as of the end of September we were three-tenths of 1 percent over the alltime high which was reached in 1952. We are now at an alltime high, rather, as of the end of September, we were at the alltime high for crime in this city.

The CHAIRMAN. As of the end of September, you were at the alltime high for crime in the District of Columbia?

Mr. WILSON. Yes, sir.

The CHAIRMAN. In 1963, January 1 to September 30.

Mr. WILSON. There, again, for the 12-month average it would be October 1 of 1962 through September 30 of 1963 was the highest 12-month period of crime in our District.

The CHAIRMAN. Thank you. Now, on the same October 23 hearing one of the witnesses testified that in some instances the police do not make a complete and thorough examination of the crime.

In the case of offenses involving assaults with dangerous weapons the witness stated the complainant in the case is generally the one who makes the first report to the police or turns himself into the hospital. The witness cited the case of *Joseph Taylor* (case 198–61), and several others as an example illustrating this point. Would you care to comment upon that particular statement, Chief?

Mr. MURRAY. I don't believe what that witness had to say and that is the one I want to rebut. I want to put a statement in, if I may.

The CHAIRMAN. Very well. I want to give you the opportunity to make comments on anything that has been said during the course of these hearings. We were attempting to go into this in depth and want to come up with the correct answer.

Now, Assistant Dean Pye testified that the rate of police resignations during fiscal 1962 was double the rate of fiscal 1961. Is that a correct statement?

Mr. WILSON. Mr. Chairman, the resignations for the fiscal year 1962 were very nearly double the rate for fiscal 1961. The rate for 1963, however, had dropped again.

We had a peak which we reached in January of this year, and since the salary increase that was allowed in January, resignations have dropped considerably. To give you the figures for 1961 we had 78 resignations; for 1962 we had 141; for 1963 it was 113; and I would say that our current rate is about 90 per year.

The CHAIRMAN. Is there any explanation indicated? You say it is a salary problem, Chief?

Mr. MURRAY. We think the salary rates that went into effect last January did stem resignations to a great extent, and also we haven't had any trouble in recruiting men over the last several months. We are recruited to full strength and have a backlog of applicants.

The CHAIRMAN. At the present time are there any officers in your Department assigned to help the Probation Department apprehend parolees and probation violators?

Mr. LAYTON. No, sir.

The CHAIRMAN. There are none?

Mr. MURRAY. No, sir. If there is somebody that they have a lookout for, the whole force would be on the lookout for them.

The CHAIRMAN. This I understand. That would be in connection with the police force?

Mr. MURRAY. Yes, sir. No specific assignments.

The CHAIRMAN. I think that there were some indications that some police officers were being used in this parole and probation capacity, and that this made a demand upon your police force.

Mr. MURRAY. No, sir.

The CHAIRMAN. You would say this is not correct?

Mr. MURRAY. This is not correct.

The CHAIRMAN. Dean Pye, the witness at the October 23 hearing, suggested that *Mallory* is not too great a problem in the District because it is his understanding that the Metropolitan Police Department closes approximately 44 percent of its cases compared with the national average of 27 percent. This was his statement, and this would be my question.

If that is the situation, how is it explained that the city police departments which do not have the *Mallory* restriction to contend with lag so far behind the Metropolitan Department in this measure of police efficiency?

Mr. MURRAY. I can't, Mr. Chairman, say why their clearance rate is not up to ours, but we feel kind of bad because our clearance rate is not 58 percent as it has been.

The CHAIRMAN. I understood that. You furnished a table indicating it had dropped to 44 percent, and again you use that as part of your argument that this is due to the restrictive influence of the *Mallory* decision.

But conversely if the national average of clearances is 27 percent, then certainly they are not restricted by the *Mallory* decision.

Mr. MURRAY. No; but we want to clear 58 percent.

The CHAIRMAN. And do you think if the *Mallory* decision is corrected by enacting legislation, that you would be back to 58 percent?

Mr. MURRAY. Yes, sir; I do.

The CHAIRMAN. Any further questions?

Thank you very much, Chief. We always enjoy having you with us. You have been very helpful. We will do the best we can to work out this problem.

Mr. MURRAY. Mr. Chairman, I would also like to express my appreciation to you for bringing in the chiefs of police and other witnesses to help present our side of the case. I know you have brought in people from both sides, but I know you have had the superintendent as a witness and others in here, and I appreciate it very much.

The CHAIRMAN. Thank you.

Our next witness is Mr. Tobriner.

Mr. Tobriner, I am very grateful to you for your indulgence in waiting this long to be heard. It occurred to me that in view of the testimony of the Department of Justice and the U.S. attorney, it was very proper that we hear from the Police Chief at that particular point.

STATEMENT OF WALTER N. TOBRINER, PRESIDENT OF THE BOARD OF COMMISSIONERS

Mr. TOBRINER. Thank you very much, sir.

Mr. Chairman and members of the committee, the Commissioners appreciate this opportunity to present their views on titles I and III of H.R. 7525, an act relating to crime and criminal procedure in the District of Columbia, passed by the House of Representatives on August 12, 1963.

Title I of H.R. 7525 is intended to overcome for the courts of the District of Columbia the effect of a rule of evidence laid down in a line of cases beginning with the case of *Mallory* v. *United States*, decided in 1957 by the Supreme Court, barring the admissibility in evidence of statements made by arrested persons if such persons are not promptly taken before a committing magistrate in accordance with rule 5(a) of the Federal Rules of Criminal Procedure, requiring arrested persons to be taken before a committing magistrate "without unnecessary delay."

Title I of the bill would change the existing situation in the District of Columbia so as to provide that statements and confessions, otherwise admissible, will not be inadmissible solely because of delay in taking an arrested person before a commissioner or other officer with power to commit persons charged with offenses against the laws of the United States.

The Commissioners naturally favor the admissibility of confessions and statements which are made freely and voluntarily. However, they believe that title I of H.R. 7525 should be amended in several respects so as to expand its coverage and afford certain safeguards to the persons making confessions or statements.

Accordingly, the Commissioners have recommended a number of changes in this title of the bill, set forth on page 2 of their report to the committee. The first of these changes would make the title applicable in cases of arrests for violations of the laws of the District of Columbia as well as of the laws of the United States.

The second change has the effect of requiring that each person shall immediately prior to being interrogated, be advised that he is not

required to make a statement and that any statement made by him may be used against him. The third change proposed by the Commissioners is the addition of three new subsections designed to surround arrested persons with safeguards to protect their constitutional rights.

The first of these subsections requires that, prior to any interrogation, an arrested person shall be plainly advised by the police officer or officers having him in custody of his right to reasonable opportunity to communicate with counsel or with a relative or friend, and requires that the arrested person shall in fact be afforded such opportunity.

The second subsection requires that, whenever reasonably possible, each interrogation of an arrested person, and the warning and advice given him, (1) be monitored by some responsible person who is not a law-enforcement officer, or (2) be reported verbatim, be recorded by a recording device, or be conducted subject to some other means of verification. The third proposed subsection is designed to emphasize that nothing in the title is intended to supersede the requirements of rule 5(a) of the Federal Rules of Criminal Procedure respecting the right of an arrested person to be taken before a committing magistrate "without unnecessary delay."

To interpolate for a moment our views are the views of the Department of Justice, with the exception that we would eliminate that section providing for a ceiling of 6 hours on detention prior to arraignment.

If title I of H.R. 7525 be amended as I have suggested, the Commissioners would have no objection to its enactment. However, should the title not be amended along the lines I have set forth, the Commissioners, since they have reservations concerning the protection afforded an arrested person by this section, in the form in which it is set forth in the bill, would be constrained to recommend against its enactment.

Title III of H.R. 7525 consists of two sections, the first of which, patterned after the so-called Uniform Arrest Act, provides for the detention of suspects for a period not exceeding 6 hours, while the second provides for the detention of certain material witnesses.

The Commissioners are unalterably opposed to the enactment of the first of the two sections contained in title III, on the ground that the section is either unconstitutional or unnecessary, depending on the judicial interpretation of the phrase "reasonable ground to suspect" appearing in line 21 on page 14. This phrase, taken with the balance of the section, has the effect of permitting an officer or member of the Metropolitan Police Force to detain, for a period not exceeding 6 hours, any person suspected by the officer or member of committing, or having committed, or being about to commit, a crime, and who has failed to identify himself or explain his actions to the satisfaction of such officer or member.

If the phrase "reasonable ground to suspect" is interpreted as authorizing the detention of an individual on the basis of something less than probable cause, then this section, in its effect, authorizes arrests for investigation—a practice that the Commissioners firmly believe is unconstitutional in that such arrests involve the detention of a person without the requirement of probable cause, in violation of the fourth amendment to the Constitution of the United States.

Obviously, any such arrest denies to the person so detained, for a period of as much as 6 hours, the opportunity to secure his liberty by posting bail or collateral, denies him the right of habeas corpus, deprives him of the assistance of counsel, and tends to impair his right under the fifth amendment not to be compelled in any criminal case to be a witness against himself. The Commissioners note, incidentally, that the U.S. Court of Appeals for the Fifth Circuit, in the case of *Staples* v. *U.S.*, 320 F. 2d 817, decided July 10, 1963, stated, with respect to one of the defendants in the case, that "McNamara was not under lawful arrest, but had been booked for 'investigation of passing counterfeit notes.'" The emphasis in my statement is also in the original.

This statement, the Commissioners believe, supports their view that arrests for investigation are not lawful. In addition, there is a line of cases which you are well aware of in the other Federal courts, and in the Supreme Court of the United States.

The Commissioners are cognizant of the fact that there is some support in the community for statutory authorization of the practice of making arrests for investigation, as an effective means of coping with the crime situation in the District of Columbia. They question, however, whether the "cure" provided by section 301 of title III is not in fact worse than the disease. It should be borne in mind that, if section 301 should be enacted by the Congress and be approved by the President, each of us present in this room today would be subject to being stopped on the street by a police officer merely because he is suspicious of us, and, should we not satisfy him concerning our identity or actions, we could be held incommunicado in a police precinct station house cell for as long as 6 hours, regardless of the pressing and important nature of our business elsewhere. This, the Commissioners strongly believe, is too high a price to pay.

If, however, the phrase "reasonable ground to suspect" in section 301 is construed, as has been the case in two of the three States in which the so-called Uniform Arrest Act is in effect, as meaning nothing more than "reasonable ground to believe"—that is, probable cause—then the Commissioners are of the view that this provision of the bill is unnecessary, since the officers and members of the Metropolitan Police force already possess the power to make arrests on the basis of probable cause.

Accordingly, to sum up my testimony on so much of title III of the bill as would impose on the District of Columbia the so-called Uniform Arrest Act, the Commissioners are strongly opposed to this provision as being either unconstitutional, in that it would authorize "arrests for investigation," or unnecessary, in that if the phrase "reasonable ground to suspect" be interpreted to mean "probable cause," the provision gives the Metropolitan Police no greater authority than they already possess.

With respect to the second of the two sections contained in title III of H.R. 7525, the Commissioners recognize the desirability and practical necessity of securing the appearance of material and necessary witnesses under the particular circumstances outlined in the section. However, they believe that such persons should be subjected to even less restraint on their physical liberty and freedom than those formally charged with crime, and that they should in all cases be permitted to appear immediately at the beginning of their detention before a judge or commissioner for the purpose of determining whether

they are in fact necessary and material witnesses and be given an opportunity to post bond or deposit collateral to secure their appearance at trial. Accordingly, the Commissioners have recommended to the Congress certain proposed legislation which has been introduced in the Senate as S. 1148, a bill to amend the law relating to material and necessary witnesses to crimes committed in the District of Columbia.

This bill amends section 401 of the Revised Statutes of the United States relating to the District of Columbia so as to better protect the rights of persons detained as material and necessary witnesses. The Department of Justice has suggested a number of amendments to the legislation proposed by the Commissioners—suggestions with which the Commissioners agree and which they have incorporated in a revision of their proposed amendment of such section 401. This revision appears on pages 9, 10, and 11 of the Commissioners' report to the committee on H.R. 7525.

In summation, I wish to emphasize that the Commissioners strongly believe that whatever action the Congress may take with respect to providing more effective statutory tools to deal with the crime situation in the District of Columbia should not be in disregard of the constitutional rights of the residents of the District of Columbia, both law-abiding and non-law-abiding alike. The Commissioners recognize the need for clarifying the situation with respect to the admissibility in evidence of confessions and statements made by arrested persons. They have, however, concern for the constitutional rights of all persons, those accused of crime as well as others.

Accordingly, they strongly recommend that title I incorporate safeguards designed to protect the constitutional rights of such persons while at the same time permitting the use in evidence of confessions and statements voluntarily made by them. With respect to section 301 of title III, it is the view of the Commissioners that it is either constitutionally objectionable or is unnecessary, and therefore should not be enacted by the Congress. As to section 302, relating to the detention of material witnesses, the Commissioners believe that such persons should be given greater consideration than section 302 presently provides, and therefore the Commissioners strongly recommend that the Congress consider enacting legislation substantially similar to that suggested in the Commissioners' report on H.R. 7525.

Thank you very much for affording the Commissioners an opportunity to express their views on these two titles of H.R. 7525.

The CHAIRMAN. I certainly appreciate your appearance here, Mr. Tobriner, and the views that you have expressed. I don't think I have any questions on your statement. It was very specific and is easily understood.

The Senator from Colorado?

Senator DOMINICK. No questions, Mr. Chairman.

Senator MCINTYRE. No questions.

Mr. TOBRINER. Thank you very much.

Senator BIBLE. This is a good day for you, Mr. Commissioner.

Mr. TOBRINER. Yes, sir.

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

(Whereupon, at 12:45 p.m., the committee was recessed, to reconvene at 10 a.m., Wednesday, November 6, 1963.)

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

WEDNESDAY, NOVEMBER 6, 1963

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

The committee met, pursuant to recess, at 10:17 a.m., in room 6226, New Senate Office Building, Senator Alan Bible (chairman) presiding.

Present: Senators Bible and McIntyre.

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.

Our first witness this morning will be Mr. Irving R. M. Panzer, of the American Veterans Committee.

STATEMENT OF IRVING R. M. PANZER, WASHINGTON CHAPTER, AMERICAN VETERANS COMMITTEE

The CHAIRMAN. We are very happy to have you with us this morning, Mr. Panzer.

Mr. PANZER. Thank you, Senator.

My name is Irving R. M. Panzer, and I appear before this committee on behalf of the Washington, D.C., Chapter of the American Veterans Committee (AVC).

We are proud to live in or near our Nation's Capital. We have worked long and valiantly to help make it a better place for all persons, and to eliminate or mitigate its deficiencies or shortcomings. We are deeply concerned about the social and economic conditions which foster juvenile delinquency and crime. We believe that the governing agencies of this community—the Congress, the District Commissioners, the police, and all other agencies of government—must be continually alert to deal with the evils of crime and delinquency, and to do so in a way that is compatible with our constitutional guarantees and protections.

We are deeply troubled by many features of the so-called omnibus crime bill (H.R. 7525) now being considered by your committee. Our concern that the bill is unconstitutional and unwise is heightened by the fact that it is opposed vigorously by at least 147 Congressmen, by the Department of Justice, by the U.S. attorney, by the District Commissioners, in many respects by the Bar Association of the Dis-

trict of Columbia, and by many others concerned with crime, civil liberties, and man's relation to his fellow man, and the problems of controlling crime.

The technical aspects of this bill are already detailed at length in the majority and minority reports in the House of Representatives (H. Rept. 479, 88th Cong.), and in the letters of the District Commissioners and the Department of Justice opposing the bill which are printed in the Congressional Record of August 12, 1963, which the House debated the bill; and many witnesses have commented on these technical aspects in their testimony before this committee.

Our concern does not rest on technicalities. Rather, we believe that the overall effect of this bill would abridge the constitutional rights of many people, and would not achieve its professed purpose of alleviating or preventing crime in the District of Columbia.

First, we oppose title I of the bill, which would repeal, solely for the District of Columbia alone among all Federal jurisdictions, the uniform Federal rule (known as the *Mallory* rule) which makes inadmissible the confession of an arrested person who has not been taken before a committing magistrate without unnecessary delay as required by rule 5(a) of the Federal Rules of Criminal Procedure.

We believe that title I weakens the rights and liberties of every American. It opens the door to unrestrained detention and intimidation of suspects by the police for prolonged periods of time, and encourages the use of "third degree" methods to extract confessions. The Deputy Attorney General recently advised the Congress that this provision "Fails to provide even minimum safeguards for the accused."

It is no answer to say that title I would exclude involuntary confessions extracted by intmidation, because an arrested person whose confession has been obtained in the confines of illegal police detention will almost never be able to prove that he was coerced, or that the police engaged in more than "polite inquiry."

It is argued that the *Mallory* rule hampers effective law enforcement because it is often difficult to show "probable cause" for the arrest prior to securing a confession. The difficulty with this argument is that the Constitution prohibits any arrest except upon probable cause. If there is no probable cause at the time of arrest, the accused should not have been arrested at all. A civilized society like ours, whose basic Constitution prohibits arrests without probable cause, should not water down that guarantee by destroying the protection furnished to arrested persons under rule 5(a) and the *Mallory* rule.

Second, we oppose title II which would make radical and far-reaching changes in the highly complex and controversial law of criminal responsibility. We regard the *Durham* rule, which focuses attention on the question of mental disease or mental defect as a causal factor in criminal conduct as a great step forward toward bringing the legal test of criminal responsibility into harmony with modern medical and psychiatric knowledge concerning mental disorder.

Under the present law, a person acquitted on the ground of insanity must be confined in a mental institution until such time as he can prove that he is sane. The community is protected, and the accused receives treatment for his mental disease. The use of the *Durham* rule by the District courts has not loosed a flood of criminals upon the public. On the contrary, it has afforded greater protection to the

community, and has been more just to the individual, than the usual criminal sanctions.

The *Durham* rule has been warmly approved by eminent judges, legal commentators, psychiatrists, and others who have carefully studied the problems of criminal responsibility. The Department of Justice and the U.S. attorney, who are charged with the duty of prosecuting criminal cases, have repeatedly stated that the court decisions in this field are "working out" and that their task in the administration of justice would be disrupted by enactment of title II. We think that no adequate basis has been shown to override their views, and we urge that title II not be enacted.

We are opposed to title III of the bill which, in effect, reinstates investigative arrests which were discontinued in March 1963, only 8 months ago.

Not one lawyer has disputed the outright illegality of arresting persons for investigation or on suspicion. Not one lawyer has claimed that it could be constitutionally continued. The report of the Horsky committee explodes every legal and factual justification for investigative arrests, and demonstrates their pragmatic vice. Despite the assertion in section 301(c) of the bill that the detention is not an arrest, it clearly deprives a person of his liberty and violates the fourth amendment to the Constitution which specifically prohibits any arrest except upon probable cause. Title III strikes at the heart of the Bill of Rights and abrogates the very protections which distinguish us from a police state. It should be rejected by the Congress.

Fourth, we oppose the provisions of title V which provide for mandatory minimum sentences and disrupt the rehabilitation procedures of existing parole laws.

High mandatory minimum sentences do not deter crime. They produce bad results by depriving prosecutors of the ability to secure cooperation from some criminals in exposing and helping convict other criminals, by making it more difficult to obtain convictions because juries often will not convict a criminal when they think the penalty is too high, and by depriving prisoners of effective incentives for good behavior. Thus, the enactment of title V will tend to result in more acquittals and will not protect the District against crime.

Fifth, we oppose section 507, which would amend the District's obscenity laws. We do not favor obscenity. However, we think the ex parte methods proposed in that section would violate constitutional limitations.

The Nation's Capital should lead in protecting, rather than destroying, freedom of speech, press and other expression of ideas. We abhor obscene materials and agree that there are some kinds of materials which are so obscene that they deserve no place in a civilized community. But there is the widest disparity of views as to what is truly "obscene" or "indecent" and what constitutes the exercise of expression protected under the first amendment's guarantee of freedom of speech and press. In such an area, there should be the greatest care taken to avoid having constitutional rights abrogated on the basis of individual whim or caprice.

Under the present District law, the sale of obscene or indecent material is subject to criminal penalties of fine and imprisonment which are imposed after a trial. Section 507 of this bill, however, would impose censorship through the technique of ex parte restraining orders issued

without a hearing. Moreover, these ex parte orders would apply not only to the materials themselves alleged to be obscene or indecent, but to all personal and real property used in connection therewith. Thus, a bookseller, or newspaper publisher, or theater owner, or anyone having any materials alleged to be obscene or indecent, could be entirely shut down and deprived of the use of his property prior to a trial. We think this procedure would violate the constitutional guarantees of due process of law.

We think these provisions of section 507 are too drastic to be used in the delicate area of speech and press which is specially protected under our Constitution. In trying to eliminate household vermin, we should not burn down the whole house. There are other ways to combat obscenity and indecency than by the Draconian sanctions of section 507 which would destroy essential constitutional protections and choke off freedom of expression, speech and press. We therefore urge that section 507 be rejected.

Thank you for permitting us to present these views on H.R. 7525.

The CHAIRMAN. We very much appreciate your appearance here, Mr. Panzer, and appreciate the views of the American Veterans Committee on this omnibus crime bill that is before us. Your prepared statement will be included in the hearing record at this point.

(The prepared statement follows:)

TESTIMONY OF IRVING R. M. PANZER, ON BEHALF OF WASHINGTON CHAPTER, AMERICAN VETERANS COMMITTEE

My name is Irving R. M. Panzer and I appear before this committee on behalf of the Washington, D.C., Chapter of the American Veterans Committee (AVC).

We are proud to live in or near our Nation's Capital. We have worked long and valiantly to help make it a better place for all persons, and to eliminate or mitigate its deficiencies or shortcomings. We are deeply concerned about the social and economic conditions which foster juvenile delinquency and crime. We believe that the governing agencies of this community—the Congress, the District Commissioners, the police, and all other agencies of government—must be continually alert to deal with the evils of crime and delinquency, and to do so in a way that is compatible with our constitutional guarantees and protections.

We are deeply troubled by many features of the so-called omnibus crime bill (H.R. 7525) now being considered by your committee. Our concern that the bill is unconstitutional and unwise is heightened by the fact that it is opposed vigorously by at least 147 Congressmen, by the Department of Justice, by the U.S. attorney, by the District Commissioners, by the Bar Association of the District of Columbia, and by many others concerned with crime, civil liberties, and man's relation to his fellow man, and the problems of controlling crime.

The technical aspects of this bill are already detailed at length in the majority and minority reports in the House of Representatives (H. Rept. 579, 88th Cong.), and in the letters of the District Commissioners and the Department of Justice opposing the bill which are printed in the Congressional Record of August 12, 1963, when the House debated the bill; and many witnesses have commented on these technical aspects in their testimony before this committee.

Our concern does not rest on technicalities. Rather, we believe that the overall effect of this bill would abridge the constitutional rights of many people, and would not achieve its professed purpose of alleviating or preventing crime in the District of Columbia.

First, we oppose title I of the bill, which would repeal, for the District of Columbia alone among all Federal jurisdictions, the uniform Federal rule (known as the *Mallory* rule) which makes inadmissable the confession of an arrested person who has not been taken before a committing magistrate without unnecessary delay as required by rule 5(a) of the Federal Rules of Criminal Procedure.

We believe that title I weakens the rights and liberties of every American. It opens the door to unrestrained detention and intimidation of suspects by the police for prolonged periods of time, and encourages the use of "third degree" methods to extract confessions. The Deputy Attorney General recently advised

the Congress that this provision "Fails to provide even minimum safeguards for the accused." It is no answer to say that title I would exclude involuntary confessions extracted by intimidation, because an arrested person whose confession has been obtained in the confines of illegal police detention will almost never be able to prove that he was coerced, or that the police engaged in more than "polite inquiry."

It is argued that the *Mallory* rule hampers effective law enforcement because it is often difficult to show "probable cause" for the arrest prior to securing a confession. The difficulty with this argument is that the Constitution prohibits any arrest except upon probable cause. If there is no probable cause at the time of arrest, the accused should not have been arrested at all. A civilized society like ours, whose basic Constitution prohibits arrests without probable cause, should not water down that guarantee by destroying the protection furnished to arrested persons under rule 5(a) and the *Mallory* rule.

Second, we oppose title II which would make radical and far-reaching changes in the highly complex and controversial law of criminal responsibility. We regard the *Durham* rule, which focuses attention of the question of mental disease or mental defect as a causal factor in criminal conduct as a great step forward toward bringing the legal test of criminal responsibility into harmony with modern medical and psychiatric knowledge concerning mental disorder.

Under the present law, a person acquitted on the ground of insanity must be confined in a mental institution until such time as he can prove that he is sane. The community is protected, and the accused receives treatment for his mental disease. The use of the *Durham* rule by the District courts has not loosed a flood of criminals upon the public. On the contrary, it has afforded greater protection to the community, and has been more just to the individual, than the usual criminal sanctions.

The *Durham* rule has been warmly approved by eminent judges, legal commentators, psychiatrists, and others who have carefully studied the problems of criminal responsibility. The Department of Justice and the U.S. attorney, who are charged with the duty of prosecuting criminal cases, have repeatedly stated that the court decisions in this field are "working out" and that their task in the administration of justice would be disrupted by enactment of title II. We think that no adequate basis has been shown to override their views, and we urge that title II not be enacted.

Third, we oppose title III of the bill, which would reinstate the plainly unconstitutional system of arrests for investigation which the District Commissioners, after the most careful deliberation, ordered discontinued in March 1963, only 8 months ago. Not one lawyer has disputed the outright illegality of arresting persons for investigation or on suspicion. Not one lawyer has claimed that it could be constitutionally continued. The report of the Horsky committee explodes every legal and factual justification for investigative arrests, and demonstrates their pragmatic vice. Despite the assertion in section 301(c) of the bill that the detention is not an arrest, it clearly deprives a person of his liberty and violates the fourth amendment to the Constitution which specifically prohibits any arrest except upon probable cause. Title III strikes at the heart of the Bill of Rights and abrogates the very protections which distinguish us from a police state. It should be rejected by the Congress.

Fourth, we oppose the provisions of title V which provide for mandatory minimum sentences and disrupt the rehabilitation procedures of existing parole laws.

High mandatory minimum sentences do not deter crime. They produce bad results by depriving prosecutors of the ability to secure cooperation from some criminals in exposing and helping convict other criminals, by making it more difficult to obtain convictions because juries often will not convict a criminal when they think the penalty is too high, and by depriving prisoners of effective incentives for good behavior. Thus, the enactment of title V will tend to result in more acquittals and will not protect the District against crime.

Fifth, we oppose section 507, which would amend the District's obscenity laws. We do not favor obscenity. However, we think the ex parte methods proposed in that section would violate constitutional limitations.

The Nation's Capital should lead in protecting, rather than destroying, freedom of speech, press, and other expression of ideas. We abhor obscene materials and agree that there are some kinds of materials which are so obscene that they deserve no place in a civilized community. But there is the widest disparity of views as to what is truly obscene or indecent and what constitutes the exercise of expression protected under the first amendment's guarantee

of freedom of speech and press. In such an area, there should be the greatest care taken to avoid having constitutional rights abrogated on the basis of individual whim or caprice.

Under the present District law, the sale or exhibition of obscene or indecent material is subject to criminal penalties of fine and imprisonment which are imposed after a trial. Section 507 of this bill, however, would impose censorship through the technique of ex parte restraining orders, issued without a hearing. Moreover, these ex parte orders would apply not only to the materials themselves alleged to be obscene or indecent, but to all personal and real property used in connection therewith. Thus, a bookseller, or newspaper publisher, or theater owner, or anyone having any materials alleged to be obscene or indecent, could be entirely shut down and deprived of the use of his property prior to a trial. We think this procedure would violate the constitutional guarantees of due process of law.

We think these provisions of section 507 are too drastic to be used in the delicate area of speech and press which is specially protected under our Constitution. In trying to eliminate household vermin, we should not burn down the house. There are other ways to combat obscenity and indecency than by the disconian sanctions of section 507 which would destroy essential constitutional protections and choke off freedom of expression, speech, and press. We therefore urge that section 507 be rejected.

Thank you for permitting us to present these views on H.R. 7525.

Our next witness is Mr. Alexander Benton. Is Mr. Benton here?

(No response.)

The CHAIRMAN. Is Mrs. Fischer here?

(No response.)

The CHAIRMAN. Do we have other witnesses who want to be heard?

(No response.)

The CHAIRMAN. We have three more witnesses listed. They were not due until 11 o'clock, and this was done purposely because we have an appropriation markup session this morning at 10:30, and I must attend that session, at least for the purposes of providing a quorum, and we will stand in recess then until 11 o'clock when we will continue.

We have four more listed witnesses and we will complete them at that time. We will stand in recess until 11 o'clock.

(At this point a recess was taken.)

The CHAIRMAN. The committee will come to order.

First, my apologies for being gone for so long, but we had the District of Columbia appropriation bill up for a markup. It is a very important piece of legislation.

It detained both Senator McIntyre and me. My apologies to you, Mr. Bennett. We will hear you now.

STATEMENT OF JAMES V. BENNETT, DIRECTOR, U.S. BUREAU OF PRISONS

The CHAIRMAN. Just be seated there, Mr. Bennett. It is always good to welcome you to this committee.

I would like to make a statement which, I think, somewhat indicates the present posture of the bill which is before us.

It is my hope that the committee may today close its hearings on all of the major provisions of H.R. 7525, with the exception of section 506 of title 5 dealing with indecent publications.

I believe it might be appropriate at this time to review the activities of this committee in its examination during this Congress of the need for strengthening the criminal justice code in the District of Columbia. It was my announced purpose when these hearings on the omni-

bus crime bill opened on October 10 to make an indepth examination of this broad subject matter. The House bill actually contains 12 proposed changes of law in 5 separate titles and deals with two of the most complex and difficult subjects in the criminal law field today—*Mallory* and *Durham* rules.

During the past weeks and before this day is over, we will have listened to 42 witnesses. They have included some of the outstanding legal scholars from prominent law schools around the country; practicing attorneys dealing closely with the crime picture; medical-psychiatric experts; police chiefs from several of our Nation's major cities; and representatives of our local citizenry who must live with this crime upsurge in the Nation's Capital City day in and day out.

It was the committee's hope that this in-depth examination would be completely objective and I believe this commitment has been carried out. I believe it is noteworthy that the witnesses we have heard have been the finest the committee could secure in the broad field of law enforcement. This committee by the end of today will have listened to 23 hours of testimony since our hearings on this bill began on October 10. The committee records show that no single piece of legislation has received greater attention in this committee for many, many years.

Likewise, this committee in its efforts to examine this city's crime problems, held joint hearings with the House District of Columbia Committee on February 6, 25, and March 4, listening to 10 witnesses at that time. Subsequently, on April 2, this committee again heard witnesses on four different bills dealing with the crime situation. In my judgment this committee is making a most conscientious and determined effort to bring about some accomplishments in the difficult area of law enforcement in this city.

As we have heard so many times from witnesses from all over the country, this city faces the same problems that other cities do in the rising crime trend. However, that is little consolation as any crime is too much crime. I still say we should take every reasonable step to strengthen the arm of the law enforcement agencies as long as constitutional guarantees are provided. We have attempted to hammer home the constitutional guarantees related to the crime problems. Those accused must have their constitutional guarantees but law-abiding men, women, and children must also have their constitutional guarantees of the safety of the streets and their homes.

It will now be the committee's task to deal in executive sessions with the information we have at hand. I hope that this can be done expeditiously in the weeks ahead and the decisionmaking is not a simple task as I know other people who have listened to the testimony over these months, will agree.

May I extend the appreciation of this committee to the witnesses we have called back several times on various sections of this bill for their attention to their official positions.

And now, Mr. Bennett, we will be very happy to hear from you.

Mr. BENNETT. Senator Bible, and members of the committee, as Director of the Federal Prison Bureau and at one time a member of the advisory board of the American Law Institute, in its drafting of its model penal code, I want first of all to congratulate you for the thoughtful work you have done here and for the care with which you are going into this entire piece of legislation.

It is a most difficult problem to deal with. I come in that capacity but I am here particularly to comment on some of the penalty provisions of the statute.

I have a statement, Senator, but since time is of the essence here I think I will merely file the statement and, with your permission, talk a little about these penalty provisions.

The CHAIRMAN. Your statement will be received, Mr. Bennett, and incorporated in full in the record.

(The statement of Mr. Bennett follows:)

STATEMENT OF JAMES V. BENNETT, DIRECTOR, U.S. BUREAU OF PRISONS

I appreciate the opportunity of appearing before this committee on H.R. 7525. I have been a resident of this area for the past 45 years and both in my official capacity and as a private citizen have always been much interested in our crime problem and what can be done about it. There are aspects of the pending bill that I heartily approve. On the other hand there are proposals which I believe to be poorly grounded.

I am happy to see that your committee is giving it such careful consideration. There is no need for hurry or hasty action. The crime situation in the District is, I believe, not as serious as some would have you believe. The police here are doing an excellent job and Washington is not a city with an inordinate amount of crime. There is virtually no organized crime here, no gang killings, no racketeering of consequence, no corruption of public officials, and virtually no commercialized vice. The crime we have here largely stems from the cultural changes that are occurring, from the fact that Washington is a haven for the handicapped forced out of other areas. Also Washington lacks employment opportunities for certain types of workers who drift into crime. But despite these problems there are eight of our larger cities with a higher crime rate than Washington.

To be sure, we have our share of murders, armed robberies, assaults, and similar serious crimes, but considering the upheaval occurring in our culture, the tensions arising from current racial conditions, and the ever-widening number of statutory crimes, I believe we should pause to put the situation here in proper perspective.

I say this in the hope you will not proceed too rapidly and hastily with this legislation and will break down the various sections and titles into separate bills, study them deliberately, and consider each on its merits.

If this is done I think you will wish to consider modifying the penalty provisions for burglary and robbery. These are the sections that provide a mandatory minimum of 5 years for second-degree burglary and a mandatory 20-year minimum for first-degree burglary. These Draconian penalties almost without parallel elsewhere in the United States are self-defeating. I am convinced they will not have the intended effect of deterring this type of offense.

Moreover, I find it difficult to understand why these severe mandatory minimum terms have been proposed. The sentences imposed in the District of Columbia are already severe, and on the average, much higher than in any other Federal jurisdiction. Even in comparison to the States the District ranks, according to fiscal year 1960 figures, third among the most severe sentencing jurisdictions. Offenders convicted of burglary in the District of Columbia, as a matter of fact, now serve longer sentences than in any other State or Federal jurisdiction in the country. If crime can be stopped or deterred by heavy penalties then the District should have no burglaries or robberies.

I do not mean to infer that there are not some instances where very heavy penalties are justified. And the law as it does now should make it possible for a judge to impose heavy penalties. But the law should also leave to the judge the discretion to make distinctions between one offense or one offender and another. He should be free to impose lighter terms where the infraction is minor or where there are circumstances in mitigation. The mandatory aspect of the penalties proposed by H.R. 7525 will, if the bill is enacted, inevitably bring about injustices just as have all other mandatory sentencing laws passed by the Congress or the State legislatures. They have not only brought about injustices but have also created serious problems for prosecutors, judges, and law enforcement officials.

Moreover, statutes providing harsh mandatory terms do not work because judges, juries, and even prosecuting attorneys find ways of getting around them. Prof. Paul Tappan, in an article, "Court Treatment of General Recidivist Statutes" (48 Col. L. Rev. 238 (1948)), has documented just how prosecutors, courts, and defense attorneys evade the mandatory provisions of such statutes. He cited one appellate court which frankly declared its hostility to the application of the law. In granting a writ of habeas corpus to a prisoner the court said: "If the sentence under review stands, the relator, who is 25 years of age, because he had previously stolen chickens, certain automobile parts, and a motorcycle, must spend the remainder of his days in a State's prison." He cited another case in which a district attorney had to apply to the Supreme Court for a writ of mandamus to a lower court judge who had issued an order forbidding supplementary proceedings under the habitual criminal act. The article gives other instances, some legal and some of doubtful illegality, in which judges have found ways to avoid imposing mandatory penalties.

Similar examples of circumventing such mandatory penalties may be found in the Federal jurisdiction. The Congress in 1935 passed a law providing a mandatory 25-year term for armed postal robbery. It was passed in a gangster-ridden era and undoubtedly the Congress had in mind the desperadoes of those days who held up post offices at the point of a machinegun, shotgun, or revolver. But in the years since then the Dillingers have gone, and their places have been taken by social misfits, alcoholics, emotionally disturbed youngsters, and others who may enter a smalltown grocery store doubling as a post office and brandish some kind of weapon to force the proprietor to hand over the contents of the cash register, including whatever stamps it may contain.

The judges get around this statute in two ways. First, they found that the statute did not prohibit the imposition of probation for such offenders. In many instances, although a prison term may have been indicated, the judges placed the defendants on probation rather than impose a 25-year term. This is perhaps an outstanding example of the manner in which a statute has completely frustrated its own purpose. Other judges have completely ignored the statutory requirement for a 25-year term and imposed a lesser term of years. These sentences were illegal, but they have not been challenged by the defendants, who benefited from them, or by the U.S. attorneys, who were aware as well as the judge that a 25-year term would be contrary to the interests of justice.

The Narcotics Control Act of 1956 provides other illustrations, both of the injustices of mandatory penalties and the means that have had to be found to mitigate or correct these injustices. That statute, as you know, provides mandatory minimum terms of 5 years or more for certain types of narcotics and marihuana offenses. It does not provide any means of distinguishing between major racketeers such as Vito Genovese and the victim of the drug traffic, the addict. In fact, we have received smalltime drug addicts and pushers with much more severe sentences than the 15 years that was imposed on Genovese. Just last week I interviewed one such person at Leavenworth who received 40 years for possession and sale of demerol and other synthetic drugs stolen apparently from a doctor's supply. This sentence was partially the result of the requirement that a long prescribed sentence had to be imposed on some of the counts. Some of it, of course, was due to the savagery of the judge.

Despite the fact the Narcotics Control Act has been tightly written there are other judges who find ways of avoiding the imposition of such grossly excessive penalties. In the typical case several counts are involved, some of which call for a mandatory minimum penalty and a few of which (26 U.S. 7273(a)) permit the judge to use his discretion in imposing probation or a term of 2 years or more with eligibility for parole. Some judges, in cases in which the 5-year minimum term would be too severe under the circumstances, have dismissed the counts of the indictment carrying mandatory minimum terms and allowed the defendant to plead to a count permitting the judge to use his discretion in sentencing. This is typical of the way these mandatory sentencing provisions are circumvented and is the basis for my belief they are self-defeating.

The American Law Institute's model penal code, in tentative draft No. 2 (p. 41) states that: "Experience has shown that * * * highly afflictive, mandatory punishment provisions become nullified in practice." I predict that if H.R. 7525 is enacted with its present provisions for mandatory minimum terms of 20 years for first-degree burglary and 5 years for second-degree burglary, as well as the similar mandatory minimum terms for robbery, when armed, the following trends will result:

1. In worthy cases the representatives of the U.S. attorney's office will find ways of reducing the charges of burglary to petty larceny or some similar offense not carrying a mandatory minimum term.

2. The U.S. attorney's office will be under constant pressure from the defense counsels, and others, to reduce the charge.

3. The courts will not be slow in dismissing or finding unsupported by the evidence those counts of the indictment carrying high mandatory minimum sentences.

4. Defendants charged with offenses carrying mandatory minimum terms will not plead guilty, request jury trials, raise all possible defenses and technicalities.

5. Juries will be hesitant to convict a defendant when they know that conviction will bring him a minimum 20-year sentence or 5 years for the relatively minor offenses that can be tried under the definition of burglary as defined in this bill.

6. The appellate courts will comb the record to find some grounds for reversing the case.

7. More cases will be brought to the President for the exercise of his clemency powers.

All of these things have occurred as a result of the mandatory penalties of the Narcotics Control Act. This has also occurred in those States where conviction of certain offenses carries with it a mandatory penalty. The result is destructive to the orderly administration of criminal justice and enhances the possibility that a defendant can escape the consequences of his crime.

Under the proposed bill, H.R. 7525, if enacted in its present form, injustice is not only inevitable as a consequence of the mandatory minimum penalties but as a consequence of the broad, all-embracing definition of second-degree burglary.

As the definition now stands, almost any act of petty theft could be charged as second-degree burglary, as for instance:

1. A youth going into a dimestore and stealing a pencil from a counter.

2. A derelict passing an open garage, spying a pile of old newspapers and stealing them to sell them for a few pennies.

3. A young man walking down the wharf, and seeing a coil of rope on the deck of a nearby boat and impulsively stealing it.

4. An alcoholic removing a few pieces of rusted metal from a junkyard in order to sell them for the price of a drink.

These and many other examples could be cited, each of which would be second-degree burglary, requiring the judge to impose a 5-year minimum.

You can predict the result as well as I.

If the provision were actually enforced as written, the District of Columbia would have to build several more penal institutions to house the petty offenders that would be imprisoned for 5 years or more. Appropriations for the District of Columbia would have to be substantially increased. The crime statistics on the District would also give an unfair picture of the actual crime situation.

But experience with only mandatory sentencing statutes around the Nation indicates that the provisions would not be enforced as written. Burglary charges would be downgraded to petty larceny, law enforcement people would find ways around the statute, juries would hesitate to convict and as a consequence respect for the law would drop another notch in public estimation.

The present District of Columbia housebreaking statute seems more than adequate to me in its provision for a 15-year maximum term. But if the committee feels that this statute should be broken up into two degrees of burglary, which I think would be desirable, the action relating to second-degree burglary ought to be rewritten. The distinction between first- and second-degree burglary ought to rest on whether the dwelling or room used as a sleeping apartment was occupied or unoccupied at the time of the offense. The rest of the offenses potentially covered by H.R. 7525's definition of second-degree burglary can be left to existing statutes.

Similarly, the bill's provisions barring probation, parole short of the minimum, or suspension of sentence should be removed. We must not rob a man of all hope. No civilized country can afford to bury a man in the penitentiary giving him no chance to reform and set no goal he can possibly attain. We have done away with wholesale hangings, banishment, transportation to penal colonies so let's not substitute in this day and age medieval penalties of the same stripe.

Our judges can safely be trusted with the responsibility of fair and adequate sentencing and protecting fully the public. They are carefully selected, well qualified, able, knowledgeable, and realistic men who take their responsibilities

seriously. They should not be hobbled by shortsighted, arbitrary statutes which rob them of their discretion.

I urge, therefore, that minimum mandatory penalties be stricken from the bill and broad discretion left to the courts in making the penalty fit both the crime and the criminal. There are some other sections of the bill that I consider undersirable and will, if the committee wishes, file a separate memorandum at a later date.

Average time served and average sentence of burglary offenders released from State institutions in 1960

State	Average served in months	Average sentence in months	State	Average served in months	Average sentence in months
Alabama	22.7	40.1	Montana	13.9	42.7
Arizona	20.2	46.7	Nebraska	21.4	53.9
Arkansas	23.5	41.4	Nevada	16.7	140.7
California	26.9	50.5	New Hampshire	21.3	48.6
Colorado	16.5	101.5	New Mexico	22.4	51.6
Connecticut	17.3	57.0	New York	33.7	80.7
Delaware	14.9	21.9	North Carolina	22.4	50.4
District of Columbia	41.1	64.5	North Dakota	16.3	44.4
Florida	23.6	51.4	Ohio	25.4	178.4
Georgia	27.0	70.7	Oklahoma	21.3	41.7
Hawaii	38.3	217.3	Oregon	18.9	36.3
Idaho	16.3	91.5	Pennsylvania	32.4	71.4
Illinois	30.8	71.7	Rhode Island	24.8	36.7
Indiana	29.8	77.0	South Carolina	29.5	45.6
Iowa	34.6	122.5	South Dakota	14.3	31.1
Kansas	21.3	117.8	Tennessee	29.4	52.6
Kentucky	18.4	28.9	Texas	25.7	55.4
Louisiana	22.8	47.7	Utah	24.3	202.5
Maine	15.5	42.0	Vermont	13.1	31.1
Maryland	18.9	30.8	Virginia	30.2	53.1
Massachusetts	20.2	63.1	Washington	26.0	198.2
Michigan	22.2	137.5	West Virginia	25.0	128.1
Minnesota	25.3	73.8	Wisconsin	16.7	38.0
Mississippi	27.3	39.4	Wyoming	15.2	33.7
Missouri	20.9	40.6			

The CHAIRMAN. You refer to the penalty provisions. You are referring to the mandatory minimum sentences?

Mr. BENNETT. I am referring, sir, particularly to title V.

The CHAIRMAN. Very well.

Mr. BENNETT. And the sentences prescribed there.

You will note that the penalty for burglary in section 823 is 5 years for second degree burglary, and that is a minimum mandatory penalty which the judge must impose, of 5 years, for second degree burglary, and a mandatory 20 year minimum sentence for first degree burglary.

These penalties are without parallel anywhere in the world. There is no State, no place, where these penalties are so large or as Draconian as these, and I cannot understand the reason why these penalties should have been proposed.

They are inconsistent. Already the District of Columbia is sending men to prison for burglary and giving them higher average sentences than any other jurisdiction in the country. I will file with the committee a statement showing these penalties.

In the District of Columbia the average time served in months for burglary is 41.1 months as contrasted, Senator McIntyre, with New Hampshire, which is 21.3 months, and so it goes.

Some of these States, for burglary, have the average time served as low as 15 months. Wisconsin, which has a very fine criminal record, there the average time served for burglary in Wisconsin is only 16 months, and so it goes.

And it is to be borne in mind that the judge has no discretion in this bill when it comes to imposing the penalty. Neither you nor I, Senator Bible, from your experience in the law courts, and so on, know how difficult that makes the problem of prosecuting attorneys when he comes to, after indictment, choosing the charge. You realize the pressures that are brought upon him.

And you realize, I am sure, that these penalties are self-defeating. Efforts are made, and successful efforts are made, to circumvent these penalties by every person and every individual having any contact with the case.

Judges and courts undertake to avoid them in various ways. They charge the case out of court. Some of them will ignore the statute entirely, and other judges, of good conscience, find ways to prevent imposing this mandatory penalty.

The defendant, since he has nothing to lose, in every case will demand and get a jury trial which prolongs the case, and adds additional work to the court. He will appeal it.

And the appeal courts, as you know, Senator, are likely to comb the record for technicalities by which they can upset the conviction when such a mandatory penalty is imposed.

We have had examples of this sort of thing in the Federal system. In the Federal courts there are two, only two, laws where mandatory penalties are required.

One is the robbery of a post office while armed. That gives a mandatory sentence of 25 years.

Now, this penalty or this statute or people, rather, who are indicted under this statute are relatively few in the number of cases, but there are some cases.

It frequently happens that a person will go into a country store, and I am reciting a specific case, where he goes into a country store and he robs the store. Well, there happens to be a post office in that store.

Then the case is frequently made into a Federal case and it is transferred to the Federal court and the person is subjected to a mandatory minimum penalty of 25 years.

Well, judges get around the statute in two ways. First, the courts found that probation was applicable in such cases and even though they realized that the defendant might require some period of treatment in an institution to avoid this 25-year penalty they would grant him probation.

Other judges will completely ignore the penalty provision and sentence him, under whatever they feel the circumstances require. Now, of course, the defendant doesn't appeal that. And the U.S. attorneys for the most part have been reluctant, and I know of no case where they have filed a mandamus provision, to require the imposition of the longer sentence.

The other statues on the Federal books that require mandatory penalties are under the Narcotics Control Act.

As I guess you know, it provides for a mandatory minimum penalty of a term of 5 years for the first offense of possession of narcotics and 10 years for the second offense, and so on.

Now, the judge can make no distinction in these cases. When he has a case before him of the victim of the drug peddler, the addict,

he has to give him the same sentence that he gives the bigtime racketeers.

Mr. Vito Genovese, who was one of the bigtime racketeers in the drug business, received a sentence of 15 years; whereas I have another case of a prisoner that I just recently interviewed last week out in Leavenworth who had stolen some synthetic Demerol tablets from a drugstore and sold them.

There were a number of counts involved, and he received a sentence of 40 years under the mandatory provisions of the sentencing.

I am hopeful that some of these things are going to be modified. Other committees of this Congress have this matter under consideration, and I hope that these matters are going to be modified.

One of the interesting things, Senator, I suppose you realize, is that section 501 here, which provides for penalties for assault with intent to kill, rob, rape, or poison—they have described it—they have prescribed a new penalty there which is a minimum term of 2 years; whereas, burglary first has a minimum term of 20 years.

This is totally inconsistent, it seems to me, to consider assault with intent to rob or rape—demanding a penalty less for that than when it is burglary.

Take what you can do under this burglary statute. The wording of the statute is so broad that almost any offense can be brought under it.

For instance, in burglary second degree, a youth who goes into a dime store, for instance, and steals a pencil or anything else, technically can be brought in under that statute and given a minimum sentence of 5 years.

A drunken derelict passing by a garage—this is an actual case—passing by a garage spies an old pile of newspapers and takes them to sell them for a few pennies to get some smokes.

He can be sent to prison and in this particular case would have had to be sent to prison for a minimum of 5 years.

And this is another actual case.

A man walking down here by the wharves sees a coil of rope on the deck of a boat, and he more or less compulsively steals it and he goes to jail. The judge has no discretion.

He goes to jail for a minimum of 5 years. Stealing a tire or a piece of junk from a junkyard also takes a similar penalty.

We can sit here and cite examples of this kind all day long. I just bring that up to show that these penalties are in no way consistent with the offense.

I do not believe that they will work.

The CHAIRMAN. May I ask you a question, Mr. Bennett?

You have been Director of the Federal Prison System for how many years?

Mr. BENNETT. Twenty-seven years.

The CHAIRMAN. Twenty-seven years? Approximately how many men are directly under your jurisdiction within the Federal prison system?

Mr. BENNETT. At the present time about 24,000.

The CHAIRMAN. My interest in these particular sections would be whether or not, in your considered judgment, a mandatory minimum sentence is or is not a deterrent of crime.

Mr. BENNETT. I do not think so, Senator. I do not think making a penalty mandatory has any influence whatever upon the individual who might be contemplating or might be involved in the commission of a crime.

The CHAIRMAN. I am sure that must have been the objective of the authors of the bill and the proponents of the bill, to build in a mandatory minimum sentence, believing that if there was a mandatory minimum sentence that this might serve as a deterrent to crime.

In your opinion, you do not think it would be?

Mr. BENNETT. I do not think it would be. In fact, it probably or might possibly act in just the opposite direction because, as I cited with regard to these mail robbery cases, people would escape or would circumvent these charges.

The CHAIRMAN. Well, that is a new approach to this particular problem.

It was said by the Director of the Federal Penal Institution in the District of Columbia and you might like to comment on it.

If I recall his testimony correctly, it was to the effect that the man who has a mandatory minimum sentence is invariably a very recalcitrant and a very difficult prisoner to deal with because he knows he is going to be in for a minimum of 5 or 10 years as an absolute minimum.

Now, would you have any type of a comment on that?

Mr. BENNETT. Oh, yes, indeed.

The CHAIRMAN. Because you have many men under your system who are also in under a minimum prison sentence.

What kind of prisoners are they?

Mr. BENNETT. Well, they are very difficult persons. You hold out no hope for them.

You can assign no goal for them to achieve, and they feel that they have nothing to lose, and the consequence is, of course, that it complicates our problems tremendously.

It increases the tax burden.

The CHAIRMAN. Well, do they attempt to break out of the penitentiaries?

Mr. BENNETT. Yes. He is a desperate person.

The CHAIRMAN. A desperate person?

Mr. BENNETT. When he is on the lam and, with these charges against him, why, he is an extremely dangerous person.

We have been trying, Senator, for 500 years to solve the problem of crime by imposing severe penalties.

We did it. There is a very famous case of the lazy apprentice. As you know, they executed him so that other apprentices would not be lazy.

We transported people. We branded them. We drew and quartered them in times past, and it did not solve the crime problem.

It is extremely difficult to scare people into complying with the laws especially if they are hungry and especially if they are in search of something by which they can alleviate their immediately emotional problems.

So I say to you, Senator, and hope that when you reconsider this bill at least you will eliminate the mandatory provisions. I have no particular objection to the maximum specified here, but I want to leave these matters to our judges.

Our judges are conscientious people. They are understanding people. They know the situation here in the District or anyplace else they are, and I think that man ought to be left to them.

Why have a judge on the bench if you restrict him so that he has no alternative?

And I think that it will be in line with the—the changes in these penalties or eliminating these penalties will be in line with the attitude of the Congress. I agree that perhaps we ought to break the burglary definition down into two sections, of first degree burglary and second degree burglary, and then we might—any penalty within reason—any maximum penalty within reason would be agreeable.

But to put in a mandatory penalty is a step backward.

The CHAIRMAN. I certainly understand your position, Mr. Bennett.

The Senator from New Hampshire?

Senator MCINTYRE. No questions.

Thank you, Mr. Bennett, for your excellent statement.

The CHAIRMAN. I want to join in that word of thanks and again express my apology for running as late as I did. It was unavoidable.

I do appreciate your coming here to give us the benefit of a tremendous number of dedicated years of service in a very difficult field.

You have an outstanding record in the field in which you serve.

Mr. BENNETT. Thank you very much, Senator.

If there are any other parts of this bill later on, as you begin studying them more, if you want me to comment on or file a brief on them, I will be very happy to do so.

The CHAIRMAN. I primarily wanted your views on the effect of a mandatory minimum sentence, because it appeared to me, in calling you as a witness, that we would have somebody who has had vast experience in this field.

Does this average out to about 25,000 Federal prisoners a year?

Is that a fairly steady figure?

Mr. BENNETT. It has been increasing, Senator.

The CHAIRMAN. It has been increasing? When you went in as Director of Prisons how many Federal prisoners did you have?

Mr. BENENTT. We had about 13,000 or 14,000.

The CHAIRMAN. You had about 13,000 or 14,000, and you have been Director for what did you say?

Mr. BENNETT. Twenty-seven years.

The CHAIRMAN. Twenty-seven years, and it has increased to approximately 25,000?

Mr. BENNETT. That is right; yes, sir.

The CHAIRMAN. Well, as the Director you have firsthand knowledge of how the prisoners under you react.

Mr. BENNETT. Let me just add one other figure, Senator, that you might like to keep in mind.

The District of Columbia has more people in jail per 100,000 of population than any other State or section or political entity in the country.

It has 287—in 1961 it had 287 men in prison per 100,000 of population, contrasted, for instance, with New Hampshire, which has only 31.

The CHAIRMAN. Well, they are so law abiding.

Mr. BENNETT. So, they do not have to put people in prison in New Hampshire, Senator, in order to have an orderly State.

The CHAIRMAN. Well, that is an interesting statistic. I did not realize that.

Will you repeat the statistics again?

Mr. BENNETT. Yes; on December 31, 1961, there were 287.7 people in prison per 100,000 of population in the District of Columbia.

On that same date, in New Hampshire, there were 31.2 persons. In Massachusetts there were 38.1 persons, and so on.

The average number, as I recall the statistics, is about 130 persons in prison per 100,000 of population for the country as a whole.

The CHAIRMAN. I appreciate that additional statistic.

Senator MCINTYRE. Do you happen to have figures on a State like Michigan?

Mr. BENNETT. Yes, sir.

Senator MCINTYRE. What was the average—did you say per 100,000?

Mr. BENNETT. I do not have them immediately before me, but I can guess that it was about 165.

Senator MCINTYRE. And that is a sharp rise then over the 31 that you found in New Hampshire?

Mr. BENNETT. Oh, yes, sir; incidentally, too, Senator, the penalties for burglary or the time served for burglary in States like South Carolina, North Carolina, and Virginia are about 16 months.

I can give you that. It is about 16 months.

The CHAIRMAN. I would like to have you furnish that for the record. It has been testified to earlier.

I understand you to say that some of these tables did develop that?

Mr. BENNETT. Yes, they do.

The CHAIRMAN. I certainly appreciate your coming here and giving us the benefit of your knowledge.

Mr. BENNETT. Thank you, sir.

The CHAIRMAN. Thank you very much.

Our next witness is Mr. Sidney Zagri, legislative counsel, of the International Brotherhood of Teamsters.

Mr. Zagri?

STATEMENT OF SIDNEY ZAGRI, LEGISLATIVE COUNSEL, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

The CHAIRMAN. Good morning, Mr. Zagri.

Mr. ZAGRI. Good morning, Mr. Chairman.

Mr. Chairman and members of the Senate District Committee, although I am appearing specifically on title I and title III, of H.R. 7525, as well as on H.R. 5726, I would not like to have this opportunity escape me to say that the testimony by the preceding witness, Mr. Bennett, Director of the Bureau of Prisons, his comments on the meat ax approach of this bill, its drastic approach in finding solutions to crime, illustrates the approach of the bill in title I and title III as well.

And we are here specifically in opposition to H.R. 7525, particularly title I and title III, as well as H.R. 5726, which has been offered by U.S. Attorney Acheson and Deputy Attorney General Katzenbach as a compromise solution.

I note in today's paper that the committee is thinking in terms of a compromise solution on the *Mallory* rule. I trust it has not reached

that because I am going to direct much of my testimony here this morning to point out that this so-called compromise——

The CHAIRMAN. The committee has reached no determination on this bill. They have not met in executive session and there will be no determination until they have met in executive session.

The indication was where there were possible avenues of working this out.

Mr. ZAGRI. Because let me say that there can be no compromise with the techniques of the police state or with the essentials of personal liberty. There can be no compromise with "secret investigative" arrests, whether they be by Castro's secret police, the Soviet Committee for State Security, or by the Metropolitan Police of the District of Columbia.

There can be no compromise with fundamental constitutional guarantees. H.R. 7525 openly flouts the Constitution; whereas, H.R. 5726 hems and haws, advances and retreats between constitutional safeguards and arbitrary police action. What it gives with one hand, it takes away with another.

H.R. 5726: I consider H.R. 5726 the more dangerous of the two bills because it is the more plausible. It appears to afford constitutional safeguards without assuring them. It is an attempt to reconcile "the exigencies of criminal prosecution with the imperatives of constitutional liberty." In reality, it ends in whittling away dangerously at vital constitutional safeguards.

Its principal proponents—such as Deputy Attorney General Katzenbach—start out with the major premise that the *Mallory* rule is a good one—but not for the District of Columbia.

In defense of the *Mallory* rule, he states:

> * * * the District court made clear its intention to prevent law enforcement officers from delaying hearings for the purpose of eliciting confessions. This is as it should be.

He then states:

> The problem which gives rise to the legislative proposal before the committee not with the *Mallory* rule but with its application in the District of Columbia.

He makes the rather remarkable proposal that Federal rule 5(a), requiring preliminary hearing without unnecessary delay, which is effective in all of the courts of the 10 judicial districts of the Federal court system, and with all the States having similar enactments, be repealed in its application in the District of Columbia.

Rule 5(a) is aimed at preserving constitutional rights and, in particular, procedural due process of law. It provides for the treatment of accused persons on an equal basis—the innocent as well as the guilty. It offers protection to the impoverished, uneducated, or youthful suspect. The hardened, well-heeled criminal does not need a city magistrate to advise him of his rights.

He knows those rights. He has highly paid attorneys to advise him in advance.

On what basis can he justify that the lowly, the illiterate, the impoverished of the District of Columbia be detained by the police up to 6 hours without probable cause to believe that the accused has committed a crime, and afford the right of prompt arraignment in all other jurisdictions?

Deputy Attorney General Katzenbach seeks to justify a double standard of constitutional safeguards on the basis that—

> Only in the District of Columbia do the Federal courts have broad jurisdiction over crimes of violence which characteristically lack eye witnesses and independent evidence.

By contrast, he points out—

> 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., controlled property, financial records, tax returns, et cetera.

He then concludes that—

> It is reasonable to consider the problems in the District of Columbia as being rather unique with respect to the *Mallory* rule and deserving of congressional consideration in legislation limited in its application to the District of Columbia.

While it may be true that such a distinction may exist between the District of Columbia and other Federal jurisdictions, it is not true with reference to the State jurisdictions where the *Mallory* rule has been applied. As recently as last week, in *People* v. *Donovan*, 326 W 2A1, the Court of Appeals in the State of New York, where crimes of violence are as great as in the District of Columbia, applied the *Mallory* rule.

And I quote from that citation:

> Quite apart from the due process clause of the 14th amendment, New York's constitutional statutory provisions, pertaining to the privilege of self-incrimination and the right to counsel, not to mention the State's guarantee of due process, require its exclusion.

In this case the court excluded a confession solely on the grounds that it was taken during a period of unnecessary delay prior to arraignment. And I think that it is especially significant at this time that a State like New York, which includes, of course, New York City where crimes of violence are certainly as many in number or probably much higher in number, and almost as great in frequency, as they are in the District of Columbia, that the New York Court of Appeals applied the *Mallory* rule.

The Supreme Court has enforced the *Mallory-McNabb* rule in the States under the 14th amendment.

The rule in the *Mallory* case is in full force and effect in the city of Buffalo, N.Y. This is in accordance with section 165 of New York State Code of Criminal Procedures, which provides:

> The defendant must in all cases be taken before the magistrate without unnecessary delay and he may be given bail at any time of the day or night.

An examination of crime statistics of cities with half a million to 1 million persons establishes Washington, D.C., as No. 1 in two major crime categories of violence, and Buffalo, N.Y., is recorded as 16th in these same two crime categories. A check with Lieutenant Phelps of the Buffalo police force indicates that:

> We do not arrest a man unless we are ready and prepared to go to court.

The *Mallory* rule did not impede effective police practices in Buffalo. Operating under the New York State Code, the police are required to use brains rather than brawn.

In Great Britain the suspect cannot be questioned, with the exception of clearing up ambiguities, once he is placed under arrest. Yet we find according to the criminal statistics of England and Wales in

1962, an unusually high percentage of crime solutions, particularly in acts of violence without the aid of the confession. Although crime is on the upgrade in England, felonies increasing from 283,220 in 1938 to 896,424 in 1962, we find that in 1962, there were 37,958 offenses charging acts of violence with 32,027 cases cleared during the same year.

It is clear from these figures that adherence to a strict code of police behavior is not a handicap to police efficiency. On the other hand, slack and unimaginative police work cannot occur where recourse to extra legal action is not available in the solution of crime.

It should be pointed out that the *Mallory* rule does not prohibit questioning of a suspect. It simply requires arraignment without unnecessary delay.

The crucial period during which mental or physical coercion may be applied is between the time of detention and arraignment. The investigation into lawless enforcement of law conducted by the Wickersham Commission showed that out of 106 cases reported between 1920 and 1930 in appellate courts where use of the third degree was charged, there were only 7 cases where the prisoner declared that the third degree was used after he had been brought before a city magistrate.

Coercion itself is always hard to prove because the questioning takes place in secret. It is true that H.R. 5726 provides that—

> Such questioning and the warning and advice required by subsections (a) and (b) of this section were, whenever reasonably possible, witnessed by a responsible person who is not a law enforcement officer or transcribed verbatim or recorded by a wire, tape, or other sound recording or conducting subject to other comparable means of verification.

This provision simply provides for verification of the accuracy of the warnings and advice with reference to self-incrimination, also to notify a relative or friend and consult with counsel. This does not provide for verification of the actual questioning, and it is well established that mere questioning, in and of itself, can be coercive under certain circumstances.

Section 3 of H.R. 5726 establishes a 6-hour period for detention between the time of arrest and completion of the confession, statement or admission. Could not this result in establishing the norm for investigative arrests?

Deputy Attorney General Katzenbach conceded this as a possibility in his questioning by Senator Dominick in his appearance before this committee yesterday. This establishes an arbitrary standard in which questioning which, in fact, was coercive could take place and confessions so acquired would be admissible. Deputy Attorney General Katzenbach seeks to justify the 6-hour rule on the basis that recent decisions of the District Court of Appeals have reversed convictions based upon confessions given 2 or 3 hours after arrest. He states:

> Thus, "without unnecessary delay" has come to mean "without any delay."

On cross examination, Deputy Attorney General Katzenbach concedes that while confessions were obtained within 2 or 3 hours or less after arrest, arraignment in some instances did not take place until the following day. The *Mallory* rule simply requires the court to find that under a particular set of circumstances, delay was unnecessary. It may be that in each of the instances cited by Deputy Attorney Gen-

eral Katzenbach, the court had good reason to find that the delay was unnecessary. It does not follow that because a confession was obtained within a short time after arrest, that the surrounding circumstances did not indicate the existence of unnecessary delay.

The 6-hour detention period repeals the present rule banning investigative arrest in the District of Columbia, which was enacted by the Commissioners as a result of the Horsky report, which found that there had been great abuse of police authority in arresting individuals on grounds of suspicion. There is no law called suspicion.

Under the fourth amendment, the person may not be arrested unless there is probable cause before the arrest may be made. This probable cause may not be ascertained by an unnecessary delay through the media of the secret investigative arrest. The fact that there is a 6-hour limitation on the investigative arrest does not make it less a violation of a fourth amendment right.

Despite all the constitutional window dressing of section 3, the fact remains that the suspect is informed of his rights against self-incrimination, right to counsel, right to remain mute—not by a magistrate, not by a commissioner, but by the police. This bill substitutes the zealousness of police action for time-honored checks on the police through judicial machinery.

The legislative policy behind the requirement that an officer making an arrest take the arrested person without unnecessary delay before the nearest available commissioner is spelled out by the U.S. Supreme Court in *McNabb* v. *United States* (318 U.S. 332, 343, 344, p. 1582):

> The purpose of this impressively pervasive requirement of criminal procedure is plain. * * * The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication.

I wish to point out that the Katzenbach proposal does not divide this function. He vested all in the police authorities.

> Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement, checks resort to those reprehensible practices known as the third degree which, though universally rejected, as indefensible, still find their way (354 U.S. 453) into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.

I must agree with the Washington Post editorial:

> * * * It is a sound principle of law that arrested persons should be taken before a judicial officer without unnecessary delay, that they should be advised of their rights by a judicial officer and that they should be subject to detention only upon the authorization of a judicial officer. The only effective way we can think of to make the police observe this principle of law is to forbid the use of any evidence, including confessions, obtained in violation of it.

I must agree with Senator Morse's evaluation of this bill:

> The Acheson bill is a most unacceptable compromise. When one concludes the reading of the Acheson bill he discovers he has nothing but a meaningless hodgepodge left.

I must agree with the—

> overwhelming majority of the 900-odd lawyers of the District bar who voted against all three bills (including the Acheson bill) aimed at a revision of the *Mallory* rule and permitting easy interrogation of suspects by policemen.

H.R. 7525, title I: Repeals the *McNabb-Mallory* rule and nullifies section 5(a) of the Federal rules. While the *Mallory* rule is an exclusionary rule of evidence, its repeal will interfere with certain basic constitutional safeguards. It opens the door for prolonged detention for an unlimited period of time. Imprisonment incommunicado interferes with the right of habeas corpus, which is guaranteed by article I, section 9, of the Constitution itself. If the prisoner's family or friends or lawyers knew where he was, they could at once obtain habeas corpus and compel the immediate production of the prisoner before a magistrate.

No expediency would supersede the rule of immediacy—no court would permit custody without commital to be continued an instant because of the desirability of interrogation or the indavisability of warning confederates. The suspension of habeas corpus by policemen should be condemned.

Unlawful detention takes away the right to bail guaranteed by the eighth amendment of the Constitution to insure personal freedom. Even after a lawful arrest only a magistrate can grant a person bail. Those who keep him from the magistrate are denying him the right to bail.

Unlawful and secret detention deprives the accused to have the assistance of counsel for his defense; which is guaranteed by the sixth amendment. The Supreme Court through Justice Sutherland and Justice Black has declared that a person requires the guiding hand of counsel in every step in the proceeding against him.

The constitutional right to counsel commences from the moment of the arrest of the prisoner to assist him in securing his discharge if the evidence is insufficient, to advise him about his statement during preliminary examination before the magistrate, to arrange his bail, and to protect him from abuses during confinement.

Finally, unlawful detention tends to impair the right of the accused under the fifth amendment not to be "compelled in any criminal case to be a witness against himself." This does not preclude proper questioning, but it is obvious that the line between proper and improper questions may easily be passed. Nothing but the conscience of the police officer can protect a prisoner from milder or drastic forms of the third degree so long as he is in their uncontrolled custody removed from systematic prison regulations and isolated from the outside world.

Title III: Title III seeks to accomplish indirectly what title I would do directly. It is, to quote the minority report of the House District Committee, "a legislative sheep in wolf's clothing."

Although it is extensively designed to detain a material witness, it does not provide that the material witness be in connection with a pending case. The Federal rules already provide for the detention of material witnesses under those circumstances. Actually under this title, any investigative arrest or any confession obtained could be used for the purpose of obtaining an arrest of a person detained.

The proponents of title I will do more than to "qualify and amend" the Supreme Court's decision in *Mallory* v. *United States* (354 U.S. 449); it will, in fact, overrule many court decisions and a long well-established judiciary policy of protecting persons against unlawful arrest and secret prolonged interrogation.

It has been argued that the *Mallory* rule hampers effective law enforcement in that it is often difficult to show "probable cause" unless and until a confession has been secured. I have already pointed out that efficient police work does not depend upon obtaining confessions by unlawful detention, in fact the contrary is true.

Reliance upon extra-legal methods for obtaining evidence results in sloppy police work: it results in disrespect for law because of the use of unlawful means by law enforcement officers.

Earlier in our discussion, I referred to Buffalo as an example of the best behaved city in America where the *Mallory* rule was enforced.

I suggest that there is a more basic reason for the crime rates in the two cities; that is, Buffalo and Washington.

Let us compare the situation of a man, able bodied, unemployed, and penniless with a family to support in Washington and in Buffalo. I do not suggest the gentleman has two families to support. I ask you to envisage him in the same family situation in Washington or in Buffalo. In Washington, he could not be given relief, desperately though he, his wife, and his children may need it. In Buffalo he would be entitled to relief. This relief would be supplied, in part, by Federal matching funds under the aid-to-dependent-children law, as amended in 1961. If he were a single able-bodied man in Buffalo he would get relief from the city general assistance fund. In Washington, he would get no relief.

The exclusion of a man from relief because he is able bodied, when he has a family to support and cannot find work, is inhuman. It arouses in the man desperation, bitterness, and enormous envy. This is a tough society in which to be poor. The bitterness of the dispossessed is reflected in the crime statistics of this city and in the type of crime committed.

Washington is the highest city in the Nation in incidence of aggravated assault and second to highest in the incidence of robbery. Out of 16 cities, Buffalo is 15th in the incidence of both aggravated assault and robbery.

What is a penniless father of a family to do in Washington when his children cry for food or for more warmth on a winter's night? For many of low skills there is no work and no prospect of work. He must either beg or he must steal. Until we, too, have been faced with that choice I do not think we should feel sure of what we would do.

In Buffalo, the same man has an additional choice. He can apply for relief. It is better than begging or stealing.

I criticized the Murray thesis for simplicity. Am I opening myself to the same criticism here? My argument is a simple one. Many crimes in Washington are committed, on impulse, by desperately poor men denied help by the society which has rejected them as wage earners.

I am not sugegsting that this is the only or even the major cause of crime in this city. What I do suggest is that it is one of the major causes. I believe there is a positive correlation between the humane welfare regulations of the city of Buffalo and the low crime rate there.

Scrupulous police work and a human approach to welfare problems spells Buffalo, America's best-behaved big city.

A police force encouraged openly by its chief to demand extra-legal rights in "fighting" crime and an inhuman welfare program directed by Members of the Congress who oppose advance in the area of civil rights spells Washington, D.C., where one's chances of being assaulted and robbed are higher than anywhere else in the Nation.

May I urge upon members of this committee to call upon their colleagues on the full Senate Appropriations Committee this week to replace the aid-to-dependent children program in the new District of Columbia budget. Let us give it a try for 1 year. Let us see what demoralizing results will flow from helping a poor unemployed and able-bodied man to feed his wife and little ones. Let us see what effect this innovation might have upon the crime rate.

CONCLUSION

It should be noted that the Ford Foundation has made a grant of $215,000 to the American Law Institute for the purpose of conducting an objective study of the rule in the *Mallory* case and related problems raised by that case.

I completely agree with Senator Wayne Morse that the Congress should put off making any decision in this matter until the American Law Institute has completed its study.

In the meantime, let us not be stampeded into any drastic departure eliminating basic constitutional safeguards. Let us remember that the basic separation of functions does not permit the police to pass judgment on the validity of their own arrests. Let us face up to the problem of the increasing crime rate in the District by improving the efficiency of the police, increasing the size of the force, raising the minimum educational standards and training program.

For example, the Buffalo Police Department requires high school graduates; the District police have many school dropouts on the force.

And, finally, let us remember the problem of crime in the District is far too complex to find solutions through any single panacea. Remember that the concentration of crime here is in the central city which economy is a disaster area. The average unemployment rate in this area, calculated from 1960 census figures, is 10.4 percent of the male work force.

And this figure does not really tell the full story because we find that when the average national unemployment is around 6 percent, that the Negro unemployment in the country borders nearly 20 percent.

They are the first to be laid off and the last to be returned to work.

Let us remember the warning of Judge Lehman, New York Court of Appeals in the *Doran* case:

> Suggestions that courts should not hamper police by restricting them to the use of lawful methods seem to many of our citizens in accord with commonsense. Our boasted guarantees of liberty—it would seem—are so precious that they must be kept for special occasions and not be subjected to the wear and tear of daily use. Not so may the court treat these guarantees. In a court of law no argument of expediency can ever justify a lawless invasion of a legal right.

The CHAIRMAN. Thank you very much, Mr. Zagri. I appreciate your views.

You made constant reference to Buffalo. Approximately how large a city is Buffalo?

Mr. ZAGRI. It is over 500,000.

The CHAIRMAN. Do you have any knowledge as to the size of its police force? Do you know how many police they have there?

Mr. ZAGRI. I can get that information for you

(The information referred to follows:)

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Detroit, Mich., December 16, 1963.

In re H.R. 7525, H.R. 5726.

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

DEAR SENATOR BIBLE: When I testified before the Senate District Committee on November 6, 1963, on the subject of the *Mallory* rule, I was asked to supply figures for the populations and police strengths of Buffalo and the District of Columbia.

The figures are appended below.

	District of Columbia	Buffalo
Population (1960)	763,956	532,759
Present police strength	2,920	1,346

This means there is a policeman for each 261 persons in the District of Columbia and 1 for each 395 persons in Buffalo. Yet, it is the District of Columbia police who call for additional police powers.

If I can be of any further assistance, please let me know.

Cordially yours,

SIDNEY ZAGRI, *Legislative Counsel.*

The CHAIRMAN. I think it would be helpful to furnish it for the record because it apparently is a city of somewhat comparable size.

It is a little smaller, but it is not surrounded by as large a metropolitan area as we have, but comparisons of that kind, I think, are very helpful.

The Senator from New Hampshire?

Senator MCINTYRE. I just want to compliment Mr. Zagri for a very fine statement and to assure him that the views that he has expressed here will be given every consideration by this committee.

Mr. ZAGRI. Thank you.

Senator MCINTYRE. In view of the time situation here, I do not think I will ask any questions.

The CHAIRMAN. Thank you, Mr. Zagri. We certainly appreciate your coming here this morning.

Our next witness is Mr. Alexander Benton, of the Washington Bar Association.

Is Mr. Benton here?

Mr. BENTON. Yes, sir.

The CHAIRMAN. I regret to say this, while you are just getting here, Mr. Benton, but it is now 12:30 and that last call was for a quorum from the Senate, and we have to answer it.

I am wondering what would be a convenient time for you to come back. I would like to have you return, but it is 12:30 at this time and we must go to the Senate.

Would tomorrow morning suit you all right? What is your schedule?

Mr. BENTON. If you will excuse me just a moment, I will check.

The CHAIRMAN. Would you check your calendar? I want to accommodate you because you have waited very patiently.

We will have a voting session on the Senate floor all afternoon, so I hesitate to continue a hearing until this afternoon and if you can give me some indication of what your calendar looks like for tomorrow——

Mr. BENTON. Senator, I find tomorrow morning will be convenient for me.

The CHAIRMAN. I think we have one further witness and that is Mrs. Fischer, president of the Mount Pleasant Citizens Association.

Is Mrs. Fischer here?

(No response.)

The CHAIRMAN. Apparently you are the last remaining witness, and I see that you have a full statement here. It is a 12-page statement, and I want you to do it justice.

So, without objection, we will be in recess until 10 o'clock tomorrow morning.

Mr. BENTON. Thank you very much, sir.

(Whereupon, at 12:30 p.m., the committee was recessed, to reconvene at 10 a.m., Thursday, November 7, 1963.)

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

THURSDAY, NOVEMBER 7, 1963

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

The committee met, pursuant to recess, at 10:05 a.m., in room 6226, New Senate Office Building, Senator Alan Bible (chairman) presiding.

Present: Senator Bible.

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

The CHAIRMAN. The committee will come to order.

We have three witnesses this morning on titles I and III of the District of Columbia omnibus crime bill.

STATEMENT OF ALEXANDER L. BENTON, ON BEHALF OF THE WASHINGTON BAR ASSOCIATION

The CHAIRMAN. Our first witness is Mr. Benton of the Washington Bar Association.

Mr. Benton?

Mr. BENTON. Good morning, Senator.

The CHAIRMAN. We appreciate your courtesy in returning this morning because of the legislative situation that precluded us from hearing you yesterday.

Mr. BENTON. I appreciate that, Senator. I well understand the problems.

Sir, if it please the Senator, I have a prepared statement. Of course, in view of the fact that there has been much testimony already with reference to titles I and III, as you indicated yesterday, and also as indicated in this morning's press, I would like to submit this statement.

The CHAIRMAN. The statement will be submitted and will be incorporated in full, and you may highlight it or add anything that you would like.

(The statement referred to follows:)

STATEMENT OF THE WASHINGTON BAR ASSOCIATION

Mr. Chairman and members of the committee, my name is Alexander L. Benton. I am a member of the bar of the District of Columbia and I appear before you in behalf of the Washington Bar Association. I would like to take this

opportunity to express my sincere appreciation for the opportunity to appear before this committee and offer testimony relative to titles I and III of H.R. 7525.

At the outset, the Washington Bar Association would like the record to show that it opposes the entire act in general on the ground that no new legislation is needed for the purposes or so-called evils the act proposes to remedy. Secondly, the act is applicable only to the District of Columbia and specific opposition is registered with respect to titles I and III of the act, for reasons which will be more fully set forth herein below.

TITLE I

Section 101(a). This title, as I understand it, would not exclude confessions or statements made during detention simply because of a delay in having the arrested person brought before a committing magistrate or other judicial officer; that is, an officer clothed with judicial authority and concomitant power to commit persons charged with violation of laws of the United States.

The bare language of this section is pregnant with evils of a most sinister nature. It strips an arrested person of fundamental constituental rights. And, contrary to the views held in some circles, it does not afford protection to the public or society in general. It attempts to achieve by statutory fiat what only can be done by a competent and properly administered judiciary. It lays stress on the viciousness and the heinous nature of an offense as the need for relaxation of the current rule relative to admission of confessions and statements rather than stressing the need to safeguard the fundamental constitutional rights of the individual which it is submitted is the beacon for safeguarding the public. It is submitted that a denial of the constitutional rights of a single individual can only lead to a weakening of the confidence of society in the whole structure of criminal justice.

While the language fo title I does not so state, the majority view of the report accompanying H.R. 7525 states that one of the purposes of title I is to return to voluntariness as the test of admissibility of confessions. It would appear that one of the tests of voluntariness is whether there wa a delay, other than adminitrative, in taking the arrested person before a committing magistrate. It should be observed at this juncture that neither the language of title I nor the report of the majority places any time limit on the delay. Conceivably, one could be held for months before being allowed to confront a committing magistrate or other judicial officer—thus delay in itself, without more, could be tantamount to coercion.

The majority views of the House committee report relates that a confession, to be admissible, should not be the product of coercion, duress, physical compulsion, promises, or threats; but if such foregoing factors are absent the confession should be admissible provided it is given freely and voluntarily and that the purpose of title I is to insure such a result. It is submitted that title I would do just the opposite. From practical experience it is known that a delay in itself could produce some of the very evils which constitute the irregular factors. Having had the experience of representing defendants in criminal cases in both the U.S. District Court for the District of Columbia and the District of Columbia court of general sessions, I have a somewhat more intimate and personal knowledge of some of the interplay between defendants and police officers. In many instances there have been situations where an arrested person has been held until he decides to give a statement. In some instances it was intimated to the prisoner that he would be permitted to make a phone call to contact a friend or relative or to contact a bail bondsman, only if he cooperated with the officer. In some of these cases the prisoner finding himself in such a situation has indicated he would cooperate only after he could talk with a particular officer, but it would develop that the particular officer was on leave or was off duty and he would not return for several hours or, in some cases, several days. And thus the prisoner would be held incommunicado until such time as the officers or officer arrived.

It would then develop that the defendant would make statements to this particular officer because he had a special confidence in him. Of course in many instances such confidence was ill-founded. In most cases he would exact from the officer an oral and confidential promise to help him with the district attorney or to recommend a low bond. In return for such oral promises, totally unsupported by any consideration, the prisoner unburdens himself orally. The officer at no time, tells the inmate that he does not have to make a statement. After hearing

all of the story the officer goes to his typewriter and types out his recollection of the confession plus any view of his own. Usually he begins the typewriter version with language to the effect that the accused was advised of his rights. However, in many such instances the officer does not spell out just what those rights are. The typewritten version is then presented to the defendant for him to sign, which he does in 90 percent of the cases without bothering to read it. In many cases, he cannot read so he has to rely upon what the officer tells him is in the typewritten version.

In other situations the defendant is told he doesn't have to make a statement "but it will be better for you if you do or the sooner you do, the sooner you can get out on bail, or if you cooperate I will see that you get a bondsman." To the neophyte and uninitiated this is tantamount to saying to him, "You have no other choice." It should also be observed that in many such situations this represents the first time the defendant has been locked in a cell and some of the cell blocks are permeated with stench and foul odors as a result of being inhabited by drunks and unclean persons, and there is an additional factor of, in many cases, having to be in the same cell with sexual deviates.

The upshot is that in many instances, as a practical matter, being advised of one's rights by a police officer, is the same as receiving no advice because of the manner in which the advice is given. However, when these same cases are brought into court and a motion is made to suppress the confession, it amounts to a contest of credibility between the testimony of the defendant as to the involuntariness of the confession, because of the manner in which it was obtained, and the testimony of the officer, who, by virtue of his status, is presumed to give credible testimony, and, further, can furnish ample corroborative testimony from fellow officers.

A good example of this is *U.S.* v. *Mitchell*, 332 U.S. 65 (1944). In that case, it will be recalled, Mitchell was indicted for housebreaking and larceny, for which he was tried in the U.S. District Court for the District of Columbia. At the trial a motion was made to suppress Mitchell's oral confessions and certain stolen property which had been recovered from his home. The facts disclosed that Mitchell made the oral confession shortly after being arrested and gave his consent for the search of his home. Subsequently, Mitchell was held for a period of some 8 days before being taken before a committing magistrate. The trial court denied the motion. On appeal, the U.S. Court of Appeals of the District of Columbia reversed on the basis of *McNabb* v. *U.S.*, 318 U.S. 332 (1943). The Supreme Court, on writ of certiorai to said U.S. Court of Appeals for the District of Columbia reversed on the ground that the *McNabb* doctrine was inapplicable because the extended period of detention occurred after the confession and the consent to search the premises. Incidentally, in passing, it is interesting to note that the ostensible purpose of the detention was to give Mitchell the opportunity to cooperate with the officers in solving about 30 other cases of housebreaking. This gives one cause to wonder whether, in fact, such cooperation was voluntary on Mitchell's part. In any event, it would make little difference because it would be his word against that of the officers.

Moreover, title I, and particularly section 101(b) does not provide a mechanism for fully protecting the defendant. It merely states that prior to interrogation by law-enforcement officers the arrested person is advised that he does not have to make a statement and that any statement made may be used against him. It is submitted that this proscription does not provide ample protection for the accused.

It does not comport with his full constitutional rights. In the first place, it fails to set a standard relative to who should do the advising and what their qualifications should be; the manner in which such advice is given or any requirements that there be some criteria for indicating or determining that the accused person had some, or better still, substantial awareness, of the significance of such advice. A mere bare statement, ofttimes incoherently mumbled, is insufficient. In addition, this admonition does not spell out or provide for one's full rights, such as his right to counsel, which is quite important. I think he should be told not only the fact that he does not have to make a statement and that any statement that he makes could be used against him, but he should also be fully advised of his right to consult with counsel prior to making any statement. This, the act, does not do.

Title I could only lead to wholesale dragnet arrests, without any scintilla of probable cause, in contravention of the dictates of the fourth amendment to the Constitution. There could be arrests solely for the purpose of exacting a con-

fession. Such tactics are closely akin to those of the police state or gestapo. It hardly commends itself to what is expected of a law-enforcement agency of a self-confident and free society. Moreover, it would deny protection to those persons who are in greatest need of such protection. I have reference to the poor, the illiterate, and the impoverished, the victims of the slums and low economic ghettos. The educated and sophisticated and the affluent are not in great need of protection. In the first place, the incidence of crime is much lower in this group and the brush with the law is not as frequent. Furthermore, when there is such a brush with the law the members of this group are able to make bail immediately, and, more important still, they know that they have a right to consult with counsel before making any statement.

Frequently does this situation occur. In this category, when the arrested person is asked a question, his reply is "I'm not saying anything until I've seen my lawyer." It is also significant that the police, with respect to members of this group, do not bother or attempt to get a statement because of their very physical appearance and the manner of dress and speech. The police are impressed with the fact that these are the people that should not be tampered with, their rights should not be infringed upon, and they make no effort to question them.

It is submitted that rule 5(a) of the Federal Rules of Criminal Procedure, which requires that an arrested person shall be brought before the nearest available committing magistrate "without unnecessary delay," and the *McNabb-Mallory* doctrine, afford the best protection against violation of one's rights by law enforcement officers, and by so doing, protects society. This is significant because it was fashioned by the courts and not by the legislature—which is the way it should be. As was said by Mr. Justice Frankfurter in *McNabb* v. *U.S.*:

"Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. Instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication."

and in *U.S.* v. *Mitchell*, referred to above, Mr. Justice Frankfurter had this to say:

"Practically the whole body of the law of evidence governing criminal trials in the Federal courts has been judgemade. Naturally these evidentiary rules have not remained unchanged. They have adapted themselves to progressive notions of relevance in the pursuit of truth through adversary litigation, and have reflected dominant conceptions of standards appropriate for the effective and civilized administration of law.

"As this court when making a new departure in this field took occasion to say a decade ago, 'The public policy of one generation may not, under changed conditions, be the public policy of another.' The *McNabb* decision was merely another expression of this historic tradition, whereby rules of evidence for criminal trials in the Federal courts are made a part of living law and not treated as a mere collection of wooden rules in a game."

I submit to you, gentlemen, that the same situation is applicable today; that the rule as is commonly espoused by Federal rule 5(a) as buttressed by *McNabb-Mallory*, is an example of living law—that it should be flexible, and only the courts can keep it that way. The legislature is not in the position to devise and design laws which should be applicable in every situation. It should be left to the courts to do this, depending on the facts and circumstances in each given case. The proposed law would merely be one of the wooden rules referred to by Mr. Justice Frankfurter.

It would appear that if the proponents of title I really wanted to eliminate entirely, or considerably reduce, the incidence of crime in the District of Columbia, more energy and attention should be directed to the cause of crime. And some of these are self-evident; e.g., lack of employment opportunities, low paying jobs, inadequate housing, and school dropouts. It is noteworthy that a large percentage of crimes are committed by juveniles or young adults. It would appear that society is partly responsible for this. Many of these youngsters have been denied an opportunity. A classic example is a current situation in the District of Columbia, relative to the policy of certain boys' clubs which still espouse and adhere to the outmoded and undemocratic doctrine of segregation on the basis of race. The proposed legislation is not going to resolve such issues and, therefore, is not going to reduce the incidence of crime.

TITLE III

Section 301 in its entirety is unequivocally and emphatically objectionable. It is a dangerous provision. It clothes the police with too much authority, it constitutes the police officer—both judicial officer and prosecutor. One might well ask whether the proposed law will require the police officer to be a graduate of an accredited law school. Such a law could only lead to widespread arrests without probable cause. It could be used as a means of harassment. As an example of this, in a number of criminal cases in which I have represented the defendant, I have been told by the defendant that a certain officer is: "Out to get me," and, "he has told me that he is going to lock me up every time he sees me." This provision is clearly unconstitutional. The standard of probable cause, as required by the fourth amendment to the Constitution, is wholly missing from this provision. And to retreat to the subterfuge that a detention is not an arrest, is sheer shammery.

Not to be overlooked is the obvious fact, with attendant ominous portents, that this provision would provide the police with the open sesame to resort to third-degree tactics. Moreover, it would provide the police with pseudoshortcuts to solving crimes, at the risk of sacrificing the constitutional rights of citizens. There is no concomitant provision that the standard of training and caliber of constituents of the police department be raised, or that they be bona fide residents of the District of Columbia. It is axiomatic that an undue proportion of the members are not residents, and, as such, their true loyalty lies elsewhere. It cannot be expected that these officers will take the same interest in protecting the rights of District of Columbia residents as they would those of the residents of the communities in which the officers themselves reside and where their families reside.

To go a step further, this provision could only lead to giving legal sanction to some of the tactics which are prevalent in some other sections of the country, such as using the law as a means of frustrating the activities of individuals who are merely trying to pursue their civil rights. The test for suspicion, as espoused in the proposed law, is more subjective than objective. Some of the means used are denial of bail, arrest, and trials on sham charges, and issuance of unconstitutional court orders. One sure evil to arise, as has been indicated in recent cases, is to arrest and charge with making a false report, one who makes a report or files a complaint against the police for physically abusing a person. And this is likely to occur no matter how sincere the motives of the complainant and irrespective of the fact that the report is made in good faith. It should be observed that in such cases the complainant is not entitled to a jury trial and, as a general rule, several officers appear as witnesses against him. It follows, therefore, that in most instances the defendant is convicted. One recent case received wide publicity because after being convicted the defendants were given the alternative of writing an essay, of not less than 100 pages in length, extolling the virtues of the police department, which, it is submitted, is sheer irony because, under the circumstances, there was nothing good to say but in order to escape a heavy fine or jail term an effort was made to write such an essay. It is also significant that in this case, the punishment meted out to the two defendants varied in direct proportion to the length of the essays submitted to the court. The defendant who submitted the longer essay received a suspended sentence, while the other defendant received a fine or jail sentence. More important, however, both defendants were being forced by judicial sanction to make statements which were not a reflection of their true feelings. Is this freedom of speech? Is one being given his full constitutional rights? Is it justice? Will passage of the proposed law mitigate or improve such practices? Unfortunately, all of these questions must be answered in the negative. On the contrary, the proposed law will only worsen, by a thousandfold, such a sorrowful state of affairs.

Section 302 of the proposed title III is a mere camouflage designed to buttress section 301 by providing additional assurance that the police will be permitted to hold a person for 6 hours of questioning prior to confronting a judicial officer.

This provision is riddled with booby traps. It does not make provisions for releasing witnesses who are poverty stricken and cannot pay the bond premium, which means such persons could be detained for an indefinite and protracted period. Neither is there any provision made for arranging counsel for the witnes or assuring that the witness will be advised of his right to counsel. Not only does the proposed act fail in these significant respects but it also fails to

offer a compensatory provision such as providing that the witness will be clothed with immunity against prosecution with respect to any crime as a result of statements made during such detention. Moreover, no procedure is shown to exist for compensating a witness who has been detained, which could result in a loss of income in many cases. Current procedures for detaining material witnesses in criminal cases are quite adequate, particularly with reference to the Federal court. Indeed it is submitted that the procedures with respect to the District of Columbia Court of General Sessions it is quite adequate. However, if the police feel that they need additional authority they should attempt to seek specific legislation for that purpose.

The esteem in which policemen in general are held, by the people who are most likely to be affected by the proposed law, is not very high. The proposed law cannot and will not, in fact is not designed to, raise such esteem. It can and will lower it.

Accordingly it is strongly urged that this committee reject H.R. 7525, particularly titles I and III.

Thank you very much.

Mr. BENTON. Yes. Of, course, I would like to make a few comments here and there with reference to the proposed legislation.

In the first place, in reference to the proposed rule, that is title I, which deals with *Mallory*, I get the impression that the basis for the proposed rule is the prevalence of crime in the District of Columbia. Apparently, some people have been disturbed by the great incidence of crime.

Now, I also get the impression that they are more concerned about the nature of the crime. For instance, they seem to be disturbed about the crimes of violence, particularly, for instance, rape, murder, and what-have-you.

The CHAIRMAN. Aggravated assault——

Mr. BENTON. Yes, aggravated assault.

Now, apparently, they feel that something can be done about it and, of course, they have proposed this law which they think is going to act as a deterrent to the commission of these particular offenses.

Now, I frankly think that that is fallacious reasoning. I do not think that is the proper approach to use. I do not think that that is going to solve the problem.

I think you have to get to the basic roots; that is, as to the cause of the crime before we can really decide on how it can be solved.

And a striking example of this is the case of the narcotics offender, which reminds me this morning I was just reading in the press about 11 persons who were arrested for narcotics offenses.

I think the Senator knows and, perhaps, the staff already know that under the Harrison Narcotics Act that the mandatory punishment imposed—I think the initial punishment is 5 years without any chance of parole, and the second time it is 10 years, and every time it increases and becomes more severe without any chance of parole.

Now, some of these narcotics offenders know that and some do not but apparently whether they do or do not know it, that has not made any difference insofar as the commission of the offenses. They still commit the offense.

The CHAIRMAN. Well, your testimony in that respect is directed to title V, which deals with the mandatory minimum sentences.

Is that correct? What you are saying, is that the severity of the penalty is not a deterrent to crime.

Mr. BENTON. That is the point I am making, but I am also using that to buttress this proposition, that changing the *Mallory* rule itself

is not going to affect—is not going to serve as a deterrent to the commission of crimes.

In other words——

The CHAIRMAN. Why does one follow from the other? That is the only point I am trying to make.

I think the testimony of Mr. Bennett, the Director of the Federal prison system was to the point that mandatory minimum sentences, as built into the Federal law, certainly do not deter the men who are convicted of Federal crimes and violate the U.S. criminal code.

I thought that he made some very emphatic points in this connection, and that came from a man of 27 years of experience and whose department retains jurisdiction over something like 25,000 prisoners in the Federal prison system.

I think that point was made very well by him. I understood you to emphasize it, but I do not quite understand how you use it to buttress your argument that title I is not a deterrent to crime.

Mr. BENTON. You do not see the relevancy?

The CHAIRMAN. I do not see the particular relevancy. I would like to have you tie it up.

Even admitting that one is true, that a mandatory minimum sentence does not actually deter crime, how does it follow that title I would not serve as a deterrent to crime?

The CHAIRMAN. It seems to me like they are two different propositions.

Mr. BENTON. Well, that particular phase of it is, perhaps, a little different but what I was going to say or, I mean, to elaborate on this further——

The CHAIRMAN. Yes, and I did not mean to cut you off.

Mr. BENTON. But what I was going to say is this, that under the Harrison regulation, that is that particular act, there was an easing of the rules of evidence.

In other words, they were not as stringent. In other words, usually when a person was arrested under that particular act, that is for a violation of that particular act, there were usually three counts against him, a sales count, possession count, and also importation.

That is, it was presumed that he had imported this particular product and that is, in a sense, what *Mallory* would do.

It would tend to ease the rules of evidence in a sense, to make it easier to obtain a conviction.

So my point is this——

The CHAIRMAN. You do not mean "*Mallory.*" You mean title I.

Mr. BENTON. I beg your pardon. Title I; yes.

The CHAIRMAN. Your point is that title I would make it easier to admit confessions into evidence than is now present under the *Mallory* rule?

Mr. BENTON. Yes, and my point is that it has not worked so far as the Narcotics Act is concerned, and I do not think it would work in this case.

The CHAIRMAN. Yes; now I have your point. I was putting too much emphasis on the mandatory nature of the minimum sentence.

Mr. BENTON. I might say for the record that I, of course, do object to the mandatory sentence phase of it.

The CHAIRMAN. I understand your position.

Mr. BENTON. Now, if I may go a step further, I might say, in passing, that the same thing, the same general rules seem to apply so far as capital punishment is concerned in the District of Columbia.

In other words, it does not make much difference actually as to whether or not a person likes to be punished severely. I mean, this is by way of collateral reference, so to speak.

The area in which this proposed law will operate, and the people that it is likely to affect—they are not going to really know about it in advance anyway. I mean, they do not really read the papers. They do not listen to the radio.

They are not aware of the fact that there is any law being considered now, the ones who are really going to be affected.

So, actually, I do not think we are going to accomplish much really in reference to title I.

Now, also in that connection I would like to say this, that from my experience in dealing with these people, who have been involved in the commission of crimes, and I have had some experience in handling criminal cases both in the U.S. District Court for the District of Columbia and also in the District court of general sessions and there particularly, in the court of general sessions, you come in contact with some of the so-called lowest element of society, the people who are very earthy, and they frequently have told me on various occasions that they did not know they did not have to make any statement.

As a matter of fact, some—I have asked some of them. I said, "Did you make any statement to the police officer," and they have said, "No, I didn't make any statement."

Of course, some were lying on that and I did not realize, until it came time for trial, that there had been a confession signed.

So, naturally, when it came time to try to get the confession suppressed it really resolved itself into a question of credibility between the officers and what the defendant said. So the defendant usually has not witnesses to support what he has said.

So a lot of times the court has no alternative—I mean, he has to more or less go by what the officer says; the credibility is better.

So my position in this regard is this particular title I, as I understand it, says that a mere delay in itself shall not be the cause of refusing to having a confession admitted as long as the confession is voluntarily made.

Now, I submit that the very fact that there is a delay, that in itself, is a form of coercion. In other words, that is the only weapon in many instances that a defendant would have to protect himself.

That is the only thing that would be accurately recorded. For instance, at the time that he is arrested or the time he is arrested, for instance, that perhaps could be checked by documentary evidence or the time that he appeared before a committing magistrate.

Those factors could be checked through documentary evidence, but what happened in between, whether or not he did make a statement or whether he did not make a statement, sometimes cannot be proved.

I mean, if he says he didn't, he cannot prove it.

And also in connection—in the same connection, the same people, these little people, the people who are uninitiated, the uninformed, usually when they get locked up they do not really—they do not think about the lawyer first. The first thing they think about is a bondsman.

"Can I get out of here; how can I get out?" That is all they are concerned about. They are not concerned about what their rights are.

So, actually, that is an area in which the law enforcement officer has an opportunity to take advantage of one. In other words, there have been cases, and I have had personal experience with this, where the defendant has told me that he wanted to talk with an officer first because the officer told him that he was going to see that he had bond and was going to let him get out.

So he wanted to talk to him first before he talked to a lawyer. That is a matter that has actually happened, and I have had personal experience in that connection.

And, of course, we have this problem also insofar as confessions are concerned as to the manner in which a confession is given.

There have been situations where the defendant would be brought into a precinct and he would be asked to give a statement. Now, contrary to popular belief, in many cases he is not told at that time that he does not have to make a statement or that any statement he makes may be used against him.

As a practical matter, what really happens is the officer tells him, "Well, you want to get out, don't you?"

"I am going to see that you get a bondsman. Just tell me what happened."

Well, the defendant may or may not. He may relate in abbreviated terms what he considered to be the facts. The officer, a lot of times, will go and reduce that to writing by a typewriter or he will usually incorporate his own version or; that is, his view of the case, and then he will bring it back to this defendant to sign it and a lot of times the defendant cannot even read. He can hardly sign his name. That is an actual fact.

Usually, at the very beginning of the typewritten version, they will also have—at the very beginning there will be the statement that the defendant was advised of his rights and, of course, usually it is just a simple statement that he was advised of his rights without bothering to explain what those rights are or bothering to make it clear that the defendant really understood what his rights were.

So in those cases a lot of times the confession is held admissible on the ground that it was voluntary when, in fact, it was not.

The defendant generally has no defense then and, therefore, I say the delay factor itself could be very important.

That is why I say it is very important that that be maintained as a protective measure against these poor illiterate people.

I would like to direct the chairman's attention to a recent case—well, it was not exactly a recent case, but it was decided not too long ago, and it bears on this point and it is on page 4 of the prepared statement, but that gives——

The CHAIRMAN. *United States* v. *Mitchell*?

Mr. BENTON. Yes, *United States* v. *Mitchell* which, I think, is a good example of that.

Now, in that case, of course, it was alleged that Mitchell confessed immediately to certain crimes and, of course, after having made a confession he was held for a period of some 8 days before he was taken to a committing magistrate.

But the point I was trying to make is that later, when he was tried, of course, he tried to have his confession suppressed and eventually

it went to the Supreme Court and it was held that the confession should be admitted because the *McNabb* doctrine did not apply, but the point was that Mitchell actually had denied making the confession.

The officers had said that he made the confession and he was held because he said he was going to cooperate with them. So here we have really a question of credibility.

Who are we going to believe, Mitchell, the defendant, or the officers?

I think those are the points I would like to make.

The CHAIRMAN. Yes, you have emphasized that very well in your prepared statement, Mr. Benton. Your position is very clear.

I mean, you do not favor title I, and you think the *Mallory* rule should be retained just as it is.

Mr. BENTON. Yes, that is right. I do not think there should be any change.

I think that should best be left to the court.

The CHAIRMAN. I understand.

Mr. BENTON. As a matter of fact——

The CHAIRMAN. Why do you not just comment briefly on title III? I think it is very clear.

I have read your statement, incidentally, and I have read it in full. Of course, your first point, on section 301, is that investigative arrests are clearly unconstitutional.

Mr. BENTON. Yes, and I think that has been made a clear by a lot of testimony that has gone on in advance to my appearing here, and I think it is amply supported by documentary evidence.

The CHAIRMAN. Now, why do you not just comment very briefly on section 302, that is the section of title III, as you know, that permits the holding of persons as material witnesses?

Mr. BENTON. Well, I think that is a very dangerous provision.

The CHAIRMAN. Now, why is it dangerous?

Mr. BENTON. Well, in the first place, it gives too much authority to a police officer.

In other words, the police officer, who is considered to be perhaps of average intelligence, as a general rule, has a right to determine for himself by merely being on the street whether or not a person should be picked up and held, and it can lead to other dangers.

For instance, there can be situations where that can be used as a weapon against particular individuals. For instance, they might want to harass an individual while they cannot charge him specifically with any particular offense, and they can arrest him repeatedly and hold him.

They can hold him for 6 hours and release him and then go right out in the street and pick him up again, and that has happened.

It happens now, I mean, without this new law, because I have had some defendants, whom I have represented, tell me that, that they have picked them up repeatedly and tell them that they are going to do it, particularly in cases of some of these prostitutes.

They have been arrested repeatedly for something. They are not really guilty, but the officer says, "I am going to keep you off the streets," and every time he sees them he picks them up.

So that has definite dangers.

Frankly, I feel that one of the things—I do not know whether it has been expressed previously or not, but I think this merits some consideration.

As I said before, the people who are going to be affected are the low-income level people, the people who are somewhat illiterate. I think that it is really a sociological problem that should be given a lot of consideration first.

For instance, there are the job opportunities for these peope. A lot of them do not have jobs and cannot get jobs because of either race or because of educational attainment and what-have-you. The jobs are just not made available to him.

"So what am I going to do? I have a family. I want to live, too."

Well, I mean I do not approve of these crimes, but I think we have got to get to the root of this thing.

The CHAIRMAN. A number of people have advanced the same theory, as far as the long-range solution of the problem is concerned, the problems related to unemployment, substandard housing, poor schooling, and some breakdown in the welfare system.

Mr. BENTON. One point, and I do not know whether this has been expressed previously or not, that I want to make is that I think this proposed legislation is going to be applicable purely to the District of Columbia. And I think that some consideration should be given to the fact that the Metropolitan Police Department is going to be involved and I think that some consideration should be given to a reorganization perhaps of that Department itself.

I think that a lot of the trouble, insofar as solving these crimes are concerned, is as a result of the Police Department itself.

For instance, I think that the individual members do not have the interest of the District of Columbia really at heart because the vast majority of them live in other jurisdictions. They are nonresidents.

I think if they, in order to hold those jobs, were required to be residents of the District of Columbia, I think perhaps that would make a big difference in the total effectiveness of the Department itself.

I think that they would have a greater interest, you see, not only because of the fact that they are drawing their money, their means of making a living, from the District but also the fact that they reside here. Their families reside here and their children reside here.

I think it would create a greater personal interest in themselves, I mean, as an individual, and not just go by mere authority or by mere orders.

And, secondly, I think the morale somewhat could be improved because I think there is no question about the fact that the morale is quite low in some areas because some of the members are not afforded an opportunity to advance or they are being held in certain categories. There is no question about that, and it is usually because of their race.

Secondly, they are not permitted to serve in certain positions, for instance, squad cars and scout cars and what-have-you.

They have a tendency to isolate them into certain groups, which is bad for morale.

They have police dogs which so far are not really effective. They only operate in certain areas of the city and again it is those of the low income and illiterate people.

I think that something should be done in that area. I think if that were done that might be some improvement.

Actually, I do not think there is any need for legislation at this time.

The CHAIRMAN. Well, I certainly appreciate your views, Mr. Benton, and I thank you for returning this morning.

Thank you very much.

Our next witness will be Mrs. Margaret A. Fischer, president of the Mount Pleasant Citizens Association.

STATEMENT OF MRS. MARGARET A. FISCHER, ON BEHALF OF THE NORTH WASHINGTON COUNCIL, WASHINGTON, D.C.

The CHAIRMAN. Mrs. Fischer?

Mrs. FISCHER. Good morning, Mr. Chairman, and members of the committee.

I forgot my reading glasses this morning, so if I am a little hesitant in what I am reading you will know why.

The CHAIRMAN. Surely; you just proceed in your own way, Mrs. Fischer.

Mrs. FISCHER. I would like to say, Senator Bible, that I am here for the North Washington Council. It is true that I am president of the Mount Pleasant Citizens Association.

I am not here as a lawyer. I am simply here before this committee as someone who has been very active in civic matters. I am a member of the board down at the Federation of Citizens Associations.

I am on the police and fire committee, and I am also a member of the legislative committee.

I only give you this background so that you will know that I have been deeply interested in this crime situation here in the District of Columbia.

The CHAIRMAN. Surely.

Mrs. FISCHER. My name is Mrs. Margaret A. Fischer, and I am here as the duly authorized delegate from the North Washington Council which is composed of nine citizens associations that is, Arkansas, Brightwood, Chillum Heights, Columbia Heights, Crestwood, Mount Pleasant, Kalorama, Petworth, Shepherd Park, all located in the Northwest section of Washington, D.C., west of Rock Creek Park.

These associations have served their community and our Capital diligently for many years, in fact, Brightwood Association celebrated its 74th year of service, and my own Mount Pleasant Association has 53 years of service behind it. I mention this that you may know that we are not newcomers to this area and that we have an understanding of the problems which exist and we desire to correct them.

Our actions in the past have consistently pointed up our deep concern because of the rise in crimes and deplored the soft policy shown toward the criminals. We strongly supported the antiloitering law and thereby hoped to get children off the streets and help parents to assume responsibility for their whereabouts.

We also supported Judge Davis' legislation which would have taken juveniles between the ages of 16 and 18 out of the jurisdiction of the juvenile court and would have had them tried as adults in the municipal court. In the past, we have presented our resolutions regarding the seriousness of crime to members of the Senate and House District Committees and the newspapers of our city.

I am here today because we again note with grave alarm the ever increase in crime figures covering all categories, and realize every

day that our law-abiding citizens no longer enjoy peace and protection day or night on the streets, in their homes, in their churches, and in their place of business.

It is a known fact among people who want to know the truth, that night attendance has decreased in citizen association meetings, church services, and that restaurants (in many areas) do not enjoy the evening patronage that they once had. It has come to my attention that certain dining rooms are closing (after 20 years of service) because the older people are deathly afraid to be out. The fact that the National Geographic lecture at 5 is very popular, that the Lisner afternoon concert programs are being well attended, that church bazaars advertise afternoon hours rather than late evening hours as they once used to do, and that more early evening schedules are being adopted for meetings, classes, et cetera, is surely indicative of the growing fear of being assaulted.

People do not travel alone but usually try to get a ride with someone and by the way, everyone insists that the doors be locked. Does this not point up a danger and a restraint on the free movement of the law-abiding citizen?

We speak of our concern for the well-being of our people. Are we thinking seriously of another category of citizens? The doctors, nurses, ambulance drivers, policemen, firemen, utility service people, and those who serve us in emergencies. These are only a few who serve us at night. What are we doing to protect them? As you know, it is absolutely necessary for them to be out at night in all types of neighborhoods, and I call your attention to page 8 of Report No. 579 of the District of Columbia crime, this report shows that during 1962, the District of Columbia ranked 1st in aggravated assault (assault with a dangerous weapon), 2d in robbery, 4th in murder and nonnegligent manslaughter, 5th in housebreaking, 10th in forcible rape, 10th in auto theft, 11th in larceny. Rather disgraceful, isn't it?

Are we going to permit our streets to become dead because of the absence of law-abiding citizens because they are afraid to go out? Are we going to permit freedom of movement only to the criminals? Are we going to put off punishing the criminals until our tourist trade becomes nonexistent?

Gentlemen, it is high time that something be done about this deplorable condition. We the citizens are not apathetic—many do not have the time to appear here—others are shy and cannot speak before you—we know what the problem is—you are talking only about the known reported crimes.

We are also concerned with the many crimes which are committed every day but which are not known to our police and the news media. You ask why that is? People are afraid because of the consequences (if they testify against the criminal) to their personal safety. Others do not wish to be embarrassed by questioning in a courtroom, the mental anguish is too great. And because of the leniency of many court decisions in favor of the criminal, they feel that the criminal will eventually be let off and so what is the use?

Therefore, the North Washington Council wishes to go on record today as supporting H.R. 7525, known as the omnibus crime bill. We are wholly in accord with the purpose of the bill and are deeply grateful for the time and effort expended by Chairman McMillan, and members of the House District Committee.

And we definitely urge the adoption of titles I, II, III, IV, and V—and, Chairman Bible, you have heard so much about the explanation of these titles that I did not bother going into them.

The CHAIRMAN. Yes, I think I am fairly familiar with them, Mrs. Fischer. Thank you.

Mrs. FISCHER. We sincerely feel that if they are incorporated, they will be a deterrent to crime and will be instrumental in helping the policemen interrogating criminals and thus help apprehend them with greater dispatch and thus remove them from society and our streets and get them in penal institutions where they should learn discipline, cooperation, and respect for the laws of society and its people.

Then and only then, will the law-abiding citizen have freedom of movement and protection under the law which the Constitution guarantees to him. And he then can fulfill his obligations to God, country, family, and society without fear of being harmed.

Thank you, gentlemen, for this opportunity to appear here and please accept our sincere thanks for everything you may do to uphold H.R. 7525 and help in its passage.

The CHAIRMAN. Might I just ask you, for the record, a couple of questions, Mrs. Fischer?

Mrs. FISCHER. Yes, sir.

The CHAIRMAN. The North Washington Council is made up of nine citizens associations——

Mrs. FISCHER. That is right.

The CHAIRMAN (continuing). And you have named them.

Mrs. FISCHER. Yes.

The CHAIRMAN. Now, approximately, how many people are in each of these associations?

Mrs. FISCHER. Well, they have different memberships, sir. I would say the overall membership would be around 3,500.

The CHAIRMAN. Now, these various areas represent how many people?

Mrs. FISCHER. Well, in my own association—I can speak for my own association——

The CHAIRMAN. And yours is the Mount Pleasant association?

Mrs. FISCHER. Yes; we have 250 members.

The CHAIRMAN. How many people are within the Mount Pleasant area?

Mrs. FISCHER. Oh, in the Mount Pleasant area there would be many, many thousands.

The CHAIRMAN. I think it would be helpful if you could furnish that to the committee.

Mrs. FISCHER. I would be very happy to do that, sir.

The CHAIRMAN. You have nine citizents associations?

Mrs. FISCHER. Yes; our boundary line, and I can help you with that, begins at Florida Avenue and goes over to Rock Creek Park west, and goes as far as the District line on the north, and then would go over to about Fourth Street on the Northwest section.

Mrs. FISCHER. May I make a personal observation here, sir?

The CHAIRMAN. Surely.

Mrs. FISCHER. There has been much said that the policemen should not have the privilege of investigative arrests.

Of late I have been a witness of several little things that have happened out on the streets, and the only thing that I noticed was that

with the appearance of the police the individuals scattered so quickly that I do not see how anybody would have had time to go through the neighborhood trying to find these people.

And I do believe that it is helpful for the officer in an area to be able to ask somebody why they are there.

I also have observed lately at night that there are many of our good citizens who are afraid to be out on the streets. However, if you look out through the window you will find there are other people walking around at 3 and 4 o'clock in the morning and there is no way of knowing whether these individuals are residents of your area and, as citizens, we have no right to question them.

We may suspect that they should not be in the neighborhood and that there may be something wrong about it. Yet as individuals we cannot do that.

And I believe that our policemen, when they are walking around, if there is something happening they should have the privilege of trying to find out what these people are doing there for our own protection.

I know that about a month ago a very good friend of mine was walking along a street at 11 o'clock at night, and he felt perfectly safe and he noticed across the street there were about 12 boys walking along and one of them called across the street and asked him if he had a cigarette and he replied he didn't have.

And in a few minutes there were 12 young men that crossed the street and completely surrounded him. And this man had been in the Medical Corps in World War II, and he realized that he was no match for these 12 boys, and one boy asked him for a dime, and he refused to give him any money and another fellow replied, "Well, you are a wise guy."

And immediately they started pumping him and before he knew it he was down on the ground. He said he realized the only thing he could do was to make unmerciful sounds, which he did, and in a few seconds' time these 12 boys dispersed.

Well, Senator Bible, you can realize how could we possibly find 12 boys in the neighborhood. Perhaps they did not even live in our neighborhood.

I think that this has to be brought out before you.

The other thing that I noticed was in yesterday's paper or last night's Star that Mr. Bennett had felt that there was not any urgency for crime legislation.

I wish that someone would make a survey either through the newspapers or some organization and permit the number of people to write in who would actually answer whether or not we need legislation.

Those of us who have lived here many years and, sir, I have lived here since 1936, and those of us who like living here and who realize this is our Capital, I do not think, sir, that we look at it comparing ourselves with other States or other places. I do not think that we should.

If the crime is here it is our problem, and I think we should solve it here and not worry about whether some other city or some other State has more or less crime than we have.

I think we should settle that problem here and make our city safe for our own people.

The CHAIRMAN. Thank you very much, Mrs. Fischer. You have been a very fine witness and I appreciate your testimony.

Our next witness is Mr. John A. Patterson, Jr., of the Chevy Chase Citizens' Association.

STATEMENT OF JOHN A. PATTERSON, JR., FIRST VICE PRESIDENT, CHEVY CHASE CITIZENS' ASSOCIATION

The CHAIRMAN. Mr. Patterson?

Mr. PATTERSON. Good morning, Senator Bible.

The CHAIRMAN. Good morning.

Mr. PATTERSON. My name is John A. Patterson, Jr., first vice president of the Chevy Chase Citizens' Association. I am appearing here today as a substitute witness for F. McKey Smith, who is ill, chairman of the Public Protection Committee of the Chevy Chase Citizens' Association, an organization with a membership of approximately 3,000 out of approximately 10,000 residents, and a large number of them approximately are residents of apartment houses and do not have the same interest possibly as property owners do, of the leading business and professional people in our community.

Mr. Smith was to appear here today as the result of a meeting of the executive committee of the Chevy Chase Citizens' Association which had empowered him to make the following comments reflecting our policy upon H.R. 7525, the omnibus crime bill, now before the Senate District Committee.

The delicate balance of the pendulum of justice has been thrown completely out of balance in the District of Columbia by the *Mallory* decision and the ensuing restrictions placed upon the Metropolitan Police Department to interrogate and question suspects of crimes or witnesses to crimes. This delicate balance must be restored if there is to be a return to normalcy in the Nation's Capital, permitting the law-abiding citizen and his family to walk the streets with a reasonable degree of safety, free from molestation from assailants, murderers, and rapists.

The result of almost 6 years of the *Mallory* decision, which has hampered police activities in bringing criminals to justice, is coldly and shockingly emblazoned in the headlines, which reveal the facts of repeated criminals being allowed to mingle in our society with meager or no punishment, and the sharp reduction in the rate of crime clearance by the police department.

Six years of justice by this 20th-century equation has turned our once-proud city with a remarkably low crime rate into a haven for criminals and lawbreakers and a showcase of sin beset by police-mocking felons. Washington, D.C., has become a global symbol of lawlessness and acquired the reputation, deserving or not, of being soft on crime.

To dramatically demonstrate the effect of the *Mallory* decision, I wish to point to the following statistical evidence. The *Mallory* decision was made in June of 1957. From 1952 to 1957, a period of 5 years, there had been a marked drop in crimes of violence and felony offenses in the District of Columbia. Since June of 1957, the trend has completely reversed itself and the incidence of crime has again skyrocketed, even more markedly upward than the descent from 1952.

The law enforcement officials of this city must be taken off the defensive they have occupied since *Mallory*. The most acceptable remedy, the one advocated by the vast majority of the law-abiding elements of our community, is embodied in title I of H.R. 7525. Other bills have been introduced to alleviate the handcuffing effect upon law enforcement of the *Mallory* decision. Unquestionably there is virtue to many parts of these bills and would most certainly represent an improvement over the present conditions.

One of these, H.R. 5726, proposed by the U.S. attorney for the District of Columbia and Deputy Attorney General Katzenbach is a compromise which would, generally, be of assistance to law enforcement. It is our feeling, however, that H.R. 5726 and other bills go too far in the direction of protecting the criminal and tend to make the job of law enforcement subject to extremely cumbersome and unwieldy limitations in performing their principal duties of protecting our law abiding citizenry.

We urge the adoption of title III of H.R. 7525 which will permit an officer or member of the Metropolitan Police Department to detain and question persons suspected of committing crimes and to require bond in the case of certain material witnesses. Title III also provides for legislation similar to the Uniform Arrest Act as an alternative practice to investigate arrests. This legislation will provide for the detention and questioning of material witnesses to crimes of violence. It is deemed necessary for enactment in view of the shortcomings of the present statute covering the detention of material witnesses, which is practically impossible to utilize and in the final analysis, serves no practical value.

Any material witness legislation, to be effective, must make certain that the witness is available before, during, and after the initition of criminal proceedings in the court. Other legislation introduced in the Congress to provide for the detention of material witnesses tends to place excess restrictions upon law enforcement and some would leave us no better off, if it were enacted, than we are today.

The American Law Institute has made a detailed and comprehensive study of the *Durham* rule, adopted in 1954 after the now famous *Monte Durham* decision. The *Durham* rule provides that a defendant is not responsible if the act was caused by mental disease or defect.

Title II of H.R. 7525, drafted upon the recommendations of the American Law Institute, would allow a successful defense if the accused, as a result of mental illness or defect, lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. This represents an updating of the traditional right-wrong and irresistible impulse tests which were the determining factors in criminal defense prior to the *Durham* decision in 1954.

In urging the adoption of this legislation, we realize that this is an extremely technical subject but feel that the diligent research of the American Law Institute has provided us with badly needed and, equally important, workable legislation.

The Chevy Chase Citizens' Association considers these legislative proposals to be of paramount importance in bringing about a swift and dramatic change in the crime picture of our Nation's Capital. We strongly feel that unless legislation covering these points is swiftly

enacted into law that our crime problems in the District of Columbia will continue to multiply manifold rather than commence to diminish.

Mr. Chairman, in conclusion, I would like to speak briefly about a matter not covered directly by H.R. 7525, but bearing a direct and undeniable effect upon the total District crime problem. An attitude and inclination toward lawlessness and disrespect for the property and rights of others is becoming progressively greater among the youth of the District of Columbia.

The number of multiple offenders in the 16- and 17-year-old brackets, both male and female, continues to rise at an unbelievably alarming rate with the result that we are actually raising and breeding a generation of young criminals who are committing heinous adult crimes but continues to be treated as juveniles by our courts.

Age has become, and remains today, the arbitrary line of division for a criminal act. The current practice of treating these incorrigible young criminals, the vast majority of the 16- and 17-year-old multiple offenders, as juveniles should not be condoned by our lawmakers or by society. The demonstrated contempt these youths have for law and order and civilized living is absolutely appalling.

Today, modern justice dictates that rehabilitation and readjustment to society are all important. The law-abiding citizen who maintains a well-balanced adjustment to society is ignored today with the result his rights are constantly abridged to provide repeated readjustment opportunities for the youthful criminal. There must be a limit to the degree of flexibility our society can possess in dealing with juvenile offenders.

In the Nation's Capital, this limit has been passed long ago. The shocking release of four juveniles, recidivists beyond any question, with unbelievable records of criminal activity, serves as a glowing illustration of the need for a stern reappraisal of our current methods of punishment for the so-called juvenile offender.

Mr. Chairman, the citizen of the District of Columbia is entitled to the same protection from his police force as the citizen in 1 of the 50 States. You, and your fellow Members of the Congress, have the power to provide our fine Police Department with the tools to give us this protection. In your deliberations, we ask that you consider us, the law abiding, equally with the criminal, hopefully, to be adjusted to society.

Thank you, Mr. Chairman, and members of the Senate District Committee for this opportunity to set forth the views of the Chevy Chase Citizens Association in support of H.R. 7525.

I have something not in the prepared statement, to say, and this is a comment concerning yesterday's testimony before this committee which I would like to comment on, if I may.

The CHAIRMAN. Certainly, we will be glad to have your comments.

Mr. PATTERSON. Yesterday before this committee a witness stated that he believed that there was a positive correlation between the humane welfare regulations of the city of Buffalo, N.Y., and the low crime rate there.

He also stated that scrupulous police work and the humane approach to the welfare problems spells Buffalo as America's best behaved big city.

A review of the facts and statistics from the Uniform Crime Report of the Federal Bureau of Investigation, released July 19, 1963, do not

in our opinion bear out this conclusion. In 1962, for 200 major cities in the United States, reporting in the five major categories of criminal activities, Buffalo ranked as follows, per 100,000 inhabitants:

Fifty-two cities had fewer total offenses than Buffalo; 42 cities had fewer cases of murder and nonnegligent manslaughter; 59 had fewer cases of forcible rape; 64 had a lower incidence of robbery; 91 cities had fewer cases of aggravated assaults, and 51 had fewer cases of burglary.

Also of interest is the fact that many of the cities in the foregoing statistics are in the depressed and high unemployment areas of Pennsylvania and West Virginia.

That is in my statement, Mr. Chairman.

The CHAIRMAN. I am very happy to have those statistics.

I think, to tell the full story, we should know exactly what the population range is of the cities that are cited. You cited many cities that have less crime than Buffalo, but I would also be interested, and I think to round out the picture, we should know how many cities have more crime than Buffalo.

I do not know whether that is readily available, but the record is going to be kept open for a week and I think, in fairness, it should be rounded out in that manner.

You have told part of the story, but I think we should have the complete story of whatever value these statistics are, and statistics can be made to tell many, many different stories.

And I think that we should know the number of cities that go to make up this particular study, when this study was made, and what year this represents.

I think you have to take more than 1 year in any of these things if you are to give it any significance, and we have not had that in these hearings here.

I mean, the proponents will pick out a year that makes the record look the blackest for their purposes and the opponents will pick out a year that serves their purposes best.

I think, as a lawyer, you understand how people plead their cases, and there is somewhere between the highest and the lowest in these cases the complete answer and the complete facts.

Since Buffalo came into the picture yesterday I asked him at that time to furnish some statistics not directly on the point that you are making but to the point of the size of the city. I asked him how many policemen they had, and he said he did not know.

I think if you are going to make a comparison you ought to make a good rounded out comparison so we can see just how it strikes in the balance of the cities.

As I have said, the mere fact that our city compares favorably with many, many towns, of comparable size in the uprise of crime is of slight consolation. We want to make this the most perfect city in the entire world.

This is the ultimate goal and we obviously have quite a ways to go yet, but I think we should keep striving in that direction.

So I think if you can, without too much difficulty, give these additional facts I would appreciate it.

Mr. PATTERSON. Mr. Chairman, I stated this was information released in the latest uniform crime report, and these statistics are for 1962, which is available.

The CHAIRMAN. Yes.

Mr. PATTERSON. I have confidence in the source of this because I am also——

The CHAIRMAN. I am not questioning the source. Do not misunderstand me. I am not questioning the source.

I do not think that this tells the whole story for two reasons; No. 1, it takes 1 year, 1962, and I think the statistics have got to be broader than for 1 year.

No. 2, it lists, according to your recitation, the cities that have less crime. It does not list the cities that have more crime, and it seems to me that this is the only way that you can fit them into the tabulation for whatever value the comparison of one city to another may have.

Obviously, this is a problem. This has been testified to time and time again during these hearings, that the racial component and racial makeup of communities has some direct relationship to this problem that we are considering today.

I do not think we can blindfold ourselves to that fact.

Mr. PATTERSON. There is a lot of material in relation to this.

I am also on the protection committee of the board of trade, and we have gone into this quite thoroughly and I feel certain that this is a comparable setup to Washington, but we will be glad to get further information and submit it within the week to the staff.

The CHAIRMAN. Well, if it is not too much trouble, I would appreciate it.

I would rather have a broader look at Buffalo or Washington or Philadelphia or San Francisco than just one isolated year such as 1962.

Mr. PATTERSON. I agree with you that often the whole picture is better. But those are the statistics that we got and we brought it out for the very reason that you said, to bring out one city to prove the point, but I will be very happy to get the other information.

Thank you very much.

The CHAIRMAN. Mr. Patterson, I am delighted to have you here and I am delighted at the interest that the citizens' associations show in these matters.

Now, the hearing record will remain open until 5 p.m., Thursday, November 14, for rebuttal statements from any and all witnesses, and we welcome rebuttal statements.

There are many areas upon which we have heard testimony over the last several weeks in which there are differences of opinion, and we would be delighted to have any comments that anyone whatever wants to make pro or con on the matter before us.

A letter from Frank J. Remington, professor of law, University of Wisconsin Law School, dated November 4, 1963, whose views were sought by the committee and who was unable to testify personally, will be included in the record.

(The letter referred to follows:)

THE UNIVERSITY OF WISCONSIN LAW SCHOOL,
Madison, Wis., November 4, 1963.

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

DEAR MR. SMITH: This is a reply to your letter of October 16 in which you ask for my views of titles I and III of H.R. 7525.

These two titles deal with the general issue of incustody investigation, a matter of great current interest and importance to law enforcement. I have had an

opportunity to concern myself with this issue as project director of the American Bar Foundation's survey of the administration of criminal justice in the United States, and as a member of the Advisory Committee on the Federal Rules of Criminal Procedure. The views which I express in this letter, however, are not those of either of these groups but are my own individual views.

Title I is designed to repeal the so-called *Mallory* rule. In the very recent case of *United States ex rel. Williams* v. *Fay* decided on October 4, 1963, Chief Judge Lumbard of the Second Circuit Court of Appeals made a statement which seems to me very relevant to the issue raised by title I. In his opinion he referred to the problem of police interrogation and said in part:

Cases such as this raise a very serious question, whether the States are powerless to make the kind of inquiry which will bring to justice those who rob at night and murder their victims leaving no witness who can identify them. As a judge who must pass upon these cases where Federal court intervention is sought, I cannot concur without pointing out that the courts have been left to make rules and apply constitutional standards with little, if any, real knowledge or guidance regarding the difficulties which face the police in solving such crimes in our crowded metropolitan centers. *Moreover, Congress and the legislatures have failed to make appropriate inquiry and statutory provision to meet the situation.* [Emphasis added.]

It seems to me that Judge Lumbard is right when he says that courts have had to act without sufficient knowledge or guidance regarding most enforcement practices and problems. I believe he is also right when he says that the Congress has failed to make appropriate inquiry and statutory provision to meet the situation. Certainly title I does not meet this need. All it does is to repeal the sanction which is the exclusion of evidence obtained during a period of illegal detention. The vital question is left unanswered. This is the question of when a law enforcement agency may properly detain a person, following a lawful arrest, for the purpose of conducting an in-custody interrogation or other in-custody investigation designed to produce facts which will make it feasible to either charge the suspect or to release him from custody. This is an extremely complex and an extremely important issue. Its difficulty makes it understandable why the Congress might want to avoid the issue by merely providing that a confession is not inadmissible merely because of a failure to bring the suspect before the Commissioner without unnecessary delay. However, the difficulty of the task does not, in my judgment, justify the failure to deal with the issue.

Law enforcement agencies cannot avoid the responsibility of deciding whether to detain or not to detain suspects. The question is whether they will have to continue to do this without adequate guidance from the Congress. Congressional dissatisfaction with the *Mallory* rule, evidenced by the passage of title I of H.R. 7525, is in fact dissatisfaction not only with the exclusion of evidence, but more importantly with the requirement that a suspect be brought before the Commissioner without unnecessary delay. Treating the symptom, which is the exclusion of the evidence, will have no effect whatsoever on the basic and important question of when detention for purposes of in-custody investigation following a lawful arrest is proper and when it is improper.

Passage of title I of H.R. 7525 will make it possible for police to act illegally without jeopardizing the conviction of the suspect. Certainly this is not a happy situation for anyone, most of all for law enforcement agencies who ought not to be content with a situation in which they are required to act illegally in order to maintain the level of enforcement demanded by the community. If in-custody interrogation is necessary (and I might say parenthetically that I believe it is both proper and necessary), it ought to be sanctioned by legislation spelling out when a suspect may be detained for the purpose of in-custody investigation. Congress has the facilities to make the kind of thorough investigation necessary to enable legislation to be drafted which will adequately deal with this issue.

In brief, I would oppose title I of H.R. 7525 because I do not think it deals adequately with the problem. It continues what seems to me to be the history of legislative default in regard to some of the basic questions facing law enforcement agencies today.

Title III of H.R. 7525 does attempt to deal more directly with the problem of detention for investigation prior to arrest (title I having dealt with detention following arrest). Title III does at least try to indicate the circumstances in which it is proper to detain a person and sets a limit on the period of detention. There is also an effort made to prevent the suspect from having an arrest record if he is released following the investigation.

The weakness of title III is that it merely incorporates the provisions of the Uniform Arrest Act, which are some 30 years old, and fails to reflect some of the problems which have arisen under the Uniform Arrest Act in States where it has been adopted. For example, in Delaware the Supreme Court in *Desalvatore* v. *State* (163 A.2d 244 (1960)), held that the phrase "reasonable grounds to suspect" means "reasonable grounds to believe." By this interpretation the Supreme Court of Delaware sustained the constitutionality of the detention provision but in so doing deprived it of any significance. To equate "reasonable grounds to suspect" with "reasonable grounds to believe" means that a person can be detained prior to arrest only when grounds for arrest exist. The courts of the District of Columbia will not necessarily adopt this view of the Delaware court, but it would be desirable to make certain of this by attempting to give some further content to the phrase "reasonable ground to suspect." In *Rios* v. *United States*, the Department of Justice argued that law enforcement officers ought to have the right to question a suspect where there exists "reasonable grounds for inquiry." This seems to be a better formulation, particularly if the draftsmen were able to give some indication of the factors which might properly be taken into account by a law enforcement officer in deciding whether sufficient grounds for inquiry exist.

Even if these matters were clarified, my own individual view would still be that it is unnecessary to have a 6-hour in-custody detention provision if Congress were to provide an adequate basis for stopping and questioning suspects on the street; adequate arrest power; and an adeqaute right to conduct a reasonable in-custody interrogation following a lawful arrest.

In brief, my view of title III is that it is inadequate to the extent that it perpetuates the difficulties which have developed in the Uniform Arrest Act during the 30-year period since its original formulation and further that it is both unnecessary and unwise to raise the very difficult constitutional questions involved in the 6-hour detention provision when adequate provision for stopping and questioning suspects, arrest and in-custody interrogation would provide the power needed for effective law enforcement today.

Very truly yours,

FRANK J. REMINGTON,
Professor of Law.

The CHAIRMAN. I believe the views expressed in his letter are most challenging.

The committee had also hoped to hear Prof. Jerome Hall, of the University of Indiana, a legal scholar in the *Durham* field, who was unable to arrange his schedule to appear before the committee.

Therefore, I ask to be placed in the record at this time an article by Professor Hall in the American Bar Association Journal of October 1963, dealing with the *Durham* subject, and during the course of our hearing on title II, which involved the *Durham* subject, a number of witnesses referred to this particular article.

(The article referred to follows:)

THE MCNAGHTEN RULES AND PROPOSED ALTERNATIVES

Responding to overt and implied criticism of the McNaghten Rules for determining legal insanity to excuse criminal responsibility, Mr. Hall proposes a national seminar or study by judges of the diverse and perplexing problems they must face in deciding issues in this field. He thinks that McNaghten needs repair rather than replacement and that a rough consensus might be attainable.

(By Jerome Hall, distinguished service professor of law, Indiana University)

In the March 1963, issue of the American Bar Association Journal, Justice William J. Brennan, Jr., after stating that he would not even "by the slightest intimation suggest" which insanity test he thought preferable to the McNaghten rules, "if indeed it has yet been proved that any one of them is better," proceeds directly to express some very definite preferences on this subject.[1]

[1] Brennan, "Law and Psychiatry Must Join in Defending Mentally Ill Criminals," 49 A.B.A.J 239 (March 1963).

Thus, evidently referring to those who defend the McNaghten rules, he asks a startling and illuminating question: "How valid is the assumption that morality and safety require punishment * * * of mentally ill people?" This is startling because it seems to suggest that defenders of the McNaghten rules wish to have psychotic persons punished. It is illuminating because if indicates a lack of awareness of the fact that the principal problems in this area concerning the meaning of "mentally ill", the "knowledge" by reference to which this is to be determined, and how mental illness can best be decided in a democratic society when the issue is criminal responsibility.[2] One's concern is heightened by the justice's confidence in "medical assessment" as a condition of release from imprisonment and by his evident opinion that there is an obvious answer to the question whether "mentally ill offenders" should be sent to a hospital or a penal institution.

The McNaghten rules were propounded by English judges in 1843 in *Daniel McNaghten's Case*, 10 Cl. and Fin. 200. 8 Eng. Rep. 718, in response to inquiries from the House of Lords. They hold that "to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." This test has been and is followed (with some glosses) in almost all American jurisdictions, except New Hampshire, Vermont, and perhaps Illinois. In New Hampshire, for instance, in *State* v. *Pike*, 49 N.H. 399 (1869), the supreme court of that State formulated a test holding that an accused is not criminally responsible "if the [unlawful act] was the offspring or product of mental disease * * *."

DURHAM CASE AROUSES INTEREST IN INSANITY RULES

The present interest in insanity is a defense in trials of criminal responsibility was aroused by the decision of the U.S. Court of Appeals for the District of Columbia Circuit in 1954 in *Durham* v. *United States*, 214 F. 2d 862, in which the court held that a defendant was not criminally responsible "if his unlawful act was the product of mental disease or mental defect." The Court of Appeals for the Third Circuit has refused, as have many other courts, to follow the *Durham* rule, stating: "We are of the opinion that the following formula most nearly fulfills the objectives just discussed: The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated."[3]

Another alternative to the M'Naghten rules is proposed in the Model Penal Code of the American Law Institute. This provides:

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

(2) As used in this article, the terms "mental disease or defect" do not include an abnorality manifested only by repeated criminal or otherwise antisocial conduct.[4]

In his article Justice Brennan goes on to state that "a glance at the transcripts in more than a handful of cases" convinced him that although an accused may be "legally sane," he may "nevertheless [be] seriously disordered." Able psychiatrists, after considerable study of many cases, disagree on this, and experienced forensic psychiatrists have said that the M'Naghten rules operate well and justly and are preferable to alternative proposals.[5]

The Justice then asks: "Can a true moral judgment be made about responsibility for any act without delving deeply enough into the actor's background * * * to attempt to explain the whole man?" While no mention is made of anyone who wishes to limit such an inquiry or of inevitable limitations of any legal or psychiatric inquiry, the implication regarding the present law and its administration is plain and disturbing.

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[2] These questions are discussed in Hall, "General Principles of Criminal Law," 449–529 (2d ed. 1960).

[3] *United States* v. *Currens*, 290 F. 2d 751 (1961).

[4] Sec. 4.01, Model Penal Code (proposed official draft) 66 (1962). See, also, Schwartz, "The Model Penal Code: An Invitation to Law Reform," 49 A.B.A.J. 447, at 449 (May 1963).

[5] Hall, op. cit. supra at 519–520, passim.

Justice Brennan also refers to the "distinguished Drs. Karl Menninger and Joseph Sotten" and he quotes approvingly and at length from Judge Bazelon, the author of the *Durham* opinion, but he does not mention Drs. Frederic Wertham and Hervey M. Cleckley or other distinguished psychiatrists who hold a different opinion of the current law and of the forensic use of psychiatry. Finally, there is no reference to any of the judges of some 20 jurisdictions, State and Federal, who have rejected the *Durham* rule and other proposed alternatives to the M'Nagthen rules, not even to the particularly thoughtful opinion of the chief justice of the supreme court of his own State in *State* v. *Lucas*, 30 N.J. 37, 152 A. 2d 50 (1959).

JUSTICE DOUGLAS THINKS DURHAM IS IMPROVEMENT

In a lecture a few years ago to group of psychiatrists, Justice William O. Douglas hailed the *Durham* rule as a great improvement on the "rigid," the "arbitrary, fixed" M'Naghten rules.[6] He first attributed the M'Naghten test to political pressure, public clamor, and newspaper publicity, but later he said: "The only warrant of the M'Naghten rule of insanity was tradition." "To most psychiatrists," he continued, the *Durham* decision "was a break with legal tradition that was long overdue." It has the great advantage of permitting the psychiatrist to "speak to the court and to the jury in the language of his discipline," he declared.

Justice Douglas, in my opinion, was seriously mistaken in every one of these statements. Not the least significant evidence of this is that an overwhelming majority of the judges who have had an opportunity to pass on the question have rejected the *Durham* rule and the psychiatry summoned in support of it. The irony of these implied and expressed criticisms of the M'Naghten rules is that these justices, especially sensitive to the protection of civil liberties, do not realize that if the M'Naghten rules are abandoned, the consequence will probably be a "tyranny of experts".[7] The vaunted "humanitarianism" of some psychiatrists contemplates the long-term incarceration of vast numbers of persons who have violated no law, as well as the detention of thousands of petty offenders for as long a time as the so-called experts withhold their favorable prognosis. It is unfortunate that these justices do not raise a question regarding the touted claim that adequate knowledge exists to discharge the above vital functions fairly and with warranted assurance in the validity of the "experts' " decisions.

What is especially significant is the probability that if judges as able and conscientious as Justices Brennan and Douglas lack the knowledge required to deal soundly with this problem, then many other judges and lawyers are in a similar situation. In sum, we face a complex 20th-century problem whose solution requires much more than sympathy with unfortunate persons charged with the commission of crimes.

INFORMED DISCUSSION SHOULDN'T BE CURTAILED

Can anything be done to remedy this situation, especially in its relation to issues of the gravest importance that will no doubt be presented in due course to the Supreme Court? Certainly it would be a mistake for judges to refrain from public speaking and printed publication, for then important potential contributions would not be made and the occasional need for further study would be unknown.

It may be suggested, in the first place, that when a judge delivers a public lecture and has it published in a widely read journal, it is both fair and necessary that the views he expresses be subjected to the same sort of searching criticism as the published views of others. But objectivity is very difficult to maintain when a Justice of the U.S. Supreme Court is concerned.

Moreover, one can hardly ignore the fact that although we avow a free market in ideas as the best test of truth, the heads of well-financed psychiatric institutions and powerful officials enjoy strategic positions in the formation of public opinion. The implications are alarming when a Justice of the Supreme Court appears to have accepted certain philosophical versions of psychiatry.

It would, of course, be absurd to imply that either Justice Brennan or Justice Douglas would approve any philosophy that depreciated human freedom. What

[6] Douglas, "The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists," 41 Iowa L. Rev. 485 (1956).
[7] Wertham, "Psychoauthoritarianism and the Law," 22 U. Chi. L. Rev. 337 (1955).

troubles one is their apparent failure to recognize the relationship to human freedom of the thesis that everyone or that every criminal is "mentally ill." What troubles, also, is the apparent acceptance of the extremely broad meaning of "mental illness" propagated by psychiatrists whose philosophy is, quite consistently, the utter repudiation of freedom, responsibility, and other basic values of democratic society. It is hardly possible to avoid the conclusion that what is plainly needed is further study of this difficult problem by judges and practicing lawyers so that at least the cogent questions can be raised.

NATIONAL SEMINAR IS PROPOSED

Can anything be done to facilitate this and to assure a fair and informed hearing of these problem? Given competent guidance, it would be possible for an able lawyer or judge to acquire a significant degree of critical competence in this area in a year of carefully planned reading and bimonthly discussions. This could be done in seminars or roundtable discussions in which the M'Naghten adherents were given a role and an opportunity equal to that of the critics of the prevailing law. Newspaper reporting and other interference with dispassionate study and uninhibited discussion, such as stenographic or other recording, would be barred. Efforts should be made to avoid the connotations of "work"; instead everything should be done to make the study enjoyable. The company of the judges interested in this particular problem might be augmented by the admission of thoughtful laymen, legal philosophers, other scholars, and friends, so that a congenial atmosphere conducive to discussion prevailed.

The great books method of study depends on a discussion leader who carries the major burden, and it allows a larger number to participate than is possible in a seminar where each participant is expected to report in some detail on a particular problem. On the other hand, in a discussion group, one would participate only to the extent he desired. In a seminar which met bimonthly for 10 months, 20 participants would probably be the maximum number that could be accommodated.

Ten major phases of a basic problem, such as that noted above, could be studied, one each month, with two participants reporting each session, preferably on opposed sides. The other members would prepare for these meetings by reading from a carefully selected biblography in order to participate meaningfully in the discussion of their colleagues reports. Each participant would also be preparing his own report.

A small, able research staff would be a valuable adjunct to the seminar or discussion group. It might limit its function to reporting on specific questions; e.g., How man psychiatrists are there in this country? How many of them have critized the M'Naghten rules? What studies have been made to determine whether psychiatric testimony is at present restricted?

SOME SUBJECTS FOR DISCUSSION

The following program of a seminar or discussion group is suggested as illustrative. No preference is implied as to the order of studying the various problems and their formulation is not wholly neutral since my purpose is, also, to raise questions regarding current criticism of the M'Naghten rules.

1. What are the principal meanings of "disease"? Is mental illness like physical illness, or is it so different from it that even a very wide analogy is misleading?

2. What is "science"? Is there an intermediate type of knowledge between science, rigorously defined, and commonsense? Where should psychiatry be placed; e.g., what of statements by leading psychiatrists to the effect that psychiatry is an art? What evidence is there that psychiatrists (*a*) cure mental illness, (*b*) diagnose it correctly, (*c*) can recognize that persons who have not committed any harm are socially dangerous, and (*d*) can accurately predict that certain individuals will commit crimes if they are released from hospitals or penal institutions?

3. What is an expert; e.g., does that term imply that there is a body of knowledge with reference to which all or most "experts" agree? What is the basis of the position taken by some social scientists that psychiatry has not yet developed to the point where psychiatrists should be permitted to testify in court as experts? What are the principal types or schools of psychiatry, and what is the significance of divergent theories and divergent diagnoses? What does this imply regarding the common assumption that psychiatrists

are expert in classifying certain persons as "psychotic" or "insane"? If these terms mean extreme and irrational deviation from social norms; for instance, being a social nuisance, is such labeling by a psychiatrist more or less sound than that by an intelligent jury?

4. Does psychiatry include expert skill in elucidating such terms as "right," "freedom," "justice," "punishment," and "responsibility"? What is the special competence of psychiatrists? What is the significance of a deterministic premise when employed (*a*) in physical science, (*b*) in psychiatric research, (*c*) in therapy, (*d*) in deciding whether a person should be held criminally responsible for a harm he committed?

5. The history of legal tests of insanity should be explored to ascertain their relationship to the contemporaneous medical and psychiatric knowledge, moral ideas, and views of "human nature" and, also, to evaluate certain recent statements, e.g., that the M'Naghten rules were merely the product of political pressure, that a "wild beast" test was ever actually a rule of law in England in the implied literal sense, and that lawyers have usually impeded the march of scientific progress while doctors have facilitated it.

6. Important, also, is a comparative study of American, English, and continental law, especially with reference to the "irresistible impulse" test as a complete alternative to the cognitive (M'Naghten) test. On what grounds has the Report of the Royal Commission, 1949–53, so highly praised in this country by critics of M'Naghten, been criticized by English judges, for instance, Justice Devlin? In the study of continental codes, the meaning of the word "or" needs to be scrutinized to determine whether its significance is disjunctive or conjunctive. Continental cases should be studied to determine whether the position so vigorously urged here by very articulate psychiatrists—that a person's cognitive faculties may be quite normal or even superior but, nonetheless, he may be unable to keep from committing the most serious harms—is actually accepted in European law. If it is found to be recognized to some extent, is this the effect of the early 19th century psychology of separate faculties, which has been everywhere discarded, or is it currently supported by able European psychiatrists?

7. In the study of such social problems, the most difficult question often is: What is the question or the proposal that is made? This requires logical analysis of various arguments. For example, is it consistent with the psychology of integrated personality (that man functions as a unit) to argue that M'Naghten should be abandoned? Is it consistent with that theory of psychology to argue that the volitional function can be seriously disordered but, at the same time, the cognitive functions remain normal? Is it consistent to assert that psychiatry does not deal with human freedom, right and wrong, responsibility, and justice, and to assert also that the right-and-wrong test is a vestige of superstition and that psychotic persons understand the difference between right and wrong? Logical inquiry can also disclose the areas where no assured answer can be given to certain questions, e.g., whether punishment deters, whether psychiatrists can rehabilitate criminals, and so on. If "experts" in behavioral disciplines and psychiatrists do not have all the desired answers, what is the role of intelligent laymen in dealing with such problems, and what of the legal and ethical standards developed by thoughtful persons in the course of many centuries?

8. The characteristics and requirements of a democratic legal order should be studied especially in relation to the role of unfettered officials, unfettered experts, and unfettered juries. Are the prevailing conceptions of human nature, individual responsibility, freedom, right and wrong, as traditionally expressed in the rules of law which guide judges and juries, to be subordinated to the theories of psychiatrists and, if so, to which ones—Freudian, neo-Freudian, anti-Freudian, Jungian, Adlerite, existentialist, organicist, neurologist, Reikian, Frommian, or eclectic?[8] Should the selected experts be permitted to present any theories or opinions to juries who receive no guidance from judges or laws?

9. There are still unsettled questions about "punishment" to be studied; they involve questions of public policy, ethics and free discussion. There are distinctions to be drawn between reforms, utopias, and the relation of punishment to freedom and social responsibility. There are issues which concern hospitali-

[8] "We are forced to conclude that the psychologically minded psychiatrist and his organicist colleague, though often members of the same professional organizations, do not talk the same language and do not have the same interests. 'It is not surprising, then, that they have nothing good to say to each other, and that when they do communicate it is only to castigate each other's work and point of view," Szasz, "The Myth of Mental Illness," 93 (1961).

zation and punishment, e.g., when is a "hospital" a penitentiary? And again, if we cannot determine whether punishment deters or whether experts can rehabilitate offenders, what is the status of so-called retributive punishment?

10. Finally, efforts might be made to formulate conclusions reached at the end of the inquiry, which, presumably, would correctly and precisely reflect the various positions held at that time. Evidently, also, some of the topics and some of the methods of analysis indicated above would be dealt with or employed at several meetings.

Study Has Values Even Without Answers

There is, of course, no certainty that a general agreement will be reached on these difficult questions even after a year's study; it is possible that one's ultimate premises, one's "can't helps," as Holmes put it, will persist to the very end. But this does not imply that painstaking inquiries are illusory or mere "ideologies." The more defensible view is that such study takes one closer to the relevant truths as well as to a fuller appreciation of opposed positions. Certainly the direction and degree of tolerable compromise could be more clearly discerned, and in the practical realm of daily life in a democracy, that may suffice.

For me the existence of a significant degree of human freedom is a "can't help," as it is, no doubt, for Justices Brennan and Douglas and the vast majority of thoughtful Americans. So, too, as regards moral values, e.g., that after thinking about a problem it makes sense to speak of "right" and "wrong" actions. But human freedom and moral values depend upon understanding—they imply the reasoning, generalizing, cognitive functions of the human mind. "Mental illness" in at least some of its meanings deeply affects the validity of these postulates and their implications.

Seen in relation to these basic postulates, the M'Naghten rules are neither a political contrivance nor a mere tradition. They may be faulty in their formulation, in emphasis on one phase of personality, and in connotating the one-sidedness of the supporting psychology of the times. But despite its defects, M'Naghten incorporates the most important function of human personality in terms of criteria with which a civilized body of criminal law must be concerned.

M'Naghten Needs Repairs, Not Abandonment

For that reason, what is relevant is not the abandonment of M'Naghten, but only its repair. Just as the Venus de Milo is not neglected because an arm is missing, just as the Winged Victory holds the place of honor in the world's greatest art museum despite its glaring defect, so, too, reform of the present law should preserve what is essential in the M'Naghten rules. This means the avoidance of completely autonomous alternatives such as the Durham rule, the American Law Institute's alternative proposal in terms of lack of "substantial capacity . . . to conform" and other forms of the "irresistible impulse" hypothesis. A test solely in terms of "control of conduct" is ambiguous because it is silent on the crucial question: whether understanding has anything to do with conduct. To preserve the sound core of M'Naghten requires that the rationality of the human mind (understanding, knowledge, appreciation) be included in the proposed test, in which case it may, of course, and probably should be, joined to other major functions of the personality.[9]

There is sufficient acceptance of these basic premises to warrant the expectation that a very substantial agreement can be reached on their application to criminal responsibility, including the problem of mental illness. The hazards are the traditions which envelop and condition our attitudes toward the judiciary and the possibility that powerful judges will be called on to render extremely important decisions before they have studied this difficult subject. American realism, resourcefulness, and candor should be able to meet this challenge.

Activities of Sections

The section of labor relations law conducted spirited meetings at the association's 86th annual meeting, with an extensive 3-day program.

Supreme Court Associate Justice Arthur J. Goldberg, a former member of the council of the section, was a featured speaker. His remarks will appear in a later publication of the section.

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[9] Hall, op. cit., supra, at 521–522.

Reports of the various committees of the section were presented and three received extended attention.

The committee on National Labor Relations Board practices and procedure, headed by Edward Schneider of Boston, Mass., and J. Albert Woll of Washington, D.C., reported recent revisions in the National Labor Relations Board rules and regulations, terming the changes a "substantial improvement." The committee reported that its liaison relations with the Board were improved and cordial, though there are still some areas of disagreement.

Two committee reports provoked floor debates. The ad hoc committee known as "Gulf-Warrior" presented majority and minority reports on a resolution to amend section 301 of the Taft-Hartley Act to overturn the rules set forth in *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960). After debate, the minority report, which favored amendment, was adopted by a vote of 62 to 49.

Another ad hoc committee—this one known as "Atkinson-Sinclair"—presented three reports, one representing a neutral position. The resolution proposed amendment of the Norris-LaGuardia Act in the light of *Sinclair Refining Company* v. *Atkinson*, 370 U.S. 195 (1962), to permit issuance of an injunction in violation of a no-strike provision of a labor contract. The resolution was amended to provide that no injunction may be issued except on notice and hearing and as amended was adopted, 63 to 30.

A paper on "Labor Law Decisions of the Supreme Court, 1962 Term" was given by Clyde W. Summers of New Haven, Conn. At the annual luncheon meeting, Arnold Ordman, newly appointed General Counsel of the National Labor Relations Board, was the principal speaker.

Guests of the section at the meeting were Frank W. McCulloch, Chairman of the NLRB, and John H. Fanning and Boyd Leedom, members of the Board. Charles Donohue, Solicitor of Labor of the U.S. Department of Labor, participated in the workshop session on fair labor standards.

The membership committee report, submitted by William F. Joy and Robert M. Segal of Boston, Mass., cochairmen, indicated a substantial growth in the section, with a membership now of 2,400.

The meeting concluded with the election of new officers and council members. Tracy H. Ferguson of Syracuse, N.Y., was elected chairman and Louis Sherman of Washington, D.C., vice chairman. Robert F. Koretz, who is professor of law at Syracuse University, is the new secretary of the section. New members of the council are Frank A. Costangy of Atlanta, Ga., and David Previant of Milwaukee, Wis.

The CHAIRMAN. Likewise, the committee is hopeful of receiving from the Advisory Committee on Criminal Rules of the Judicial Conference of the United States a report of its study of the provisions of rule 5(a) of the Federal Rules of Criminal Procedure, since one of its eminent judicial members was unable to arrange his schedule to appear before the committee.

(The report referred to follows:)

NOVEMBER 15, 1963.

Mr. WARREN OLNEY III,
Director, Administrative Office of the U.S. Courts,
Supreme Court Building, Washington, D.C.

DEAR MR. OLNEY: This committee has before it for consideration, legislation passed on August 12, 1963, by the House of Representatives which, under title I thereof, would substantially abrogate the *McNabb-Mallory* rule in the District of Columbia.

This committee has conducted a series of hearings on the above subject and other matters relating to Criminal Justice Code, in the District of Columbia, during the past 2 months. The committee has made every effort to secure a comprehensive view of this subject.

This committe has in its files copies of a purported report of the Advisory Committee on Criminal Rules of its study of provisions of rule 5(a), dated July 2, 1963; and a purported report of the Committee on Rules and Practice and Procedure to the Judicial Conference of the United States, dated August 26, 1963, copies of which are enclosed.

It would be appreciated if you could ascertain if these copies are the actual reports of the two committees because the information contained therein might

well be helpful in this committee's examination of the pending legislation. Likewise, if these reports are those of the committees involved, this committee would like to include such in the appendix of the printed hearing record for the benefit of the Members of the Senate considering this subject matter.

A staff member of the District of Columbia Committee spoke with Mr. Joseph F. Spaniol, Jr., over the past several weeks in an effort to arrange a date satisfactory for Judge William Smith of the U.S. Court of Appeals, Third Circuit, to testify on the Mallory legislative proposal. However, a conflict with schedules of Judge Smith and the committee precluded his testimony. Therefore, as another means of securing information on the position of the Advisory Committee and the Committee on Rules of Practice and Procedure, I am attempting to secure the inclusion of such reports in the hearing record.

For your general information as to the general subject matter involved I enclose a copy of H.R. 7525 and call your attention to the *McNabb-Mallory* section designated as title I and commencing on page 1.

I shall await your reply in order that we can proceed with the preparation of the printed hearing record.

Your courtesy is appreciated.

Cordially,

ALAN BIBLE.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., November 21, 1963.

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

DEAR SENATOR BIBLE: I am replying to your letter of November 15, concerning the report of the Advisory Committee on Criminal Rules on its study of the provisions of Rule 5(a): Federal Rules of Criminal Procedure, dated July 2, 1963, and the report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States, dated August 26, 1963, copies of which were enclosed with your letter.

We have examined these reports and find them to be identical with the reports submitted to the Judicial Conference at its recent session in September 1963. I should like to inform you further that at that time the recommendations contained in these reports were approved by the Judicial Conference. The copies of the reports which you enclosed with your letter are returned herewith for such use as you may wish to make of them.

Sincerely yours,

WARREN OLNEY III, *Director.*

REPORT OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE JUDICIAL CONFERENCE OF THE UNITED STATES

Your Committee on Rules of Practice and Procedure has received from the Advisory Committee on Criminal Rules a report of its study of the provisions of rule 5(a) of the Federal Rules of Criminal Procedure. That report, a copy of which is annexed hereto, recommends that the Judicial Conference disapprove S. 1012, 88th Congress, and similar bills which seek to abrogate the *McNabb-Mallory* rule. Your committee approves the report of the Advisory Committee on Criminal Rules and recommends that it be approved and adopted by the Judicial Conference and that the Bureau of the Budget, which has requested the views of the Conference on S. 1012, 88th Congress, be informed of the action of the Conference.

Our committee has no definitive proposals to present to the Judicial Conference at this time for changes in the rules of practice and procedure. Tentative proposals for the amendment of certain of the Federal rules of criminal procedure have been widely circulated and are now being considered by the bench and bar. All five of the advisory committees now under appointment are actively engaged in the work to which they have been assigned. Progress reports from each of them are annexed hereto for the information of the Conference.

Respectfully submitted.

ALBERT B. MARIS, *Chairman.*

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES OF ITS STUDY OF THE PROVISIONS OF RULE 5(a)

The Advisory Committee on Criminal Rules has spent a considerable amount of time studying and discussing the problems raised by the provisions of rule 5(a) which requires that a person arrested be brought before a commissioner "without unnecessary delay."

The present status of the deliberations of the committee on these problems is as follows:

(1) The committee is agreed that there should be no change in the doctrine enunciated by the Supreme Court in such cases as *McNabb* v. *United States*, 318 U.S. 332 (1943) and *Mallory* v. *United States*, 354 U.S. 449 (1957) under which confessions obtained during a period of delay longer than that permitted by rule 5(a) are excluded from evidence.

(2) The committee has so far been unable to articulate any better standard than "without unnecessary delay" which will fit the wide variety of situations and circumstances which exist in the various Federal districts.

(3) The committee recognizes that special problems may exist in the District of Columbia because of the fact that the police in the District have general law enforcement jurisdiction. However, the committee has felt that special rules for the District should not be incorporated in the rules of criminal procedure. The committee, therefore, has not given special attention to the problems which are peculiar to the District.

However, the committee does recommend to the Judicial Conference that it oppose S. 1012 and similar bills which merely seek to abrogate the *McNabb-Mallory* rule in the District of Columbia. Such proposals avoid, but do not solve, the fundamental problems of what procedures are appropriate to govern the police in the District. Instead, their thrust appears to be to permit the police to avoid the present procedure in the course of securing confessions subject only to the controls imposed where the violations are so grave as to result in determinations that confessions are involuntary.

Respectfully submitted.

JOHN C. PICKETT, *Chairman.*

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., January 10, 1964.

MR. RICHARD JUDD,
Professional Staff Member,
District of Columbia Committee,
New Senate Office Building,
Washington, D.C.

DEAR MR. JUDD: In accordance with our telephone conversation of this afternoon, I am enclosing a copy of the Report of the Proceedings of the Judicial Conference of the United States at its September 17–18, 1963, meeting. The record of the position taken by the Judicial Conference with respect to the case of *Mallory* v. *United States* and to S. 1012, 88th Congress, you will find beginning at the top of page 80.

Sincerely yours,

WARREN OLNEY III, *Director.*

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, WASHINGTON, D.C., SEPTEMBER 17–18, 1963

ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Warren Olney III, Director

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RULES OF PRACTICE AND PROCEDURE

Senior Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, presented to the Conference a report of the activities of the standing Committee and the Advisory Committee on Rules of Practice and Procedure.

Judge Maris reported that the Advisory Committee on the Criminal Rules in connection with its study of the provisions of Rule 5(a): Federal Rules of Criminal Procedure, which requires that a person arrested be brought before

a commissioner without unnecessary delay, had considered the proposal contained in S. 1012, 88th Congress. The bill seeks to overcome the effect of the decision in the case of *Mallory* v. *United States*, 354 U.S. 449, under which confessions obtained during a period of delay longer than that permitted by rule 5(a) are excluded from evidence. Upon the recommendation of the standing committee, the Conference voted to disapproved S. 1012 and similar bills which seek to abrogate the McNabb-Mallory doctrine.

The Conference was informed that the committee had no definitive proposals to present to the Conference at this time for changes in the rules of practice and procedure. Tentative proposals for the amendment of certain of the Federal Rules of Criminal Procedure have been widely circulated and are now being considered by the bench and bar. All five advisory committees now under appointment are actively engaged in the work to which they have been assigned.

The CHAIRMAN. The record will be kept open until 5 p.m., Thursday, November 14.

This completes the hearing record on all phases of H.R. 7525 with the exception of section 506, which is the section dealing with indecent publications.

The Chair proposes, after the close of the hearing record and the reproduction of the testimony and the examination of it by my fellow committee members to proceed with that.

We will stand adjourned subject to call of the Chair.

(Whereupon, at 11:10 a.m., the committee was adjourned, subject to call of the Chair.)

APPENDIX

U.S. SENATE,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
November 8, 1963.

DEAR—: May I call your attention to title I (dealing with the *Mallory* rule) of H.R. 7525, the House-passed omnibus crime bill, on which you testified before this committee recently.

In testimony on November 5, Deputy U.S. Attorney General Nicholas deB. Katzenbach said that if some corrective legislation is felt to be necessary in the *Mallory* area, that the Justice Department's recommendations were that a minimum of four essential safeguards of the defendant's rights should be incorporated in it. These safeguards and his comments particularly on this point are set out starting on page 681 of the enclosed transcript of the hearing that day. Mr. Katzenbach was questioned on these points by Senator Dominick at some considerable length starting on page 687. Senator Bible further questioned Mr. Katzenbach on these points on pages 716 and 717 wherein it was indicated that possibly only the first two safeguards might be required to meet the constitutionality test.

Likewise, U.S. Attorney David Acheson discussed these safeguards in his statement starting on page 724. Enclosed is a copy of H.R. 5726 which sets these safeguards out in bill form in greater detail.

I call your further attention to statements by Maj. Robert V. Murray, Chief of the Washington Metropolitan Police Department on the above points, found on pages 738 to 749 and pages 757 to 760.

It would be deeply appreciated by this committee in its examination of this complex subject if we could receive your written comments on Mr. Katzenbach's suggested amendments to any legislation amending the *Mallory* rule. Since this committee has concluded its hearings on this section and is desirous of moving into an executive session in the near future, it would be appreciated if your written comments might be received by this committee no later than Monday, November 25. Your views will be valued and I believe most helpful in this committee's deliberations. I am enclosing a self-addressed envelope for your use in sending your comments to the committee.

Again, please accept my thanks on behalf of this committee for your time and effort in assisting in this important field.

Cordially,

ALAN BIBLE.

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,
Washington, D.C., November 15, 1963.

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

DEAR SENATOR BIBLE: This is in response to your letter of November 8, in which you request my comments on Mr. Katzenbach's suggested amendments to the pending legislation to modify the rule of the *Mallory* case, H.R. 7525. It gives me pleasure to comply with your request.

Deputy Attorney General Katzenbach proposed four safeguards as amendments to the bill. For reasons that I shall endeavor to state in some detail, I am in favor of the first safeguard suggested by him, which in fact is already in the bill, but am opposed to the remaining three.

Before discussing the individual proposed safeguards it seems desirable to be reminded of the background for this legislation. Prior to the decision of the Supreme Court in *Mallory* v. *United States*, 354 U.S. 449, June 24, 1957, the Federal rule, in fact the general rule, governing the admissibility of confessions

at trials of criminal cases, was that any voluntary confession was admissible, while any involuntary confession, i.e., a confession obtained as a result of any physical, mental, or moral coercion, or improper inducement, was excluded. This has become a rule of constitutional law and is comprehended by the due process clause of the 5th and the 14th amendments. The *Mallory* case added a further qualification, that no confession, voluntary or otherwise, should be admitted in evidence if made after the expiration of an unnecessary delay between the arrest of the defendant and the time when he was brought before a committing magistrate. This additional limitation is not a rule of constitutional law, but purely a rule of evidence, and was intended as a sanction or a means of enforcing rule 5(a) of the Federal Rules of Criminal Procedure, which requires that an arrested person be brought before a committing magistrate without unnecessary delay. The pending legislation would abrogate this additional limitation and would bring the law back to where it was prior to the decision in the *Mallory* case. Thus, it would seem clear that no constitutional question is involved in the pending legislation.

As I read Mr. Katzenbach's testimony, he agrees with the foregoing postulates. He suggests, however, that the Supreme Court might possibly change its views on the constitutional aspects of the matter. Such a possibility always exists, for the history of Supreme Court decisions, ever since the creation of that tribunal, indicates that from time to time the Supreme Court has changed its views on various questions. I respectfully suggest, however, that it is futile to speculate on the possibility of a change of decisions in the future, and legislation should be framed in the light of the law as it exists at the time.

Mr. Katzenbach predicated his fears on the dissenting opinions in two cases: *In re Groban*, 352 U.S. 330, 337; and *Anonymous* v. *Baker*, 360 U.S. 287, 298. These cases, however, dealt with an entirely different subject and involved a wholly different principle than that presented by the pending legislation. In each case there was a State statutory proceeding at which a witness was compelled to answer questions. In each instance the official presiding at the hearing excluded counsel although the witness requested that his counsel be present. In each instance the witness was convicted of contempt of court for refusing to answer questions when his demand for the presence of counsel was denied. The Supreme Court upheld the convictions. The dissenting Justices expressed the view that it was a violation of the due process clause of the 14th amendment, to compel a person to appear alone before any law-enforcement officer and give testimony against his will. Manifestly these views are not applicable to the legislation under consideration, as it does not contemplate compelling anyone to give testimony.

It is observed that in the course of the hearing a question was asked whether the rule of the *Mallory* case has actually kept anyone from being punished for a crime that he has committed. From my observation of cases that have come before me, I can unequivocally say that this question should be answered in the affirmative. There have been quite a number of instances, although I have no statistics, in which a person who has committed a crime has received no punishment whatever because of the limitations of the rule of the *Mallory* case. Some judges of the district court on occasion have been constrained to exclude confessions and to direct judgments of acquittal because of the rule of the *Mallory* case. Mallory himself was released and was not punished for the rape that he committed. As an irony of fate some time later he was apprehended by the local police in Philadelphia, for another crime that he subsequently committed there, and was sentenced to a long term of imprisonment by the Pennsylvania State courts. Then, too, there have been cases in which the U.S. attorney found it impossible to prosecute because of the limitations of the *Mallory* case.

The four amendments proposed by Mr. Katzenbach will now be taken up by me individually.

In dealing with these proposals it must be borne in mind that they would apply, not only to the Metropolitan Police Department of the District of Columbia, but also to Federal law enforcement agencies, such as the Federal Bureau of Investigation, the Federal Bureau of Narcotics, the Post Office inspectors, the Secret Service, and others, when they investigate crimes committed in the District of Columbia. While the majority of cases that come before the U.S. District Court for the District of Columbia, originate from the Police Department, there is a large minority of cases that are handled by Federal law enforcement agencies.

I

A warning to the prisoner immediately in advance of the interrogation that he is not required to make any statement at any time, and that any statement made by him may be used against him.

I find no objection to this proposal.

In fact this proposal is now included in section 101(b) of H.R. 7525 and, consequently, no amendment to include it is needed. In this connection it might be said that the Supreme Court has held that no such warning is required, *Wilson* v. *United States*, 162 U.S. 613, 623. It is the practice both of the local Police Department and Federal law enforcement agencies to give such a warning. There is no reason why the requirement should not be embodied in a statute. It should be made clear, however, either in the legislation or possibly in a committee report that it is not intended to exclude a voluntary statement made by a prisoner on his own initiative, and sometimes even blurted out by him, but that the warning is required only in connection with the questioning of prisoners. An extreme instance of a voluntary statement is found in *Nance* v. *United States*, 299 F. 2d 122, 112 U.S. App. D.C. 38, in which a person charged with a robbery was identified by his victim at a preliminary hearing before the U.S. commissioner. The prisoner then asked the witness, "How do you know it was me when I had a handkerchief over my face?" Naturally, this statement was admitted in evidence at the trial.

II

That the arrested person be afforded a reasonable opportunity to notify a relative or friend, and consult with counsel of his choosing.

I am opposed to this amendment.

As a practical matter, if the prisoner wants to consult with counsel he will usually decline to answer any questions until he is given an opportunity for such a consultation. There is no reason why the police should be required to inform the prisoner of this right. There seems to be no doubt that an arrested person should be permitted to notify his family of the fact that he is in custody and also to consult with counsel of his choosing, if he expresses a desire to that effect. It is questionable whether he should be permitted to notify a friend because the friend may be an accomplice.

Under any circumstances this provision does not seem to have any place in the pending legislation. It must be borne in mind that the more restrictions and conditions that are included in the legislation, no matter how desirable some of them may be, the more opportunity there is for the defendant to raise objections at his trial, and claim that the requirements were not complied with.

III

That the interval between arrest and completion of a confession should not exceed a maximum of 6 hours.

I am opposed to this restriction.

Such a limitation would be purely arbitrary and there does not seem to be any basis for this specific figure. In many cases, indeed, the questioning of a prisoner is completed long before the expiration of 6 hours after his arrest. It is not necessarily always the case. The prisoner may give information to the police which, if true, would exculpate him and lead to his immediate release, but on investigation it may be found to be false, as not infrequently happens. The prisoner may then decide to confess. Ordinarily, he first makes an oral confession and then it is reduced to writing on a typewriter, because the police department is not equipped with many stenographers. By the time the typing is finished more than 6 hours may have elapsed from the moment of the arrest. It would seem unreasonable to exclude such a statement. Other situations can be conceived where 6 hours expires while a confession is being typed. Must the completion of the confession then be stopped? Such a requirement would likewise be unreasonable and may well lead to a miscarriage of justice.

IV

That a responsible witness, other than the law enforcement officer, observe the questioning or that a verbatim transcript or a recording of the interrogation be made.

I am opposed to this proposal.

First, it must be noted that sometimes a brief questioning takes place at the place of arrest at the time the arrest is made, or in an automobile on the way from the place of arrest either to a police station or to police headquarters. Manifestly it would be impossible to comply with either of the foregoing alternatives in such a situation. As to other situations, to bring in a responsible witness on each occasion would seem impracticable. The police have to work 24 hours a day, 7 days a week. Very frequently arrests take place in the dead of night, or in the early morning hours. Any questioning must take place forthwith, if at all. Ordinally it would not be practicable to get a witness of substantial standing in the community immediately. Mr. Katzenbach states that this has been tried in one or two precincts in Chicago. He does not indicate, however, how successful the experiment was and whether it has become a permanent feature and, if so, why it has not spread to other precincts. There are occasions in which the local police will bring in the victim of a crime and if an admission has been made the prisoner may be asked to repeat it in the presence of the victim. This, too, cannot always be done because the victim may not be immediately available.

The second alternative of a verbatim transcript or a recording of the interrogation would, of course, not be practicable in case the interrogation takes place at the place of arrest, or in an automobile on the way to the place of detention. But beyond that, it is not practicable for other reasons. It would be a very fine thing if it were possible to have a pool of stenographers on hand at police headquarters, 24 hours a day every day in the year, and 2 or 3 stenographers similarly on duty at all times in every one of the 14 police stations. It would be equally desirable to have a core of stenographers on duty continuously in the offices of all Federal law enforcement agencies. The expense of such an arrangement would be prohibitive, and it is hardly necessary. Without such an arrangement it would be impossible to guarantee a verbatim transcript in every instance. As to recording every interrogation, again it would be necessary for the Government to make a large investment in tape recorders, so that a number of them would be on hand at police headquarters, and several at each police station, as well as a number at the office of every Federal law enforcement agency. Questions and objections would arise if at a particular point the recording is not clear, as frequently happens with tape recordings if the person speaking does not enunciate well.

In conclusion, I repeat that I find desirable the first proposal made by Mr. Katzenbach, but am opposed to the remaining three.

Respectfully,

ALEXANDER HOLTZOFF,
U.S. District Judge.

ROCKVILLE, MD., *November 12, 1963.*

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

DEAR MR. SMITH: Pursuant to Senator Bible's very kind letter dated November 8, 1963, I shall be pleased to comment upon the proposed amendment to title I (dealing with the *Mallory* rule) of H.R. 7525, as suggested by Deputy U.S. Attorney General Nicholas deB. Katzenbach. As these suggestions are set forth in detail in H.R. 5726, perhaps my comments will be more precise if directed to specific portions of that bill.

SUGGESTED CHANGES (H.R. 5726)

Section 1. No changes.

Section 2. No changes.

Section 3. Subsection (a), line 14. After the word "him" add: "to prove his guilt for the purpose of securing a conviction of crime in a subsequent criminal trial."

Subsection (b), line 20. After the word "opportunity" add: "and was given the names and telephone numbers of Legal Aid Agency attorneys or other volunteer attorneys, if any, who are available to advise indigent suspects."

Subsection (c). No changes.

Subsection (d). Rewritten as follows:

Such questioning and warning and advice required by subsections (a) and (b) of this section were recorded by a wire, tape, or other sound recording which includes the arrested person's response that he understands the warning and

the advice, the times of beginning and interruption of all questioning, and a concluding statement by the arrested person that he has been subjected to no questioning after his arrest, or threats or promises that are not upon recording.

Subsection (e). New:

Such recording was made available to the arrested person's counsel for inspection, listening, and copying, a reasonable time prior to trial.

DISCUSSION OF SUGGESTED CHANGES

A. General

Whether warranted or not the basic reason for Mallory-type restriction upon police interrogation lies in traditional American distrust of secret interrogation and an unwillingness to believe the police testimony regarding such interrogatons. The historic choice between the differing versions regarding the interrogation of the suspect and the police has proven unpalatable to the courts. The risk of self-serving perjury by police interrogators has been deemed sufficiently great that judicial measures to eliminate the risk have been taken. The result has been restrictive upon interrogation itself. The suggestions herein are designed to eliminate the risk but not the questioning. Actually, the risk cannot be completely eliminated, but it can be reduced.

The military practice of keeping a complete tape recording of all interrogations seems a good model to follow. I am not aware of any inability to gain convictions as a result of this procedure. My suggestions are largely, but not entirely, patterned after the military experience.

B. Specific

The change in section 3, subsection (a), is designed to insure that the warning and advice to the arrested person would appear in the sound recording, thus eliminating the risk of challenge upon this point. The sound record also has the tangible proof concerning the actual questions and answers and the manner of interrogation. The concluding statement by the suspect reduces the possibility of "softening up" tactics which occur "off the record."

Section 3, subsection (e), is designed to facilitate a plea of guilty when appropriate and the avoidance of unnecessary trials. It also aids the defense if there is any suspicion of coercive tactics.

I believe the bill is a good one, and I would support it with the suggested changes.

Respectfully,

GEORGE W. SHADOAN.

P.S.—With reference to my testimony before the committee, I find Chief Murray stating (p. 766 of November 5, 1963, transcript): "I don't believe what that witness has to say and that is the one I want to rebut. I want to put a statement in, if I may." I would appreciate a copy of the Chief's statement. It does not appear in the transcript.

NATIONAL CAPITAL AREA CIVIL LIBERTIES UNION,
Washington, D.C., November 13, 1963.

Hon. ALAN BIBLE,
Chairman, Senate District Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR BIBLE: The National Capital Area Civil Liberties Union appreciates the opportunity you have given us to comment upon the revisions of title I, of H.R. 7525, which have been proposed by Deputy Attorney General Nicholas deB. Katzenbach, and endorsed by U.S. Attorney David Acheson and by the President of the Board of Commissioners, Mr. Tobriner.

The point of departure for our present comment is Mr. Katzenbach's testimony in which he declared his opinion that, "* * * The *Mallory* rule is a good one. Through it, the Supreme Court made clear its intentions to prevent law enforcement officers from delaying preliminary hearings for the purpose of eliciting confessions. This is as it should be."

If this is as it should be, we cannot understand how the Deputy Attorney General can justify his recommendations to your committee.

First, he would give police authorities, "a maximum of 6 hours elapsed time between arrest and completion of the confession," before they would be required to take their prisoner before the U.S. commissioner. This recommendation is a barefaced repudiation not only of the *Mallory* rule, but of rule 5 of the Federal Rules of Criminal Procedure because it plainly and explicitly allows the arrest-

ing officers to delay preliminary hearings 6 hours for the "completion of a confession."

Mr. Katzenbach's justification for this recommendation we believe is singularly unconvincing for it is nothing more than a recital of judicial decisions which excluded confessions which were given in periods varying from 15 minutes to 3½ hours after arrest.

If it is a good rule to have which prevents delay for the purpose of eliciting a confession, it cannot make a difference whether the delay is for 15 minutes or for 6 hours. Any delay for this purpose would be forbidden.

As the Supreme Court has explained, rule 5(a) of the Federal Rules of Criminal Procedure "contemplates a procedure that allows arresting officers little more leeway than the intervals between arrest and the ordinary administrative steps required to bring a suspect before the nearest magistrate," *Mallory* v. *United States*, 354 U.S. 449, 453 (1956).

Second, Mr. Katzenbach would give to the police the duty to warn the "defendant, immediately in advance of the questioning, that he is not required to make any statement at any time and that any statement made by him may be used against him."

The Supreme Court has more than once found, as laudable as these words of caution may be, coming from the lips of a police officer, that they are not adequate to assure persons under arrest of the rights they may wish to assert. "The lawful instruments of criminal law cannot be entrusted to a single functionary," the Supreme Court said in *McNabb* v. *United States*, 318 U.S. 332.

It is for this reason that rule 5 of the Rules of Criminal Procedure commands that a person under arrest be taken to a U.S. commissioner, and gives to that judicial officer the function of advising the defendant of his rights.

The decision in *McNabb* indicates that Mr. Katzenbach's proposal neither provides protection for a person under arrest nor assures the prosecution of the admissibility of a confession obtained in violation of rule 5.

Mr. Katzenbach's two remaining proposals deal with the conduct of the police interrogation. Inasmuch as we believe that no interrogation of persons under arrest is permissible until after they have been arraigned before a U.S. commissioner, it is our belief that there is no warrant to establish procedures for conducting such questioning. To the extent that these procedures would establish the proper safeguards, they would merely duplicate the preliminary hearings now prescribed by the Federal Rules of Criminal Procedure. To the extent that they failed to provide such safeguards, it is our view, as it seems to be Mr. Katzenbach's, that the procedures would be unconstitutional.

If, nonetheless, your committee favors legislation to define procedures under which police officers may question persons under arrest, we believe that there must be as a minimal requirement, a provision for representation by counsel.

It would seem necessary to assert the need for such representation, in view of the importance which it has been given in the Constitution. The much-quoted statement of Justice Sutherland in *Powell* v. *Alabama*, 287 U.S. 68, 69 (1932), that "even the intelligent and educated layman * * * requires the guiding hand of counsel at every step in the proceedings against him" applies as much to the interrogation in the police station as to any other stage of his prosecution. This requirement has been underscored in at least two Supreme Court decisions: *Crooker* v. *California*, 357, U.S. 433 (1958) and *Cicenia* v. *LaGay*, 357, U.S. 504 (1958).

The National Legal Aid Association has pointed out that "if the rights of the defendant are to be fully protected, the defense of a criminal case should begin as soon after arrest as possible" "Equal Justice for the Accused, 1959," p. 60). Obviously, the need for protection becomes all the more compelling if the police are to be given the authority to conduct interrogations of accused persons who are in their custody.

In the light of these requirements, Mr. Katzenbach's proposal that persons under arrest be given, "a reasonable opportunity * * * [to] consult with counsel of his choosing," is scarcely adequate.

For counsel to be able to provide the "guiding hand" which *Powell* v. *Alabama* says is indispensable, the accused must have more than the right of consultation with counsel. Counsel must be present during interrogation.

Moreover, for the indigent, the right to have "counsel of his choosing" is no more than an empty gesture. Mr. Katzenbach's proposal would perpetuate the phenomenon which Chief Justice William Howard Taft decried many years ago:

"Of all the questions which are before the American people, I regard no one as more important than the improvement of the administration of justice. We

must make it so that the poor man will have as nearly as possible an equal opportunity in litigating as the rich man, and under present conditions, ashamed as we may be of it, this is not the fact."

We therefore believe that if interrogations are to be permitted of persons while they are in the custody of police officers, provision should be made for representation by counsel, and for those who are indigent, that counsel be appointed on their behalf.

With representation by counsel, Mr. Katzenbach's fourth proposal, we believe would be best modified to eliminate the need for the presence of a "responsible witness" to observe the questioning. A verbatim transcript of the interrogation would constitute the best record of the proceeding.

In conclusion, the National Capital Area Civil Liberties Union restates its belief that H.R. 7525, fails utterly to deal with the complex problem of crime in Washington. We believe that the enactment of the bill will serve no purpose other than to hobble the fair administrations of justice. We therefore urge that it be rejected.

Respectfully yours,

DAVID CARLINER, *Chairman.*

SHER, OPPENHEIMER & HARRIS,
Washington, D.C., November 19, 1963.

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

DEAR MR. SMITH: This letter is in reply to Senator Bible's November 8, 1963, letter, with enclosures, requesting my comments upon the Department of Justice proposal to revise the *Mallory* rule as embodied in H.R. 5726.

As the transcript of my testimony at the hearing on H.R. 5725 shows, I appeared as a witness for the National Capital Area Civil Liberties Union. That organization intends to submit a single reply to Senator Bible's invitation to comment further on the record, and therefore I do not believe I should comment separately, except to say this:

The protective features proposed by the Department of Justice and written into H.R. 5726 deal only with the rights of a potential criminal accused who is arrested and questioned before his preliminary hearing. They provide no solution to the other great evil which criminal rule 5A and *Mallory* were intended to eliminate, namely, the loss of basic liberty involved in an arrest and detention which has no judicial approval. This is the same loss of liberty which makes investigative arrests unconstitutional because there can be no judicial finding of probable cause prior to the preliminary hearing.

For this reason alone I would oppose H.R. 5726. At any rate, I respectfully suggest that it is far too complex and important a proposal to be recommended for passage without a fuller hearing on its own terms.

Thank you very much for the opportunity to submit these comments.

Sincerely,

JAMES H. HELLER,
Secretary, National Capital Area Civil Liberties Union.

OFFICE OF THE SUPERINTENDENT OF POLICE,
Chicago, November 13, 1963.

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

DEAR SENATOR BIBLE: Thank you for again permitting me to comment upon proposed legislation pending before the U.S. Senate Committee on the District of Columbia pertaining to the *Mallory* rule.

It is my firm belief that there should be no exclusionary rule on confessions so long as they are voluntarily obtained.

I have no objection to a requirement that an accused be advised that he is not required to make a statement and that any statement made by him may be used against him. I think that a failure to so advise an accused should be considered with other evidence bearing upon the voluntariness or involuntariness of the confession but that such failure alone should not operate automatically to exclude an otherwise valid confession.

My feeling is the same with respect to affording the accused an opportunity to notify a relative or friend or consult with counsel of his own choosing. There are some instances where it might be unwise to permit such notification because notification might jeopardize the life of a kidnaped child, or permit incriminating evidence to be hidden or destroyed, or valuable loot to be moved or disposed of, or material witnesses to disappear or be intimidated. Here again, I feel that the notification should be permitted within a reasonable time but not necessarily immediately.

I am opposed to a 6-hour rule or any other arbitrary time limit between arrest and arraignment. What is a reasonable time depends entirely upon the circumstances of the individual case. As I pointed out in my original statement, police require reasonable time to check on the accused's story, to check the accused's fingerprints, to bring witnesses in to see if they can identify him as the person who committed the crime, to interview and take statements from victims, witnesses, and the accused, to search for the murder weapon or loot or other physical evidence of the crime, and to make laboratory analyses of physical evidence. Some of these police actions can be conducted simultaneously but the point is a reasonable time is required which may be more or less than 6 hours. Allowance must be made for these necessary actions between arrest and arraignment. Probable cause to arrest is not necessarily probable cause to formally charge or arraign.

As to the fourth suggestion that the questioning of an accused be witnessed by a responsible person who is not a law enforcement officer, I feel that this is a good idea in a few important murder cases but is impracticable when one considers the tremendous volume of criminal cases investigated daily in a large metropolitan city. In Chicago, for example, we investigate close to 500 felonies a day. Again, I feel that this should not be an automatic precondition to the admissibility of a confession. To get a responsible outsider present to witness the questioning of an accused may not always be practicable, particularly at odd hours, and may add to the very delay that the law is seeking to rectify. In instances where neutral observers were not available and statements were taken without the presence of observers, defense counsel would certainly use this fact to the disadvantage of the prosecution in attempting to exclude confessions from evidence.

If a wire or tape recorder were used, it would be necessary that the accused be informed that his statements were being recorded electronically. It is inevitable that many persons, through ignorance or suspicion, would immediately refuse cooperation. Moreover, confessions or admissions are often made sua sponte or in circumstances where outside witnesses or wire recorders are not immediately available.

It appears to me that the introduction of the safeguards proposed by Mr. Katzenbach and Mr. Acheson might well have the effect of not only codifying the Mallory rule but introducing new automatic exclusionary rules that go beyond even the present requirements. As Senator Dominick has so aptly put it, "I have a basic feeling that the more legislative standards you put into the law which must be complied with prior to a conviction, the more shillelaghs you give to a defendant's attorney to say that they haven't been lived up to." It seems to me that appellate courts would inevitably add interpretive extensions to the statutory requirements that would lead to utter chaos. It is difficult enough as it is for a policeman to know how to find his way through the maze of conflicting legal decisions in the law of arrest, search, and seizure, and the questioning of suspects.

I think that we should stay away from arbitrary or automatic exclusionary rules and get back to deciding cases on the rule of reason, admitting or excluding confessions solely on the question of their voluntariness.

Sincerely,

O. W. WILSON,
Superintendent of Police.

UNIVERSITY OF MINNESOTA LAW SCHOOL,
Minneapolis, November 21, 1963.

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

DEAR SENATOR: I welcome your invitation of November 8 to comment on Deputy Attorney General Nicholas de B. Katzenbach's suggested amendments to any legislation amending the *Mallory* rule, and, I take it, to comment on the testimony of November 5 generally. I would greatly appreciate it if the follow-

ing statement could be included in the printed record of the Senate District of Columbia Committee hearings, perhaps as a supplement to my testimony of October 23.

At the outset, let me say that the balanced, thoughtful, judicious testimony of Mr. Katzenbach, and David Acheson, U.S. attorney for the District of Columbia, who accompanied the Deputy Attorney General, is a refreshing change from some of the semihysterical outbursts some other law enforcement spokesmen have made.

Assuming that a person is not taken into custody and questioned absent "probable cause," and I think this is assumed. (See Daily Report of Proceedings, Nov. 5, 1963, at p. 700.) Mr. Katzenbach's proposed safeguards do fulfill the main purposes of the *McNabb-Mallory* rule: to bypass conflicts over the nature of the secret interrogation and to minimize both the "temptation" and the "opportunity" to obtain confessions improperly; to effectuate or implement various constitutional rights, such as the right to counsel, the privilege against self-incrimination, and the protection against arbitrary arrest.

I would be still happier with the proposal if the maximum time between arrest and confession were reduced from 6 hours to 4. I believe this could be done without significantly hampering police interrogation. In this connection, Mr. Acheson's comments are most illuminating (pp. 704–705):

I think in some very high percentage of the cases a confession is made, *if it is going to be made at all*, within an hour or two, perhaps 3 hours after arrest. * * * In the great majority of cases a confession is made fairly promptly after arrest. Of course, a confession is withheld because the defendant thinks the police have nothing on him. When he finds out they do, he very frequently confesses. You get some cases like *Killough* in which the police cannot get anything on him and he will not confess even though he is held for a few days. *We certainly don't suggest that there is any legislation that is practicable which would cope with a situation like that.* [Emphasis added.]

I share the doubts Senator Dominick (pp. 697–698) and, to a lesser extent, Senator McIntyre manifested (p. 706) about the feasibility of locating and producing a "responsible witness other than a law-enforcement officer" to observe the questioning. Therefore, I would prefer the alternative: a verbatim recording of the interrogation. I think disputes about when and how the police issued the warning that the suspect is not required to make any statement at any time and that any statement made by him may be used against him, could be avoided by assuring that this too is recorded.

Since, under Mr. Katzenbach's proposal, the recording would be the suspect's main protection against coercion, promises of special or favorable treatment and other deception, I do not think it unfair to make any editing or tampering of the recording a serious offense and, further, to take the position that once it is established that any such tampering has occurred, the confession must be thrown out.

Whether such legislation would survive constitutional attack, especially on the ground that the suspect was subjected to interrogation without being permitted to have the presence and aid of counsel, is, as Mr. Katzenbach has indicated, a matter of some speculation. His proposal would mean that persons accused of crime in the District would have significantly more protection than they do in many States, and I, for one, think such legislation would be sustained by the Supreme Court of the United States.

However, if we are prepared to go this far to protect the rights of those accused of crime—and I think we ought to be—the persistent question I have is: Then why not stick with the *McNabb-Mallory* rule?

Inasmuch as the Department of Justice's proposal requires that a suspect be plainly advised of his privilege against self-incrimination and permits him to consult with an attorney, I fail to see how it would "hurt" law enforcement one whit more if an arrested person were first brought before the nearest available judicial officer "without unnecessary delay," as rule 5(a) now requires; issued the warning by him, as rule 5(b) now requires (perhaps also permitted to consult briefly with an attorney), and then remanded to police custody for several hours of interrogation.

I realize, of course, that in the District of Columbia, if the accused is committed he is placed in the custody of first the U.S. marshal and next the prison warden and that prison regulations require the police to obtain the defendant's written consent (which they have managed to get in a number of recent cases) before they can pursue or resume interrogation. But I share the view that "the present practice of immunizing an arraigned person from interrogation does not rest on inviolable principles of law. The Constitution would appear to permit

the suspension of bail pending a brief period of judicially authorized interrogation." (Note, 68 *Yale L.J.* 1003, 1025–26 (1959)). "In fact, prior to the *McNabb* decision, the U.S. marshals in the District of Columbia—under whose custody the great majority of federally accursed persons are placed pending trail—regularly returned them to police for interrogation," the same at 1026.

The Supreme Court has sustained a confession obtained from a defendant after he had been duly committed to jail, *United States* v. *Carignan*, 342 U.S. 36 (1951). Moreover, in *Goldsmith* v. *United States*, 277 F. 2d 335, 339 (D.C. Cir. 1958), a municipal judge, at the request of the police, signed an order permitting police interrogation after the defendants had been ordered held for the grand jury; the practice was not challenged and the resulting reenactment of the crime was sustained.

True, the *Carignan* case is a long time ago, considering the tremendous strides taken by the Supreme Court in recent years. It is conceivable that postcommitment interrogation (*a*) without counsel's permission of one who has already retained counsel, or (*b*) of one who has not had the opportunity to consult counsel at any point, may be deemed constitutionally impermissible by the present Court. My own view is that it would not; that prior to the filing of an information or indictment, the absence of counsel, without more, is not likely to be considered a fatal defect in the near future.

What if I am wrong? Then the measure proposed by the Department of Justice would also be struck down on constitutional grounds.

Although, as I have previously indicated, I think the Department of Justice proposal resolves, in the main, the "involuntary confession" problems which have long plagued the courts, I am troubled by a "right to counsel—equality of justice" aspect of the proposal.

In the testimony pertaining to the proposal there are frequent statements about permitting the arrested person to consult with "counsel of his own choosing." But as Mr. Acheson observed (p. 706), "usually * * * these people don't know a lawyer." Usually, one might add, these people lack the financial resources to hire a lawyer, even if they did know one. But, as Mr. Acheson has also pointed out (p. 707), neither the Legal Aid Society nor any other legal agency is presently authorized to accept the call of the police to represent defendants in the custody of the police.

What follows from this? A forceful argument may be made that to condition the availability of counsel at the crucial period shortly after arrest on the financial ability of the arrested person constitutes an "invidious discrimination" violative of 14th amendment equal protection and (in the case of Federal law enforcement) 5th amendment due process.

To paraphrase Mr. Justice Douglas, speaking for a 6 to 3 majority in the recent landmark case of *Douglas* v. *California*, 372 U.S. 353, 355, 357–58 (1963):

There can be no equal justice where the time an accused first enjoys the benefit of counsel depends on the amount of money he has. There is lacking that equality demanded by the 5th and 14th amendments where the rich man is fortified by the advice of counsel before he is interrogated but the indigent is forced to shift for himself.

In your letter of November 8, you call my attention to the November 5 testimony of Maj. Robert V. Murray, Chief of the District of Columbia Police Department. You have been good enough to let me take issue with Major Murray at great length, but I cannot resist the temptation to comment briefly about some of the statements the Chief made on November 5.

1. Major Murray testified that "over the years if a man was arrested and said 'I want a lawyer' he was given an opportunity to call a lawyer" (Daily Report of Proceedings, Nov. 5, 1963, p. 740); that this was the practice "when I worked in homicide 20 years ago that we had a person in there and he said, 'I want a lawyer,' why there is no use wasting time with him. Just get him a lawyer" (p. 758). But at that same point, he states: "But I have never run into an attorney yet that would not advise his client not to talk to the police. We know when an attorney comes in that his client is not going to talk to the police about the case" (p. 749).

It may be my shortcoming, but so far as I can make out, isn't Major Murray saying, in effect, that those persons who are wary enough and sophisticated enough—the experienced and professional criminals, if you will—to request an attorney as soon as they are taken into custody can commit crime with virtual impunity?

As Prof. William Beaney of Princeton has observed, Beaney, "The Right to Counsel in American Courts," page 207 (1955):

"[T]he professional criminals, the 'syndicate representatives,' the hired gunmen, and the veteran safecrackers, are well aware of their rights and will say nothing until they see their lawyers. In fact, it is not uncommon in some cities for a 'mouthpiece' to appear at precinct headquarters before the suspect is brought in. The undefended criminals, for the most part, are perpetrators of amateur crime, simple assault, petty larceny, or grand larceny involving slightly more than the statutory sum, or they are first or youthful offenders."

2. A flat "6-hour" rule between arrest and completion of the confession troubles the Chief. "I think," he testified, "a time limitation should be decided by the judge, if it is a reasonable length of time" (p. 741). And he continues (p. 743): "[T]he trial judge can determine whether there was any unnecessary delay." This is what the judges are doing—right now. If the Chief is willing to "leave it to the courts," what has he been complaining about so bitterly all these years?

3. "Under the hampering effect of the *Mallory* ruling and corollary decisions," insists Major Murray, "our rate of offense clearance has decreased" (p. 726). The clearance of crime, he tells us "started down * * * when the *Mallory* decision was handed down" (p. 747). "We feel kind of bad," he reveals, "because our clearance rate is not 58 percent as it has been" (p. 768); and, he promises, it would be "back to 58 percent" if *Mallory* were "corrected" by enacting legislation (ibid.).

The facts—those supplied by Chief Murray's own department—are that the clearance rate dropped 7 full points (from 64.9 to 57.9) in the 2 years before the *Mallory* case; rose two-tenths of 1 point the year after *Mallory;* and rose another 2½ points to 60.7 2 years after that much-maligned case. See House Report 579 (to accompany H.R. 7525) (July 1963) at page 6. What then is the "readily apparent relationship" (p. 726) between *Mallory* and the clearance rate?

At another point (p. 727), Chief Murray seems to point the finger of blame for declining clearance rates (although the Chief nowhere notes this, the clearance rate first began to drop 3 years after the *Mallory* decision) not at *Mallory* after all, but at the "changed policies" on "arrest for investigation," starting from the time the Horsky committee first began its study of this practice. For the reasons I gave in my testimony of October 23, and for the reasons spelled out at length in the Horsky report itself, I doubt this very much. But in any event, there is nothing this committee—or any other—can do about the ban on "arrests for investigation"—and the practice condemned by the Horsky committee was not "field detention" but the actual "booking" and fingerprinting of persons on "investigation."

As you yourself so aptly summed up the situation, Senator (p. 761): "I guess we will just have to give up that idea [of 'arrest for investigation'] because we don't want to do anything that is not constitutional * * *. I don't think there has been one single solitary witness that has appeared before us that has said it was constitutional."

4. Major Murray has made much of the "aggravated assault" category, where the District is No. 1, statistically. The District has always been high in this category. Although there were 470 more cases of aggravated assault in fiscal year 1963 than in fiscal year 1957 (the all-time low for crime under the Districts' modern reporting system), even with this increase there was still 1,583 fewer cases of aggravated assault in fiscal year 1963 than in fiscal year 1952 (the all-time high for crime in the District under the current reporting system). See House Report 579 at page 5. This hardly suggests the "criminal army" is running rampant in the District.

Why has the incidence of "aggravated assault" always been high in the District? Chief Murray suggested the answer in a recent interview published in U.S. News & World Report, October 21, 1963, pages 92, 97:

"Question. Can you give any reason for Washington being the No. 1 city in assaults?

"Answer. * * * I'll say this: In this list of cities that I mentioned—16 cities of 500,000 to 1 million population—we'll run pretty close with the other cities in homicides. There's no doubt about a homicide—if a person's dead, he's dead—or about stolen cars—you can tabulate those. But in aggravated assault, the figures are way off balance; we're way ahead of the others. Now, whether there is a different system of reporting——

"Question. Different definition, maybe?

"Answer. Could be."

In any event, the increase in aggravated assaults has come about since June of 1959, not since June of 1957, when *Mallory* was decided. According to the graph on page 16 of the joint hearings before the House and Senate District of Columbia Committees (1963), there had been virtually no increase in this category at all as of 2 full years after *Mallory*.

The incidence of robbery has risen, but the significant increase did not begin until 1960. See page 15 of the joint hearings. Homicide has increased slowly in the 5 years since *Mallory*, but not as rapidly as it did in the 2 years prior to *Mallory*. See page 13 of the joint hearings. And the incidence of rape started to drop at the end of 1957 and has continued to fall. See page 14 of the joint hearings.

How apparent, then, is the relationship between *Mallory* and the incidence of crime?

5. A basic fallacy pervading Chief Murray's testimony is that the *Mallory* rule is something new. It is not. Even Prof. Fred E. Inbau—a stanch foe of the *Mallory* rule—admitted in his testimony of October 23 that the *Mallory* case simply reaffirmed the *Upshaw* case of 1948, which, in turn, reaffirmed the *McNabb* case of 1943. Indeed, 15 years ago, Professor Inbau criticized the *McNabb* rule, see Inbau, "The Confession Dilemma in the Supreme Court," (43 Ill. L. Rev. 442 (1948)), on the very grounds he criticized the *Mallory* rule in his testimony before your committee last month.

Questioning of Chief Murray on November 5 brought out that the District of Columbia metropolitan area population increased from 1,464,000 to 2,100,000 from 1950 to 1960 (pp. 750–751), an increase of over 40 percent. During this 10-year period, as Chief Murray pointed out in earlier testimony (joint hearings at p. 7), the total number of offenses in the District increased only 11 percent. No State in the Union had to operate under the *McNabb-Upshaw-Mallory* rule—only the District of Columbia did—during the 1950–60 decade but as Chief Murray also disclosed, the nationwide increase in crime during this period was a staggering 98 percent. (Ibid.)

It is interesting to note that during 1950 to 1960, the overall felony rate in the three major Maryland and Virginia suburbs of the District for which generally complete figures were available—and Maryland and Virginia law enforcement officers were "hampered" by neither the *McNabb-Upshaw-Mallory* rule nor the exclusionary rule in search and seizure cases during this period—increased much more rapidly than did the District's. See Goshko, "Major Crime Rate Growing Faster in Suburbs than District of Columbia," Washington Post, March 11, 1962, page B5, column 1; Mintz, "Serious Crime Rate Down Here Despite Furor Raised by Congress," Washington Post, July 5, 1961, page B1, column 6.

6. Nowhere does Major Murray come to grips with the information supplied by Deputy Chief John E. Winters, concerning juvenile crime in the District (joint hearings at p. 121):

"The total crime picture in the District of Columbia for fiscal year 1962 reflected a 1.2-percent decrease as compared to fiscal 1961. Juvenile delinquency increased 17.7 percent during the same year as compared to the year before. * * * *A noteworthy decrease in crime in the District of Columbia would have occurred* in fiscal 1962 if it had not been for the increase in offenses committed by juveniles. [Emphasis added.]

Are we supposed to believe that juvenile perpetrators of crime calculate nicely the length of time during which they may be interrogated by the police before deciding whether to beat up a person or snatch a purse, but that adult offenders do not?

Sincerely,

YALE KAMISAR, *Professor of Law.*

THE DEMOCRATIC CENTRAL COMMITTEE
OF THE DISTRICT OF COLUMBIA,
Washington, D.C., November 29, 1963.

Hon. ALAN BIBLE,
U.S. Senate, Washington, D.C.

DEAR SENATOR BIBLE: I write in response to your letter of November 8, 1963, enclosing a copy of H.R. 5726 and a transcript of the testimony of November 5, 1963. Our comments on Deputy Attorney General Katzenbach's proposed amendments to legislation regarding the *McNabb-Mallory* rule as embodied in H.R. 5726 and his November 5 testimony follow:

1. The Supreme Court has had two main purposes in mind in formulating and enforcing *McNabb-Mallory*. The first of these, of course, is to insure that the arrested person, the potential defendant, is not overborne as to his constitutional right to a fair trial and his constitutional right to refrain from incriminating himself. The safeguards proposed by Mr. Katzenbach are directed to this concern. Secondly, however, *McNabb-Mallory* is meant to preserve the equally basic liberty of the citizen to be free from arrest and detention on less than probable cause as promptly found by an impartial judicial officer. The requirement of a prompt preliminary hearing under criminal rule 5(a) contemplates not only that the magistrate shall advise the accused of his rights and insure that they are respected, but that he shall forthwith release those who have been improperly arrested.

Mr. Katzenbach's proposals are not addressed to this second purpose at all. Indeed, on its face, H.R. 5726 would in effect license arrest and detention without magistrate approval for as much as 6 hours; moreover, at page 717 of the November 5 hearing transcript, Mr. Katzenbach appeared to suggest that the 6-hour limitation could also be dropped. I agree that if you set a 6-hour limitation it is likely to become the minimum as well as the maximum (i.e., the standard) time of detention. On the other hand, Mr. Katzenbach was in error in stating that a time limitation was of no importance since the normal case "involves 1 or 2 hours" (transcript, p. 717), if the past practice of arrests for investigation provide any clue. The Horsky committee found that in 1960 out of 3,960 such arrestts, over 2,800 involved detention more than 2 hours and over 1,300 involved detention over more than 8 hours (Horsky committee report, table VIII-A, p. 97).

It is no good saying that those figures have no relevance to arrests on specific charges, for H.R. 5726 really permits the police to revive investigative arrests substituting a specific charge for the former word "investigation." I cannot stress this point too strongly, especially since the committee members and all witnesses who appeared before it opposed section 301 of H.R. 7525 because it purported to authorize the unconstitutional practice of making arrests on less than probable cause. But if the police can arrest a man on a specific charge and need not bring him before a magistrate without unnecessary delay, they can use the nominal charge as a device to do precisely what the Supreme Court forbade in *Mallory:* "to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause'" (354 U.S. at 456). With the best will in the world the police will surely use ths power if there is no sanction such as the *Mallory* rule to forbid them. What H.R. 5726 does is to remove that sanction, the only effective one to deter such practices.

In sum: If H.R. 5726 or any substantial equivalent is enacted, the inevitable effect will be to revive what we formerly called investigative arrests. I urge the committee not to permit this result.

2. The foregoing objection is, for us, insuperable. On the score of providing increased protection to the accused who is actually charged before a magistrate and made a defendant, H.R. 5726 does improve substantially on existing practice. However, I do not agree at all that the Supreme Court will for that reason admit evidence taken in violation of rule 5(a) and the fourth amendment. I think it is an error to assume that the Court will allow Congress to dictate the admissibility of such evidence. Moreover, the safeguards in section 3 of H.R. 5726 are not really satisfactory in these respects (apart from Mr. Katzenbach's seeming agreement to drop subsections (a) and (c)):

(i) It is meaningless to permit the friendless and indigent to call a relative or a lawyer. If a lawyer is not furnished to such a person, the statute merely gives him a theoretical right of no practical value. Moreover, a relative or friend is no substitute for legal counsel during questioning by the police.

(ii) Six hours is more than enough time to overcome the resistance of a man detained in the police station and subjected to continuous questioning, notwithstanding the other safeguards provided. Again and again the hopelessness of a criminal accused's proving the duress which he feels in such a situation has been pointed out to the committee and the courts. One man is weak, another strong. Rule 5(a) was intended to settle this issue by a flat rule requiring in all cases a preliminary hearing "without unnecessary delay." If that rule seems too mechanical it is so precisely because any other rule is impossible to apply with fairness to the accused. The absence of third-degree tactics is not proof against compulsion during 6 hours of questioning. Of course, the hardened criminal will not be the victim of this sort of duress.

(*iii*) Unless the questioning is both witnessed and recorded, there will be no assurance against overbearing questioning. A tape recorder can be turned off, and it does not reflect such matters as a policeman leaning over the accused while he questions him. A witness, on the other hand can observe such acts but cannot hope to remember 6 hours of conversation.

3. We utterly reject the claim that such a sweeping revision of the rights of arrested persons in the District of Columbia, as opposed to all other Federal jurisdictions, is either necessary or wise because we have more common-law crime here. By the same token we have more people arrested whose constitutional rights must be protected. We are not second-class citizens simply because we are the only big city controlled by the Federal Government. I also point out that rape or assault are equally serious whether they occur here or in another Federal enclave and that what the police do not need elsewhere to solve such a crime they do not need here either. To handle our crime problems we have a correspondingly larger police force.

4. Lastly, I submit that H.R. 5726, which was not the focus of the committee's hearings prior to November 5, is not the sort of measure that should be reported out after only 1 day of hearing. It is far too complicated and explosive a proposal for that sort of consideration. I am confident that the committee and its chairman, who have been unfailingly courteous to District citizens and attentive to their views, will want to search the issues posed by the bill more fully than can be done by written comments such as these.

Sincerely yours,

JOSEPH L. RAUH, Jr., *Acting Chairman.*

Washington, D.C., November 25, 1963.

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

DEAR SENATOR BIBLE: Undersigned furnishes herewith written comments upon Mr. Katzenbach's suggested amendments to any legislation amending the *Mallory* rule, as per request contained in your November 18, 1963, letter.

Undersigned, as chairman of the Due Process Committee of the National Capital Area Civil Liberties Union, in its behalf and personally, cannot urge upon you any more strongly, graphically, vividly, or vigorously his own opposition to any alteration whatsoever to the *Mallory* rule and, as well, the unalterable opposition of the Civil Liberties Union to such legislation.

Testimony of Chief Robert Murray, of the Metropolitan Police Department, contained in pages 738 to 749 in the transcript of the record of the hearings held by your committee, serves to illustrate, in some particulars, some of the vices inherent in the proposals of the highly esteemed Assistant Attorney General Mr. Katzenbach: While Chief Murray gives lipservice to the proposition that an arrested suspect should be advised of his right to counsel and he gives further lipservice to the proposition that the suspect should be permitted to consult with counsel during incarceration and, presumably, during, and prior to, an interrogation, the true feelings of Chief Murray are perhaps best put in his own testimony at page 741 of the transcript, wherein the Chief says:

"* * *, if a criminal knows that all he has to do is sit tight for 6 hours, he may sit tight for 6 hours and not say anything. I think a time limitation should be decided by the judge, if it is a reasonable length of time."

What Chief Murray really seeks is the right to incarcerate for periods exceeding 6 hours persons arrested without probable cause, after having given a suspect merely a superficial assurance that he is entitled to counsel and for the sole purpose of facilitating a breach of the fifth amendment by causing the possible self incrimination of the suspect.

The right to counsel is a very precious right that should be jealously guarded by the Senate of the United States of America. Personal experiences, while often germane to an issue, are not always acceptable in demonstrating or proving a point at issue. Nevertheless, undersigned will point out to you and to the committee that on an occasion, on a Good Friday afternoon in the early 1950's, possibly 1953, 1954, or 1955, undersigned presented himself at the headquarters of the Metropolitan Police Department, 300 Indiana Avenue NW., in the District of Columbia, on the fifth floor of that building, where the offices of the Gambling and Liquor Squad of the Morals Division were then housed, for the purpose of conferring with his client, one Kermit Mallette, who had been arrested a matter

of 2 or 3 hours prior to that time by members of the Gambling Squad in the execution of a search warrant for the premises occupied by Mr. Mallette. Arrested along with Mr. Mallette, were four or five other individuals, all of whom were represented by undersigned and all of whom desired to see and confer with their counsel. The, now Deputy Chief, John D. Layton was in charge of the Gambling and Liquor Squad at that particular time and it was he, the then Capt. John D. Layton, who personally refused to permit undersigned to confer with, consult with, or even see his clients, until they had been subjected to the attention of Mr. Layton's subordinates in the securing of written or oral statements or confessions from these arrested suspects or in the attempting to secure same through intensive interrogation.

Undersigned, who has been in the active practice of the law in the District of Columbia continuously for the past 19 years, and whose practice has consisted, perhaps, of 30 percent criminal practice, which practice has included some of the larger, more important and, perhaps, more publicized cases during that period of time since 1944, places no stock whatsoever in the reliability or upon dependability of police officers to properly advise arrested suspects when such advice would thwart the desires and intentions of such officers. In the mind of undersigned, the establishment of the mechanical means of facilitating the pure emasculation of the right guaranteed to every American citizen by the Founding Fathers in the fifth amendment, not to be compellable to give testimony against himself by the method of assigning the duty of protecting that right to he very same individual who a the very same time is interested primarily in having the citizen give up, waive, or lose that valuable right and give to the individual police officer a statement incriminating himself, and ascribing to such "protection" validity under the fifth amendment of the Constitution of the United States, is the very quintessence of sophistry.

Senator Bible, the many reasons for the vigorous stand taken by the National Capital Area Civil Liberties Union in opposition to any legislation whatsoever seeking to amend or modify the *Mallory* rule are contained in our prepared statement, previously submitted, and in the oral testimony of undersigned and the oral testimony of James Heller before your committee, so that it is, perhaps, unnecessary to reiterate these reasons in this letter. We are extremely grateful to you and to the committee for having extended to us this opporunity to present our views on the subject of Mr. Katzenbach's proposed amendment. As a footnote, we add that because a copy of H.R. 5726 was enclosed with your letter, that your committee was, or is, considering this bill as the embodiment or Mr. Katzenbach's suggestions. Will you please, therefore, consider the foregoing statement as directed generally and specifically to the terms and provisions of H.R. 5726.

Sincerely yours,

DE LONG HARRIS.

CRAIGHILL, AIELLO, GASCH & CRAIGHILL,
Washington, D.C., November 25, 1963.

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

DEAR MR. CHAIRMAN: Your letter of November 8 requests my comments on certain suggested amendments to any legislation concerning the *Mallory* rule.

I have read over the transcript which was forwarded to me by your office. Also, I have reread the cases on which Mr. Katzenbach's testimony was predicated, *In re Groban*, 352 U.S. 330, and *Anonymous* v. *Baker*, 360 U.S. 287. I have also reread *Crooker* v. *California*, 357 U.S. 433, and *Cicenia* v. *Lagay*, 357 U.S. 504.

As I see this picture, four Justices of the Supreme Court have heretofore stated that interrogation of an arrested person without the presence of counsel or friends or relatives may constitute a violation of the 14th amendment regardless of whether the jury subsequently makes a determination that confessions or admissions obtained as a result of such interrogation was voluntary and, therefore, entitled to credibility.

No one knows the final answer to this problem. The views of the four Justices are clear. There have been changes on the Court and the Deputy Attorney General's conclusions with respect to how the new Justices might vote on this issue are likely to be more accurate than my own. I simply cannot say how Mr. Justice White or Mr. Justice Goldberg or any other member of the Court would be likely to vote on this matter.

In my experience, I have never encountered much success in relying upon dissenting opinions of the Supreme Court. The question of whether a lawyer should be permitted to advise an arrested person at the police station level was directly before the Supreme Court in both *Crooker, supra,* and *Cicenia,*[1] *supra.* The majority ruled that the due process clause of the 14th amendment did not require the presence of counsel during interrogation by the police. In *Crooker,* Mr. Justice Clarke, speaking for the majority, said that such a requirement would have a devastating effect on law enforcement.

For these reasons, I prefer the House-passed bill, H.R. 7525. It is noted that the motivation for the joint hearings conducted by Senators and Congressmen earlier this year was the desire to strengthen the public safety. There is no question but that the rights of the individual are scrupulously protected by the judges who try and review the case. There is question, however, as to whether the innocent victims of crime in this jurisdiction are given adequate protection by the Government. Interrogation of persons whom the police have reason to believe are involved in crime has long been regarded as the most useful single tool for the solution of crime.

Washington leads cities of the Nation of comparable size in aggravated assauts. Washington is second in the cities of the Nation of comparable size insofar as the crime of robbery is concerned. Most of these crimes take place on poorly lighted streets at late or unusual hours when the question of identity is difficult. These additional safeguards proposed in H.R. 5726 will render more difficult the solution of crime and the punishment of these numerous felons with whom the public is plagued in the Nation's Capital. Certainly inablity to solve and punish crimes of this character is not likely to aid law enforcement or increase the public's safety. Obviously, the opposite is true.

A lawyer called in to advise a client during the course of interrogation has only one obligation, to protect his client. It would be unprofessional for him to act in any other capacity. This is so clear that the only advice to a client under these circumstances would be the words "don't talk."

If the committee, in the exercise of its legislative judgment, decides to follow the expert advice of the Deputy Attorney General, and I willingly concede that his sources of information and consequently his judgment on the matter are superior to mine, then I would say that it is preferable to limit as far as possible the additional "safeguards" proposed in H.R. 5726 to 3a and 3b. It is noted that 3a, in substance, is contained in the House-passed legislation. Subsection 3b does not require that the interrogation be stayed until either the lawyer or the friend or relative is present. It simply requires that the arrested person prior to questioning be told by his custodian that he should have the opportunity to notify a relative or friend and to consult with counsel of his own choosing.

The additional safeguards 3c and 3d, which incidentally are not strongly urged by the Deputy Attorney General, seem to be in addition to the rationale of the dissenting opinions contained in *In re Groban* and *Anonymous* v. *Baker, supra.* Subsection 3c puts an arbitrary limit of 6 hours upon questioning. The arbitrary limitation would seem by implication to tell the police that any questioning up to 6 hours is lawful. In many instances, the police can complete their procedures in less than 6 hours. I do not favor this provision. Take the case of *Milton Mallory,* 259 F. 2d 296, the nephew of Andrew Mallory. He was convicted of a sexual assault on a young girl. He was arrested and after some preliminary questioning, it was ascertained that he was too intoxicated to respond to questions. The detention was continued for approximately 13 hours before he had sobered up sufficiently to permit continuation of the questioning. Shortly after the commencement of this second period of interrogation, he confessed. Obviously, the 6-hour rule would preclude meaningful questioning of such a person. The court of appeals held that the conduct of the police under the circumstances in that case was proper and the conviction was affirmed.

Subsection 3d which requires either a stenographic transcript of the interrogation or an electronic recording thereof, or that the interrogation be conducted in the presence of a "responsible person who is not a law enforcement officer" is in my experience impracticable. The police have very few, if any, employees who could record verbatim interrogations. Electronic recording devices require experienced operatives and are always subject to the charge by defense counsel of tampering or splicing. Finding a "responsible person who is not a law en-

[1] In what amounts to dicta, at p. 509 of 357 U.S., the Supreme Court said: "* * * even in Federal prosecutions this Court has refrained from laying down (a rule that) police could not interrogate a suspect before giving him an opportunity to secure counsel."

forcement officer" in the middle of the night for the purpose of having him witness an interrogation presents real difficulties. Such a witness would be subject to rigorous cross-examination by defense counsel, to which no citizen seeking to perform a public duty should be subjected.

It seems to me that upon proper instructions the jury is the best instrumentality for passing on the voluntariness of confessions or admissions. In my experience, in this jurisdiction, if there is factual issue as to the voluntariness of the confession, it must be submitted to the jury for the jury's determination.

I would make this additional comment on section 4 of H.R. 5726. In the recent *Killough* case, 315 F. 2d 244, where our court of appeals was sharply divided, Judge Youngdahl, the trial judge, did make findings of fact, 193 F.S. 905, with reference to Killough's second confession to the police after he (Killough) had been judicially warned. Judge Youngdahl was in the best position to observe the witnesses on whose testimony he made these findings of fact, nevertheless, his determinations were overruled by the majority of the appellate court. (See dissenting opinion of Judge Danaher at p. 324 of 114 U.S. App. D.C.)

If section 4 of H.R. 5726 which requires the trial judge to make findings is adopted, I would recommend that "such findings when predicated upon substantial evidence shall be deemed conclusive" be added.

Respectfully submitted.

OLIVER GASCH.

NORTHWESTERN UNIVERSITY,
SCHOOL OF LAW,
Chicago, Ill., November 21, 1963.

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

DEAR SENATOR BIBLE: I greatly appreciate the opportunity you have given me in your letter of November 8, to comment upon the testimony given before your committee on Tuesday, November 5. Attached hereto is my statement, in triplicate, regarding the testimony of November 5, and also outlining briefly my overall views regarding title I and title III of H.R. 7525.

Since some of my views regarding the necessity for the police interrogation of criminal suspects have been set forth more fully in a recent book of mine, I am forwarding a copy thereof to you under separate cover with my compliments. After it has served your present purpose, perhaps you may wish to keep it available for possible committee use on future occasions whenever this issue should again arise.

Trusting that the enclosure may be of interest and value to you and your committee, I am.

Sincerely yours,

FRED E. INBAU,
Professor of Law.

COMMENTS OF PROF. FRED E. INBAU, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Title I, section 101(a) is, in my opinion, an absolutely necessary law. It would nullify the *McNabb-Mallory* rule which makes it impossible for the police of the District of Columbia to give the people of the District the protection they so badly need from the criminal element in the District. At the same time, section 101(b) will give to arrested persons a protection they do not now have as a matter of law, even though, as a practical matter, the prescribed warning is usually given to the arrestee at some time during his interrogation or before the taking of his confession.

To add anything further to title I, as proposed by Deputy Attorney General Katzenbach and U.S. Attorney Acheson, would make matters worse than they are at the present time, and I say so for the following reasons:

1. It is unrealistic to fix a specific time limitation during which a confession could be lawfully obtained. The time that is reasonable or required in a given case will depend upon the particular factual situation of that case. In some instances a half-hour or 1 hour may be adequate; in others a much longer period would be required. I think it is dangerous to generalize on 6 hours. For one thing, the police may generally assume that they are entitled to 6 hours in all cases, which obviously would be to the detriment of many arrested persons. Also, with a specific time limitation, an over zealous police officer may be induced

to resort to interrogation methods which he would not use except for this running out of the clock. I can also see the possibility of many informed criminals—and there are many informed criminals abroad today—deliberately waiting for the expiration of the 6 hours and then making a confession which would be unusuable against him and at the same time the 6-hour expiration would nullify the validity of any derivative use being made of what he said. I think, therefore, that it is far better to omit any specific time limit.

2. It is impractical for the police to conduct the interrogation of criminal suspects in the presence of an observer, and it is also impractical to have transcripts and recordings made of all police interrogations.

An effective interrogation cannot be conducted except under conditions of privacy (the reasons for this are set forth in my book "Criminal Interrogation and Confessions," 1962) pages 1 to 5 and 203 to 210.

Mr. Katzenbach, on page 698 of his reported testimony, was completely in error when he said that the police of Chicago (even in the area in which Mr. Katzenbach lived) "always secured, when somebody was arrested, an independent witness to look at the questioning * * *." Based upon my own experience and observation, when I was director of the Chicago police scientific crime detection laboratory, and my close familiarity with police practices since then, I can confidently report to the committee that this has never been and is not now the practice of the Chicago Police Department. What Mr. Katzenbach may have had in mind is a practice whereby in certain sensational murder cases the police would bring in some reputable citizen to witness the signing and acknowledgment of a written confession. This, however, occurred only after the individual had been interrogated and only after he had made an oral confession. Rarely, if ever, would the police have some nonpolice representative present at the time of the interrogation itself. Morover, considering the large volume of cases in which the police must question criminal suspects (including, of course, those who are established, by the questioning itself, to be innocent), it is not feasible to arrange to have citizen observers present at all police interrogations.

I am afraid that when Chief Murray was being questioned regarding this matter of an impartial observer, and he said that he had no objection to an impartial observer being present, that he had in mind the signing of a confession stage of an interrogation rather than a practice whereby all interrogations would be conducted in the presence of an impartial observer. I do not believe he meant to agree with Mr. Katzenbach's proposal. In any event, Chief Murray is being sent a copy of this statement so that he may clarify what he said if I am correct as to what I believe he actually intended to say.

Almost as impractical as the impartial observer proposal is the one with respect to stenographic or tape recordings of all police interrogations. The expenditure of time, manpower, and money would be tremendous in view of the large number of persons who are questioned by the police, and it is not known in advance which ones are guilty and likely to confess. Then, too, a tape recording in itself would not be much more trustworthy than the police who are making it.

Overlooked all too frequently is the fact that our only real safeguard against police abuses is to develop a system whereby our police are selected and promoted on a merit basis, properly trained, adequately compensated, and accorded an opportunity to protect the public and enforce the law with a minimum of politically inspired interference. Public opinion and an alert press would furnish the required controls with respect to the issues of police abuses.

In my judgment, title I is a constitutional proposal just as it now stands. The *McNabb-Mallory* rule was established in the exercise of the Supreme Court's supervisory power over lower Federal courts and was not based on constitutional considerations (see "Criminal Interrogation and Confessions," pp. 158 to 162) and the State courts have uniformly refused to adopt a similar rule for their own jurisdiction, as they were privileged to do since the *McNabb-Mallory* rule was not founded upon constitutional considerations. Of significance, too, is the fact that not one of the State cases has ever been reversed by the Supreme Court.

Although there are some Justices on the Supreme Court who are in favor of raising the *McNabb-Mallory* rule to a constitutional status, the decisions of the Court up to the present time certainly have not done so, and it seems to me that Congress is privileged to proceed with the enactment of title I. With regard to the right to counsel during the arrest stage of a criminal case—that is, before the placing of a formal charge against the arrestee—the committee should bear in mind that in two cases the U.S. Supreme Court upheld the admissibility of

confessions even though the police had actually denied the arrestee the right to counsel. See *Crooker* v. *California* 357 U.S. 433 (1958) and *Cicenia* v. *LaGay* 357 U.S. 504 (1958).

The committee's attention is also called to a recent decision of the Supreme Court of Illinois, *People* v. *Escobedo*, 190 N.E. 2d 825 (1963) in which the Illinois Supreme Court said:

"Commonsense dictates that the presence of an accused's attorney would preclude effective police interrogation even though the questioning be fair. The law, of course, protects an accused whose will to confess has been overborne by excluding the use of the confession as evidence against him. It does not follow, however, that he is entitled to have someone present, who under the auspices of giving legal advice, warns and advises him against reacting to his first natural sensations to confess. As long as the questioning is fair, incriminating statements of an accused are not likely to result from any idea that he must answer, that is, as a result of his ignorance of his right against self-incrimination, but are likely to result from his free choice to make them. In any event, it is possible for someone other than his attorney to advise him of his right against self-incrimination and let the accused invoke the right rather than his attorney. The exclusion of a voluntary confession made outside the presence of counsel or the preclusion of effective interrogation by the presence of counsel is a high price to pay for whatever deterrent effect the presence of counsel would have on police abuses."

(A discussion of the issue of the right to counsel at the arrest state of criminal case appears on pp. 167 to 173 of "Criminal Interrogation and Confessions.")

In the light of the case law upon the subject, I do not feel that the committee should concern itself about the right-to-counsel aspect of title I. In my judgment, title I should be held constitutionally valid, and there is some reason for believing that if and when the issue is squarely presented to the Supreme Court, it would hold title I constitutional, although probably in another one of its 5-to-4 decisions.

Title 3, which is essentially the Uniform Arrest Act, is in my judgment, necessary legislation and it is also constitutionally valid. I have reference particularly to subsections a, b, and c of section 301 which, as a practical matter, is of greater importance than section 302.

Just as it is essential that the police have the opportunity to interrogate criminal suspects, it is necessary that they be given the opportunity to detain for a reasonable period of time persons they have reasonable grounds to believe are committing, have committed, or are about to commit a crime in order to identify these persons and inquire of them the reason for their presence in the particular place. The States of Delaware and Rhode Island have similar provisions in their laws and the supreme courts of both of these States have upheld their constitutionality. See *Kavanagh* v. *Stenhouse* 174 A 2d 560 (R.I. 1961), which was appealed to the U.S. Supreme Court, but the appeal was dismissed for want of substantial Federal questions (368 U.S. 516). Also see *Cannon* v. *State* 168 A 2d 108 (Del., 1961). In the light of these two State supreme court decisions and in view of the dismissal of the appeal of one of them by the U.S. Supreme Court, I think the way is clear for Congress to proceed with the enactment of title 3 on the assumption that it is constitutionally valid.

GEORGETOWN UNIVERSITY LAW CENTER,
Washington, D.C., November 27, 1963.

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

DEAR SENATOR BIBLE: Thank you for providing me with the opportunity of commenting on the proposals contained in H.R. 5726 and the testimony of Deputy Attorney General Katzenbach, U.S. Attorney Acheson, and Chief Murray.

In the first place, I do not think that a need for legislation on the subject has been established. After declining in 1962, the crime rate again rose last year. The crime rates in adjoining counties which have no *Mallory* rule also has risen. Chief Murray has not presented any evidence, other than his own opinion, that the *Mallory* rule either has been a factor in the increasing crime rate, or that any substantial number of defendants has escaped conviction because of it. Mr. Katzenbach stated that he did not know of any facts that could be cited which would lead to the conclusion that a substantial number of criminals have evaded punishment (R. 712). Mr. Acheson testified that there has been no substantial

number of criminals who have evaded punishment although there may be some instances in which they received less punishment than they deserved (R. 713, 714).

I do not think that Congress should legislate in matters of such obvious judicial cognizance as the admissibility of evidence in criminal trials unless a strong case is made for the need for a change and unless legislation is necessary in order to accomplish the change. Apparently neither Mr. Katzenbach nor Mr. Acheson object to the *Mallory* decision. They object to "extensions of the *Mallory* rule" in *Elsie Jones*[1] and the two *Coleman*[2] cases. In addition, Mr. Katzenbach referred to a dissenting opinion in the *Muchette* case[3] and a ruling by a trial court in the *Jones*[4] case. He did not mention that the trial judge who ruled in *Jones* was the same judge who dissented in *Muchette*.

If the Department of Justice thinks that the *Mallory* rule has been interpreted improperly by the court of appeals, it has a remedy in the writ of certiorari. I do not understand the basis for Mr. Katzenbach's conclusion that "there has been no disposition on the part of the Supreme Court to review any of these cases" (R. 692). I have not checked all of the cases in which the court of appeals has interpreted the *Mallory* rule. It is clear that the Government did not seek certiorari in *Jones* or either of the *Coleman* cases. I do not think they have sought certiorari in any *Mallory* rule cases during recent years.

It is particularly inappropriate at the present time for the Congress to legislate on the subject of pretrial interrogation of defendants in criminal cases. The law is in a state of flux and cases are presently pending before the Supreme Court which may have grave implications on the entire subject of pretrial interrogation.

The Supreme Court has recently granted certiorari in *Escobedo* v. *Illinois*, 32 L.W. 3188; reported in the Supreme Court of Illinois as *People* v. *Escobedo*, 190 N.E. 2d 825. In the *Escobedo* case the Court will consider again the issue of whether a defendant has a right to counsel during a period of police interrogation. The prior decisions sustaining the right of the police to interrogate in the absence of requested counsel (*Crooker* v. *California*, 357 U.S. 433; *Cicena* v. *LaGay*, 357 U.S. 504) will be reexamined during the present term in the *Escobedo* case. The Court has also granted certiorari in *Massiah* v. *United States*, 31 L.W. 3407, reported below at 307 F. 2d 62, to examine the extent of the Federal right to counsel in pretrial police investigations.

It is too early to know whether the Government will seek certiorari in *Lee* v. *United States*, 322 F. 2d 770, in which the Court of Appeals for the Fifth Circuit held that an indicted defendant was deprived of his right to counsel and due process of law when interrogated by Federal agents in his cell, although the record did not show that counsel was requested by the defendant.

It is quite conceivable that the Court may determine that a defendant has a right to counsel during a police interrogation and that counsel must be furnished to the indigent. During the last term the Court stated: "But it is settled that where the assistance of counsel does not depend on a request." *Carnley* v. *Cochran*, 369 U.S. 506.

I respectfully submit that it is wise to delay action on a statute which will permit intorrogation by the police in the absence of counsel, until the law is clarified by the Supreme Court.

The study of prearraignment procedures recently undertaken by the American Law Institute is another reason to delay action. I do not agree with Mr. Katzenbach that it is desirable to pass legislation now because Congress "can always consider the recommendations subsequently, and amend any laws in the light of anything that they come up with" (R. 720). The institute's research will deal specifically with the *Mallory* rule as well as other matters. In a letter of November 8, 1963, Prof. Arthur Sutherland, reporter for the institute study, inquired of me concerning the effect of the *Mallory* rule within the District of Columbia and requested that I provide him with the names of persons knowledgeable in the field. I have suggested that he contact Professor Shadoan, Assistant U.S. Attorney Timothy C. Murphy, Chief Layton, and your staff before beginning his study.

I appreciate that some persons sincerely think that some legislation is desirable in this field. I agree with Messrs. Katzenbach and Acheson that title I

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[1] *Jones* v. *United States*, 307 F. 2d 397.
[2] *Coleman* v. *United States*, 313 F. 2d 576; *Coleman* v. *United States*, 317 F. 2d 891.
[3] No. 17410, July 25, 1963.
[4] *United States* v. *Jones*, Crim. No. 366–63.

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

In my opinion there are several deficiencies in the bill.

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

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

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

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

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

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

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

is to record all that transpires from the moment the defendant is taken into custody. This seems extremely difficult to accomplish as a practical matter.

I wish to apologize to the committee concerning certain aspects of my testimony which apparently were misleading. I thought that I had made it clear that my testimony concerning the crime rate and the rate of police resignations were based on fiscal 1962, which was the last year the statistics were available. Since my testimony I have received a copy of the hearings conducted by the subcommittee of the Committee on Appropriations on September 28, 1963. The new statistics indicate that the crime rate increased in 1963 and that police resignations declined, although the rate was still considerably higher than in previous years.

I did not intend to suggest that any police officers are specially detailed to the probation service. I intended to indicate that a more effective probation service would relieve the police of the duties of arresting violators and would result in a general reduction of the crime rate.

I am taking the liberty of enclosing two judicial conference committee reports relating to the *Mallory* rule.

Thank you again for providing me with the opportunity for expressing my views.

Yours very truly,

A. KENNETH PYE, *Associate Dean.*

THE METROPOLITAN WASHINGTON BOARD OF TRADE,
Washington, D.C., December 2, 1963.

CHESTER H. SMITH,
Staff Director, Senate Committee on the District of Columbia, New Senate Office Building, Washington, D.C.

DEAR MR. SMITH: Pursuant to our conversation of Friday, November 27, 1963, concerning Senator Bible's letter of November 8 addressed to William K. Norwood, chairman of the Board of Trade's Public Protection Committee, soliciting our comments upon the testimony of Deputy Attorney General Katzenbach on title I of H.R. 7525, I am happy to enclose a redraft of our previous correspondence of November 26 for inclusion in the record.

The text of the enclosed letter was approved unanimously by our board of directors at a meeting earlier today. Please disregard the earlier reply and substitute the enclosed to reflect our official comments.

Again, please accept our thanks for allowing us the opportunity to bring this matter before our board of directors for action and approval.

Sincerely yours,

HENRY P. LOSS,
Manager, Community Affairs Department.

THE METROPOLITAN WASHINGTON BOARD OF TRADE,
Washington, D.C., December 2, 1963.

HON. ALAN BIBLE,
Chairman, Senate Committee on the District of Columbia, New Senate Office Building, Washington, D.C.

DEAR SENATOR BIBLE: The Metropolitan Washington Board of Trade appreciates the opportunity you have provided for us to comment on the testimony presented by the Deputy Attorney General, Nicholas deB Katzenbach, at the recently concluded hearings on title I, H.R. 7525, the omnibus crime bill, concerning corrective legislation in the *Mallory* area. These comments we shall set forth represent the best judgments of our public protection committee and have been reviewed and endorsed by our board of directors.

We have directed our comments, as you have requested, to a consideration of the safeguards suggested by Mr. Katzenbach to constitute appropriate legislation amending the *Mallory* rule. His recommendations would provide for the following four points:

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

(2) The arrested persons being afforded a reasonable opportunity to notify a relative or friend and consult with counsel of his choosing;

(3) A maximum of 6 hours elapsed time between arrest and completion of the confession;

(4) A responsible witness, other than a law enforcement officer, observing the questioning, or a verbatim transcript or recording of the interrogation.

We are commenting on the proposed safeguards in order.

(1) We have no disagreement with the inclusion of this amendment if "immediately" is omitted. To insure a warning immediately in advance of questioning might require repeated warnings, for it could very possibly be difficult, or impossible, to determine exactly at what point the questioning may be considered to have begun. This is particularly pertinent as the definition of "immediately" is "without interval of time," and any general or miscellaneous remarks or questions between the warning and the legal start of questioning might, by a stretch of the imagination, be used as an argument against the admissability of the confession.

The proposed amendment, subject to the above comment, is generally in effect at the present time in the District of Columbia and would require no material change in present procedures.

(2) We recommend a revision of the second proposed amendment to read as follows:

"The arrested persons being afforded a reasonable opportunity to consult with counsel of his choosing, if such a request is made."

We believe "notify a relative or friend" should be omitted. A friend or relative could be an accomplice and notification to them could result in the destruction or removal of evidence, or other action, preventing or hindering successful solution of the case.

While consultation with counsel would most probably result in the arrested person being advised to make no statement whatsoever, and thwart the securing of necessary evidence for prosecution, we feel that this desire for counsel should not be denied, if requested by the suspect. However, we do not believe advice concerning the availability of counsel should be required or in any way be a mandatory provision prior to proper interrogation.

(3) The third proposed amendment should be omitted in its entirety. The establishment of a 6-hour maximum may void confessions which under all other requirements are legally admissable. Such a time limit could result in a claim by the defense that the arrested persons were detained unreasonably solely because of the 6-hour time allowance. On the other hand, arrested persons could decide, or be advised, to wait out a 6-hour period without making any statement with the knowledge that any statement made after the expiration of this time limit would be inadmissible.

We oppose the inclusion in any legislation of a time limit between arrest and completion of the confession and would prefer that the determination of the reasonableness of any time interval be left to the discretion of the court.

(4) As regards the fourth suggested amendment, we fully recognize the desirability of corroboration, in one acceptable form or another, of a confession. Our recommended wording to cover this situation is as follows:

"A responsible witness observing the questioning, or if practical a verbatim transcript or recording of the interrogation."

We do not believe that a law enforcement officer should be prevented from qualifying as a responsible witness. Under some circumstances it may be impossible to secure some other witness. It would be a sad commentary on our police officers if we could not so qualify them. We impose other and greater responsibilities on them in the conduct of their normal duties.

We believe it should be recognized that a verbatim transcript or recording should be secured on a "when practical" basis.

In preparing the above comments we have carefully weighed, on the one hand, reasonable and essential safeguards of the defendant's rights, and on the other hand, the rights of innocent and law-abiding society to be protected from criminal depredations. In our opinion, our comments reflect a reasonable balance between these two requirements, and any further tipping of the scales of justice in favor of the accused persons would be denying our law-abiding citizens their rights to safety and protection to which they are fully entitled.

Again, we thank you for this opportunity to present our views on Deputy Attorney General Katzenbach's testimony concerning title I of H.R. 7525.

Sincerely yours,

WILLIAM K. NORWOOD,
Chairman, Public Protection Committee.

VAROUTSOS, KOUTOULAKOS & ARTHUR,
Arlington, Va., December 3, 1963.

Hon. ALAN BIBLE,
Chairman, Committee on the District of Columbia,
U.S. Senate,
Washington, D.C.
(Attention Mr. Chester Smith).

DEAR SENATOR BIBLE: I am writing in response to your letter of November 8, 1963, in which you ask for comments on the recommendations of Deputy U.S. Attorney General Nicholas deB. Katzenbach with regard to possible corrective legislation in the *Mallory* area.

The Greater Washington Chapter of the Americans for Democratic Action are strongly opposed to these recommendations and stand squarely behind our original position upholding the *Mallory* rule as enunicated by the Supreme Court. The reasons for our opposition follow.

The recommendations (most particularly, the third recommendation) would permit, and, in effect sanction, the reprehensible practice of dragnetting into the police station large numbers of persons, charging them all with the commission of the same crime, pressing them all for a confession in the hope one will admit his guilt.

This means that the police can engage in the en masse detention for investigation technique which we so vehemently deplored in our testimony before your committee on October 24, 1963, merely by placing a charge against each arrestee, rather than "detaining for investigation," regardless of the requirements of probable cause so ingrained in our jurisprudence. For 6 hours, therefore, any person whom the police remotely suspect has any connection with the commission of a given crime, or even happened to be in the area of the crime, could be subjected to intensive interrogation. If no confession was forthcoming from an arrestee, he could be merely released without ever being brought before a magistrate.

The essential crux of the issue is whether we are going to allow persons to be detained in police headquarters without judicial approval. Judicial approval can only be given if there is probable cause to believe that the arrested person committed the crime of which he is accused. Probable cause must exist prior to the arrest.

The Supreme Court reiterated in *Mallory* that prompt arraignment is one of the essentials of the procedural due process of law. Implicit in this view is the difficulty faced by the courts in insuring that this important step of procedure is adhered to by the police. One method of enforcement the Supreme Court has is to emphatically make known to the police through its decisions that regardless of the actual guilt or innocence of the accused, if he is detained unnecessarily before arraignment then such detention is unlawful, and the "fruits" of such period of detention will be inadmissible in a trial, and thus the conviction may well be unattainable if the other evidence is insufficient.

Secondly, the Court restated in *Mallory* that arrests must not be upon mere suspicion but only for probable cause and that the arraignment before a commissioner is essential so that he can inform the accused of his right to counsel, right to remain silent and can allow the accused a reasonable opportunity to consult counsel (354 U.S. 1359 and rules 5 (b) and (c) of the Federal Rules of Criminal Procedure).

Thus, if there is probable cause for arrest, prompt arraignment should not affect the police's case. If there is no probable cause, a 6-hour delay provides a ready pretext for police to search for probable cause by pressuring statements from any amount of arrestees the police can round up.

Recommendation 3 makes the 6-hour rule an irrebuttable presumption of admissibility of otherwise admissable confessions or admissions regardless of the circumstances affecting the promptness of arraignment. We feel that the clear meaning of the philosophy underlying Mallory and of the constitutional requirements of procedural due process make such a presumption untenable. The other three recommendations are all acceptable to us as normal elements of police practice. The first two recommendations, in substantial measure, are already basic to procedural due process of law, and the fourth might be a useful tool for the police in substantiating confessions. However, neither of these three proposals belong to any formula for a presumption of admissibility of confessions that would permit and encourage dragnetting of suspects and adversely affect

the courts' major means of insuring that the police will comply with the requirement for prompt arraignment.

Thank you kindly for this opportunity to comment upon this important subject after your committee has terminated its hearings.

Very truly yours,

PHILIP SCHWARTZ,
Member of Executive Board, Greater Washington Chapter, Americans for Democratic Action.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Washington, D.C., November 26, 1963.

Re H.R. 7525, H.R. 5726.

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

DEAR SENATOR BIBLE: By letter of November 8, 1963, you have asked for my comments on H.R. 7525, the bill designed to undercut the *Mallory* rule, and, in particular, for my comments on the November 5, 1963, testimony of Deputy Attorney General Nicholas Katzenbach and U.S. Attorney David Acheson.

The most profitable starting point of any such discussion is the *Mallory* case itself and its background. The precise background of *Mallory* appears to stem from *McNabb* v. *United States*, 318 U.S. 332, in which the Supreme Court invalidated a confession made during a period of unlawful detention. Federal agents, prior to *McNabb* had virtually ignored the requirement of prompt arraignment which was, at that time, found in many places in the Federal criminal code. While the case went to the Supreme Court on the question of admissibility of the confession as tainted by coercion, the Court decided it on much narrower grounds, i.e., that the Government broke the law by failing to arraign promptly (in this case 18 U.S.C. 595), and "no Federal court can accept evidence obtained by a procedure expressly forbidden by Congress." Hogan and Snee, "The McNabb Mallory Rule: Its Rise, Rationale, and Rescue," 47 Geo. L. Rev. 1, 4 (1958). Although the Court, in *McNabb*, talked about "the circumstances in which the statements * * * were secured * * * a barren cell * * * for 14 hours * * * unremitting questioning by numerous officers," 318 U.S. at 344, it is clear that these facts did not lead to the result. As Professors Hogan and Snee put it:

"The outcome of the case, it seems would have been the same had the president of the University of Tennessee been arrested and confined for 2 days in the best suite in Chattanooga's finest hotel; had he been served a menu which would have sent a gourmet into ecstacy; and had he been questioned for short periods by polite mild-spoken Federal agents while soft music was played in the background." Hogan and Snee, supra.

The rule emanating from *McNabb*, therefore, is one of evidence and one deemed necessary by the Court "to enforce the congressional requirement of prompt arraignment." *Mallory* v. *United States*, 534 U.S. 449, 453, explaining the *McNabb* holding.

The next step, it seems to me, once having determined that the *Mallory* rule springs from the holding in *McNabb* and that the *McNabb* rule is one of evidence designed to enforce congressionally dictated Federal police practices, is to determine what the congressional mandate the Court is enforcing really is. It is at this point that the constitutional overtones of this issue come into play. The fourth amendment to the Constitution of the United States, in prohibiting "unreasonable * * * seizures," bans arrests made without probable cause. This is a fact which is quite often overlooked. Yet *Mallory* v. *United States*, 354 U.S. 449, 454, makes it quite clear:

"The police may not arrest upon mere suspicion but only on 'probable cause.' "

It was clear, however, long before *Mallory* that the fourth amendment prohibition against "unreasonable * * * seizures" and the provision that "no warrants shall issue, but upon probable cause * * * particularly describing the * * * persons * * * to be seized" applies to arrests and arrest warrants equally as to searches and search warrants. That was made clear in *Albrecht* v. *United States*, 273 U.S. 1, 5. It has since continually been reaffirmed, most recently in *Giordenello* v. *United States*, 357 U.S. 480, 485:

"The language of the fourth amendment * * * of course applies to arrest as well as search warrants."

The lower courts have consistently so held. In *Wrightson* v. *United States*, 229 F. 2d 556, 559 (D.C. Cir. 1955):

"Moreover that the fourth amendment covers warrants of arrest is established. The amendment protects the people against the seizure of their persons as well as against the search of their houses."

And in *Bynum* v. *United States*, 262 F. 2d 465, 467 (D.C. Cir. 1953):

"The fourth amendment makes protection of the individual against illegal search or arrest a constitutional imperative."

The District of Columbia Circuit has not been alone. The Third Circuit in *United States* v. *Rabb*, 141 F. 2d 45, 46 (3d Cir. 1941), at footnote 1, observed:

"The history and development of the fourth amendment show that it guarantees the right of the individual to be secure in his person against unreasonable arrests, as well as against unreasonable searches of houses and seizures of papers and effects."

Indentical language is found in *Worthington* v. *United States*, 166 F. 2d 557, 562 (6th Cir. 1948) and in *Cohen* v. *Norris*, 300 F. 2d 25, 28 (9th Cir. 1962).

Since a person has a constitutional right to be free from unreasonable seizures or arrests without probable cause, someone has to determine when the right is being violated. Quite obviously, neither the arrested person nor the arresting officer can make such a determination. This is a judicial function. *Giordenello* v. *United States*, *supra* at 486, makes that clear:

"The protection afforded by these rules *when they are viewed against their constitutional background*, is that inferences from the facts which lead to the complaint '* * * be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterpirse of ferreting out crime.'" [Emphasis supported.]

See also *United States* v. *Wallace & Tiernaw Co.*, 336 U.S. 793. In *Wong Sun* v. *United States*, 9 L. Ed 2d 441, 451, the Supreme Court put it this way:

"The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police to assess the weight and credibility of the information which the complaining officer adduces as probable cause."

Earlier, in *Wood* v. *United States*, 128 F. 2d 265, 270 (D.C. Cir. 1942), our court of appeals described the Commissioner's function as being "to decide between the informer or prosecutor and the accused on the preliminary question of his temporary restraint."

Almost by definition, once the fourth amendment inhibition against unlawful seizure of the person or an arrest without probable cause is recognized, the decision on whether the right has been violated should be made promptly after arrest. And that, in reality, is all that rule 5(a), F.R. Crim. P., does, in providing:

"An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner * * *".

The next question is one of definition—when is an arrest made? The law in the District of Columbia is quite clear—an arrest is made, in the constitutional sense, whenever a person is in fact "restricted in his freedom to proceed where he wishes" ("Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation (1962)," p. 25). In *Coleman* v. *United States*, 295 F. 2d 555 (1961), the court referred with approval (at pp. 563–564) to the jury instructions on the meaning of an "arrest" that had been given by the district court:

"You are instructed that an arrest is the restraint of the right of locomotion, or a restraint of the person. It may be made without force or without touching the body. It is sufficient if the party arrested is within the power of the officer and submits to arrest, even as a result of a verbal command."

"You are instructed that in order for there to be an arrest it is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of the one arresting, and submits in consequence."

The court of appeals again considered the meaning of "arrest" in *Kelley* v. *United States*, 298 F. 2d 310 (D.C. Cir. 1961). There the court held that the arrest of a person subsequently charged with possession of marijuana had occurred when he was ordered by police officers to leave a restaurant where he

had been sitting and to submit to a search outside. The court rejected the argument that the "arrest" took place only after the police officers had discovered the marijuana and, referring again with approval to the jury instructions given in the *Coleman* case, the court concluded (at p. 312):

"That the appellant was restricted of his liberty and so understood can hardly be doubted as he left the restaurant with one officer leading the way and the other alongside or behind the appellant."

The definition of arrest stated by the *Kelley* and *Coleman* decisions rests upon an earlier case which is frequently referred to as having established for the District of Columbia that an arrest occurs when there is a detention that amounts to a restraint on liberty. In *Long* v. *Ansell*, 69 F. 2d 386, 389 (D.C. Cir. 1934), the court declared:

"* * * the term 'arrest' may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time" (see also *Morton* v. *United States*, 147 F. 2d 28, 30 (D.C. Cir. 1945); *Price* v. *United States*, 119 A. 2d 718 (Mun. Ct. App. 1956)).

All of this background, I believe, is necessary to a full understanding of what *Mallory* itself says. In *Mallory* v. *United States*, 354 U.S. 449, 453–454, the Supreme Court excluded a confession, admittedly otherwise voluntary, because of a violation of rule 5(a). In so doing, the Court made two significant observations:

"The requirement of rule 5(a) is part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement. Provisions related to rule 5(a) contemplate a procedure that allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate."

* * * * * * *

"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."

It is quite clear from a study of the cases cited by Deputy Attorney General Katzenbach that this is exactly what the police did—take a suspect to police headquarters, not solely for booking, but "to carry out a process of inquiry." In *Jones* v. *United States*, 307 F. 2d 397, 399 (D.C. Cir. 1962), the facts speak eloquently of what occurred:

"She was thereupon placed under arrest at approximately 4:25 a.m. on Sunday, July 3, 1960. After an additional hour of questioning the police returned appellant to the scene of the killing when, with her help, they found the weapon used, a knife. Thereupon, she was returned to homicide headquarters, where the questioning continued until about 8 a.m. when she signed a full confession claiming self-defense. She was not brought before the committing magistrate until the following day, Monday, July 4, at 9 a.m."

It is clear, merely from this recitation, that Jones was not taken to the station for "booking" or for "ordinary administrative steps." She was brought for questioning—a flagrant violation of *Mallory*. Under such circumstances, the time interval is insignificant; it is the conduct of the police within that interval which counts. The same is true in *Charles Coleman* v. *United States*, 313 F. 2d 576, 577 (D.C. Cir. 1962), *Tony Coleman* v. *United States*, 317 F. 2d 891, 893 (D.C. Cir. 1962) and *Muschette* v. *United States*, No. 17,410 (D.C. Cir. July 25, 1963). In each case, police officers took the accused to headquarters for the precise purpose of "carrying out a process of inquiry." This they may not do. It's just as simple as that. The fact that these are nighttime arrests is unimportant. A committing magistrate and an assistant U.S. Attorney are "available to the police 24 hours a day" (*Jones* v. *United States*, 307 F. 2d 397, 399 (D.C. Cir. 1962)). "This arrangement with the U.S. attorney and the municipal court has been in effect for several years" (id., footnote 6). The unmistakable conclusion is that the police have intentionally ignored these procedures, preferring instead, to take their chances on the admissibility of any statements thereby obtained.

I pointed out earlier that the *McNabb-Mallory* exclusionary rule is one of evidence. The obvious question, therefore, is whether the courts are justified in imposing such a rule as a means of enforcing proper police procedures (*Mallory* v. *United States*, 354 U.S. 449, 453). An excellent discussion is found in

Hogan & Snee, supra, pages 21–33, and I would suggest that particular heed be paid to that section. They conclude:

"The court must never confine itself to the question whether justice is being done; it must also take heed how it is being done" (id., p. 30).

The real answer is that no other way has been found effective to enforce proper police practices. As long ago as *Neuslein* v. *District of Columbia,* 115 F. 2d 690, 695 (D.C. Cir. 1940), our court commented:

"The rights given by the fourth amendment are something quite distinct from the determination of whether the defendant was driving under the influence of liquor. The two problems must be considered together, however, in effectuating either the protection of the Constitution, or the punishment of the guilty. When two interests conflict, one must prevail. To us the interest of privacy safeguarded by the amendment is more important than the interest of punishing all those guilty of misdemeanors. Happy would be the result if both interests could be completely protected. If this declaration is admissible and justice meted out on the issue of drunken driving, where is the defendant's remedy for the inexcusable entry into his home? The casuist answers—a civil action against the officers. That remedy has been found wanting. Such remedy scarcely satisfies the nonbelligerent, nonlegal mind of a person whose security has already been violated and who stands convicted. To follow that procedure means delay, expense, unwanted publicity; it asks the individual to stake too much, and to take too great a chance, in the hope of compensating the interference to his privacy. A criminal remedy is also possible, but it is likely to be too strict or too lax. If criminal actions are brought consistently against the enforcing officers, before long their diligence will be enervated. If no prosecutions are brought, which appears to be the case, it cannot be said that statutory criminal provisions afford any deterrent to the infringement of the fourth amendment. Even if the criminal and civil remedies worked, the protection would not be complete. The amendment does not outline the method by which the protection shall be afforded, but some effective method must be administered; the protection granted by constitutional provisions must not be dealt with as abstractions. A simple, effective way to assist in the realization of the security guaranteed by the fourth amendment, in this type of case, is to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home."

In adopting such an exclusionary rule, the Supreme Court of California, in *People* v. *Cahan,* 44 Cal. 2d 434, 282 P. 2d 905, 50 A.L.R. 2d 513 (1955), reviewed the entire history of the rule, pro and con, and concluded:

"We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers."

* * * * * * *

"Moreover, even when it becomes generally known that the police conduct illegal searches and seizures, public opinion is not aroused as it is in the case of other violations of constitutional rights. Illegal searches and seizures lack the obvious brutality of coerced confessions and the third degree and do not so clearly strike at the very basis of our civil liberties as do unfair trials or the lynching of even an admitted murderer. 'Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends.' (Frankfurter, J. dissenting in *Harris* v. *United States,* 331 U.S. 145, 156; 67 S. Ct. 1098, 1104; 91 L. Ed. 1399). There is thus all the more necessity for courts to be vigilant in protecting these constitutional rights if they are to be protected at all. *People* v. *Mayen* (188 Cal. 237, 205 p. 435; 24 A.L.R. 1383) was decided over 30 years ago. Since then case after case has appeared in our appellate reports describing unlawful searches and seizures against the defendant on trial, and those cases undoubtedly reflect only a small fraction of the violations of the constitutional provisions that have actually occurred. On the other hand, reported cases involving civil actions against police officers are rare, and those involving successful criminal prosecutions against officers are nonexistent. In short, the constitutional provisions are not being enforced."

Certainly, this does not mean, as both Katzenbach and Acheson seem to imply, that no confessions while in custody are admissible. The so-called "threshold

confession," one made immediately upon apprehension, is always admissible (*Lockley* v. *United States*, 270 F. 2d 915 (D.C. Cir. 1959) (confession made within 15 minutes of arrest); *Heideman* v. *United States*, 259 F. 2d 943 (D.C. Cir. 1958) (less than an hour and during booking procedure); *Metoyer* v. *United States*, 250 F. 2d 30 (D.C. Cir. 1957) (immediately upon transfer from Maryland authorities to metropolitan police); *Day* v. *United States*, 281 F. 2d 33 (D.C. Cir. 1960) (in police vehicle on way to station house). What is forbidden is a delay in arraignment beyond that necessary for normal administrative procedures for the purpose of questioning.

In respect of the precise legislative recommendations of Katzenbach and Acheson, I see two basic obstacles. First, by providing for a 6-hour period (transcript, p. 681), Katzenbach appears to be sanctioning the practice of investigative arrests. I said, at the outset, that the *McNabb-Mallory* rule is one of evidence. Actually, and more properly, it is a rule of procedure enforced by a rule of evidence. If, by the proposed legislation, Katzenbach would be establishing a new rule of procedure, i.e., an investigative arrest limited to 6 hours, serious constitutional problems are raised. For the reasons indicated earlier in this letter, I think such a rule would violate the fourth amendment. I am not alone in this belief. The Commissioners' Committee so concluded ("Report and Recommendations," supra, p. 44). And the Commissioners, acting on the report, outlawed the practice. The other criticism which I have goes to the proposition of legislating solely for the District of Columbia. Katzenbach bases the need for change on the high incidence of crimes of violence in the District (transcript, p. 678). Yet, he recommends legislation which would apply to all crime in the District, including "frauds, mail thefts, narcotic violations, and the like" (transcript, p. 678), crimes which he implies can ably be prosecuted without a change. The resulting distinction between the Federal prosecution of crimes of violence in the District and in other Federal jurisdictions is an "invidious discrimination" within the meaning of the U.S. Constitution. It is geographic legislation with no sound basis for a geographic distinction.

The applicability to Federal criminal defendants of the guarantee of equal protection, through the due process clause, was implied in *Coppedge* v. *United States* (369 U.S. 438, 447, and note 13). The Court there indicated that "invidious discrimination" against pauper defendants, which had been held "inconsistent with the guarantees of due process and equal protection of the laws of the 14th amendment" in *Griffin* v. *Illinois* (351 U.S. 12), and in similar cases, would also be prohibited to Congress in legislating for Federal criminal defendants. Recently, in *Koyce* v. *United States Board of Parole* (306 F. 2d 759 (1962)), our Court proceeded on the premise—advanced by appellant and not disputed by the Government's brief—that the fifth amendment due process clause secures the guarantee of equal protection of the laws to Federal offenders with respect to conditions of punishment. Applying this principle in *Koyce*, the Court upheld the distinction in treatment there in issue "because of the recognition by Congress that it is desirable and feasible for persons confined in [civilian prison] institutions * * * to be subject to certain specified and salutary parole conditions, notwithstanding like provisions have not been deemed desirable or feasible for those who serve their sentences in a military prison * * *" (306 F. 2d at 762).

"But it is equally clear that the [congressional] power of selection for classification is not an arbitrary one, but must have a reasonable foundation. It 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis' (*Gulf, C. & S.F.R. Co.* v. *Ellis*, 165 U.S. 150, 155; 41 L. Ed. 666, 668; 17 Sup. Ct. Rep. 257" (*Lappin* v. *District of Columbia*, 22 App. D.C. 68, 79 (D.C. Cir. 1903)).

In the leading case on point, *Skinner* v. *Oklahoma* (316 U.S. 535), the Supreme Court ruled that the equal protection guarantee of the 14th amendment prohibits a State from prescribing a mandatory punishment for certain defendants drastically more severe than could be imposed upon others for essentially identical conduct. The issue in *Skinner* concerned the constitutionality of a statute requiring sterilization of third felony offenders who had committed larceny but not similarly situated offenders who had committed embezzlement. The Court observed that larceny and embezzlement involved conduct essentially the same in nature and culpability. The equal protection guarantee was therefore violated by the "invidious discrimination" entailed in applying the sterilization requirement to prior offenders convicted of the former but not those convicted

of the latter offense. Careful scrutiny of such a law was essential, the Court held, despite the latitude usually allowed to States in equal protection cases, "lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws" (id. at 541). The Oklahoma statute failed to withstand such scrutiny because of its unequal treatment of similarly culpable defendants.

"* * * The guarantee of 'equal protection of the laws is a pledge of the protection of equal laws' (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 369). When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment (*Yick Wo* v. *Hopkins*, *supra*; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337)" (ibid.).

The principle asserted in *Skinner*, that the equal protection guarantee requires a rational basis for discriminating in the punishment and rights accorded like offenders, has consistently been applied by the Supreme Court. See *Pennsylvania* v. *Ashe*, 302 U.S. 51; *Graham* v. *West Virginia*, 224 U.S. 616; *Finley* v. *California*, 222 U.S. 28; *McDonald* v. *Massachusetts*, 180 U.S. 311; *Moore* v. *Missouri*, 159 U.S. 673. See also *Ex Parte Wells*, 99 F. Supp. 320, 323–24 (N.D. Cal. 1951), *reversed*, 201 F. 2d 503 (9th Cir. 1952), *cert. denied*, 346 U.S. 861 (1953); *Re Mallon*, 16 Idaho 737, 102 Pac. 374 (1909). In the foregoing Supreme Court cases, unlike *Skinner*, it was held that the statute in question created a reasonable classification of offenders and meted out the more severe penalty for all who were similarly situated. By contrast, in *Skinner*, unequal punishment results for "those who have committed intrinsically the same quality of offense." Substitute the word "treatment" for "punishment" and the provision espoused by Katzenbach would seem to be encompassed. Any attempt to uphold such a distinction is well answered by the language of Justice Black, in *Berra* v. *United States* (351 U.S. 131 (1956)):

"The Government's contention here also challenges our concept that all people must be treated alike under the law. *This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same.* It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice" (id. at 140 (dissenting opinion, discussing question not reached by the majority)). [Emphasis supplied.]

The basic rule governing the application of the equal protection guarantee is that, "a statutory discrimination must be based upon differences that are reasonably related to the purposes of the act in which it is found." *Morey* v. *Doud* (354 U.S. 457, 465). "Of course, distinctions * * * may be justified by genuinely different characteristics * * *. But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences'." Ibid., quoting from *Hartford S.B.I. Ins. Co.* v. *Harrison* (301 U.S. 459). The statutory classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Lappin* v. *District of Columbia*, *supra*, at 79, quoting with approval, *Gulf, C. & S.F.R. Co.* v. *Ellis* (165 U.S. 150, 155). To the foregoing principles, the Supreme Court has added a caveat, having particular bearing here:

" 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' *Louisville Gas & E. Co. v. Coleman* (277 U.S. 32, 37, 38); *Hartford S.B.I. Ins. Co.* v. *Harrison* (301 U.S. 459, 462)." *Morey* v. *Doud*, *supra*, at 464. [Emphasis supplied.]

If a State legislature were to enact a mandatory death sentence for murders committed in the State's capital city, while leaving the jury discretion whether to impose capital punishment for murders in other areas of the State, such a discrimination would almost certainly be held invalid on equal protection grounds. See *United States* v. *Meyers* (143 F. Supp. 1, 4 (D. Alaska 1956)); *State ex rel White* v. *Wyandotte County Commrs.* (140 Kan. 744, 39 P. 2d 286, 289–90 (1934)); *State* v. *Fowler* (193 N.C. 290, 136 S.E. 709 (1927)); *Ex parte Falk* (42 Ohio St. 638 (1885)). Why then should a similar discrimination effected by Congress be held consistent with the guarantee of equal protection?

A more realistic distinction would be to treat all Federal crimes of violence alike. This, too, might fail to pass the test, but it certainly would come closer.

Thank you for the privilege of allowing me to elaborate on the points under consideration. I hope these comments are of some assistance to you.

With kind regards, I remain,

Cordially yours,

SIDNEY ZAGRI, *Legislative Counsel.*

THE UNIVERSITY OF WISCONSIN LAW SCHOOL,
Madison, Wis., November 22, 1963.

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

DEAR MR. SMITH: This is a reply to your letter of November 15 in which you ask for such additional views as I may have relating particularly to the testimony of Deputy U.S. Attorney General Nicholas deB. Katzenbach.

The major point which I tried to make in my previous letter is that it is important for the Congress to indicate whether in-custody interrogation is proper and, if it is, the circumstances under which an in-custody interrogation is proper. Title I of H.R. 7525, as passed by the House of Representatives, does not achieve this objective but on the contrary, merely provides that a confession will be admissible even though it was given during a period of detention in violation of the requirements of rule 5(a) of the Federal Rules of Criminal Procedure.

The suggestions of Mr. Katzenbach do go further in the direction of specifying when an in-custody interrogation is proper. In my view the legislation ought to be even more explicit and provide substantially as follows:

Delay for purposes of interrogation for a period not in excess of 6 hours following a lawful arrest is proper when such delay is reasonably required in order to decide whether to charge the person with a crime or to release him without prosecution provided that the arrested person is notified of his right to remain silent and of his right to counsel, and the interrogation is observed by a responsible witness or there is a verbatim transcript or recording of the interrogation.

I assume that this is not inconsistent with the Deputy Attorney General's objective. He says on page 680 of the transcript of the hearing of November 5, 1963: "Free of abuse, interrogation is a valuable investigative tool for arriving at the facts." One of the major difficulties with the current state of the law in the Federal system is that it is at best doubtful whether police act properly when they interrogate a person after his arrest, even when the interrogation is for a brief period and conducted under otherwise proper conditions. Unfortunately most of the attention given by legislatures and courts in the past has been in the direction of specifying improper police practices without giving enough attention to the specification of procedures which police can follow with assurance that they will be acting in conformity with the requirements of law. In the long run, the specification of proper procedures may be more important than the identification of improper procedures.

I would also go further, for much the same reason, and specifically authorize the common police practice of conducting a "field interrogation" of suspicious persons. By this I do not mean the detention provisions specified in title III nor the arrests for investigation discussed in the so-called Horsky report. Rather, I have in mind the more limited kind of imposition which results from a brief stopping and questioning of a person found under suspicious circumstances on the street.

This position was argued by the Department of Justice in *Rios* v. *United States*, decided by the Supreme Court on other grounds:

Being stopped by a police officer for purposes of inquiry may at times cause some inconvenience to the person stopped, but that temporary inconvenience is normally minor compared to the importance of such reasonable inquiry to effective law enforcement. Without the power, for example, to stop a suspiciously acting automobile to ask questions, the police might be forced to spend fruitless hours investigating actions which the occupant, had the police been able to ask him questions, could readily have explained as being entirely inno-

cent. In a fair balancing of the interests at stake, we submit that the rights of the person questioned are adequately protected by his privilege not to answer and that the police, having reasonable grounds for inquiry, ought not to be foreclosed from at least the opportunity, by asking questions, to determine whether further investigation is necessary.

This point is made also by Judge Roger Traynor of the Supreme Court of California (in *Mapp* v. *Ohio at Large in the Fifty States* (1962 Duke L.J. 319, 333)):

It might be possible, for example, to lessen the risk of arrest without probable cause by giving the police clear authorization to stop persons for restrained questioning whenever there were circumstances sufficient to warrant it, even though not tantamount to probable cause for arrest. Such a minor interference with personal liberty would touch the right to privacy only to serve it well. If questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of their personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest.

In my judgment congressional enactment of a prearrest and postarrest investigation procedure would make a very substantial contribution to effective and fair enforcement of the criminal law.

Very truly yours,

FRANK J. REMINGTON,
Professor of Law.

CANTER, MCLAUGHLIN & UROW,
Washington, D.C., December 12, 1963.

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

DEAR SENATOR BIBLE: I received your letter regarding the Mallory testimony after it resided about 3 weeks in a wrong pigeonhole, and I now hasten to send you my brief comments on the proposed amendments.

A line of decisions has been initiated, following the *Mallory* rule, interpreting and construing rule 5(a) of the Federal Rules of Criminal Procedure and specifically the words "without unnecessary delay," in such manner as to alter radically the traditional law on the admission of evidence concerning statements and confessions in criminal trials in the Federal courts. Rule 5 is statutory in nature and origin, and therefore is susceptible to amendment or interpretation and clarification by further legislation. Such is the purpose of section 101 of H.R. 7525. This section places no limitations on the extent to which the defense, in a criminal trial, may adduce evidence to show the circumstances under which statements or confessions were obtained by law officers, or, of course, the actual nonexistence of such alleged statements. Circumstances may well warrant the court's exclusion of a statement or confession which it finds to have been obtained by unreasonable delays and circumstances amounting to coercion.

Section 1 of H.R. 5726 is not inconsistent with the traditional law, nor with section 101 of H.R. 7525, and, taken in conjunction with the latter, is not objectionable. Section 2 of H.R. 5726 merely restates the line of decisions above referred to, and would serve only further to confuse the issues. It should be omitted. Section 3(a) is covered in section 101(b) of H.R. 7525, and is unnecessary. Language should be included to give the accused a reasonable opportunity to consult legal counsel; but he should not be permitted to consult with "a relative or friend," as provided in section 3(b), lest he advise and warn accomplices in further obstruction of justice.

I would oppose section 3(c) of H.R. 5726, as an encouragement to criminals to refuse to cooperate with peace officers in connection with their investigations of crime.

Section 3(d) should be omitted as a matter of direct legislation, and left to the procedural orders of the Police Department where this principle should be utilized to strengthen evidence for presentation before the grand jury and/or trial courts.

Section 4 should be omitted as an intrusion upon the discretion of the court, and an encroachment upon the factfinding prerogatives of the jury.

The Citizens' Crime Commission believes that modification of the *Mallory* rule is of great importance to the criminal law enforcement picture of the Na-

tion's Capital. It was a few weeks after the *Mallory* decision that I was asked what the result of the rule would be. I said that the crime curve, that had descended at that time every month for over 5 years, would turn back upward. The ascent began with the next monthly report (July 1957) and has continued to rise for the past 6 years. My experience from 1928 to 1934 in the U.S. attorney's office was in this specific field, handling legal questions related to suppression of evidence, and I feel that we have a question of psychology and morale of the criminally inclined versus the psychology and morale of the individual policemen in the performance of their duty, which has a real bearing on the efficiency of law enforcement. This consideration, combined with the technical disadvantages of the prosecutor in obtaining convictions, requires, in the opinion of the Citizens' Crime Commission, an effective modification of the *Mallory* rule, and it feels that such modification is contained in H.R. 7525; but that it would not be the result of passage of H.R. 5726. Under H.R. 5726 matters would only grow worse, and it is not felt that such hedging is required to stay within the limitations of the U.S. Constitution.

I appreciate this opportunity to forward these comments for the Citizens' Crime Commission.

Respectfully yours,

ROBERT E. MCLAUGHLIN,
President, Citizens' Crime Commission of Metropolitan Washington.

NOVEMBER 14, 1963.

Prof. ARTHUR SUTHERLAND,
School of Law,
Harvard University,
Cambridge, Mass.

DEAR PROFESSOR SUTHERLAND: This committee has before it for consideration legislation passed on August 12, 1963, by the House of Representatives which, under title I thereof, would substantially abrogate the *McNabb-Mallory* rule in the District of Columbia. (Copy of this bill enclosed herewith and your attention is directed to title I, starting on p. 1.)

This committee has been advised that you are presently serving in a capacity as the reporter for a study by the American Law Institute of the rule in the *Mallory* case and related problems as they concern prearraignment procedures in criminal cases and the entire area dealing with an arrested person before he sees a magistrate.

Because this is a complex question and since any action by the Congress on such legislation even though this particular legislation concerns itself only with the District of Columbia but, nevertheless, might have a far-reaching effect, could you advise this committee of the scope of your assignment and the possible date of its conclusion? This question has already been raised and will probably be raised again as the committee continues its examination into this subject matter. This committee has held a series of hearings during the past 2 months on this and other criminal subjects contained in the enclosed bill.

Any information you can provide to the committee, as requested, would be deeply appreciated.

Cordially,

ALAN BIBLE.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., November 19, 1963.

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

DEAR SENATOR BIBLE: This letter is written to answer yours of November 14, 1963, in which you ask about the scope and the expected time of conclusion of the American Law Institute's prearraignment study.

The scope of this matter is quite wide. We have undertaken to study as comprehensively as possible the legal situation arising when some person is first suspected of crime until the time when he is first produced before a judicial officer. We are still in the early stages of this matter. This covers a number of areas as you will see, including at least surveillance by various means, mechanical and otherwise; search and seizure; detention and arrest; interroga-

tion and the various events characteristic of it; right to counsel at all these stages; and the first appearance before a judicial officer.

The end product of this, beside a published study, will, we hope, be a model statute which may achieve enactment in a large number of States.

The work has been paid for by a Ford Foundation grant which contemplates a 5-year period for completion. I hope that we may finish a little sooner than that, though there is a good deal to be done.

Perhaps this rather general information will still give to you and to your committee an idea of what we are about. I shall await with great interest the result of the important deliberations of your committee. If you publish any reports or other documents, I shall be most grateful to you for sending me a copy.

With every good wish, I am,

Sincerely yours,

ARTHUR E. SUTHERLAND.

STATEMENT OF AMERICAN UNIVERSITY PARK CITIZENS' ASSOCIATION, WASHINGTON, D.C.

Mr. Chairman and members, Senate District Committee, I am Mrs. Robert Burns, president, American University Park Citizens' Association, representing an area west of Rock Creek Park covering about 1,400 families.

This statement was to have been delivered in person but illness prevented, thus a resort to this second best method of sentiment expression on this serious problem.

At a time when crime has increased in the District of Columbia for the 17th consecutive month and the month just ended had an all-time high, we of the American University Park Citizens' Association, protest further softness in the handling of criminals.

How can officials glibly boast that the crime rate in the District of Columbia compares favorably with other cities of comparable size? In 1962 the District ranked 1st in aggravated assault; 2d in robbery; 4th in murder and nonnegligent manslaughter; 5th in housebreaking; 10th in forcible rape; 10th in auto theft; and 11th in larceny. We are called upon to set a pattern for the Nation, in other areas, so why not set the groundwork and uphold our police force, that they may be aided in giving us a city with the lowest crime rate in the Nation?

As long as we hamstring our Metropolitan Police in the apprehension of suspects, continue making Washington attractive for criminals, the press continues to whip the public into a state of emotional sympathy for the criminal and criminals are continually freed on a psychiatric basis, we cannot expect crime to decrease.

There is a printed pamphlet which says, "Crime Strikes—Anyone—Anytime—Anyplace." There is a phrase there that is not altogether true; if crime had struck close to any high official or even one just riding the "molly-coddling" bandwagon, drastic changes would already be history.

Mr. Chairman, do you realize the one-sideness of a Nation's Capital that isn't safe to walk the dog at night, isn't safe for night meetings, isn't safe to sleep in one's own bedroom? Many, many of the loyal interested members of my own citizens' association tell me they cannot come to night meetings. They simply are afraid. It's not just a psychological hysteria either; they have seen crime, yes and been victims of crime, right here in American University Park.

We of this association agree with the judge of the U.S. Court of Appeals of the District of Columbia, when he said: "In our concern for criminals we should not forget that nice people have some rights too."

Therefore we urge that you pass titles 1, 2, 3, 4, and 5 of the omnibus crime bill, H.R. 7525.

However, there is a crime area not mentioned in this bill, that has increased along with adult crime since 1957. Juvenlie crime is worse with each crime report. Many juveniles are seasoned criminals long before adulthood. Adults have set the pattern; crime-bent youth learn fast and follow with no fear of punishment. Will you please enact legislation to allow a tougher policy in the handling of adult criminals? The juvenile will be quick to learn here also and the number of future hardened criminals will be naturally reduced.

Thank you for your attention.

WEST END CITIZENS ASSOCIATION,
Washington, D.C., October 21, 1963.

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

DEAR SENATOR BIBLE: The West End Citizens Association, at its regular meeting on October 16, by unanimous vote, passed a resolution to endorse H.R. 7525, the omnibus crime bill, and to urge its early enactment.

We will appreciate your efforts toward enactment of this legislation.

Sincerely yours,

PATRICIA M. KEEGAN, *Secretary.*

CAPITOL HILL SOUTHEAST CITIZENS ASSOCIATION, INC.,
Washington, D.C., October 15, 1963.

Senator ALAN BIBLE,
Chairman, Senate Committee on Crime,
U.S. Senate, Washington, D.C.

DEAR SENATOR BIBLE: The Capitol Hill Southeast Citizens Association definitely supports the strongest crime bill as brought over from the House District Committee and House of Representatives as possible.

Your wise judgment may suggest better means by which law and order can be restored in the U.S. Capital, but the House of Representatives tried very hard to give the police of Washington support, in order that crime may be decreased.

Many discussions over the matter have taken place since the stadium riot occurred last fall. Crime can be controlled in Washington, D.C. Please do the best you can to make it safe for people to walk the streets of this city or work in their own gardens or be safe from attacks in shops and banks. So long as an easy policy is provided for the criminal to operate in, just so long will danger lurk everywhere in the Nation's Capital.

Thank you for your efforts. Please place this letter in the record.

Sincerely yours,

ELIZABETH DRAPER, *Secretary.*

WASHINGTON, D.C., *November 7, 1963.*

Re H.R. 7525, title I.

Senator ALAN BIBLE,
Chairman, Senate District Committee,
Senate Office Building, Washington, D.C.:

When conditions force citizens to hold meetings in their homes for the purpose of discussing ways and means to secure protection against criminals and protection of their homes from housebreakers, it indicates a situation which merits, and usually secures, attention and help from our lawmakers.

Is this taking place in a Washington slum area? No; instead, it is in the Spring Valley neighborhood, where the precinct 8 police station has approximately 37 unsolved housebreakings reported in only 1 month, October 1963. The total for 1963, up to November 1, is 186.

The police are working on this long list of cases, but the criminals responsible are still at large. We, District propertyowners, are worried and alarmed. The women of the neighborhood are especially stirred by the continuing danger. The police, in their efforts to protect persons and property from criminals, need all the assistance possible. They confirm the fact that the *Mallory* rule is a handicap.

The Senate District Committee, by recommending modifications of the *Mallory* rule, in a manner satisfactory to the police department, will remove this important stumbling block lying in the way of the conviction of the criminals who are daily adding to Washington's mounting crime rate.

Several of our neighbors are U.S. Senators who can personally advise that they realize the danger that threatens their homes. Who knows where the housebreaker will strike next?

ALBERT F. MURRAY.

GOVERNMENT OF THE DISTRICT OF COLUMBIA,
METROPOLITAN POLICE DEPARTMENT,
November 18, 1963.

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

DEAR MR. SMITH: During my testimony before the committee on November 5, 1963, there were several items which I promised to furnish the committee.

In a separate letter to the chairman, which I trust will be inserted in the record, I have replied to the charges made by Mr. Shadoan, and have also amplified my views on the suggestions of Mr. Katzenbach and have suggested an alternative to section 301 of H.R. 7525.

In my statement, I promised to furnish the committee staff with copies of letters from other police chiefs outlining arrest procedures in various cities throughout the Nation. Copies of those letters are forwarded herewith.

At one point during my testimony, there was a discussion of statistical changes in population of the District metropolitan area from 1950 through 1960. Some confusion developed during this discussion because of a misprint in the table from which we were reading. I am forwarding herewith a table giving complete, correct data.

In response to a question by the chairman, I promised to furnish the committee for the record a statement on the training program of this department. I am forwarding herewith a copy of my letter to you earlier this year which outlined in rather complete detail our various training programs and procedures.

Also during my testimony, the chairman asked us to provide for the record the number of detectives in our force in 1957. There were during that year 330 detectives in comparison with the 370 we now have.

Again, I want to thank you and the staff for the cooperation we have received in presenting to the committee our problems and needs for corrective legislation to assist law enforcement in the District of Columbia.

Sincerely yours,

ROBERT V. MURRAY,
Chief of Police.

Comparison of population, District of Columbia standard metropolitan area

By civil divisions	1950	1960	Increase or decrease	Percent increase or decrease
District of Columbia	802,178	763,956	38,222	−4.8
Maryland:				
Montgomery County	164,401	340,928	176,527	107.4
Prince Georges County	194,182	357,395	163,213	84.1
Virginia:				
Alexandria City	61,787	91,023	29,236	47.3
Falls Church City	7,535	10,192	2,657	35.3
Arlington County	135,449	163,401	27,952	20.6
Fairfax County	98,557	262,482	163,925	166.3
Total, metropolitan area	1,464,089	1,989,377	525,288	35.9

GOVERNMENT OF THE DISTRICT OF COLUMBIA,
METROPOLITAN POLICE DEPARTMENT,
March 28, 1963.

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

DEAR MR. SMITH: In response to your letter of March 25, 1963, I am furnishing the following information for Senator Hartke relating to the training programs of this Department.

BASIC TRAINING

The basic training and indoctrination processes of this Department are divided into two sections; namely, the primary indoctrination course and the advanced recruit training course.

I. PRIMARY INDOCTRINATION COURSE

The primary indoctrination course, requiring approximately 2 weeks, provides 80 hours of indoctrination processes and instructions for the newly appointed recruit police officer. This is the minimum training requirement of this Department; no police officer is assigned to street duty until he has fully completed and qualified in all aspects of this course. This minimum training and indoctrination process includes the following curriculum:

A. Orientation

1. Administration of oath of office.
2. Welcome address by executive officer of the Department.
3. Issuance of badges and equipment.
4. Recording of personal history data of the recruit.
5. Issuing of books, maps, and other study material.
6. General instructions for new recruits.
7. Reading, discussing, and explaining of departmental orders especially important to new recruits (including the code of ethics and the use and safety of the service revolver both on and off duty). Emphasis is placed on departmental orders and policies regarding courtesy on the part of police officers at all times and on use of service revolvers by members of this Department. I am attaching copies of those orders with this letter (General Order No. 3, series 1959, and Memorandum Order No. 28, series 1954).
8. Daily rollcall and inspections including the reading of teletype messages and dispatches.
9. Explanation of the various societies, associations, and organizations within the Department and explanation of the Government life and hospitalization insurance programs and the need for personal liability insurance for automobile owners.
10. A tour is conducted of the various units of Police Headquarters to familiarize the new recruit with departmental operations and procedures.
11. Issuance of uniforms and measurements of recruits for new clothing.
12. Instructions concerning departmental policies regarding outside employment of police officers.
13. Securing of District of Columbia operators permits for new recruits.
14. Potographing of new recruits for Police Department records.
15. Physical training and explanation of fundamentals of self-defense.
16. Assignment of homework to be completed and returned while detailed to precinct duty.
17. Lectures on official conduct of police officers both on and off duty.
18. Procedures for operating departmental radios and switchboards.

B. Classroom and range instruction

The major portion of the classroom work during the primary indoctrination course is devoted to the following subjects:

1. *Instruction on care and use of service revolvers.*—A 2-hour lecture and demonstration is given on the day that revolvers are issued to recruits before the students are permitted to leave the headquarters building with the revolvers.

About 10 hours are spent on the pistol range in actual firing and instruction on the use and care of the service revolver in order to meet the prescribed qualification. If a satisfactory score is not obtained, the trainee is required to return and qualify on his own time and at his own expense. The number of hours necessary for qualification will vary according to the number of trainees involved. Additional instruction is also given by the instructors in the training classes on the policies of the Department relating to permissible use of service revolver. Every police recruit is required to qualify with the service revolver during the primary indoctrination course. For the calendar years 1961 and 1962 there were 45 experts (scoring 270 to 300 on the range), 235 sharpshooters (scoring 240 to 269 on the range), and 434 marksmen (scoring 195 to 239 on the range) among newly appointed recruits.

2. *The police manual.*—Approximately 8 hours of classroom time are spent on instructions and discussions of the police manual with particular attention to those chapters specifically relating to new police officers and their duties and responsibilities.

3. *Courtroom procedures.*—The trainees are taken as a group to the court of general sessions of the District of Columbia so they may observe and familiarize themselves with the procedures of the criminal court. Subsequently, about 1 hour

is spent in the classroom discussing observations made during the trip to the court, and other instructions are given during classroom work concerning the jurisdiction and procedures of the various courts.

4. *Arrest procedures.*—An explanation is given of the authorities, duties, responsibilities, and limitations placed upon police officers in the process of making arrests. An explanation is given of the distinction between misdemeanors and felonies. Thorough instruction is given to the officer regarding his conduct and attitude in taking persons into custody, including the need for careful evaluation by the police officer of the situation for his own self-protection while at the same time recognizing the rights of the citizen being arrested.

In connection with the law of arrest, an explanation is also given of the rules of evidence and rules of fresh pursuit pertaining to this jurisdiction.

5. *Recording instructions.*—Thorough instruction is given to the recruit regarding proper method of recording lookouts, complaints, and other notices given at rollcalls.

6. *Traffic instruction.*—About 4 hours of classroom instruction are devoted to instruction of the police recruits on traffic enforcement and on the need for courtesy in dealing with the public, and about 2 hours of classroom time are taken in instruction pertaining to the procedures relating to issuance of traffic violation notices. Instructions are also given on the methods of directing traffic and on procedures for investigating and reporting on traffic accidents.

7. *City geography.*—Instructions are given on the physical geography of the city and the proper method of giving directions to citizens. Maps and city guides are issued to all recruit police officers during the primary indoctrination course.

8. *Report writing.*—Instruction is given stressing the importance of making complete, precise, and accurate reports, and an explanation is given of the various report forms used by this Department.

9. *First aid.*—Instruction is given in emergency first aid including treatment for stoppage of breathing, for bleeding, and for poisons, and instructions are given in methods for using mouth-to-mouth resuscitation.

10. *Precinct assignments and discussion.*—The Director of the Police Academy and Training Section gives assignments to precincts and final instructions. Recruit police officers are directed to report to the various precincts and to receive further instructions from their precinct commanders. The trainees are given further study assignments in the form of homework which must be completed while detailed to the precincts. Outlines are furnished that will require the trainee to thoroughly study the subject matter, and completed homework assignments are required to be turned in to the Police Academy and Training Section at regular intervals to insure that the training is continued.

In addition to the homework assignments prescribed by the Police Academy and Training Section, the precinct commanders, acting under instructions from this office, have established in-service classes for members of the force assigned to their units, designed especially to fill the needs of new men. These classes cover in detail the various regulations and orders applicable to police work and are supported by training films to the extent available.

II. ADVANCED RECRUIT TRAINING COURSE

Following the primary indoctrination course, the new police officer is detailed to one of the precincts for on-the-job training purposes. He is assigned initially with an experienced police officer until, in the judgment of the precinct commander, he is competent to work alone in regular patrol or other police duty. As pointed out above, during this period of on-the-job precinct training, the new police officer is required to continue his study of various training material provided him and is required to submit completed homework assignments to the Police Academy and Training Section for review.

This Department has found that the assignment of new police officers to the precinct for on-the-job training following the primary indoctrination course and before completion of the advanced recruit training course serves to better fix in the mind of the new police officer the problems involved in police work and makes him more aware of the need for and more interested in the subsequent classroom training.

The advanced recruit training course consists of an elaboration on the subjects presented during the primary indoctrination course. For example, classroom instruction is given in detail on the various regulations applicable to police work and on the background and principles underlying those regulations; more detailed first aid instruction is given, including advanced subjects, such as emer-

gency delivery of babies; a 10-hour course in radiological monitoring; the trainees are taken to visit the District of Columbia General Hospital, the morgue, and St. Elizabeths Hospital, where the procedures for committing a person for confinement and examination are explained; 1 week of the advanced training course is devoted to police-community relations; additional subjects, such as public speaking, are presented; lecturers from the Federal Bureau of Investigation, the office of the U.S. attorney, the Alcoholic Beverage Control Board, and similar other Government agencies discuss their work with the trainees; and detailed instruction is given on the Constitution of the United States with particular emphasis on the Bill of Rights.

I am forwarding herewith a copy of the weekly schedule of classes 160 and 161 which outline the curriculum of the complete advanced recruit training course. You will notice that the curriculum for those classes consisted of only 12 weeks; the proposed police-community relations program, which will require 1 additional week, is attached to that list and will be presented to all future advanced recruit training classes.

It will be of interest to you to note that, during the 13-week advanced recruit training program, on several occasions the entire class is detailed back to the precincts for duty in connection with special events and emergencies. When the time required for such details prevents completion of the full schedule, additional weeks are added to the course in order that the full schedule will be completed by every police officer.

Ideally, every newly appointed police officer should complete the advanced recruit training course within 6 months from the date of his appointment. Such a schedule would then give him an additional 6 months of street duty before completion of his probationary year. However, because of an acute lack of classroom space and also because of the prevailing high crime rates which require the assignment of as many men as possible to patrol duty, we have been unable to meet that ideal with respect to every police officer appointed to the Department. As of this date, we have a total of 276 police officers who have not yet completed the advanced recruit training course.

Advanced Inservice Training Courses

During my tenure as Chief of Police, I have placed as much emphasis as possible on advanced training and have alloted to training schedules as much effort as available space and other needs of the police service have permitted. The following are some of our more significant accomplishments in providing advanced training:

1. Every possible source of professional training for police personnel has been used. The Department regularly sends officials to the FBI Academy, to the Northwestern University Traffic School, and to other training courses which become available.

2. Positive efforts have been taken to stimulate interest of Department personnel in university-level training. In 1956, Police Department representatives met with officials of the American University and the University of Maryland and established police certificate programs including police-oriented university-level training. These programs continued on a voluntary, individually financed basis for several years. Last month, when it became apparent that some additional stimulus was needed to revive interest in these programs, I directed that arrangements be made for the Department to finance a major part of the tuition costs of these programs. One hundred and seventeen men are now attending classes under that program.

3. In cooperation with the office of the U.S. attorney, this Department arranged for a series of training lectures by the U.S. attorney's staff on the ramifications of the *Mallory* ruling and its practical applications to police work. Because of the success of that program, arrangements were later made for similar lectures on the rules relating to search and seizure of evidence. To insure that the force was kept abreast of current rulings on *Mallory*, a second series of lectures on this subject was presented within the last year.

4. Special courses have been established within the Department to give inservice training to police personnel on proper methods of handling juveniles and a pamphlet on this subject has been issued to each member of the force.

5. To improve the efficiency of police handling of all aspects of traffic, a special in-service traffic training course was established and, in addition to that course, special instructions were issued to precinct personnel outlining proper methods for direction and control of traffic.

6. Special arrangements were made with the Federal Bureau of Investigation for that organization to conduct a command-level training course for all senior officials of the Department and a supervisors training course for sergeants and corporals of the force. Those courses were given in April and July 1962.

7. A special pamphlet was issued to the Department as "A Guide to Understanding Race and Human Relations" and the course of training for police recruits was expanded to stress human relations. In addition, a special course in human relations is being planned for presentation to all personnel of the force.

8. To improve the general efficiency of the organization, a middle management acquaintanceship training program has been planned and will be instituted within the next few weeks for senior officials.

9. A special course of training in techniques of crime detection was devised and presented to all detective personnel of the force. This course will be repeated in the near future for presentation to newly assigned detective personnel.

This Department fully recognizes that even more advanced in-service training courses are needed. Specifically, we would like to expand our training for supervisory and command personnel, we would like to be able to conduct courses in driver improvement, and we need expanded in-service courses for personnel in administrative, clerical, and technical assignments. Especially needed is a reactivation of the Washington Police Academy.

Two factors have held back our advanced training programs. These are: (1) The acute lack of space for conducting training programs and (2) the significant increases in authorized police personnel during recent years have imposed a heavy load of recruit training on our training facilities and, with a backlog of men who have not yet completed advanced recruit training, it has been deemed unwise to divert existing training facilities for advanced in-service training.

Number of Police Officers Trained

In specific response to your question pertaining to the number of Metropolitan Police officers who receive training in compliance with the prescribed minimum standards, you are advised, as I pointed out earlier in this report, that no newly appointed officer is permitted to perform patrol duty on the street until he has successfully completed all phases of the primary indoctrination course. Also, as I have pointed out heretofore, all but 276 of the police officers of this Department have also completed the advanced recruit training course. Although this training is above the minimum standards, I deem it important for every officer and member of the force to complete the advanced recruit training course as soon after his appointment as the needs of police service will permit. My plan in this area was and is to assign a class of 100 men to the advanced recruit training course when daylight saving time goes into effect in the District of Columbia at the end of April 1963. Past experience has demonstrated that with the additional hours of daylight during the evening under daylight saving time, there usually is a reduction in the number of street crimes and, consequently, more men can be spared at that time from preventive patrol.

Training of Pvt. Elmer L. Hunter

Pvt. Elmer L. Hunter was appointed to the Department on April 2, 1962, and was immediately processed through the 2-week primary indoctrination course. As I have pointed out earlier in this report, that course includes complete training on methods of making arrests and on the use of firearms.

After completion of the primary indoctrination course, Private Hunter was detailed to the pawn office of the Detective Division in an undercover capacity for a special assignment lasting 2 weeks. At the conclusion of that detail, Private Hunter was detailed to the 11th precinct for on-the-job training.

Upon reporting for duty at the 11th precinct, the commanding officer of the precinct gave Private Hunter instruction in the proper use of his service revolver and baton, in courtesy in dealing with the public, and general instructions regarding methods of protecting himself while making arrests. Private Hunter was then assigned to plainclothes duty in the suppression of vice offenses, and received detailed instructions in this phase of police work by officials of the precinct.

Toward the end of June 1962, Private Hunter was relieved of his assignment to vice suppression and was assigned to various duties in the 11th precinct such as foot patrol duty, patrol wagon duty, and station house duty, all with experienced police officers who further instructed him in police procedures.

Beginning about the middle of September 1962, Private Hunter was permitted to work on foot patrol without being accompanied by an experienced officer.

In addition to the specific training outlined above, the 11th precinct gives regular instructions to police officers on various aspects of police duty during the regular police rollcalls.

It may be pertinent to point out that Private Hunter, like 72 percent of the police officers of this Department, was an ex-serviceman. He had 4 years' service in the U.S. Navy, during which he undoubtedly received some training in self-defense and was exposed to various disciplines which are often helpful in preparing a man for police work in a quasi-military organization.

With respect to this question of yours, I want to reemphasize, as I have already pointed out, to others, that there is no indication that lack of training had anything to do with the unfortunate death of Private Hunter. Certainly it is possible that a more seasoned police officer faced with a similar situation might have (but, too, he might not have) recognized the danger and disarmed the person arrested.

CONCLUSION

Notwithstanding the fact that there is no indication that lack of training resulted in the death of Private Hunter, I am concerned with the overall need for expeditious completion of the advanced recruit training course by all personnel of this Department and for considerably increased emphasis on all aspects of advanced in-service training for officers and members of the force.

Because of our need for much more space for training facilities, and because of our current need for as many men as are available for patrol duty, I anticipate that it may take as long as 10 years to bring the total training program of this Department up to what I would consider an ideal level. Along these lines, I have been seeking over the past 2 years to obtain additional space for our training facilities, and have recommended to the Board of Commissioners inclusion of new training facilities in the current public works program of the District.

Notwithstanding the fact that I fully recognize the need for even more emphasis on training within this Department, I am able to report to you with some pride that in May 1958 the Judicial Conference of the District of Columbia Circuit adopted a resolution commending me for my actions up to that time in emphasizing initial training courses and in instituting in-service training courses within this Department. I am also proud to be able to state that, notwithstanding our own recognized additional training needs, this Department is often called upon to assist other police departments in setting up their own training programs and that the police personnel from the Armed Forces police department and from police departments of surrounding jurisdictions often attend our recruit and our advanced training courses. The U.S. Park Police sends selected park police personnel to our recruit training courses on a regular basis.

In addition to the foregoing statements, I am forwarding for your information copies of the training pamphlets and materials furnished to every member of this Department for their personal study. (You undoubtedly have copies of the police and traffic regulations of the District; therefore, although copies of those publications are furnished every member of the force, I have not included them in the accompanying material.)

I hope that you will convey to Senator Hartke my appreciation for his interest and the interest of his subcommittee in the training problems now facing this Department. I will appreciate whatever help the Senate Committee on the District of Columbia can provide to assist me in attaining an ideal advanced training program as expeditiously as possible.

Sincerely yours,

ROBERT V. MURRAY, *Chief of Police.*

GOVERNMENT OF THE DISTRICT OF COLUMBIA,
METROPOLITAN POLICE DEPARTMENT,
November 18, 1963.

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

DEAR MR. CHAIRMAN: My purpose in writing this letter, which I hope you will include in the record of testimony regarding H.R. 7525, is threefold.

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

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

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

I. THE FOUR PROPOSED SAFEGUARDS

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

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

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

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

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

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

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

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

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

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

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

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

police specifically advise an arrested person of this opportunity must certainly incur a new handicap on police investigations. I believe that the testimony of witnesses before your committee has been unanimous that any attorney will immediately advise his client to make no statement whatever to the police, and to require the police to actively solicit this probability would operate to effectively preclude any in-custody questioning of a defendant.

(3) A maximum of 6 hours elapsed time between arrest and completion of the confession:

As I informed your committee, I believe that imposition of a specific time period, especially one as short as 6 hours, for obtaining an admissible confession would be harmful to police investigations in some cases. I know that there are those persons who argue that criminals, by and large, are not sophisticated and knowledgeable in matters of law and their basic rights and that they consequently fail to take advantage of legal limitations imposed on the police. I cannot agree with this position. Even though it may be demonstrated that some criminals are either simple, uneducated thugs, or are previously law-abiding citizens, naive in law enforcement procedures which never before applied directly to them, there remains a considerable proportion of the criminals who do have a rudimentary knowledge of these limitations obtained through their contacts with other criminal elements and, in fact, through their own experiences with the police and during confinements for previous offenses. During my own testimony before the committee, I explained how one of our criminal repeaters had learned of the need to avoid leaving fingerprints at the scenes of his crimes.

I am certain that the habitual criminal would quickly learn of any time limitation on police interrogations and would take advantage of it.

(4) A responsible witness, other than a law enforcement officer, observing the questioning, or a verbatim transcript or recording of the interrogation:

I testified that I would not have any serious objection to this fourth safeguard as presented by Mr. Katzenbach. However, when I compare this proposal by him with the full language of the proposal in H.R. 5726, I am reminded of several very important points on which I should comment.

It is worth mentioning the problem, which was brought out in your hearing, of obtaining a responsible witness other than a law enforcement officer for observing the questioning of arrested persons at late and unusual hours of the night. This problem would arise even during daytime questionings if this provision were required in all cases handled by this Department. One of the problems of law enforcement today is the reluctance of witnesses, even complaining witnesses, to become involved in the criminal processes and the resulting repeated appearances at hearings and trials, which impose on the time and even the livelihood of the innocent witness. I feel that we would encounter similar problems in seeking responsible persons to witness confessions and to thereby involve themselves in prolonged criminal processes.

As I stated to the committee on this point, our current practice is to try to arrange for reenactment of a crime before a disinterested party such as an apartment house manager or an apartment janitor and we try, when possible, to have the accused repeat a confession before the complaining witness. However, we have not heretofore made a concerted effort to have the entire questioning of the subject witnessed by a disinterested person. One problem which would arise under a "responsible person" requirement is the need for insuring, before the questioning begins, that the witness selected will fully withstand a definition and test of his "responsibility" by a defense attorney later attacking the validity of the confession.

However, it is likely that we can avoid these foregoing problems by resorting to the alternative transcribing or recording of questioning. These factors are mentioned here, therefore, for information of the committee and to demonstrate the real need for the alternative procedures.

Having compared the fourth safeguard as briefly worded by Mr. Katzenbach with the more detailed wording of H.R. 5726, I believe it worthwhile to recommend that any provision of this sort be written along the lines of the latter to specifically allow recording by a wire, tape, or other sound recording, or a questioning conducted subject to other comparable means of verification.

As you can well imagine, verbatim transcription of the questioning of all persons arrested could become quite expensive and, with present shortages of shorthand personnel, would very likely be difficult to obtain for hurried proceedings at late and unusual hours of the night. By comparison, electronic recording is inexpensive (after the purchase of original equipment) and can be made available at all hours without unreasonable problem.

Another major recommendation which I make regarding this fourth proposed safeguard is that any such provision include the words "whenever reasonably possible" as contained in H.R. 5726. Although we can certainly provide recording equipment for most questionings within headquarters and precinct offices, it must be foreseen that there will be some instances where questioning of suspects and their confessions will take place at times and locations where neither "responsible" third parties nor recording equipment are available. The inclusion of the "whenever reasonably possible" phrase should guard against loss of such confessions because of the exigencies of the moment and through no fault of the police.

II. TESTIMONY OF OTHER WITNESSES

At the hearings, you asked for my comments on testimony given by some preceding witnesses on title I and title III of H.R. 7525. I have had an opportunity to review the testimony of the various witnesses and am happy to furnish the following explanations and comments.

On examination of the testimony of various witnesses who opposed these titles of the bill, I found a number of concepts and viewpoints with which I disagree. As my disagreement in those general areas will be readily evident from my own statement and testimony to the committee, I will not attempt in this writing to debate the major issues involved in this proposed legislation. However, there are a number of statements, offered by some witnesses, which are not a true representation of facts. To insure that the committee has a clear picture on which to base its judgments, I do want to offer some more accurate information regarding these statements.

First, Mr. George W. Shadoan disputes our argument that we need time to detain and interrogate a suspect in order that we will be able to check out his story in cases of shaky identification, to verify his alibi, and to thus avoid placing a criminal charge against an innocent person. He argues that the common police approach is to secure enough evidence to meet the requirement of probable cause before a committing magistrate, to meet the evidentiary requirements of the prosecuting attorney, and to then stop the investigation. He characterizes this as the "clearance concept."

In support of his argument, he offers two criminal cases: namely, *United States* v. *Joseph Taylor*, and *United States* v. *William Kemp*. I think it may be illuminating to the committee to place in the record some facts of record which Mr. Shadoan did not relate.

First, for example, in the case against Joseph Taylor, it was admitted that the complaining witness had been severely cut about the face with a broken bottle. In this connection, it is noteworthy that as a result of the injury the complaining witness was admitted to the hospital in an undetermined condition.

We are not able to determine whether or not it is true that the defendant, at the time of his arrest, claimed that he had acted in self-defense against a drunken and unprovoked attack.

Whether or not the defendant told the officer that he acted in self-defense, or whether he did in fact act in self-defense, the circumstances of such a case then and now would require that the defendant be taken into custody. There was no question then and there is none now that the defendant did actually severely injure the complaining witness with a broken bottle. It is not always possible to examine every possible extenuating circumstance in a case where the person arrested has clearly committed a criminal offense. On the other hand, had the identification of the accused been less than positive in this case, and had the accused claimed that he had not actually injured the complaining witness, the policy of this department would have required the officer to examine the case further to insure that the real offender was being arrested.

Incidentally, although the arrest records of the complaining witness and the defendant in this case obviously have no real bearing on the matter under examination, those records were related in part in the original testimony to the committee; I think the full record may be of even greater interest to the committee. Mr. Shadoan testified, "[The complaining witness] 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 * * * the accused I think had had a charge himself of simple assault at South Carolina at some time." Interestingly enough, our records show that the accused, prior to the offense in question, had been charged 15 times with drunkenness, 12 times with disorderly conduct, once with pandering, 3 times with miscellaneous misde-

meanors, 3 times with assault with a dangerous weapon (with 1 conviction), and had been convicted once for carrying a dangerous weapon. Subsequent to the offense referred to, he has been charged 13 times with drunkenness, twice with disorderly conduct, once with assault, once with vagrancy, and has been convicted once for assault with a dangerous weapon.

And to place this preceding case in its proper perspective for the committee, it may be worth mentioning that just 3 days prior to the offense mentioned by Mr. Shadoan, the defendant had himself reported that he was cut on the nose with a sharp instrument held in the hands of a man known to him as "Dynamite," but had subsequently refused to cooperate with the police in ascertaining the real identity of that reported assailant when our investigation produced what we thought was the probable offender. It is typical in assault cases for a complainant, in heat of anger, to identify his assailant and then later, when his temper has cooled, to refuse to cooperate in the criminal prosecution.

A second case referred to by Mr. Shadoan is that of *United States* v. *William Kemp*. In this case, Mr. Shadoan testified that the defendant had witnesses at home who could testify that he had been picked up by his codefendant at his home only a few minutes before his arrest. But his testimony, and that of the codefendant, was that he had left his home at about midnight, whereas the testimony and records of the department indicate that the arrest was made some 2 hours later at about 2:15 a.m.

Mr. Shadoan suggests that, to be consistent with our statements, we should have checked his alibis at the time of arrest. Again, we have a situation where the defendant is immediately connected with the proceeds of the crime, and not a case where his guilt or innocence rests on a shaky identification by a witness.

And again, not all of the facts in the case were related to the committee. Mr. Shadoan testified that "the defendant's evidence did come forward," in such fashion as to appear to imply that the trial produced alibi witnesses who cleared the defendant of guilt. On the contrary, the jury did in fact find him guilty of the offenses charged. However, the U.S. court of appeals did set aside the verdict and judgment because in its view there was insufficient evidence on which to reach a clear conclusion of guilt.

Reference was also made to the case of *United States* v. *Ernest Dubose*, in which it is alleged that the officer testified that the complainant picked a picture of the accused from 13 photographs, whereas the complainant testified that she had been shown only one picture.

As this case was not transcribed, we have been unable to check the accuracy of this alleged testimony. But one of the investigators in the case states that the witness was certainly shown more than one photograph and that she later positively identified the defendant in a lineup. (The principal investigator in this case has since left the department for employment with the Central Intelligence Agency and is presently out of the city; therefore, we could not obtain a statement from him for this letter.)

We must concede Mr. Chairman that, with the volume of crime we have, and with the number of policemen we have, there is a limit to the amount of investigation that can be conducted. Not always is there time or necessity to go into every detail of the defense offered by every person arrested. This is especially so in cases such as *United States* v. *Joseph Taylor*, where there is no question that the defendant has committed a criminal offense, and in the case of *United States* v. *William Kemp*, where the defendant is arrested in immediate proximity of stolen propety and where the alibi offered has questionable bearing on the case.

On the other hand, our position is that additional time allowed us before arraignment does permit us to check our alibi statements given by persons arrested when their arrest is based on shaky identifications or on barely sufficient probable cause.

Since Mr. Shadoan, in his testimony, in effect stipulated that this procedure of checking is followed in some cases, no effort is being made here to enumerate examples where this has been done. We will, however, provide suitable examples to the committee if desired.

Mr. Shadoan also referred to what he characterized among some policemen as a "conviction philosophy." To support his view regarding this philosophy, he quoted two criminal cases.

The first example cited by him is *United States* v. *Howard W. Lee and John Thomas Lee*. In this case, he simply read a portion of the transcript of testimony between the U.S. attorney at the trial on direct examination of a witness to the robbery.

That witness, in effect, testified that at a lineup of prisoners she was coerced by a police officer into identifying the defendants and, in addition, that the police officer stated "what difference does it make, it's just a couple more niggers."

In this particular case, it is noteworthy that we did in fact, prior to the lineup, obtain a confession from one of the defendants. It is also pertinent, in connection with other statements offered by Mr. Shadoan, that this confession was obtained (in front of a disinterested witness) after the investigating officers had checked out an alibi offered by the confessing defendant.

With respect to the testimony read into the record by Mr. Shadoan, I am forwarding to the committee a confidential report by one of the investigating officers relating the views expressed by the assistant U.S. attorney regarding this witness, and his decision not to call her in the second trial. This report may reflect somewhat on the motive behind the testimony of that particular witness.

Mr. Shadoan also discussed the case of *United States* v. *Eugene Evans* in which the investigating detective testified that the defendant confessed while in the police cruiser on the way to the station house, whereas the defense claimed, and was supported by testimony of a precinct officer, that the defendant was transported to headquarters in a patrol wagon.

This conflict of testimony was brought to the attention of this department by the U.S. attorney, at the time, and although it could not be resolved, it was brought to the attention of all detective personnel and they were instructed to be very careful in keeping a chronological journal of their activities in each major arrest in order to prevent similar incidents in future cases.

Notice is also taken of Mr. Shadoan's testimony that in 1960 there were 1,337 felony indictments, of which there were 140 acquittals, indicating an acquittal rate of about 5 percent of the indictments. He suggests that this compares favorably with the State jurisdictions who are not hampered by the *Mallory* rule.

I think the committee should also have benefit of the following statistical information. In the fiscal year 1960, there were 9,510 felony arrests in this city. At the end of the year, 590 were pending, 402 had been dismissed, 1,487 had been nolle prossed, 1,333 had been dropped with no papers, 1,851 had been referred to juvenile authorities, 605 had been committed to penal institutions by lower courts, and 3,242 had been referred to the grand jury. Taking Mr. Shadoan's statistic, apparently 1,197 had been convicted in the U.S. district court. Counting as convictions the 590 pending, the 1,851 juvenile, the 605 lower court commitments, and the 1,197 district court convictions, the overall rate totals a maximum of 45 percent.

I, of course, would not argue that all of these cases are lost because of the *Mallory* rule. Some of them are, but many of them are weeded out under the procedure of presenting to the grand jury only the best cases, when multiple charges are placed against a defendant, in order to avoid clogging the courts with a great number of criminal charges finally resulting in concurrent sentences.

Too, and I would be the first to admit it, some of these cases are lost because of inexperience, lack of judgment, or failure to follow proper procedures by investigating officers who are pressed, not only by procedural policies imposed by the courts, but also by heavy workloads during peak periods.

I would also want to take issue with the statement by Prof. Yale Kamisar that 6,000 suspects were "picked up" in connection with three murders. It would seem that he is misinterpreting as arrests the interviews reported in newspaper articles regarding some spectacular cases. There have been a number of major cases in this city in which hundreds of suspects were checked out and interviewed without arrests being made.

For example, in the case of the murder of Gordon C. Brown, there was a newspaper item relating to the fact that about 5,000 servicemen were questioned. However, these interviews were in no sense arrests, but voluntary interviews conducted on the base at Bolling Field. The defendant in the case was actually passed over during his first interview, but was later requestioned as a result of information obtained from other persons. He was eventually charged with the murder and convicted. There have been a number of similar cases where hundreds and on occasion more than a thousand persons were interviewed, but I have no recollection and there is no record of this department to substantiate such a statement as that made by the professor.

With regard to the testimony of Mr. Kenneth Pye, it is worth noting that his quotation of crime statistics was not current. Actually, during the fiscal year 1963, crime in this city increased by 8 percent over the preceding year, and as of

the end of September, crime in this city was at an alltime high and had increased 56 percent over the low point of June 1957.

On another subject, Mr. Pye states that in the *Miska Merson* case, the police detained an individual for 60 hours before arraignment, and that one of the juveniles involved was subjected to an intensive interrogation for 35 hours. A narrative account of the investigation of this case is on record with your committee in the joint hearings before the Senate and House Committees on the District of Columbia earlier this year. That narrative outlines in detail the periods of detention of the various principals and the need for detention of each and, incidentally, will show that none of them was intensively questioned for 35 hours.

Mr. Pye also mentioned a *Leroy Pane* case, which we have been unable to identify and, therefore, offer no comment here.

III. PROPOSED ALTERNATIVE TO UNIFORM ARREST ACT

During my testimony before the committee, the chairman remarked that to his recollection only one of the many witnesses appearing before the committee had supported section 301 of H.R. 7525 as a constitutional provision. In my own testimony to the committee, I noted that my understanding was that even some of the supporters of title I of the bill had testified that section 301 would not be constitutional, and I informed the committee that, despite the acute needs of law enforcement, I would not want to recommend any clearly unconstitutional provisions.

Still, I feel a duty to impress upon the committee the acute need for some provision to authorize a police officer to detain and question a person found under "probable cause" circumstances without placing a permanent formal charge and arraignment against the person detained. Again I would remind the committee that we have had a number of cases where formal, serious criminal charges have been placed on the records of persons arrested on probable cause who were later released, without trial, when further investigation of the facts by the police have proven them innocent. And under existing law, such a charge cannot be expunged from the record of the person arrested.

Recognizing that section 301 might have been construed to be unconstitutional because of the breadth of its provisions, I should like to offer for consideration of the committee a more limited proposal which may be more in line with constitutional requirements. A similar proposal has recently been considered in one of the State legislatures and is as follows:

RIGHT OF DETENTION

A. A peace officer may detain for a reasonable period of time any person who, he believes, on reasonable grounds, has committed, is committing, or is about to commit any offense, even though the nature of the offense may be unknown, and may conduct such investigation as he believes, on reasonable grounds, to be necessary.

B. A period of detention in excess of 6 hours shall be prima facie unreasonable, At the end of the detention period the person so detained shall be released or shall be arrested.

C. The release of the person detained does not render the detention unlawful.

Sincerely yours,

ROBERT V. MURRAY, *Chief of Police.*

DIVISION OF POLICE, CITY OF MADISON,
Madison, Wis., April 13, 1961.

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

DEAR SIR: It is my belief that the information you requested in your letter of April 4, 1961, governing arrests is well covered in citations from the 1959 Wisconsin statutes:

66.31 Arrests. Any peace officer of a city, village, or town may, when in fresh pursuit, following into an adjoining city, village, or town and arrest any person or persons for violation of State law or of the ordinances of the city, village, or town employing such officer.

954.03 Arrest without warrant. (1) When lawful. An arrest by a peace officer without a warrant for a misdemeanor or for the violation of an ordinance is lawful whenever the officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor or has violated an ordinance and will not be apprenhended unless immediately arrested or that personal or property damage may likely be done unless immediately arrested. This subsection is supplemental to section 62.09(13) and shall not in any way limit any powers to arrest granted by that section.

(2) Arrest under warrant not in officer's possession. An arrest by a peace officer acting under a warrant is lawful even though the officer does not have the warrant in his possession at the time of the arrest, but, if the person arrested so requests, the warrant shall be shown to him as soon as practicable. An arrest may lawfully be made by a peace officer when advised by any other peace officer in the State that a warrant has been issued for the individual.

I believe that what you refer to as investigation arrests would come under our classification of "suspicion" of a specific charge. We do not make arrests solely for investigative purposes.

According to our statutes, an individual arrested on suspicion of a felony on information and belief, and probable cause, may be held incommunicado for a reasonable length of time. Ordinarily those incarcerated are held in the city jail until they can be arraigned at the next court session, which is the mornings of Monday through Friday.

Trusting this information suffices, I remain,

Very truly yours,

WILBUR H. EMERY, *Chief of Police.*

CHARLESTON, W. VA., *May 17, 1961.*

ROBERT V. MURRAY,
Chief of Police,
Metropolitan Police Department,
Washington, D.C.

DEAR CHIEF MURRAY: In answer to your inquiry of April 4, 1961, I first want to apologize for my delay in replying. Your letter is of much interest to all law-enforcement agencies.

We do not have any statute law of arrest for investigation of persons suspected of a crime. However, we have a practice of common usage in the State of West Virginia wherein we hold persons for investigation of felonies for 72 hours. Also, we have comparatively recently enacted a suspicious persons ordinance in the city of Charleston which we use under these circumstances and which states as follows:

"It shall be unlawful for any suspicious person to be found strolling, loitering, or lingering within the city.

"For the purposes of this section, a 'suspicious person' shall be deemed to be a person who, not being licensed or privileged by State and Federal law to possess it, is found with opium, opium pipe, cocaine, heroin, cannabis indica, cannabis sativa, marihuana, or other narcotic drug in his possession; and any person in whose possession shall be found concealed any device, tool, instrument, or thing for use in the commission of burglary, larceny, or other crime, or for picking locks or pockets, or for use in obtaining money or other property of value by swindle, trick, or false pretense; and any person who is known to obtain his living by criminal means and practices or who is known to be a companion and associate of criminals or other dissolute persons."

Our investigation arrest is generally described in volume 1 of Alexander's "The Law of Arrest in Criminal and Other Proceedings," published by Dennis & Co., Inc., Buffalo, N.Y., on probable cause and detain for questioning, and it is deemed, through common usage in the State of West Virginia, that 72 hours' detention is not unreasonable.

In view of your reference to the Supreme Court's opinion in the *Andrew Mallory* case, it would be absolutely impossible to have reasonable law enforcement and investigation if you were required to have all the evidence on a criminal before he is arrested, and I am afraid our departments would go wanting.

We are continuing under our regular practice and will do so until it is ruled otherwise to be illegal in the State of West Virginia.

Very truly yours,

DALLAS W. BIAS, *Chief of Police.*

CITY OF DALLAS,
POLICE DEPARTMENT,
Dallas, Tex., April 14, 1961.

ROBERT V. MURRAY,
Chief of Police,
Washington, D.C.

DEAR CHIEF MURRAY: The State of Texas is perhaps slightly more lenient with peace officers than are many States regarding the detention of prisoners arrested on suspicion or investigation. Actually, there are no statutes or city ordinances which set the particular time between an arrest and the filing of charges. It is our policy for detectives to interrogate persons in custody on investigative charges within 24 hours. This policy is not always strictly adhered to, though generally it is.

When a person is held on an investigative charge in this department, and is released without a formal charge, the normal procedure is for the investigating detective to sign the investigative worksheet authorizing release of the prisoner.

I am attaching some of the State statutes which may be of interest to you. Included are several court decisions relative to confessions and delays in taking defendant before a magistrate.

I hope this information will be beneficial to you in your study.

Sincerely yours,

J. E. CURRY, *Chief of Police.*

Article 212. Code of Criminal Procedure. State of Texas, Offense Within View

A peace officer or any other person, may, without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an "offense against the public peace."

Article 214. Code of Criminal Procedure. State of Texas, Authority of Municipality

The municipal authorities of towns and cities may establish rules authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws.

Ordinance 4290. Dallas City Code

All policemen in the city of Dallas, in the exercise of sound discretion, may arrest without a warrant therefor any person or persons found in suspicious places, or any person or persons found under circumstances reasonably tending to show that such person or persons have been guilty of some felony or breach of the peace or violation of some municipal ordinance, or are about to commit some offense against some State law or against some municipal ordinance.

Article 215. Code of Criminal Procedure. State of Texas, When Felony Has Been Committed

Where it is shown by satisfactory proof to a peace officer, upon the representation of credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

Article 216. Code of Criminal Procedure. State of Texas, Rights of Officer

In each case enumerated where arrests may be lawfully made without warrant, the officer or person making the arrest is justified in adopting all the measures which he might adopt in cases of arrest under warrant.

Article 217. Code of Criminal Procedure. State of Texas, Must Take Offender Before Magistrate

In each case enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order.

DECISIONS

The court knows that in the regular course of official business, magistrates before whom the statute requires the defendant arrested be immediately taken, cannot keep open offices at night. Hence, under the circumstances it was im-

practical for the officers to attempt literal compliance with the statute, and in the opinion of this court it is unreasonable to say that such was their duty. Under the foregoing circumstances pending return of the regular time for official business, we think the officers acted with legal propriety.

What is a reasonable time depends upon the facts in each case, to be considered with regard, among other things, to such matters as judicial accessiblity and facility, intervention of a Sunday or a holiday, the intoxicated or mental condition of the person detained. *Fouraker* v. *Kidd Springs Boating and Fishing Club* (Civ. App., 65 S.W. 2d 796).

Fact that defendant accused of nighttime burglary of private residence was not taken before magistrate, as is contemplated by this article, did not of itself require rejection of confession made while defendant was under arrest. *Henson* v. *State* (159 Cr. R. 647, 266 S.W. 2d 864).

Fact that defendant was confined in jail from time of his arrest at 8 p.m. until following morning did not show an unreasonable or unnecessary delay in taking him before a magistrate. *Gilbert* v. *State* (162 Cr. R. 290, 284 S.W. 2d 906).

Where defendant was arrested about 10:45 p.m. and taken to a hospital where a blood specimen was taken at 12:45 a.m. and then to the police station where he made a statement between 1 and 2 a.m. and complaint was filed after 2:25 a.m. confessions of defendant were not required to be excluded because defendant was not taken before a magistrate or because of unreasonable delay in filing of a complaint. *Mitchell* v. *State* (Cr. App., 312 S.W. 2d 245).

Where accused was arrested about 8 o'clock on Saturday night and made confession on Sunday morning, there was no unreasonable delay in taking accused before a magistrate.

A confession made while under arrest is not inadmissible as a matter of law because officers failed to take accused before magistrate. *Childress* v. *State* (Cr. App., 312 S.W. 2d 247).

Article 727. Code of Criminal Procedure. State of Texas, When Confession Shall Not Be Used

The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed. If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness.

DECISIONS

In absence of evidence of a long and continued questioning by reason of which confession resulted, or that 3½ days' confinement or failure to take defendant before magistrate caused defendant to make confession, failure of officers to file charges against defendant or to take defendant before a magistrate before confession was made did not constitute denial of due process of law and did not render confession inadmissible. *Dimery* v. *State* (Cr. R. 156, 197, 240 S.W. 2d 293).

The *McNabb* rule that a confession is inadmissible if made during illegal detention due to the failure to promptly take prisoner before committing magistrate, whether or not confession is result of torture, is not controlling in State trials. *Golemon* v. *State* (157 Cr. R. 534, 247 S.W. 2d 119, certiorari denied 73 S. Ct. 60, 344 U.S. 847, 97 L. Ed. 659, rehearing denied 73 S. Ct. 174, 344 U.S. 882, 97 L. Ed. 683).

Failure to take accused before magistrate does not invalidate a confession unless such failure, in some manner, causes or contributes to bring about the confession. Id.

POLICE DEPARTMENT,
CITY OF NASHVILLE,
Nashville, Tenn., April 19, 1961.

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

DEAR CHIEF: In answer to your letter of April 4 we wish to inform you that numerous cases decided by the Tennessee Supreme Court hold that there is no set time that a person may be held between arrest and arraignment before a magistrate when the arrest is made by an officer. However, the code does provide that a private person who arrests another for a public offense must take the arrested person before a magistrate or deliver him to an officer without unnecessary delay.

Our city code provides that an arrested person must be taken before a magistrate without unnecessary delay when arrested in the daytime or when the court is in session. When at nighttime and the court is not in session the arrested person may be placed in detention without a warrant until such time as the court is in regular session. The arrested person is allowed bail for bailable offenses.

There is nothing in the State code to prohibit an officer from holding a person incommunicado for the purpose of investigating him when there is reasonable grounds for believing he had committed a felony, even though it was later determined he was not guilty and any confession obtained during that time can be used in evidence against him, provided he is not held for a period longer than 72 hours and was not mistreated during that time and no promises were made to him.

I am enclosing several cases decided by our Tennessee Supreme Court relating to confessions obtained between arrest and arraignment.

Very truly yours,

DOUGLAS E. HOSSE, *Chief of Police.*

SUBMITTED HEREWITH IS SOME AUTHORITY FOR THE POLICE DEPARTMENT TO DETAIN A PERSON AND TAKE HIS CONFESSION PRIOR TO ARRAIGNMENT BEFORE A COMMITTING MAGISTRATE OR JUDGE

In the case of *Wynn* v. *State*, reported in 181 Tennessee, at page 325, the supreme court, speaking through Chief Justice Green, said:

"The proprietor of a restaurant in Memphis, after closing his place of business about 11 o'clock at night, on his way home was held up by three Negroes at the point of a pistol and a small sum of money and a bunch of keys were taken from his person. He received a blow in resisting the assault. The Negroes left him and he reported the matter to the police telling them that the keys to his place of business were taken and that it was probably the intention of those assaulting him to enter it. The doors to the house and safe were opened with keys, without doubt the keys taken from the prosecutor's person.

"They were detained in the police station 3 days without being taken before a magistrate. They were held incommunicado during this time. On the third day they were taken before a magistrate and in open court pleaded guilty. Shortly before he was taken into the magistrate's court, Wynn made a confession, as did the other two Negroes.

"At the conclusion of this preliminary hearing objection was made to the admission of the confessions solely on the ground that the defendant and the other Negroes were illegally detained for about 72 hours before they were brought into the magistrate's court.

"Since there was no proof of any mistreatment of defendant, nor of whipping, nor of threats of whipping while in custody offered on the preliminary hearing the trial judge was right in admitting the confession, unless the mere fact of the detention of defendant during the 72 hours rendered the confession inadmissible.

"Section 11544 of the code provides: 'A private person who has arrested another for a public offense, shall, without unnecessary delay, take him before a magistrate or deliver him to an officer.' There is no such provision with respect to the duty of an officer making an arrest."

In *Ashcraft* v. *State* (unreported 1943) and on appeal in the U.S. Supreme Court, 88 L. Ed. 858, this Court, with respect to the detention of the defendants for 36 hours prior to the time they were taken before a magistrate, said that,

"there was a temporary holding or arrest for examination purposes, and this is not a committal to prison within the spirit of our statute. Such an examination precedes a committal and an accused may be released before a warrant is issued."

"We do not understand that the Supreme Court reversed the *Ashcraft* case because of his detention but owing to the treatment he received during his detention. We think the bare detention of this defendant is not sufficient to render his confession inadmissible."

From the two above opinions, it appears that the police department has the full authority to detain, question, and take a confession from any person suspected of committing a crime prior to taking them before a magistrate or judge, and said detention can be for as much as 72 hours, so long as the person detained is not mistreated.

In the case of *Rosenthal* v. *State*, 200 Tenn., page 178, the Supreme Court said:

"In prosecution for homicide, record did not show that the defendant was prejudiced by being held incommunicado for 6 days after his arrest or by the fact that a preliminary hearing was held in the private office of an inspector instead of in the courtroom, and therefore there was no showing that the constitutional rights of the defendant were violated."

POLICE DEPARTMENT,
CITY OF COLUMBIA, S.C.,
April 20, 1961.

HON. ROBERT V. MURRAY,
Chief of Police, Metropolitan Police Department,
Washington, D.C.

DEAR CHIEF MURRAY: Please accept my apologies for not having answered your letter of April 4, 1961, until this time. The reason for the delay has been that I have discussed your problems several times with our city attorney.

We are fortunate here in Columbia in having reasonable cooperation from our criminal lawyers, who, in most cases, will give us a reasonable amount of time to complete our investigations. It is also the rule in our jurisdiction that we will be allowed at least 4 days to make an investigation as that is the statutory time required for notice of a hearing before a circuit judge or county judge on a writ of habeas corpus.

We, too, have been very much disturbed about the decision in the *Mallory* case, and our city attorney thoroughly disagrees with the opinion. However, as of this time, it has not affected our operations.

This is about all the information I can give you in regard to our investigations. I certainly sympathize with you and feel that it is ridiculous to cause a court to be called in session during the nighttime and having all parties concerned attend the court. It would appear that the Supreme Court, sitting in its ivory tower has completely overlooked the practical aspect of law enforcement in this Nation and seems solely concerned with the welfare of the criminal element.

Yours very truly,

L. J. CAMPBELL, *Chief of Police.*

PROVIDENCE POLICE DEPARTMENT,
Providence, R.I., October 30, 1961.

Chief ROBERT V. MURRAY,
Chief of Police, Metropolitan Police Department,
Washington, D.C.

DEAR CHIEF MURRAY: I am pleased to send you herewith a copy of the Providence Police Academy's latest training bulletin which, coincidental with your recent request for same, has as its subject "The Rhode Island Arrest Law."

This department publication, will, I am sure, provide some specific information you seek as study reference material in consideration of your interest in any adaptions of the provisions of the model Uniform Arrest Act.

The department procedures followed in operation of this statute are explained at some length with one exception: directing your attention to page 14, paragraph B, section 1, "Temporary Detension of Suspects," it is the practice of all enforcement units of this department to maintain a so-called 2-hour book in which a brief summary of the detention action is kept. This book is strictly an

unofficial record of a police activity and does not conflict with the provisions of the arrest statute.

I hope that you will find the enclosed material helpful; if I can be of any further assistance in this or any other matter of mutual interest, please contact me.

With kind personal regards, I am,

WALTER E. STONE,
Colonel, Chief of Police.

IV. THE RHODE ISLAND ARREST LAW

Up to this point in this manual we have been talking mostly about what a police officer cannot do. We will, in this section, cite the things a policeman can do.

Before going into the actual arrest law as it is stated in the statutes, it is necessary for each officer to understand the definition of the word "arrest:"

An arrest is the taking into custody of a person for the actual purpose of bringing that person before a court or otherwise securing the administration of the law.

Another definition that each officer should be thoroughly familiar with is the word "crime," and what constitutes a crime:

A crime is an act of commission in violation of a law forbidding or commanding it, and punishable only in a procedure brought by the Government.

1. In every crime there are two elements:

(*a*) The objective element: The objective element is shown by an outward act or omission condemned by law.

(*b*) The subjective element: The law is more concerned with the intent than with the act, because a malicious intent in the commission of a crime makes a person a menace to society, while a good intent in the commission of the same act could make the person innocent.

2. Example: The act of one person hitting another person with a heavy stick: A person with a malicious intent, the intent to injure the other person, for purposes of revenge or other similar reasons, would be arrested and charged with assault with a dangerous weapon.

If the person hitting the other was a policeman, and it was necessary to strike the other person with his baton to affect an arrest, his intent is not a malicious one, he would not be guilty of a crime.

Even though the overt act was the same, one person hitting another with a heavy stick, the intent determines whether there was a crime committed.

A. BACKGROUND OF THE RHODE ISLAND ARREST LAW

The Rhode Island arrest law is essentially the same as the Uniform Arrest Act which was proposed in 1941 and 1942, as a result of the Interstate Crime Commission investigation.

The principal drafter of the Uniform Arrest Act was Prof. Sam Bass Warner of the Harvard Law School. He was assisted by Prof. John Barker Waite of the University of Michigan Law School.

These two men, whose judgment and integrity were respected throughout the country, accompanied the police on their tours of duty in order to learn the true facts of police procedure. 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.

As a result of their experiences and after a study of the various State laws they drafted the Uniform Arrest Act, which somewhat liberalized a policeman's arrest privileges, in the hope all the States would adopt a uniform arrest law.

As of December 1960, only three States have adopted the principal provisions of the original Uniform Arrest Act. Those States are: Delaware, New Hampshire, and Rhode Island. The superintendent of the Chicago Police Department, O. W. Wilson, has been fighting, for years, for all the States to adopt similar laws to the Uniform Arrest Act.

So, in essence, Rhode Island has a reasonable amount of liberalism insofar as police arrest privileges are concerned. It then becomes necessary for the policemen of Rhode Island to maintain this reasonable degree of liberalism by not abusing any of the privileges set forth in the Rhode Island arrest law.

B. THE STATUTORY PROVISIONS OF THE RHODE ISLAND ARREST LAW—(TITLE 12, CH. 7, SEC. 1–17) AS CITED IN THE GENERAL LAWS OF RHODE ISLAND

1. Temporary detention of suspects (title 12, ch. 7, sec. 1)

"A peace officer may detain any person abroad whom he has reason to suspect is committing, has committed, or is about to commit a crime, and may demand of him his name, address, business abroad, and whither he is going; and any such person who fails to identify himself and explain his actions to the satisfaction of such peace officer may be further detained and further questioned and investigated by any peace officer; provided, in no case shall the total period of such detention exceed 2 hours, and such detention shall not be recorded as an arrest in any official record. At the end of any detention period the person so detained shall be released unless arrested and charged with a crime."

Explanation

(*a*) A policeman may stop any person, not in his own home, whom he suspects is committing, has committed, or is about to commit a crime. You may not stop people indiscriminately without a reason. You must be prepared to answer why you suspected, or what you suspected.

(*b*) If the person you stop can give you a reasonable explanation for his being at that place at that particular time you may allow him to continue.

(*c*) If the person you stop cannot satisfy you completely for his actions, you may detain him further by bringing him to the station for further questioning. (You must have a legitimate reason for stopping, or detaining, him in the first place.)

(*d*) After bringing him to the station you relay your suspicions to the superior in the office and the person may be questioned or investigated for up to 2 hours.

(*e*) If after 2 hours nothing can be found to warrant charging him with an offense he must be released. (This is not considered an arrest.)

(*f*) If, after questioning, sufficient grounds are found to charge him, he may be arrested and held for the next session of the appropriate court.

(1) Some actions that could be considered suspicious or questionable are: A known police character prowling around an area where breaks are occurring. A young boy or girl out late at night. A group of men driving around aimlessly late at night. A person carrying bundles at night in a residential neighborhood, etc.

2. Search of detained person for weapons (title 12, ch. 7, sec. 2)

"A peace officer may search for a dangerous weapon any person he is questioning or about to question concerning any crime or suspected crime, whenever he reasonably believes that he is in danger from such person carrying such weapon, and if such person is carrying a dangerous weapon, such officer may take and keep it until the completion of such questioning, when he shall either return it or arrest such person."

Explanation

(*a*) Once again, you must have a reason for questioning and if you have reason to suspect the person you are questioning is carrying a weapon you may search him for that weapon if you reasonably believe you are in danger from that weapon.

(*b*) In the event you are not satisfied with the person's explanation and you decide to convey that person to the station in a police vehicle he must be searched for weapons before he is placed in the vehicle.

(*c*) It is this writer's opinion that anyone capable of committing a crime is capable of carrying a weapon.

3. Arrest without warrant for misdemeanor (title 12, ch. 7, sec. 3)

"A peace officer may without a warrant arrest a person for a misdemeanor, whenever:

(*a*) The officer has reasonable ground to believe that a misdemeanor has been or is being committed in his presence and that the person to be arrested has committed or is committing it.

(*b*) The person to be arrested in fact has committed or is committing a misdemeanor in the presence of the officer, and in such case it shall be immaterial that the officer did not believe him guilty or on unreasonable ground entertained belief in his guilt.

(*c*) The officer has reasonable ground to believe that the person to be arrested has committed a misdemeanor and either has fled from the scene of the crime or is a nonresident of this State and cannot be arrested later.

"Provided, an arrest under paragraph (*a*) or paragraph (*b*) of this section must be made within 24 hours after the commission of the misdemeanor, but, an arrest under paragraph (*c*) may be made at any time."

Explanation

A. Paragraph (*a*): Any of the officer's five senses that detect a misdemeanor would cover the "in his presence" phrase. For instance:

A police officer sees a motor vehicle driving erratically in the highway, he hears shouting in the car, a disinterested person tells him he just saw that driver stagger into the car and it appeared that he was being assaulted by another man who is now a passenger in the car.

From what this officer has seen and heard it appears that the man is probably a drunken driver and he was also being assaulted. Certainly this officer has reasonable ground to believe that a misdemeanor is being committed in his presence (drunken driving and possibly assault).

Paragraph (*b*): Upon stopping the car and investigating he ascertains that the man driving is not drunk but sick, and the shouting was because of his pain. (The other man couldn't drive, but was helping him to the car, and they were on the way to the hospital.) But during the investigation a knife with a 4-inch blade was found on the driver. He was arrested for possession of the knife even though that was not the original reason for stopping him.

Paragraph (*c*): This paragraph allows a police officer to arrest for a misdemeanor even though the offense wasn't committed in his presence, if he has reasonable grounds to believe that the person has in fact committed a misdemeanor. For example:

At 12:30 a.m. there was a simple assault in the north end of the city and a police broadcast was made giving the name and description of the person wanted. At 2:15 a.m., same day, an officer in the south end of the city sees, and arrests the man responsible.

The officer had reasonable ground to believe that the man committed an assault because of the police radio broadcast.

B. A misdemeanor is a crime punishable by less than 1 year in prison or less than a $500 fine.

Past decisions relative to this section

1. Where a police officer followed defendent as he operated his automobile in an erratic manner along a street and arrested him at his residence when he stopped, arrest without a warrant was valid. *State* v. *Cambio* (1945) 71 R.I. 228, 43 Atl. (2d) 307, 44 Atl. (2d) 428.

2. One legally placed under arrest may be searched for evidence with which the crime has been committed and such as is found upon him may be legally taken from him. *State* v. *Chester* (1925) 46 R.I. 485, 129 Atl. 596.

It should be noted, in case No. 2, that the man was legally arrested and not just stopped indiscriminately and searched. Whenever you search a man be sure you are on proper ground.

This is a good time to mention procedure when arresting a female. Unless it is absolutely and positively necessary, to protect your life, or to immediately secure evidence of a vital nature, no male police officer will search the person of a female prisoner. One of the policewomen, or one of the matrons, should conduct a search of the person of a female. If you consider it imperative that the female be searched immediately, you may appoint a disinterested, female bystander, or passerby to assist you. In most cases it is practical to have an officer hold each hand and arm while the female is being transported to the station where a matron or policewoman is available.

4. Arrest without warrant for felony (title 12, ch. 7, sec. 4)

"A peace officer may, without a warrant, arrest a person for a felony, whenever:

"(*a*) The officer has reasonable ground to believe that a felony has been or is being committed and that the person to be arrested has committed or is committing it.

"(*b*) The person to be arrested in fact has committed or is committing a felony, and in such case it shall be immaterial that the officer did not

believe him guilty or on unreasonable ground entertained belief in his guilt."

The same explanations as cited in section 3, paragraphs (*a*) and (*b*) hold true for this section:

A. "Reasonable ground" could be the fact that someone complained of a break, or an assault with a dangerous weapon, etc., and pointed out the man that did it. Or you could hear glass break and a man running away from a store with merchandise. This is not absolute proof but it is "reasonable ground."

If, after arrest, you searched and found narcotics on him the fact that you didn't believe him guilty of the possession of narcotics wouldn't alter the fact that he did possess them, as long as you had reasonable ground to believe him guilty of a crime in the first place.

B. A felony is any crime punishable by more than 1 year in prison or more than a $500 fine.

5. Arrest on improper ground (title 12, ch. 7, sec. 5)

"If a lawful cause of arrest exists, the arrest shall be lawful even though the officer made the arrest on an improper ground."

(*a*) This section means essentially the same as section 3, paragraph (*b*) and section 4, paragraph (*b*).

6. Arrest on warrant not in possession of arresting officer (title 12, ch. 7, sec. 6)

"A peace officer may, without having the warrant therefor in his possession, arrest any person for whose arrest a warrant has been issued, but after arrest, the warrant shall be shown to him as soon as practicable."

(*a*) This section speaks for itself. An arrest with a warrant already issued is most desirable.

(*b*) No arrest should ever be made except on the authority of a warrant of arrest if it is at all practicable to obtain one. This is not always possible, but when it is, one should be obtained.

(*c*) The warrant orders the officer to act and is issued by a member of the judiciary such as supreme court justices, superior court, district court, or municipal judges.

7. Methods of arrest (title 12, ch. 7, sec. 7)

"An arrest is made by the restraint of the person to be arrested or by his submission of his person to the custody of the person making the arrest."

(*a*) Marshall Houts, in his book "Arrest to Release" writes:

"An arrest requires the existence of three elements in combination:

"First, there must be an intent on the part of the officer making it to place his subject under his actual control, to deprive him of his liberty and freedom of action—an intent to restrain him physically if he does not submit peacefully. This intent may develop at any time, either before the officer first approaches his subject or while he is conversing with him.

"Second, there must be a communication of both the officer's intent and his authority. 'You are under arrest,' 'You are my prisoner,' 'You will have to come with me,' are sufficient to communicate the officer's intent. * * * If the officer is in uniform and the subject is in a position to observe it, this in and of itself is sufficient to establish the officer's identity.

"If it is practical the subject should be told the reason he is being arrested. If because of circumstances, telling the subject the reason, would jeopardize future investigation, it is probably advisable to tell him he is being brought to the station for investigation of a crime in which he is a suspect.

"Third, the subject must actually be placed under the control of the officer, 'taken in custody.' If he submits peacefully, this is sufficient. The officer need not touch him, although it is good practice for him to place his hand on the subject's arm or shoulder since this symbolizes the officer's control over the subject. If the subject resists, the officer must be prepared to restrain him physically if necessary. This implies a power on the part of the officer to control his subject. If, for example an officer while patrolling on foot yells to a speeding motorist, 'You are under arrest for violating the traffic laws,' no arrest takes place since he did not possess the power to control the offender; and the courts have held consistently that mere words are never sufficient to constitute an arrest.

"If any one of these three requisites is missing, no arrest takes place."

8. Restraint and force used (title 12, ch. 7, sec. 8)

"No greater restraint than is necessary shall be used for the detention of any person, and no unnecessary or unreasonable force shall be used in making an arrest."

(*a*) How much force may be used in making an arrest? The rule is usually stated rather glibly that as much force can be used as is absolutely, or reasonably necessary. This is essentially true, but it is a generality and could be misleading to an uninformed or nonthinking policeman. There are certain other conditions that must exist.

(1) Unless the officer acts under a valid warrant or has legal grounds for arresting without a warrant, he cannot employ any force. Once again it cannot be emphasized too strongly that there must be a legitimate reason, according to law, for stopping, detaining, or arresting a person initially.

(2) If the officer fails to identify himself properly, or to communicate his authority, he cannot use any force.

(3) If the officer has legal grounds for making an arrest, the use of any force is unreasonable if the subjects submit peacefully: and the officer using unreasonable force may be subject to departmental charges, plus criminal and/or civil charges.

(4) If the subject resists, the officer is entitled to stand his ground; "He need not retreat" as some courts phrase it—and make every reasonable effort to subdue him.

(5) If the resistance actually places the officer's life in danger, he may kill in self-defense, regardless of the original offense charged against the subject.

(6) If the officer's life is not threatened, he may kill a felon to complete his arrest if he has to; but he must stop short of taking the life of a misdemeanant.

9. Conditions justifying force dangerous to life (title 12, ch. 7, sec. 9)

"A police officer may use force dangerous to human life to make a lawful arrest for committing or attempting to commit a felony, whenever he reasonably believes that such force is necessary to effect the arrest and that the person to be arrested is aware that a peace officer is attempting to arrest him."

(*a*) This section is explained in the explanation for the previous section.

10. Resisting illegal arrest (title 12, ch. 7, sec. 10)

"It shall be unlawful for any person to use force or any weapon in resisting an illegal arrest by a peace officer, if such person has reasonable ground to believe that he is being arrested and that the arrest is being made by a peace officer."

(*a*) This section makes it unlawful for anyone to resist arrest even though he knows the officer has the wrong man. For instance, if an officer has a warrant for James Palmer and he approaches a man he thinks is James Palmer and attempts to place him under arrest, even though this man is not James Palmer he cannot resist arrest. Technically this is an illegal arrest but the man must submit and go along to the station where the mistake would be corrected.

(*b*) Although there are no specific provisions in our statutes for resisting arrest under common law all persons must follow a lawful order of a peace officer, and under title 11–32–1 every person who shall obstruct any officer in the performance of his duty shall be imprisoned not exceeding 1 year or fined not exceeding $500.

11. Summons instead of arrest (title 12, ch. 7, sec. 11)

"In any case in which a peace officer is authorized to arrest without a warrant a person for a misdemeanor, he may instead issue to him a summons—

"Willful failure to appear in answer to such summons may be punished by a fine of not over $50 or imprisonment for not over 15 days. Upon failure to appear, a warrant of arrest may issue."

(*a*) The Providence Police Department recently instituted a policy whereby a police officer may issue a summons for a traffic violation.

12. Release of arrested person by officer in charge of police station (title 12, ch. 7, sec. 12)

"The officer in charge of any police station may release any person in his station who has been arrested without a warrant:

"(*a*) Without requiring such person to appear in court, when he is satisfied that there is no ground for making a criminal complaint against such person or

when such person has been arrested for drunkenness but in the judgment of the officer need not be brought before a magistrate; or

"(*b*) If the arrest is for a misdemeanor, upon that person signing an agreement to appear in court at a time designated."

(*a*) On occasion, a well meaning, but perhaps overzealous policeman will bring a person to the station whom he thinks should be charged with an offense. After investigation the officer in charge could release this person generally with a stern warning. Some officers, whose attitude is questionable, would become passively belligerent, and perhaps apathetic about his work, feeling he was let down by his superiors.

While a certain disappointment in the young officer is understandable, apathy, lethargy, or undermining will not be tolerated.

This officer must appreciate the long years of service, and the long years of experience accumulated by the officer in charge of the station. He knows from experience which cases are acceptable in court, and which cases the judge would criticize the police for bringing into court.

Example: A slap in the face by one man to another; while this may technically and legally be considered an assault, there are many times this type of case is straightened out in the captain's office (of course, depending upon the complete circumstances).

Example: The case where a policeman brings a man into the station and says, "I want this man charged with disorderly conduct," when asked why he would say, "He gave me a bad time." Investigation revealed that the officer was writing the man up for a traffic violation and they became involved in an argument with one another, and if there was any disorderly conduct it was on the part of the officer. To save face for this young officer, the officer in charge must diplomatically and tactfully lecture the alleged offender who was operating the car and release him with a warning (the traffic offense would still stand). The officer in charge should then explain the reason the case was not sent to court to insure against discouraging or demoralizing the patrolman.

There are isolated cases but they do happen occasionally, contrary to the opinion of some of the men involved in incidents of this nature that the superiors do not back them up. The superiors bend over backward to legally make a case for a policeman that has been subjected to abuse from a citizen. If it is at all possible your superiors will back you up in the case of unwarranted abuse, but don't ask them to do the impossible and make a case out of something that is 70 percent your fault. The policeman that continually has difficulty along these lines should thoroughly study the training bulletin on "Courtesy," which has a section on human relations.

13. Maximum period of detention (title 12, ch. 7, sec. 13)

"Every person arrested shall be released either on bail or as provided in title 12–7–12 or shall be brought before a judge of the district court within 24 hours from the time of his arrest, unless a judge of the district court of the district where he is detained or of the district court of the district where the crime was committed for good cause shown orders that he be held for a further period of not exceeding (*a*) 24 hours, if he be a resident of this State or (*b*) 48 hours, if he be a nonresident."

(*a*) In order to hold a person an additional 24 hours before sending him to court there must be a specific charge against him in the first place. Then the superior that requests the "hold" must justify wanting to hold the man to the judge. Generally there is some evidence to indicate that he is involved in crimes other than the one he is being charged with.

The channels that a request to "hold" go through are: From the officer in charge of the unit requesting the hold, to the chief of police, to the judge of the district court.

14. Punitive damages for false arrest or imprisonment (title 12, ch. 7, sec. 61)

"In an action for false arrest or false imprisonment, the plaintiff if successful, may be awarded punitive damages in addition to compensatory damages."

(*a*) A policeman need not worry about false arrest or false imprisonment action if he detains, or arrests a person upon probable cause and that person is not held more than 2 hours without a charge being placed against him. It is when a person is detained or arrested by an officer that has no "reason to suspect" is committing, has committed, or is about to commit a crime, that the officer subjects himself to criticism, or even court action.

(*b*) Be certain you are on proper ground when making an arrest.