SENATE—*Friday, July 17, 1970*

The Senate met at 11 a.m. and was called to order by the Vice President.

The Chaplain, the Reverend Edward L. R. Elson, D.D., offered the following prayer:

Eternal God, our Father, come to us now with such a vivid sense of Thy presence that we may meet the duties of this day with the mastery and majesty befitting men who acknowledge Thy sovereignty. When the way is hard, when pressures mount, and tension is high, light up the way to wise solutions to every problem.

Keep us growing in the manly graces of the Master of Life. By kind words, gentle disposition, and firm resolution may we identify ourselves sympathetically with suffering humanity. Give us faith and perseverance, sensitive and generous hearts, so as to bring healing to a troubled world.

As we pray for ourselves, so we pray also for our countrymen that the life of the Republic may be incandescent with righteousness and justice.

In the Master's name. Amen.

MESSAGES FROM THE PRESIDENT

Messages in writing from the President of the United States submitting a nomination and withdrawing a nomination were communicated to the Senate by Mr. Leonard, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Vice President laid before the Senate messages from the President of the United States submitting the nomination of Brig. Gen. Roy M. Terry (colonel, Regular Air Force, chaplain), U.S. Air Force, for temporary promotion to the grade of major general in the U.S. Air Force, and withdrawing the nomination of J. Richard Lucas, of Virginia, to be Director of the Bureau of Mines, which nominating message was referred to the Committee on Armed Services.

THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the reading of the Journal of the proceedings of Thursday, July 16, 1970, be dispensed with.

The VICE PRESIDENT. Without objection, it is so ordered.

VACATING OF ORDER FOR RECOGNITION OF SENATOR MUSKIE TODAY

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the special order for the distinguished Senator from Maine (Mr. MUSKIE) to speak today for not to exceed 30 minutes be vacated.

The VICE PRESIDENT. Without objection, it is so ordered.

LIMITATION ON STATEMENTS DURING TRANSACTION OF ROUTINE MORNING BUSINESS

Mr. MANSFIELD. Mr. President, I ask unanimous consent to limit statements to 3 minutes in relation to the transaction of routine morning business.

The VICE PRESIDENT. Without objection, it is so ordered.

COMMITTEE MEETINGS DURING SENATE SESSION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that all committees be authorized to meet during the session of the Senate today.

The VICE PRESIDENT. Without objection, it is so ordered.

LABOR DAY RECESS AND PROGRAM

Mr. SCOTT. Mr. President, I rise to ask the distinguished majority leader to comment on the proposed and very limited recess which is all, I understand, that we can manage over the Labor Day period; also to inquire as to the schedule for next week.

Mr. MANSFIELD. Mr. President, in response to the questions raised by the distinguished minority leader, if it meets with his approval, and the Senate's, I would suggest that the Senate stand in adjournment from the conclusion of business on Wednesday, September 2, 1970, until Tuesday at noon, September 8, 1970.

Mr. SCOTT. That would meet with my approval, and I have so advised the Senate Republican Members.

Mr. MANSFIELD. I shall advise the Senate Democratic Members. This will be a tentative agreement, subject to approval by our groups and the adoption of an appropriate resolution. The Senator's side has already approved it, and I am sure that ours will, also.

Mr. SCOTT. Yes. While everyone would like more time off, especially in an election year, we must put the public's business first. There is still a great deal of unfinished work to be done.

Mr. MANSFIELD. To recapitulate, the Labor Day recess will begin at the conclusion of the Senate's business on Wednesday, September 2, 1970, and the Senate will then stand in adjournment until noon on Tuesday, September 8, 1970.

Mr. SCOTT. Yes. That is understood.

Mr. MANSFIELD. So far as consideration of proposed legislation is concerned, it is the desire of the joint leadership at this time to take up unobjected-to bills on the calendar and then, at the conclusion of routine morning business, to turn to the consideration of the District of Columbia Court Reform and Criminal Procedure Act of 1970; and when that is finished—evidently not before Monday or Tuesday next week at the earliest—to take up the military procurement bill.

Mr. SCOTT. Mr. President, I appreciate that statement and thank the distinguished majority leader. I hope that we can finish the District of Columbia crime bill with reasonable expedition, in consideration of its importance. The crime clock does not stop running for us. This bill is much needed.

Mr. MANSFIELD. It is, indeed.

THE CALENDAR

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of unobjected-to bills, beginning with Calendar No. 1021.

The VICE PRESIDENT. Without objection, it is so ordered; and the clerk will state the first message.

JAMES E. MILLER

The bill (S. 878) for the relief of James E. Miller was considered, ordered to be engrossed for a third reading, read the third time, and passed, as follows:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That James E. Miller, of Washington, District of Columbia, is relieved of liability to pay to the United States the sum of $1,374.79, representing the aggregate amount of the loss resulting from the robbery of his cashier's cage at the National Bureau of Standards, Gaithersburg, Maryland, on July 11, 1966. In the audit and settlement of the accounts of any certifying or disbursing officer of the United States, credit shall be given for the amount for which liability is relieved by this Act.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91–1017), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

PURPOSE

The purpose of the bill is to relieve the claimant of liability to pay the sum of $1,374.79, representing the aggregate amount of the loss from his cashier's cage resulting from a robbery of the National Bureau of Standards.

STATEMENT

The Department of Commerce has no objection to the enactment of the bill.

In its favorable report on the bill, the Department of Commerce sets forth the facts in the case as follows:

"This bill would relieve James E. Miller, of Washington, D.C., of liability to the United States in the sum of $1,374.79, which represents the aggregate amount of the loss resulting from a theft from his cashier's cage at the National Bureau of Standards, Gaithersburg, Md., on July 11, 1966.

"Mr. Miller was employed by the Department of Commerce as a cashier in the National Bureau of Standards. On July 11, 1966, $1,374.79 in Treasury funds was stolen from his office. The circumstances surrounding this theft were investigated by the Secret Service and the FBI, and Mr. Miller was found not to have been implicated. The General Accounting Office denied a request that Mr. Miller be relieved of liability in this matter on the basis that the office was un-

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attended at the time, was not reasonably secure against theft, and that failure to lock the money in a drawer provided for that purpose was a negligent omission which made the theft possible.

"Mr. Miller retired on disability on December 10, 1967, at which time he was in step 10 of grade GS-5. He had been transferred subsequent to the theft to a position at this grade from his former position of cashier at step 7 of grade GS-6.

"In view of the circumstances and Mr. Miller's otherwise unblemished record, we believe it would be unduly harsh to require him to reimburse the United States for the amount of this loss.

"We would, therefore, have no objection to the enactment of S. 878.

"We have been advised by the Bureau of the Budget that there would be no objection to the submission of our report to the Congress from the standpoint of the administration's program."

The committee believes that the bill is meritorious and recommends it favorably.

DONAL E. McGONEGAL

The bill (S. 1422) for the relief of Donal E. McGonegal was considered, ordered to be engrossed for a third reading, read the third time, and passed, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That Donal E. McGonegal, of Springfield, Virginia, is hereby relieved of all liability for repayment to the United States of the sum of $728.37, representing the amount of overpayments of per diem he received, as the result of administrative error, from the United States Navy during the period from June 26, 1966, through November 22, 1966, while the said Donal E. McGonegal was serving on active duty with the United States Navy. In the audit and settlement of the accounts of any certifying or disbursing officer of the United States, full credit shall be given for the amount for which liability is relieved by this Act.

SEC. 2. (a) The Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the said Donal E. McGonegal, the sum of any amount received or withheld from him on account of the overpayment referred to in the first section of this Act.

(b) No part of any amount appropriated in this Act shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91-1018), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

PURPOSE

The purpose of the bill is to relieve the claimant of all liability for repayment to the United States of the sum of $728.37, representing the amount of overpayments of per diem he received, as the result of administrative error, from the U.S. Navy during the period from June 26, 1966 through November 22, 1966, while he was serving on active duty.

STATEMENT

The Department of the Navy has no objection to the enactment of the bill.

In its favorable report on the bill, the Department of the Navy set forth the facts of the case as follows:

"The proposal would relieve Mr. Donal E. McGonegal, a former lieutenant commander in the U.S. Navy, of liability to repay to the United States the amount of $728.37, the sum he was overpaid per diem for the period June 26, 1966 through November 22, 1966, while he was serving on active duty with the U.S. Navy.

"The records of this Department show that during the period of the overpayment Mr. McGonegal was on temporary duty at Bangkok, Thailand. The disbursing officer for the U.S.S. *Intrepid* (CVS-11) erroneously computed the per diem for this period at the $23 special rate rather than the $18 travel per diem rate established by volume 1 of the Joint Travel Regulations. The difference between the amount paid, $3,426.25, and the amount allowable, $2,697.88, represents the overpayment of $728.37.

"The special per diem rates authorized under the Joint Travel Regulations must be specifically authorized in advance by a special determination issued by the Per Diem, Travel, and Transportation Allowance Committee, or the committee which is authorized by statute to publish the Joint Travel Regulations. The records in this case reveal that no application was submitted for a special per diem allowance.

"It would appear that the overpayment in this case was the result of an administrative error on the part of the disbursing officer for the U.S.S. *Intrepid* in using the wrong standard in determining the proper rate of per diem for Mr. McGonegal. There is no indication that the overpayment was the result of fault or negligence on the part of Mr. McGonegal.

"In view of the foregoing, the Department of the Navy would interpose no objection to the enactment of S. 1422.

"The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee."

The committee believes that the bill is meritorious and recommends it favorably.

Attached and made a part of this report is a letter dated September 23, 1970, from the Department of the Navy.

WILLIAM H. MORNING

The bill (S. 1804) for the relief of William H. Morning was considered, ordered to be engrossed for a third reading, read the third time, and passed, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purposes of the Civil Service Retirement Act, William H. Morning, Silver Spring, Maryland, who was voluntarily separated from his employment with the Department of the Navy on December 30, 1965, for purposes of his retirement, shall be held and considered to have performed thirty years of service creditable for retirement purposes at the time of his separation. The said William H. Morning was voluntarily separated from the service for retirement purposes as a result of his reliance on erroneous information, through administrative error and without fault on his part, that he had performed the thirty years of creditable service requisite for his retirement on December 30, 1965, whereas he had in fact performed twenty-nine years, eleven months, and sixteen days of such service at such time.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91-1019), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

PURPOSE

The purpose of the bill is that for the purposes of the Civil Service Retirement Act, William H. Morning, Silver Spring, Md., who was voluntarily separated from his employment with the Department of the Navy on December 30, 1965, for purposes of his retirement, shall be held and considered to have performed 30 years of service creditable for retirement purposes at the time of his separation. The said William H. Morning was voluntarily separated from the service for retirement purposes as a result of his reliance on erroneous information, through administrative error and without fault on his part, that he had performed the 30 years of creditable service requisite for his retirement on December 30, 1965, whereas he had in fact performed 29 years, 11 months, and 16 days of such service at such time.

STATEMENT

The facts of the case are found in the Department of the Navy report as follows:

"Mr. Morning applied for optional retirement with 30 years of creditable service to be effective December 30, 1965, as supply command management officer, Logistics Division, Bureau of Ships (NAVSHIPSYSCOM), Washington, D.C. He was advised by the personnel office of the Bureau of Ships that he was eligible for optional retirement with 30 years of creditable service. However, the Civil Service Commission on reviewing Mr. Morning's claim for optional retirement, discovered that service rendered in the U.S. Maritime Service intermittently for the period from January 30, 1945, to August 9, 1946, was erroneously credited for retirement purposes. Without such service, the total service creditable for retirement purposes was only 29 years, 4 months, and 19 days. This was offset by crediting 6 months, 25 days of creditable service with the Board of Public Welfare of the District of Columbia, Public Assistance Division. With this service credited, Mr. Morning at the time of his retirement application had performed 29 years, 11 months, and 16 days of creditable service; 14 days short of the 30 years of creditable service required for an annuity based on optional retirement. The administrative error and Mr. Morning's reliance on erroneous information were without fault on his part.

"In view of the above, the Department of the Navy interposes no objection to the enactment of S. 1804."

In agreement with the views of the Navy, the committee recommends the bill favorably. Attached hereto and made a part hereof is the favorable report of the Department of the Navy.

BILL PASSED OVER

The bill (S. 2104) for the relief of Milton Kyhos was announced as next in order.

Mr. MANSFIELD. Over, Mr. President.

The VICE PRESIDENT. The bill will be passed over.

RUTH E. CALVERT

The bill (S. 3138) for the relief of Ruth E. Calvert was considered, ordered to be engrossed for a third reading, read the third time, and passed, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Administrator of Veterans' Affairs is authorized and directed to pay, out of money appropriated for the payment of veterans' benefits, to Ruth E. Calvert, of Stirling, New Jersey, the sum of $1,600, representing the amount of an allowance erroneously authorized by the Veterans' Administration on behalf of her late husband, Ben Sassin Calvert, a disabled veteran, for the purchase of a specially equipped automobile, the payment of such allowance having been disallowed after the purchase of the automobile had been made by the said veteran.

SEC. 2. No part of the amount appropriated in this Act shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same is unlawful, any contract to the contrary notwithstanding. Violation of the provisions of this section is a misdemeanor punishable by a fine not to exceed $1,000.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91-102), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

PURPOSE

The purpose of the proposed legislation is to direct the Administrator of Veterans' Affairs to pay $1,600 to Ruth E. Calvert, of Stirling, N.J., representing the amount of an allowance toward the purchase price of a specially equipped automobile that the Veterans' Administration erroneously authorized for her late husband, Ben Sassin Calvert, the payment of which was disallowed after the veteran had purchased the automobile.

STATEMENT

In its favorable report on the bill, the Veterans' Administration set forth the facts of the case as follows:

"Ben Sassin Calvert (XC-8666773) served honorably in the U.S. Armed Forces from September 7, 1940 through August 20, 1945, and from August 20, 1946, through November 30, 1961. In a rating decision of July 23, 1964, the Veterans' Administration established peacetime service-connection for Mr. Calvert's condition of metastatic carcinoma which, it was determined, had its inception in 1961. He was accordingly awarded disability compensation for total disability. A subsequent rating of March 23, 1967, found him entitled to a higher statutory rate of compensation on account of the loss of use of both lower extremities at a level preventing natural knee action with prostheses in place, effective from August 4, 1966.

"In May 1967, Mr. Calvert filed an application for an award of monetary assistance toward the purchase of an automobile. The law (38 U.S.C. 1901, et seq.) authorizes monetary assistance, not to exceed $1,600, to veterans who incurred the loss or permanent loss of use of one or both feet (among other specified losses) from disability incurred in or aggravated by World War II or Korean conflict service. The benefit is also payable where the disability was incurred in or aggravated by service after January 31, 1955 and where "the injury was incurred or the disease was contracted in line of duty as the direct result of the performance of military duty." Mr. Calvert was not entitled to this benefit since his disability, stemming from service after January 31, 1955, was not incurred as the "direct result of the performance of military duty." However, through error, Mr. Calvert was certified as entitled to the benefit. Before the error was discovered and the veteran notified, he had contracted for the purchase of an automobile, had taken delivery of the new car, and had surrendered his old car which had been resold. The veteran filed an appeal from the decision denying him the $1,600 allowance. The Board of Veterans' Appeals, in its decision of March 28, 1968, denied the appeal holding that the veteran did not meet the criteria of law governing the grant of assistance on the purchase price of an automobile.

"Following the veteran's death, Mrs. Calvert satisfied the contractual obligation by paying the $1,600 due on the automobile. She requested that she be afforded relief by the Veterans' Administration under 38 U.S.C. 210(c)(2). That statutory provision authorizes the Administrator to grant equitable relief where benefits "have not been provided by reason of administrative error on the part of the Federal Government or any of its employees." This request was denied by letter of November 1, 1968. While recognizing that the Veterans' Administration had made an error in the case in issuing a certificate of eligibilty to the veteran, the letter pointed out that the reason the benefits in question had not been provided was not because of that error but because Mr. Calvert did not have basic eligibility for the monetary assistance. Hence, the case did not come within the scope of 38 U.S.C. 210(c)(2) and the relief requested by Mrs. Calvert could not be granted.

"It is obvious that Mr. Calvert quite properly acted under the semblance of authority provided by the erroneous certificate of eligibility and was misled by it to his, and Mrs. Calvert's, detriment. In view of the nature of the disease from which he was suffering, it is quite reasonable to assume that if he had been aware of his nonentitlement to the $1,600 allowance he would not have contracted for the purchase of a new automobile with special controls and relinquished his old automobile.

"Accordingly, while we generally do not favor the enactment of private relief legislation, in view of the facts and equities in this case, we recommend the favorable consideration of S. 3138 by your committee."

The committee, after a review of the foregoing, believes that the bill is meritorious and recommends favorable consideration of S. 3138, without amendment.

DONAL N. O'CALLAGHAN

The Senate proceeded to consider the bill (S. 2755) for the relief of Donal N. O'Callaghan which had been reported from the Committee on the Judiciary with an amendment on page 1, line 6, after the word "sum", strike out "of $1,650.85", and insert "to which he would be entitled under section 5724(a)(4), title 5 of the United States Code and the regulations issued thereunder without regard to section 4.1d of the Bureau of the Budget Circular Numbered A-56, Revised, October 12, 1966."; so as to make the bill read:

S. 2755

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to Donal N. O'Callaghan of Carson City, Nevada, the sum to which he would be entitled under section 5724(a)(4), title 5 of the United States Code and the regulations issued thereunder without regard to section 4.1d of the Bureau of the Budget Circular Numbered A-56, Revised, October 12, 1966. Such sum represents the amount of expenses the said Donal N. O'Callaghan incurred in selling his residence in Carson City, Nevada, incident to his transfer in June 1967, as an employee of the Office of Emergency Preparedness, from one location to another for the convenience of the Government, the said Donal N. O'Callaghan having been unable, due to circumstances beyond his control, to comply with a Government regulation permitting reimbursement of such expenses only in the case of sales completed within one year after transfer.

SEC. 2. No part of the amount appropriated in this Act in excess of 20 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Violation of this section is a misdemeanor punishable by a fine not to exceed $1,000.

The amendment was agreed to.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91-1022), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

PURPOSE OF AMENDMENT

The amendment is inserted at the request of the Comptroller General and has the effect of requiring the claimant to prove his loss was the amount claimed in the bill as introduced.

PURPOSE

The purpose of the bill is to authorize and direct the Secretary of the Treasury to pay, out of any money in the Treasury not otherwise appropriated, to Donal N. O'Callaghan of Carson City, Nev., the sum of his losses on a Government move. Such sum represents the amount of expenses the said Donal N. O'Callaghan incurred in selling his residence in Carson City, Nev., incident to his transfer in June 1967, as an employee of the Office of Emergency Preparedness, from one location to another for the convenience of the Government, the said Donal N. O'Callaghan having been unable, due to circumstances beyond his control, to comply with a Government regulation permitting reimbursement of such expenses only in the case of sales completed within 1 year after transfer.

STATEMENT

Public Law 89-516 provides, in part, that under regulations promulgated by the President, funds available to the departments for their administrative expenses shall be available for the reimbursement of all or part of the expenses of the sale and acquisition of their residences (or the settlement of unexpired leases) by certain Federal officers and employees transferred to new locations incident to their employment. Such reimbursement is made pursuant to regulations promulgated for the President by the Bureau of the Budget.

Bureau of the Budget regulations (section 4.1 of Circular No. A-56) permit such reimbursement only when "the settlement dates for the sale and purchase or lease termination transactions for which reimbursement is requested are not later than 1 year after the date on which the employee reported for duty at the new official station, except that an appropriate extension of time be authorized by the head of the department or his designee when settlement is necessarily delayed because of litigation."

Evidently the pendency of litigation is the only valid reason for granting extensions of time.

Mr. O'Callaghan entered on duty as regional director of his agency on June 1, 1967, at Santa Rosa, Calif., leaving his family

at his last official residence in Carson City, Nev., where efforts were underway to sell the subject dwelling. On January 30, 1968, Mr. O'Callaghan moved his family to Santa Rosa, and left sales efforts to a real estate agency.

By letter dated November 7, 1968, the regional director of the Federal Housing Administration supports Mr. O'Callaghan's claim that homes in Carson City, were "very difficult to sell during the period of June 1967 to August 1968." He states that "our records show that very few new homes were built and sold in the area during this time. Likewise, the market was very slow for the sale of existing homes."

When Mr. O'Callaghan finally sold his house on August 14, 1968, he did so by taking a down payment of only $700 and a second mortgage of $2,588.48, an arrangement which Mr. O'Callaghan states worked a hardship on him but which nevertheless, had to be made in view of rental payments and mortgage payments he was making on his new and old residences.

Mr. O'Callaghan did all he could to comply with the regulations at considerable hardship to his financial situation. Under the foregoing circumstances the committee believes the bill is meritorious and accordingly recommends favorable consideration of S. 2755, as amended.

JOHN BORBRIDGE, JR.

The Senate proceeded to consider the bill (S. 2834) for the relief of John Borbridge, Jr., which had been reported from the Committee on the Judiciary with an amendment on page 1, line 5, after the word "of", strike out "$1,639.61," and insert "$1,584.61,"; so as to make the bill read:

S. 2834

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John Borbridge, Junior, of Anchorage, Alaska, is relieved of all liability for repayment to the United States of the sum of $1,584.61, representing the amount of costs erroneously paid by the United States to move the said John Borbridge, Junior, his dependents, and his household goods in 1967 from Juneau, Alaska, to Anchorage, Alaska, the said John Borbridge, Junior, having made such move to accept a civilian position with the Public Health Service after having been erroneously advised that the Department of Health, Education, and Welfare had authorization to pay such costs. In the audit and settlement of any accounts in regard to such liability, full credit shall be given for the amount for which liability is relieved by this Act.

SEC. 2. (a) The Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the said John Borbridge, Junior, the sum of any amount received or withheld from him on account of the liability referred to in the first section of this Act.

(b) No part of any amount appropriated under this section shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same is unlawful, any contract to the contrary notwithstanding. Violation of this subsection is a misdemeanor punishable by a fine not to exceed $1,000.

The amendment was agreed to.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91-1023), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

STATEMENT

The U.S. Civil Service Commission has no objection to the bill as amended.

In its report to the committee on the claim, the Civil Service Commission has said:

"The proposed legislation would relieve Mr. Borbridge of all liability for the repayment to the United States of the $1,639.61 erroneously paid by the United States to move him, his dependents, and his household goods in 1967 from Juneau, Alaska, to Anchorage, Alaska, to accept a civilian position with the Public Health Service.

"Mr. Borbridge was hired by the Government for the position of native affairs officer with the Alaska Area Native Health Service of the Department of Health, Education, and Welfare at Anchorage, Alaska. The personnel or administrative officer who did the hiring advised Mr. Borbridge that he would be entitled to travel and transportation expenses for himself, his immediate family, and his household goods, and personal effects. Payment was later made by the Government for Mr. Borbridge's expenses incurred in moving from his place of residence in Juneau, Alaska, to his first post of duty in Anchorage, Alaska. Mr. Borbridge was subsequently advised that the payment was made in error and that he would be required to repay the Government.

"On February 26, 1969, Mr. Borbridge filed a claim with the Comptroller General for repayment of the transportation expenses. On July 9, 1969, the Comptroller General, in claim No. Z-2379211, ruled that since Mr. Borbridge was not a Federal Government employee when he accepted the position with Public Health Service, and since the position of native affairs officer was not one for which the Civil Service Commission had determined a manpower shortage existed under 5 U.S.C. 5723, Mr. Borbridge was not entitled to payment of travel and transportation expenses to his first post of duty. The Comptroller General further stated that the Government was not bound by the negligence or erroneous acts of its officers or agents and that no authority existed to waive recovery of the erroneous payment.

"It is evident that when Mr. Borbridge accepted the position with the Government he did so with the belief that he would incur no expenses in moving his family from their place of residence to his first post of duty. A new employee being hired by the Government for the first time could not be expected to know all the technicalities of the travel, transportation, and appointment regulations. To require him to repay the Government under these circumstances would impose an unfair and unnecessary burden on him.

"We have been informally advised by the Department of Health, Education, and Welfare that the proper amount of relief should be $1,584.61 since Mr. Borbridge did not in fact use a $55 authorization for air shipment of personal effects. The Commission would have no objection to the enactment of S. 2834 provided it is amended to grant relief of $1,584.61."

JAMES GLEN RAMSAY

The Senate proceeded to consider the bill (S. 311) for the relief of James Glen Ramsay which had been reported from the Committee on the Judiciary with amendments on page 1, line 7, after the word "approve", insert "in the amount not to exceed $286.50"; at the beginning of line 10, strike out "Ramsey" and insert "Ramsay"; on page 2, line 2, after the word "Glen", strike out "Ramsey" and insert "Ramsay"; and in line 3, after the word "Ann", strike out "Ramsey" and insert "Ramsay"; so as to make the bill read:

S. 311

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of the first section of the Act entitled "An Act providing for the barring of claims against the United States", approved October 9, 1940 (54 Stat. 1061; 31 U.S.C. 71a(1)), the Secretary of the Army is authorized to receive, consider, and approve in the amount not to exceed $286.50 any claim filed within six months after the date of enactment of this Act by James Glen Ramsay (Army Serial Number 224186) of 114 North 11th Street, Miles City, Montana, for a refund of deductions which were made in 1918 and 1919 from the military pay of the said James Glen Ramsay for the support of his mother, Ann Ramsay, and which were not paid to his mother.

The amendments were agreed to.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

The title was amended so as to read: "A bill for the relief of James Glen Ramsay."

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91-1024), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

PURPOSE OF AMENDMENTS

The purpose of the amendments is to correct the spelling of the claimant's name and insert a definite monetary amount of the claim in accordance with the available governmental records.

PURPOSE OF THE BILL AS AMENDED

The purpose of the bill as amended is that notwithstanding the provisions of the first section of the act entitled "An act providing for the barring of claims against the United States", approved October 9, 1940 (54 Stat. 1061; 31 U.S.C. 71a(1)), the Secretary of the Army is authorized to receive, consider, and approve in an amount not to exceed $286.50, any claim filed within 6 months after the date of enactment of this act by James Glen Ramsay (Army Serial No. 224186) of 114 North 11th Street, Miles City, Mont., for a refund of deductions which were made in 1918 and 1919 from the military pay of the said James Glen Ramsay for the support of his mother, Ann Ramsay, and which were not paid to his mother.

SMITHSONIAN INSTITUTION PLANS AND CONSTRUCTION OF MUSEUM SUPPORT AND DEPOSITORY FACILITIES

The Senate proceeded to consider the bill (S. 209) to amend the act of August 22, 1949 (63 Stat. 623), so as to authorize the Board of Regents of the Smithsonian Institution to plan and construct museum support and depository facilities which had been reported from the Committee on Rules and Administration with an amendment on page 2, line 4, after the word "publications;", strike out "and further, appropriations are hereby authorized to plan and construct museum support and depository facilities, and

these appropriations shall remain available until expended." and, in lieu thereof, insert "and further, appropriations not to exceed $500,000 are hereby authorized for preliminary planning and design of museum support and depository facilities proposed to be constructed on land presently owned by the Federal Government within the metropolitan area of the District of Columbia, such funds to be considered a part of the total design cost of the proposed facilities, and to remain available until expended."; so as to make the bill read:

S. 209

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act of August 22, 1949, is amended to read as follows:

"SEC. 2. Appropriations are hereby authorized to the Board of Regents for the maintenance of the Astrophysical Observation and the making of solar observations at high altitudes; for repairs and alterations of buildings and grounds occupied by the Smithsonian Institution in the District of Columbia and elsewhere; and for preparation of manuscripts, drawings, and illustrations for publications; and further, appropriations not to exceed $500,000 are hereby authorized for preliminary planning and design of museum support and depository facilities proposed to be constructed on land presently owned by the Federal Government within the metropolitan area of the District of Columbia, such funds to be considered a part of the total design cost of the proposed facilities, and to remain available until expended."

The amendment was agreed to.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91–1030), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

S. 209 as referred would authorize appropriations to the Smithsonian Institution for planning and construction of museum support and depository facilities.

COMMITTEE AMENDMENTS

The Committee on Rules and Administration adopted an amendment to S. 209 to limit the authorized appropriation to $500,000, to specify that the proposed museum support and depository facilities be constructed on land presently owned by the Federal Government within the metropolitan area of the District of Columbia, and to limit the use of the appropriated funds to preliminary planning and design of the facilities.

BACKGROUND

S. 209, as amended, is intended as a first step toward providing adequate storage and support facilities for the large and growing national collections committed to the care of the Smithsonian Institution.

The collections under the care of the Smithsonian now number in excess of 60 million objects. The total includes items sought by the Smithsonian for historical or scientific value, gifts from foreign countries, and donations of valuable items from individuals. These items vary in size from specimens a few millimeters in diameter to full-scale examples of American rocketry and aircraft.

The problem of storing these items when they are not on public display is becoming increasingly critical. The national collection has been increasing at the rate of 1 million items a year for the past 10 years.

The Subcommittee on the Smithsonian Institution of the Committee on Rules and Administration conducted a joint hearing on S. 209 on September 23, 1969, together with the Subcommittee on Library and Memorials of the Committee on House Administration.

The subcommittee examined in detail the storage needs of the Smithsonian, the Institution's efforts to control the growth of the collections, and the projected costs of the proposed storage and support facilities.

Officials of the Smithsonian Institution testified that additions to the collections are screened carefully to limit accessions to materials valuable for exhibition, research, or historical purposes. The committee was assured that existing collections are, in addition, periodically reviewed and unnecessary items in the collections removed. Proper care, full utilization, and adequate review of the existing collections are hampered however by existing crowded storage conditions.

Nearly all of the national collections are now stored either in the complex of Smithsonian buildings on the Mall in the District of Columbia, or in temporary, obsolete metal buildings at a 20-acre storage site in Silver Hill, Md.

The committee believes that use of space in buildings on the Mall for storage is undesirable. The Mall buildings were constructed primarily for display in an area convenient to visitors. Space on the Mall is far too limited and valuable to be devoted to any substantial extent to warehouse functions. On the other hand, the existing structures at Silver Hill do not provide adequate, secure, modern storage.

Smithsonian officials informed the committee that they envision a 10-year construction program to provide 600,000 square feet of depository and support facility space. The current estimated cost of these facilities, including allowances for cost escalation during the 10-year period, is $19,980,000.

COMMITTEE ACTION

The Committee on Rules and Administration believes that the need for modern depository and support facilities for the Smithsonian has been demonstrated. The committee believes further that the Smithsonian should be encouraged to make the maximum use of existing buildings on the Mall for public display purposes, and utilize less expensive buildings, less centrally located, for storage and support functions.

The committee is concerned, however, that the expenditures for new depository and support facilities be held at the lowest possible level, particularly at a time when Federal Government expenditures must be restrained. Accordingly, the committee has limited the current authorization to $500,000 for preliminary planning and design of the proposed facilities. The Congress thus will have an opportunity to review the plans before funding for construction is authorized.

The committee believes further that the proposed facilities should be planned for a site already owned by the Federal Government, and within the metropolitan area of the District of Columbia, and has amended the bill accordingly.

BILL PASSED OVER

The bill (H.R. 14213), to amend sections 5580 and 5581 of the revised statutes to provide for additional members of the Board of Regents of the Smithsonian Institution, was announced as next in order.

Mr. MANSFIELD. Over, Mr. President.

The VICE PRESIDENT. The bill will be passed over.

SPECIAL POLICEMEN AT THE GOVERNMENT PRINTING OFFICE

The bill (H.R. 14452) to provide for the designation of special policemen at the Government Printing Office, and for other purposes, was considered, ordered to a third reading, read the third time, and passed.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the record an excerpt from the report (No. 91–1026), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

H.R. 14452 would authorize the Public Printer or his delegate to designate employees of the Government Printing Office to serve as special policemen to protect persons and property in premises and adjacent areas occupied by or under the control of the Government Printing Office. Under regulations which would be prescribed by the Public Printer, employees designated as special policemen would be authorized to bear and use arms in the performance of their duties; to make arrest for violations of laws of the United States, the several States, and the District of Columbia; and to enforce the regulations of the Public Printer, including the removal from Government Printing Office premises of individuals who violate such regulations. The jurisdiction of special policemen in premises occupied by or under the control of the Government Printing Office and adjacent areas would be concurrent with the jurisdiction of the respective law enforcement agencies where the premises are located.

TIME OFF AS COMPENSATION FOR OVERTIME WORKED BY CERTAIN EMPLOYEES OF THE GOVERNMENT PRINTING OFFICE

The bill (H.R. 14453) to authorize the Public Printer to grant time off as compensation for overtime worked by certain employees of the Government Printing Office, and for other purposes was considered, ordered to a third reading, read the third time, and passed.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91–1027), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

H.R. 14453 would authorize the Public Printer to grant employees paid on an annual basis compensatory time off from duty instead of overtime pay for overtime work. Additional information on the purpose and background of H.R. 14453, excerpted from the accompanying House report (H. Rept. 91–1121), is as follows:

"PURPOSE

"The purpose of this bill is to grant legislative sanctions for the longstanding policy of the Public Printer which permits, as a substitute for paid overtime, the granting of an equivalent amount of time off from duty to annual salaried employees who are required to work overtime. The proposal, which is patterned after an authorization to the Architect of the Capitol (5 U.S.C. 5543(b)), is submitted in accordance with a recommendation by the Assistant Comptroller General of the United States and with the concurrence of the Joint Committee on Printing."

AIR POLLUTION ABATEMENT BY FEDERAL FACILITIES

The resolution (S. Res. 421) to print as a Senate document the report of the Secretary of Health, Education, and Welfare entitled "Air Pollution Abatement by Federal Facilities" was considered and agreed to, as follows:

S. RES. 421

Resolved, That there be printed, with illustrations, as a Senate document, the report of the Secretary of Health, Education, and Welfare, entitled, "Air Pollution Abatement by Federal Facilities", submitted to the Congress in accordance with section 111(b) of the Clean Air Act, as amended, and that there be printed two thousand five hundred additional copies of such document for the use of the Committee on Public Works.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91–1028), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

Senate Resolution 421 would provide (1) that there be printed, with illustrations, as a Senate document, the report of the Secretary of Health, Education, and Welfare entitled "Air Pollution Abatement by Federal Facilities," submitted to the Congress in accordance with section 111(b) of the Clean Air Act, as amended, and (2) that there be printed 2,500 additional copies of such document for the use of the Committee on Public Works.

The printing-cost estimate, supplied by the Public Printer, is as follows:

Printing-cost estimate

To print as a document (1,500 copies)	$1,535.54
2,500 additional copies, at $72.34 per thousand	180.85
Total estimated cost, Senate Resolution 421	1,716.39

THE 1970 ANNUAL REPORT ON URBAN AREA TRAFFIC OPERATIONS IMPROVEMENT PROGRAMS

The resolution (S. Res. 427) to print as a Senate document the report of the Secretary of Transportation, "The 1970 Annual Report on Urban Area Traffic Operations Improvement Programs" was considered and agreed to, as follows:

S. RES. 427

Resolved, That there be printed, with illustrations, as a Senate document, the report of the Secretary of Transportation, entitled, "The 1970 Annual Report on Urban Area Traffic Operations Improvement Programs (TOPICS)", submitted to the Congress in accordance with section 10 of the Federal-Aid Highway Act of 1968 (Public Law 90–495), and that there be printed two thousands five hundred additional copies for the use of the Committee on Public Works.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 91–1029), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

Senate Resolution 427 would provide (1) that there be printed, with illustrations, as a Senate document, the report of the Secretary of Transportation, entitled "The 1970 Annual Report on Urban Area Traffic Operations Improvement Programs (TOPICS)", submitted to the Congres in accordance with section 10 of the Federal-Aid Highway Act of 1968 (Public Law 90–495); and (2) that there be printed 2,500 additional copies of such document for the use of the Committee on Public Works.

The printing-cost estimate, supplied by the Public Printer, is as follows:

Printing-cost estimate

To print as a document (1,500 copies)	$1,896.61
2,500 additional copies, at $76.47 per thousand	191.18
Total estimated cost, Senate Resolution 427	2,087.79

BILL PASSED OVER

The bill (S. 734) to revise the Federal election laws, and for other purposes, was announced as next in order.

Mr. MANSFIELD. Over, Mr. President.

The VICE PRESIDENT. The bill will be passed over.

SYLVIA M. COLEMAN

The resolution (S. Res. 430) to pay a gratuity to Sylvia M. Coleman was considered and agreed to, as follows:

S. RES. 430

Resolved, That the Secretary of the Senate hereby is authorized and directed to pay, from the contingent fund of the Senate, to Sylvia M. Coleman, widow of Raleigh S. Coleman, Junior, an employee of the Architect of the Capitol assigned to duty in the Senate Office Buildings at the time of his death, a sum equal to six months' compensation at the rate he was receiving by law at the time of his death, said sum to be considered inclusive of funeral expenses and all other allowances.

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The VICE PRESIDENT. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ERVIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. ALLEN). Without objection, it is so ordered.

COMMUNICATIONS FROM EXECUTIVE DEPARTMENTS, ETC.

The VICE PRESIDENT laid before the Senate the following letters, which were referred as indicated:

REPORT ON OCEANOGRAPHIC SHIP OPERATING SCHEDULES

A letter from the Oceanographer of the Navy, transmitting, for the information of the Senate, a report on oceanographic ship operating schedules dated June 1970 (with an accompanying report); to the Committee on Commerce.

HEALTH PROFESSIONALS AND NURSES

A letter from the Secretary of Health, Education, and Welfare, informing the Senate the report on health educational assistance and nurse training due prior to July 1, 1970, under the Public Health Service Act, will be delayed; to the Committee on Labor and Public Welfare.

PROPOSED LEGISLATION TO PROVIDE EMPLOYMENT WITHIN THE ENVIRONMENTAL PROTECTION OF COMMISSIONED OFFICERS OF THE HEALTH SERVICE

A letter from the Secretary of Health, Education, and Welfare, transmitting a draft of proposed legislation to provide for employment within the Environmental Protection Agency of commissioned officers of the Public Health Service, and for other purposes (with accompanying papers); to the Committee on Post Office and Civil Service.

REPORT ON SALE AND EXCHANGE OF PAINTINGS

A letter from the Comptroller General of the United States, transmitting, for the information of the Senate, a copy of a letter report to Congressman HASTINGS KEITH on the sale and exchange of paintings by the National Collection of Fine Arts of the Smithsonian Institution (with accompanying papers); to the Committee on Rules and Administration.

ENROLLED BILLS AND JOINT RESOLUTION SIGNED

The VICE PRESIDENT announced that on today, July 17, 1970, he signed the following enrolled bills and joint resolution, which had previously been signed by the Speaker of the House of Representatives.

S. 980. An act to provide courts of the United States with jurisdiction over contract claims against nonappropriated fund activities of the United States, and for other purposes;

S. 1520. An act to exempt from the antitrust laws certain combinations and arrangements necessary for the survival of failing newspapers;

H.R. 7517. An act to amend the Canal Zone Code to provide cost-of-living adjustments in cash relief payments to certain former employees of the Canal Zone Government, and for other purposes;

H.R. 11766. An act to amend title II of the Marine Resources and Engineering Development Act of 1966;

H.R. 12758. An act to authorize the Secretary of the Interior to establish a volunteers in the park program, and for other purposes;

H.R. 16595. An act to authorize appropriations for activities of the National Science Foundation, and for other purposes; and

S.J. Res. 88. Joint resolution to create a commission to study the bankruptcy laws of the United States.

REPORT OF A COMMITTEE

The following report of a committee was submitted:

By Mr. RANDOLPH, from the Committee on Public Works, without amendment:

S. 3192. A bill to designate the navigation lock on the Sacramento deepwater ship channel in the State of California as the William G. Stone navigation lock (Rept. No. 91–1032).

EXECUTIVE REPORT OF A COMMITTEE

As in executive session, the following favorable report of a nomination was submitted:

By Mr. PASTORE, from the Joint Committee on Atomic Energy:

Glenn T. Seaborg, of California, to be a member of the Atomic Energy Commission.

BILLS INTRODUCED

Bills were introduced, read the first time and, by unanimous consent, the second time, and referred as follows:

By Mr. MOSS:

S. 4097. A bill to preserve and stabilize the domestic gold mining industry on public, Indian, and other lands within the United States and to increase the domestic production of gold to meet the needs of industry and national defense; to the Committee on Interior and Insular Affairs.

By Mr. HARTKE:

S. 4098. A bill entitled "Policeman's Salary Supplemental Act"; to the Committee on the Judiciary.

(The remarks of Mr. HARTKE when he introduced the bill appear later in the RECORD under the appropriate heading.)

By Mr. MILLER:

S. 4099. A bill to amend section 2771 of title 10, United States Code, relating to final settlement of accounts of deceased members of the Armed Forces; to the Committee on Armed Services.

(The remarks of Mr. MILLER when he introduced the bill appear later in the RECORD under the appropriate heading.)

S. 4098—INTRODUCTION OF THE POLICEMAN'S SALARY SUPPLEMENT ACT

Mr. HARTKE. Mr. President, there is a crisis in law enforcement in this country. Last year, this domestic war resulted in 200,000 casualties and huge property losses. I believe this crisis stems, in part, from an increasing demand for highly qualified police officers combined with a seeming reluctance on government's part to pay our policemen an adequate salary. For this reason, I am today introducing legislation to provide a minimum annual salary of $10,000 for full-time police officers.

Though the estimates of the cost of crime in this country range upwards of $35 billion, the President's Crime Commission reports that the 420,000 policemen in America are operating on an annual budget of $2½ billion. Out of every tax dollar, only a penny goes for law enforcement. The nationwide average pay for a police officer is less than $7,000, a figure which constitutes in J. Edgar Hoover's words, "a national disgrace." When one compares the average patrolman's maximum weekly pay of $149 with the $233 a man can earn in most construction trades, it is not difficult to see one of the sources of our crisis in law enforcement. Inflation chips away at the policeman's standard of living; while, far more ominously, the rising crime rate makes the policeman's job increasingly dangerous. The income necessary for a family of four to maintain a moderate standard of living, as given by the Bureau of Labor Statistics, now stands at $10,077; we are forcing our policemen to moonlight in order to provide for their families.

A man willing to accept the low pay and risk that attends being a policeman is given little incentive to do his best. Since the average maximum pay for a policeman is only about $1,200 more than the average starting salary, most policemen receive little financial reward for showing unusual ability. Indianapolis patrolmen, for example, start at $7,000; all they have to set their sights on is a maximum salary of $7,500.

In the past, law enforcement has received a low budget priority; the result is that today we face a critical shortage of police in America. Across the country, police chiefs of medium size and big cities report their departments are below their authorized strength by an average of 10 percent. We would need 50,000 new policemen just to bring all the police departments in the country up to their 1967 authorized strength. More policemen will be needed to cope with demographic trends; the most crime-prone segment of the population—poor urban youths aged 15 to 24—will increase disproportionately until 1975.

The effect of the growing population in urban areas and the accompanying rise in the crime rate on police manpower requirements will be further exacerbated by a sharp rise in the retirement rate of police officers presently serving. The end of World War II saw a rapid upsurge in police recruitments; 25 years later, these men are reaching pension eligibility. Now 40 percent of the Los Angeles police force is eligible for retirement. Soon we will have to replace these men besides adding men to meet the growing demands of an urban society.

It is more than just a question of numbers; today we need a new breed of law enforcement officer, with specialized knowledge in everything from law to crowd psychology. Existing pay scales have proved incapable of attracting men who can meet the high standards our times require. The Los Angeles Police Department, one of the Nation's finest, is forced to turn away all but 3 percent of its applicants for police service, because they lack the necessary qualifications. Pay raises do bring definite results in recruiting qualified personnel; the high motivation and fierce competition for entry which is associated with the FBI is due in no small part to the fact that FBI agents start at $8,400 and eventually advance to salaries of $17,000 in the same assignments.

Some people fear that a bill to guarantee a minimum salary for policemen would be the first step toward a Federal police force. This is a gross exaggeration. All this bill seeks is to attract qualified men into police service. The Safe Streets Act is an acceptable vehicle for channeling Federal funds to the States for increasing the pay of policemen. I think opponents of this measure lose sight of its primary purpose—to provide assistance to hard-pressed State and local agencies, to help them improve their administration of justice. One simply cannot get around the fact that 90 percent of the costs of law enforcement are salaries to personnel. If the Federal Government is going to have a serious role in combating crime, subsidizing the salaries of law enforcement officers must be part of that role.

At the beginning of my statement, I spoke of domestic war in which we are engaged. This war is very familiar to the residents of Washington, D.C. If last week was an average week, there were five homicides, six rapes, 200 auto thefts, 238 robberies, and 447 burglaries. Well trained police cannot defeat crime alone but an adequate, efficient police force is an imperative first step. Unless policemen receive the adequate pay this bill guarantees, the war against crime will continue to be as unwinnable as the one in Indochina.

The PRESIDING OFFICER (Mr. MATHIAS). The bill will be received and appropriately referred.

The bill (S. 4098) entitled "Policeman's Salary Supplement Act," was received, read twice by its title and referred to the Committee on the Judiciary.

S. 4099—INTRODUCTION OF A BILL RELATING TO FINAL SETTLEMENT OF ACCOUNTS OF DECEASED MEMBERS OF THE ARMED FORCES

Mr. MILLER. Mr. President, I introduce a bill to cancel any indebtedness for excess leave of a serviceman who is killed in action. A situation has come to my attention which needs legislative correction. Several of my constituents have notified me of a case where an Iowa serviceman had used 9 days more leave than he had accumulated at the time, and when he was subsequently killed in action in Vietnam, his final paycheck was reduced to recoup the excess leave.

Under present law, the Secretary of the Army has the authority to cancel an enlisted member's indebtedness to the United States. However, the Comptroller General has ruled that this authority may be exercised only with respect to a member who is on active duty, and may not be used for the remission or cancellation of an enlisted man's indebtedness to the Government after his status as an enlisted man has terminated—even when this results from being killed in action.

I ask unanimous consent that a letter from Mr. R. F. Keller, Assistant Comptroller General of the United States, concerning this matter be printed in the RECORD at the conclusion of my remarks.

The bill I am introducing would simply provide that a setoff may not be made against an amount for pay and allowances due a serviceman whose termination of service resulted from his being killed by enemy action. The bill would be retroactive to January 1, 1964, which conforms with Executive Order 11216 by which the President designated Vietnam and the waters adjacent thereto as a combat zone for the purposes of section 112 of the Internal Revenue Code, with January 1, 1964, being the date combat activities began in that zone.

I urge that prompt consideration be given to this bill.

The PRESIDING OFFICER (Mr. MATHIAS). The bill will be received and appropriately referred; and, without objection the letter will be printed in the RECORD.

The bill (S. 4099) to amend section 2771 of title 10, United States Code, relating to final settlement of accounts of deceased members of the Armed Forces, introduced by Mr. Miller, was received, read twice by its title and referred to the Committee on Armed Services.

The letter presented by Mr. MILLER is as follows:

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., July 16, 1970.

Hon. JACK MILLER,
U.S. Senate.

DEAR SENATOR MILLER: This is in further reference to your letter of June 17, 1970, requesting an opinion whether the armed services have authority to administratively waive changes for excess leave granted to a member

of the armed services who is subsequently killed while on active duty.

Sections 4837(d) 6161 and 9837(d) of title 10, U.S. Code, provide for the remitting or cancelling of an "enlisted member's" debts remaining unpaid before or at the time of his honorable "discharge," if the Secretary concerned considers such action to be in the best interest of the United States. This authority extends to debts resulting from overpayments of pay and allowances.

Section 4837(d), cited above, is applicable to the Army and provides:

"(d) If he considers it in the best interest of the United States, the Secretary may have remitted or cancelled any part of an enlisted member's indebtedness to the United States or any of its instrumentalities remaining unpaid before, or at the time of, that member's honorable discharge."

We have held that all the statute apparently requires before remission action may be taken is an indebtedness to the United States over which the Department concerned has jurisdiction and a current status for the debtor as an enlisted man. See 38 Comp. Gen. 788 (1959). In 39 Comp. Gen. 415, 418 (1959), which you state you have studied, we held that once the member's status on the active list is terminated a debt cannot be remitted or cancelled under the authority of section 4837(d) or section 9837(d). That conclusion was based on the legislative history of sections 4837(d) and 9837(d), which indicated that the primary purpose of those statutory enactments was to alleviate a serious morale problem of indebted enlisted men on active duty.

While an indebted enlisted man on active duty would be vitally interested in the possibility that his indebtedness might be cancelled prior to or at the time of his discharge and thus he could return to private life free of such indebtedness, we find nothing in the law which would permit cancellation of such an indebtedness after his active service is terminated. The statutes are phrased in terms of "an enlisted number's indebtedness" and authorize action "before, or at the time of" a member's discharge, all of which seem to contemplate action while the enlisted man is under active military control. Hence, it is our view that those provisions of law furnish no authority for the remission or cancellation of an enlisted man's indebtedness to the Government after his status as an enlisted man has terminated upon his death.

We trust this will serve the purpose of your inquiry.

Sincerely yours,

R. F. KELLER,
Assistant Comptroller General of the United States.

ADDITIONAL COSPONSORS OF BILLS

S. 4080 AND S. 4081

Mr. ERVIN. Mr. President, I ask unanimous consent that, at the next printing, the distinguished Senator from New Mexico (Mr. ANDERSON) and the distinguished Senator from New Jersey (Mr. CASE) be made cosponsors of two bills, S. 4080, to reorganize the courts of the District of Columbia, improve the District of Columbia Bail Agency, authorize a District of Columbia Public Defender Agency, allow the District of Columbia to participate in the Interstate Compact on Juveniles, and for other purposes; and S. 4081, to revise the laws of the District of Columbia relating to juvenile proceedings, to revise the laws of the District of Columbia relating to criminal law and procedure, and to extend the life of the Commission on Revision of Criminal Laws, and for other purposes.

The PRESIDING OFFICER (Mr. BELLMON). Without objection, it is so ordered.

SOCIAL SECURITY AMENDMENTS OF 1970—AMENDMENTS

AMENDMENT NO. 786

Mr. HARTKE submitted amendments, intended to be proposed by him, to the bill (H.R. 17550) to amend the Social Security Act to provide increases in benefits, to improve computation methods, and to raise the earnings base under the old-age, survivors, and disability insurance system, to make improvements in the medicare, medicaid, and maternal and child health programs with emphasis upon improvements in the operating effectiveness of such programs, and for other purposes, which were referred to the Committee on Finance and ordered to be printed.

INVESTIGATION AND STUDY WITH RESPECT TO DRILLING AND OIL PRODUCTION UNDER LEASES ISSUED PURSUANT TO THE OUTER CONTINENTAL SHELF LANDS ACT—AMENDMENTS

AMENDMENT NO. 787

SANTA BARBARA OIL POLLUTION

Mr. CRANSTON. Mr. President, I submit, for appropriate reference, an amendment to S. 1219, a bill which I introduced on February 28, 1969, to terminate drilling for oil in the Santa Barbara Channel.

I believe there has been a growing consensus that no further leases should be put into production in the Santa Barbara Channel. Therefore, I propose to amend S. 1219, to provide for termination of the 68 Federal leases on which there are no drilling platforms or producing wells. This was the intent of S. 1219 in its original version.

However, since at that time the idea of terminating a lease was so novel, I then proposed only to suspend the leases and to make a study of how to terminate them. I believe that a legislative termination, which has always been the most appropriate action, is now much more acceptable. Legislative termination has now been accepted for oil leases by President Nixon as evidenced by S. 4017, the administration bill. In addition, my amendment makes provision for circumstances under which the three leases upon which drilling platforms have been installed may be terminated. Finally, my amendment provides consent for the lessees to bring suit for just compensation, if any, while making clear that there is no implication of liability on the part of the United States.

I feel that this approach is the simplest yet the most comprehensive proposal to end drilling in the Santa Barbara Channel. It makes no reference to the Elk Hills trade proposal, thus leaving the question of opening Elk Hills or other Naval petroleum reserves up to the committee after its hearings on S. 2516 and S. 4017, the two bills by Senator MURPHY which include the Elk Hills plan. It would terminate all 68 undeveloped leases, instead of selecting just 20 such leases, as does the administration bill, or 16, as does S. 3351.

The Subcommittee on Minerals, Materials, and Fuels, under the patient and diligent leadership of its distinguished chairman, the junior Senator from Utah (Mr. MOSS), will hold its third set of hearings on July 21 and 22. In testimony before the committee, I intend to urge the members to accept this amendment.

I am particularly pleased that I have been joined by Senators GOODELL, MONDALE, NELSON, TYDINGS, WILLIAMS of New Jersey, and YOUNG of Ohio in submitting this amendment.

Mr. President, I ask unanimous consent that the amendment be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER (Mr. MATHIAS). The amendment will be received and printed, and will be appropriately referred; and, without objection, the amendment will be printed in the RECORD.

The amendment (No. 787) was referred to the Committee on Interior and Insular Affairs, as follows:

AMENDMENT NO. 787

Strike out all after the enacting clause and insert in lieu thereof the following:

"That, except as provided in section 2, effective on the date of enactment of this Act (1) all lease and rights thereunder issued pursuant to the Outer Continental Shelf Lands Act with respect to lands in the Santa Barbara Channel offshore of the State of California are terminated, and (2) all authority under such Act to issue leases with respect to lands in such channel is terminated.

"SEC. 2. (a) The provisions of the first section of this Act shall not apply to the leases designated as P-0166, P-0240, and P-0241.

"(b) The Secretary of the Interior shall terminate such lease designated as P-0166 at such time as the State of California terminates the lease, designated as PRC-3150, granted by such State with respect to adjoining lands in the Carpinteria Offshore Oil Field.

"(c) The Secretary of the Interior shall terminate such leases designated as P-0240 and P-0241 at such time as he determines that production of oil under such leases can be terminated without undue risk of pollution from resulting oil seepage. Prior to any such termination the Secretary shall take such action as is necessary to prevent or decrease any oil seepage in areas under such leases.

"SEC. 3. Jurisdiction is conferred upon the United States District Court for the Central District of California to hear, determine the just compensation if any, and render judgment upon any claim against the United States on account of the termination of any lease by or pursuant to this Act filed by the holder of such lease at any time within one year after the date of such termination. Nothing in this section shall be construed as an inference of liability on the part of the United States. Except as otherwise provided herein, proceedings for the determinations of such claim, and review and payment of any judgment or judgments thereon shall be had in the same manner as in the case of claims over which such court has jurisdiction under section 1346(a)(1) of title 28, United States Code, but the amount limitation in such section shall not apply."

Amend the title to read as follows: "A bill to terminate certain leases issued pursuant to the Outer Continental Shelf Lands Act in the Santa Barbara Channel offshore of the State of California, and for other purposes."

ENROLLED BILLS AND JOINT RESOLUTION PRESENTED

The Secretary of the Senate reported that on today, July 17, 1970, he presented to the President of the United States the following enrolled bills and joint resolution:

S. 980. An act to provide courts of the United States with jurisdiction over contract claims against non-appropriated fund activities of the United States, and for other purposes;

S. 1520. An act to exempt from the antitrust laws certain combinations and arrangements necessary for the survival of failing newspapers; and

S.J. Res. 88. Joint resolution to create a commission to study the bankruptcy laws of the United States.

ADDITIONAL STATEMENTS OF SENATORS

PROPOSED CONTRACT AWARD BY NASA FOR PROCUREMENT OF APPLICATIONS TECHNOLOGY SATELLITES F AND G

Mr. ANDERSON. Mr. President, last month, on June 12, as shown on page S 8935 of the RECORD, I reported to the Senate on the proposed contract award by NASA for the procurement of Applications Technology Satellites F and G, such award having been made on April 8 to the General Electric Co. and then protested by Fairchild-Hiller Corp. At that time, I noted that NASA had requested the GAO to review the selection of the General Electric Co., reviewed the actions taken by the Aeronautical and Space Sciences Committee and assured the Senate that the committee was fulfilling its responsibilities to the Senate in exercising oversight on this matter.

The committee was kept currently advised by both GAO and by NASA on this matter and on July 2 received copies of the GAO report in the form of a letter to the Administrator of NASA, Dr. Thomas O. Paine, which stated that the award to General Electric should be reconsidered in view of an ambiguity in NASA's instruction to the competitors and a 1-week extension granted General Electric to submit its revised proposal. The committee was advised on the same day that NASA would reopen the competition and on Friday, July 10, the committee was notified that the Administrator of NASA had appointed a top level ATS Procurment Review Committee, of people not previously associated in any way this procurement of these application technology satellites, to review the selection of last April of General Electric for the Applications Technology Satellites F and G procurement.

The committee, headed by Mr. Bruce Lundin, Director of NASA's Lewis Research Center, will consider the facts and circumstances known to have existed on April 7, 1970, based on work done by General Electric or Fairchild-Hiller on or before this date. The review committee's reconsideration, of course, will include the information set forth in the Comptroller General's letter report of July 2, 1970. The Lundin Review Committee has been instructed to complete its work no later than August 3, 1970, and to recommend to an entirely new NASA selection panel whether the April 7 selection of General Electric should be confirmed or reversed in favor of Fairchild-Hiller.

The new selection panel is composed of Dr. Homer Newell, NASA's Associate Administrator, Willis Shapley, Associate Deputy Administrator, and Bernard Moritz, Acting Associate Administrator for Organization and Management. This panel will review the work of the Lundin Review Committee and make the decision on behalf of the Administrator as to who should be awarded the contract to build the applications technology satellites F and G. It should be pointed out that this is not the same as the usual procedure of evaluation and selection. The Lundin Review Committee will reconsider the previous proposals, their evaluation, and that selection. It is, therefore, more investigatory in nature than the ordinary Source Evaluation Board and has the added major responsibility to recommend whether the April 7 selection of General Electric should be confirmed or reversed.

It is understood that this new procedure was established following an agreement between NASA, Fairchild-Hiller, and General Electric that a reconsideration of the selection made on April 7 is preferable rather than a recompetition.

Mr. President, the Administrator of NASA has assured me that he will keep the committee fully advised of further developments in their review of the ATS F and G procurement.

REWARDS TO DECEASED SERVICEMEN'S FAMILIES

Mr. MATHIAS. Mr. President, I was distressed to read about what appears to be an unwarranted hardship on the survivors of members of the Armed Forces killed in action this morning, July 17, 1970, in the Washington Post, Jack Anderson published the following item:

HERO'S REWARD

Sergeant Major James H. Palmer skimmed in his helicopter 100 feet over the Vietnam jungle on April 27 to draw fire from Communist troops so his men on the ground could attack.

The strategy worked too well. Deadly fire from the ground struck the helicopter, which banked, tumbled and exploded, killing him instantly.

A grateful government recommended Palmer for the Silver Star for gallantry and, at the same time, abruptly ended payments to help keep his son in a special school for children with learning difficulties.

Mrs. Palmer, with two other children to raise by herself now, must pay $205 a month to keep her 15-year-old son in a special school in Falls Church, Va. If her hero husband had lived, they would need to pay only $65.

"I hope and pray you will print my story," she pleaded.

Our investigation shows there are 55 wives like Mrs. Palmer who have lost government aid for their handicapped children because their husbands were killed in action. Payments to help 110 retarded children were cut off the day their fathers died for their country.

This cruelty is the result of a legislative goof. When the law was passed setting up the Civilian Health and Medical Program of the Uniformed Services, the payments were restricted to men still on active duty.

The 165 wives and children who have been suddenly stricken from the program could be put back on the rolls for only about $250,000 a year, mere chicken feed in Pentagon parlance.

I would hope that the 91st Congress, which has done so much to provide benefits to our servicemen, both during and after active duty, would correct this unfortunate situation.

To those in a serviceman's family who must carry on after his death in the line of duty, the need for medical care and special educational opportunities does not diminish but, in fact, becomes increasingly difficult.

I believe that we should expand our program for special training for all children with learning difficulties. But it is intolerable that the program should contract under the tragic circumstances of a father's combat death.

It is my intention to introduce during the coming week appropriate legislation to end this problem.

SENATE VA HOSPITAL APPROPRIATIONS INCREASE

Mr. CRANSTON. Mr. President, the other day, my good friend in the other body, OLIN E. TEAGUE, chairman of the Veterans' Affairs Committee, sent me a copy of a letter he had sent to Chairman MAHON of the House Appropriations Committee with a copy to all other House Members. In the letter, Chairman TEAGUE called for the House to support the $100 million additional for VA hospital and medical programs which the Senate adopted on July 7 in H.R. 17548.

The unqualified support of "TIGER" TEAGUE is great news to all supporters of the urgently needed $100 million increase voted by the Senate. He is a notable and historically most successful fighter for the treatment our veterans deserve and to which they are entitled. He has been a constant ally and colleague in efforts to uncover the true facts about VA medical care during the last half year or so. Now, through his great efforts and those of the veterans organizations and others, and with the stanch insistence of our Senate conferees on the bill (Mr. PASTORE, Mr. MAGNUSON, Mr. ELLENDER, Mr. HOLLAND, Mr. ANDERSON, Mr. ALLOTT, Mrs. SMITH, Mr. HRUSKA, and Mr. YOUNG), I am hopeful that we will be successful in appropriating and ultimately spending the full $100 million for the betterment of medical care for our disabled veterans.

Mr. President, I ask unanimous consent that the text of Chairman TEAGUE's July 8 letter be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

COMMITTEE ON VETERANS' AFFAIRS,
Washington, D.C., July 8, 1970.

Hon. GEORGE H. MAHON,
Chairman, Committee on Appropriations,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: I am seeking your support of the Senate action which added $100 million additional funds for the Veterans Administration Medical Program for fiscal year 1971 in H.R. 17548. In April of 1969 the Administration sought to reduce funds for the VA Medical Program and Con-

struction and Modernization of VA hospitals by about $68 million. The Appropriations Committee very wisely restored all of the funds for Medical Care and most of the funds for Construction and Modernization although the major portion of the construction funds were frozen by Presidential Order and not obligated in 1970. It is particularly fortunate that the Medical Care funds were totally restored in the 1970 budget, because on April 2, 1970, it became necessary for the Administration to ask the Congress for an additional $15 million for Medical Care in 1970 and ask for a further amendment of $50 million for Medical Care in the 1971 budget. Almost $10 million of the 1970 request was needed to partially clear up an intolerable dental backlog involving hundreds of thousands of returning Vietnam veterans who were having to wait from four to eight months to have their teeth fixed. These funds did not meet the need and there are over 75,000 pending cases as of the close of the 1970 fiscal year which did not receive treatment because of lack of funds. The dental workload has shown sharp increases in recent months and with the escalation of troop withdrawals from Vietnam, there is every reason to believe that the magnitude of the total VA Medical Program workload in 1971 has been vastly underestimated in the budget requests which the Bureau of the Budget permitted the Veterans Administration to present to the Congress.

For several years the Veterans' Administration has been caught in an impossible budget squeeze between higher medical and drug costs and rising workloads without receiving proportionately higher fund and staffing allocations. Needed equipment and maintenance and repair projects have been deferred and many hospital directors have been unable to fill critically needed positions on their hospital staff, which are recruitable, because they lacked the funds to do so. The average staff ratio in private sector hospitals is about 2.72 employees for each patient. In the Veterans Administration, the nationwide average in its general medical and surgical hospitals is about 1.5 staff for each patient. This means that the VA is trying to render "second to none" medical care with about one-half of the pensive modern equipment was installed but the hospital directors lacked funds to properly staff the units resulting in indequate care for veterans in intensive care units and other special care units for seriously ill veterans.

I realize that in recent years your Committee has appropriated whatever funds the Veterans' Administration was permitted by the Bureau of the Budget to request for the VA Medical Program. In May of this year, the House of Representatives, on recommendation of the Appropriations Committee, added $97 million more to the original requests of the VA Medical Care Appropriations for 1970 and 1971. The funds which the House voted were sufficient to meet some of the most emergent and critical needs which the Veterans' Affairs Committee's six-month long investigation disclosed. These funds will help retain personnel who hospital directors had scheduled to RIF; these funds will prevent some of the closing of wards with over 11,000 beds scheduled for closing in fiscal years 1970 and 1971; these funds will permit the replacement of some of the outmoded patient care and diagnostic equipment with equipment which will render faster and better care; and they will help reduce some of the dental, pharmacy, and other backlogs which presently exist in the VA hospital system.

When the Senate Appropriations Committee considered the House-passed appropriations bill it heard testimony from the Chairman of the Senate Subcommittee on Veterans' Affairs which confirmed and underscored the deficiencies which our Committee found during its investigation. Accordingly, the Senate Appropriations Committee added $100 million more—$80 million for Medical Care and $20 million to proceed at a faster pace with the modernization and air conditioning of 43 hospitals. An example of how this program has lagged is demonstrated in the two attached newspaper clippings which I have had in my files for twenty years concerning the number of outmoded hospital facilities in the VA system. In one of the articles you will note that the Bronx VA hospital, which was the subject of a recent article in Life Magazine, was then listed as in need of "complete renovation." After the Life article was published I personally visited this hospital, as did Chairman Jim Haley of our Hospital Subcommittee and several Members of the Committee. Many Members of the New York Congressional Delegation also accompanied the Committee. While it has been air conditioned, it is far from being completely renovated so that it can efficiently and properly render the care veterans deserve. This hospital alone has reported a 1971 operating budget deficiency of $3,216,942, and they need over $7 million to complete the modernization which was mentioned 20 years ago. Of course, what is really needed is a completely new replacement hospital. The VA construction and modernization program funds have been deferred twice in the last five years even though Congress, during the Eisenhower Administration, agreed to an orderly appropriation of funds over a 10-year period for construction and modernization programs to update the VA medical facilities.

I agree with the Senate action in appropriating $20 million in additional funds to step-up the pace of the hospital construction program. And, I am wholeheartedly in favor of the addition of the $80 million which has been added by the Senate for Medical Care, as these funds are badly needed to start immediate recruitment of much needed hospital personnel. Our Committee investigation disclosed that over 85% of the needed personnel are recruitable and I have introduced legislation which will soon be reported for Floor action to make the Veterans Administration more competitive in recruiting personnel with private sector hospitals.

The simple facts are that the VA Medical Program has fallen woefully behind in its ability to properly and promptly care for America's disabled veterans. It is time to catch up! Even the additional funding voted by the Senate will not enable the Veterans Administration to do all that should be done to modernize its medical system and to take care of the large segment of our aging World War II veterans, plus the increased load from the Vietnam war. But, this will be a significant step. It will be an indicator to both the veterans of this nation and the dedicated corps of hospital personnel, many of whom have become fatigued physically and demoralized mentally because they have tried to do the work of two people, that Congress is raising the priority of funding the medical needs of the Veterans Administration to the level it deserves. Considerable detail is available in the Veterans Affairs Committee on the hospitals of your state if you are interested in seeing it.

I urge your support of the Senate increase of $100 million for the VA Medical Program.

Sincerely,

OLIN E. TEAGUE,
Chairman.

HOUSE STUDIES VA HOSPITAL MODERNIZING

(By James Daniel)

WASHINGTON, March 26.—The House Appropriations Committee is expected to decide momentarily whether to start a huge modernization program for elderly Veterans Administration hospitals.

Rep. Albert Thomas (D., Tex.) points out that there are more than 50 VA hospitals requiring major improvement, plus 16 that are so bad they ought to be replaced entirely.

It is planned to ask for $15,000,000 to start the improvement. The total cost, it is figured, would be at least $150,000,000, and if the replacement institutions were built, possibly $600,000,000—all over seven or eight years.

Some of the VA hospitals are characterized as little better than firetraps.

The average age of veterans hospitals is distinctly in the twilight years for efficient administration. Rep. Olin E. Teague (D., Tex.) reported that 1800 buildings presently used for hospital and medical purposes were erected before 1940.

Some 341 were built between 1880 and 1920—many in the Spanish-American War class. Another 1035 were built between 1920 and 1940, or from President Harding's time on.

OLD VA HOSPITALS CALLED NEGLECTED

WASHINGTON, March. 26.—The House Veterans Committee reported last night that the Veterans Administration has apparently neglected its old hospitals while seeking to build new ones.

As a result Chairman Olin E. Teague (D., Tex.) said a committee survey showed that 56 of VA's 172 hospitals need major modernization.

This work would cost $150,000,000 and would take seven years, Mr. Teague said. Summarizing the committee's findings, based mostly on reports from hospital managers, he said:

"The Veterans Administration has been preoccupied with its new building program, which is coming to an end, and . . . apparently very little funds or attention have been given the need for major renovation and replacement of older hospitals."

Of 4755 buildings in use at VA hospitals, 1800 are at least 15 years old and 341 were built before 1900, Mr. Teague said. Many of the older buildings are so designed as to preclude a modern medical program unless major alterations are made, he asserted.

The report listed as in need of complete renovation and modernization VA hospitals in the Bronx, at Lyons, N.J.; Newington, Conn., and Northport, L.I.

FIFTEENTH ANNIVERSARY OF DISNEYLAND

Mr. MURPHY. Mr. President, in this world with its fast-moving pace, daily trauma, horror stories, and continual strife among people everwhere, it is always good to take notice of what is right with America, as our President just recently asked us to do.

One of the most "right" and good things I know about America is Disneyland, in Anaheim, Calif. I believe that the world of reality is a far nicer place today as a result of the imagination and fantasy so admirably projected by the late beloved Walt Disney. The dream of this one man has done more than any one single act I know to promote good will and happiness throughout the entire world. Consequently, on this the 15th anniversary of Disneyland, I should like to offer my congratulations on this auspicious occasion and extend my best wishes for the continued success of this all-America institution.

I feel certain that millions of folks everywhere would wish to join me in saying "Thank you, Walt Disney"—you have truly made this world a better place in which to live."

RESOLUTION OF TEXAS POSTMASTERS COMMENDING SENATOR YARBOROUGH

Mr. HARTKE. Mr. President, at their State convention in San Antonio in June of 1970, the Texas Chapter No. 18, National Association of Postmasters of the United States, expressed its thankfulness and appreciation to Senator YARBOROUGH for his inexhaustable efforts to better the conditions of the postal service. The postmasters lauded in their commendatory resolution the immense interest in, and devotion to, the improvement of postal affairs that the senior Senator from Texas has demonstrated in his terms of office.

In recognition of the fine accomplishments and contributions that Senator YARBOROUGH has made while on the Post Office Committee, I ask unanimous consent that the following resolution be printed in the RECORD:

There being no objection, the resolution was ordered to be printed in the RECORD, as follows:

COMMENDATORY RESOLUTION

Whereas, The Honorable Ralph W. Yarborough, the Senior Senator from Texas, has represented all of the people of the State of Texas, capably and zealously; and,

Whereas, He has always exerted his abilities and untiring efforts in promoting and advocating better relations between the citizens of our country and in our government and all other peace-loving countries of the world; and,

Whereas, He has capably served as United States Senator for several years and has always demonstrated immense interest in Postmasters and their problems; and,

Whereas, He has always been interested in bettering the conditions of the service and has always cooperated with the Post Office Department and Postmasters towards this and, be it therefore

Resolved: That an expression of thankfulness and appreciation to Senator Yarborough for this inexhaustable efforts on behalf of the Postmasters, Postal Service, and Post Office Employees, as well as of our Country, be sent by the Texas Chapter No. 18, National Association of Postmasters of the United States, assembled in San Antonio, Texas, June 21–23, 1970, and

Be it further resolved: That with our best wishes for his success and continued good health, we pledge our continued appreciation and support of him, and

Be it further resolved: That Senator Yarborough be furnished a copy of this resolution so that he will know of our appreciation of him as well as his efforts and the manner in which he discharges and fulfills the heavy responsibilities which are entrusted to him.

Submitted by Resolutions Committee.

OLIVER N. BRUCK,
Chairman.

AUSTIN, TEX.

THE BOWIE, MD., POST OFFICE

Mr. MATHIAS. Mr. President, today, criticism appears to be in vogue. It is encouraging to receive from a constituent a letter commending the work of Government employees. In this case, the much beleaguered Post Office received the thanks of Mr. R. L. Wright, of Bowie, Md.

The civil servants of the Bowie Post Office took the initiative to find one gentleman's address. Their work is only one example of the dedicated service of public workers throughout the Nation.

I am pleased to be able to join in paying the debt of public recognition to these civil servants.

I ask unanimous consent that the text of Mr. R. L. Wright's letter to the Postmaster General be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

BOWIE, MD.,
July 7, 1970.

POSTMASTER GENERAL,
Washington, D.C.:

I would like to commend the Bowie Post Office and express my appreciation for the excellent job they do. There is too much criticism today of Government employees in general and Post Office employees in particular.

I am involved in some research very important to me and today received two letters of significant value. The letters came from a remote area of Southern Ohio addressed only to R. L. Wright, Bowie, Maryland. In some way your "marvelous mailmen" got these letters to me.

I sincerely appreciate the efforts of the individuals involved in seeking out my address and assuring delivery to me. I apologize for my correspondents who had no way of obtaining a complete address for me.

Please transmit my expression of appreciation to the Bowie Post Office with the realization that it is long overdue recognition and only illustrative of the exemplary attitude and service of the Bowie mailmen.

Respectfully,

R. L. WRIGHT.

COLLAPSE OF WORLD ACADEMY FOR SCHOOLS OF FOREIGN SERVICE

Mr. MOSS. Mr. President, like many others I have been disturbed by the financial collapse of the World Academy Schools for Foreign Studies which left thousands of young Americans stranded in Europe. Many of these students had saved their own money for years in order to afford this summer in Europe. The bitter disappointment felt by these unfortunate young people is well expressed in the following newspaper article. I ask unanimous consent that it be printed at this point in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

TOUR AGENCY GOES BELLY-UP—STRANDED STUDENTS FLY FOR HOME, LEAVE TRAVEL DREAMS IN EUROPE

(By Stanley Johnson)

NEW YORK.—An emergency airlift bringing home 3,500 students temporarily stranded in Europe by the financial collapse of a travel agency began arriving Tuesday.

"It was bedlam" when the students heard that their summer study tours had been cut short, said Debbie Monk, 16, Newport News, Va.

"It was like the beginning of World War III," added Mary Storm, 16, also of Newport News.

The two girls were among 185 persons arriving at Kennedy Airport on a World Airways Inc. charter flight from Geneva, Switzerland.

The cost for the summer abroad was from $1,200 up.

IT WAS HEARTBREAKING

"Most of the students raised the money for the trip by themselves," said Sister Celeste Marie Reichert of St. Edmund's High School, Brooklyn. She chaperoned a group of 13 girls from that school.

"They worked after school and on Saturdays and Sundays. That's what's so sad. It was heartbreaking."

World Academy Inc., which arranged the trips, filed bankruptcy petitions in federal court, Cincinnati, along with four of its subsidiaries. They were World Academy Schools for Foreign Studies, the Institute for Cultural Education, International School for Young Americans and Travel-Rite Inc.

The Provident Bank of Cincinnati, saying the scope of the situation was too great, declined Tuesday to become receiver in bankruptcy for the companies.

PROBLEM IN HAND

"This means that we'll have to start over again as far as the bankruptcy agreement is concerned, but we have the student problem in hand," said Lawrence Kane, Jr., attorney for World Academy.

Kane said the U.S. District Court in Cincinnati would act as receiver until one is found to replace the bank.

Meanwhile, Kane said, the court permitted a company representative to take $5,000 to Europe and "the students have room and board now."

In Salt Lake City, Dr. Lynn M. Hilton, superintendent of the Foreign Study League, said he was "concerned and grieved to hear of the collapse of World Academy."

He told newsmen his league, the nation's largest foreign study service, was on a "firm financial footing." He said the FSL had 14,000 students and teachers enrolled for study abroad this year—roughly equal to the combined total of all competitors.

Hilton said the planned departure of some 160 students from Salt Lake City on Saturday will go ahead as scheduled.

Sister Celeste said her group had only two hours notice they were being flown home.

OGDENITE INVOLVED

Joe Dixon, Ogden, Utah, a tour leader for World Academy, was in Cologne, West Germany when news of the stranded students broke.

Charles Brogdon, a teacher from Broward Junior College in Fort Lauderdale, Fla., said: "The students received the news of the tour's end with dismay, but they cooperated to the fullest extent."

World Academy contracted with Capitol International Airways of Nashville, Tenn., to bring the students home.

Capitol's vice president, Frank Roach, said the line was using its entire fleet of eight planes and subcontracting with other charter lines to help with the job.

More flights from Paris, Amsterdam and Bonn-Cologne, were expected early Wednesday.

The less fortunate students had been in Europe only five or six days.

Groups were caught in France, Italy, Switzerland, Austria, Yugoslavia, Greece and Germany.

NOT WEALTHY

"Most of them don't come from wealthy families," said Dr. William Forel, vice president of Miracosta Academy at Oceanside, Calif., who escorted a group from his own school.

"It was a bitter disappointment for them, of course, but they took it marvelously well. There was surprisingly little griping."

Dr. Forel said he learned of the collapse of World Academy early Sunday when he woke up "hearing a lot of commotion outside in the corridor" of a French university center 20 miles southwest of Paris where some 600 of the students were staying.

"We spent the whole day trying to decide what to do," he recalled. "Some of the students wanted to continue, but the majority could not have raised the funds. It was quite out of the question to continue at our own expense."

Blonde Candy Meek, 18, of Firebaugh, Calif., had tears in her eyes. "I've worked

practically all my life in my parents' shoe store to save for this trip," she said. "I wonder if I'll be able to come back again."

In the plane on the way to Europe, Candy said, the organizers collected an extra five dollars from each student "in case we break anything."

"I never broke a thing," she added. "I wonder if I'll ever even get my five dollars back."

ARMY NEXT TIME

Valarie Rich, 18, of Mount Clemens, Mich., was among those who filed sadly into buses in the 90-degree afternoon heat on their way to Le Bourget airport and a plane to New York.

Mr. MOSS. Mr. President, also mentioned in this newspaper story is the Foreign Study League based in my hometown of Salt Lake City. Like the World Academy, it offers a packaged foreign study program where for one basic tuition fee, the student is provided with round trip jet transporation to Europe, board, and lodging, and a general educational program involving classroom time of 20 hours a week for 6 weeks. Educators have given these programs high marks.

But unlike the bankrupt World Academy, the Foreign Study League is in no financial danger primarily because it is backed by the huge resources of Transamerican Corp., which owns all of the league's stock. Students, parents, and educators can have confidence in the Foreign Study League because they know it is a subsidiary of a well established conglomerate.

I have learned, however, that the Civil Aeronautics Board through its hearing examiner has ordered Transamerica to divest itself of the Foreign Study League. Forcing the Foreign Study League to give up the financial security of the Transamerica relationship would, in my opinion, be a grave mistake. It may well be reasonable to restrict the business transactions between the Foreign Study League and Trans International Airlines, another wholly owned subsidiary of Transamerica. But the CAB should act with caution when a forced divestiture could jeopardize the opportunity for thousands of young Americans to study and travel abroad. Unless such organizations as the Foreign Study League are financially secure, we will eventually see only more heartbreak and hardship.

DISTRICT OF COLUMBIA CRIME

Mr. MATHIAS. Mr. President, I wish to remind Congress of our responsibility in facing and dealing with the serious crime problem in the District of Columbia, since Congress has chosen to retain virtually exclusive governmental authority within the District.

To this end, I ask unanimous consent to have printed in the RECORD a list of crimes committed within the District yesterday, as reported by the Washington Post. Whether the list grows longer or shorter depends on Congress.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

WOMAN CHARGED IN MAN'S SLAYING

A 48-year-old Washington man found Tuesday night in his apartment with a gunshot wound in his head died yesterday, police reported.

The resident manager of the apartment house, at 1334 Fairmont Street NW, told police he discovered the victim, T. C. Thomas, about 9:20 p.m. Thomas was pronounced dead at Washington Hospital Center at 3:45 a.m. Thursday.

Police arrested Macie Lee Parks, 50, of 5574 B St. SE, at the apartment and charged her with homicide.

In other serious crimes reported by area police up to 6 p.m. yesterday:

ROBBED

DeWitt Moore Jr., of Washington, a driver for the Canada Dry Co., of Silver Spring, was held up about 2:20 a.m. Wednesday at 46th Street and Hunt Place NE by two men with revolvers. "Give us the money," ordered one. Moore told them the cash was in the safe and he did not have a key to unlock it. The men removed his wallet and fled east on Jay Street.

Paul Daniel Danish, of Washington, was beaten and robbed about 11:10 p.m. Wednesday by six men who attacked him at 3d and C Streets NE. The men surrounded Danish, knocked him to the ground and fled with the money from his wallet.

Ahmad Batouir, of Washington, was held up about 2:50 p.m. Wednesday by two young men who attacked him from behind in the 1800 block of Kendall Street NE. The men, both displaying revolvers, threatened, "Give us all your money or we'll kill you." One of them took the bills from one of Batouir's pockets while his partner removed a change purse from another pocket and the pair drove east on Capitol Avenue in a black car.

Oliver W. Johnson, of Washington, was beaten and robbed by two youths in the 100 block of 18th Street SE. The two hit him until he fell to the ground and took his wallet and keys.

Lucille E. Brown and Edna Mae Thorton, both of Washington, were held up about 11:30 p.m. Wednesday by two men, one wielding a revolver, near their apartment building in the 5000 block of 1st Street NW. "All right. Give it to me," the gunman demanded. His companion took their pocketbooks.

Donald Major, of Washington, was beaten and robbed shortly after midnight Wednesday by two youths who approached him from behind at 19th and East Capitol Streets NE. One struck him over the head with an unidentified object, threatened him and demanded his money. After taking his wallet, the pair ran south on 19th Street.

James A. Thomas, of Washington, was beaten and robbed about 7:25 p.m. Wednesday by two youths on 16th Street NE between Gales and Rosedale Streets near his home. The youths forced Thomas into an alley where he began struggling with one of them. The youth drew a gun and knocked Thomas to the ground. The other youth took a six-pack of beer and a large amount of bills and change.

Caroline Allen, of Washington, was beaten and robbed about 9:45 p.m. Wednesday by two youths in the 500 block of Valley Avenue SE. One of them struck her over the head while the other one forced her to release her pocketbook.

Greta Renee Graham, of Washington, was held up about 5:20 p.m. Wednesday inside the Woodward & Lothrop store in the 1000 block of F Street NW by two youths. One drew a long-bladed knife and warned, "Be quiet." The other youth grabbed her pocketbook, removed her wallet and tossed the purse to the ground. The pair then ran up the stairs.

William Brockington, of Washington, was held up about 12:35 p.m. Wednesday while he was parked in his car at the corner of 24th and Douglas Streets NE by two young men. One held a pistol at Brockington's head and said, "Give it up." Brockington handed a large amount of money to the gunman, who warned, "Do not turn around for five minutes," and escaped with his partner in a bronze car.

Allen B. Wilson, of Washington, was beaten and held up about 4:30 p.m. Wednesday at 46th Street and Sheriff Road NE by two youths who asked if he had any money. When Wilson said he did not, one of the youths grabbed his arms and the other hit him. The pair took the money from Wilson's pockets.

William O. Hickey, of Glen Burnie, was held up shortly after 3 p.m. Wednesday by a youth who approached him in his truck at North Capitol and O Streets NW. He entered the passenger's side of the truck and ordered Hickey to drive to New York Avenue. The youth then drew a gun and forced the driver to hand over his watch, money and diamond ring. The gunman forced Hickey to stop and pick up a second youth, then fired one shot, which missed, and fled.

Mary Linder, of Canton, Ohio, was robbed by two men about 6:30 p.m. Wednesday as she was getting out of her car in the 700 block of Monroe Street NE. One man grabbed Miss Linder by the neck while the other one took her pocketbook.

Johnnie Johnson, of Washington, a driver for the Good Humor Co., was held up about 9:30 p.m. Wednesday while he was vending at 17th Street and Potomac Avenue SE. A young man approached Johnson and asked for some ice cream. As he was filling the order, another man, displaying a gun, told him, "This is a stickup." The pair took Johnson's money and fled west in the 1600 block of Potomac Avenue.

Wilbert Ross, of 460 N St. NW, was held up about 7:15 a.m. by two men who opened his apartment door and demanded, "Where's the money?" One showed Ross the revolver in his coat pocket, searched his pockets and took his watch and money. "You come out and we will blow you away," the pair threatened, and fled.

Matt's Liquor Store, 3203 Naylor Road, Silver Hill, was robbed about 6:40 a.m. yesterday of an undetermined amount of money by a man armed with a .45 caliber automatic who walked behind the counter and demanded the cash from the register.

Edwin Marshall, of Washington, was held up about 9:45 a.m. Tuesday by a man wielding a gun who approached him in a parking lot in the 6500 block of Chillum Pl. NW, and ordered him to face the wall of the adjacent building. The gunman frisked Marshall, took the money from his pockets and fled toward the railroad tracks.

Tower of Pizza, 2916 Nichols Ave. SE, was held up by two men who entered the shop Tuesday night. One of them, displaying a gun, told the owner, "Give me the money and put it in a paper bag." The pair escaped in an alley beside the shop.

Pauline Ellis, of Washington, was beaten and robbed shortly after 8 p.m. Tuesday by two youths who attacked her in the 600 block of Condon Terrace SE. After knocking her to the ground, the assailants took her pocketbook and fled into the 400 block of Atlantic Street NE.

Murry's Steaks, 4019 South Capitol St. SW, was held up about 9:15 p.m. Tuesday by two youths who ordered a steak sandwich. One of them pointed a pistol at the clerk while his companion opened the cash register and scooped out the money. The pair then ran out of the store.

William Violette, of Brentwood, a taxi driver was robbed about 11:40 p.m. Tuesday by a young man wielding a gun who asked the driver to take him to the 1300 block of Independence Avenue SE. At 7th Street and Independence Avenue, the passenger ordered Violette to stop and said, "Give me your money or I'll kill you." Taking his watch and cash, the gunman escaped into a park near the intersection.

Frederick Eugene Underwood, of Washington, was held up about 9:15 p.m. Tuesday

at the corner of Summit Pl. and U Street NE, by three young men carrying guns in their pockets who warned, "Don't run or we shoot. Give us your money." Underwood gave the gunmen his bills and change and they escaped.

Floyd Minor, of Ravenna, Ohio, a truck driver for Continental Oil Co., was beaten and robbed about 3:30 a.m. by two men and a woman who carried him to the second floor of a building in the 1000 block of Massachusetts Avenue NW. After the men hit him in the head and body, the trio frisked him and fled with his money and watch.

Wyatt Langford, of Washington, was held up about 6:20 p.m. Tuesday by four youths as he was entering his car in the 700 block of 3d Street NW. One of them held a revolver at Langford's side while the others searched him and removed his wallet. The youths then fled into an alley towards 4th Street.

Sanford Jameson, of Darien, Conn., was beaten and robbed shortly after 10 p.m. Monday by two men who attacked him on 19th Street NW, struck him on his head and face until he fell to the ground. The pair then removed his wallet from his pocket and fled.

STOLEN

A canvas bag containing $700 in cash was stolen between 3 and 9:30 a.m. Monday from the Good Guys Restaurant, 2311 Wisconsin Ave. N.W.

Typewriters and other office equipment, with a total value of $700, were stolen between 6 p.m. Monday and 8 a.m. Tuesday from Tecnifax, 6200 Kansas Ave. NW.

Four typewriters valued at $1500 were stolen between 6 and 10 p.m. June 22 from a classroom at Roosevelt High School, 4301 13th St. NW.

An $800 calculator was stolen sometime before 4:20 p.m. Monday from a car belonging to Daniel Keller, of Maryland, while it was parked in the 1020 block of O Street NW.

A typewriter and a record player were stolen between 3:30 p.m. Monday and 9:30 a.m. Tuesday from Elliott Junior High School, 19th Street and Constitution Avenue NE.

A trailer carrying a 14-foot boat with a 50 horsepower engine valued at $900 was stolen between 9 a.m. Monday and 11:40 Tuesday from E. A. Page, of Norfolk, Va., when it was separated from his car at 10th and K Streets NE.

An adding machine and an IBM typewriter were stolen between 5 p.m. Tuesday and 7 a.m. Wednesday from an office in the administration building at Catholic University, 620 Michigan Ave. SE.

OIL RESTRICTION LAID TO NIXON

Mr. McINTYRE. Mr. President, Frank Porter, writing in Friday's Washington Post, reports that Capitol Hill sources said President Nixon actually sought a measure which would tie his hands on oil import policy and take him off the hook with northeastern legislators and consumers who are pressuring for an easing of quotas to get lower priced fuel oil.

Mr. President, if this report is true, if Mr. Nixon did, indeed, solict the House measure which would bar him from abandoning oil import quotas for the tariff recommended by the Cabinet advisory committee, then the oil-starved, overcharged people of New England should flood the White House with letters of indignant protest.

I am sure this bit of subterfuge will not fool the people of my region who are sick and tired of paying needlessly inflated prices for the oil to heat their homes and businesses.

These people are fully aware, Mr. President, that the present oil import quota system is costing consumers from $4.5 billion to $7 billion a year that they should not have to pay.

Mr. President, I ask unanimous consent that Mr. Porter's article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

OIL QUOTA SUPPORT ATTRIBUTED TO NIXON

(By Frank C. Porter)

President Nixon actually solicited the support of Rep. Wilbur D. Mills (D-Ark.) for a measure that would tie his hands on oil import policy, a Capitol Hill source said yesterday.

The revelation came in the wake of tentative agreement Wednesday by the House Ways and Means Committee on the provision which would bar the President from abandoning oil import quotas for a tariff recommended by a cabinet advisory group. Mills is chairman of the committee.

Ironically, Mr. Nixon's own special representative for trade negotiations, Carl J. Gilbert, told the committee in closed session that the administration was opposed to the provision, an amendment to the omnibus trade bill.

An aide to Gilbert said he had no knowledge of the President's plea to Mills or of his support of the measure.

One person privy to the action said Mr. Nixon solicited Mills' backing for the measure "to get him off the hook."

The President received strong campaign support in 1968 from the oil industry, which in general is satisfied with the status quo and regards the present quota system as more favorable to its interests than the proposed tariff. The staff could result in increased imports and lower domestic prices for crude petroleum and probably its derivative products.

When the cabinet task force, by a vote of 5 to 2, advised the switch to a tariff system last winter, Mr. Nixon took no action on the recommendations. Instead, he appointed another commission to study them. The administration indicated there would be no decision at least until after the election.

If the oil quota amendment becomes law, Mr. Nixon would thus be insulated from strong political pressures from the other side—from legislators from the oil-hungry Northeast and consumer groups in particular—to shift to a tariff system.

There were also reports yesterday that Chairman Mills received a pledge from Mr. Nixon before the latter's inauguration that as President he would not recommend legislated import quotas for textiles, which also have been tentatively approved in the trade bill.

Mr. Nixon had promised help to textile interests in their plea for relief from rising imports. His hope was to negotiate an international agreement setting voluntary import quotas on man-made and wool textile products similar to the existing pact covering cotton textiles.

Having received the President's asurances that he would not seek legislated quotas, Mills introduced a bill providing for precisely those quotas in the event a voluntary agreement was not reached. Its ostensible purpose was to give the United States greater bargaining power in those negotiations.

When the negotiations collapsed, the administration suddenly came out in support of the Mills bill. Sources close to the chairman, long a liberal trade advocate, say he felt the rug was pulled from under him.

Meanwhile, the oil quota amendment was greeted with cries of outrage from many lawmakers.

Rep. Charles A. Vanik (D-Ohio), one of five Ways and Means members who voted against it, claimed the measure had been hastily rammed through without time for adequate consideration.

"This ill-conceived action puts the slimy hand of oil on the trade bill, converting it into a gargantua of greed," he said. Vanik said the action freezes a program which costs the American consumer $4.5 billion to $7 billion a year.

"I am ashamed of the trade bill and the process under which it was conceived and developed," Vanik said. "It is ugly, it is oppressive, it is Rosemary's Baby."

A source close to the committee said the other negative votes were cast by Reps. Martha W. Griffiths (D-Mich.), James A. Burke (D-Mass.), William J. Green (D-Pa.) and Sam Gibbons (D-Fla.).

CAPTIVE NATIONS WEEK

Mr. CURTIS. Mr. President, 25 years ago the flames of freedom that had smoldered for so many years flared up and shone brightly once again. Americans had played a great part in rekindling these fires. Many thousands of Americans had died in the process. Many more thousands were wounded.

Americans had given freely of their resources—both in material things and in human lives to help achieve this grea and noble rebirth of freedom.

We rejoiced that the war was over in Europe. Our joy was made more sweet by the knowledge that we had fought for a great and noble purpose—the destruction of tyranny and the betterment of our fellow men—and that these noble ambitions had been achieved. All through the land the churches were filled with prayers of thanksgiving, and the streets with joyfully dancing people.

But there were those among us who, though they shared our joy that war was at an end, still tempered that joy with a sense of foreboding. They held then the knowledge that we all share now:

Freedom in Europe was by no means all encompassing.

They knew that, while we were helping to destroy the great prison bastion that was Nazi Europe, the walls were being rebuilt by yet another tyranny—that of Communist Russia.

I refer to that great body of fine Americans whose origins were in Eastern Europe—in that part of the continent which was being—and I use this word in quotes—"liberated" by the armies of the Soviet Union.

Many millions of Americans have relatives, some close, some more distant, living in that area of Europe. Their families migrated to America from those countries: from Poland, from Rumania, from Czechoslovakia, from Hungary, from Bulgaria, from Latvia, Lithuania, Estonia; from Germany east of the Elbe.

For generations their ancestors lived under the threat of the Russian power to the east. And they passed along these fears—well-grounded fears they were, too—generation to generation.

So it was that these Americans held within themselves the knowledge and the fear that all was not well, though the battlefields were now quiet, Hitler was dead, and nazism had been destroyed.

It is of no solace to them now to know that they were right and that elsewhere

in America this knowledge has had to be accepted.

The lesson we Americans can and must learn from this tragic episode in the history of mankind is that freedom cannot be taken for granted. Having won a battle against one form of oppression, we cannot supinely expect that freedom will automatically become a universal state of man, or even replace the tyranny just destroyed.

That we won the battle of Europe cannot be denied.

But in winning that battle, we did not achieve our basic goal—freedom of choice and opportunity for all Europeans.

It has been said before, here and elsewhere, that freedom is like a fragile vase—difficult to achieve, beautiful when accomplished, but oh so easy to shatter.

It has also been said many times, but I feel it is worth reiterating, that no man is completely free unless all men, everywhere, are free.

It may also be said here that freedom can be smothered and subdued, but so long as there is one free man in the world freedom cannot be killed.

Therefore, Mr. President, I urge Americans to guard their own freedom jealously, not only to preserve it for themselves but to give hope to men and women everywhere who live in bondage.

We must live our own freedom. We must be willing to fight for its preservation.

Only thus can we hope to keep the fires of freedom burning so that they provide a beacon for the rest of the world, and provide at least a small glimmer of warmth for those upon whom the chill hand of tyranny has been clamped.

We can rightfully rejoice in our liberty. We gladly share it with all others regardless of background, regardless of place of origin, regardless of color or creed.

Because in this sharing, this giving, we strengthen and broaden our own freedom.

It is important that we remember this as we end the observance today of Captive Nations Week for 1970.

FUNDS FOR NASA

Mr. ANDERSON. Mr. President, last week the Senate passed an appropriation for the National Aeronautics and Space Administration which was recommended by the Appropriations Committee and supports the earlier authorization for the fiscal year 1971 program. The Washington Post, on Sunday, July 12 published an excellent editorial on this matter. The editorial argues eloquently that the Senate acted prudently in not curtailing NASA's funds. In part, the editorial says:

The country has so many problems, the argument goes, that it must divert the money that might be spent on manned space flights to programs that will aid more directly and more quickly the people who now inhabit the earth.

This is a hard argument to answer for to answer it fully and logically (or, for that matter, to make it fully and logically) requires a prescience that none of us has. No one really knows what is to be gained by going on with manned space flights and no one really knows what is to be lost by stopping them. There is a universe out there that we don't know about. There is, of course, the argument that unmanned space probes can tell us all we need to know about it for as far into the future as we now care to think. But it is difficult, if not clearly wrong, to accept the idea that machines can totally replace men in so delicate a task of exploration.

We raise this now because the debate in the Senate last week, while cast in terms of merely slowing down the pace of the manned space program, was in fact a debate over halting it. The cuts already made in NASA's budget have built in a halt to manned space activities from 1975 to, probably, 1978. To expand that period of inactivity to four or five years, it seems to us, is to kill the program. So long a pause would mean the dismantling of the teams of experts and probably of the equipment that put Apollo together and controlled its flights. Rebuilding those teams would be a long, arduous and costly process.

Thus we were pleased that the Senate did not go along with its liberal bloc which voted almost to a man to curtail NASA's funds even more.

Mr. President, traditionally, liberals are regarded as forward-lookers, men of progress, supporters of the new and innovative, men with faith that a progressive world now will provide a better future world for all mankind. Well, that is what the space program is all about, and that is why it is distressing to see so many of my liberal colleagues consistently lining themselves up in opposition to the space program, which, as the editorial states, "may well hold the key to man's future." I would urge my liberal friends to look at the facts, search their minds, and reexamine their position. It just does not seem right for the liberals to be against the future.

Mr. President, I ask unanimous consent that the Washington Post editorial be printed in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

THE CADILLAC IN THE SKIES

Just a year ago, the manned space program was riding high. Apollo 11 was waiting on the launch pad at Cape Kennedy for its crew and the world was waiting for the most spectacular trip in history to begin. The excitement and the glamor passed quickly and the manned space program is now in trouble. It came within a handful of votes last week of being strangled by the Senate and if the debate there is any indication more troubles are ahead. The psychology that sustained the program during its heydays of the 60s has been reversed and manned space flight is now regarded by many people as the Cadillac in the skies.

This psychological shift is understandable. To many of those who are deeply concerned about the quality of life at home, about the educational level of our children, the housing conditions of our poor, the pollution of our surroundings, supporting manned space flight is as provocative as riding in a chauffeured limousine through the slums. The country has so many problems, the argument goes, that it must divert the money that might be spent on manned space flights to programs that will aid more directly and more quickly the people who now inhabit the earth.

This is a hard argument to answer for to answer it fully and logically (or, for that matter, to make it fully and logically) requires a prescience that none of us has. No one really knows what is to be gained by going on with manned space flights and no one really knows what is to be lost by stopping them. There is a universe out there that we don't know about. There is, of course, the argument that unmanned space probes can tell us all we need to know about it for as far into the future as we now care to think. But it is difficult, if not clearly wrong, to accept the idea that machines can totally replace men in so delicate a task of exploration.

We raise this now because the debate in the Senate last week, while cast in terms of merely slowing down the pace of the manned space program, was in fact a debate over halting it. The cuts already made in NASA's budget have built in a halt to manned space activities from 1975 to, probably, 1978. To expand that period of inactivity to four or five years, it seems to us, is to kill the program. So long a pause would mean the dismantling of the teams of experts and probably of the equipment that put Apollo together and controlled its flights. Rebuilding those teams would be a long, arduous and costly process.

Thus we were pleased that the Senate did not go along with its liberal bloc which voted almost to a man to curtail NASA's funds even more. Many of the arguments made by NASA's supporters seem to us quite irrelevant—curtailment would mean unemployment in the aerospace industry, the Russians will be out there, and so on. But so did the basic argument made by the programs critics—that the funds should be used at home. We all know that cutting NASA's budget by $100 million or $500 million or $1 billion does not mean that the government is going to spend that much more on pollution control, education, housing, urban renewal and all the things that we ourselves place high on the list of national priorities. The fact is that if Congress really wanted to do all the things its members talk about, and postpone each year because of fiscal restraints, it wouldn't have turned last year's tax-reform bill into a tax-reduction bill.

The basic issue involved in NASA's appropriations this year, as it will be next year and for many years to come, is whether this country should give up something it has done and which is going well, something that has brought it great international prestige and internal pride, and something that we believe may well hold the key to man's future.

AGRICULTURAL PAYMENT LIMITATIONS

Mr. MURPHY. Mr. President, my purpose in speaking today is to discuss agricultural payment limitations, particularly as these limitations affect cotton. Last week, the Senate passed an amendment to the Department of Agriculture and related agencies appropriations bill (H.R. 17923), that limited to $20,000 price-support payments for any crop, except sugar. In addition, the House Committee on Agriculture is currently developing the farm bill, and here in the Senate the Committee on Agriculture has completed its hearings on the farm program, and is awaiting action by the House.

There is a lot of emotionalism about the current support programs, in part, because like any artificial program, there are abuses and inequities. Senators are all aware of these as they have been thoroughly documented on the Senate floor by the distinguished senior Senator from Delaware (Mr. WILLIAMS). In spite of these, I want to call on my colleagues, both in the Senate and in the other body, especially those on the House Committee on Agriculture, to avoid this emotional-

ism and find a workable and practical solution to the problem. Our farm programs are far too complex to tinker with by payments ceilings alone, without careful consideration of the effects on the entire agricultural industry.

Let me make it clear that I am in favor of eliminating support payments entirely, and thus cosponsored S. 2524, introduced by our late beloved minority leader, Senator Dirksen. This measure would phase out farm payments over a 5-year period.

I think we in Congress are, in part, responsible for the situation since we have developed over the years this involved, technical, and complicated program. Certainly no Philadelphia lawyer understands it, and only a few from Des Moines or Fresno. It is unfair for us virtually to eliminate in 1 year a program we have led the farmer to rely on and, indeed, to develop the economics of his whole industry around. It is not a question of whether the limitations should be $20,000, $55,000, or $110,000, but rather fairness to a segment of our Nation whose continued production is so important to the well-being of our national economy.

Let me make it clear, as well, that my interest is not in continuing payments to the large growers for whom it makes little or no difference whether the amount is $20,000 or $110,000. These growers will leave the program under any circumstances and attempt to compete elsewhere. I am, however, worried about the smaller growers who are the ones whose continued ability to compete is threatened. It might well be that those who are pushing for payment limitations because they are concerned about the increasing concentration of farming in the hands of large agribusinesses are the very ones who will accelerate this concentration by forcing the small grower out of business.

In short, unless we in Congress take a long look at the farm program in its entirety, we could well see the demise of our ability to produce so well at such a relatively low cost.

It is my deep desire that in these days of continued confusion, government by crisis, and the pressures of instant communications, we in Congress always make certain of the overall effect while we are rectifying a few special cases.

RECESSION CAN'T CURE INFLATION

Mr. HARTKE. Mr. President, the Consumer Price Index posted its 41st consecutive advance this May. This is the longest inflationary stretch in the 57 years the index has been compiled. Presidential statements that the administration's "game plan" is working obviously lack value.

In the July issue of Dun's, Mr. Max Shapiro argues that the policies pursued at present are doomed to failure and, what is worse, there is not the slightest sign that the administration is contemplating a policy change. The only thing that has been changed is that the target date for ending inflation has been moved to 1973.

The administration still pins its hopes for braking the soaring cost of living on a minirecession. Though it is inconceivable to me how the administration could be willing to tolerate an unemployment rate of 6 percent, Mr. Shapiro gives clear evidence to demonstrate that even a 6-percent rate of unemployment will be insufficient to halt inflation.

Nevertheless, inflation must be arrested. To do nothing is to stand by while the inflationary whirlwind increases in fury. In 1967, the cost of living rose 3.5 percent; in 1968, 4.7 percent; and in 1969 there was a 6-percent increase with no letup in sight.

Clearly what is needed is a new approach to the inflation problem, but first we must discard the inadequate thinking of the past. Mr. Shapiro's article goes a long way toward dispelling the shibboleths that seem to haunt administration policymakers.

Mr. President, I ask unanimous consent that the article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

RECESSION CAN'T CURE INFLATION

(By Max Shapiro)

"There is no cause for concern," President Herbert Hoover assured the nation a few weeks after the Great Crash of 1929. "Conditions are fundamentally sound."

With these soothing words, the Hoover Administration launched its ritualistic exercise in reassurance. In January 1930, Secretary of the Treasury Andrew Mellon announced a "revival of economic activity in the spring." And a few days later, Secretary of Commerce Robert R. Lamont told the country, "There are grounds for assuming that this is about a normal year."

By this time, the rot of Depression was spreading over the land. Thousands of farmers, unable to hold out until spring, abandoned their properties; in the cities, the breadlines lengthened. But as matters grew worse, government officials intensified their "confidence-restoring" efforts and promised that improvement was "just around the corner."

The Hoover Administration, it seemed, was bent on following the nostrums of Emile Coue, a French psychotherapist who wielded a considerable influence during the 1920s and early 1930s. According to Coue, patients could be cured by "positive autosuggestion" and by the constant repetition of the phrase, "Every day in every way, I am getting better and better." Until the full tide of events overwhelmed the country, Hoover and his aides continued to cling to the motion that good times would return if only people would have faith in their return.

Now, forty years later, in the midst of another economic crisis, the rites of reassurance have been revived. In a steady stream of "confidence-building" pronouncements over the past eighteen months, key members of the Nixon Administration have heralded the coming triumph over the nation's most crucial domestic problem: inflation.

At first, the public was given the impression that the Administration's "game plan" against soaring living costs would attain its objective in a short period of time. In April 1969, Herbert Stein, one of the President's most trusted economic advisers, asserted that "the underlying causes for inflation" were being stemmed. But the Consumer Price Index did not respond to Stein's optimism. It rose to new highs in April, May and June.

Undeterred, President Nixon in a message to Congress on June 20, 1969 said that the Administration's program of "fiscal responsibility and monetary restraint" would achieve results in several months. Once again, living costs vaulted to new levels in July, August and September—the "target date" President Nixon had set for visible "effects."

The next Hoover-like pronouncement came on August 11, 1969 from the University of Chicago's Milton Friedman, the President's most influential outside economic adviser. Said Friedman as he pushed ahead the day of victory once again: "We should not despair that the fight against inflation has not brought prices down. There is a considerable lead time between acts and results on prices." Friedman forecasts specifically that the rise in the Consumer Price Index would be slowed to an annual rate of about 4% by the end of 1969 and that it would be slowed still further in early 1970.

Then in November, Commerce Secretary Maurice Stans told DUN'S ("Can They Really Stop Inflation?" DUN'S, *December 1969*) that "by spring we will have a very perceptible decrease in the rate of inflation."

Events, of course, have made a mockery of all these Coué-like predictions. The rate of inflation has not fallen at all, but has persisted at an alarming 6% annual rate month after month. And final confirmation that the battle against inflation is far from won came in the "Economic Report of the President," published in February. The Report indicated that although some moderation of prices could be expected in 1970 and 1971, the fires of inflation would not be fully quenched before 1973.

The new "target date" of 1973, is, of course, a far cry from the original forecast for 1969. But a close reading of the Report reveals an even more disturbing fact: Despite the continuing failure of the anti-inflation program, there was nowhere evident in the 284-page document the slightest indication that a policy change was being considered.

And most disquieting of all is the fact that the Report's new projections on inflation for 1970–1972 have already proved inaccurate. In one section, the Council of Economic Advisers asserted: "With continued slow increase of GNP in the early months of 1970, the growth of real output would remain close to zero and there should be some decline in the rate of inflation." There has, of course, been no decline in the early months of 1970; instead, we have witnessed another increase. The regrettable conclusion is that we have received another spate of incantatory rhetoric that holds out the promise that things will get better—only to have them become worse.

THE GAME PLAN HAS FAILED

And there is a strong likelihood that matters will deteriorate even further. The Administration's game plan has failed—and will continue to fail—because it is rooted in a basic fallacy. The core of the program rests on the supposition that wages and prices will gradually come down in an economy characterized by a "moderate" amount of unemployment.

No exact unemployment rate has been projected, but on a number of occasions top Administration officials have indicated that "a 6% unemployment rate would not be tolerated," and while the Report does not explicity include a projected maximum rate of unemployment for 1970–1973, it clearly implies that it will lie somewhat under 6%.

The Administration rests its policy on the assumpiton that this rate and the resulting slide in profits will cool off our hot cost-push inflation. "Disinflation," according to the Economic Report, can be expected to develop in the following manner: "As profits per unit weakened, employers would become more resistant to granting wage increases. At the same time, a softening labor market would lessen workers' insistence on large wage increases. As a consequence, the average rate of wage increase would ultimately begin to diminish."

To expect such a deflationary process to occur while the unemployment rate is only 5% to 6% is to disregard a considerable

amount of contrary empirical evidence. In each of the three postwar recession years (1949, 1958 and 1961), unemployment was higher than the rate the Administration projects for 1970–1972 (*see Table A*). Yet hourly wage rates and average weekly earnings rose each year. The average unemployment rate for the three periods came to 6½%. Yet hourly wage rates rose by 3.3%, and the average rise in weekly wages came to almost 4%.

Even more striking is the fact that wage rates in the United States have increased in every year since 1933—even during the Great Depression. The average unemployment rate for the 1934–1939 period, for example, was 18%. Yet weekly wages rose at an average annual rate of 7%. Moreover, these wage increases took place in an era of relatively weak unionism, of price stability and a time when the expectation of automatic wage hikes had not yet become a way of life.

If wages continued to rise under such dire economic conditions, how could they conceivably be held in check in today's business climate? The combination of inflation, an unemployment rate of under 6%, inordinately powerful labor unions and an ingrained expectation of automatic pay hikes virtually insures an upward spiral in labor costs. To expect labor to "diminish" its demands under such conditions is to engage in another exercise in Couéism.

Nor are the Administration's hopes for a significant lowering of prices likely to materialize. From time to time, marginal producers or retailers caught temporarily with surplus inventories may reduce prices, but such occurrences will be temporary and nonpervasive. For the most part, there will be a resistance to price reduction by business because: 1) wages will rise; 2) with wage costs increasing and production falling, executives will attempt to sustain vanishing profit margins by maintaining prices; 3) a growing number of businessmen will conclude—with good reason—that the present "disinflationary" efforts by government will be abandoned for political, social or economic reasons.

High prices will also be perpetuated by the growing purchasing power of government employees. The number of government workers (federal, local and state) has risen from approximately three million in 1929 to over twelve million in 1969. Today, over 16% of all salaried workers are employed in government. And the annual wages for these government employees have increased from about $5 billion in 1929 to $104.5 billion in 1969.

Wage boosts for government employees continued even in the recession years of 1949, 1958 and 1961. And in this slowdown year, federal employees have been given a substantial wage hike. Given the growing power of public employee unions, the salaries of government employees are sure to grow at an even greater rate in the years immediately ahead.

WAGE PUSH FROM THE SERVICE SECTOR

An almost parallel situation exists in the service industries. The wages of workers in the services have increased year by year during the past three decades and have gone up even during the recession years of 1949, 1958 and 1961. In 1949, total service salaries rose by $700 million; in 1958, by $2 billion; and in 1961, by $3.5 billion. Last year, the $88 billion received by service employees represented a 13% increase over 1968. This trend is almost certain to continue.

The mushrooming growth of purchases made via "time payments" will also sustain high living costs. In 1940, total consumer credit outstanding amounted to only $8 billion; by the end of 1969, it had skyrocketed to $122 billion. And the amount of goods bought "on the cuff" keeps rising year after year, even in slack periods. In each of the three recession years of 1949, 1958 and 1961, total consumer expenditures, fueled by expanding consumer credit, showed a sharp gain despite a 6% unemployment rate (*see Table B*). These increased expenditures were the chief underlying cause for the rise of living costs in 1958 and 1961. In 1949 there was a decline of less than 2% in the Consumer Price Index, which was brought about by a sudden worldwide collapse in farm prices. Had this unusual event not occurred, the Index would have reflected a substantial rise.

Increased consumer expenditures are likely to offset the slowing effects of a moderate unemployment rate, but expanded outlays by business will also propel inflation.

In previous periods of rising unemployment, although consumer and government expenditures increased, the business sector acted as a braking element by reducing its plant outlays (*see Table B*).

A reversal of this historic trend is about to occur this year. According to private and government surveys made late in 1969, corporations planned to increase expenditures for new plants in 1970 by about 10%, or $7.5 billion. Tight money conditions and a profit squeeze in some companies have lowered this estimate, but an increase of at least $6.5 billion is a minimum expectation. So while the major inflationary impetus will come from consumers, these increased expenditures by business will go far toward minimizing any deflationary trends that will develop.

BUSINESS IS BETTING ON INFLATION

Why is this reversal occurring? Because the business sector has little confidence that present deflationary efforts will succeed. Corporate officials are becoming increasingly convinced that an unemployment rate of 5% to 6% will not cool off inflation and that government officials cannot embark on a program that will raise unemployment substantially beyond that level.

The business community has concluded, moreover, that the Fed's tight money policies are fast being abandoned to meet the borrowing needs of both government and industry. Consequently, most businessmen reason that inflation will get even worse and it would therefore be foolish to hold back on capital expenditures, which will only be more costly later on.

All of this adds up to the strong likelihood that the Administration's game plan, based predominantly on a moderate rate of unemployment, will not meet its objectives. Neither prices nor wages will decline meaningfully.

What, then, are our alternatives? The Administration could embark on a program that would bring about a 10%–12% unemployment rate. This would cause a depression and prices would fall. But such a program would be intolerable. Our nation, already rent by dissention, would be ripped apart by a government-induced massive depression.

Another alternative—the most likely one—would be to drift along with the game plan in the hope that the situation will not get out of hand. But this would be courting the whirlwind. A continuing inflation is like a cyclone. At first there is a mild disturbance. Next, the wind intensifies and then dies down a little. For a while it seems as if the gathering storm will blow itself out. Then suddenly, with deathlike swiftness, the cyclone strikes, smashing everything in its way.

We are now in the precyclonic stage. In order to grasp fully how dangerous and insidious inflation has become, we need only put the current situation into historic perspective. In April 1970, the Consumer Price Index posted its fortieth consecutive monthly advance. Unbroken since January 1967, this string of month-to-month advances is, by far, the longest in the 57-year history of the Index. In the 54 years from January 1913 through December 1966, there were only eleven cycles in which consecutive rises in living costs went beyond six months. The longest interval, created by the vast inflationary pressures of World War II, lasted 22 months and was only brought to an end by wage and price controls. But the average cycle of consecutive monthly rises lasted only four months, or only one-tenth the duration of the present span.

Moreover, the wind has ominously begun to pick up force. In 1967 the increase in the cost of living amounted to 3.5%, in 1968 it was 4.7%, and in 1969 just under 6%. During the first four months of 1970, the gain gradually crept beyond 6%.

This alarming situation has brought forth calls for some kind of an incomes policy from such leaders of the business establishment as Chairman Thomas J. Watson of IBM and Chairman David Rockefeller of The Chase Manhattan Bank. And even Federal Reserve Chairman Arthur Burns, a long-time critic of even indirect government intervention in the wage-price process, has begun to change his mind.

While an incomes or guideposts policy might have a temporary effect, the hour is already too late for such half-way measures. We must pass quickly from a failing policy, whose defects are obscured by beguiling assurances, to action that meets the problem head-on. That action—undesirable and unwelcome in a free society—is the adoption of mandatory wage and price controls. At this point, we have no other acceptable alternative.

Controls open a hornet's nest; they are onerous, difficult to administer and present all sorts of problems in implementation. But it is better to have controls than to have the destruction that a continuing inflation is bound to cause. It is no longer a matter of choices; it is a matter of survival.

TABLE A

[In percent]

Year	Unemployment rate	Percentage rise in hourly wage rates	Percentage rise in average weekly earnings
1949	5.9	+4	+2½
1958	6.8	+3	+2½
1961	6.7	+3	+6

TABLE B

[Dollars in billions]

Year	Unemployment rate (percent)	Change in consumer price index (percent)	Change in consumer expenditures	Change in Government expenditures	Change in new plant expenditures
1949	5.9	−2	+$3.2	+$8.8	−$2.3
1958	6.8	+2	+9.8	+12.3	−4.1
1961	6.7	+1	+10.0	+12.9	−0.69

OIL IMPORTS

Mr. HANSEN. Mr. President, a committee of the other body has tentatively approved an amendment to a trade bill that will help insure this Nation's self-sufficiency in oil, our most vital and important source of energy.

In voting to amend the national security clause of the Trade Expansion Act upon which the mandatory oil import program is based, the committee wisely froze the program into a quota system.

President Nixon had also wisely refused to implement a tariff plan recommended by a task force he had appointed to study the problem of mounting imports and applications for further exemptions and exceptions to the program.

But the advocates of more and more cheap foreign oil kept up the drum beat.

Within the last few weeks, and after additional import allocations were made for heating oil for New England, my good friends and colleagues from that area contended that the 40,000 barrels per day increase was merely a "drop in the bucket" and they needed much more.

But now I detect a sudden silence. The drums are stilled. Why?

Well, almost overnight that cheap foreign oil became more expensive than our own.

Mr. President, for the past several months several of us have been attempting to warn the Senate of the dangers inherent in becoming overly dependent upon imported oil.

In answer to those who demanded more cheap foreign oil, we have warned that this oil would remain cheap only as long as we were not dependent on it.

The chickens have now come home to roost, and that cheap oil delivered to our east and west coasts is now priced higher than the delivered price of our own domestic crude.

We have repeatedly pointed to the explosive situation in the Middle East and North Africa and the dangers of dependence on oil from that area. Western Europe and Japan are almost entirely dependent on oil from those sources and are now suffering the consequences.

In order that Senators may fully understand the background and series of events that led up to this dilemma and the implications, I ask unanimous consent that an article published in the Wall Street Journal of July 15 and an editorial from the Oil and Gas Journal of July 13 be printed in the RECORD.

There being no objection, the articles were ordered to be printed in the RECORD, as follows:

SOARING TANKER RATES DAMP OIL IMPORTS AND MAY FORCE U.S. GASOLINE PRICES UP

Motorists in the U.S. and Western Europe may soon be paying more for gasoline because a pipeline closedown in Syria and forced production cutbacks in Libya have sent oil tanker charter rates zooming to near records.

The tanker charges, which have doubled since April and quadrupled since this time last year, have bloated the delivered cost of Middle Eastern and African crude oil at U.S. East Coast refineries to 75 cents a barrel higher than the cost of delivered U.S. oil.

Normally the price edge is on the other side. The imported crude usually costs $1.45 a barrel less than U.S. oil.

As might be expected, the price distortion has sharply reduced U.S. imports of foreign oil. And it has narrowed the profit outlook for some inland refiners who customarily obtain a windfall by trading off their oil import "tickets."

But it has sharply raised the profit outlook for such independent ship owners as Aristotle Onassis and Stavros Niarchos of Greece and Daniel K. Ludwig of the U.S., operators of the world's largest private tanker fleets.

The impact is mirrored in domestic production plans. The Texas Railroad Commission, that state's oil regulatory agency, is expected today to raise sharply the amount of oil that Texas wells will be allowed to produce next month.

Louisiana's oil regulatory body, the Conservation Department, has already acted to open up the August flow. Last Friday it announced that the August per-well oil production rate will be the highest since the Suez Canal crisis snuffed off the flow of foreign oil in 1956.

Canada, too, is rushing in more crude. U.S. imports from Canada in the first week of July ran at nearly double the year-earlier rate.

PIPELINE RUPTURE

This latest oil crisis had its beginnings May 3, when a bulldozer under mysterious circumstances rammed into the Trans Arabian Pipe Line in Syria, knocking out the line, which normally carries about 475,000 barrels of oil a day from Saudi Arabian fields to the Mediterranean port of Sidon, Lebanon.

The line carried only about one-sixth of the oil output of Arabian American Oil Co., which is owned 30% each by Standard Oil Co. of California, Texaco Inc. and Standard Oil Co. (New Jersey) and 10% by Mobil Oil Corp. But this was oil that was close to Europe, only a short tanker's run away from Continental refiners.

Fixing the line would be simple enough, company officials asserted in New York. A spokesman said the job could be done "in about 24 hours." But so far, he stated, the Syrian government has adamantly refused to allow company technicians to do any repair work, and the line still sits idle.

Though Arabian American Oil officials are loathe to speculate about Syria's refusal, other Middle East specialists view the government stand as another ploy in the Arab-Israeli war. The line had often been attacked in the past by Arab guerrillas; one section of it goes through the Israeli-occupied Golan Heights. Evidently, by the analysis of some Middle East sources, Syria hopes to pressure the U.S., through the oil companies, to cut off Israeli aid.

Syria, though, was only the starting point for the current oil crisis. Libya has compounded the woes in the past month by ordering seven producers in that country to slash their output some 550,000 barrels a day, or about 15% of Libya's total output. Companies hit there are Occidental Petroleum Corp., Continental Oil Co., Marathon Oil Co., Amerada Hess Corp., the Royal Dutch-Shell Group, Texaco and California Standard.

The issue, by Libyan government account, is conservation. But some oil experts, see this, too, as a ploy, not in the war with Israel but in the war with the oil companies over tax payments.

Europe, as the Middle East's most immediate customer, has made up some of the almost one million barrels a day lost in Syria and Lybia by shortstopping oil from Libya and Nigeria that normally would have gone to the U.S.

But Europe has had to do most of its emergency shopping in the Persian Gulf, and therein lies the cause of the tanker rate surge. Because the Suez Canal remains closed by the Arab-Israeli war, all Persian Gulf oil destined for Europe must take the long-trek around Africa, a six-times-longer journey than the voyage across the Mediterranean from Lebanon to Europe.

The resulting sudden jump in tanker demand has quickly eliminated what had been a traditional summer surplus. And it has sent spot charter rates for a single voyage soaring close to levels prevalent during the Suez crisis of 1956. They are more than half again higher than during the six-day Arab-Israeli war of 1967.

The cost of moving a barrel of oil from the Persian Gulf to the U.S. East Coast has skyrocketed to about $3.25 a barrel; the oil itself in the Persion Gulf area costs only $1.25 a barrel, producing a total cost in the U.S. of about $4.50 a barrel. A barrel of crude oil from Louisiana, by contrast, costs only $3.75 delivered to an East Coast refiner, or 75 cents less.

On the West Coast, too, "Persion Gulf crude is quite a bit more costly than California crude," a California Standard spokesman says.

PEDDLING IMPORT "TICKETS"

The effect of the high tanker rates has been to render temporarily worthless a "ticket" to import foreign oil. In normal times, inland refineries, which are too far from ports to economically utilize foreign oil, work out exchange agreements with East Coast refiners. They deliver low-cost foreign oil to the East Coast refinery in exchange for receiving an equal amount of high-cost domestic oil at the inland refinery. The value of this swap can be a windfall as high as $1.75 a barrel to the inland refiner.

This gain "often means the difference between a profit and loss" for an inland refiner, said one oil executive. And the smaller the refinery, the greater the impact, under a so-called "sliding scale" that provides quotas of up to 40% of a small refinery's total crude oil processing rate, compared with a big-refinery average of only about 7%.

J. Avery Rush, president of Diamond Shamrock Corp.'s oil and gas unit, said in Amarillo, Texas, his company was having increased difficulty arranging trades for about half its second half oil import quota of about 4,000 barrels a day. "The amount of our quota which we haven't placed yet is large enough for us to be concerned" about its potential effect on second half earnings, he said.

Clark Oil & Refining Co., Milwaukee, said "everything is still up in the air" in its efforts to work out exchange agreements for its second half quotas.

SEEKING TO EXTEND QUOTAS

"A number of companies holding unused tickets are likely to be hot-footing it to Washington in the next few weeks to seek an extension of their quotas," one oil executive said. The quotas are due to expire Dec. 31. During the 1967 world oil supply crisis, however, the Government permitted unused quotas to be used during the following two years.

Some inland companies also have protected themselves against the present situation with long-term exchange agreements. American Petrofina Inc., controlled by Petrofina S.A. of Brussels, said in Dallas it made "most of our deals on a full-year basis" good until next Jan. 1, so it doesn't expect to be hit too hard by the current difficulties.

As the foreign crude costs mounts ever higher, meantime, the big international oil companies continue to cut back on their use of foreign oil at U.S. refineries. "East Coast crude oil imports could fall to as little as 300,000 barrels a day from a normal level about 700,000 barrels daily," one major company predicted. Total U.S. imports of foreign oil other than that from Canada fell to 520,000 barrels a day in the week ended July 3 from 850,000 barrels daily a year earlier, the American Petroleum Institute said.

In the same period, imports of Canadian oil jumped to 609,000 barrels daily from 316,000 barrels a day a year earlier. This was despite the fact that Canadian oil was placed under an official U.S. quota for the first time July 1, limiting imports to an average of 395,000 barrels a day for the last six months of the year. "Companies are borrowing from future quotas to boost Canadian imports now at the expense of November or December," one oilman declared.

Some oilmen were hopeful the U.S. Government could be persuaded to ease restrictions on Canadian oil. Ashland Oil Inc. said in Ashland, Ky., it hopes the Government will foresee the possibility of a U.S. crude oil shortage and allow freer access to Canadian crude.

WATCHING WASHINGTON

(By Gene Kinney)

LOOK WHO'S IN FAVOR OF RESTRICTING IMPORTS NOW

Events have a way of confounding policy-makers and would-be policy-makers, and nowhere is this more evident today than in oil-import controls.

New England consumers and politicians still look to increased imports under a tariff system as the key to lower product prices. But the tide seems to be turning against the tariff scheme recommended by the Cabinet Task Force on Oil Import Controls. This despite the fact that the chairman of the President's Oil Policy Committee and the chief White House aide on the subject are still in the tariff camp.

There are two main reasons for changing attitudes. One is the growing problem of energy supply, now properly considered a crisis.

It has brought home the folly of some past policies—premature reliance on atomic energy at the expense of coal, and restriction of natural-gas prices until supply has dried up.

The other reason is the dangerous situation in the Middle East. Arab-Israeli tensions and government-industry conflicts make insecure sources seem still less certain.

Together, these developments have had a sobering effect on public officials. The need to encourage development of domestic energy sources sticks out more obviously than ever.

In the present tight tanker market, advocates of imports as a means of breaking U.S. prices are getting an education. Past imports of No. 2 oil haven't lowered prices. The grant of 40,000 b/d in regular quotas to terminal operators probably won't either. Indeed, these terminal operators may have trouble finding a foreign supply this winter—especially at cut-rate prices they were expecting.

And, who would ever believe that the delivered cost of foreign oil on the East Coast would exceed domestic prices? But that's the present situation, lending weight to the arguments of those who say cheap foreign oil will remain cheap only so long as we don't have to depend on it.

In this atmosphere, the key staff members who wrote the task-force report have taken pains to tell petroleum economists privately that they have been badly misunderstood. Professors Phillip Areeda and James McKie stress the report's finding that imports should be limited to protect national security—although their first proposal was for unlimited imports. And drive prices down? They favored no such thing, despite clear language in the report to the contrary. Would they support an increase in domestic prices to $4/bbl if necessary to develop reserves? Why, yes.

As we say, events have a way of confounding policy-makers, and to an even greater extent, would-be policy-makers.

WALTER HELLER CRITICIZES NIXONIAN HANDS-OFF POLICY IN THE WAGE-PRICE FIELD

Mr. PROXMIRE. Mr. President, yesterday the Joint Economic Committee heard from three eminent economists—Walter Heller, Robert Solow, and Raymond Saulnier. One of the most important comments about the administration's attitude toward an incomes policy or wage-price guidelines was given by Mr. Heller in his statement.

While he welcomed the establishment of the Productivity Commission and the price watchdog committee, Mr. Heller expressed great concern that the inflation alert is to be administered by those who do not believe in guidance, leadership, and intervention in the wage-price process.

Mr. Heller also points out that very important international observers; namely those at the OECD, at the IMF, and other bodies have expressed a similar concern.

I ask unanimous consent that that part of his statement on this subject be printed in full in the RECORD.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

REMARKS OF WALTER HELLER BEFORE THE JOINT ECONOMIC COMMITTEE JULY 16, 1970, ON WAGE-PRICE GUIDELINES

First, I should note that I welcome the in-house price watch-dog committee that the President has set up. Also, I hope that the Productivity Commission will do some good in the long run, and I am glad that the Council of Economic Advisers is going to give us an inflation alert from time to time. All of this adds up to a recognition of the facets of the inflation problem that the Nixon Administration had previously ignored or neglected, and this is all to the good.

But I am concerned that the inflation alert is being administered by economists who are declared disbelievers in government guidance, leadership, and intervention in the wage-price process. Being first-rate economists and dedicated public servants, they will do their job in a responsible way. But unless the National Commission on Productivity "takes it from there" and expresses public outrage over things like that 13% truckers' settlement or unwarranted price boosts (and the composition of the Commission is almost an irony-clad guarantee against such a development), there is simply going to be little or no moral restraint, no effective self-restraint, in the wage-price field.

A considerable part of the trouble stems from the surprisingly dogmatic, almost theological, Nixonian adherence to a hands-off policy in the wage-price field—a policy that delights labor, pleases business, puzzles the financial community both here and abroad, and shortchanges the public. Lest that strikes you as a partisan comment, let me recall that important international observers in the OECD, IMF, Bank for International Settlements, and other bodies, have made pointed statements urging the United States to adopt a meaningful incomes policy. *Fortune* magazine, and more recently *Business Week*, have devoted pointed editorials to the same end. Why should government intervention in the trucking settlement have been confined to the mediation service, with its approach of "peace at any price level"?

Direct intervention and leadership—not a straightjacket of mandatory controls—is needed to flank appropriate fiscal and monetary policies for stabilization.

A TIME OF GLOOM FOR AMERICAN PRISONERS OF WAR

Mr. SAXBE. Mr. President, dismal weeks of rain and heat have closed in on North Vietnam, making existence even more uncomfortable for those Americans being held prisoner by the Communist North Vietnamese Government.

Spirits already weakened by up to 5 or 6 years of imprisonment are being further dampened by the gloom of the weather, and the apparent hopelessness of their grim situation.

For the families of these men this is a time of deep sorrow and frustration. Although their wives have attempted to keep up the appearance of cheerfulness for the sake of their children, we know how deep is their anguish—not only in the knowledge that their husbands are prisoners but also at the fact they do not have any accurate or recent information as to the conditions under which they are being held. They do not know, for instance, whether their men are well or wounded, whether they are starving or fed, whether they are ill-treated or not. Some do not know even whether the men are alive or dead.

I say again that we must do all in our capability at every turn to induce the North Vietnamese Government to treat the men in a more humane manner and to abide by the Geneva Convention on prisoners of war. We must make these efforts both as elected officials and in our capacity as private citizens. We cannot rest until the lot of these prisoners is made easier, and until their families can learn their whereabouts and their condition from the men themselves.

CASPER W. WEINBERGER, BUDGET OVERSEER

Mr. MURPHY. Mr. President, the Washington Evening Star of last evening, July 16, contains an article about President Nixon's new budget overseer, Casper W. Weinberger, who acknowledged yesterday that he will be seeking to balance the 1972 fiscal budget, which is being prepared now.

Cap Weinberger, who is the top budget man at the White House, is an extremely capable, practical, and talented economist in the true sense of the word. I am sure if there is anyone who can balance the next fiscal budget, Cap Weinberger is the man.

I ask unanimous consent that the article to which I am referring, written by Paul Hope, Star staff writer, be printed in the RECORD. I sincerely hope that it will be widely read. It is the most refreshing and practical statement that I have read since I came to Washington 6 years ago.

I take great pride that Cap Weinberger is not only a constituent, but a long respected friend. I congratulate him most sincerely.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

WEINBERGER GIVES VIEWS: HE'S NOT FOR PUMP-PRIMING

(By Paul Hope)

Star Staff Writer

President Nixon's new budget overseer, Caspar W. Weinberger, came off today as a non-pump-priming low-tax, balanced-budget man.

Weinberger acknowledged at a breakfast meeting that some of his views may seem heretical under modern theories that the budget should be used to influence the economy, but he is not convinced that means he's wrong.

Weinberger, a lawyer, became top budget man in a White House shift that sent former Secretary of Labor George P. Shultz to a new post, director of the Office of Management and Budget, and moved former Federal Trade Commission Chairman Weinberger in as Shultz's deputy, with primary responsibility for the budget.

He disputed statements made by some economists that a budget deficit would be a good thing now to reverse the economic downturn.

"I don't think deficits help anybody. The federal budget should be managed like any other budget. We should live within our income and let other forces manage the economy," Weinberger said.

"We shouldn't deliberately court a deficit to influence the economy. It might work for a year or two but in the long run you really pay the piper. You can do it for a while and hope to get out of office before you have to take a wheelbarrow full of money to the grocery store."

Under the Keynesian theory of economics, the federal budget should be used to "prime the pump" in times of economic downturns by pouring money into the economy.

One reporter commented that Weinberger is not an economist and that his views are almost "heretical" in these times.

"I'm not concerned that they are heretical," Weinberger smiled, "but I'd be concerned if they are wrong." He clearly didn't think so.

He hastened to add, though, that he was offering his own views and not necessarily those of anyone else in the administration.

He is in favor of making every attempt to balance the fiscal 1972 budget, which is being prepared now. There has been speculation that unless expenditures are cut or revenues increased, the deficit could run to $15 billion to $20 billion.

"I don't know if we can succeed, but the try ought to be made. We should use the same Puritan ethic to balance the federal budget as you do your own," he said.

He said he would favor an increase in taxes only as a last resort to balance the budget indicating he expects to use some heavy pruning shears on the expenditure side.

In a discussion of taxes and the return to a peacetime economy once the war in Vietnam is over, Weinberger said if there is a "peace dividend" one of the things that should be given serious consideration is lowering taxes.

"I don't think there is any requirement that we spend $200 billion a year. Taxes ought to be based on needs. I don't think there should be a feeling that we need to develop programs to keep taxes high.

"One of the goals should be to have as many decisions left to the individual as possible. The more the government spends for him, the fewer decisions he has left to make. I believe there is a tremendous philosophic need for government spending to be held down."

He said some system needs to be devised in Congress to give Senators and House Members a better over-all view of the budget.

"There is no way for Congress to see the whole picture. There is no machine adding up the total, with lights flashing. They should know the results of each action. It would produce a better result if they could know the result from each specific vote."

PRESIDENTIAL ACCESS

Weinberger also said the President needs more access to specific information.

He suggested establishment in the White House of a "domestic situation room" similar to that run by Henry A. Kissinger on the foreign side. He said a lot of the government's capability to produce more specific information is not being used.

On the political front, Weinberger, who was Republican party chairman in California in 1961–62 and was California finance director before he came to Washington, tried to knock down reports that California Gov. Ronald Reagan is interested in the presidency in 1972.

"I don't think he ever really had the presidential bug. I have heard him say many times he is supporting Nixon for renomination. I don't think he has any intention of seeking the nomination. He is as good a party man as anyone I know. I don't think he would do anything to interfere with Republican unity."

WCBS–TV EDITORIAL BACKS GOODELL-PROXMIRE AMENDMENT FOR ANNUAL MILITARY EXPENDITURES REPORT

Mr. PROXMIRE. Mr. President, in an editorial entitled "Defense Watchdogs" WCBS–TV in New York City has supported the amendment the Senator from New York (Mr. GOODELL) and I have introduced calling for an annual report on military expenditures from the President.

In our amendment we ask for the President to supply the projected military budget costs for 5 years, the specific costs of the war in Southeast Asia, and the short-term effects military spending will have on individual communities.

With the local disruption which a long overdue cut in military spending will bring, we believe our amendment is both sensible and long overdue.

As the editorial states:

We can't expect Congress to control military spending if it doesn't understand the costs involved.

I ask unanimous consent that the editorial be printed at this point in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

WCBS–TV EDITORIAL—DEFENSE WATCHDOGS, JULY 10, 1970

Most of us know someone who has bought a bad bargain, who has gotten in over his head. Maybe in a foolish moment, that someone bought a used luxury car, something that seemed to be a bargain at first, but later proved to be a financial disaster.

And what so many have learned so painfully is this: the true cost of an item cannot be reckoned in terms of the downpayment, even the total purchase price. The true cost of a big car must be reckoned in the total cost of maintenance and operation: how much gasoline it burns; how much it costs to repair power windows that break down.

Now Congress is beginning to recognize these financial facts of life, too. Some legislative leaders have begun to realize that Congress puts itself in the position of a yokel in a used-car lot when it goes about buying billions of dollars worth of weapons systems. For, in fact, Congressmen do not have all the facts at their command when they agree to buy billions of dollars worth of new ships, missiles and planes. They can only guess at how much these new weapons will cost in the long run. They can only guess at the total purchase price, which at times exceeds estimates by billions of dollars. They can only guess at operating and maintenance costs, which can exceed the purchase price within a decade.

Now, obviously, to make a rational decision about whether to vote for or against a weapons system, a Congressman needs reliable information about the total purchase price, and the costs of maintenance and operation.

An amendment now before the Senate would go a long way toward doing that. The measure is sponsored by Senator William Proxmire, Democrat of Wisconsin, and Senator Charles Goodell, Republican of New York. It would require the President to give Congress an annual report on military expenditures that would project defense costs over a five-year period. Among other things, the amendment would also require the President to relate the level of future defense spending to the economy as a whole, revealing what steps would be taken to ease unemployment from defense cutbacks.

On the whole, we think the Goodell-Proxmire amendment is a useful one, one that merits approval. We can't expect Congress to control military spending if it doesn't understand the costs involved.

PRIVATE DATA IN PUBLIC FILES

Mr. MATHIAS. Mr. President, one of modern man's most frequent and frustrating battles is his fight to keep personal information to himself. Every citizen who has ever opened a charge account, applied for a loan, bought a house, served in the Armed Forces, worked for the Government, or come into contact with a law-enforcement agency knows that the private information which he may keep in a strongbox is also stored in the maw of some computer over which he has virtually no control. He does not know who has access to this very personal data, when, or for what purposes. Often he does not even know what is there, and whether it is accurate, in fact or implication.

As Tom Wicker pointed out in a perceptive column published in the New York Times of July 7, the problem of controlling computers is especially challenging and urgent where criminal justice data is involved. The record of an arrest, for instance, may find its way into the files of a dozen Federal and State law-enforcement agencies and follow an individual around for years, although the individual may have been released immediately after the arrest and never actually charged, much less found guilty of any crime. A case now pending in the District of Columbia hinges on the propriety of maintaining FBI files on just such an incident.

Obviously we need clear and consistent rules to protect individuals by controlling the types of information to be stored, the uses to be made of it, and the extent to which it should be disseminated. Such regulations are especially urgent because we are rapidly moving toward the creation of what Mr. Wicker called "an ominous national network" of computers. In fiscal 1969 alone, the Law Enforcement Assistance Administration made grants under the Safe Streets Act totaling almost $1 million to a total of 11 States for the development and testing of various types of computerized criminal justice data and intelligence networks. As this work proceeds, we must be sure that the legitimate needs of law enforcement are balanced by recognition and protection of the rights of the individuals.

In 1967, while a member of the House Committee on the Judiciary, I proposed an amendment to the original version of the Safe Streets Act which would have required the Department of Justice to submit to Congress a confidential annual report detailing the types of automated data processing systems being used or developed, the volume of personal information contained in them, and the safeguards being employed to limit access to this data, insure that all information was accurate, and generally protect individual rights. Unfortunately this amendment was not included in the 1968 act, which required only a very general annual re-

port on activities under the Safe Streets Act.

Mr. President, I intend to renew this effort to secure for Congress the basic information which we need in order to control computers and protect American citizens. As a first step, I am today asking the Administrator of LEAA for a full report to me on all criminal justice data systems which have received LEAA funding, the volume and types of information involved, and the regulations, if any, governing access, sharing of information, updating, and general accuracy.

I am also asking the Attorney General for a similar report on each of the criminal justice data systems operated by agencies in the Department of Justice other than LEAA.

On the basis of this preliminary information, I will be exploring the types of legislative controls which are necessary to promote both efficient law enforcement and effective protection of individual rights.

I ask unanimous consent to have printed in the RECORD the column, "In the Nation: A Right Not To Be Data-Banked?" published in the New York Times of July 7.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

IN THE NATION: A RIGHT NOT TO BE DATA-BANKED?

(By Tom Wicker)

WASHINGTON, July 6.—Do you have a right not to be stored in a computer, where you can be called up for instant investigation by any bureaucrat or law officer who considers you a "person of interest" or who may want to provide someone else—maybe your employer—with "facts" about you? If you haven't thought about that, it's high time you did.

Ben A. Franklin detailed in The New York Times of June 28, for example, how Government "data banks" are mushrooming out of computer wizardry. Literally hundreds of thousands of individual dossiers now are being stored on tape by various agencies. The tape can be fed to computers with instant recall; and the computers and tapes can be interconnected from one agency or region to another in an ominous national network. Numerous state agencies have easy access to the material in this computer network, and are under little or no pressure to keep it confidential.

At the very least, therefore, some guidelines on the compilation of these banks and some safeguards on disseminating the material appear in order. An interesting case pending in Federal court here (*Menard v. Mitchell and Hoover*) may help provide them.

A Maryland man was arrested in California in 1965 on suspicion of burglary, held for two days, then released when police found no basis for charging him with a crime. Subsequently, a brief record of the detention, together with the Maryland man's fingerprints, appeared in F.B.I. criminal files.

Maintaining that the record is misleading and incomplete and that it is not properly a "criminal record," the Maryland man moved in Federal District Court here to have it purged from the F.B.I. files.

COURT CONCERN INDICATED

The court denied this motion, and the man appealed. On June 19, the Court of Appeals for the District of Columbia, while finding no fault with the district court's ruling on the motion, ordered the case remanded for trial and "more complete factual development." The supporting opinion, although limited to the case, suggests the circuit court's concern about what ought to go into Government files, under what rules, and whether proper safeguards surround its dissemination.

The judges (Bazelon, McGowan and Robinson) pointed out that the fact that the police had been "unable to connect" the Maryland man with a crime did not necessarily acquit him of having committed one, and they conceded that certain arrests not followed by a charge or a conviction might be a proper part of someone's criminal record. But, they asked, did the mere fact that a man had been picked up and held for two days justify the F.B.I. in retaining the record in its criminal identification files?

An arrest record (the distinction between a "detention" and an "arrest" is considerably less than a difference) can be terribly damaging to one's opportunities for schooling, employment, advancement, professional licensing; it may lead to subsequent arrests on suspicion, damage the credibility of witnesses and defendants, or be used by judges in determining how severely to sentence. Moreover, thousands of arrests are made every year without any further action against the arrested person, usually for lack of evidence.

DISSEMINATION ISSUE

Thus, the court asked, if a person is arrested, even properly, but no probable cause for charging him is developed, should he "be subject to continuing punishment by adverse use of his 'criminal record'"?

This has particular point because of the lack of established safeguards on dissemination. The Maryland man's record, for instance, could be made available by statutory authority to "authorized officials of the Federal Government, the states, cities, and penal and other institutions" and also, by an Attorney General's regulation, to government agencies in general, most banks, insurance companies, and railroad police.

When New York recently passed a law requiring employes of securities firms to be fingerprinted, several hundred were dismissed for "criminal records," but about half of them had only arrests, not convictions, on their records. The Appeals Court, noting this, reasoned that F.B.I. records had been passed directly to the securities firms involved.

As data banks proliferate, so will the indiscriminate use of the material they contain. And that raises the question whether an American citizen has a constitutional or legal right *not* to be data-banked, computerized, stored, exchanged and possibly damaged—materially or in reputation—by the process.

THE INCREASE OF CRIME

Mr. HANSEN. Mr. President, during much of the discussion which took place yesterday on the conference report for the District of Columbia Court Reform and Criminal Procedure Act of 1970, I was in the chair as the Presiding Officer.

I was impressed by the statements which were presented, and I intend to support the conference report.

During 1969, some 56,000 felonies were reported in the District of Columbia. The number of felonies reported in the District has risen 122 percent over the past 5 years.

It has become a way of life for those of us who live in the District to avoid whenever possible, venturing out on the streets at night.

Mr. President, I ask unanimous consent to have printed at this point in the RECORD the District of Columbia crime report, published in the Washington Post this morning.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

WOMAN CHARGED IN MAN'S SLAYING

A 48-year-old Washington man found Tuesday night in his apartment with a gunshot wound in his head died yesterday, police reported.

The resident manager of the apartment house, at 1334 Fairmont Street NW, told police he discovered the victim, T. C. Thomas, about 9:20 p.m. Thomas was pronounced dead at Washington Hospital Center at 3:45 a.m. Thursday.

Police arrested Macie Lee Parks, 50, of 5574 B St. SE, at the apartment, and charged her with homicide.

In other serious crimes reported by area police up to 6 p.m. yesterday:

ROBBED

DeWitt Moore Jr., of Washington, a driver for the Canada Dry Co., of Silver Spring, was held up about 2:20 p.m. Wednesday at 46th Street and Hunt Place NE by two men with revolvers. "Give us the money," ordered one. Moore told them the cash was in the safe and he did not have a key to unlock it. The men removed his wallet and fled east on Jay Street.

Paul Daniel Danish, of Washington, was beaten and robbed about 11:10 p.m. Wednesday by six men who attacked him at 3d and C Streets NE. The men surrounded Danish, knocked him to the ground and fled with the money from his wallet.

Ahmad Batouir, of Washington, was held up about 2:50 p.m. Wednesday by two young men who attacked him from behind in the 1800 block of Kendall Street NE. The men, both displaying revolvers, threatened, "Give us all your money or we'll kill you." One of them took the bills from one of Batouir's pockets while his partner removed a change purse from another pocket and the pair drove east on Capitol Avenue in a black car.

Oliver W. Johnson, of Washington, was beaten and robbed by two youths in the 100 block of 18th Street SE. The two hit him until he fell to the ground and took his wallet and keys.

Lucille E. Brown and Edna Mae Thorton, both of Washington, were held up about 11:30 p.m. Wednesday by two men, one wielding a revolver, near their apartment building in the 5000 block of 1st Street NW. "All right. Give it to me," the gunman demanded. His companion took their pocketbooks.

Donald Major, of Washington, was beaten and robbed shortly after midnight Wednesday by two youths who approached him from behind at 19th and East Capitol Streets NE. One struck him over the head with an unidentified object, threatened him and demanded his money. After taking his wallet, the pair ran south on 19th Street.

James A. Thomas, of Washington, was beaten and robbed about 7:25 p.m. Wednesday by two youths on 16th Street NE between Gales and Rosedale Streets near his home. The youths forced Thomas into an alley where he began struggling with one of them. The youth drew a gun and knocked Thomas to the ground. The other youth took a six-pack of beer and a large amount of bills and change.

Caroline Allen, of Washington, was beaten and robbed about 9:45 p.m. Wednesday by two youths in the 500 block of Valley Avenue SE. One of them struck her over the head while the other one forced her to release her pocketbook.

Greta Renee Graham, of Washington, was held up about 5:20 p.m. Wednesday inside the Woodward & Lothrop store in the 1000 block of F Street NW by two youths. One

drew a long-bladed knife and warned, "Be quiet." The other youth grabbed her pocketbook, removed her wallet and tossed the purse to the ground. The pair then ran up the stairs.

William Brockington, of Washington, was held up about 12:35 p.m. Wednesday while he was parked in his car at the corner of 24th and Douglas Streets NE by two young men. One held a pistol at Brockington's head and said "Give it up." Brockington handed a large amount of money to the gunman, who warned, "Do not turn around for five minutes," and escaped with his partner in a bronze car.

Allen B. Wilson, of Washington, was beaten and held up about 4:30 p.m. Wednesday at 46th Street and Sheriff Road NE by two youths who asked if he had any money. When Wilson said he did not, one of the youths grabbed his arms and the other hit him. The pair took the money from Wilson's pockets.

William O. Hickey, of Glen Burnie, was held up shortly after 3 p.m. Wednesday by a youth who approached him in his truck at North Capitol and O Streets NW. He entered the passenger's side of the truck and ordered Hickey to drive to New York Avenue. The youth then drew a gun and forced the driver to hand over his watch, money and diamond ring. The gunman forced Hickey to stop and pick up a second youth, then fired one shot, which missed, and fled.

Mary Linder, of Canton, Ohio, was robbed by two men about 6:30 p.m. Wednesday as she was getting out of her car in the 700 block of Monroe Street NE. One man grabbed Miss Linder by the neck while the other one took her pocketbook.

Johnnie Johnson, of Washington, a driver for the Good Humor Co., was held up about 9:30 p.m. Wednesday while he was vending at 17th Street and Potomac Avenue SE. A young man approached Johnson and asked for some ice cream. As he was filling the order, another man, displaying a gun, told him, "This is a stickup." The pair took Johnson's money and fled west in the 1600 block of Potomac Avenue.

Wilbert Ross, of 460 N St. NW., was held up about 7:15 a.m. by two men who opened his apartment door and demanded, "Where's the money?" One showed Ross the revolver in his coat pocket, searched his pockets and took his watch and money. "You come out and we will blow you away," the pair threatened, and fled.

Matt's Liquor Store, 3203 Naylor Road, Silver Hill, was robbed about 6:40 a.m. yesterday of an undetermined amount of money by a man armed with a .45 caliber automatic who walked behind the counter and demanded the cash from the register.

Edwin Marshall, of Washington, was held up about 9:45 a.m. Tuesday by a man wielding a gun who approached him in a parking lot in the 6500 block of Chillum Pl. NW, and ordered him to face the wall of the adjacent building. The gunman frisked Marshall, took the money from his pockets and fled toward the railroad tracks.

Tower of Pizza, 2916 Nichols Ave. SE, was held up by two men who entered the shop Tuesday night. One of them, displaying a gun, told the owner, "Give me the money and put it in a paper bag." The pair escaped in an alley beside the shop.

Pauline Ellis, of Washington, was beaten and robbed shortly after 8 p.m. Tuesday by two youths who attacked her in the 600 block of Condon Terrace SE. After knocking her to the ground, the assailants took her pocketbook and fled into the 400 block of Atlantic Street NE.

Murry's Steaks, 4019 South Capitol St. SW, was held up about 9:15 p.m. Tuesday by two youths who ordered a steak sandwich. One of them pointed a pistol at the clerk while his companion opened the cash register and scooped out the money. The pair then ran out of the store.

William Violette, of Brentwood, a taxi driver was robbed about 11:40 p.m. Tuesday by a young man wielding a gun who asked the driver to take him to the 1300 block of Independence Avenue SE. At 7th Street and Independence Avenue, the passenger ordered Violette to stop and said, "Give me your money or I'll kill you." Taking his watch and cash, the gunman escaped into a park near the intersection.

Frederick Eugene Underwood, of Washington, was held up about 9:15 p.m. Tuesday at the corner of Summit Pl. and U Street NE, by three young men carrying guns in their pockets who warned, "Don't run or we will shoot. Give us your money." Underwood gave the gunmen his bills and change and they escaped.

Floyd Minor, of Ravenna, Ohio, a truck driver for Continental Oil Co., was beaten and robbed about 3:30 a.m. by two men and a woman who carried him to the second floor of a building in the 1000 block of Massachusetts Avenue NW. After the men hit him in the head and body, the trio frisked him and fled with his money and watch.

Wyatt Langford, of Washington was held up about 6:20 p.m. Tuesday by four youths as he was entering his car in the 700 block of 3d Street NW. One of them held a revolver at Langford's side while the others searched him and removed his wallet. The youths then fled into an alley towards 4th Street.

Sanford Jameson, of Darien, Conn., was beaten and robbed shortly after 10 p.m. Monday by two men who attacked him on 19th Street NW, struck him on his head and face until he fell to the ground. The pair then removed his wallet from his pocket and fled.

STOLEN

A canvas bag containing $700 in cash was stolen between 3 and 9:30 a.m. Monday from the Good Guys Restaurant, 2311 Wisconsin Ave. NW.

Typewriters and other office equipment, with a total value of $700, were stolen between 6 p.m. Monday and 8 a.m. Tuesday from Tecnifax, 6200 Kansas Ave. NW.

Four typewriters valued at $1500 were stolen between 6 and 10 p.m. June 22 from a classroom at Roosevelt High School, 4301 13th St. NW.

An $800 calculator was stolen sometime before 4:20 p.m. Monday from a car belonging to Daniel Keller, of Maryland, while it was parked in the 1000 block of O Street NW.

A typewriter and a record player were stolen between 3.30 p.m. Monday and 9:30 a.m. Tuesday from Elliott Junior High School, 19th Street and Constitution Avenue NE.

A trailer carrying a 14-foot boat with a 50 horsepower engine valued at $900, was stolen between 9 a.m. Monday and 11:40 Tuesday from E. A. Page, of Norfolk, Va., when it was separated from his car at 10th and K Streets NE.

An adding machine and an IBM typewriter were stolen between 5 p.m. Tuesday and 7 a.m. Wednesday from an office in the administration building at Catholic University, 620 Michigan Ave. NE.

Mr. HANSEN. According to my count, there were 32 serious crimes committed in the 24-hour period ending 6 p.m. yesterday.

In an average week in the Nation's Capital, there are five homicides, six rapes, 200 auto thefts, 238 robberies, and 442 burglaries.

During the first quarter of 1970, crime in the Capital rose 21.7 percent. This is substantially above the Nation's rate of increase.

Mr. President, many major issues are facing Congress this year. Certainly one of the most important of all issues which we face is to stem the increase of crime.

Statistics prove that crime in the District of Columbia is on the increase. The decision whether or not we will allow this crime to continue to increase rests with the Senate.

The conference report now before us will help determine whether we will continue to let this crime run rampant.

We have an authorized limit of 5,100 policemen here in the District. Without a doubt, the sidewalk policeman has to do the basic work with the offenders; however, once the arrest has been made, the judicial system must have the tools to proceed to convict and punish those who have committed a crime.

It is alarming for me to note that the existing rules of criminal procedure allow up to a 10-month delay between arrest and trial here in the District of Columbia. The problem which results is that many of those who are awaiting trial are released and allowed to commit another crime.

A study undertaken in the District in 1968 indicates that 60 to 70 percent of the defendants released on bail while awaiting their trial were rearrested while on bail.

Mr. President, the District of Columbia crime bill has been in conference for over 3 months. It goes without saying that if we are to get a crime bill during this session of Congress, we are going to have to accept this conference report. The choice which each of us faces is whether we are going to allow the crime to continue to run rampant for another 2 years before we can get another crime bill, or are going to face up to the responsibility of crime here in the Capital City now.

Mr. President, the charge has been made by some who oppose this bill that it is antiblack legislation—that the bill discriminates against the black individual in the District. I feel this is a false and misleading charge.

The truth is that over 70 percent of the residents here in the city are black. The bill that is before us today is not antiblack but, rather, designed to protect black population.

Eighty-six percent of all District of Columbia murder victims are black; 86 percent of all aggravated assault victims are black; 80 percent of all rape victims are black; 66 percent of all auto theft victims are black; and 60 percent of all burglary victims are black.

These figures make it clear that those who claim that the bill is racial in nature simply do not recognize the fact that the black is the most frequent victim of crime in the District, and so it will be the black who will benefit from any decrease in the crime rate.

I realize fully that the present District of Columbia crime bill contains many changes in criminal procedure. I personally do not have the problems with the no-knock and preventive detention provisions which some of the opponents to this bill have. However, the important thing to realize in this regard is that the general law-abiding public is entitled to some protection also. I believe

there has to be some reasonable balance between protecting the rights of an individual and protecting the rights of the general public. The public deserves protection from the individual criminal. We seem to have overlooked or forgotten this fact.

I am not a constitutional scholar, but I do believe the provisions in this bill are constitutional. It is the feeling of the House of Representatives that the provisions in this conference report are constitutional. I believe that the majority of the Senate share this belief.

Be that as it may, the Senate has the responsibility of facing up to the problem of crime in the District.

If the Supreme Court determines that there are provisions of the existing bill which are unconstitutional, those sections will become inoperative, but the Congress of the United States has a responsibility to the citizens of the District of Columbia, as well as the entire United States, to make the Nation's Capital a safe place in which to live and visit.

The present legislation represents a giant step in this direction and I intend to vote in favor of the conference report.

SENATOR JAVITS ANSWERS MAIN CONSTITUTIONAL OBJECTIONS TO RATIFICATION OF GENOCIDE CONVENTION III

Mr. PROXMIRE. Mr. President, during the last 2 days I have quoted certain statements made by Senator JAVITS in reply to arguments made against the ratification of the Genocide Convention. Today, I would like to examine the major constitutional objection to ratification of the convention.

This argument says that whether or not the provisions of the convention are self-executing, they would immediately supersede all State laws and practices inconsistent with them and thereby deprive the States of the power to prosecute and punish in their courts acts condemned by articles II and III of the convention. In other words, the States would be deprived of jurisdiction over certain offenses of the convention.

Senator JAVITS' answer is very convincing:

The Convention is clearly non-self-executing in view of the requirement of article V to enact the necessary implementing legislation. The administration intends to await enactment of such legislation by the Congress before depositing our ratification and thus becoming a party of the Convention. If there is supersession of any inconsistent State laws, it will be by the Federal legislation, not by the Convention. It is difficult to imagine in what way any existing state law or practice could be inconsistent with the Convention.

The enactment of the implementing legislation for the Genocide Convention by the Congress need not automatically preclude the States from prosecuting the acts proscribed by the Convention. Whether or not a congressional act preempts an area of law depends on the intent of Congress. If, as could be reasonably argued, Congress did not intend completely to fill this area of law, States would be free to continue to act in this area. To ensure that States would still have such freedom the Congress could provide in its implementing legislation that nothing in that legislation should be construed as indicating an intent on the part of Congress to occupy, to the exclusion of State or local laws on the same subject matter, the field in which the provisions of the legislation operate.

Mr. President, I think this is an excellent rebuttal to the major constitutional argument against ratification. Clearly, Congress has the power to make sure that no infringements are made on State jurisdiction.

The time for further delay on ratification of the Genocide Convention is over. Let us move now and give this treaty speedy consideration.

DOMESTIC APPLICATIONS OF DEFENSE RESEARCH

Mr. BELLMON. Mr. President, I ask unanimous consent to have printed in the RECORD a statement prepared for delivery in the Senate by the distinguished Senator from Massachusetts (Mr. BROOKE), who is unable to be present today.

There being no objection, the statement by Senator BROOKE was ordered to be printed in the RECORD, as follows:

AN IMPORTANT START ON THE CONVERSION PROBLEM: DOMESTIC APPLICATIONS OF DEFENSE RESEARCH

Mr. BROOKE. Mr. President, a year ago in the debate on the Defense authorization bill the distinguished Junior Senator from California and I proposed an amendment aimed at promoting increased domestic benefits from the sizeable program of defense research. Since that time our amendment has been considered further by the Committee on Armed Services and I am pleased to report that this promising provision has been included in the fiscal year of 1971 Defense Procurement Authorization Bill. This measure will come before the Senate shortly, but in advance of the full debate on that occasion, I wish to call the Senate's attention to this particular title.

It has become increasingly clear to those of us concerned about national priorities that we must maximize the return on our heavy investment in defense programs. Many of these expenditures amount to contingency expenses; we buy weapons and support many programs on the ground that by acquiring them we will reduce the need for ever having to use them. Yet economists recognize that defense expenditures are primarily an economic drain rather than a productive investment, since they rarely contribute directly to increasing the nation's productive capacity. Thus, there is all the more reason to identify and take advantage of those elements of the defense budget which promise valuable returns to the society as a whole.

Few areas are so promising in this respect as the large program of defense research which often has led to useful technology for other factors of the economy. Yet the spin-off from defense research to other applications has been substantially less than could have been the case. There has been too little systematic effort to insure maximum civilian benefit from the vast sums spent on defense research and development.

At the same time, in a period when the defense budget is shrinking and resources previously devoted to national security are being freed for new missions, it is important that we make better provision for steering such capabilities into fruitful new applications. Many institutions now doing defense research are seeking an opportunity to apply their skills to the nation's pressing domestic needs. Presently, there is no good mechanism for encouraging the re-orientation of such capabilities. As the Congress begins to narrow the margin of operations of the Department of Defense, I believe the course of responsibility is to make a special effort to preserve and redirect useful military research capabilities, rather than see them merely perish for want of alternative sponsorship.

This requires thorough advance planning and intense effort. It is but one of many instances of the conversion problem, the mammoth task we shall face in converting an increasing share of our economic resource from war time to peace time functions.

In Massachusetts we have recently experienced an analogous and fortunately, successful re-orientation of a principal space research center to the urgent mission of advance transportation research. Yet, this significant achievement is, sad to say, the exception rather than the rule. In coping with the problem on a national scale, something more than ad hoc arrangements will be required.

The bill reported by the Armed Services Committee makes a small beginning toward meeting this large and long-range challenge. It creates an Interagency Advisory Council on Domestic Applications of Defense Research. The Council will draw its membership from the Defense Department and the principal domestic agencies likely to make use of the fruits of such research, namely, the Departments of Health, Education and Welfare, Housing and Urban Development, Transportation, Labor, Interior, NASA and the Office of Economic Opportunity. Under the chairmanship of the HUD member, the Council will evaluate research proposals submitted to it and advise the Department of Defense of opportunities to generate useful domestic applications within the framework of the ongoing defense research programs. It will attempt both to identify useful spin-offs from existing defense projects and to suggest specific ways in which additional non-defense applications can be realized from such projects.

Final decisions on such proposals, will, of course, remain the responsibility of the Secretary of Defense and will be subject to the requirement that the research be directed toward a specific mission of the Department. The focus, in short, will be on appropriate military research of *mutual interest to DOD and other agencies.*

Examples of such work are numerous. Military radar and computer technology have direct possibilities for serving the current needs of domestic air traffic control. Defense work on basic materials offers many opportunities for innovations in civilian industrial processes, as illustrated by the development of titanium processing methods for defense purposes in recent years. Many transportation technologies and components—external combustion engines, turbines, and other components, for instance—are appropriate objects of defense research and could provide the basis for alleviating the high-pollution output of present civilian automobiles. Defense work on fuel cells, as has been true of the space agency's development of such systems, can be of value in a variety of civilian programs.

The Defense Department also has a continuing program to develop improved housing for service personnel and their dependents; work has now begun to use the Defense housing programs for experimental purposes, since housing built on military bases can be erected without the limitations of archaic housing codes and other restrictions that impede such experiments elsewhere. Modular construction and other techniques can be explored thoroughly on these bases. They could well be a principal interest of the Council, which can build on the preliminary work now in progress.

With a multi-billion dollar manpower and training program, the Department of De-

fense also engages in many studies to improve its educational and training systems. Such endeavors promise real benefit to the growing manpower programs in the domestic sector and the Council will afford a continuing mechanism for cross-fertilization between the DOD and these programs. Similarly the growing concern for improved delivery of health services and medical care to the population at large can be met in part through better experimental use of the elaborate health system now operating in the military establishment. The Department itself believes that many of the most important domestic applications may grow from defense programs in the life, behavioral, and environmental sciences.

But these are but a few examples of the many opportunities the Council will be able to identify as deserving special attention. This provision of the bill will provide limited authority to the Secretary of Defense to focus resources on especially promising ventures which promise maximum results to the Department and to the domestic sector. Grants under this authority will be governed, I repeat, by the fundamental standard that DOD research must relate to a valid military requirement. But the important thing to realize is the broad scope of activities which have great potential value both to DOD and its domestic counterparts. It is noteworthy that the National Aeronautics and Space Administration has long had an office specifically devoted to insuring domestic spinoffs from space research. The proposed Council would perform much the same function for defense research and development.

This proposal is compatible with other efforts under way in the Department to employ the large resources it commands in ways which assist other sectors of other society. Discussions with prominent members of the research community have revealed substantial interest in this kind of idea, both as a means of realizing important short-term benefits and as a method of re-allocating over a period of time some fraction of our defense capabilities to non-defense applications. The intent would be that, as non-defense research programs expand in the coming years, sponsorship and supervision of work begun under the auspices of the Council would shift to other departments.

I consider the Committee's approval of this provision an important and constructive initiative. I will have more to say as discussion of the measure proceeds but would like to take this opportunity to call the Senate's attention to this significant element of the Committee bill.

POLITICS AND PRIVATE SCHOOLS

Mr. THURMOND. Mr. President, the cornerstone of the foundation on which this great Nation was built is the principle that we are a government of laws and not of men. This means that the law remains constant until changed through constitutionally permissible procedures. This principle guarantees that the standards by which our society lives cannot be arbitrarily changed or withdrawn because of the personal preference of one man or small influential pressure groups.

Mr. President, I am deeply concerned when this Government even hints that this principle will not be strictly followed, for, without strict adherence to it, individual rights and liberties can be curtailed overnight without due process of law.

In the July 13 edition of the Evening Star a very fine editorial by David Lawrence appeared, in which this principle of government was discussed and aptly applied to the recent announcement by the Internal Revenue Service regarding the restriction of the tax exempt status of private schools. I commend David Lawrence, not only for his intellectual ability, but also for his dedication to sound principles of government.

Mr. President, I ask unanimous consent that the editorial, entitled "Politics and the Private Schools," be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

POLITICS AND THE PRIVATE SCHOOLS

(By David Lawrence)

Government by law and the Constitution or government by political expediency—that's the choice which the Nixon administration faced, and it took the latter course when it ordered white private schools to open their doors to all, regardless of race, or lose their tax exemptions.

The hypocrisy of this action was revealed when it was announced that private schools which admit persons of only one religion and other tax-exempt organizations—such as fraternal clubs which limit their membership to one race—would not be affected.

It might be asked how tax deductions can be justified for gifts to an organization known as the "National Association for the Advancement of Colored People" and yet be denied when made to organizations which seek to advance the education of white people.

In one of the cases filed in May, the Department of Justice submitted a brief supporting the tax-exempt status of private schools of all kinds and the deductibility of contributions as well. But in recent days an internal squabble in the administration resulted in a change of heart. One White House aide told the press last Friday that the President "believes that ultimately the tax status of racially discriminatory private schools will be determined by the courts and that this is desirable."

This is, in effect, passing the buck to the courts. But, in the meantime, the administration presumably is to escape criticism from the Negro groups because it has changed position.

The Supreme Court of the United States has rendered many decisions on segregation since its historic opinion in 1954 declaring that the "equal protection" clause of the Fourteenth Amendment bars racial discrimination in public schools. But no opinion of the court has said that the federal government may penalize citizens in one group while citizens in other groups are given privileges in their financing of educational projects.

Parochial schools, for example, teach religion and attract students on certain religions. This has long been recognized by the courts and by the American people as a legitimate practice and not a violation of of any part of the Constitution. But now the present administration is arguing that a group of citizens who wish to exercise their freedom of association and help to maintain schools where whites can enjoy their own educational environment cannot have the same tax-exempt status or tax deductibility for contributions as is granted to citizens who contribute to religious schools. Tuition fees, incidentally, are not involved, as they are not deductible.

"Private schools" are, of course, private institutions. Each school has its own admission policy, and the government heretofore has never interfered, if anybody wished to challenge the tax exemption, the proper way would have been to file suit in the courts, and the administration need not have taken any part in the controversy. Also, dissenting citizens, could have had a bill introduced in Congress with the hope of getting a law passed setting forth specifically the conditions under which the federal government could withhold tax exemption or tax deductibility.

But the chances are that no such legislation would be enacted because the proposal encroaches on the rights of privacy of American citizens. If these privileges can arbitrarily be withdrawn at the whim of any administration, irrespective of the constitutional principles that are involved, it can mean that individual rights can be suddenly curtailed by the government for in a penalty through income-tax regulations.

If the government now is to step in and pass judgment on the whole system of charitable giving in America and raise doubts as to whether particular organizations which receive aid are satisfactory politically to the administration in power, the whole edifice of philanthropic operation in America will be weakened. Contributors will be scared off, and there will be a slowdown in the growth of the rather sizeable private-welfare program that exists. Politics can go too far, and the government's intrusion into the charitable help given private schools is a flagrant example of mistaken judgment.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Is there further morning business? If not, morning business is closed.

DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970

Mr. ERVIN. Mr. President, I move that the Senate proceed to the consideration of the conference report on S. 2601.

The PRESIDING OFFICER. The clerk will please state the conference report by title.

The assistant legislative clerk read as follows:

Report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the amendment of the House to the text of the bill (S. 2601) to reorganize the courts of the District of Columbia, and for other purposes.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from North Carolina.

The motion was agreed to; and the Senate proceeded to consider the report.

Mr. ERVIN. Mr. President, it has been urged that we should adopt the conference report in order to get a bill. We can get a bill without adopting the conference report. If we adopt the conference report, we will get a bill which is unconstitutional, which is unfair, which is unjust, and which is unworkable in many respects. If we vote down the conference report we can get enacted speedily into law every provision of the conference report which is in harmony with the principles which ought to prevail in a civilized system of criminal justice. We can get a bill which would reorganize the courts of the District of Columbia and a bill which would do something toward coping, in a practical, just, fair, and constitutional way, with the crime problem.

I have given the solution for the crime problem in the District of Columbia and

every other district in the United States in a bill which I introduced, with a number of cosponsors, to require the speedy trial of cases in the Federal courts of this Nation and in the courts of the District of Columbia.

According to figures recently released by the Judicial Council, it takes 8 months, on an average, to dispose of a criminal case in the District of Columbia on a plea of guilty. It takes more than 10 months on the average in the District of Columbia to dispose of a case upon a trial by jury.

What this means is that men are not brought to trial for a year or a year and a half; and this delay is the way to bring the laws into contempt. The passage of a bill like this to remedy a condition like that makes a mockery of justice. It brings the laws into contempt because the people of the United States and the people of the District of Columbia are not going to have any respect for a law—and I add, they ought not to have any respect for a law—which says officers of the law shall have the right to enter the dwelling houses of citizens of the District of Columbia in the same way that burglars now enter those dwelling houses.

I have told how to remedy this situation, and there is only one way to remedy it. It will require hard work on the part of law-enforcement officers, prosecuting attorneys, and judges.

What we need is to pass the parts of this bill that reorganize the courts and provide an adequate number of judges and prosecuting attorneys, and then we need this: We need to detain prosecuting attorneys in their offices long enough for them to prepare cases for trial. Courts cannot try cases without their first being prepared for trial by prosecuting attorneys. Then, after the prosecuting attorneys are detained in their offices long enough to prepare cases for trial, we need to have an adequate number of judges, and detain them in the courthouse long enough to try the cases.

When the District of Columbia has enough prosecuting attorneys to prepare cases for trial and enough judges to try cases, we will not need a law to preventively detain the accused, and we will not need a law to knock down people's doors with sledge hammers in order for officers of the law to gain admittance.

Mr. President, the supreme value of civilization is the freedom of the individual, which is simply the right of the individual to be free from governmental tyranny. As the late Justice George Sutherland so well said:

> Freedom is not a mere intellectual abstraction, and is not merely a word to adorn an oration upon occasions of patriotic rejoicing. It is an intensely practical reality, capable of concrete enjoyment in a multitude of ways day by day.

The Founding Fathers who drew the Constitution of the United States certainly entertained the abiding conviction that the supreme value of civilization is the freedom of the individual. As express testimony of this conviction, they stated in its preamble that they drafted the Constitution to secure the blessings of liberty to themselves and their posterity.

With due deference to all other men in all generations, I confess my belief that the world has never known any other group as well qualified as the Founding Fathers to write organic law for a people dedicated to the freedom of the individual. They were versed in the heartbreaking history of man's fight for freedom, and knew that a nation which ignores the lessons taught by such history is doomed to repeat the mistakes of the past. They had studied the legal philosophy of Blackstone and the political philosophy of Hobbes, Locke, and Montesquieu.

They had observed much tyranny, both in the colonies and in the lands beyond the seas. They had meditated upon these things. As a consequence, they had discovered this shocking but everlasting truth: Nothing short of tyranny can quench the insatiable search of government for power, and in its ardor to extend and multiply its authority, government will extinguish the freedom of the individual unless it is restrained from so doing by fundamental law which it alone can neither repeal nor amend.

For this reason, as Justice David Davis declared in his courageous and illuminating opinion in *Ex parte Milligan* (71 U.S., page 121) the Founding Fathers "foresaw that troublous times would arise," when the Government would "seek, by sharp and decisive measures, to accomplish ends deemed just and proper," and in so doing would put the freedom of the individual in peril, unless such freedom were "established by irrepealable law." To forestall this calamity in such times, they devised the Constitution to define and limit the powers of the Federal Government, and to protect the freedom of the individual from destruction at its hands.

The best statement as to why the Constitution of the United States was written and raified by the American people appears in this opinion of Justice David Davis. After pointing out that the Founding Fathers had incorporated certain basic principles in the Constitution, put them in writing, and provided that every public officer from President down to township constable should take an oath to support this Constitution, he made this remark:

> Time has proven the discernment of our ancestors, for even these provisions—

He was there discussing provisions about the right of indictment by grand jury and trial by a jury—

> For even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint and seek, by sharp and decisive measures, to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be imperiled unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future.
>
> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

What we have here today is the same thing that was said there, at the time they tried to try a civilian in Indiana before a military commission and to deny him his right to be indicted by a grand jury, before he was placed on trial, and his right to have his guilt determined by a petit jury in a civil court rather than by the commissioners of the military commission. They said in justification: "It is necessary to do this."

One of the Senators whom I hold in highest regard, the distinguished Senator from Nebraska (Mr. HRUSKA), repeated the same argument of necessity here the other day. He said it is necessary, on account of the crime situation in the District of Columbia, that we abandon the traditions that have prevailed in this country since it became a Republic and give the officers of the law the right to break into people's private homes the way burglars now break into them; that it is necessary to imprison men under a preventive detention process for crimes which they have not committed and may never commit. It is necessary. It is a necessity.

It is queer how the old argument—necessity—is constantly repeated when we undertake to deprive people of basic rights. We have to abandon the traditions of every generation of Americans since George Washington took his first oath of office as President of the United States, on account of the crime situation in the District of Columbia.

All that needs to be said about the word "necessity" as justifying actions such as that proposed in this conference report was said by one of the greatest English-speaking statesmen of all time, William Pitt, in a speech in the House of Commons on November 18, 1783. He said this:

> Necessity is the plea for every infringement of human freedom. It is the argument of tyrants. It is the creed of slaves.

Yet, despite that fact, we have here one of the troublous times in the history of our Nation, when crime is rampant and rising—one of the troublous times that Justice David Davis was warning us about, when people would seek, by sharp and decisive measures, to achieve ends they deemed to be just.

So, here, in the name of law and order, we have the demand made on the floor of the Senate to pass a crime bill for the District of Columbia which is unconstitutional in many respects, which is unfair in many respects, which is unjust in many respects, and which is not workable, as a practical matter, insofar as the provisions for preventive detention are concerned.

The constitution of my State contains two things which ought to be emblazoned indelibly upon the mind of every man who exercises public authority within the borders of the United States: that

"eternal vigilance is the price of liberty," and "that frequent recurrence to fundamental principles is essential to the preservation of the blessings of liberty."

It takes a good amount of vigilance to study a bill such as that embodied in the 243 pages of small print in the conference report now pending before the Senate. When one reads this bill, he finds some legal curiosities, some constitutional curiosities, that ought not be made a part of the law applicable to the District of Columbia but ought to be removed from this bill and transferred to the Smithsonian Institution, to manifest some of the greatest legal curiosities that ever have been evolved by the mind of man on the North American Continent.

The case of Ex parte Milligan pointed out why the Constitution was written. The Justice who wrote the majority opinion did that. But there is an equally remarkable statement by one of the great lawyers who argued that case, Jeremiah S. Black. He told us how the Constitution of the United States was written. He pointed out the method by which the words were found to place in the Constitution.

I should like to assert here that behind every great judicial opinion of a great judge lies the great argument of a great lawyer. Nowhere is that better illustrated than by the argument made by Mr. Black in presenting to the court, at a time when it took courage on his part to present the contention, that even a man suspected of disloyalty to the Union was entitled to the protection of the Constitution of the United States. Mr. Black, the counsel for Milligan, said this, which appears at pages 66 and 67 of the report of that case, in 71 U.S. Reports. The report begins at page 2. This is what Jeremiah Black said:

If the men who fought out our Revolutionary contest, when they came to frame a government for themselves and their posterity, had failed to insert a provision making the trial by jury perpetual and universal, they would have proved themselves recreant to the principles of that liberty of which they professed to be the special champions. But they were guilty of no such thing. They not only took care of the trial by jury, but they regulated every step to be taken in a criminal trial. They knew very well that no people could be free under a government which had the power to punish without restraint. Hamilton expressed, in the Federalist, the universal sentiment of his time, when he said, that the arbitrary power of conviction and punishment for pretended offences, had been the great engine of despotism in all ages and all countries. The existence of such a power is incompatible with freedom.

Following that statement, Jeremiah Black discussed exactly how the Constitution of the United States came into being as a written document.

He said:

But our fathers were not absurd enough to put unlimited power in the hands of the ruler and take away the protection of law from the rights of individuals. It was not thus that they meant "to secure the blessings of liberty to themselves and their posterity." They determined that not one drop of the blood which had been shed on the other side of the Atlantic, during seven centuries of contest with arbitrary power, should sink into the ground; but the fruits of every popular victory should be garnered up in this new government. Of all the great rights already won they threw not an atom away. They went over *Magna Charta*, the *Petition of Right*, the *Bill of Rights*, and the rules of the *common law*, and whatever was found there to favor individual liberty they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by a more universal application. They put all those provisions into the organic law, so that neither tyranny in the executive, nor party rage in the legislature, could change them without destroying the government itself.

Mr. President, we have heard a great deal of discussion here about the no-knock and preventive detention provisions in the bill, but there are some other inequities in the bill which merit the attention of the Senate.

MULTIPLE OFFENDER PROCEDURES

One particular section I call attention to at this time is the provision dealing with habitual criminals, on pages 142 and 143 of the conference report.

To save time, I shall not read the major provisions of the report which deal with the sentencing of multiple offenders—that is, habitual offenders, sometimes called habitual criminals—as found in section 201.

In the interest of time, so that it may be available to anyone who reads the CONGRESSIONAL RECORD and wishes to test the soundness of the assertions I am going to make with regard to these provisions relating to habitual criminals, I ask unanimous consent that section 201 on pages 142 and 143 of the conference report be printed in the RECORD.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

TITLE II—CRIMINAL LAW AND PROCEDURE

SENTENCING OF MULTIPLE OFFENDERS

SEC. 201. (a) Section 907 of the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901 (D.C. Code, sec. 22–104), is amended to read as follows:

SEC. 907. (a) If any person—

"(1) is convicted of a criminal offense (other than a non-moving traffic offense) under a law applicable exclusively to the District of Columbia, and

"(2) was previously convicted of a criminal offense under any law of the United States or of a State or territory of the United States which offense, at the time of the conviction referred to in paragraph (1), is the same as, constitutes, or necessarily includes, the offense referred to in that paragraph,

such person may be sentenced to pay a fine in an amount not more than one and one-half times the maximum fine prescribed for the conviction referred to in paragraph (1) and sentenced to imprisonment for a term not more than one and one-half times the maximum terms of imprisonment prescribed for that conviction. If such person was previously convicted more than once of an offense described in paragraph (2), he may be sentenced to pay a fine in an amount not more than three times the maximum fine prescribed for the conviction referred to in paragraph (1) and sentenced to imprisonment for a term not more than three times the maximum term of imprisonment prescribed for that conviction. No conviction with respect to which a person has been pardoned on the ground of innocence shall be taken into account is applying this section.

"(b) This section shall not apply in the event of conflict with any other provision of law which provides an increased penalty for a specific offense by reason of a prior conviction of the same or any other offense."

(b) Such Act is amended by adding after section 907 the following new section:

"SEC. 907A. (a) If—

"(1) any person (A) is convicted in the District of Columbia of a felony, and (B) before the commission of such felony, was convicted of at least two felonies; and

"(2) the court is of the opinion that the history and character of such person and the nature and circumstances of his criminal conduct indicate that extended incarceration or lifetime supervision, or both, will best serve the public interest,

the court may, in lieu of any sentence otherwise authorized for the felony referred to in clause (A) of paragraph (1), impose such greater sentence as it deems necessary, including imprisonment for the natural life of such person.

"(b) For purposes of paragraph (1) of subsection (a)—

"(1) a person shall be considered as having been convicted of a felony if he was convicted (A) of a felony in a court of the District of Columbia or of the United States, or (B) in any other jurisdiction of a crime classified as a felony under the law of that jurisdiction or punishable by imprisonment for more than two years; and

"(2) a person shall be considered as having been convicted of two felonies if his initial sentencing under a conviction of one felony preceded the commission of the second felony for which he was convicted.

No conviction with respect to which a person has been pardoned on the ground of innocence shall be taken into account in applying this section."

Mr. ERVIN. Mr. President, this section provides drastic penalties for habitual criminals, which range from terms of years up to life imprisonment, upon their conviction of a third or subsequent offense.

The provisions of the bill which deal with the implementation of this provision appear on pages 154 and 155 of the conference report, which is subsection 23–111.

In the interest of time, I ask unanimous consent to have it printed in the RECORD verbatim.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

"§ 23–111. Proceedings to establish previous convictions

"(a)(1) No person who stands convicted of an offense under the laws of the District of Columbia shall be sentenced to increased punishment by reason of one or more previous convictions, unless prior to trial or before entry of a plea of guilty, the United States attorney or the Corporation Counsel, as the case may be, files an information with the clerk of the court, and serves a copy of such information on the person or counsel for the person, stating in writing the previous convictions to be relied upon. Upon a showing by the Government that facts regarding previous convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

"(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years, unless the

person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

"(b) If the prosecutor files an information under this section, the court shall, after conviction but before pronouncement of sentence, inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a previous conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

"(c)(1) If the person denies any allegation of the information of previous conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the prosecutor. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the Government to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the prosecuting authority shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

"(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a previous conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

"(d)(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of previous convictions, the court shall proceed to impose sentence upon him as provided by law.

"(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the prosecutor, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by law. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered."

Mr. ERVIN. Mr. President, I invite the attention of the Senate to the fact that this has nothing to do with the no-knock or preventive dentention provisions but has much to do with many parts of the Constitution.

Some of the things that our forefathers asserted in the Constitution, in order to protect the liberty of the individual against the Federal Government, are found in amendment No. 5, which reads as follows:

AMENDMENT [V]

No person shall be held to answer for a capital, or other wise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Mr. President, under this provision of the Constitution, the Supreme Court has held in many cases that a person is charged with an infamous crime when he is charged with a crime punishable by death or a crime punishable by more than 1 year's imprisonment. Congress has sanctioned that interpretation of this provision of amendment V of the Constitution by decreeing that every crime which is punishable by death, or by more than 1 year's imprisonment, constitutes a felony under Federal law.

Subsection 23–111, as incorporated in the conference report, provides that instead of prosecuting these persons as habitual offenders for second or subsequent crimes on a bill of indictment found by a grand jury, they can be prosecuted upon an information except in cases where the increased punishment which may be imposed is imprisonment for a term in excess of 3 years.

In other words, under this provision of the bill, the prosecuting attorney in the District of Columbia can prosecute by information rather than by indictment an infamous offense or a felony which is punishable by imprisonment up to as much as 3 years imprisonment. That is in direct contradiction of the provisions of the fifth amendment providing that no man can be placed on trial for an infamous crime—that is for a felony—except upon indictment by a grand jury.

The distinguished Senator from Maryland yesterday paid high tribute to the criminal procedure laws of England. Evidently those who wrote this conference report had a very high admiration for the laws of England. Indeed, they manifested in this section I am discussing their high opinion of the Court of Star Chamber of England which is held in abhorrence by every other American since it permitted people to be tried in secret and compelled them to be witnesses against themselves on their trial.

It was as a result of this practice in the Court of Star Chamber that the Founding Fathers placed in the Constitution the provision of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.

That is a very simple statement. It means exactly what it says, that no person charged with a crime in the courts of the United States can be required to give testimony or make a confession which can be used as one of the chains of events or chains of elements necessary to his conviction.

Under the provisions of this bill dealing with habitual criminals, a person can be given increased punishment if he commits a second or a subsequent serious offense. In order for the court to be able to impose this increased punishment on him it is necessary under the Constitution, but not under this bill, for the Government to prove two things—that he is guilty of the offense presently charged against him and that prior to committing that offense, he was convicted of other offenses. Then such increased punishment is to be imposed upon him.

This provision, section 23–111, actually says that the prosecutor shall prosecute him as a habitual criminal upon information, even in those cases where he can be imprisoned for between 1 and 3 years if adjudged guilty. That is not the most remarkable thing in it. It says that this information charging the accused with having committed prior offenses—that is offenses prior to the present offense—shall be served upon the accused or his lawyer. Then it says, and I read verbatim this portion of section 23–111:

If the person—

That is the accused—

denies any allegation of the information of previous conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information.

Then it proceeds further:

If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of previous convictions, the court shall proceed to impose sentence upon him as provided by law.

In other words, under that everything he does not deny he admits. So, we have a statute here, section 23–111, which actually requires a defendant, instead of pleading not guilty or instead of standing mute, to file a written response and admit or deny that he is the man who was previously convicted as alleged in the Government's pleading.

In other words, this statute compels a man to be a witness against himself in violation of the self-incrimination clause of the fifth amendment to the Constitution. So it is not surprising that the people who admire the English system to such an extent that they even admire the Court of Star Chamber should write a bill with such inequities as that in it.

What I have said thus far shows that this section violates the provision of the fifth amendment which says that no man can be placed on trial for an infamous crime or subjected to infamous punishment unless he is first indicted by a grand jury. Then it violates the clause that says that no man shall be compelled to be a witness against himself.

I was surprised to find those things in this provision. But I was also surprised to find two other things which, if it is possible for anything to be worse than those two provisions, are worse than those two provisions.

Section 23–111 says:

The hearing shall be before a court without a jury and either party may introduce evidence.

That is a hearing upon the information and the defendant's response to the

information which he is required to make in violation of his rights not to be required to be a witness against himself.

In other words, here is a man being tried upon a charge that he is an habitual offender, that he has been convicted of prior offenses, and he can be imprisoned under some of the provisions of the bill incorporated in the conference report for as much as life, and instead of being allowed a trial by jury on the issues of fact, it expressly says that the trial shall be before the court without a jury.

That is a clear violation of section 2 of article III of the original Constitution which declares this:

> The trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trials shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

So that provision providing for trial by a judge rather than a jury upon an accusation which can result in sending an accused to prison for years or even for life, is an offense against that provision of the Constitution. It is also in direct violation of this provision of the Constitution, and I now read amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .

In this one section of the bill there are four separate and distinct violations of four separate provisions of the Constitution.

We are informed by the distinguished senior Senator from Maryland that we must swallow this lock, stock, and barrel or we are not going to get a crime bill for the District of Columbia.

I have difficulty accepting the proposition that the Members of the House of Representatives are so irresponsible and so alien to their oaths to support the Constitution that they will defeat any bill unless that bill violates the Constitution at least four times in just one section, and I shall point out a fifth time in just a minute.

Another provision of the Constitution is embodied in the fifth amendment which states:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

This provision of the Constitution has been interpreted, and rightly interpreted, to require that before a man can be convicted and punished for criminal conduct, his guilt must be established; that the burden of proof is upon the prosecution; and that the burden on the prosecution requires it to prove his guilt beyond a reasonable doubt—which means to prove it fully—by evidence in the case other than evidence extorted from the defendant in violation of the self-incrimination clause.

But, Mr. President, I want you to see what this miraculous section 23–111 has to say about burden of proof. It states in subsection (c)(1) that—

> Except as otherwise provided in paragraph (2) of this subsection, the prosecuting authority shall have the burden of proof beyond a reasonable doubt on any issue of fact.

The next subsection annuls the lipservice paid to the Constitution by subsection (c)(1). The next subsection—(c)(2)—states:

> The person—

The person before the court upon an accusation which involves whether he shall be imprisoned for many years or even for life—

> * * * shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response.

In other words, that is the exception which destroys the lipservice which the previous subsection had paid to the requirement of the due process clause of the fifth amendment that issues of fact must be established beyond a reasonable doubt.

Here it takes the negative of that section and states that a man who files a response to an information, which charges him with previous offenses and with being a habitual criminal, has the burden of proof to prove he was not the man who committed the previous offenses, and he is required to show it by the greater weight of the evidence.

What I have said makes it as clear as the noonday sun in a cloudless sky that section 23–111 of the bill incorporated in the conference report violates at least five different provisions of the Constitution governing trials of persons who are charged with being habitual offenders and who have enhanced punishment placed upon them when they are found to be persons who committed previous offenses.

I have a high respect for the Congress of the United States, but this is one case where I say, "Thank God that the Congress of the United States, acting through the conference committee, is not the supreme ruler of the American people and that we have courts in which a man can invoke the constitutional rights which Congress may undertake to rob him of."

There are many decisions on this point.

I discovered these five violations of the Constitution in section 23–111 of the bill only a short time ago by burning the midnight oil. I found that this matter has been passed on in virtually every State that has a habitual criminal statute, and that every State which has passed upon the matter has the same requirement, with the exception of one State, which has a very peculiar rule which I think is probably unconstitutional since the Supreme Court last May held that the sixth amendment right of trial by a jury now applies to the States. That decision was rendered last May or thereabouts in the Bloom case from Illinois and a case from Louisiana. One State has ruled that whether a man has been previously convicted is a matter for the court and not for the jury. But every other State that has ruled on the matter has held exactly to the contrary.

The general rule on this subject is laid down in the following words in 25 American Jurisprudence. The subject is "Habitual Criminals," section 33, page 379. It declares that on a charge of second or subsequent offenses it is generally held that the question of prior conviction is an issue of fact to be determined by a jury.

Then, Corpus Juris Secundum has something to say on this subject.

I read this from 24 Corpus Juris Secundum, the subject "Criminal Law," page 278, subject, "Habitual Criminals," section 31:

> The defendant has the same rights to a speedy trial, to time for preparation, to assistance of counsel, to be confronted with the witnesses against him, to require proof beyond a reasonable doubt, and to all other rights enjoyed by defendant on trial for a criminal offense.

Then, in the recent revision of American Jurisprudence, 39 American Jurisprudence—second series—page 322, subject "Habitual Criminals," section 18 states:

> One who is charged with crime as a second or subsequent offender is entitled to the rights enjoyed by all criminal defendants, including the right to a speedy trial and an appropriate hearing, a time for preparation of his defense, of assistance of counsel, and of compulsory process for witnesses. The accused is also entitled to be confronted by the witnesses against him, to require proof of guilt beyond a reasonable doubt, and to be exempt from adverse presumption on account of failure to testify as a witness in his own behalf.

Despite the last clause I have just read, this bill provides that the defendant admits everything that he does not deny, he is required to make a written response, and they not only can comment on it, but can convict him on account of his failure to make a response.

I have pointed out these general text statements. I never got hold of a copy of this provision, and I never saw it until about 3 days ago, and I almost had apoplexy to find any bill proposed to the Senate of the United States that a man could be tried for a felony or punished as an infamous criminal without indictment by a grand jury, that a man could be required to incriminate himself, that a man could be denied the right of trial by jury and have the issues of fact determined by a judge, that the burden of proof could be shifted from the prosecution to the accused, to require the accused to establish that he was not the man who had committed the previous offenses and for that reason was not subject to the increased punishment and was not an habitual offender. But I started to investigate when I read these provisions despite the shock they gave me.

I could not bring all the cases here. I did not have time even to record them all. But I found that the decisions hold that on a charge of a second or subsequent offense under a habitual criminal statute such as incorporated in the conference report, the question of whether there was a prior conviction is an issue of fact to be determined by a jury.

State v. *Beaudoin*, 131 Me. 31, 158 A Reporter 863, 85 ALR 1101; *State* v. *Findling*, 123 Minn. 413, 144 NW 142, LRA (NS 449); *People* v. *Gowasky*, 244 N.Y. 451, 155 N.E. 737, 58 ALR 9; *People* v. *Reese*, 258 N.Y. 89, 179 N.E. 305, 79 ALR 1329; *State* v. *Durham*, 177 Or. 574, 164 P. 2d 448, 162 ALR 422; *State* v. *Cardwell*, 332 Mo. 790, 60 S.W. 2d 28; *Burnham* v. *State*, 127 Neb. 370, 255 N.W. 48; *Metzger* v.

State, 214 Ind. 113, 13 N.E. 2d 519; *State* v. *Delano*, 189 Wash. 230, 64 P. 2d 511; *State* v. *Held*, a Missouri decision, 148 SW 2d 508; *Millwood* v. *State*, a Mississippi decision, 1 So. 2d 582; *Singletary* v. *State*, a Mississippi decision, 4 So. 2d 234; and *State* v. *Furth*, a Washington decision, 195 P. 2d 925.

Now I want to call attention to some of these cases and put them in the RECORD.

These cases are State cases involving the trial of habitual criminals. Each of them holds that under a State constitution guaranteeing the right of trial by jury in criminal cases, every person charged with being a habitual criminal has the right to trial before a jury instead of a trial before a judge.

They also require that his guilt be established beyond a reasonable doubt—requirement which is absolutely contradicted by this section of the crime bill as reported.

I call the attention of the Senate to the Missouri case of State against Cardwell, reported in 60 S.W. 2d at page 28. I wish to read just one sentence from that. It says:

Missouri has no statute regulating the procedure in such cases. The question of a former conviction must, therefore, be submitted to a jury.

I ask unanimous consent that the decision of the Supreme Court of Missouri on this issue in the case of State against Cardwell be printed in the RECORD at this point.

There being no objection, the decision was ordered to be printed in the RECORD, as follows:

[Supreme Court of Missouri, Division No. 2, April 20, 1933]

STATE V. CARDWELL—NO. 32721

1. CRIMINAL LAW—1202(4)

Instruction that if accused stole automobile maximum penalty should be assessed *held* error, where jury were not required to find prior conviction and discharge, though admitted by accused (Rev. St. 1929, §§ 4065, 4461).

2. CRIMINAL LAW—823(1)

Instruction that prior conviction could be considered as bearing on punishment to be assessed did not cure erroneous instruction directing maximum punishment in case of guilt where prior conviction and discharge were not submitted (Rev. St. 1929, § 4461).

3. CRIMINAL LAW—1202(4)

Better practice is to submit prior conviction distinct from guilt or innocence of crime charged and to frame verdict so that it will show jury passed on each proposition (Rev. St. 1929, § 4461).

4. CRIMINAL LAW—695(2)

Whether accused has attempted to plead guilty to charge involved was so incompetent that general objection was good.

5. CRIMINAL LAW—1169(1)

Admitting evidence of accused's offer to plead guilty is reversible error.

6. CRIMINAL LAW—730(3)

Court should have reprimanded prosecuting attorney and admonished jury to disregard question whether accused had offered to plead guilty.

7. CRIMINAL LAW—508(8)

Admission of testimony of one charged in separate information of same crime was not error, particularly where no objection was made (Rev. St. 1929, § 3691).

Appeal from Circuit Court, Taney County; Robert L. Gideon, Judge.

Glen (Buck) Cardwell was convicted of grand larceny, and he appeals.

Reversed and remanded.

Stratton Shartel, Atty. Gen., and C. A. Powell, Asst. Atty. Gen., for the State.

Westhues, Commissioner.

On April 21, 1932, appellant was convicted in the circuit court of Taney county, Mo., on a charge of grand larcency, the stealing of an automobile. The punishment was fixed at ten years imprisonment in the penitentiary, the maximum prescribed for the offense. Section 4065, R. S. Mo. 1929 (Mo. St. Ann. §4065). After appellant's motion for a new trial had been overruled, he was sentenced. From this sentence he has appealed. The information upon which appellant was tried was based upon section 4461, R. S. Mo. 1929 (Mo. St. Ann. § 4461), in that in addition to the charge of grand larceny it charged that appellant had previously been convicted of burglary and sentenced to serve a term in the Missouri penitentiary therefor, and that he had been discharged from the sentence imposed.

The evidence, on part of the state, was ample to sustain a verdict of guilty. It tended to prove that on a certain night of August, 1931, an automobile, belonging to Daisy Mayden, was stolen. This occurred near a church at Kissee Mills, Taney county, Mo. The car was later found in Oklahoma. Appellant was arrested in Oklahoma, brought back to Missouri, and charged with the theft. The state offered evidence that appellant had made statements admitting that he had taken the car and driven it to Oklahoma. There was other evidence introduced tending to connect appellant with the theft. It was admitted in evidence that on October 21, 1929, appellant entered a plea of guilty to a crime of burglary in the circuit court of Taney county and was sentenced to serve a term of two years imprisonment in the penitentiary, and that he was released under the merit system, on the 5th day of June, 1931.

[1] Apellant has filed no brief in this case. The assignments of error discussed are found in the motion for new trial filed by appellant. The giving of instruction No. 1, on part of the state, was assigned as error. It reads as follows:

"The court instructs the Jury that if you believe and find from the evidence herein that the defendant, Glen (Buck) Cardwell, in the County of Taney and the State of Missouri, on or about the ——— day of August, 1931, did wrongfully and feloniously take, steal and carry away the property described in the information, with the intent to fraudulently convert the same to his own use and deprive the owner thereof permanently, without her consent, and that the same was the property of Daisy Mayden, you will find the defendant guilty of grand larceny and assess his punishment at imprisonment in the State Penitentiary for a term of ten years; and unless you do so find the facts to be, you will acquit the defendant.

" 'Feloniously' means wickedly and against the admonition of the law."

The particular objection to the instruction was that the only punishment authorized was ten years imprisonment in the penitentiary, the maximum prescribed for the offense. The learned Attorney General in his brief attempts to justify the giving of this instruction on the theory that the defendant admitted that he had been previously convicted of a crime and had been discharged from the sentence imposed, as alleged in the information; that, therefore, if the jury found defendant guilty of the crime for which he was on trial the punishment would be the maximum. This contention is untenable for the reason that the instruction does not refer to, or mention, the previous conviction. A previous conviction and a discharge from the punishment imposed are made a condition precedent by the statute to the infliction of the maximum punishment for a subsequent offense. State v. Schneider, 325 (Mo. 486, 29 S.W.(2d) 698; State v. Dalton (Mo. Sup.) 23 S.W.(2d) 1, loc. cit. 5 (13); State v. Bresse, 326 Mo. 885, 33 S.W. (2d) 919, 922. Even though this fact be admitted it must be submitted to the jury in a proper instruction. An analysis of the cases cited in the state's brief will disclose that the giving of instruction No. 1, supra, constituted reversible error.

In the case of State v. McBroom, 238 Mo. 495, 141 S.W. 1120, 1121, a pawnbroker was charged with receiving goods from a minor without the written consent of the minor's parents. It was also charged that defendant had been previously convicted of a similar offense. The state offered evidence of the previous conviction, which was not denied. However, the previous conviction was not admitted by the defendant. The trial court submitted the case to the jury, authorizing them to either convict defendant and assess the increased punishment provided for a second offense, or to acquit. This court held that the trial court should also have submitted the case to the jury on the theory that defendant had not been previously convicted, so as to permit the jury to assess the punishment provided for a first offense. This, on the theory that it was necessary for the state to allege and prove the prior conviction. This court also held that since defendant did not admit the prior conviction, it was a question for the jury to determine and not for the court to assume. In the case of State v. Asher (Mo. Sup.) 246 S.W. 911, the defendant was charged with robbery in the first degree. The information alleged a prior conviction and a discharge from the sentence imposed. This court held that the defendant had admitted his previous conviction and had offered evidence that he had been pardoned by the Governor; that, therefore, an instruction, which assumed the fact that defendant had been discharged from the prior sentence, was not erroneous. The case does not disclose whether the court submitted the case to the jury in the alternative so it could return a verdict of guilty without finding defendant had been previously convicted. However, this question was presented to this court and decided in State v. English, 308 Mo. 695, 274 S.W. 470, loc. cit. 473 (7, 8). English was charged with stealing chickens during the night. This information also charged a previous conviction and a discharge from the sentence. The case was submitted to the jury upon the sole proposition that they would either acquit defendant or find him guilty under what is now section 4461, and assess the maximum penalty. The opinion disposed of the question thus:

"The defendant claims instruction No. 1 was error because the jury was not given an opportunity to find the defendant guilty of the crime charged without finding him guilty of the former crime. As instruction No. 1 reads, the jury could not find the defendant guilty at all, unless he had been formerly convicted, and had served a term in the penitentiary. If they failed to find that, as well as that he was guilty of the present crime, they would have to acquit him. They were properly instructed as to the punishment because if they found him guilty of the present crime and of the former offense, the only punishment they could inflict upon him was five years in the penitentiary. Section 3314 and section 3702, R.S. 1919. Besides the record of the former conviction was conclusive of that matter, and the fact was not denied. Defendant's counsel objected, when defendant was asked on cross-examination about the former conviction, on the ground that the record was the best evidence."

In all of the above cases the allegations of the information, with reference to the former conviction and discharge from the sentence imposed, were embodied in the instruction submitting the case to the jury. We have

been unable to find any where it was not so submitted.

In 16 C. J., page 1348, § 3177, we find the following statement of the general rule: "Where defendant confesses the prior conviction alleged in the indictment, in accordance with a statute conferring such right, it is not necessary for the jury to pass upon the question of previous conviction in order to authorize a sentence for the enhanced penalty. However, in the absence of such statute, or of other statutory provisions regulating the procedure in such case, the jury must find specially as to the fact of prior conviction even though confessed by defendant."

Missouri has no statute regulating the procedure in such cases. The question of a former conviction must, therefore, be submitted to a jury. In the case of State v. Bresse, supra, the defendant offered to admit to the court his previous conviction and discharge from the sentence imposed. He requested the court, however, to require the state's attorney to refrain from reading that part of the information and from informing the jury of the former conviction. Defendant also offered that in case the jury should convict him of the charge for which he was on trial the maximum penalty should be assessed against him. This court in answer to that proposition said:

"Defendant was on trial for a felony, that of participating in the theft of a motor car. It is true that section 3702 of itself creates no offense, but, if its essential elements are present and proved, it does prescribe a greater punishment upon the jury finding defendant guilty of the offense on trial.

"The finding of facts, under our procedure, is the function of the jury, and this includes the ultimate finding of guilt, and primarily the assessment of the punishment. In a felony case, a defendant cannot consent to a trial before the court without the intervention of a jury. State v. Talken, 316 Mo. 596, 292 S. W. 32. In effect, the court's assent to defendant's offer would have been tantamount to a trial in part before the court and an usurpation of the function of the jury. It would have resulted in the cause being tried partly by the court and partly by the jury. Notwithstanding defendant's tentative admission, it was the function of the jury to pass upon defendant's previous conviction, and the court's consent to the offer would have usurped that function. To sustain a conviction under section 3702, supra, it was necessary for the state to plead and prove the essential elements of said section, and it was necessary for the jury to find them."

Instruction No. 1, in the case before us, made no reference whatever to the previous conviction. The instruction made it mandatory on the jury to assess the maximum penalty for grand larceny without requiring the jury to find that defendant had been previously convicted. If a defendant is not to be permitted to admit his previous conviction before the court and to offer, in case of conviction of the crime charged, to take the maximum penalty therefor, without having the fact of the previous conviction disclosed before a jury, then certainly the state ought not to have the right to submit the case to the jury, without requiring the jury to find that defendant had been previously convicted, before inflicting the maximum penalty for the offense for which defendant is on trial. Why should the fact of a former conviction be made known to a jury if it can be taken into consideration by the court in its instructions on the punishment to be assessed without making any reference thereto, or requiring a finding thereon? It would serve no purpose other than to prejudice the jury against defendant.

[2] Instruction No. 2, given by the court, correctly instructed the jury not to consider the former conviction as any evidence of defendant's guilt. Instruction No. 2 further told the jury that it could consider the former conviction as bearing upon the question of the amount of punishment to be assessed. This was a useless admonition, since, under instruction No. 1, the jury was authorized to assess only the maximum punishment without any reference to the prior conviction. Admonishing the jury not to consider the former conviction in determining the guilt of the defendant of the charge for which he was on trial did not cure the defect in instruction No. 1. The jury should be required to find the essential facts as set forth in section 4461, supra, before being authorized to assess only the maximum punishment for the offense of which the jury finds the defendant guilty.

[3] The record discloses that when the jury read its verdict the foreman addressed the court as follows: "We all feel under the law we couldn't make any other sentence except what you instruct; and, we thought it was a little stiff; and we didn't think we had any right to change the terms, and thought we would leave that to you and thought perhaps you could."

The court thereupon informed the jury that, under the law, defendant could only be assessed the maximum penalty for grand larceny because it was his second offense. A number of jurors, in answer to questions by the attorney for the defendant, said that had they known the court was powerless to reduce the punishment they would not have returned a verdict of guilty. Defendant contends that at this point the court erred in not sending the jurors to their juryroom with further instructions that they might assess a lesser punishment. Since the case must be reversed and remanded, we will forego a discussion of this assignment of error. However, it demonstrates that in practice it sometimes happens that a guilty man escapes punishment because under the instructions of the court the jury are limited to inflict a penalty which in their judgment is too severe. Section 4461, the habitual criminal act, if properly applied, is a most effective weapon whereby a prosecutor may rid his community of professional criminals. In State v. English we held that the trial court was authorized to submit to the jury the sole question of conviction or acquitting a defendant under section 4461. This, because the instruction required the jury to either acquit the defendant or to find as a fact that defendant had been previously convicted, and to further find him to be guilty of the crime for which he was on trial and then to assess the maximum penalty. However, we think the better practice to be followed in prosecutions under section 4461 is that prescribed in State v. McBroom, supra, where it is advised as follows: "In our judgment, the instructions should present to the jury, in the alternative, the issue of former conviction, so that the jury could find for or against the defendant on that issue, as distinct from the question of guilt or innocence of the crime charged, and the verdict should be so framed as to show that the jury passed upon each proposition."

Because of the error in instruction No. 1, the case must be reversed and remanded for a new trial.

[4–6] Error is assigned because the trial court refused to reprimand counsel for the state and to discharge the jury for an improper question asked by the prosecutor. The matter can be best presented by quoting from the record the cross-examination relied on for error.

" 'Q. How many times have you been convicted of a crime of any kind? A. I never was convicted; I always plead guilty when they got me for anything.

" 'Q. You tried to plead guilty in this?

" 'By Mr. Ingenthron: We object to that.

" 'By the Court: Objection sustained.

" 'By Mr. Ingenthron: We ask that the Prosecuting Attorney be reprimanded and the jury discharged.

" 'By the Court: It will be refused.'

"To which action of the court in refusing to reprimand the Prosecuting Attorney and discharge the jury in said cause, the defendant, by his counsel, duly objected and excepted at the time.

" 'By Mr. Blunk: That remark was thrown in by the Prosecuting Attorney for the purpose of poisoning the minds of the jury.' "

The question, "You tried to plead guilty in this?" was highly improper. It will be noted that no reason was advanced for the objection. However, the answer to the question could not have been relevant to any issue in the trial. Its incompetency was so apparent that a general objection was good. State v. Baldwin, 317 Mo. 759, 297 S. W. 10. The trial court evidently so thought, as the objection was promptly sustained. It is reversible error to admit in evidence the offer of a defendant to plead guilty. State v. Abel, 320 Mo. 445, 8 S.W.(2d) 55, and cases there cited. The trial court should have reprimanded the prosecuting attorney and admonished the jury to disregard the improper question. Since the case must be remanded for a new trial, we will refrain from deciding whether or not the error justified a retrial.

[7] It is charged that the court erred in permitting witness Lyman Cardwell to testify for the state against appellant, when said witness "was a co-defendant charged with the commission of the same crime, his case not disposed of either by plea, trial or dismissal." This assignment is without merit. Lyman Cardwell was not jointly charged with appellant, but was charged in a separate information. Nor was objection made to his testifying. State v. Black, 143 Mo. 166, 44 S. W. 340. Section 3691, R. S. Mo. 1929 (Mo. St. Ann. § 3691), applies only to persons jointly indicted or prosecuted. State v. Braden (Mo. Sup.) 295 S. W. 784, syl. 2; State v. Lackmann (Mo. Sup.) 12 S.W.(2d) 424.

Other assignments have been examined and found to be without merit. The record proper discloses no reversible error. The judgment of the trial court is reversed and the cause remanded for a new trial.

Cooley and Fitzsimmons, CC., concur.

Per Curiam.

The foregoing opinion by WESTHUES, C., is adopted as the opinion of the court. All concur.

Mr. ERVIN. I wish to read certain extracts from an opinion of one of the greatest judges this Nation has ever known, Chief Judge Benjamin N. Cardozo, speaking for the Court of Appeals of New York in the case of People against Reese, which is reported in 258 N.Y. 39, 179 N.E. 305.

Headnote 5 summarizes the holding of the court very accurately, as follows:

Identity of defendant as person previously convicted must be established beyond reasonable doubt on accusation of prior convictions.

I call the attention of the Senate to this extract from the opinion on page 307. Justice Cardozo said:

Other objections to the judgment are made by the defendant, and should be considered at this time, for they are certain to recur.

[5] 2. The defendant assigns as error a ruling of the trial court that the case for the people did not require proof beyond a reasonable doubt, but would be sufficiently made out by a preponderance of evidence, and also a ruling that in determining the defendant's identity the jury might properly consider the defendant's failure to take the stand as a circumstance against him.

Justice Cardozo sustained the defendant's position on both of these points. Reading now from page 308, he says:

To justify a verdict that the defendant charged in the information is the person previously convicted, the jury should be sat-

isfied of his identity beyond a reasonable doubt.

It is a far cry from that holding to the provisions of this proposed statute, that not only is the prosecution not required to show the defendant to be a habitual offender, by evidence beyond a reasonable doubt but the defendant is required to show that he is not such a person by the greater weight of the evidence.

Justice Cardozo pointed out further about these habitual criminal statutes:

Unquestionably this inquiry is a criminal case, and not a civil one. Unquestionably it was so conceived by the lawmakers, for by the terms of the statute it is made the duty of the district attorney to file an information "accusing" the defendant of the previous convictions. The section from beginning to end speaks the language of the criminal law. Not only is the proceeding punitive in form, it is punitive also in effect. The answer made to the "accusation" by the verdict of the jury may mean that the defendant will be a free man after a brief term of confinement, or may mean, on the other hand, that he will be a prisoner for life. If the previous convictions had been charged in an indictment, there is no doubt that they must have been proved beyond a reasonable doubt, for they would then have been elements affecting the grade of the offense.

Mr. President, I ask unanimous consent that the opinion in People against Reese, written by that great jurist, Chief Judge Benjamin Cardozo, be printed in full at this point in the body of the RECORD.

There being no objection, the opinion was ordered to be printed in the RECORD, as follows:

[Court of Appeals of New York, Jan. 5, 1932]

PEOPLE V. REESE

1. CRIMINAL LAW—1202(3)

Statute making certificate of custodian of fingerprint records presumptive evidence of prior conviction *held* inapplicable to certificate by custodian in another state (Code Cr. Proc. § 482-b, as added by Laws 1927, c. 356).

Code Cr. Proc. § 482-b, as added by Laws 1927, c. 356, should be held inapplicable, to custodians of fingerprints in other states, since foreign custodian of fingerprint records, though he knows about prints of convicts in prison in his state, is unable to identify fingerprint records taken in the state, purporting to be those of defendant, which are put in to be those of defendant, which are put in custodian's hands for comparison.

2. CRIMINAL LAW—1202(3)

Certificate of purported custodian of fingerprint records in another state *held* incompetent, both for comparison with local records and for identifying foreign records, where certificate was not authenticated, nor official character shown, nor genuineness of signature attested (Code Cr. Proc. § 482-b, as added by Laws 1927, c. 356).

There was nothing in the records to show whether any such office as that of custodian of fingerprints existed in Oregon where the certificate was given, and there was nothing to show whether the person whose name was affixed to the certificate was incumbent of such office, or to show that his signature was genuine.

3. CRIMINAL LAW—304(17)

Boundaries of judicial notice as to officer's authority are narrower when officer who certifies instrument acts under laws of another state.

4. CRIMINAL LAW—403

Implication of authority of custodian of records to certify copy is dependent on showing that person is custodian.

5. CRIMINAL LAW—1202(3)

Identify of defendant as person previously convicted must be established beyond reasonable doubt on accusation of prior convictions (*Penal Law,* § 1943, Code Cr. Proc. § 389).

6. CRIMINAL LAW—1202(3)

On trial of information charging prior convictions, no adverse presumption arises from defendant's failure to testify, and instruction authorizing jury's consideration of such circumstance was erroneous (Penal Law, § 1943; Code Cr. Proc. §§ 2, 393).

7. JURY—135

Provisions regulating peremptory challenges must be viewed on background furnished by history of criminal law.

8. JURY—135

Defendant charged with prior convictions *held* not entitled to peremptory challenges, since proceeding was merely collateral or supplementary (Pen. Law, § 1943; Code Cr. Proc. §§ 2, 359, 370, 373).

Appeal from Supreme Court, Appellate Division, First Department.

Howard B. Reese was convicted of attempted forgery in the third degree, and sentenced to life imprisonment as a fourth offender. From the judgment of the Appellate Division (232 App. Div. 624, 250 N. Y. S. 392) affirming the conviction, defendant appeals by permission.

Judgment of the Appellate Division and of Court of General Sessions reversed, and new trial ordered.

Caesar B. F. Barra and Ralph J. Barra, both of New York City, for appellant.

Thomas C. T. Crain, Dist. Atty., of New York City (Felix C. Benvenga and A. A. De Vito, both of New York City, of counsel), for the People.

Upon a plea of guilty, the defendant was convicted in the Court of General Sessions, county of New York, of attempted forgery in the third degree. Thereafter, before sentence was imposed, the district attorney filed an information, in accordance with Penal Law (Consol. Laws, c. 40) § 1943, accusing him of having been convicted of three crimes which would have been felonies if committed in New York. He was accused of having been convicted of forgery under the name of E. F. Lathrop in Spokane county, Wash., of having been convicted of the crime of false pretenses under the name of E. E. Lewiston in Larimer county, Colo., and of having been convicted of forgery under the name of Earl Freeman Lathrop in Multnomah county, Oregon.

Arraigned in response to this information, and cautioned as to his rights, the defendant stood mute. A jury, which was thereupon impaneled to determine his identity, found him to be the same person previously convicted. He was sentenced as a fourth offender to imprisonment for life.

1. The defendant makes the claim that the evidence offered by the people to establish his identity is insufficient and incompetent.

The form of proof was the same as to each of the three felonies. The conviction of forgery in Oregon will illustrate them all. A police officer who had taken the defendant's fingerprints after his conviction in the Court of General Sessions in this state, produced the prints then made. There was then produced an exemplified copy of an indictment of Earl Freeman Lathrop for forgery, and of the conviction and sentence thereunder in a court of competent jurisdiction in Multnomah county, Or., with the warrant of commitment. Next there was received a certificate signed, or purporting to be signed, by the custodian of fingerprint records in the Oregon state penitentiary, certifying that the records in his custody show "a previous conviction of a person whose fingerprints are identical with those hereto attached," adding a description of the crime and the sentence. Two sets of fingerprints were attached: one a set of fingerprints displayed upon a sheet of paper with the printed heading of the bureau of criminal identification of the city of New York; the other a set of prints purporting to have been made at the state penitentiary in Oregon. On the production of this certificate, a member of the police force of the city of New York, who qualified as an expert, testified that the defendant's fingerprints taken in this state and the fingerprints attached to the certificate from Oregon were those of the same person.

Code Criminal Procedure, § 482-b, enacted in 1927 (Laws 1927, c. 356), provides as follows: "The report of a person charged with the custody of finger print records of persons convicted of crime, who shall certify in writing that the records in his custody show certain previous convictions of persons whose finger prints, are identical with those of a defendant shall be presumptive evidence of the fact of such previous convictions of such defendant."

(1) The defendant argues, and we think correctly, that this statute does not apply to a certificate by a custodian of fingerprints in a state other than our own. No doubt a foreign custodian, annexing fingerprints to his certificate, would be competent to certify without the aid of any statute that they were prints or copies of prints kept upon his files in conformity with law, and to state, after comparison with the warrant of commitment, the name of the prisoner whose prints were so recorded. 3 Wigmore on Evidence, § 1677, p. 552. There would be a presumption in such circumstances that the prisoner fingerprinted was the prisoner committed; the presumption being merely an instance of the more general presumption of official regularity. 3 Wigmore on Evidence, § 1635, p. 401; § 1636, pp. 402, 403; Chesapeake & Delaware Canal Co. v. United States [C. C. A.] 240 F. 903, 907; Gaines v. Relf, 12 How. 472, 570, 13 L. Ed. 1071; Evanston v. Gunn, 99 U.S. 660, 25 L. Ed. 306; Commonwealth v. Slavski, 245 Mass. 405, 415, 140 N. E. 465, 29 A. L. R. 281, and cases there cited. People v. Bromwich, 200 N. Y. 385, 93 N. E. 933, is not a decision to the contrary. It rests upon the ground that the so-called rule of confrontation forbids the introduction of a certificate by a foreign officer that a record does not exist, a certificate wholly negative. Cf. 3 Wigmore on Evidence, § 1678, p. 560. The decision goes to an extreme limit of strictness, but it does not touch the admissibility of a certificate, affirmative in tenor, annexing copies of the records and attesting their correctness. The rule of confrontation which in this state is purely statutory (Civil Rights Law [Consol. Laws, c. 6], § 12; Code Cr. Proc. § 8) has never been deemed to require the exclusion of certificates or records made by a public officer in the course of his official duty. 3 Wigmore on Evidence, § 1398, p. 109; Commonwealth v. Slavski, 245 Mass. 405, 414, 415, 417, 140 N. E. 465, 29 A. L. R. 281; Heike v. United States (C. C. A.) 192 F. 83. If the certificate under the Code were merely one attesting the identity of records in the custody of the certifying officer, there would be little difficulty in applying the Code provisions to officers in other states. Upon proof that a person bearing the same name (5 Wigmore on Evidence, § 2529, p. 531; R. v. Levy, 8 Cox Cr. 73; Bayha v. Mumford, 58 Kan. 445, 49 P. 601; Ayers v. Ratshesky, 213 Mass. 589, 101 N. E. 78) had been convicted by a court of competent jurisdiction, a certificate, so framed, would be admissible in evidence, if properly authenticated. Identity of name is not always sufficient in a criminal prosecution to show identity of person (Ayers v. Ratshesky, supra), but it may be accepted as sufficient if fortified by circumstances, as, for example, by

reasonable coincidence of time between the conviction and the prints, and by the duty of the officer, presumably discharged, to ascertain that the person fingerprinted is the one described in the commitment. The certificate being received, comparison of the prints annexed, with the prints of the defendant on file in this state could then be made in open court by a witness qualified to testify. People v. Roach, 215 N. Y. 592, 604, 109 N. E. 618, Ann. Cas. 1917A, 410.

The difficulty in this case has its origin chiefly in the fact that section 482-b of the Code of Criminal Procedure does not limit the custodian to a certificate as to the genuineness of the prints and a statement from the warrant of commitment of the name of the prisoner whose prints have been recorded. He is to certify to much besides. He is to certify to his opinion that the prints which he attaches to his certificate are identical with those of the defendant, and the opinion is to be taken as presumptively correct. Plainly a custodian of foreign records is in no position to make the comparison or to venture the opinion which the statute has in view. The data necessary to the formation of a judgment are not in his possession. If the certificate sanctioned by the Code is confined to fingerprints taken in this state, the statute becomes workable. The domestic custodian has upon the files of his bureau the prints of defendants convicted in our courts, prints presumably taken in conformity with law. Cf. Code Cr. Proc. §§ 940-949, as amended by Laws of 1928, c. 875. He is thus in a position to make the comparison permitted by the statute and to express an opinion, that the prints are the same. If the defendant challenges the opinion, the maker of the certificate is here, and can be produced and cross-examined. None of these tests is available in the case of a custodian absent from the state. Such a custodian when he expresses an opinion that two sets of prints are those of the defendant is making a comparison without knowledge of one of the two things which he is expected to compare. He knows something about the prints of a convict imprisoned in his state. He knows nothing about any others except that a group of prints, bearing a heading which indicates that they have been transmitted to him by the police department of New York, but not otherwise authenticated, are in his hands for comparison. He does not know when or where or by whom they were made or whether they are genuine or fictitious. How is it possible for him to certify in the language of the statute "that the records in his custody show certain previous convictions of persons whose fingerprints are identical with those of a defendant"?

[2-4] The argument may be made that so much of the foreign certificate as expresses a comparison between the foreign prints and others may be rejected as surplusage, and the certificate accepted as identifying the foreign ones only. In that view, the effective comparison would be the one made upon the witness stand. At this point, however, another difficulty confronts us. The foreign certificate is not so authenticated as to the evidence of anything. All that is given us is a document signed by a person who describes himself as the custodian of the fingerprint records of persons convicted of crime. Neither the official character of the signer nor the genuineness of his seal and signature nor the regularity of his certificate is vouched for or attested by any one. We take judicial notice of the authority, and at times even of the signatures, of public officers acting in this state in accordance with our laws. The boundaries of judicial notice are narrower when the officer who certifies is acting under the laws of another state or country. 3 Wigmore on Evidence, § 1679, p. 563. We assume that a custodian of a record has authority, by implication of his office, to certify a copy. 3 Wigmore on Evidence, § 1677, p. 552; United States 1. Percheman, 7 Pet. 51, 86, 8 L. Ed. 604. Whether there is such a custodian is, however, the pivotal fact upon which implication is dependent. 3 Wigmore on Evidence, § 1677, p. 553. There is nothing in this record to inform us whether any such office as that of custodian of fingerprints exists in the state where the certificate was given. There is nothing to inform us whether the person whose name is affixed to the certificate is the incumbent of such an office. There is nothing to inform us (if he is the incumbent) whether his signature is genuine. Authentification is not merely defective. It is lacking altogether. 3 Wigmore on Evidence, § 1679, pp. 561, 563; cf. U.S. Code, tit. 28; § 688 (28 USCA § 688). Civil Practice Act, § 344.

Other objections to the judgment are made by the defendant, and should be considered at this time, for they are certain to recur.

[5] 2. The defendant assigns as error a ruling of the trial court that the case for the people did not require proof beyond a reasonable doubt, but would be sufficiently made out by a preponderance of evidence, and also a ruling that in determining the defendant's identity the jury might properly consider the defendant's failure to take the stand as a circumstance against him.

The procedure upon an inquiry such as the one before us is regulated by section 1943 of the Penal Law as follows: "If at any time, either after sentence or conviction, it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth either in section nineteen hundred and forty-one or nineteen hundred and forty-two, it shall be the duty of the district attorney of the county in which such conviction was had to file an information accusing the said person of such previous convictions. Whereupon, the court in which such conviction was had shall cause the said person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegations contained in such information and of his right to be tried as to the truth thereof according to law, and shall require such offender to say whether he is the same person as charged in such information or not. If he says he is not the same person or refuses to answer, or remains silent, his plea, or the fact of his silence, shall be entered of record and a jury shall be empanelled to inquire whether the offender is the same person mentioned in the several records as set forth in such information. If the jury finds that he is the same person or if he acknowledges or confesses in open court, after being cautioned as to his rights, that he is the same person, the court shall sentence him to the punishment prescribed in said sections nineteen hundred and forty-one and nineteen hundred and forty-two, as the case may be, and shall vacate the previous sentence, deducting from the new sentence all time actually served on the sentence so vacated. Whenever it shall become known to any warden or prison, probation, parole, or police officer or other peace officer that any person charged with or convicted of a felony has been previously convicted within the meaning of said sections nineteen hundred and forty-one or nineteen hundred and forty-two, it shall become his duty forthwith to report the facts to the district attorney of the county."

To justify a verdict that the defendant charged in the information is the person previously convicted, the jury should be satisfied of his identity beyond a reasonable doubt.

We are not required to hold that the persuasiveness of proof essential at such a time is governed by section 389 of the Code of Criminal Procedures, whereby "a defendant in a criminal action is presumed to be innocent, until the contrary be proved; and in case of reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." That section is part of title 7 of part 4 of the Code of Criminal Procedure (section 388 et seq.), which has to do with the trial of indictments. An inquiry as to identity after guilt has been established is not the trial as an indictment. People v. Gowasky, 244 N.Y. 451, 155 N.E. 737, 58 A. L. R. 9. To say this is not equivalent, however, to solving the whole problem. The necessity of proof beyond a reasonable doubt is not limited to cases within the letter of section 389. If it were, there would be no such requirement in prosecutions begun by an information, and triable, as many misdemeanors are triable, by a court without a jury. The necessity for a higher degree of persuasiveness than a mere preponderance of evidence exists at common law in criminal cases generally (5 Wigmore on Evidence, § 2497), and would supply the governing rule even though section 389 of the Code of Criminal Procedure had never been enacted. Unquestionably this inquiry is a criminal case and not a civil one. Unquestionably it was so conceived of by the lawmakers, for by the terms of the statute it is made the duty of the district attorney to file an information "accusing" the defendant of the previous convictions. The section from beginning to end speaks the language of the criminal law. Not only is the proceeding punitive in form, it is punitive also in effect. The answer made to the "accusation" by the verdict of the jury may mean that the defendant will be a free man after a brief term of confinement, or may mean, on the other hand, that he will be a prisoner for life. If the previous convictions had been charged in an indictment, there is no doubt that they must have been proved beyond a reasonable doubt, for they would then have been elements affecting the grade of the offense. People v. Gowasky, supra; People v. Sickles, 156 N.Y. 541, 51 N. E. 288. We find no token of a purpose to abate the measures of the proof upon an inquiry as to the same elements after guilt has been adjudged. The genius of our criminal law is violated when punishment is enhanced in the face of a reasonable doubt as to the facts leading to enhancement. If that genius is to be expelled, there should be a clear announcement of the purpose to drive it forth from the dwelling it has inhabited so long.

There are conflicting decisions on the subject in the courts below. The Appellate Division for the first department has held in a case decided without opinion that a preponderance of evidence suffices (People v. Rocco, 229 App. Div. 847, 243 N. Y. S. 847); the Appellate Division for the Fourth Department in an opinion by Sears, P. J., has held the opposite (People v. Brennan, 229 App. Div. 378, 242 N. Y. S. 692).

[6] Error, we think, there also was in the instructions to the jury that upon the trial of an information under Penal Law, § 1943, the failure of the defendant to take the stand may be considered by the jury to be a circumstance against him.

We have no thought in thus holding to intimate a belief that a statute permitting adverse comment in such circumstances would impair the constitutional privilege against self-incrimination (cf. Hiscock, Criminal Law and Procedure in New York, 26 Columbia Law Rev. 259, 260). In our view of the case, no such question is before us. We deal with the question solely in the aspect of statutory construction, and, so viewing it, we are satisfied that the comment is forbidden. By the express terms of section 1943 of the Penal Law, the defendant against whom the information is presented must be "cautioned as to his rights." This can only mean that he may speak or be silent as he prefers, and that silence, if preferred, will not tend to his prejudice. "The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify

does not create any presumption against him." Code Cr. Proc. § 393. It is far too narrow a reading of this section to limit it by force of its position in title 7, part 4, of the Code, to a privilege arising upon the trial of an "indictment." Cf. Code Cr. Proc. § 2. If that were its full meaning, a failure to take the stand might give rise to a presumption against a defendant whenever an information was the basis of a charge against him. Even the privilege to testify, which is conferred by the same section, would be subject in that view to a like restriction. The common understanding of the bench and bar is a sufficient answer to an attempt so to circumscribe the field of these procedural reforms. Irrespective of its place in the divisions of the Code, section 393 applies, by its very terms, "in all cases," i.e., in all criminal cases, without reference to the manner in which the prosecution was begun. We have seen that an inquiry to ascertain the previous convictions of one found guilty of a felony is to be treated as a criminal case. The whole structure of section 1943 of the Penal Law shows that this was its dominant quality in the thought of the framers of the statute. If so it is to be viewed, the incidents of a criminal case must be held to go along with it, including both the privilege to testify and the exemption from adverse presumption in the event of unwillingness to testify. If the Legislature desires to abrogate that exemption, it must speak with a clearer voice.

[7, 8] 3. The defendant assigns as error a ruling of the trial court that there were to be no preemptory challenges, and that any challenges to be allowed must be made for cause.

The provisions of the Criminal Code regulating peremptory challenges must be viewed upon the background furnished by the history of the criminal law. For centuries the privilege of such a challenge has been denied whenever the proceeding, though triable by a jury, has been collateral to the general issue of the defendant's guilt or innocence. Rex v. Okey (1674) 1 Lev. 61; Johnson's Case (1728) Foster's Crown Law, 46; Rex v. Radcliffe, 1 W. Bl. 3; Brooks v. Commonwealth, 41 Va. (2 Rob.) 845; People v. Youngs, 1 Caines, 37; Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216; People v. Schaller, 224 App. Div. 3, 229 N. Y. S. 492. The present inquiry, though a criminal proceeding rather than a civil one, is collateral or supplementary within the meaning of the ancient rule. People v. Gowasky, supra.

If the sections as to peremptory challenges are read with literal strictness, they do not touch this case. They have been placed in the part and title of the Code governing proceedings after indictment and before trial. Code Cr. Proc. § 2, and part 4, tit. 6, c. 3, §§ 359, 370, 373. This position might not be controlling if an intention to extend the privilege to other criminal proceedings were otherwise revealed. It is significant, if not wholly decisive, where such evidence is lacking.

We are unable to discover in the statute an indication of a purpose to reverse the course of history, and clothe the defendant with a privilege so consistently denied.

The court did not err in its limitation of the right of challenge.

The judgment of the Appellate Division and that of the Court of General Sessions should be reversed and a new trial ordered.

Pound, Crane, Lehman, Kellogg, O'Brien, and Hubbs, JJ., concur.

Judgments reversed, etc.

Mr. ERVIN. I call the attention of the Senate to a certain statement in the opinion of the court in the case of State against Durham, an Oregon case reported 177 Or. 574.

This was another case involving the question of whether the defendant was a habitual offender. To be guilty of being a habitual offender, as I have previously stated, the person must be guilty of the crime with which he presently stands charged, and second, he must have committed previous crimes in times past.

Sometimes this proceeding is tried all at once, and sometimes the question of his guilt in the present trial is determined and then the question of whether he is a previous offender is tried separately.

In this case, they were tried separately, and the court said this:

Although the jury in this special proceeding is not determining the guilt or innocence of the defendant on the main charge—

Because it was determining whether he was a previous offender—

it is nevertheless well established that it is a criminal proceeding. 24 C.J.S., Criminal Law, § 1969, page 1168. As said in 25 Am. Jur. 278, Habitual Criminals, § 31: "The defendant has the same rights to a speedy trial, to time for preparation, to assistance of counsel, to compulsory process for witnesses, to be confronted with the witnesses against him, to require proof beyond a reasonable doubt, and to all other rights enjoyed by a defendant on trial for a criminal offense."

I ask unanimous consent that the decision of the Oregon court in State against Durham be printed in the RECORD at this point.

There being no objection, the decision was ordered to be printed in the RECORD, as follows:

[Supreme Court of Oregon, Dec. 12, 1945]

STATE *v.* DURHAM

1. CRIMINAL LAW—1202(6)

Trial court was not required to sentence defendant on main charge before proceeding with habitual criminal charge. O.C.L.A. §§ 26–2803, 26–2804.

2. CRIMINAL LAW—1202(7)

Failure to sentence defendant upon main charge before proceeding with habitual criminal charge did not deprive defendant of right to appeal, but, when trial court disposed of habitual criminal proceeding and entered final judgment of conviction, defendant had right to appeal therefrom and could review entire proceedings commencing with the original prosecution. O.C.L.A. §§ 26–2803, 26–2804.

3. JURY—135

At common law, peremptory challenges in selection of jury in criminal cases were confined to main issue and did not extend to trial of collateral issues.

4. JURY—135

Defendant charged with prior convictions should have been given right to exercise peremptory challenges in selection of jury in habitual criminal proceedings, though proceeding was merely collateral to main issue, since proceeding was a "criminal case" within the common-law rule permitting peremptory challenges. O.C.L.A. §§ 26–919, 26–2803, 26–2804.

See Words and Phrases, Permanent Edition, for all other definitions of "Criminal Case".

5. CRIMINAL LAW—163

The plea of former jeopardy has no application to an habitual criminal proceeding, since being an habitual criminal is not an offense but merely a status. O.C.L.A. §§ 26–2803, 26–2804.

6. CRIMINAL LAW—1202(1)

Final judgments convicting defendant of having a pistol in his possession after having been convicted of a felony and of receiving stolen property could be relied upon by state in proceeding to establish charge that defendant was an habitual criminal, notwithstanding that trial court, subsequent to imposition of concurrent sentences and during absence of defendant while he was in prison, purported to change judgments relative thereto so as to make sentences run consecutively. O.C.L.A. § 25–112; Laws 1941, c. 330; O.C.L.A. §§ 26–2803, 26–2804.

Appeal from Circuit Court, Union County; R. J. Green, Judge.

George Washington Durham was convicted of having a pistol in his possession after having been previously convicted of a felony and sentenced to life imprisonment as an habitual criminal, and he appeals.

Reversed and remanded.

Boon Cason, of Portland (Irvin Goodman and Leo Levenson, both of Portland, on the brief), for appellant.

Colon R. Eberhard, Dist. Atty., pro tem., of La Grande, for respondent.

Before Belt, C. J., and Rossman, Bailey, Lusk and Hay, JJ.

Belt, Chief Justice.

On February 24, 1945, the defendant, George Washington Durham, was convicted in Union County of the crime of having a pistol in his possession after having been previously convicted of a felony. The possession of a pistol under such circumstances is punishable as a felony under § 25–112, O.C.L.A., as amended by Chapter 330, Laws of Oregon for 1941. After verdict was returned and before sentence was imposed on such charge, the District Attorney filed an information on March 22, 1945, charging the defendant with being an habitual criminal in that previous to his last conviction he had been convicted of four felonies, to wit: (1) On December 10, 1928, in the State of Kansas, the defendant was convicted upon an indictment containing three counts (a) burglary in the second degree; (b) larceny committed at the time and upon the occasion of a burglary; (c) larceny of an automobile. (2) On June 12, 1934, in Multnomah County, Oregon, the crime of burglary not in a dwelling house. (3) On April 18, 1938, in Multnomah, County, Oregon, the crime of having a pistol in his possession after having been convicted of a felony. (4) On May 13, 1938, in Multnomah County, Oregon, the crime of receiving stolen property. Defendant, upon being duly arraigned upon such charge, stood mute and thereupon the court entered a plea of not guilty. A jury was empaneled and, after hearing the evidence, the instructions of the court, and the argument of counsel, returned a verdict in the form of special findings, establishing the identity of the defendant and his previous convictions of felonies specified in the information. Based upon such verdict, the court imposed a sentence upon the defendant that he be confined in the penitentiary for the term of his natural life. From this judgment of convictions the defendant has appealed.

[1] It is assigned as error that the court refused to sentence the defendant on the main charge, namely, of having a pistol in his possession, before proceeding with the habitual criminal charge. We do not agree with this contention. It would have been premature and in violation of the purpose and spirit of the Habitual Criminal Act to have imposed sentence on the main charge before determining whether the defendant was a fourth offender as charged in the information. Indeed, the court had no authority to impose sentence on the main charge after this information had been filed and while it was pending. Had the court done so, such sentence could have been vacated in the event the defendant was found to have been an habitual criminal. Ex parte Towne, 14 Wash. 2d 633, 129 P. 2d 230, State ex rel. Edelstin v. Huneke, 138 Wash. 495, 244 P. 721.

The Habitual Criminal Act, so far as material herein, provides:

§ 26–2803, O.C.L.A. "A person who, after having been three times convicted within this state of felonies or attempts to commit felonies, or, under the law of any other state, government or country, of crimes which, if committed within this state would be felonious, commits a felony within this state, shall be sentenced, upon conviction of such fourth, or subsequent, offense, to imprisonment in a state prison for the term of his natural life."

§ 26–2804, O.C.L.A. If at any time, either after sentence or conviction, it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth in this act, it shall be the duty of the district attorney of the county in which said conviction was had to file an information, accusing the said person of such previous convictions. Whereupon, the court in which such conviction was had shall cause the said person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegations contained in such information and of his right to be tried as to the truth thereof according to law, and shall require such offender to say whether he is the same person as charged in such information or not. If he says he is not the same person or refuses to answer, or remains silent, his plea, or the fact of his silence, shall be entered of record and a jury shall be empaneled to inquire whether the offender is the same person mentioned in the several records as set forth in such information. If the jury finds that he is the same person or if he acknowledges or confesses in open court, after being duly cautioned as to his right, that he is the same person, the court shall sentence him to the punishment hereinbefore provided, and shall vacate the previous sentence, deducting from the new sentence all time actually served on the sentence so vacated.

"Whenever it shall become known to any warden or prison, probation, parole or police officer or other peace officer that any person charged with or convicted of a felony has been previously convicted within the meaning of said sections hereinbefore set forth, it shall become his duty forthwith to report the facts to the district attorney of the county from which he was sentenced."

If the defendant was found not to have been previously convicted of the four felonies as charged, then no life imprisonment sentence could be imposed. The act provides for a separate and supplementary proceeding in order to enable the court to determine the kind and character of man upon whom sentence is to be imposed. It is a continuation of the original prosecution. If he is a second or subsequent offender then he must suffer an enhanced penalty. If it is shown that the defendant has been convicted of four felonies, including that of the main charge, then it is deemed under the act that he is hopeless, so far as reformation is concerned, and must, for the protection of society, be perpetually confined. No error was committed by the court in continuing the imposition of sentence during the pendency of the habitual criminal charge.

[2] It is argued that the failure to sentence defendant upon the main charge deprived him of the right of appeal. In our opinion, when the court disposed of the habitual criminal proceeding and entered final judgment of conviction, the defendant had the right of appeal therefrom and could review the entire proceedings commencing with the original prosecution. The separate and supplementary proceeding does not involve a new and independent charge of the commission of a crime. It is a proceeding merely to determine the penalty to be imposed in the main charge. As said in State ex rel. Edelstin v. Huneke, supra [138 Wash. 495, 244 p. 722], "It is no crime to be one 'who has been previously convicted' no matter how many times."

[3, 4] The serious question is whether the court erred in denying defendant the right to exercise any preemptory challenge in the selection of the jury in this special proceeding. The court allowed defendant the right to challenge any juror for cause, but definitely held that he was not entitled to any peremptory challenge.

People v. Reese, 258 N.Y. 89, 179 N.E. 305, 309, 79 A.L.R. 1329, supports the trial court. It was there held that the issue in such proceeding was collateral to the defendant's guilt or innocence, and, by reason thereof, no right of peremptory challenge existed. The New York court nevertheless held—and we think properly so—that such "inquiry to ascertain the previous convictions of one found guilty of a felony is to be treated as a criminal case." Indeed, the court said: "Unquestionably this inquiry is a criminal case, and not a civil one" and that "if so it is to be viewed, the incidents of a criminal case must be held to go along with it." We agree. The court further said: "To justify a verdict that a defendant charged in the information is the person previously convicted, the jury should be satisfied of his identity beyond a reasonable doubt." We agree. With all deference to the New York court, it is difficult to reconcile its conclusion, relative to peremptory challenges, with the view of the court that such proceeding is a criminal case and that it has all the incidents of such.

We are not unmindful of the fact that at common law peremptory challenges in criminal cases were confined to the main issue and did not extend to the trial of collateral issues. Wharton's Crim.Proc. (Vol. III) §§ 1548–1551, Chitty's Crim.Law 535, 35 C.J. 407, Bishop's New Crim.Proc. § 942. It is clear that the question of whether defendant is an habitual criminal is collateral to the main issue of his guilt or innocence of the principal charge, but we think it is not collateral to the question as to the kind of judgment of conviction to be entered against him. The direct and vital issue involved in this separate proceeding—its being a continuation of the original prosecution—was whether the defendant was to serve a term in the penitentiary for the rest of his natural life or whether the sentence would be for a much shorter term. No final judgment of conviction could be entered until sentence had been imposed. When the jury found that the defendant was one and the same person as named in the records of previous convictions, it, in effect, fixed the penalty for the last offense. It only remained, then, for the court to enter the final judgment of conviction.

Whatever may be the common-law rule relative to peremptory challenges, we think that when the legislature enacted § 26–2804, O.C.L.A., in 1927, giving the defendant an absolute right to a jury trial, it had in mind the kind of jury trial then in practice. It was not concerned with a jury trial under ancient common-law rules. We think there was no intention to impair the right to a jury trial in a proceeding involving such extreme penalties. Although the jury in this special proceeding is not determining the guilt or innocence of the defendant on the main charge, it is nevertheless well established that it is a criminal proceeding. 24 C.J.S., Criminal Law, § 1969, page 1168. As said in 25 Am.Jur. 278, Habitual Criminals, § 31: "The defendant has the same rights to a speedy trial, to time for preparation, to assistance of counsel, to compulsory process for witnesses, to be confronted with the witnesses against him, to require proof beyond a reasonable doubt, and to all other rights enjoyed by a defendant on trial for a criminal offense." True, in the same section it is said that peremptory challenges are not permitted in habitual criminal proceedings, citing in support of the text, People v. Reese, supra.

At the time of the enactment of § 26–2804, O.C.L.A., relative to the right of a jury trial, a defendant charged with a crime punishable with death or life imprisonment was entitled to twelve peremptory challenges. § 26–919, O.C.L.A. Since 1864, a defendant in a criminal action has always had the right of peremptory challenge. Is it not reasonable to assume that the legislature, in the enactment of the Habitual Criminal Act, had no intention of restricting such right where the penalty of life imprisonment was involved? Can it be that in a civil action to recover on a promissory note each party has three peremptory challenges, but in a proceeding involving life imprisonment none are allowed! We think it is far more in keeping with the proper administration of justice that there be no such impairment of the right of trial by jury, and that reversible error was committed in denying defendant the right of peremptory challenge.

[5] Defendant assigns error because the court refused to dismiss the habitual criminal proceeding on the ground of former jeopardy. The defendant asserts that he was acquitted in Multnomah County, Oregon, on June 7, 1944, of the charge of being an habitual criminal and the previous convictions then relied upon by the State are the same as those in the instant proceeding, with the exception of the last conviction had in Union County. Plea of former jeopardy has no application to this kind of a proceeding. It is not an offense to be an habitual criminal; it is merely a status. Furthermore, there is no showing of any adjudication that the defendant was not the same person as named in the previous convictions relied upon by the State in this special proceeding.

[6] The fourth and last assignment of error is based upon the admission in evidence of certified copies of records of convictions in Multnomah County, Oregon. It is asserted that these judgments of conviction had been set aside by a subsequent judgment of the court. It appears that the defendant was convicted in Multnomah County in April, 1938, of the crime of having a pistol in possession after having been convicted of a felony and was sentenced to serve a term in the penitentiary without limitation of time not to exceed five years. In May of the same year, he was convicted in Multnomah County of the crime of receiving stolen property and was sentenced to serve a similar period of time in the penitentiary. These sentences were to run concurrently. It is claimed that the court, subsequent to the imposition of these sentences and during the absence of the defendant while he was imprisoned in the penitentiary, changed the judgment relative thereto so as to make the sentences run consecutively. Defendant asserts that this alteration of the judgments during his absence was a null and void proceeding. Assuming such to be true, it does not follow that the sentences as originally imposed are null and void. Suffice it to say that the final judgments of conviction may be relied upon by the State in this proceeding to establish the charge that the defendant was an habitual criminal.

Based solely on the refusal of the court to allow the defendant the right to peremptory challenge, the judgment of conviction is reversed and the cause remanded for a new trial.

Mr. ERVIN. These cases establish beyond the peradventure of a doubt that when a defendant is charged in any proceeding with being a habitual criminal or a second or subsequent offender for the purpose of imposing upon him enhanced judgment, he is entitled to all of the rights belonging to a defendant in any criminal trial.

So I say that under the fifth amendment, a person cannot be charged with

an infamous crime, punishable by more than 1 year's imprisonment, unless he is first indicted by a grand jury. And when he is indicted by a grand jury, the burden falls upon the prosecution to prove his guilt, and not upon him to prove that he is not guilty of the previous offenses.

I also say that when a person is charged, under these constitutional provisions, he cannot be required to incriminate himself. I assert that unless his guilt is proved beyond a reasonable doubt, by evidence independent of his coerced testimony, he is entitled to an acquittal.

Despite this, one section of the D.C. Crime bill—section 23-111—undertakes to rob some persons charged with being habitual criminals of their right to be indicted by a grand jury before being placed on trial. Moreover, the same section undertakes to rob all of them of their constitutional right to be tried before a petit jury. In addition, it undertakes to make them incriminate themselves in violation of the fifth amendment, and to place upon them the burden of disproving their guilt.

I wish to invite attention to one other case in this connection, the case of State against Furth, a Washington decision, reported in 195 Pacific 2d 925. In the interest of time, I will merely read certain headnotes. Headnote 3:

3. CRIMINAL LAW—1202(2)

The state which charged accused, convicted of petit larceny, with being an habitual criminal was required to prove the fact that the prior convictions had been rendered and that the accused was the person previously convicted, the question of identity of accused being one of fact. Rem. Rev. Stat. § 2286.

Headnote 6:

6. CRIMINAL LAW—737(1)

It is the function of the jury and not the court to settle disputed issues of fact and the court cannot intrench upon the province of the jury upon such issues. Const. art. 1, § 21.

Headnote 7:

7. CRIMINAL LAW—1202(4)

Where the state charged accused, convicted of petit larceny, with being an habitual criminal, the question of whether there were prior convictions and whether the person convicted was accused, were questions of fact for the jury and could not be determined by the court. Rem. Rev. Stat. § 2286; Const. art. 1, § 21.

Mr. President (Mr. METCALF), I ask unanimous consent to have printed at this point in the RECORD the opinion of the supreme court of the State of Washington in State against Furth.

There being no objection, the opinion was ordered to be printed in the RECORD, as follows:

[Supreme Court of Washington, Aug. 1, 1940]

STATE v. FURTH—No. 27956

1. CRIMINAL LAW—1202(4)

In determining whether accused who had been convicted of petit larceny should be sentenced under habitual criminal statute because of conviction of third-degree burglary in Utah, question whether third-degree burglary was a felony in Washington was required to be determined by Washington law and if the information on which accused was convicted in Utah stated facts sufficient to constitute a felony in Washington the conviction would come within the habitual criminal statute. Rem. Rev. Stat. § 2286.

2. CRIMINAL LAW—1202(1)

The crime of burglary in third degree in the state of Utah is the same as the crime of burglary in the second degree in Washington and if accused had been convicted of third-degree burglary in Utah, he was guilty of crime constituting a "felony" in Washington and upon conviction of petit larceny in Washington was subject to punishment under habitual criminal statute. Rem. Rev. Stat. § 2286.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony".

3. CRIMINAL LAW—1202(2)

The state which charged accused, convicted of petit larceny, with being an habitual criminal was required to prove the fact that the prior convictions had been rendered and that the accused was the person previously convicted, the question of identity of accused being one of fact. Rem. Rev. Stat. § 2286.

4. CRIMINAL LAW 1202(3)

Where previous convictions are charged in information for purposes of enhancing punishment of accused, the convictions must be proved beyond a reasonable doubt, since fact of prior convictions must be taken as an essential element of the offenses charged, at least to the extent of aggravating it and authorizing an increased punishment. Rem. Rev. Stat. § 2286.

5. JURY 31(1)

The word "inviolate" as used in constitutional provision that right of trial by jury shall remain inviolate means freedom from substantial impairment and does not prohibit modification of the details of administration which does not affect enjoyment of the right of jury trial. Const. art. 1, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Inviolate".

6. CRIMINAL LAW 737(1)

It is the function of the jury and not the court to settle disputed issues of fact and the court cannot intrench upon the province of the jury upon such issues. Const. art. 1, § 21.

7. CRIMINAL LAW 1202(4)

Where the state charged accused, convicted of petit larceny, with being an habitual criminal, the question of whether there were prior convictions and whether the person convicted was accused, were questions of fact for the jury and could not be determined by the court. Rem. Rev. Stat. § 2286; Const. art. 1, § 21.

8. JURY 21(5)

Inclusion in prior habitual criminal statute of provision for jury trial on question of prior conviction was merely declaratory of an existing right of accused and the omission from subsequent habitual criminal statute of provision for jury trial did not divest the accused of right to such a trial on disputed issues of fact. Rem. & Bal. Code, §§ 2177, 2178; Rem. Rev. Stat. § 2286.

9. CRIMINAL LAW 1202(3)

Where accused who was convicted of petit larceny and was charged under habitual criminal statute of having previously been convicted of third-degree burglary in Utah, the court did not err in failing to require proof that accused had been released from Utah penitentiary, in view of fact that accused's presence in court constituted prima facie evidence of his release. Rem. Rev. Stat. § 2286.

Department 1.

Appeal from Superior Court, King County; Donald A. McDonald, Judge.

Oscar Furth was convicted of petit larceny and was sentenced as an habitual criminal, and he appeals.

Reversed.

Maurice Kadish, of Seattle, for appellant.

B. Gray Warner and John C. Merkel, both of Seattle, for respondent.

Millard, Justice.

The prosecuting attorney of King county filed an information April 22, 1939, charging Oscar Furth with commission of the crime of petit larceny in King county, April 19, 1939. Trial of the defendant to a jury resulted in verdict June 12, 1939, of guilty as charged. The prosecuting attorney filed supplemental information August 18, 1939, charging defendant was an habitual criminal by reason of two prior convictions of crime. The cause was stricken from the trial calendar and an amended supplemental information filed November 20, 1939, accusing Oscar Furth, as follows, of being an habitual criminal:

"He, said Oscar Furth, under the name of Joe Webber, in the District Court for the State of Utah, on the 14th day of August, 1925, was duly and legally convicted of the crime of Burglary in the Third Degree, said crime amounting to and being a felony at that time and at all times since under the laws of the State of Washington.

"He, said Oscar Furth, under the name of Oscar Furth, in the United States District Court for the Western District of Washington, Northern Division, on the 7th day of February, 1936, was duly and legally convicted of Unlawful Possession of Narcotics, said crime amounting to and being a felony at that time and at all times since under the laws of the State of Washington.

"He, said Oscar Furth, under the name of Oscar Furth, in the Superior Court of the State of California, City and County of San Francisco, on the 10th day of June, 1922, was duly and legally convicted of the crime of Unlawful Possession of Narcotics, said crime amounting to and being a felony at that time and at all times since under the laws of the state of Washington."

To the amended supplemental information the defendent pleaded not guilty and requested trial by jury. The defendant's request for trial by jury on the charge of being an habitual criminal was denied on the ground that, while issues of fact were raised, the defendant was not charged with a crime. The court said:

"If the habitual criminal angle of this case was required to be submitted to a jury, that would end it. That matter goes merely to the penalty. The man had a trial by jury on the crime. There are two issues, of course, whether there were previous convictions, and if this is the man that was convicted. Your right to a jury of course is unquestioned where there is a charge of crime, but this merely goes to the matter of punishment.

"In the absence of any supplemental information the statute provides the penalty, but when brought to the attention of the court there have been these previous convictions, then the court imposes the augmented penalty.

"* * * The man will be given a chance to defend himself and to offer evidence. In other words, there are two issues here, the previous convictions must be established, and is this the man who was convicted in these previous judgments, and on that, of course, he is entitled to have a hearing."

Our first habitual criminal statute (chapter 86, Laws of 1903, p. 125, Rem. & Bal. Code, §§ 2177, 2178) provided for trial by jury of "the fact of such former conviction or convictions." Our present habitual criminal statute (chapter 249, Laws of 1909, p. 899, § 34, Rem. Rev. Stat. § 2286), which repealed chapter 86, Laws of 1903, reads as follows:

"Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been

convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been twice convicted, whether in this state or elsewhere, or petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state penitentiary for not less than ten years.

"Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been four times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state penitentiary for life."

Trial was had to the court sitting without a jury. A witness from the identification bureau of the office of the sheriff of King county by comparison of the finger prints of defendant with finger prints from the records of the Utah state penitentiary identified defendant as the Oscar Furth, alias Joe Webber, who was convicted in the state of Utah of the crime of burglary in the third degree and confined therefor in the Utah state penitentiary. Defendant objected to the evidence on the ground that no showing was made of defendant's commitment to, or release from, the Utah state penitentiary. The court found that defendant was duly and legally convicted in the state of Utah of the crime of burglary in the third degree; that said crime then and at all times since amounted to a felony in this state, and that defendant is an habitual criminal. Judgment and sentence were entered accordingly. Defendant appealed.

Counsel for appellant first contends that no showing was made that appellant was convicted of a crime elsewhere which under the laws of this state would amount to a felony, therefore the court erred in holding that the crime of third degree burglary—there is no crime so designated in this state—in the state of Utah is a felony in this state.

[1] Whether burglary in the third degree is a felony in this state is determined by the laws of this state. If the indictment or information on which one is convicted states facts sufficient to constitute a felony within this state the conviction comes within the meaning of Rem. Rev. Stat. § 2286, which reads in part as follows, and the pertinent portion of which we have italicized: "Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been convicted, whether in this state or elsewhere, of *any crime which under the laws of this state would amount to a felony,* * * * shall be adjudged to be an habitual criminal * * *."

The information on which Joe Webber, an alias of defendant, was convicted charges the accused with the "crime of Burglary in Third Degree, committed as follows, to-wit:" "The said defendant on August 11, 1925, in the day time, at the county of Weber, state of Utah, wilfully, unlawfully, feloniously and burglariously broke and entered the room of one George Fotos, said room being in the Panama Rooming House, situate at No. 2514 Lincoln Avenue, Ogden, Utah, with intent to commit larceny * * *."

[2] A comparison of the foregoing information with our statute, reading as follows, discloses that the crime of burglary in the third degree in the state of Utah is the same as the crime of burglary in the second degree, a felony, in this state: "Every person who, with intent to commit some crime therein shall, under circumstances not amounting to burglary in the first degree, enter the dwelling-house of another or break and enter, or, having committed a crime therein, shall break out of, any building or part thereof, or a room or other structure wherein any property is kept for use, sale or deposit, shall be guilty of burglary in the second degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years." Rem. Rev. Stat. § 2579.

Error is next assigned on denial of appellant's request for trial by jury on the charge of being an habitual criminal.

Counsel for the State argue that the original habitual criminal statute (chapter 86, Laws of 1903, Rem. & Bal. Code, §§ 2177, 2178), which provide for trial by jury of the habitual criminal charge, was repealed by our present habitual criminal statute (section 34, chapter 249, Laws of 1909, Rem. Rev. Stat. § 2286), in which there is no provision for trial by jury of the charge of being an habitual criminal, therefore appellant was not entitled to a trial by jury. It is insisted that appellant was not entitled to a trial by jury under section 22, Article I, of the state constitution, which guarantees the right to trial by jury where the defendant is charged with the commission of an "offense," inasmuch as being an habitual criminal is not a criminal offense. This position, urges counsel for the state, is in harmony with the concurring opinion in State v. Cotz, 94 Wash. 163, 161 P. 1191, which was incorporated into the opinion in State v. Kelch, 114 Wash. 601, 605, 195 P. 1023, to the effect that the habitual criminal statute does not require a charge of a substantive crime necessitating submission of the question of prior convictions to a jury, but that the only question involved is a state of the record, either in the court where the charge is made, or some other court, and that the only plea open to one so charged is that of nul tiel record, or that the judgment has been satisfied in some way recognized by law.

State v. Cotz, supra, is inapposite. The only question raised on that appeal was as to the sufficiency of the information which charged the crime substantially in the language of the statute.

Appellant urged, unsuccessfully, that the information was insufficient in that it failed to affirmatively allege that the prior convictions were had in a court or courts of competent jurisdiction, and in that each step in the procedure from indictment or information to final judgment was not formally pleaded. The concurring opinion was addressed to a question not before the court in that case.

Neither is State v. Kelch, supra, in point. In that case the defendant was convicted of grand larceny after trial before one judge sitting with a jury. Prior to being sentenced upon the conviction of grand larceny, he was convicted on a second or supplemental information charging him with being an habitual criminal, from having been three times convicted of crime. Upon this second information the defendant was tried before another judge of the superior court for King county. Upon his plea to the second information *he was placed upon trial before a jury,* and upon the record was convicted. He was then taken before the first judge, who had tried him upon the grand larceny charge, and was by that judge sentenced, as the law requires, to life imprisonment. We stated that the statute (Rem.Rev.Stat. § 2286) providing for the punishment of habitual criminals who have twice before been convicted of felony, is not a supplemental but a cumulative proceeding and does not require the charge of a substantive crime; that the charge of being an habitual criminal was an independent charge and not a continuation of the previous prosecution for grand larceny, except that there had to be a previous conviction of grand larceny or some such charge before the subsequent charge would lie. The questions, which we decided in the affirmative, presented on that appeal were: (1) May the charge of being an habitual criminal be tried before a judge of another department of the court, before sentence on the third felony charge; and (2) after conviction of being an habitual criminal, may the accused be sent back for sentence to the judge who tried the last felony charge? There was no question in that case of the right to trial by jury of the charge of being an habitual criminal; in fact, the defendant was placed upon trial before a jury on the charge of being an habitual criminal.

Contrast Rex v. Hunter [1921] 1 K.B. 555, C.C.A., in which it was held that the charge of being an habitual criminal was not a charge of a substantive offense; it was only for the purpose of enhancing the punishment for the principal offense. The court said that it followed, therefore, that there could not be separate juries trying the two issues, but that the same jury which tried the principal offense must also try the issue of the previous conviction.

Counsel for the state cite State v. LePitre, 54 Wash. 166, 103 P. 27, 18 Ann. Cas. 922, which is cited with approval in State v. Johnson, 194 Wash. 438, 78 P. 2d 561, to the effect that the charge of being an habitual criminal does not constitute an offense in itself, but merely provides an increased punishment for the last offense.

In State v. LePitre, supra, the supplementary information was filed under the habitual criminal statute of 1903 (chapter 86, Laws of 1903, Rem. & Bal. Code, §§ 2177, 2178) which provided for trial by jury. The following language from the opinion in State v. LePitre, supra [54 Wash. 166, 103 P. 28, 18 Ann. Cas. 922], written by the author of the concurring opinion in State v. Cotz, supra, is interesting and informative, particularly that portion which stresses the preservation within the statute of the right of trial by jury on the charge of being an habitual criminal: "The habitual criminal statute is a thing of modern creation, and, while there are many rules of law which may seem inconsistent with its purpose and the procedure adopted to compass it, it is nevertheless sound in principle and sustained by reason. * * * it does no violence to any constitutional guaranty for the state to rid itself of depravity when its efforts to reform have failed. The act is not ex post facto. It does not deny the right of trial by jury. It does not put the offender twice in jeopardy. It does not inflict a double punishment for the same offense * * *. It merely provides an increased punishment for the last offense."

All that we held in State ex rel. Edelstein v. Huneke, 138 Wash. 495, 244 P. 721, was that upon the last conviction of one accused of being an habitual criminal, it is premature for the court to sentence the accused for the last offense before trial and determination of the habitual criminal charge; and that the accused has no right to insist upon such sentence and appeal therefrom before the other charge is determined. On hearing en banc we held (State ex rel. Edelstein v. Huneke, 140 Wash. 385, 249 P. 784, 250 P. 469) that under the habitual criminal statute (Ren.Rev.Stat. § 2286), which makes no provision for the procedure, no constitutional right of the accused is violated by charging and trying the two issues separately; in view of the long established practice in this state, and the fact that a separate trial for the offense committed is saved from the danger of prejudice through combining it with an habitual criminal charge.

In State v. Kirkpatrick, 181 Wash. 313, 43 P.2d 44, we held that where defendant is charged in one information with the crimes of burglary, grand larceny and of being an habitual criminal, it is prejudicial error to place before the jury the habitual criminal charge during the trial of the substantive offenses. See, also, State v. Fowler, 187 Wash. 450, 60 P.2d 83.

In State v. Delano, 189 Wash. 230, 64 P.2d 511, the defendant appealed from a conviction of the crime of forgery and being an habitual criminal. We held that, under Rem. Rev.Stat. § 2286, an habitual criminal charge may be joined in the same information charging the substantive offense, if upon a separate paper and not called to the attention of the jury until after verdict, when, if convicted on the substantive charge, the accused may be tried on the habitual criminal charge before the same jury.

On a charge of being an habitual criminal, is the question of defendant's prior conviction an issue of fact to be determined by the jury? The weight of authority answers that question, which is one of first impression in this state, in the affirmative.

[3] The trial court recognized that by appellant's plea of not guilty to the charge of being an habitual criminal two issues of fact were presented: (1) Were there previous convictions? (2) Was appellant the man who was the subject of those convictions? It was incumbent upon the state to prove the necessary elements of the charge—that prior judgments of conviction had been rendered and that the person named therein was the same person who was on trial for being an habitual criminal. The question of identity, it will hardly be disputed, is a question of fact. State v. Harkness, 1 Wash. 2d 530, 96 P. 2d 460.

[4] Where previous convictions are charged in an information for the purpose of enhancing the punishment of the defendant, such convictions must be proved beyond a reasonable doubt, since the fact of the prior convictions is to be taken as an essential element of the offense charged, at least to the extent of aggravating it and authorizing an increased punishment. People v. Reese, 258 N.Y. 89, 179 N.E. 305, 79 A.L.R. 1329.

Commencing at page 59 of vol. 58 A.L.R., the authorities are collected in support of the editor's statement that on a charge of a second or subsequent offense the question of a prior conviction is an essential element of the offense charged and is an issue of fact to be determined by the jury. The authorities cited are the highest courts of Alabama, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Montana, Nebraska, New York, Pennsylvania, Utah and Wisconsin.

In State v. O'Neill, 76 Mont. 526, 248 P. 215, it was held that in order to convict the defendant of a subsequent offense and to authorize the enhanced punishment under the Montana statute, it was necessary for the jury to pass on the question of the prior conviction which constituted a part of the offense charged and this had to be done even if the defendant confessed the fact of the prior conviction. It is stated that the reason for this is that by the Montana statute the jury is required to fix the punishment within the limits set down by the legislature; and the further reason is that no section of the statute provided that on confession of the prior conviction all knowledge and evidence thereof must be kept from the jury.

In Rex v. Norman [1924], 2K.B. 315, C.C.A., it was held that where an offender was charged with being an habitual criminal, and did not admit the charge, it was always a question for the jury to determine whether he was an habitual criminal.

In Green Bay Fish Co. v. State, 186 Wis. 330, 202 N.W. 667, it was held that, in order to impose a sentence for the enhanced punishment, there must be proof of prior convictions and the question must be tried by the jury; the court can not take judicial knowledge of such fact, and to do so would be inconsistent with the right of the accused to meet his witnesses face to face.

In State v. Smith, 129 Iowa 709, 106 N.W. 187, 4 L.R.A.N.S., 539, 6 Ann. Cas, 1023, it was held that the fact of the two prior convictions was a part and element of the present action, and that it constituted an issue of fact to be passed on by the jury as any other issue of fact, and required a return by the jury of a special finding as to that issue.

In State v. Bailey, 165 La. 341, 115 So. 613, 58 A.L.R. 1, it was held, under the Louisiana statute providing that the judge may sentence any person convicted for a second or subsequent offense to a double or triple penalty or to perpetual imprisonment for the fourth offense, that the proof of the former convictions must be heard and passed on by the jury, since the jury alone has authority to subject an accused party to a greater penalty for the subsequent conviction.

In State v. Compagno, 125 La. 669, 51 So. 681, it was held that the fact of a prior conviction was an essential element of the offense charged, for it was the basis of the sentence for increasing the punishment; and it had to be tried and proved before a jury as any other issue of fact.

We note that, in a later opinion (State v. Guidry, 169 La. 215, 217, 124 So. 832, 835) the supreme court of Louisiana (without noticing its prior holdings) held that the statute, providing for increased punishment for second offenders, does not require that proceeding to so punish be tried by a jury, since, though the questions involved are purely questions of fact, they do not relate to the question of the guilt or innocence of the defendant. The court said: "The act itself does not expressly require, nor does the language by fair implication authorize, the submission to a jury of the fact as to whether the defendant was a second offender."

In Hall v. State, 121 Md. 577, 89 A. 111, in construing a statute providing for an enhanced punishment for subsequent offenders, the court held that the jury must find specially as to the fact of a prior conviction; that it was the province of the jury to consider only the identity of accused with the person named in the former conviction; that the question of guilt or innocence of the accused as to the prior conviction was not in issue.

Under § 5486 of the Rev.Gen.Stats., Laws of Florida, a first offense was a misdemeanor and a second offense a felony. In State ex rel. Lockmiller v. Mayor, 88 Fla. 96, 101 So. 228, the court said that, whether the section intended to prescribe merely increased punishment for habitual offenders, or create a new offense, a felony for a second violation of the act, the allegation of a prior conviction was a necessary element in the so-called felony; that the prior conviction was an element in the sense that the defendant's guilt or innocence of the first violation of the act was subject to inquiry of and determination by the jury. It was also held that the jury should find on each issue, the alleged principal offense, and the prior conviction.

In Osborne v. State, 115 Neb. 65, 211 N.W. 179, it was held that the alleged fact of prior convictions was an issue for the consideration of and determination by the jury and that the identity of the accused also had to be determined.

Alabama subscribes to the minority rule. In Lyles v. State, 18 Ala.App. 62, 88 So. 375, it was held that the evidence of a prior conviction should not be submitted to the jury; that the proper and only thing to do after defendant's conviction for the second or subsequent offense is for that fact to be brought to the attention of the court; for the court only has the right, and it is the duty of the court, in determining what hard labor punishment it will inflict upon defendant to ascertain for itself, from the records or other legitimate source, whether the defendant had been previously convicted of violation of the prohibition law.

The supreme court of Kansas held in Levell v. Simpson, 142 Kan. 892, 52 P.2d 372, and in Glover v. Simpson, 144 Kan., 153, 48 P.2d 73, that after a verdict of guilty is rendered against a person on trial for a crime, and when fact of his former conviction is under judicial ascertainment in order to impose the proper sentence upon him, he is not entitled to a jury trial on the question whether he had theretofore been convicted of such prior felony.

Commencing at page 365, vol. 82, A.L.R., is a supplement to the annotation in 58 A.L.R. 59, respecting the right of trial to a jury of the issue of prior conviction. The following recent cases are cited in support of the rule that on a charge of subsequent offense the question of a prior conviction is an essential element of the offense charged and is an issue of fact to be determined by the jury: State v. McGee, 207 Iowa, 334, 221 N.W. 556; State v. Dalton, Mo.Sup., 23 S.W.2d 1; State v. Schneider, 325 Mo. 486, 29 SW. 2d 698; State v. Breese, 326 Mo. 885, 33 S.W.2d 919; Johnston v. State, 46 Okl. Cr. 431, 287 P. 1068; Grider v. State, 49 Okl.Cr. 151, 295 P. 400; Tipton v. State, 160 Tenn. 664, 28 S.W.2d 635.

In State v. Cardwell, 332 Mo. 790, 60 S. W.2d 28, cited at page 228 of 116 A.L.R., supplementing annotations in 58 A.L.R. 59, and 82 A.L.R. 365, it is recited that the supreme court of Missouri held that the issue of defendant's prior conviction must be submitted to the jury notwithstanding the defendant's admission as to such prior conviction.

The general rule that on a charge of a second or subsequent offense the question of a prior conviction is an issue of fact to be determined by the jury was followed in State v. Beaudoin, 131 Me. 31, 158 A. 863, 85 A.L.R. 1101, and Burnham v. State, 127 Neb. 370, 255 N.W. 48.

In Metzger v. State, decided in 1938, 214 Ind. 113, 13 N.E.2d 519, it was held that, charging a jury that it must find beyond a reasonable doubt that the defendant was the same person charged to have been previously convicted, and also that the evidence of such conviction must be beyond reasonable doubt, was not erroneous.

Page 1107 et seq. of 85 A.L.R. lists the authorities sustaining the position that the question of identity is one of fact for the jury.

"The record of a former conviction is not sufficient alone to show that defendant in the present prosecution was formerly convicted. It must be shown by evidence independent of the record of the former conviction that the person whose former conviction is proved is the defendant in the present prosecution. The state has the burden of producing evidence to prove such identity. A transcript of former conviction which fails to show jurisdiction of the person will not sustain charge of former conviction. The question whether the person who was convicted at the former trial is identical with the person who is now accused, and who is now on trial, is for the jury." Underhill's Crim. Evidence, 4th Ed., pages 1500, 1501, § 829.

In support of the text that the question of identity is for the jury, cases of the courts of the United States Supreme Court, United States District Courts and the supreme courts of Georgia, Illinois, Iowa, Maine, Minnesota, Montana, Nebraska, New York, Tennessee, Vermont, Virginia and this state are cited.

The habitual criminal statute of the state of Missouri which does not authorize a conviction on a charge of being an habitual criminal and itself creates no offense, but only prescribes additional punishment based on the offender's crime reads as follows: "If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon

compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years." Mo.Rev.Stats. 1919, § 3702, Mo.St.Ann. § 4461, p. 3063.

It will be noted that the Missouri statute, like ours, contains no provision for trial by jury of the charge of being an habitual criminal.

In State v. Breese, 326 Mo. 885, 33 S.W. 2d 919, 922, an information was filed charging the defendant with the theft of a Ford automobile and a prior conviction of burglary and larceny. The supreme court held that the habitual criminal act quoted above does not authorize a conviction on a charge of being an habitual criminal or of itself create a crime, but if its essential elements are present and proved it prescribes a greater punishment upon a finding by the jury that defendant is guilty of the offense on trial; and that the issue of the defendant's prior conviction must be submitted to the jury notwithstanding his admission as to it. The court said:

"Section 3702, Revised Statutes 1919, is known as the Habitual Criminal Act. However, it does not authorize a conviction on a charge of being an habitual criminal, and itself creates no offense, but only prescribes additional punishment based on the offender's crime. State v. Collins, 266 Mo. 93, 180 S.W. 866.

"With the above section and our interpretation of it probably in mind, the defendant, after the swearing of the jury and without their presence, prior to the state's opening statement, offered to admit the previous conviction of defendant as charged, his sentence and compliance therewith and discharge from the penitentiary, and, in pursuance to said offer, requested the court to require the state's attorneys to refrain from informing the jury of said former conviction by mentioning it in their opening statement or by reading the portion of the information referring to it or by introducing evidence relative thereto, and authorized the court to instruct the jury that, if he was found guilty on the charge of stealing Townsend's car, they were to assess defendant's punishment at twenty-five years' imprisonment in the state penitentiary. The theory of defendant was that his offer to the court covered all that the State expected to prove, and that evidence as to his former conviction would only prejudice and inflame their minds against defendant as to the charge on trial.

"Defendant was on trial for a felony, that of participating in the theft of a motor car. It is true that section 3702 of itself creates no offense, but, if its essential elements are present and proved, it does prescribe a greater punishment upon the jury finding defendant guilty of the offense on trial.

"The finding of facts, under our procedure, is the function of the jury, and this includes the ultimate finding of guilt, and primarily the assessment of the punishment. In a felony case, a defendant cannot consent to a trial before the court without the intervention of a jury. State v. Talken, 316 Mo. 596, 292 S.W. 32. In effect, the court's assent to defendant's offer would have been tantamount to a trial in part before the court and an usurpation of the function of the jury. It would have resulted in the cause being tried partly by the court and partly by the jury. Notwithstanding defendant's tentative admission, it was the function of the jury to pass upon defendant's previous conviction, and the court's consent to the offer would have usurped that function. To sustain a conviction under section 3702, supra, it was necessary for the state to plead and prove the essential elements of said section, and it was necessary for the jury to find them. State v. Schneider [325 Mo. 486] 29 S.W. (2d) 698; State v. Dalton (Mo. Sup.) 23 S.W. (2d) 1. The assessment of the punishment was primarily a function of the jury, subject to their discretion and finding within the limits fixed by the statute, and we think the jury were entitled to know and have before them every essential fact that would tend to aid them in determining the punishment." State v. Breese, 326 Mo. 885, 33 S.W.2d 919.

The constitution (Art. I, § 21, State Constitution) guarantees that the "right of trial by jury shall remain inviolate," but the legislature may provide for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

[5] It is unnecessary to cite authority in support of the statement that the word "inviolate," as used in the above-quoted constitutional provision, means freedom from substantial impairment. The question whether the legislature may provide for waiving of the jury in criminal cases is not before us. Neither are we confronted by the question whether a defendant in a criminal case may waive trial by jury. The word "inviolate," as employed in the above-quoted section, does not prohibit modification of the details of administration which does not affect enjoyment of the right of trial by jury, a right some times figuratively designated as "the jewel of Anglo-Saxon jurisprudence."

[6, 7] Under the above-quoted section of our constitution the courts cannot trench on the province of the jury upon questions of fact. It is the function of the jury—not the court—to settle disputed issues of fact. The jury does not determine the guilt or innocence of the accused of the previous crimes charged. The issues of fact were whether there were previous convictions and whether appellant was the subject of those convictions. On a charge of a second or subsequent offense, the question of a prior conviction is an issue of fact to be determined by the jury.

[8] The inclusion in the 1903 habitual criminal statute (Rem. & Bal. Code, §§ 2177, 2178) of a provision for trial by jury was merely declaratory of the right the defendant had. When that statute was repealed in 1909 (Rem.Rev.Stat. § 2286) the omission from the present habitual criminal statute (Rem.Rev.Stat. § 2286) of the provision for trial by jury of the charge of being an habitual criminal did not thereby divest the appellant of his right to trial by jury of the disputed issues of fact.

[9] Finally, it is contended that the court erred in not requiring proof that appellant had been released from the Utah state penitentiary. The assignment is without substantial merit. It can not be denied that appellant was present in court, which is prima facie evidence of his release; however, if appellant is again placed on trial, doubtless satisfactory evidence to prove appellant's confinement in and discharge from the Utah state penitentiary will be forthcoming.

The judgment is reversed.

Blake, C. J., and Steinert, Robinson, and Simpson, JJ., concur.

Mr. ERVIN. I have discussed one section of this bill and the conference report—namely, section 23–111. When I first saw the original version of the bill, I said that it was just as full of injustices and of unconstitutional provisions as a mangy hound dog is of fleas. I think I have demonstrated here this morning, in my discussion of section 23–111, that that statement is just as true now, at the time the Senate is asked to place its stamp of approval on this section, as it was when the bill was in the form in which it was originally introduced.

To be sure, after about a year's discussion of matters of this kind and after 3 months' deliberations on the part of the conference committee, some of the iniquitous provisions of this bill have been removed. But here is one section which is inconsistent with the provision of the Constitution that says that no man can be punished as an infamous criminal unless he first has been indicted by a grand jury; that no man can be convicted of a crime or punished as a criminal unless he is first convicted by the verdict of a petit jury. This section not only contradicts these two provisions of the Constitution but also says that the burden of proving the innocence of the man is on the man—the accused and not the prosecution—and it says that he is to be compelled to be a witness against himself.

I have discussed this section at length, to show that the no-knock provisions and the preventive detention provisions are not the only inequities in this bill.

NO-KNOCK SEARCHES

I wish to discuss at this time the provisions about no-knock. In my judgment, the fourth amendment and the doctrine that every man's home is or should be his castle arise out of what may be correctly described as the greatest longing of the human heart. In all the countries and all the generations of the people from whom we draw our blood and our laws and our literature and our religion, we have found that one of the great hungers of the human heart has been for a place where a man could flee from the world, where he could communicate with the members of his family, and where he could converse with his God, free from molestation by any individual or by government itself. So we find in the early days of the common law that the principle was laid down, hundreds of years ago, that a man's home was his castle, that a man had a right to use any means necessary to prevent anyone from intruding on his home without his consent.

The principles of the common law lay it down that a man commits only justifiable homicide when he kills another to prevent him from forcibly intruding himself into his home. Of course, this rule is subject to certain actions on the part of the law; but this common law said that even an officer of the law had no right and had no power to intrude into a man's home against the will of that man, unless he first knocked at

the door of that house, identified himself as an officer of the law, advised the occupants of the house of his purpose in being there, and gave them a reasonable opportunity to open the door and admit him.

The desire to have a place to which one can flee from the world is one of the most passionate hungers of the human heart. Let us go back to the Prophet Micah, for he had something to say on this subject on the day when the people were going to go up the mountain to the House of the Lord. I read from chapter 4.

But in the last days it shall come to pass, *that* the mountain of the house of the Lord shall be established in the top of the mountains, and it shall be exalted above the hills; and people shall flow unto it.

2 And many nations shall come, and say, Come, and let us go up to the mountain of the Lord, and to the house of the God of Jacob; and he will teach us of his ways, and we will walk in his paths: for the law shall go forth of Zion, and the word of the Lord from Jerusalem.

3 And he shall judge among many people, and rebuke strong nations afar off; and they shall beat their swords into plowshares, and their spears into pruninghooks: nation shall not lift up a sword against nation, neither shall they learn war any more.

I come now to the words of the Prophet Micah to which I wish to call attention:

4 But they shall sit every man under his vine and under his fig tree; and none shall make *them* afraid: for the mouth of the Lord of hosts hath spoken *it*.

So according to the Prophet Micah, "the mouth of the Lord of Hosts hath spoken it." He has said that every man shall have a right to "sit under his vine and under his fig tree, and none shall make them afraid."

That is what religion has to say on this subject.

Some time ago, I mentioned that the excuse being made for passage of this bill containing the no-knock provision is the same excuse which is always made for every infringement upon human liberty. I have quoted the remark which the distinguished statesman William Pitt made on the floor of the House of Commons several generations ago, and now I should like to quote another remark of his which is apropos to this subject of the no-knock provision.

On another occasion, William Pitt stood upon the floor of Parliament and opposed a no-knock bill. The British Parliament had placed an excise tax on cider and those charged with collecting the revenues of the realm had reported that it was difficult to enforce the excise tax on cider and the only way to enforce it was to let them enter a man's house without knocking, to let them enter the house like burglars, to let them enter the house like law-enforcement officers of the District of Columbia will be able to enter, if the District of Columbia crime bill becomes law.

William Pitt was a man who recognized that eternal vigilance is the price of liberty and he stood up on the floor of Parliament and opposed the proposal that would allow no-knock entry because it was necessary to enforce the tax laws of England.

At the close of his speech in opposition to that proposal, William Pitt had this to say—and if I had the power I would write these words indelibly upon the hearts of every legislator in this Nation, including the Members of the U.S. Senate as they consider the District of Columbia crime bill.

He said:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail. Its roof may shake. The wind may blow through it. The storm may enter. The rain may enter. But the King of England cannot enter. All his force dares not cross the threshold of that ruined tenement.

In these words, William Pitt was proclaiming what has always been one of the proudest boasts made by our law, that every man's home is his castle. That has been the law of the United States, not only at the Federal level but also at the State level ever since George Washington took his first oath of office as President of the United States.

Mr. President, here we have a proposal, made in the good year of our Lord 1970, that a man's home shall no longer be his castle, that any officer of the law having the power to make an arrest or to execute a search warrant, shall have the legal power to enter the home of any citizen of the District of Columbia, in like manner in which a burglar now illegally enters the homes of people to rob them—in other words, by threat or stealth or by force.

Mr. President, I hold in my hand a newspaper clipping, and it reads:

NO-KNOCK RAIDERS: ARMED PRINCE GEORGES DEPUTIES SMASH INTO WRONG HOME

A Prince Georges County woman was awakened about 1 a.m. yesterday by a crew of armed county deputy sheriffs who had broken into her apartment with a sledge hammer.

Maj. Daniel D. Ballard of the Prince Georges County sheriff's office yesterday confirmed the incident but said it was all a mistake.

He said that a squad from the sheriff's office conducting a drug raid had divided into three sections in order to assure surprise.

That is what no-knock is for, all right, to assure surprise.

It surely must have been a surprise to the lady, to have someone knock down her door at 1 a.m. in the morning with a sledge hammer.

I am sure that Senators need not bother with the thought that their doors will be knocked down with a sledge hammer at 1 o'clock in the morning, if the District of Columbia crime bill becomes law, because everyone knows whose doors are going to be knocked down.

They are going to be the poor, the humble, and the helpless, not persons of affluence or political power.

I continue to read:

He said that a squad from the sheriff's office conducting a drug raid had divided into three sections in order to assure surprise and to cover all entrances to a nearby apartment that was the actual target of the raid.

Ballard said that one section blundered into the apartment of Margaret O. Malloy. That section had been assigned to enter through the rear of the apartment that was to be raided and erred because there were no numeral markers there, Ballard said.

Mrs. Malloy, 58, who lives at 7308 Forest Rd. with her son John, 23, came into the living room to find a half-dozen men armed with pistols and with blackjacks protruding from their rear pockets. They were wearing civilian clothes, not uniforms.

I guess that was another way they had of surprising people.

I continue to read:

As Mrs. Malloy recounted the incident yesterday, she said she found herself staring down the barrel of a rifle held by a crouching man who wore a bandolier across his sports shirt.

"My God, what's happened?" asked Mrs. Malloy, shaking, as she later said, "like a leaf."

"This is a raid. We're Prince George's County sheriffs," a spokesman for the group told her, she said.

"Isn't this 7302 Forest Rd.?" he asked.

"No," answered Mrs. Malloy's son. "This is 7308," she recounted.

"We've got the wrong apartment. I'll be right back and explain," the spokesman told her.

If we pass this District of Columbia crime bill, they will have a better explanation to give for raids when they knock people's doors down with sledge hammers. They can say that this honorable body, this guardian of the rights of the people, the U.S. Senate, authorized them to do it. They will have a better explanation in the eyes of some people. But in my opinion, it will be worse. I would a whole lot rather not have Prince Georges County sheriffs or law-enforcement officers of the District of Columbia break into the homes of people with sledge hammers at 1 o'clock in the morning without any consent, and as a Member of the U.S. Senate I affirm here and now that they will not get my consent to do so.

So, if they tell the truth in the future, they will have to say that the Senator from North Carolina attempted to prevent episodes of this kind.

I continue to read:

Mrs. Malloy and her thoroughly awakened neighbors then watched the group make its way to the nearby apartment.

They saw the search party go to 7302 Forest Rd. to a third floor apartment similar to Mrs. Malloy's.

Mrs. Malloy and her neighbors said they could hear screams and an unexplained shot as they saw pictures being removed from the walls and vases smashed, she said.

Ballard said that at the second address eight arrests were made and that $2,500 worth of heroin and other illegal drugs were seized. After the raid, a deputy returned to apologize to Mrs. Malloy, she said.

Mrs. Malloy said she believes in upholding the law but that she hopes the sheriff will be more careful next time.

"I have high blood pressure," she said.

I am afraid I will acquire high blood pressure, because it almost gives me high blood pressure to hear it solemnly advocated in the Congress of the United States that we do away with the boast of our law that a man's home is his castle and that we allow officers of the law and make it legal for officers of the law to enter houses of our citizens in like manner to that in which burglars now and have always entered them.

Mr. President, I would like to point out, of course, that they say these are bad men and that we are after bad men. Of course, sometimes they are good ladies like Mrs. Malloy.

I will read from the opinion of the

Supreme Court of the United States in Miller against United States, reported in volume 2, lawyers' edition of the Supreme Court reports, second series, at page 1332 as to what the law says. It is also reported in the official edition of the reports of the U.S. Supreme Court, 357 U.S. at page 301.

Speaking of an act of Congress applicable to the District of Columbia which is to be done away with by the District of Columbia crime bill—this statute which requires an officer to notify occupants of the house of his presence and purpose before he enters—the Supreme Court says:

"Congress, codifying a tradition embedded in Anglo-American law, has declared in § 3109 the reverence of the law for the individual's right of privacy in his house.[13] Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.

This decision of the Supreme Court has much to say about the boast of our law that every man's home in his castle. For this reason, I ask unanimous consent that a complete copy of the opinion in Minner against United States be printed at this point in the RECORD.

There being no objection, the opinion was ordered to be printed in the RECORD, as follows:

[357 US 301, 2 L ed 2d 1332, 78 S Ct 1190, No. 126]

WILLIAM MILLER, PETITIONER, *v.* UNITED STATES OF AMERICA

Argued January 28, 1958—Decided June 23, 1958

SUMMARY

Petitioner was convicted of federal narcotics offenses in the District Court for the District of Columbia, following a prosecution in which he sought unsuccessfully to suppress evidence consisting of marked currency found in his apartment after his arrest. Petitioner's contention was that the currency was unlawfully seized, since its seizure followed the breaking of his door by police officers who sought to arrest him without warrant, and the officers, before breaking the door, had not informed him of their purpose in demanding admission. The conviction was affirmed by the United States Court of Appeals for the District of Columbia Circuit (100 App DC 302, 244 F2d 750).

On certiorari, the United States Supreme Court reversed the judgment below. BRENNAN, J., speaking for six members of the court, held that the arrest was unlawful, and the currency seized thereafter inadmissible in evidence, since the police officers had not expressly demanded admission or stated the purpose for their presence before breaking defendant's door, and the evidence did not warrant a finding that the facts known to the officers justified them in being virtually certain that defendant knew their purpose so that an announcement thereof would have been a useless gesture.

Harlan, J., concurred in the result.

CLARK, J., joined by BURTON, J., dissented, asserting that the evidence supported the finding of the court below that defendant, at the time the police entered his apartment, already fully understood who the officers were and that they sought to arrest him.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated.

Arrest § 2—without warrant

1. Under the law of the District of Columbia, peace officers having probable cause to believe that a felony is being, or has been, committed, are empowered to arrest without a warrant.

Courts §§ 625, 782—arrest without warrant—law governing

2. The lawfulness of an arrest, without warrant, for violation of federal law, by state peace officers, or by peace officers of the District of Columbia, is to be determined by reference to state law, or the law of the District of Columbia, respectively.

District of Columbia § 7—local laws

3. It is the policy of the United States Supreme Court not to interfere with local rules of law fashioned by the courts of the District of Columbia.

Appeal and Error § 380—from District of Columbia court—arrest without warrant

4. The United States Supreme Court will review a judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming a conviction of crime in the District Court following the admission of evidence obtained by District of Columbia peace officers who, defendant alleges, illegally entered his apartment to execute an arrest without warrant for violation of federal law, where the government concedes that the validity of the entry to execute the arrest must be tested by criteria identical with those embodied in the provisions of 18 USC § 3109, dealing with entry to execute a search warrant, and these statutory requirements are substantially identical to those judicially developed by the Court of Appeals for the District of Columbia Circuit.

Arrest § 1—breaking door

5. At common law, the authority of law officers to break the door of a house to effect an arrest was drastically limited.

Arrest § 1—breaking door

6. Law officers cannot break the door of a house to effect an arrest where they do not first state their authority and purpose for demanding admission.

Arrest §§ 1, 2—breaking door

7. The requirement that, for the breaking of a door to effect an arrest to be lawful, the officer must first state his authority and purpose for demanding admission, is applicable whether the arrest is to be made by virtue of a warrant, or the officers are authorized to make an arrest for a felony without a warrant.

Arrest § 1—breaking of door—sufficiency of announcement

8. Although the rule that if an arrest following the breaking of a door is to be lawful the officer must first state his authority and purpose for demanding admission requires notice in the form of an express announcement by the officer of his purpose for demanding admission, the burden of making an express announcement is slight.

Arrest § 1—breaking door—sufficency of announcement

9. To the extent that the requirement that if an arrest following the breaking of a door is to be lawful the arresting officers must previously have announced the purpose of their demand for admission is satisfied when the facts known to the arresting officers justify them in being virtually certain that the person to be arrested already knows their purpose so that an announcement would be a useless gesture, no such satisfaction of the requirement is shown by proof that police officers broke defendant's door and arrested him following his attempt to bar their entry after they had identified themselves as police, where (1) defendant's act is interpretable as the expected reaction of any citizen to a demand for entry by persons who are not shown to have been in uniform and who spoke the word "police" in very low tones; (2) the arresting officers were aware of defendant's ignorance of the events leading to their attempt to arrest him; and (3) although currency marked by the police was found in defendant's apartment following the entry, defendant did not know that it was marked.

Search and seizure § 3—legality

10. A search is not to be made legal by what it turns up; in law it is good or bad when it starts and does not change character from its success.

Criminal law § 46—rights of accused—fair procedure

11. Insistence upon observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to achieving law and order; however much in a particular case insistence upon such requirements may appear as a technicality that insures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness.

Search and seizure § 3—invasion of house

12. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

Evidence § 681—wrongful seizure—arrest without warrant—breaking door

13. In a prosecution for federal crime in the District of Columbia, it is error to admit in evidence marked currency found in the defendant's apartment where the currency was seized by police officers who entered the apartment in order to effect an arrest of defendant without warrant, the entry was made by the breaking of defendant's door, and the police officers, before breaking the door, did nothing to inform the defendant of their purpose in demanding admission other than to identify themselves as police [*See annotation reference*]

APPEARANCES OF COUNSEL

De Long Harris, of Washington, D.C., argued the cause for petitioner.

Leonard B. Sand, of Washington, D.C., argued the cause for respondent.

Briefs of Counsel, p. 2126, infra.

ANNOTATION REFERENCE

Admissibility of evidence obtained by illegal search and seizure, 93 L ed 1797, 90 L ed 145, 98 L ed 581, 100 L ed 239, 50 ALR2d 581.

OPINION OF THE COURT

[357 US 302] Mr. Justice Brennan delivered the opinion of the Court.

Petitioner, William Miller, together with Bessie Byrd and her brother, Arthur R. Shepherd, was tried and convicted in the District Court for the District of Columbia for conspiracy to commit violations, and violations, of the federal n rcotics laws. 26 USC § 4707a; 21 USC § 174; 18 USC § 371. The Court of Appeals for the District of Columbia Circuit affirmed, one judge dissenting, 100 App DC 302, 244 F2d 750. We granted certiorari, 353 US 957, 1 L ed 2d 908, 77 S Ct 867, to determine whether evidence seized at the time of petitioner's arrest was properly admitted against the petitioner. The evidence was $100 of marked currency which was seized by the federal officers who arrested the petitioner and Bessie Byrd at their apartment.

On March 25, 1955, at 1:35 a.m., Clifford

Reed was arrested, under an arrest warrant, on a Washington, D.C. street on suspicion of narcotics offenses. Reed revealed to Wilson, a federal narcotics agent, that he purchased heroin in 100-capsule quantities from the petitioner through Shepherd. Agent Wilson knew of the petitioner as one who had trafficked in narcotics and had been convicted for a narcotics offense in 1953. Reed said that he was to meet Shepherd later that morning to make a purchase. Agent Wilson enlisted his aid to apprehend Shepherd and the petitioner. About 3 a.m. another federal narcotics agent, Lewis, carrying $100 of marked currency, went with Reed in a taxicab to Shepherd's home. Reed introduced Lewis to Shepherd as a buyer. Shepherd accepted the $100 and agreed to secure 100 capsules of heroin from the petitioner and deliver them to Lewis at Reed's apartment. Shepherd proceeded alone in the taxicab to the petitioner's apartment.

[357 US 303] The taxicab was followed by agent Wilson, officer Wurms of the Metropolitan Police Department, and other officers in police cars.[1] Shepherd was seen to leave the taxicab in front of the apartment house where the petitioner and Bessie Byrd occupied a two-room-and-bath basement apartment. The taxicab waited. Shepherd entered the basement but agent Wilson, who looked into the basement hall, could not see where he went. Shepherd came out of the basement within a few minutes and re-entered the taxicab. The taxicab was proceeding toward Reed's apartment when the officers following in the police cars intercepted it. Shepherd was arrested and searched. He did not have the marked bills on his person but admitted to agent Wilson and officer Wurms that a package of 100 capsules of narcotics found under the taxicab's front seat was put there by him when the police cars stopped the taxicab. He said that he had taken the package from behind a fire extinguisher in the basement hall where he had been sent by a "fellow" with Reed who had promised him $10 for getting it.

The federal officers returned immediately to the apartment building. About 3:45 a.m. agent Wilson and officer Wurms went to the door of the petitioner's apartment. Officer Wurms knocked and, upon the inquiry from within—"Who's there?"—replied in a low voice, "Police." The petitioner opened the door on an attached door chain and asked what the officers were doing there. Before either responded, he attempted to close the door. Thereupon, according to officer Wurms, "we put our hands inside the door and pulled and ripped the chain off, [357 US 304] and entered."[2] The officers had no arrest or search warrant. They did not expressly demand admission or state their purpose for their presence,[3] nor did they place the petitioner under arrest until after they entered the apartment.

Bessie Byrd was also arrested in the apartment and turned over the cash she had in her housecoat. The cash included $34 of the marked currency. After an extended search the remaining $66 of marked currency was found, some in a hatbox in a closet, and the rest within the covers of a bed in the bedroom.

The Government contends that there was probable cause for arresting the petitioner and that the marked currency [357 US 305] was properly admitted in evidence because it was seized as an incident to a lawful arrest. Harris v United States, 331 US 145, 91 L ed 1399, 67 S Ct 1098. The petitioner's argument breaks down into three contentions: (1) that the officers had no probable cause to arrest the petitioner without a warrant; (2) that the search was not justified as being an incident of a lawful arrest; (3) that the arrest, and therefore the search, was in any event unlawful because the officers broke the door of petitioner's home without first giving notice of their authority and purpose in demanding admission. If any one of these contentions prevails, it is agreed that the marked money was inadmissible in evidence. In the view we take, we need consider only petitioner's third contention.

The lawfulness of the arrest of petitioner depends upon the power of the arresting officers to "break" the doors of a home in order to arrest without warrant persons suspected of having committed narcotics offenses. Agent Wilson did not have statutory authority to arrest without a warrant although officer Wurms, as a member of the Metropolitan Police Department (Headnote 2), did have such authority.[4] This Court has said, in the similar circumstance of an arrest for violation of federal law by state peace officers, that the lawfulness of the arrest without warrant is to be determined by reference to state law. United States v Di Re, 332 US 581, 589, 92 L ed 210, 217, 68 S Ct 222; Johnson v United States, 333 US 10, 15, 92 L ed 436, 441, 68 S Ct 367. By like reasoning the validity of the arrest [357 US 306] of petitioner is to be determined by reference to the law of the District of Columbia.

In making reference to that law we are mindful of our policy of not interfering (Headnote 3) with local rules of law fashioned by the courts of the District of Columbia. Fisher v United States, 328 US 463, 476, 90 L ed 1382, 1391, 66 S Ct 1318; Griffin v United States, 336 US 704, 715, 93 L ed 993, 999, 69 S Ct 814. But the Government agrees with petitioner that the validity of the entry to execute the arrest without warrant must be tested by criteria identical with those embodied in 18 USC § 3109, which deals with entry to execute a search warrant.[5] That section provides that an officer, executing a search warrant, may break open a door only if, "after notice of his authority and purpose," he is denied admittance. The Government states in its brief that, "where an arrest is made on probable cause rather than a warrant, these statutory requirements must be met before an officer can force entry into an apartment." These statutory requirements are substantially identical to those judicially developed by the Court of Appeals for the District of Columbia in Accarino v United States, 85 App DC 394, 179 F2d 456, 465. Since the rule of Accarino (Headnote 4) bears such a close relationship to a statute which is not confined in operation to the District of Columbia, we believe that review is warranted here. Cf. Del Vecchio v Bowers, 296 US 280, 80 L ed 229, 56 S Ct 190; Carroll v United States, 354 US 394, 414, 1 L ed 2d 1442, 1454, 77 S Ct 1332.

From earliest days, the common law drastically limited the authority of law officers (Headnote 5) to break the door of a house [357 US 307] to effect an arrest.[6] Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle. As early as the 13th Yearbook of Edward IV (1461–1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party. Remarks attributed[7] to William Pitt, Earl of Chatham, on the occasion of debate in Parliament on the searches incident to the enforcement of an excise on cider, eloquently expressed the principle:

"The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his forces dares not cross the threshold of the ruined tenement!"

But the common law recognized some authority in law officers to break the door of a dwelling to arrest for felony. The common-law authorities differ, however, as to the circumstances in which this was the case. Hawkins says: "where one lies under a probable Suspicion only, and is not indicted, it seems the better Opinion at this Day, That no one can justify the Breaking open Doors in Order to [357 US 308] apprehend him." 2 Hawkins, Pleas of the Crown, c. 14 § 7 (1762); see also Foster, Crown Law, 321 (2d ed. 1776). Coke appears to have been of the same view, and to have thought that the breaking of a house was limited to cases in which a writ, now our warrant, had issued. Co. 4th Inst. 177. On the other hand, Hale says that "A man, that arrests upon suspicion of felony, may break open doors, if the party refuse upon demand to open them . . . ." 1 Hale, Pleas of the Crown, 583 (1736).

Whatever the circumstances under which breaking a door to arrest for felony (Headnote 6) might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission. The requirement was pronounced in 1603 in Semayne's Case, 5 Coke 91, 11 ERC 629, 77 Eng Reprint 194: "In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . .*" (Emphasis supplied.)

The requirement stated in Semayne's Case still obtains. It is reflected in 18 U.S.C. § 3109, in the statutes of a large number of States,[8] and in the American Law [357 US 309] Institute's proposed Code of Criminal Procedure, §28.[9] It applies, as the Government here concedes (Headnote 7), whether the arrest is to be made by virtue of a warrant, or when officers are authorized to make an arrest for a felony without a warrant. There are some state decisions holding that justification for noncompliance exists in exigent circumstances, as, for example, when the officers may in good faith believe that they or someone within are in peril of bodily harm, Read v Case, 4 Conn 166, 10 Am Dec 110, or that the person to be arrested is fleeing or attempting to destroy evidence. People v Maddox, 46 Cal2d 301, 294 P2d 6.

But whether the unqualified requirements of the rule admit of an exception justifying noncompliance in exigent circumstances is not a question we are called upon to decide in this case. The Government makes no claim here of the existence of circumstances excusing compliance. The Government concedes that compliance was required but argues that "compliance is evident from the events immediately preceding the officers' forced entry."

The rule seems to require notice (Headnote 8) in the form of an express announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by [357 US 310] the officers would have satisfied the requirement in this case. It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useles gesture. Cf. People v Martin, 45 Cal2d 755, 290 P2d 855; Wilgus, Arrest Without a Warrant, 22 Mich L Rev 798, 802 (1924).[10] But even by that test the evidence upon which the Government relies (Headnote 9) was not sufficient to justify the officers' failure expressly to notify the petitioner that they demanded admission to his apartment for the purpose of arresting him.

The single fact known to the officers upon which the Government relies is the "split-second" occurrence in which the petitioner evinced "instantaneous resistance to their entry," an "almost instinctive attempt to bar their entry after they [the officers] had identified themselves as police . . . ." It is

Footnotes at end of article.

argued that this occurrence "certainly points up that he knew their purpose immediately . . . [and], at once, realized that he had been detected and that the officers were there to arrest him"; [357 US 311] that "[i]t would be wholly unrealistic to say that the officers had not made their purpose known because they did not more formally announce that they were there to arrest him."

But, first, the fact that petitioner attempted to close the door did not of itself prove that he knew their purpose to arrest him. It was an ambiguous act. It could have been merely the expected reaction of any citizen having this experience at that hour of the morning, particularly since it does not appear that the officers were in uniform, cf. Accarino v United States, supra 85 App DC at 403, 179 F2d at 465, and the answer "Police" was spoken "in a low voice" and might not have been heard by the petitioner so far as the officers could tell.

Second, petitioner's reaction upon opening the door could only have created doubt in the officers' minds that he knew they were police intent on arresting him. On the motion to suppress, Agent Wilson testified that "he wanted to know what we were doing there." This query, which went unanswered, is on its face inconsistent with knowledge. The majority of the Court of Appeals denied the import of the query by inferring that Miller knew Wilson and Wurms personally and recognized them as soon as he opened the door. That inference has no support in the record.[11] But even if this inference were [357 US 312] supportable, Miller's recognition of Wilson and Wurms as police officers would not have justified them, in light of other facts known to them, in being virtually certain that Miller actually knew the reason for their presence. The officers knew that petitioner was unaware of Shepherd's arrest; they knew that he was unaware that the currency was marked; they knew that he was unaware that their presence was pursuant to a plan, initiated by Reed's disclosures, to catch the petitioner in a criminal act. Moreover, they did not actually know that petitioner had made a sale to Shepherd and received the marked money, for Shepherd had not talked and had not been seen to enter petitioner's apartment. The fact that the marked money was found in the apartment has no bearing upon the petitioner's knowledge of the officers' purpose since he did not know that the money was marked. This Court said in United States v Di Re, supra (332 US at 595): "We have had frequent occasion to point out that a search is not to be made legal by what it turns up (Headnote 10). In law it is good or bad when it starts and does not change character from its success." The most that can be said is that the petitioner's act in attempting to close the door might be the basis for the officers being virtually certain that the petitioner knew there were police at his door conducting an investigation. This, however, falls short of a [357 US 313] virtual certainty that the petitioner knew of their purpose to arrest him. The requirement is not met except by notice of that purpose, for the Government admits that the officers had no authority to break the petitioner's door except to arrest him. We must, therefore, conclude (Headnote 9) that the petitioner did not receive the required notice of authority and purpose.

We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers (Headnote 11) of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in § 3109 the reverence of the law for the individual's right of privacy in his house.[12] Every householder (Headnote 12), the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. The petitioner (Headnote 13) could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the peitioner did not receive that [357 US 314] notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.

Reversed.

Mr. Justice Harlan concurs in the result.

SEPARATE OPINION

Mr. Justice Clark, with whom Mr. Justice Burton concurs, dissenting.

I agree that a requirement of prior notice of authority and purpose should not be given a "grudging" application. But by the same token it should not be reduced to an absurdity. A majority of the Court of Appeals has concluded that petitioner, at the time the police entered his apartment, "already fully understood who the officers were and that they sought to arrest him." 100 App DC 302, 244 F2d 750, 758. The entry, therefore, was held valid under District of Columbia law.[13] [357 US 315] This Court now superimposes upon the local rule of the District an artificial and unrealistic requirement that, even under the circumstances found here, police must make "an express announcement" in unmistakable words that they are the police and have come to make an arrest.

The Court attempts to justify interference in local law by what it terms a "concession" of the Government that validity of the entry must be tested by a federal statute relating to forcible entry to execute a search warrant.[14] But the fact that the Government seeks clarification of a general federal statute, possibly to serve its purposes in prosecutions elsewhere, is no reason for us to oblige, especially when the result is to subvert existing local law. In the process, the Court reverses the conviction of a wholesale narcotics violator with a previous record in the traffic who carries on his abominable trade by using a juvenile as his dope peddler and co-conspirator.

The facts on which the Court of Appeals found the entry valid were these: Officers trailed Shepherd as he proceeded by taxicab to purchase heroin for Lewis, a narcotics agent. Shepherd went to the apartment occupied by his sister, Mrs. Byrd, and by petitioner. The officers saw him enter the apartment building. Agent Wilson followed him to the basement entrance and saw him disappear down a lighted hall about "as long as the jury box." Other than the entrance, there were only two [357 US 316] doors into the hall, one leading into petitioner's apartment, the other into a furnace room. No one lived in the basement except petitioner and Mrs. Byrd. Wilson then withdrew to a location across the street. He saw a light go on in the furnace room, remain on shortly, and then go out. Shepherd soon emerged, re-entered the taxicab and drove away. The officers followed, arrested Shepherd, and seized 100 capsules of heroin found in the taxicab.

The opinion of the Court of Appeals graphically described the subsequent events:

"After the arrest of Shepherd, the officers, having found the 100 capsules of heroin, immediately went back to the apartment occupied by Mrs. Byrd and Miller, and, a few minutes later, knocked on the door and announced their identity. Thereupon Miller, known to the officers as a narcotics violator, having opened his door part way, recognized the officers of the narcotics squad and attempted to close the door. As he pulled the door to, the officers resisted his effort to close it, a chain bolt broke, and the officers arrested Miller and Mrs. Byrd." 100 App DC at 304, 244 F2d, at 752.

This summary is amply supported by the evidence. Wilson testified that petitioner previously met him when he was an agent with the Federal Bureau of Narcotics. He also knew petitioner in connection with a narcotics case. Officer Wurms testified that he too knew petitioner officially.[15] As to their entry into the apartment, Wurms testified: "I knocked on the front door . . . somebody [357 US 317] asked, 'Who's there?' I said 'Blue'—in a low voice, I said 'Police.' I repeated it two or three times in that manner. The door opened. There was a chain on the door. Blue Miller saw me, Agent Wilson, and I don't know who else he saw but he tried to close the door. . . ." Wilson described the entry this way: "There was a short struggle there between Wurms and Miller to open the door and finally the door was forced open and we got ourselves into the apartment." The officers found the marked currency and a carton of one thousand unfilled gelatin capsules. Three hundred and eighty-one such capsules filled with heroin were found in the furnace room across the hall.

At a pretrail hearing petitioner moved to suppress the marked currency, alleging that the officers had neither warrant nor probable cause for arrest. This motion was denied. At trial before a jury and a different judge the motion was renewed. In denying the motion the judge said, "I will give you the right to make another motion. You certainly have a right at the end of the testimony." Petitioner never availed himself of this opportunity.

On appeal petitioner shifted his ground, emphasizing that even if the officers had probable cause to arrest him, such authority was improperly exercised because they did not formally announce their purpose before entry. The Court of Appeals held:

"Against the background of the facts as noted and the law as summarized, we find the officers at Miller's door, knowing that a felony had been committed and having probable cause to believe it was continuing. The statute spelled out their clear duty to arrest." 100 App DC 302, 309, 244 F2d 750, 757.

The court agreed with the trial judge "that the attempt of the officers to arrest Miller at his doorway under the circumstances of this case was not unreasonable," and found [357 US 318] that the breaking of the door chain "in the course of his resistance [was] immaterial and his arrest, immediately made, was justified." 100 App DC at 310, 244 F2d, at 758. Concluding that Miller without doubt was aware both of the officers' identity and purpose, the court upheld the refusal of the trial court to suppress the evidence, and found the proof of guilt "overwhelming and unanswerable."

The majority, however, brushes aside these conclusions, explaining petitioner's action in slamming the door as "the expected reaction of any citizen." This is something entirely foreign to my concept of the respect a law-abiding citizenry pays to its law-enforcement officers. Nor can I accept the conclusion of the Court that the circumstances found by the Court of Appeals fall "short of a virtual certainty that the petitioner knew of [the officers'] purpose to arrest him." His knowledge—in the absence of an express admission by him—can never be a "virtual certainty." Rather than attempting to psy-

Footnotes at end of article.

choanalyze petitioner, we should measure his understanding by his outward acts. The Court of Appeals found that they indisputably established petitioner's awareness of the police purpose. We should not disturb that finding.

The majority does not deal with the "exigent circumstances" of the case because the Government makes no claim for thus "excusing compliance" with the statute. It is to be noted, however, that the Court of Appeals expressly based its opinion on the fact that the officers "were confronted by the need for a decision arising from the necessitous circumstances of the situation." The position of the Government does not excuse us from evaluating the circumstances of the whole case. I believe that the Court of Appeals was eminently correct in its conclusion that "necessitous circumstances" here warranted the officers in entering the apartment. As that court pointed out, petitioner might have fled or hidden [357 US 319] himself or destroyed the fruits of his crime, particularly in view of his background and the visit of his brother-in-law Shepherd only a few moments before. Certainly he soon would have learned of Shepherd's arrest. Moreover, his attempt to forcibly prevent the entry of the officers into his apartment required their immediate action. Any delay might well have precluded the arrest. Destruction of the marked money might have prevented the establishment of petitioner's guilt. As the Government points out, "split-second action [was] necessary."

I would affirm the judgment on the basis of the District of Columbia rule in Accarino, 85 App DC 394, 179 F2d 456, supra, which I believe this Court should honor.[16]

FOOTNOTES

[1] The group included two Federal Bureau of Narcotics agents, Wilson and Pappas, officer Wurms of the District of Columbia Metropolitan Police Department, and officers Bowman and Thompson of the Virginia State Police, who were trainees in the narcotics program of the State of Virginia.

[2] Officer Wurms testified:

"The Witness: Agent Wilson and I were at the front door of the apartment No. 1, 1337 Columbia Road. I knocked on the front door. I said—somebody asked, 'Who's there? I said, 'Blue' [the petitioner's nickname]—in a low voice, I said 'Police.'

"I repeated it two or three times, in that manner.

"The door opened. There was a chain on the door. Blue Miller saw me, Agent Wilson, and I don't know who else he saw but he tried to close the door and at that time we put our hands inside the door and pulled and ripped the chain off, and entered."

[3] At the trial, but not at the hearing on the motion to suppress, agent Wilson testified, "He said, 'What do you-all want?' And we says, 'Police, you are under arrest, we want in.' He says he was not going to let us in, or something like that, and so Officer Wurms took ahold of the door and pulled it open." But apparently the Government is satisfied that agent Wilson was mistaken in saying that there was mention of the purpose to arrest. His testimony on the motion to suppress as well as the testimony of officer Wurms, both on the motion and at the trial, is contrary. The Government in its brief refers to this testimony merely in footnotes. Its brief accepts the petitioner's premise that the case should be decided upon the basis that the evidence shows that the officers did not formally announce their purpose. The Court of Appeals decided the case on the basis that Wilson did not make the statement. 100 App DC 294, 244 F2d 750, 754.

[4] Narcotics agents were subsequently given authority by 26 USC § 7607, added July 18, 1956, to make an arrest where the agents have "reasonable grounds to believe that the person to be arrested has committed" a narcotics offense. In the District of Columbia peace officers (Headnote 1) having probable cause to believe that a felony is being, or has been, committed are empowered to arrest without a warrant. Wrighton v. United States, 98 App DC 377, 379, 222 F2d 556, 558.

[5] 18 USC § 3109.

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

The petitioner does not raise a question of the application of DC Code, 1951, § 4–141. See also § 4–145.

[6] Judge Prettyman's opinion for the Court of Appeals in Accarino v. United States, 85 App DC 394, 179 F2d 456, discusses comprehensively the development of the law. See also the exhaustive article, Wilgus, Arrest Without a Warrant, 22 Mich L Rev 541, 673, 798 (1924).

[7] The Oxford Dictionary of Quotations (2d ed. 1953), 379. In Hansard, Parliamentary History of England (1813), vol 15, column 1307, under the proceedings in the Commons on the cider tax in March, 1763, we find: "Mr. Pitt spoke against this measure, particularly against the dangerous precedent of admitting the officers of excise into private houses. Every man's house was his castle, he said."

[8] Ala Code, 1940, Tit 15, § 155; Ariz Rev Stat, 1955, Tit 13, § 1411; Deering's Cal Penal Code, § 844; Fla Stat, 1957, § 901.17; Idaho Code, 1947, § 19–611; Burns' Ind Ann Stat, 1956, Replacement Vol, § 9–1009; Iowa Code Ann, 1949, § 755.9; Kan Gen Stat, 1949, § 62–1819; Ky Rev Stat, 1953, § 70.078; Dart's La Crim Code, 1943, Art 72; Mich Stat Ann, 1954, § 28.880; Minn Stat, 1945, § 629.34; Miss Code, 1942, § 2471; Mo Rev Stat Ann, 1949, § 544.210; Mont Rev Codes, 1947, § 94–6011; Nebr Rev Stat, 1943, § 29–411; Nev Rev Stat, 1957, § 171.305; Clevenger-Gilbert's NY Crim Code, 1956, § 178; NC Gen Stat, 1943, § 142–36; Page's Ohio Rev Code, 1953, § 2935.15; Okla Stat Ann, Tit 22, § 194; Ore Comp Laws, 1940, § 26–1530; SC Code, 1952, § 53–198; SD Code, 1939, § 34.1606; Tenn Code, 1955, § 40–807; Utah Code Ann, 1953, 77–13–12; Remington's Wash Rev Stat. 1932, § 2082; Wyo Comp Stat, 1945, § 10–309.

[9] Code of Crim Proc, American Law Institute, Official Draft, § 28 (1930).

"Right of officer to break into building. An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in section 21, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if he is refused admittance after he has announced his authority and purpose."

[10] Professor Wilgus sums up his discussion of the breaking of doors thus: "Because doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, unless this is already understood, or the peril would be increased." 22 Mich L Rev 798, 802. [Footnotes omitted.] The dissenting opinion herein, in footnote 1, mistakenly refers to this passage as if it were a holding "enunciated" by the Court of Appeals. In fact, this passage was merely quoted without approval. The holding was: "Upon one topic there appears to be no dispute in the authorities. Before an officer can break open a door to a home, he must make known the cause of his demand for entry. There is no claim in the case at bar that the officers advised the suspect of the cause of their demand before they broke down the door." Accarino v United States, 85 App DC 394, 403, 179 F2d 456, 463.

[11] Judge Holtzoff heard the motion to suppress over two months before the trial. Our examination of the record made at that time brings us into complete agreement with Judge Edgerton, who, dissenting in the Court of Appeals, said, "I find no evidence, and the court cites no evidence, that supports an inference that Miller even recognized the officers as the narcotics squad." 100 App DC 302, 311, 244 F2d 750, 759. Even if petitioner could have seen the officers sufficiently to make out their faces, there is no evidence that he knew them personally. The record at best supports an inference, not that either officer personally knew Miller, or that Miller had met, or even heard of, either officer, but only that the officers knew *of him* as a reputed narcotics violator. Judge Youngdahl presided at the trial and refused to hear a renewed motion to suppress because he considered the matter settled by Judge Holtzoff's ruling. Agent Wilson's testimony at the trial was again at variance with his testimony before Judge Holtzoff as it had been on the question whether the officers had communicated their purpose to arrest. At the trial he testified that Miller had met him on one occasion before the night of the arrest. Apparently unwilling to rely on this testimony, in the face of its inconsistency, the majority of the Court of Appeals did not allude to it as the basis for its conclusion that Miller recognized the officers.

[12] Compliance is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder. See concurring opinion in McDonald v United States, 335 US 451, 460, 461, 93 L ed 153, 160, 161, 69 S Ct 191.

[13] The rule in the District with which the Court of Appeals found compliance was enunciated in Accarino v United States, 85 App DC 394, 179 F2d 456 (opinion by Judge Prettyman). Rehearing en banc in the instant case was denied without dissent, with the author of Accarino participating.

In discussing the local rule, Judge Prettyman in Accarino quoted with approval from Wilgus, Arrest Without a Warrant, 22 Mich L Rev. 798, 802: "Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, *unless this is already understood, or the peril would be increased.*" (Emphasis added.) 85 App DC, at 401, 179 F2d, at 463. The Court of Appeals in the instant case recognized this language as the embodiment of the local rule, 100 App DC, at 309, 244 F2d, at 757, and in finding that petitioner "already fully understood who the officers were and that they sought to arrest him." id., 100 App DC, at 310, 244 F2d, at 758, applied that rule in affirming the conviction.

This Court now concludes that the rule "judicially developed" in the District is "substantially identical" to 18 USC § 3109, which concerns entry to execute a search warrant. It is important to note, however, that certain language, set out in italics above, is peculiar to the local "judicially developed" rule. The latter is not respected in the interpretation of § 3109 by the Court today.

[14] While the Government in its brief agrees "that the validity of the entry should be tested under the standard of 18 USC 3109," it joins that position with the contention that "[u]nder these circumstances, [the police] entry complied with the teaching in Accarino v. United States [85 App DC 394, 401], 179 F2d 456, 463." See note 1, supra.

[15] Q. "How did you know [Miller]?" A. "Previous knowledge, and I have seen him before." Furthermore, petitioner in his affidavit supporting his motion to suppress swore "that officers Wilson, Pappas and four others did break the chain off the door," and further that Wilson physically assaulted him in his apartment.

[16] See Fisher v United States, 328 US 463, 476, 90 L ed 1382, 1390, 66 S Ct 1318, 166 ALR

1176 (1946), where the Court said, "Our policy is not to interfere with the local rules of law which [District of Columbia courts] fashion, save in exceptional situations where egregious error has been committed."

In Griffin v United States, 336 US 704, 93 L ed 993, 69 S Ct 814 (1949), the Court determined that there was no "federal rule" on the issue in the case. But it added that even if there were such a rule, it would not necessarily control in the District of Columbia: "This Court, in its decisions, and Congress, in its enactment of statutes, have often recognized the appropriateness of one rule for the District and another for other jurisdictions so far as they are subject to federal law." Id. 336 US at 712. The Court noted that it was the "special function" of the Court of Appeals to decide questions of local law. "Only in exceptional cases will this Court review a determination of such a question by the Court of Appeals for the District." Id., 336 US at 718.

Mr. ERVIN. Mr. President, I think perhaps it was very appropriate for me to speak of the Prophet Micah because this bill depends so much on prophecy and the power of prophecy.

I wish to commend the distinguished senior Senator from Maryland for the great work he has done in this field, and I disclaim any purpose to criticize him on account of the fact that this bill contains the no-knock and preventive detention provisions. He has frankly stated all of the time that he favors such provisions. He has just the same right to favor preventive detention as I do to oppose putting people in jail for crimes they have not committed and may never commit. He has exactly the same right to say that officers of the law should be given the authority to enter people's houses without prior notice as I do to maintain the right that a man's home is his castle and that it is a sacred right that should be protected.

But I do agree with the Senator on one point. He used football language to describe my efforts and the efforts of my colleagues to get a really good bill here, without these inequities, as an "end run." It was well to engage in football parlance in discussing this bill and this conference report because this conference report certainly does "kick" the Constitution all over the District of Columbia. So it is well to refer to football where so much kicking is done as in this bill. I think it was a very appropriate metaphor or simile, as one may see fit to describe it.

I wish to call attention to the no-knock provisions of this bill. They appear on pages 160 and 177. The provision on page 177 states:

"(a) Any officer authorized by law to make arrests, or to execute search warrants, or any person aiding such an officer, may break and enter any premises, any outer or inner door or window of a dwelling house or other building, or any part thereof, any vehicle, or anything within such dwelling house, building, or vehicle, or otherwise enter to execute search or arrest warrants, to make an arrest where authorized by law without a warrant, or where necessary to liberate himself or a person aiding him in the execution of such warrant or in making such arrest.

"(b) Breaking and entry shall not be made until after such officer or person makes an announcement of his identity and purpose and the officer reasonably believes that admittance to the dwelling house or other building or vehicle is being denied or unreasonably delayed.

"(c) An announcement of identity and purpose shall not be required prior to such breaking and entry—

"(1) if the warrant expressly authorizes breaking and entry without such a prior announcement, or

"(2) if circumstances known to such officer or person at the time of breaking and entry, but, in the case of the execution of a warrant, unknown to the applicant when applying for such warrant, give him probable cause to believe that—

"(A) such notice is likely to result in the evidence subject to seizure being easily and quickly destroyed or disposed of,

"(B) such notice is likely to endanger the life or safety of the officer or another person,

"(C) such notice is likely to enable the party to be arrested to escape, or

"(D) such notice would be a useless gesture.

Mr. President, the Supreme Court had occasion to consider the question of the meaning of the Fourth Amendment in respect to matters of this kind. I shall return in a few minutes to discuss this particular provision, but I wish to lay some emphasis on my belief about what Micah called the right of a man to dwell under his own vine and under his own fig tree without being afraid, and what an important right it is.

One of the recent commentaries upon the Constitution was written by Bernard Schwartz. Two of the volumes of this commentary are entitled "The Rights of the Person." These two volumes deal with these fundamental rights, which Jeremiah Black stated in his argument in Ex parte Milligan, that the Founding Fathers had garnered from the basic principles of our law, such as the Magna Charta, the Bill of Rights, and the Principles of Common Law. They deal with the importance of these rights which are necessary for the individual to retain if he is to be a free man and is to live in a free society.

In volume 1 of "Rights of the Person" Mr. Schwartz stated as follows, as shown at pages 178, 179, and 180:

PRIVACY OF THE HOME

When we think of a right of privacy, constitutionally guaranteed against governmental invasions, we naturally think first of the privacy of the home, for it is such privacy that is most plainly safeguarded by explicit provisions in the basic document.

In protecting the privacy of the home, the Constitution does "but embody a principle of English liberty, a principle old, yet newly won, that finds another expression in the maxim, 'every man's home is his castle.'" As early as 1603 *Coke's Reports* could declare "That the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose."

Certainly the notion of the home as a privileged place whose privacy may not be disrupted by governmental intrusions is one that is basic in a free society: "A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

The Framers themselves were deeply concerned with the problem of search by public officials. They were well aware of the abusive attempts by Crown officers, both in Britain and the Colonies, to exceed the narrow limits within which the law confined governmental powers of search. Such attempts called forth both the enduring judgment in *Entick* v. *Carrington* (1765), which imposed fundamental limitations on the power of search that are still valid, and appeals to the colonial courts, which culminated in the famous attack by James Otis against general writs of assistance in *Paxton's Case* (1761).

What Otis was concerned with was essentially (to use his own phrase), "the freedom of one's house," which he characterized as "one of the most essential branches of English liberty." The general writs at issue, declared Otis, "would totally annihilate this privilege.

* * * * *

It may thus be seen that it is statutes and the law of torts—not constitutional guaranties—which forbid invasions of privacy by private individuals. The constitutional guaranties, from which (we saw in the last section) a constitutional right of privacy may be derived, are directed against government action alone. To the extent that the Constitution does confer a right of privacy, it is a right against governmental invasions. It is to the principles governing such invasions that the remainder of this chapter will be devoted, dealing first with the privacy of the home and then with other aspects of the constitutional right of privacy.

All this bill requires for a no-knock warrant is a bare suspicion of the applying officer as to what is going to happen in the future. You know, Mr. President, I think if officers of the law have the uncanny capacity to prophesy what is going to happen in the future, they ought to be given the job of running our Government, because they might keep us from involving ourselves in such problems as we are now confronted with in Vietnam. This bill requires them to be prophets if they are going to discharge the duties imposed upon them and exercise the powers it vests in them. This bill permits them to break bars and locks just as James Otis said the British customs officers in Boston were doing at the time the American people decided they would seek freedom so that they could keep their homes for their castles and not have officers of the law breaking into their houses all day and all night, as this bill would authorize them to do. Continuing to read from Schwartz' book:

To be sure, the Otis appeal on behalf of the fundamental safeguard for the liberty of the people to the colonial court, staffed as it was with judges subservient to the Crown's pleasure, failed. But a higher tribunal was ultimately to resolve the issue. The debate in *Paxton's Case*, we are told by the highest Court, "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." The Otis argument, exclaimed John Adams in a famous comment over half a century after the event, "breathed into this nation the breath of life," and, "Then and there the child Independence was born."

The abuses against which Otis declaimed were part of the living experience of the men who founded the American Republic. They wrote that experience directly into the Fourth Amendment. "With the fresh recollection of those stirring discussions [respecting writs of assistance], and of the revolution which followed them, the article in the Bill of Rights, respecting searches and seizures was framed and adopted."

The Fourth Amendment categorically proclaims that, "The right of the people to be

secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." So basic to liberty is such protection against governmental search and seizure deemed, that every state in the Union has a similar constitutional safeguard.

In section 359, we saw that the Fourth Amendment prohibition (barring, as it does, unreasonable arrests) is a basic security for the Sanctity of the Person. There can, at the same time, be no doubt that, preoccupied as the Framers were with abusive exercises of powers of search—abuses so deeply felt by them as to be one of the potent causes of the Revolution—the amendment was primarily intended "to prevent . . . unlawful invasion of the sanctity of the home." At the very core of the Fourth Amendment, the highest Court tells us, "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

The Constitution, in thus safeguarding the sanctity of the home from unlawful governmental intrusion, ensures to the person a privileged sanctuary within which he can live his own life, sheltered from public supervision and scrutiny—a place where he can enjoy what William Faulkner has called that "last vestige of privacy without which man cannot be an individual." So long as such oases of privacy exist, there is still room for exercise of that individuality that distinguishes not only our species, but each of us from the other. "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment.

Mr. President, that is exactly what I am trying to do. In opposing the adoption of the conference report, I am trying to preserve for the benefit of the people of the District of Columbia, who have no one here to speak in their behalf, a liberty worth protecting from encroachment. That is precisely what the District of Columbia crime bill proposes to take from every man, woman, and child who happens to have a residence or place of business in the District of Columbia.

It would seem to me that, if Congress should be solicitous about the basic liberties and the basic constitutional rights of any of the American people, it should be solicitous about the liberties and basic constitutional rights of the people of the District of Columbia, who live here in the shadow of the Capitol which bears a flag we like to call Old Glory; the Capitol of a country which was created by men, as they stated in the Preamble to the Constitution, for the purpose of preserving to themselves and their posterity the blessings of liberty.

It is really passing strange to see this proposal for a no-knock provision. It authorizes exactly the same kind of conduct toward the people residing in the District of Columbia that the British customs officers exercised in the days of James Otis, Samuel Adams, and John Adams in respect to the people of the city of Boston.

John Adams was certainly right when he said that this abuse by the officers of the Crown of the privilege of invading the homes of the people of the city of Boston was the thing which breathed the breath of life into our Nation and gave birth to the child Independence.

Yet we have it seriously proposed in this bill that this basic right—a right which the people of America deemed so precious that they went to war to secure it—be taken from the people of the District of Columbia.

I shall come to the preventive detention question after a while, but we know that preventive detention is like the provision of this bill with relation to the swearing out of a search warrant by an officer, in that it requires a prophetic foresight, the gift of prophecy, the ability to foretell the future. And not only the future, but the future behavior of an individual. That makes it even worse. We can come nearer foretelling what the forces of nature will do than what individual human beings are going to do, because individual human beings are very much like Josh Billings' mule, in one respect. Josh Billings, in speaking of his mule, said, "It don't kick according to no rules whatever."

I do not believe any law which depends upon the ability to prophesy individual behavior will work.

It is a strange thing, here in the year of our Lord 1970, that a serious proposal is made in the Congress of the United States—and, I might add, at the recommendation of the President of the United States and at the insistence of the Department of Justice of the United States—that Congress make sacrosanct, by law, an abuse which prompted the American people to rebel against England and seek independence from England. That shows that the behavior of men cannot be predicted—even that of Senators and Representatives.

We had a very fine poet in North Carolina some years ago named John Charles McNeill. He wrote one little poem in which he said:

How teasing truth a thousand
faces claims,
As in a broken mirror;
And what the father died for
in the flames
His own son scorns as error.

American patriots died in the flames for the privilege of having their home regarded as their castle. They died in the flames of the revolution to secure the right which the prophet Micah called the right to sit under their own vines and under their own fig trees, where none could make them afraid.

Yet we see their descendants asking that we legitimize something which was so bad in the eyes of our ancestors that they rebelled against the mother country and obtained their freedom in order to escape from such tyranny. Now we have the President of the United States and the Department of Justice urging that this tyranny be given the sanction of Congress in the form of the District of Columbia crime bill.

I mentioned a moment ago the decision of the Supreme Court of the United States in the case of *Ker* v. *the State of California*, reported in 374 U.S. 23, 10 L.ed 2d726, 83 S.Ct. 1623. I am going to discuss this case.

There were three opinions in the case, which involved the question of whether or not the action of officers in the State of California in entering a man's house without knocking constituted a violation of the fourth amendment.

We had one opinion written by Justice Clark, in which three other Justices concurred, making it the opinion of four Justices. Those four all agreed that the requirement that an officer of the law notify the occupants of the house of their purpose and presence, and call on them to admit them before entering the house, is normally an inseparable part of the fourth amendment.

There was another opinion, written by Justice Brennan, in which three other Justices joined, and those four Justices concurred in the ruling of the other four Justices that the obligation to knock at the door of the house and announce their presence and purpose to make an arrest or to execute a search warrant is an inseparable part of the fourth amendment, subject only to limited exceptions.

The reason the opinion written by Justice Clark became the law of the case was because Justice Harlan wrote a separate concurring opinion. Justice Harlan does not accept the theory that the due process clause of the 14th amendment made the fourth amendment applicable to the States. He contends that the action of State officers, when they enter the house of a citizen for the purpose of making an arrest or a search without first acquainting the citizen with their presence and purpose, is to be governed solely by the due process clause, and not by the fourth amendment.

So, by reason of this separate concurring opinion of Justice Harlan, who concurred in the result reached by the opinion of Justice Clark, Justice Clark's opinion became the judgment of the Court, although it was concurred in by only four Justices out of the nine.

Since I am going to discuss this opinion, I ask unanimous consent at this point that all of the opinions and rulings made by the Supreme Court of the United States, including the dissenting opinions and the concurring opinions, in the case of Ker against State of California, be printed in the RECORD at this point.

There being no objection, the decision was ordered to be printed in the RECORD, as follows:

[374 US 23, 10 L ed 2d 726, 83 S Ct 1623, No. 53]

GEORGE D. KER ET AL., PETITIONERS, *v.* STATE OF CALIFORNIA

Argued December 11, 1962—Decided June 10, 1963

SUMMARY

On the day following a California police officer's encounter with a known marijuana dealer, including the purchase from the dealer of a package of marijuana, other police officers observed an encounter between the dealer and the defendant husband, which occurred under identical surrounding circumstances except that the officers did not see any substance passing between the two men. The officers following the defendant lost contact with him when he made a U-turn in the middle of a block. Without securing a search warrant, the officers, among them one having information that the defendant husband was selling from his apartment marijuana possibly secured from the dealer, obtained from the building manager a passkey to defendants' apartment, and entered the apartment, where they found the defendant husband in the living room. The defendant wife

emerged from the kitchen, and one of the officers, after identifying himself, observed through the open doorway of the kitchen a package of marijuana on a scale atop the kitchen sink. The officers then arrested both defendants and searched the apartment, finding additional marijuana in the kitchen cupboard and atop the bedroom dresser.

The defendants were convicted in the Superior Court of Los Angeles County of possessing marijuana. Their convictions were affirmed by the California District Court of Appeal on the grounds that there was probable cause for the arrests, that the officers' entry into the apartment was for the purpose of arrest and was not unlawful, and that the search, being incident to the arrests, was likewise lawful and its fruits admissible in evidence against the defendants. (195 Cal App 2d 246, 15 Cal Rptr 767.)

On certiorari, the United States Supreme Court affirmed. The ultimate issue before the Court concerned the admissibility, in defendants' trial, of the marijuana seized in their apartment. Eight members of the Court agreed on the nature of the standards applicable to determine the reasonableness of a state search and seizure, but split 4 to 4 as to whether these standards were violated under the circumstances of the present case. The remaining member—Mr. Justice Harlan—concurred in the affirmance of the judgment below.

In an opinion by Clark, J., expressing the views of eight members of the Court, it was held that the question of reasonableness of a state search and seizure is governed by federal constitutional standards, as expressed in the Fourth Amendment and the decisions of the Court applying that amendment. On the other hand, Harlan, J., expressed the view that state searches and seizures should be judged by the more flexible concept of "fundamental" fairness, or rights "basic to a free society," embraced in the due process clause of the Fourteenth Amendment.

The question whether federal constitutional standards of reasonableness were violated by the search in the present case was answered in the negative in an opinion by Clark, J., joined by Black, Stewart, and White, JJ. These justices held that the search without warrant was valid as incident to a lawful arrest, made upon probable cause, and that the officers' method of entry was not unreasonable. On the other hand, Brennan, J., joined by Warren, Ch. J., and Douglas and Goldberg, JJ., expressed the view that federal constitutional standards were violated because the unannounced instrusion of the arresting officers into defendants' apartment violated the Fourth Amendment.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated.

Evidence § 681; Search and Seizure § 5—restrictions on states—admissibility of evidence illegally obtained

1. The Fourth Amendment is enforceable against the states by the same sanction of exclusion of evidence as is used against the federal government and through the application of the same constitutional standard prohibiting "unreasonable searches and seizures." [*See annotation references* 1, 2.]

Evidence § 859; Supreme Court of the United States § 9—rules of evidence in federal criminal trials

2. The principles governing the admissibility of evidence in federal criminal trials are not restricted to those derived solely from the Federal Constitution; in the exercise of its supervisory authority over the administration of criminal justice in the federal courts, the United States Supreme Court has formulated rules of evidence to be applied in federal criminal prosecutions, but the Court assumes no supervisory authority over state courts.

Courts § 683—federal and state—conflicts

3. The very essence of a healthy federalism depends upon the avoidance of needless conflicts between state and federal courts.

Search and seizure § 4—constitutional prohibitions

4. Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedoms; that safeguard is of the very essence of constitutional liberty the guaranty of which is as important and as imperative as the guaranties of the other fundamental rights of the individual citizens.

Search and Seizure § 6—persons protected

5. The Fourth Amendment forbids every search that is unreasonable, and protects those suspected or known to be offenders as well as the innocent.

Search and Seizure § 8—place of search

6. The Fourth Amendment's prohibition of unreasonable searches and seizures extends to the premises where the search was made.

Search and Seizure § 5—standards governing reasonableness

7. The principle that standards of reasonableness of searches and seizures are not susceptible of Procrustean application is carried forward when the Fourth Amendment's proscriptions are enforced against the states through the Fourteenth Amendment. [*See annotation reference* 2.]

Evidence § 681; Search and Seizure § 5; Supreme Court of the United States § 9—obtained through unlawful search and seizure—distinctions

8. Although the standard of reasonableness of searches and seizures is the same under the Fourth and Fourteenth Amendments, there is a distinction between evidence held inadmissible because of the United States Supreme Court's supervisory powers over federal courts and evidence held inadmissible because prohibited by the United States Constitution. [*See annotation references* 1, 2.]

Search and Seizure § 5—unreasonableness—determination by trial court

9. The reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the fundmental criteria laid down by the Fourth Amendment and in opinions of the United States Supreme Cout applying that amendment.

Appeal and Error § 806.5—state court findings—United States Supreme Court review

10. On review of a state court judgment of conviction of crime, the United States Supreme Court will respect the state court's findings of reasonableness of a search and seizure only insofar as the finding is consistent with federal constitutional guaranties.

Appeal and Error § 806.5— United States Supreme Court review of state court findings—federal constitutional rights

11. On review by the United States Supreme Court of state court judgments of conviction of crime, findings of state courts involving federal constitutional rights are by no means insulated against examination by the United States Supreme Court; while the Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the state court findings, such as a finding as to the reasonableness of a search and seizure, the constitutional criteria established by the Supreme Court have been respected.

Arrest § 1; evidence § 681; search and seizure § 4—power of state

12. The states have power to develop workable rules governing arrests, and searches and seizures, to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the Fourth Amendment's proscription of unreasonable searches and seizures, and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. [*See annotation reference* 1.]

Evidence § 681; Search and Seizure § 12—search as incident to lawful arrest

13. Evidence obtained by a search without search warrant is admissible only if the search was incident to a lawful arrest. [From separate opinion by Clark, Black, Stewart, and White, JJ.] [*See annotation reference* 3.]

Arrest § 2—without warrant—probable cause

14. The lawfulness of an arrest without warrant, which exists where the facts and circumstances within the arresting officers knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Arrest § 2—without warrant—for narcotics offense—reasonable grounds

15. Information within the knowledge of state narcotics officers at the time they arrested a suspect at his apartment furnishes grounds for a reasonable belief that the suspect had committed and was committing the offense of possession of marijuana where some of the officers observed an encounter between a known marijuana dealer and the suspect on the evening of the arrest and, although the officers did not see any substance pass between the two men, their encounter was a virtual re-enactment of the previous night's encounter between the dealer and another narcotics officer, including the sale by the dealer to that officer of a pound of marijuana, the virtual identity of the surrounding circumstances warranting a strong suspicion that the one remaining element, a sale of narcotics, was a part of the encounter preceding the arrest, as it was the previous night, and where, moreover, the office had information from a reliable informer as well as from other sources, not only that the suspect had been selling marijuana from his apartment but also that his likely source of supply was the dealer. [From separate opinion by Clark, Black, Stewart, and White, JJ.] [*See annotation reference* 4.]

Arrest § 2—without warrant—probable cause—hearsay information

16. That information in possession of a police officer is hearsay does not destroy its role in establishing probable cause supporting an arrest without warrant. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Arrest § 2—without warrant—for narcotics offense—probable cause

17. Probable cause for the arrest, without warrant, of the wife of a narcotics suspect, and a reasonable ground for the belief of state narcotics officers that the wife was in joint possession of marijuana with her husband, exist where, upon the officers' entry into the spouse's apartment and announcement of their identity, one of the officers, walking to the doorway of the kitchen, from which the wife had emerged, and without entering the kitchen, observed a package of marijuana in plain view on a scale atop the kitchen sink and moreover the officers had reliable information that the husband had

been using his apartment as a base of operations for his narcotics activities. [From separate opinion by Clark, Black, Stewart and White, JJ.] [*See annotation reference* 4]

Courts § 625—arrest without warrant—governing law

18. In cases under the Fourth Amendment the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution, a fortiori, the lawfulness of an arrest made by a state officer for a state offense is to be determined by state law. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Courts § 625; Search and Seizure § 12—search in connection with arrest—governing law

19. Where a person's federal constitutional protection from unreasonable searches and seizures by state police officers for a state offense is to be determined by whether the search was determined by whether the search was incident to a lawful arrest, the United States Supreme Court is warranted in examining that arrest to determine whether, notwithstanding its legality under state law, the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search. [From separate opinion by Clark, Black, Stewart, and White, JJ.] [*See annotation reference* 3.]

Arrest § 1—"breaking"

20. The common law recognizes that under certain circumstances breaking a person's house is permissible in executing an arrest. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Search and Seizure §29—execution of search warrant

21. Under California law the presence of exigent circumstances constitutes an exception to the notice requirement of a statute authorizing a police officer to break open any part of a house to execute a search warrant if, after notice of his authority and purpose, he is refused admittance. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Arrest § 2—without warrant—probable cause

22. In determining the lawfulness of entry and the existence of probable cause supporting an arrest without warrant, the court concerns itself only with what the arresting officers had reason to believe at the time of their entry. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Search and seizure § 3—legality of search—result

23. A search is not to be made legal by what it turns up; in law it is good or bad when it starts and does not change character from its success. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Arrest § 1; search and seizure § 12—searches incident to lawful arrest—officers' method of entry

24. Notwithstanding the failure of state narcotics officers to give notice of their authority and purpose to a narcotics suspect prior to his arrest and the search of his apartment, their method of entry, sanctioned by state law, by obtaining a passkey from the manager of the building is not unreasonable under the standards of the Fourth Amendment as applied to the states through the Fourteenth Amendment, where, in addition to the officers' belief that the suspect was in possession of narcotics, which could be quickly and easily destroyed, his furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police. [From separate opinion by Clark, Black, Stewart, and White, JJ. Contra: separate opinion by Brennan, J., Warren, Ch. J., and Douglas and Goldberg, JJ.] [*See annotation references* 2, 3.]

Search and seizure § 12—in connection with arrest

25. The doctrine that a search without warrant may be lawfully conducted if incident to a lawful arrest is consistent with the Fourth Amendment's protection against unreasonable searches and seizures. [From separate opinion by Clark, Black, Stewart, and White, JJ.] [*See annotation reference* 3.]

Search and seizure § 12—in connection with arrest—practicability of obtaining warrant

26. The practicability of obtaining a warrant is not the controlling factor when a search is sought to be justified as incident to arrest. [From separate opinion by Clark, Black, Stewart, and White, JJ.] [*See annotation reference* 3.]

Search and seizure § 12—In connection with arrest—Practicability of obtaining search warrant

27. A search without warrant, incident to a lawful arrest, is not unreasonable, and hence not violative of the Fourth Amendment in that the state narcotics officers involved could practicably have obtained a search warrant, where the officers' observations and their corroboration, which furnished probable cause for the suspect's arrest, occurred at about 9 p.m., approximately one hour before the time of arrest, and the officers had reason to act quickly because of the suspect's furtive conduct and the likelihood that the marijuana in his possession would be distributed or hidden before a warrant could be obtained at that time of night. [From separate opinion by Clark, Black, Stewart, and White, JJ.] [*See annotation reference* 3.]

Search and seizure § 12—In connection with arrest—Extent of premises searched

28. The search, as an incident to a narcotics suspect's lawful arrest, of the kitchen and bedroom of his apartment, is within the rule that such search may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. [From separate opinion by Clark, Black, Stewart, and White, JJ.] [*See annotation reference* 3.]

Search and seizure § 12—In connection with arrest

29. The rule that an arrest may not be used merely as the pretext for a search without warrant is not violated where the record shows that the arresting officers entered the suspect's apartment for the purpose of arresting him and that they had probable cause to make that arrest prior to the entry. [From separate opinion by Clark, Black, Stewart, and White, JJ.] [*See annotation reference* 3.]

Search and seizure § 2—What constitutes search

30. The discovery by a police officer entering a suspect's apartment of a brick of marijuana on a scale atop the kitchen sink does not constitute a search, since the officer merely saw what was placed before him in full view. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Search and seizure § 12—As an incident to arrest

31. California law does not require that an arrest precede an incidental search as long as probable cause exists at the outset. [From separate opinion by Clark, Black, Stewart, and White, JJ.] [*See annotation reference* 3.]

Appeal and error §§ 1084(2), 1088, 1123—questions not properly raised

32. On review of a state court judgment of conviction of crime, the United States Supreme Court will not reach the question of the reasonableness of the search of defendant's automobile on the day subsequent to his arrest where that question was not raised in the petition for certiorari, nor discussed in the brief filed in the United States Supreme Court, nor in the state trial court nor in the state appellate court, and the latter court did not adjudicate it. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Appeal and error § 1104; courts § 95.3—scope of review—questions not raised

33. Ordinarily the United States Supreme Court does not reach for constitutional questions not raised by the parties, nor extend its review beyond those specific federal questions properly raised in the state court. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Appeal and error § 431—from state court—federal question

34. There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. [From separate opinion by Clark, Black, Stewart, and White, JJ.]

Arrest § 1; search and seizure § 12—search as incident to arrest—prerequisites of validity

35. Even if probable cause exists for the arrest of a person within, the Fourth Amendment's prohibition of unreasonable searches and seizures is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door) are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted. [From separate opinion by Brennan, J., Warren, Ch. J., and Douglas and Goldberg, JJ.]

Search and seizure § 5—constitutional protection—lawful entry

36. A lawful entry is the indispensable predicate of a reasonable search within the meaning of the Fourth Amendment guaranteeing the right of the people to be secure against unreasonable searches and seizures. [From separate opinion by Brenan, J., Warren, Ch. J., and Douglas and Goldberg, JJ.]

Courts § 95.3—constitutional question

37. The United States Supreme Court will not decide constitutional questions when a nonconstitutional basis for decision is available. [From separate opinion by Brennan, J., Warren, Ch. J., and Douglas and Goldberg, JJ.]

ANNOTATION REFERENCES

1. As to the rules governing, prior to the Mapp Case, the admissibility of evidence obtained by illegal search, see 24 ALR 1408, 32 ALR 408, 41 ALR 1145, 52 ALR 477, 88 ALR 348, 134 ALR 819, 150 ALR 566, 50 ALR2d 531. See also 93 L ed 1797, 96 L ed 145, 98 L ed 581, 100 L ed 239, 6 L ed 2d 1544 (dealing with United States Supreme Court cases in point). For the law developed on the same subject in and after the Mapp Case, see 84 ALR2d 959.

2. Federal constitution as a limitation upon the powers of the states in respect of search and seizure. 19 ALR 644.

3. Right of search and seizure incident to lawful arrest without a search warrant, 32 ALR 680, 51 ALR 424, 74 ALR 1387, 82 ALR

782. See 4 L ed 2d 1982 (collecting Supreme Court cases in point).

4. What constitutes "probable cause" or "reasonable grounds" justifying arrest of narcotics suspect without warrant. 3 L ed 2d 1736.

APPEARANCES OF COUNSEL

Robert W. Stanley argued the cause for petitioners.

Gordon Ringer argued the cause for respondent.

Briefs of Counsel, p. 1312, infra.

OPINION OF THE COURT

[374 US 24] Mr. Justice Clark delivered the opinion of the Court with reference to the standard by which state searches and seizures must be evaluated (Part I), together with an opinion applying that standard, in which Mr. Justice Black, Mr. Justice Stewart and Mr. Justice White join (Parts II–V), and announced the judgment of the Court.

This case raises search and seizure questions under the rule of Mapp v Ohio, 367 US 643, 6 L ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933 (1961). Petitioners, husband and wife, were convicted of possession of marijuana in violation of § 11530 of the California Health and Safety Code. The California District Court of Appeal affirmed, 195 Cal App 2d 246, 15 Cal Rptr 767, despite the contention of petitioners that their arrests in their [374 US 25] apartment without warrants lacked probable cause[1] and the evidence seized incident thereto and introduced at their trial was therefore inadmissible. The California Supreme Court denied without opinion a petition for hearing. This being the first case arriving here since our opinion in Mapp which would afford suitable opportunity for further explication of that holding in the light of intervening experience, we granted certiorari. 368 US 974, 7 L ed 2d 437, 82 S Ct 480. We affirm the judgment before us.

The state courts' conviction and affirmance are based on these events, which culminated in the petitioners' arrests. Sergeant Cook of the Los Angeles County Sheriff's Office, in negotiating the purchase of marijuana from one Terrhagen, accompanied him to a bowling alley about 7 p.m. on July 26, 1960, where they were to meet Terrhagen's "connection." Terrhagen went inside and returned shortly, pointing to a 1946 DeSoto as his "connection's" automobile and explaining that they were to meet him "up by the oil fields" near Fairfax and Slauson Avenues in Los Angeles. As they neared that location, Terrhagen again pointed out the DeSoto traveling ahead of them, stating that the "connection" kept his supply of narcotics "somewhere up in the hills." They parked near some vacant fields in the vicinity of the intersection of Fairfax and Slauson, and, shortly thereafter, the DeSoto reappeared and pulled up beside them. The deputy then recognized the driver as one Roland Murphy, whose "mug" photograph he had seen and whom he knew from other narcotics officers to be a large-scale seller of marijuana currently out on bail in connection with narcotics charges.

[374 US 26] Terrhagen entered the DeSoto and drove off toward the oil fields with Murphy, while the Sergeant waited. They returned shortly. Terrhagen left Murphy's car carrying a package of marijuana and entered his own vehicle, and they drove to Terrhagen's residence. There Terrhagen cut one pound of marijuana and gave it to Sergeant Cook, who had previously paid him. The Sergeant later reported this occurrence to Los Angeles County Officers Berman and Warthen, the latter of whom had observed the occurrences as well.

On the following day, July 27, Murphy was placed under surveillance. Officer Warthen, who had observed the Terrhagen-Murphy episode the previous night, and Officer Markman were assigned this duty. At about 7 p.m. that evening they followed Murphy's DeSoto as he drove to the same bowling alley in which he had met Terrhagen on the previous evening. Murphy went inside, emerged in about 10 minutes and drove to a house where he made a brief visit. The officers continued to follow him but, upon losing sight of his vehicle, proceeded to the vicinity of Fairfax and Slauson Avenues where they parked. There, immediately across the street from the location at which Terrhagen and Sergeant Cook had met Murphy on the previous evening, the officers observed a parked automobile whose lone occupant he later determined to be the petitioner George Douglas Ker.

The officers then saw Murphy drive past them. They followed him but lost sight of him when he extinguished his lights and entered the oil fields. The officers returned to their vantage point and, shortly thereafter, observed Murphy return and park behind Ker. From their location approximately 1,000 feet from the two vehicles, they watched through field glasses. Murphy was seen leaving his DeSoto and walking up to the driver's side of Ker's car, where he "appeared to have conversation with him." It was shortly before 9 p.m. and the distance in the [374 US 27] twilight was too great for the officers to see anything pass between Murphy and Kerr or whether the former had anything in his hands as he approached.

While Murphy and Ker were talking, the officers had driven past them in order to see their faces closely and in order to take the license number from Ker's vehicle. Soon thereafter Ker drove away and the officers followed him but lost him when he made a U-turn in the middle of the block and drove in the opposite direction. Now, having lost contact with Ker, they checked the registration with the Department of Motor Vehicles and ascertained that the automobile was registered to Douglas Ker at 4801 Slauson. They then communicated this information to Officer Berman, within 15 to 30 minutes after observing the meeting between Ker and Murphy. Though officers Warthen and Markman had no previous knowledge of Ker, Berman had received information at various times beginning in November of 1959 that Ker was selling marijuana from his apartment and that "he was possibly securing this Marijuana from Ronnie Murphy who is the alias of Roland Murphy." In early 1960 Officer Berman had received a "mug" photograph of Ker from the Inglewood Police Department. He further testified that between May and July 27, 1960, he had received information as to Ker from one Robert Black, who had previously given information leading to at least three arrests and whose information was believed by Berman to be reliable. According to Officer Berman, Black had told him on four or five occasions after May 1960 that Ker and others, including himself, had purchased marijuana from Murphy.[2]

[374 US 28] Armed with the knowledge of the meeting between Ker and Murphy and with Berman's information as to Ker's dealings with Murphy, the three officers and a fourth, Officer Love, proceeded immediately to the address which they had obtained through Ker's license number. They found the automobile which they had been following—and which they had learned was Ker's—in the parking lot of the multiple-apartment building and also ascertained that there was someone in the Kers' apartment. They then went to the office of the building manager and obtained from him a passkey to the apartment. Officer Markman was stationed outside the window to intercept any evidence which might be ejected, and the other three officers entered the apartment. Officer Berman unlocked and opened the door, proceeding quietly, he testified, in order to prevent the destruction of evidence,[3] and found petitioner George Ker sitting in the living room. Just as he identified himself, stating that "We are Sheriff's Narcotics Officers, conducting a narcotics investigation," petitioner Diane Ker emerged from the kitchen. Berman testified that he repeated his identification to her and immediately walked to the kitchen.

Without entering, he observed through the open doorway a small scale atop the kitchen sink, upon which lay a "brick-like—brick-shaped package containing the green leafy substance" which he recognized as marijuana. He beckoned the petitioners into the kitchen where, following their denial of knowledge of the contents of the two and two-tenths pound package and [374 US 29] failure to answer a question as to its ownership, he placed them under arrest for suspicion of violating the State Narcotic Law. Officer Markman testified that he entered the apartment approximately "a minute, minute and a half" after the other officers, at which time Officer Berman was placing the petitioners under arrest. As to the sequence of events, petitioner George Ker testified that his arrest took place immediately upon the officers' entry and before they saw the brick of marijuana in the kitchen.

Subsequent to the arrest and the petitioners' denial of possession of any other narcotics, the officers, proceeding without search warrants, found a half-ounce package of marijuana in the kitchen cupboard and another atop the bedroom dresser. Petitioners were asked if they had any automobile other than the one observed by the officers, and George Ker replied in the negative, while Diane remained silent. On the next day, having learned that an automobile was registered in the name of Diane Ker, Officer Warthen searched this car without a warrant, finding marijuana and marijuana seeds in the glove compartment and under the rear seat. The marijuana found on the kitchen scale, that found in the kitchen cupboard and in the bedroom, and that found in Diane Ker's automobile[4] were all introduced into evidence against the petitioners.

The California District Court of Appeals in affirming the convictions found that there was probable cause for the arrests; that the entry into the apartment was for the purpose of arrest and was not unlawful; and that the search being incident to the arrests was likewise lawful and its fruits admissible in evidence against petitioners. These conclusions were essential to the affirmance, since the California Supreme Court in 1955 had held that evidence [374 US 30] obtained by means of unlawful searches and seizures was inadmissible in criminal trials. People v. Cahan, 44 Cal 2d 434, 282 P2d 905, 50 ALR2d 513. The court concluded that in view of its findings and the implied findings of the trial court, this Court's intervening decision in Mapp v. Ohio, 367 US 643, 6 L ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933, supra, did "not justify a change in our original conclusion." 195 Cal App 2d, at 257, 15 Cal Rptr, at 773.

I.

In Mapp v Ohio, 367 US at 646, 647, 657, we followed Boyd v United States, 116 US 616, 630, 29 L ed 746, 651, 6 S Ct 524 (1886) which held that the Fourth Amendment,[5] implemented by the self-incrimination clause of the Fifth,[6] forbids the Federal Government to convict a man of crime by using testimony or papers obtained from him by unreasonable searches and seizures as defined in the Fourth Amendment. We specifically held in Mapp that this constitutional prohibition is enforceable against the States through the Fourteenth Amendment.[7] This means, as we said in Mapp (Headnote 1), that the Fourth Amendment "is enforceable against them [the states] by the same sanction of exclusion as is used against the Federal Government," by the application of the same constitutional standard prohibiting "unreason-

Footnotes at end of article.

able [374 US 31] searches and seizures." 367 US, at 655. We now face the specific question as to whether Mapp requires the exclusion of evidence in this case which the California District Court of Appeal has held to be lawfully seized. It is perhaps ironic that the initial test under the Mapp holding comes from California, whose decision voluntarily to adopt the exclusionary rule in 1955 has been commended by us previously. See Mapp v Ohio, supra (367 US at 651, 652); Elkins v United States, 364 US 206, 220, 4 L ed 2d 1669, 1679, 80 S Ct 1437 (1960).

Preliminary to our examination of the search and seizures involved here, it might be helpful for us to indicate what was not decided in Mapp. First, it must be recognized (Headnote 2) that the "principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has . . . formulated rules of evidence to be applied in federal criminal prosecutions." McNabb v United States, 318 US 332, 341, 87 L ed 819, 824–63 S Ct 608 (1943); cf. Miller v United States, 357 US 301, 2 L ed 2d 1332, 78 S Ct 1190 (1958); Nardone v United States, 302 US 379, 82 L ed 314, 58 S Ct 275 (1937). Mapp, however, established no assumption by this Court of supervisory authority over state courts, cf. Cleary v Bolger, 371 US 392, 401, L ed 2d 390, 396, 83 S Ct 385 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. Mapp sounded no death knell for our federalism; rather, it echoed the sentiment of Elkins v. United States, supra (364 at 221), that (Headnote 3) "a healthy federalism depends upon the avoidance of needless conflict between state and federal courts" by itself urging that "[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect *the same fundamental criteria* in their approaches." 367 US, at 658, (Emphasis added.) Second, Mapp did not attempt the impossible task of laying (374 US 32) down a "fixed formula" for the application in specific cases of the constitutional prohibition against unreasonable searches and seizures; it recognized that we would be "met with 'recurring questions of the reasonableness of searches'" and that, "at any rate, '[r]easonableness is in the first instance for the [trial court] . . . to determine,'" id. 367 US at 653, thus indicating that the usual weight be given to findings of trial courts.

Mapp, of course, did not lend itself to a detailed explication of standards, since the search involved there was clearly unreasonable and bore no stamp of legality even from the Ohio Supreme Court. Id. 367 US at 643–645. This is true also of Elkins v United States, where all of the courts assumed the unreasonableness of the search in question and this Court "invoked" its "supervisory power over the administration of criminal justice in the federal courts," 364 U.S. at 216, in declaring that the evidence so seized by state officers was inadmissible in a federal prosecution. The prosecution being in a federal court, this Court of course announced that "[t]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." Id. 364 U.S. at 224. Significant in the Elkins holding is the statement, apposite here, that "it can fairly be said that in applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement." Id. 364 U.S. at 222.

Footnotes at end of article.

Implicit in the Fourth Amendment's protection from unreasonable searches and seizures (Headnote 4) is its recognition of individual freedom. That safeguard has been declared to be "as of the very essence of constitutional liberty" the guaranty of which "is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen. . . ." Gouled v United States, 255 U.S. 298, 304, 65 L ed 647, 650, 41 S Ct 261 (1921); cf. Powell v Alabama, 287 U.S.* 45, 65–68, 77 L ed 158, 168–170, 53 S Ct 55, 84 ALR 527 (1932). While the language of the Amendment (Headnotes 5 and 6) is "general," it "forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made. . . ." GoBart Importing Co. v United States, 282 U.S. 344, 357, 75 L ed 374, 382, 51 S Ct 153 (1931). Mr. Justice Butler there stated for the Court that "[t]he Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." Ibid. He also recognized that "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." Ibid; see United States v Rabinowitz, 339 U.S. 56, 63, 94 L ed 653, 658, 70 S Ct 430 (1950); Rios v United States, 364 U.S. 253, 255, 4 L ed 2d 1688, 1690, 80 S Ct 1431 (1960).

This Court's long-established recognition that standards of reasonableness under the Fourth Amendment (Headnote 7) are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness (Headnote 8) is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. We reiterate that the reasonableness of a search (Headnotes 9 and 10) is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving [374 US 34] federal constitutional rights, findings of state courts (Headnote 11) are by no means insulated against examination here. See, e.g., Spano v New York, 360 US 315, 316, 3 L ed 2d 1265, 1267, 79 S Ct. 1202 (1959; Thomas v Arizona, 356 US 390, 393, 2 L ed 2d 863, 866, 78 S Ct 885 (1958); Pierre v Louisiana, 306 US 354, 358, 83 L ed 751, 760, 59 S Ct 536 (1939). While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—i.e., constitutional—criteria established by this Court have been respected. The States are not thereby precluded (Headnote 12) from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See Jones v United States, 362 US 257, 4 L ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960). Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques.

*[374 U.S. 33].

Applying this federal constitutional standard we proceed to examine the entire record including the findings of California's courts to determine whether the evidence seized from petitioners were constitutionally admissible under the circumstances of this case.

SEPARATE OPINION

(EDITOR'S NOTE.—As stated on p. 732, supra, Parts II–V hereof represent the separate opinion of Clark, Black, Stewart, and White, JJ.)

II.

The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest (headnotes 13 and 14), since the officers had no search warrant. The lawfulness of the arrest without warrant, in turn, must be based upon [374 US 35] probable cause, which exists "where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v United States, 338 US 160, 175, 176, 93 L ed 1879, 1890, 69 S Ct 1302 (1949), quoting from Carroll v United States, 267 US 132, 162, 69 L ed 543, 555, 45 S Ct 280, 39 ALR (1925); accord, People v Fischer, 49 Cal 2d 442, 317 P2d 967 (1957); Bompensiero v Superior Court of San Diego County, 44 Cal 2d 178, 281 P2d 250 (1955). The information (headnote 15) within the knowledge of the officers at the time they arrived at the Kers' apartment, as California's courts specifically found, clearly furnished grounds for a reasonable belief that petitioner George Ker had committed and was committing the offense of possession of marijuana. Officers Markman and Warthen observed a rendezvous between Murphy and Ker on the evening of the arrest which was a virtual reenactment of the previous night's encounter between Murphy, Terrhagen and Sergeant Cook, which concluded in the sale by Murphy to Terrhagen and the Sergeant of a package of marijuana of which the latter had paid Terrhagen for one pound which he received from Terrhagen after the encounter with Murphy. To be sure, the distance and lack of light prevented the officers from seeing and they did not see any substance pass between the two men, but the virtual identity of the surrounding circumstances warranted a strong suspicion that the one remaining element—a sale of narcotics—was a part of this encounter as it was the previous night.

But Ker's arrest does not depend upon this single episode with Murphy. When Ker's U-turn thwarted the officer's pursuit, they learned his name and address from the Department of Motor Vehicles and reported the occurrence to Officer Berman. Berman, in turn, revealed information from an informer whose reliability had been tested previously, as [374 US 36] well as from other sources, not only that Ker had been selling marijuana from his apartment but also that his likely source of supply was Murphy himself. That this information was hearsay (Headnote 16) does not destroy its role in establishing probable cause. Brinegar v. United States, 338 US 160, 93 L. ed. 1879, 69 S. Ct. 1302, supra. In Draper v. United States, 358 U.S. 307, 3 L. ed. 2d 327, 79 S. Ct. 329 (1959), we held that information from a reliable informer, corroborated by the agents' observations as to the accuracy of the informer's description of

the accused and of his presence at a particular place, was sufficient to establish probable cause for an arrest without warrant.[8] The corroborative elements in Draper were innocuous in themselves, but here both the informer's tip and the personal observations connected Ker with specific illegal activities involving the same man, Murphy, a known marijuana dealer. To say that this coincidence of information was sufficient to support a reasonable belief of the officers that Ker was illegally in possession of marijuana is to indulge in understatement.

Probable cause for the arrest of petitioner Diane Ker (Headnote 17), while not present at the time the officers entered the apartment to arrest her husband, was nevertheless present at the time of her arrest. Upon their entry and announcement of their identity, the officers were met not only by George Ker but also by Diane Ker, who was emerging from the kitchen. Officer Berman immediately walked to the doorway from which she emerged and, without entering, observed the brick-shaped package of marijuana in plain view. Even assuming that her presence [374 US 37] in a small room with the contraband in a prominent position on the kitchen sink would not alone establish a reasonable ground for the officers' belief that she was in joint possession with her husband, that fact was accompanied by the officers' information that Ker had been using his apartment as a base of operations for his narcotics activities. Therefore, we cannot say that at the time of her arrest there were not sufficient grounds for a reasonable belief that Diane Ker, as well as her husband, was committing the offense of possession of marijuana in the presence of the officers.

III.

It is contended that the lawfulness of the petitioners' arrests, even if they were based upon probable cause, was vitiated by the method of entry. This Court, in cases under the Fourth Amendment (Headnote 18), has long recognized that the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution. Miller v United States, 357 US 301, 2 L ed 2d 1332, 78 S Ct 1190, supra; United States v Di Re, 332 US 581, 92 L ed 210, 68 S Ct 222 (1948); Johnson v United States, 333 US 10, 15, note 5, 92 L ed 436, 441, 68 S Ct 367 (1948). A fortiori, the lawfulness of these arrests by state officers for state offenses is to be determined by California law. California Penal Code, § 844,[9] permits peace officers to break into a dwelling place for the purpose of arrest after demanding admittance and explaining their purpose. Admittedly the officers did not comply with the terms of this statute since they entered quietly and without announcement, in order to prevent the destruction of contraband. The California District Court of Appeal [374 US 38], however, held that the circumstances here came within a judicial exception which had been engrafted upon the statute by a series of decisions, see, e.g., People v Ruiz, 146 Cal App 2d 630, 304 P2d 175 (1956); People v Maddox, 46 Cal 2d 301, 294 P2d 6, cer. den 352 US 858, 1 L ed 2d 65, 77 S Ct 81 (1956), and that the noncompliance was therefore lawful.

Since the petitioners' federal constitutional protection from unreasonable searches and seizures by police officers (Headnote 19) is here to be determined by whether the search was incident to a lawful arrest, we are warranted in examining that arrest to determine whether, notwithstanding its legality under state law, the method of entering the home may offend federal constitutional standards of reasonableness and therefore violate the legality of an accompanying search. We find no such offensiveness on the facts here. Assuming that the officers' entry by use of a key obtained from the manager is the legal equivalent of a "breaking," see Keiningham v United States, 109 App. DC 272, 276, 287 F2d 126, 130 (1960), it has been recognized from the early common law (Headnote 20) that such breaking is permissible in executing an arrest under certain circumstances.

See Wilgus, Arrest Without a Warrant, 22 Mich L Rev 541, 798, 800–806 (1924). Indeed, 18 USC § 3109,[10] dealing with the execution of search warrants by federal officers, authorizes breaking of doors in words very similar to those of the California statute, both statutes including a requirement of notice of authority and purpose. In Miller v United States, 357 US 301, 2 L ed 2d 1332, 78 S Ct 1190, supra, this Court held unlawful an arrest, and therefore its accompanying search, on the ground that the District of [374 US 39] Columbia officers before entering a dwelling did not fully satisfy the requirement of disclosing their identity and purpose. The Court stated that "the lawfulness of the arrest without warrant is to be determined by reference to state law. . . . By like reasoning the validity of the arrest of petitioner is to be determined by reference to the law of the District of Columbia." 357 US, at 305, 306. The parties there conceded and the Court accepted that the criteria for testing the arrest under District of Columbia law were "substantially identical" to the requirements of § 3109. Id. 357 US at 306. Here, however, the criteria under California law (Headnote 21) clearly include an exception to the notice requirement where exigent circumstances are present. Moreover, insofar as violation of a federal statute required the exclusion of evidence in Miller, the case is inapposite for state prosecutions, where admissibility is governed by constitutional standards. Finally, the basis of the judicial exception to the California statute, as expressed by Justice Traynor in People v Maddox, supra (46 Cal 2d at 306), effectively answers the petitioners' contention:

"It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844. Moreover, since the demand and explanation requirements [374 US 40] of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. (Read v. Case, 4 Conn. 166, 170 [10 Am. Dec. 110]; see Rest., Torts, § 206, com. d.) Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance."

No such exigent circumstances as would authorize noncompliance with the California statute were argued in Miller, and the Court expressly refrained from discussing the question, citing the *Maddox Case* without disapproval. 357 U.S., at 309.[11] Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police.[12] We therefore hold that in the particular [374 U.S. 41] circumstances of this case (Headnote 24) the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment.

IV.

Having held the petitioners' arrests lawful, it remains only to consider whether the search which produced the evidence leading to their convictions was lawful as incident to those arrests. The doctrine that a search without warrant may be lawfully conducted (Headnote 25) if incident to a lawful arrest has long been recognized as consistent with the Fourth Amendment's protection against unreasonable searches and seizures. See Marron v United States, 275 U.S. 192, 72 L ed 231, 48 S Ct. 74 (1927); Harris v United States, 331 U.S. 145, 91 L ed 1399, 67 S Ct 1098 (1947); Abel v United States, 362 U.S. 217, 4 L ed 2d 668, 80 S Ct 683 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Cal L Rev 474, 490–493 (1961). The cases have imposed no requirement that the arrest be under authority of an arrest warrant, but only that it be lawful. See Marron v United States, supra (275 U.S. at 198, 199); United States v Rabinowitz, supra (339 U.S. at 61); cf. Agnello v United States, 269 U.S. 20, 30, 31, 70 L ed 145, 148, 46 S Ct 4, 51 ALR 409 (1925). The question remains whether the officers' action here exceeded the recognized bounds of an incidental search.

Petitioners contend that the search was unreasonable in that the officers could practicably have obtained a search warrant. The practicability of obtaining a warrant (Headnote 26 and 27) is not the controlling factor when a search is sought to be justified as incident to arrest, United States v Rabinowitz, 339 US 56, 94 L ed 653, 70 S Ct 430, supra; (374 US 42) but we need not rest the validity of the search here on Rabinowitz, since we agree with the California court that time clearly was of the essence. The officers' observations and their corroboration, which furnished probable cause for George Ker's arrest, occurred at about 9 p.m., approximately one hour before the time of arrest. The officers had reason to act quickly because of Ker's furtive conduct and the likelihood that the marijuana would be distributed or hidden before a warrant could be obtained at that time of night.[13] Thus the facts bear no resemblance to those in Trupiano v United States, 334 US 699, 92 L ed 1663, 68 S Ct 1229 (1948), where federal agents for three weeks had been in possession of knowledge sufficient to secure a search warrant.

The search of the petitioners' apartment (Headnote 28) was well within the limits upheld in Harris v United States, 331 US 145, 91 L ed 1399, 67 S Ct 1098, supra, which also concerned a private apartment dwelling. The evidence here, unlike that in Harris, was the instrumentality of the very crime for which petitioners were arrested, and the record does not indicate that the search here was as extensive in time or in area as that upheld in Harris.

The petitioners' only remaining contention is that the discovery of the brick of marijuana cannot be justified as incidental to arrest since it preceded the arrest. This contention is of course contrary to George Ker's testimony, but we reject it in any event. While an arrest may not be used merely as the pretext for a search without warrant (Headnote 29), the California court specifically found and the record supports both that the officers entered the apartment for (374 US 43) the purpose of arresting George Ker and that they had probable cause to make that arrest prior to the entry.[14] We cannot say that it was unreasonable for Officer Berman, upon seeing Diane Ker

Footnotes at end of article.

emerge from the kitchen, merely to walk to the doorway of that adjacent room.

We thus agree with the California court's holding (Headnote 30) that the discovery of the brick of marijuana did not constitute a search, since the officer merely saw what was placed before him in full view. United States v Lee, 274 US 559, 71 L ed 1202, 47 S Ct 746 (1927); United States v Lefkowitz, 285 US 452, 465, 76 L ed 877, 882, 52 S Ct 420, 82 ALR 775 (1932); People v West, 144 Cal App 2d 214, 300 P2d 729 (1956). Therefore, while California law (Headnote 31) does not require that an arrest precede an incidental search as long as probable cause exists at the outset, Willson v Superior Court of San Diego County, 46 Cal 2d 291, 294 P2d 36 (1956), the California court did not rely on that rule and we need not reach the question of its status under the Federal Constitution.

V.

The petitioners state and the record bears out that the officers searched Diane Ker's automobile on the day subsequent to her arrest. The reasonableness of that search (Headnotes 32 and 33), however, was not raised in the petition for certiorari nor was it discussed in the brief here. Ordinarily "[w]e do not reach for constitutional questions not raised by the parties," Mazer v Stein, 347 US 201, 206, 98 L ed 630, 636, 74 S Ct 460 note 5 (1954), nor extend our review beyond those specific federal questions [374 US 44] properly raised in the state court. The record gives no indication that the issue was raised in the trial court or in the District Court of Appeal, the latter court did not adjudicate it and we therefore find no reason to reach it on the record.[15]

For these reasons the judgment of the California District Court of Appeal is

Affirmed.

ADDITIONAL SEPARATE OPINIONS

Mr. Justice Harlan, concurring in the result.

Heretofore there has been a well-established line of demarcation between the constitutional principles governing the standards for state searches and seizures and those controlling federal activity of this kind. Federal searches and seizures have been subject to the requirement of "reasonableness" contained in the Fourth Amendment, as that requirement has been elaborated over the years in federal litigation. State searches and seizures, on the other hand, have been judged, and in my view properly so, by the more flexible concept of "fundamental" fairness, or rights "basic to a free society," embraced in the Due Process Clause of the Fourteenth Amendment. [374 US 45] See Wolf v Colorado, 338 US 25, 27, 93 L ed 1782, 1785, 69 S Ct 1359; [16] cf. Rochin v California, 342 US 165, 96 L ed 183, 72 S Ct 205, 25 ALR2d 1396; Palko v Connecticut, 302 US 319, 82 L ed 288, 58 S Ct 149. Today this distinction in constitutional principle is abandoned. Henceforth state searches and seizures are to be judged by the same constitutional standards as apply in the federal system.

In my opinion this further extension of federal power over state criminal cases, cf. Fay v Noia, 372 US 391, 9 L ed 2d 837, 83 S Ct 822; Douglas v California, 372 US 353, 9 L ed 2d 811, 83 S Ct 814; Draper v Washington, 372 US 487, 9 L ed 2d 899, 83 S Ct 774—all decided only a few weeks ago, is quite uncalled for and unwise. It is uncalled for because the States generally, and more particularly California, are increasingly evidencing concern about improving their own criminal procedures, as this Court itself has recently observed on more than one occasion (see Gideon v Wainwright, 372 US 335, 345, 9 L ed 2d 799, 806, 83 S Ct 792; ante, p. 736, and because the Fourteenth Amendment's requirements of fundamental fairness stand as a bulwark against serious local shortcomings in this field. The rule is unwise because the States, with their differing law enforcement problems, should not be put in a constitutional straitjacket and also because the States, more likely than not, will be placed in an atmosphere of uncertainty since this Court's decisions in the realm of search and seizure are hardly notable for their predictability. Cf Harris v United States, 331 US 145, 175–181, 91 L ed 2d 1399, 1419–1422, 67 S Ct 1098 (Appendix to dissenting opinion of Mr. Justice Frankfurter). (The latter point is indeed forcefully illustrated by the fact that in the first application of its new constitutional rule the majority finds itself equally divided.) And if the Court is prepared to relax Fourth Amendment standards in order to avoid unduly fettering the States, this would be in [374 US 46] derogation of law enforcement standards in the federal system—unless the Fourth Amendment is to mean one thing for the States and something else for the Federal Government.

I can see no good coming from this constitutional adventure. In judging state searches and seizures I would continue to adhere to establish Fourteenth Amendment concepts of fundamental fairness. So judging this case, I concur in the result.

Mr. Justice Brennan, with whom The Chief Justice, Mr. Justice Douglas and Mr. Justice Goldberg join.

I join Part I of Mr. Justice Clark's opinion and the holding therein that "as we said in Mapp . . . the Fourth Amendment 'is enforceable against . . . [the States] by the same sanction of exclusion as is used against the Federal Government,' by the application of the same constitutional standard prohibiting 'unreasonable searches and seizures.'" Only our Brother Harlan dissents from that holding; he would judge state searches and seizures "by the more flexible concept of 'fundamental' fairness, of rights 'basic to a free society,' embraced in the Due Process Clause of the Fourteenth Amendment."

However, Mr. Justice Clark, Mr. Justice Black, Mr. Justice Stewart and Mr. Justice White do not believe that the federal requirement of reasonableness contained in the Fourth Amendment was violated in this case. The Chief Justice, Mr. Justice Douglas, Mr. Justice Goldberg and I have the contrary view. For even on the premise that there was probable cause by federal standards for the arrest of George Ker, the arrests of these petitioners were nevertheless illegal, because the unannounced intrusion of the arresting officers into their apartment violated the Fourth Amendment. Since the [374 US 47] arrests were illegal, Mapp v Ohio, 367 US 643, 6 L ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933, requires the exclusion of the evidence which was the product of the search incident to those arrests.

Even if probable cause exists for the arrest of a person within, the Fourth Amendment (Headnote 35) is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons within already known of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

I

It was firmly established long before the adoption of the Bill of Rights that the fundamental liberty of the individual includes protection against unannounced police entries. "[T]he Fourth Amendment did but embody a principle of English liberty, a principle old, yet newly won, that finds another expression in the maxim 'every man's home is his castle.'" Fraenkel, Concerning Searches and Seizures, 34 Harv L Rev 361, 365 (1921); Frank v Maryland, 359 US 360, 376–382, 3 L ed 2d 877, 887–891, 79 S Ct 804 (dissenting opinion). As early as Semayne's Case, 5 Co Rep 91a, 91b, 77 Eng Rep 194, 195 (1603), it was declared that "[i]n all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors* . . . ." (Emphasis supplied.) Over a century later the leading commentators upon the English criminal law affirmed the continuing vitality of [374 US 48] that principle. 1 Hale, Pleas of the Crown (1736), 583; see also 2 Hawkins, Pleas of the Crown (6th ed 1787), c. 14, § 1; Foster Crown Law (1762), 320–321.[17] Perhaps its most emphatic confirmation was supplied only 35 years before the ratification of the Bill of Rights. In Curtis' Case, Fost, 135, 168 Eng Rep 67, decided in 1756, the defendant, on trial for the murder of a Crown officer who was attempting an entry to serve an arrest warrant, pleaded that because the officer had failed adequately to announce himself and his mission before breaking the doors, forceful resistance to his entry was justified and the killing was therefore justifiable homicide. In recognizing the defense the court repeated the principle that "peace-officers, having a legal warrant to arrest for a breach of the peace, may break open doors, *after having demanded admittance and given due notice of their warrant*"; the court continued that "no precise form of words is required in a case of this kind" because "[i]t is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority. . . ." Fost., at 136–137, 168 Eng Rep, at 68. (Emphasis supplied.) The principle was again confirmed not long after the Fourth Amendment became part of our Constitution. Abbott, C. J., said in Launock v Brown, 2 B & Ald 592, 593–594, 106 Eng Rep 482, 483 (1819):

". . . I am clearly of opinion that, in the case of a misdemeanour, such previous demand is requisite. . . . It is reasonable that the law should be so; for if no [374 US 49] previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost." [18]

The protections of individual freedom carried into the Fourth Amendment, Boyd v United States, 116 US 616, 630, 29 L ed 746, 751, 6 S Ct 524, undoubtedly included this firmly established requirement of an announcement by police officers of purpose and authority before breaking into an individual's home. The requirement is no mere procedural nicety or formality attendant upon the service of a warrant. Decisions in both the federal and state courts have recognized, as did the English courts, that the requirement is of the essence of the substantive protections which safeguard individual liberty.[19] The Court of Appeals for the District of Columbia Circuit has said: ". . . there is no division of opinion among the learned authors . . . that even where an officer may [374 US 50] have power to break open a door without a warrant, he cannot lawfully do so unless he first notifies the occupants as to the purpose of his demand for entry." Accarino v United States, 85 App DC 394, 400, 179 F2d 456, 462.

Similarly, the Supreme Judicial Court of Massachusetts declared in 1852:

"The maxim of law that every man's house is his castle . . . has not the effect to restrain an officer of the law from breaking and entering a dwelling-house for the purpose of serving a criminal process upon the occupant. In such case the house of the party is no sanctuary for him, and the same may be forcibly

Footnotes at end of article.

entered by such officer after a proper notification of the purpose of the entry, and a demand upon the inmates to open the house, and a refusal by them to do so." Barnard v Bartlett, 64 Mass (10 Cush) 501, 502, 503; cf. State v Smith, 1 NH 346.

Courts of the frontier States also enforced the requirement. For example, Tennessee's high court recognized that a police officer might break into a home to serve an arrest warrant only "after demand for admittance and notice of his purpose," McCaslin v McCord, 116 Tenn 690, 708, 94 SW 79, 83; cf. Hawkins v Commonwealth, 53 Ky (14 B Mon) 395. Indeed, a majority of the States have enacted the requirement in statutes substantially similar to California Penal Code § 844 and the federal statute, 18 USC § 3109.[20]

[374 US 51] Moreover, in addition to carrying forward the protections already afforded by English law, the Framers also meant by the Fourth Amendment to eliminate once and for all the odious practice of searches under general warrants and writs of assistance against which English law had generally left them helpless. The colonial experience under the writs was unmistakably "fresh in the memories of those who achieved our independence and established our form of government."[21] Boyd v United States, supra (116 US at 625). The problem of entry under a general warrant was not, of course, exactly that of unannounced intrusion to arrest with a warrant or upon probable cause, but the two practices clearly invited common abuses. One of the grounds of James Otis' eloquent indictment of the writs bears repetition here:

"Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well [374 US 52] guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate his privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way: and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient." Tudor, Life of James Otis (1823), 66–67.

Similar, if not the same, dangers to individual liberty are involved in unannounced intrusions of the police into the homes of citizens. Indeed in two respects such intrusions are even more offensive to the sanctity and privacy of the home. In the first place service of the general warrants and writs of assistance was usually preceded at least by some form of notice or demand for admission. In the second place the writs of assistance by their very terms might be served only during daylight hours.[22] By significant contrast, the unannounced entry of the Ker apartment occurred after dark, and such timing appears to be common police practice, at least in California.[23]

[374 US 53] It is much too late in the day to deny that a lawful entry is as essential to vindication of the protections of the Fourth Amendment as, for example, probable cause to arrest or a search warrant for a search not incidental to an arrest. This Court settled (Headnote 36) in Gouled v United States, 255 US 298, 305, 306, 65 L ed 647, 651, 41 S Ct 261, that a lawful entry is the indispensable predicate of a reasonable search. We held there that a search would violate the Fourth Amendment if the entry were illegal whether accomplished "by force or by an illegal threat or show of force" or "obtained by stealth instead of by force or coercion." Similarly, rigid restrictions upon unannounced entries are essential if the Fourth Amendment's prohibition against invasion of the security and privacy of the home is to have any meaning.

Footnotes at end of article.

It is true, of course, that the only decision of this Court which forbids federal officers to arrest and search after an unannounced entry, Miller v United States, 357 US 301, 2 L ed 2d 1332, 78 S Ct 1190, did not rest upon constitutional doctrine but rather upon an exercise of this Court's supervisory powers. But that disposition in no way implied that the same result was not compelled by the Fourth Amendment.

Miller is simply an instance of the usual practice of the Court (Headnote 37) not to decide constitutional questions when a nonconstitutional basis for decision is available. See International Asso. of Machinists v Street, 367 US 740, 749, 750, 6 L ed 2d 1141, 1149, 1150, 81 S Ct 1784. The result there drew upon analogy to a federal statute, similar in its terms to § 844, with which the federal officers concededly had not complied in entering to make an arrest. Nothing we said in Miller so much as intimated that, without such a basis for decision, the Fourth Amendment would not have required the same result. The implication, indeed, is quite to the contrary. For the history adduced in Miller in support of the nonconstitutional ground persuasively demonstrates that the Fourth Amendment's protections include the security of the householder against unannounced invasions by the police.

II

[374 US 54] The command of the Fourth Amendment reflects the lesson of history that "the breaking an outer door is, in general, so violent, obnoxious and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite." 1 Burn, Justice of the Peace (28th ed 1837), 275–276.

I have found no English decision which clearly recognizes any exception to the requirement that the police first give notice of their authority and purpose before forcibly entering a home. Exceptions were early sanctioned in American cases, e.g., Read v Case, 4 Conn 166, but these were rigidly and narrowly confined to situations not within the reason and spirit of the general requirement. Specifically, exceptional circumstances have been thought to exist only when, as one element, the facts surrounding the particular entry support a finding that those within actually knew or must have known of the officer's presence and purpose to seek admission. Cf. Miller v United States, supra (357 US at 311–313). For example, the earliest exception seems to have been that "[i]n the case of an *escape* after arrest, the officer, on fresh pursuit of the offender to a house in which he takes refuge, may break the doors to recapture him, in the case of felony, without a warrant, and without notice or demand for admission to the house of the offender."[24] Wilgus, Arrest Without [374 US 55] a Warrant, 22 Mich L Rev 541, 798, 804 (1924). The rationale of such an exception is clear, and serves to underscore the consistency and the purpose of the general requirement of notice: Where such circumstances as an escape and hot pursuit by the arresting officer leave no doubt that the fleeing felon is aware of the officer's presence and purpose, pausing at the threshold to make the ordinarily requisite announcement and demand would be a superfluous act which the law does not require.[25] But no exceptions have heretofore permitted unannounced entries in the absence of such awareness on the part of the occupants—unless possibly where the officers are justified in the belief that someone within is in immediate danger of bodily harm.

Two reasons rooted in the Constitution clearly compel the courts to refuse to recognize exceptions in other situations [374 US 56] when there is no showing that those within were or had been made aware of the officers' presence. The first is that any exception not requiring a showing of such awareness necessarily implies a rejection of the inviolable presumption of innocence. The excuse for failing to knock or announce the officer's mission where the occupants are oblivious to his presence can only be an almost automatic assumption that the suspect within will resist the officer's attempt to enter peacefully, or will frustrate the arrest by an attempt to escape, or will attempt to destroy whatever possibly incriminating evidence he may have. Such assumptions do obvious violence to the presumption of innocence. Indeed, the violence is compounded by another assumption, also necessarily involved, that a suspect to whom the officer first makes known his presence will further violate the law. It need hardly be said that not every suspect is in fact guilty of the offense of which he is suspected, and that not everyone who is in fact guilty will forcibly resist arrest or attempt to escape or destroy evidence.[26]

[374 US 57] The second reason is that in the absence of a showing of awareness by the occupants of the officers' presence and purpose, "loud noises" or "running" within would amount, ordinarily, at least, only to ambiguous conduct. Our decisions in related contexts have held that ambiguous conduct cannot form the basis for a belief of the officers that an escape or the destruction of evidence is being attempted. Wong Sun v United States, 371 US 471, 483, 484, 9 L ed 2d 441, 452, 453, 83 S Ct 407; Miller v United States, supra (357 US at 311).

Beyond these constitutional considerations, practical hazards of law enforcement militate strongly against any relaxation of the requirement of awareness. First, cases of mistaken identity are surely not novel in the investigation of crime. The possibility is very real that the police may be misinformed as to the name or address of a suspect, or as to other material information. That possibility is itself a good reason for holding a tight rein against judicial approval of unannounced police entries into private homes. Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion.[27]

Second, the requirement [374 US 58] of awareness also serves to minimize the hazards of the officers' dangerous calling. We expressly recognized in Miller v United States, supra (357 US at 313, note 12), that compliance with the federal notice statute "is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder."[28] Indeed, one of the principal objectives of the English requirement of announcement of authority and purpose was to protect the arresting officers from being shot as trespassers, ". . . for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost." Launock v Brown, 2 B & Ald 592, 594, 106 Eng Rep 482, 483 (1819).

These compelling considerations underlie the constitutional barrier against recognition of exceptions not predicated on knowledge or awareness of the officers' presence. State and federal officers have the common obligation to respect this basic constitutional limitation upon their police activities. I reject the contention that the courts, in enforcing such respect on the part of all officers, state or federal, create serious obstacles to effective law enforcement. Federal officers have operated for five years under [374 US 59] the Miller rule with no discernible impairment of their ability to make effective arrests and obtain important narcotics convictions.

Even if it were true that state and city police are generally less experienced or less resourceful than their federal counterparts (and the experience of the very police force

involved in this case, under California's general exclusionary rule adopted judicially in 1955, goes very far toward refuting any such suggestion,[29] see Elkins v United States, 364 US 206, 220, 221, 4 L ed 2d 1669, 1679, 80 S Ct 1437), the Fourth Amendment's protections against unlawful search and seizure do not contract or expand depending upon the relative experience and resourcefulness of different groups of law-enforcement officers. When we declared in Mapp that, because the rights of the Fourth Amendment were of no lesser dignity than those of the other liberties of the Bill of Rights absorbed in the Fourteenth, ". . . . we can no longer permit . . . [them] to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend [their] . . . enjoyment," 367 US, at 660—I thought by these words we had laid to rest the very problems of constitutional dissonance which I fear the present case so soon revives.[30]

III

[374 US 60] I turn now to my reasons for believing that the arrests of these petitioners were illegal. My Brother Clark apparently recognizes that the element of the Kers' prior awareness of the officers' presence was essential, or at least highly relevant, to the validity of the officers' unannounced entry into the Ker apartment, for he says, "Ker's furtive conduct including them shortly before the arrest was ground for the belief that he *might well have been* expecting the police." (Emphasis supplied.) But the test under the "fresh pursuit" exception which my Brother Clark apparently seeks to invoke depends not, of course, upon mere conjecture whether those within "might well have been" expecting the police, but upon whether there is evidence which shows that the occupants were in fact aware that the police were about to visit them. That the Kers were wholly oblivious to the officers' presence is the only possible inference on the uncontradicted facts; the "fresh pursuit" exception is therefore clearly unavailable.

When the officers let themselves in with the passkey, "proceeding quietly," as my Brother Clark says, George Ker was sitting in his living room reading a newspaper, and his wife was busy in the kitchen. The marijuana, moreover, was in full view on the top of the kitchen sink. More convincing evidence of the complete unawareness of an imminent police visit can hardly be imagined. Indeed, even the conjecture that the Kers "might well have been expecting the police" has no support in the record. That conjecture is made to rest entirely upon the unexplained U-turn made by Ker's car when the officers lost him after the rendezvous at the oil fields. But surely the U-turn must be disregarded as wholly ambiguous conduct; there is absolutely no proof that the driver of the Ker car knew that the officers were [374 U.S. 61]* following it. Cf. Miller v United States, supra (357 U.S. at 311); Wong Sun v United States, supra (371 U.S. at 483, 484).

My Brother Clark invokes chiefly, however, the exception allowing an unannounced entry when officers have reason to believe that someone within is attempting to destroy evidence. But the minimal conditions for the application of that exception are not present in this case. On the uncontradicted record, not only were the Kers completely unaware of the officers' presence, but, again on the uncontradicted record, there was absolutely no activity within the apartment to justify the officers in the belief that anyone within was attempting to destroy evidence. Plainly enough, the Kers left the marijuana in full view on top of the sink because they were wholly oblivious that the police were on their trail. My Brother Clark recognizes that there is no evidence whatever of activity in the apartment, and is thus forced to find the requisite support for this element of the exception in the officers' testimony that, in their experience in the investigation of narcotics violations, *other* narcotics suspects had responded to police announcements by attempting to destroy evidence. Clearly such a basis for the exception fails to meet the requirements of the Fourth Amendment; if police experience in pursuing other narcotics suspects justified an unannounced police intrusion into a home the Fourth Amendment would afford no protection at all.

The recognition of exceptions to great principles always creates, of course, the hazard that the exceptions will devour the rule. If mere police experience that some offenders have attempted to destroy contraband justifies unannounced entry in *any* case, and cures the total absence of evidence not only of awareness of the officers' presence but even of such an attempt in the *particular* case, I perceive no logical basis for distinguishing unannounced police entries into homes *[374 U.S. 62] to make *arrests for *any* crime involving evidence of a kind which police experience indicates might be quickly destroyed or jettisoned. Moreover, if such experience, without more, completely excuses the failure of arresting officers before entry, at any hour of the day or night, either to announce their purpose at the threshold or to ascertain that the occupant already knows of their presence, then there is likewise no logical ground for distinguishing between the stealthy manner in which the entry in this case was effected, and the more violent manner usually associated with totalitarian police of breaking down the door or smashing the lock.[31]

My Brother Clark correctly states that only when state law "is not violative of the Federal Constitution" may we defer to state law in gauging the validity of an arrest under the Fourth Amendment. Since the California [374 U.S. 63] law of arrest here called in question patently violates the Fourth Amendment, that law cannot constitutionally provide the basis for affirming those convictions. This is not a case of conflicting testimony pro and con the existence of the elements requisite for finding a basis for the application of the exception. I agree that we should ordinarily be constrained to accept the state fact-finder's resolution of such factual conflicts.

Here, however, the facts are uncontradicted: the Kers were completely oblivious of the presence of the officers and were engaged in no activity of any kind indicating that they were attempting to destroy narcotics. Our duty then is only to decide whether the officers' testimony—that in their general experience narcotics suspects destroy evidence when forewarned of the officers' presence—satisfies the constitutional test for application of the exception. Manifestly we should hold that such testimony does not satisfy the constitutional test. The subjective judgment of the police officers cannot constitutionally be a substitute for what has always been considered a necessarily objective inquiry,[32] namely, whether circumstances exist in the *particular* case which allow an unannounced police entry.[33]

[374 US 64] We have no occasion here to decide how many of the situations in which, by the exercise of our supervisory power over the conduct of federal officers, we would exclude evidence, are also situations which would require the exclusion of evidence from state criminal proceedings under the constitutional principles extended to the States by Mapp. But where the conduct effecting an arrest so clearly transgresses those rights guaranteed by the Fourth Amendment as does the conduct which brought about the arrest of these petitioners, we would surely reverse the judgment if this were a federal prosecution involving federal officers. Since our decision in Mapp has made the guarantees of the Fourteenth Amendment coextensive with those of the Fourth we should pronounce precisely the same judgment upon the conduct of these state officers.

FOOTNOTES

[1] This contention was initially raised prior to the trial. Section 995, California Penal Code, provides for a motion to set aside the information on the ground that the defendant has been committed without probable cause. Evidence on that issue was presented out of the presence of the jury, and, following the court's denial of the motion, the petitioners were tried and convicted by the jury.

[2] During the hearing on the § 995 motion, see note 1, supra, Black testified for the defense, admitting that he knew the petitioners but denying that he gave Officer Berman information about George Ker. Black first denied but then admitted that he had met with Officer Berman and another officer in whose presence Berman said the information about Ker was given.

[3] Arresting Officers Berman and Warthen had been attached to the narcotics detail of the Los Angeles County Sheriff's office for three and four years, respectively. Each had participated in hundreds of arrests involving marijuana. Warthen testified that on "many, many occasions" in his experience with narcotics arrests "persons have flushed narcotics down toilets, pushed them down drains and sinks and many other methods of getting rid of them prior to my entrance . . . ."

[4] For the reasons discussed in § V of this opinion, we find that the validity of the search of the automobile is not before us and we therefore do not pass on it.

[5] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[6] "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[7] Our holding as to enforceability of this federal constitutional rule against the States had its source in the following declaration in Wolf v Colorado, 338 US 25, 27, 28, 93 L ed 1782, 1785, 69 S Ct 1359 (1949):

"The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

[8] In Draper the arrest upon probable cause was authorized under 26 USC § 7607, authorizing narcotics agents to make an arrest without warrant if they have "reasonable grounds to believe that the person to be arrested has committed or is committing such violation." Under § 836, California Penal Code, an officer may arrest without a warrant if he has "reasonable cause to believe that the person to be arrested has committed a felony . . ."

[9] "To make an arrest, . . . in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which . . . [he has] reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

[10] "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

[11] Nor has the Court rejected the proposition that noncompliance may be reasonable in exigent circumstances subsequent to Miller. In Wong Sun v United States, 371 U.S. 471, 9 L ed 2d 441, 83 S Ct 407 (1963), the

Court held that federal officers had not complied with § 3109 in executing an arrest. There the Court noted that in Miller it had reserved the question of an exception in exigent circumstances and stated that "[h]ere, as in Miller, the Government claims no extraordinary circumstances—such as the imminent destruction of vital evidence, or the need to rescue a victim in peril—. . . which excused the officer's failure truthfully to state his mission before he broke in." Id. 371 U.S. at 483, 484.

[12] A search of the record with the aid of hindsight (Headnotes 22 and 23) may lend some support to the conclusion that, contra the reasonable belief of the officers, petitioners may not have been prepared for an imminent visit from the police. It goes without saying that in determining the lawfulness of entry and the existence of probable cause we may concern ourselves only with what the officers had reason to believe *at the time of their entry*. Johnson v United States, 333 U.S. 10, 17, 92 L ed 436, 442, 68 S Ct 367 (1948). As the Court said in United States v Di Re, 332 U.S. 581, 595, 92 L ed 210, 220, 68 S Ct 222 (1948), "a search is not to be made legal by what it turns up. In law it is good *or bad* when it starts and does not change character from" what is dug up subsequently. (Emphasis added.)

[13] In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances, such as the threat of destruction of evidence, supported the Court's holdings that searches without warrants were unconstitutional. See Chapman v United States, 365 U.S. 610, 615, 5 L ed 2d 828, 832, S Ct 776 (1961); United States v Jeffers, 342 U.S. 48, 52, 96 L ed 59, 64, 72 S Ct 93 (1951); Taylor v United States, 286 U.S. 1, 5, 76 L ed 951, 953, 52 S Ct 466 (1932).

[14] Compare Johnson v United States, note 12, supra (333 U.S. at 40). There the Court held that a search could not be justified as incident to arrest since the officers, prior to their entry into a hotel room, had no probable cause for the arrest of the occupant. The Court stated that "[a]n officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion." Here, of course, probable cause for the arrest of petitioner George Ker provided that valid basis.

[15] The record shows that petitioners made no objection to the admission of any of the evidence, thus failing to observe a state procedural requirement, People v Brittain, 149 Cal App 2d 201, 308 P2d 38 (1957); see Mapp v Ohio, supra (367 U.S. at 659, note 9). However, the District Court of Appeal passed on the issue of the narcotics seized in the apartment, presumably on the ground that petitioners preserved that question by their motion under § 995, California Penal Code, which was directed toward the principal objection to that search—the alleged lack of probable cause. While "[t]here can be no question as to the proper presentation of a federal claim (Headnote 34) when the highest state court passes on it," Raley v Ohio, 360 U.S. 423, 436, 3 L ed 2d 1344, 1354, 79 S Ct 1257 (1959), there is no indication in the court's opinion that it passed on the issue of the search of the automobile, nor is there any indication in the petitioners' briefs in that court that the issue was presented.

[16] Mapp 1. Ohio, 367 US. 643, 6 L ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933, did not purport to change the standards by which state searches and seizures were to be judged; rather it held only that the "exclusionary" rule of Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, was applicable to the States.

[17] Hale's view was representative: "A man, that arrests upon suspicion of felony, may break open doors, if the party refuse upon demand to open them . . . ." 1 Hale, Pleas of the Crown (1736), 583. See generally Miller v United States, 357 US 301, 306–310—2 L ed 2d 1332, 1336–1338, 78 S Ct 1190; Accarino v United States, 85 App DC 394, 398–402, 170 F2d 456, 460–464; Thomas, The Execution of Warrants of Arrest, ([1962] Crim L Rev 520, 597, 601–604.

[18] Compare also the statement of Bayley, J., in Burdett v Abbot, 14 East 1, 162–163, 104 Eng Rep 501, 563 (1811);

"Now in every breach of the peace the public are considered as interested, and the execution of process against the offender is the assertion of a public right; and in all such cases, I apprehend that the officer has a right to break open the outer door, provided there is a request of admission first made for the purpose, and a denial of the parties who are within."

See also Ratcliffe v Burton, 3 Bos & Pul 223, 127 Eng Rep 123 (1802); Kerbey v Denby, 1 M & W 336, 150 Eng Rep 463 (1836); cf. Park v Evans, Hob 62, 80 Eng Rep 211; Penton v Brown, 1 Keble 698, 83 Eng Rep 1193; Percival v Stamp, 9 Ex 167, 156 Eng Rep 71 (1853).

[19] See generally Gatewood v United States, 93 App DC 226, 229, 209 F2d 789, 791; 1 Bishop, New Criminal Procedure (2d ed 1913), § 201; 1 Varon, Searches, Seizures and Immunities (1961), 399–401; Day and Berkman, Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v Ohio, 13 West Res L Rev 56, 79–80 (1961).

[20] Ala Code, Tit 15 § 155; Ariz Rev Stat Ann § 13–1411; Deering's Cal Penal Code § 844; Fla Stat Ann § 901.19(1); Idaho Code § 19–611; Burns' Ind Ann Stat § 9–1009; Iowa Code Ann § 755.9; Kan Gen Stat § 62–1819; Ky Rev Stat § 70.078; Dart's La Crim Code, Art 72; Mich Stat Ann § 28.880; Minn Stat Ann § 629.34; Miss Code § 2471; Mo Rev Stat § 544.200; Mont Rev Code § 94–6011; Neb Rev Stat § 29–411; Nev Rev Stat § 171.275; McKinney's NY Crim Code § 178; NC Gen Stat § 15–44; Page's Ohio Rev Code Ann § 2935.15; Okla Stat Ann, Tit 22, § 194; Ore Rev Stat § 133.320; SC Code § 53–198; SD Code § 34.1606; Tenn Code Ann § 40–807; Utah Code Ann 77–13–12; Wash Rev Code § 10.31.040; Wyo Comp Stat § 10–309.

Compare Code of Crim Proc, American Law Institute, Official Draft (1930), § 28:

"Right of Officer to break into building. An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in section 21, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if he is refused admittance after he has announced his authority and purpose."

[21] See also Henry v United States, 361 US 98, 100, 101, 4 L ed 2d 134, 137, 138, 80 S Ct 168; Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937), c. II; Barrett, Personal Rights, Property Rights, and the Fourth Amendment, 1960 Supreme Court Review 46, 70–71; Comment, Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment, 28 U of Chi L Rev 664, 678–679 (1961). Compare East-India Co. v Skinner, Comb 342, 90 Eng Rep 516.

[22] Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937), 54.

[23] In these two respects, the practice of unannounced police entries by night is also considerably more offensive to the rights protected by the Fourth Amendment than the use of health-inspection and other administrative powers of entry, concerning the constitutionality of which this Court has divided sharply, Frank v Maryland, 359 US 360, 3 L ed 2d 877, 79 S Ct 804, supra; Ohio ex rel. Eaton v Price, 364 US 263, 4 L ed 2d 1708, 80 S Ct 1463. Since my Brother Clark does not rely upon either of those decisions, I have no occasion to discuss further the applicability of either to the case at bar. For further consideration of problems raised by those cases, see generally, Waters, Rights of Entry in Administrative Officers, 27 U of Chi L Rev 79 (1959); Comment, State Health Inspections and "Unreasonable Search": The Frank Exclusion of Civil Searches, 44 Minn L Rev 513 (1960).

[24] It is not clear whether the English law ever recognized such an exception to the requirement of notice or awareness. See, e.g., Genner v Sparks, 6 Mod 173, 87 Eng Rep 928. It is stated in an English annotator's note to Semayne's Case, supra, that "if a man being legally arrested, escapeth from the officer, and taketh shelter though in his own house, the officer may upon fresh pursuit break open doors in order to retake him, having first given due notice of his business and demanded admission, and been refused." 77 Eng Rep. at 196. The views of other commentators are ambiguous on this point. See, e.g., 2 Hawkins, Pleas of the Crown (6th ed 1787), c. 14, § 8. Blackstone's view was that "in case of felony *actually* committed, or a dangerous wounding, whereby felony is like to ensue . . . [a constable] may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken. . . ." Commentaries 292.

[25] See Professor Wilgus' comment: "Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, *unless this is already understood, or the peril would be increased.*" Wilgus Arrest Without a Warrant, 22 Mich L Rev 541, 798, 802 (1924). (Emphasis supplied.) Cf. Accarino v United States, 85 App DC 394, 398–402, 179 F2d 456, 460–464.

Compare Lord Mansfield's statement, in 1774, of the rationale for the requirement of announcement and demand for admission: "The ground of it is this; that otherwise the consequences would be fatal: for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law, that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences." Lee v Gansel, 1 Cowp 1, 6–7, 98 Eng Rep 935, 938.

[26] The comment of Rooke, J., in Ratcliffe v Burton, 3 Bos & Pul 223, 230, 127 Eng Rep 123, 127 (1802), is relevant here: "What a privilege will be allowed to sheriffs' officers if they are permitted to effect their search by violence, without making that demand which possibly will be complied with, and consequently violence be rendered unnecessary!" This view of the requirement of notice or awareness has its parallel in the historic English requirement that an arresting officer must give notice of his authority and purpose to one whom he is about to arrest. In the absence of such notice, unless the person arrested already knew of the officer's authority and mission, he was justified in resisting by force, and might not be charged with an additional crime if injury to the officer resulted. The origin of this doctrine appears to be Mackalley's Case, 9 Co Rep 65b, 69a, 77 Eng Rep 828, 835. See also Rex v George, [1935] 2 DLR 516 (BC Ct App); Regina v Beaudette, 118 Can Crim Cases 295 (Ont Ct App). Compare, e.g., People v Potter, 144 Cal App 2d 350, 300 P2d 889, in which noncompliance with § 844 was excused because the defendant was known to have been convicted of three previous robberies and was suspected of a fourth—though in fact, upon entering his hotel room unannounced and by means of a key obtained from the manager, the officers found the defendant in

bed, with the lights off, and unarmed. The entry occurred after midnight.

[27] The importance of this consideration was aptly expressed long ago by Heath, J., in Ratcliffe v Burton, 3 Bos & Pul 223, 230, 127 Eng Rep 123, 126–127 (1802):

"The law of England, which is founded on reason, never authorises such outrageous acts as the breaking open every door and lock in a man's house without any declaration of the authority under which it is done. Such conduct must tend to create fear and dismay, and breaches of the peace by provoking resistance. This doctrine would not only be attended with great mischief to the persons against whom process is issued, but to other persons also, since it must equally hold good in cases of process upon escape, where the party has taken refuge in the house of a stranger. Shall it be said that in such case the officer may break open the outer door of a stranger's house without declaring the authority under which he acts, or making any demand of admittance? No entry from the books of pleading has been cited in support of this justification, and Semayne's case is a direct authority against it."

[28] See also McDonald v United States, 335 US 451, 460, 461, 93 L ed 153, 160, 161 69 S Ct 191 (concurring opinion) for Mr. Justice Jackson's comment: "Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot."

[29] See, e.g., Kamisar, Public Safety v Individual Liberties: Some "Facts" and "Theories," 53 J Crim L, Criminology and Police Science 171, 188–190 (1962); Rogge, Book Review, 76 Harv L Rev 1516, 1522–1523 (1963).

[30] Compare Justice Traynor's recent comment:

"Nevertheless the United States Supreme Court still confronts a special new responsibility of its own. Sooner or later it must establish ground rules of unreasonableness to counter whatever local pressure there might be to spare the evidence that would spoil the exclusionary rule. Its responsibility thus to exercise a restraining influence looms as a heavy one. It is no mean task to formulate far-sighted constitutional standards of what is unreasonable that lend themselves readily to nation-wide application." Traynor, Mapp v Ohio at Large in the Fifty States, 1962 Duke LJ 319, 328.

[31] The problems raised by this case are certainly not novel in the history of law enforcement. One of the very earliest cases in this field, decided more than three centuries ago, involved facts strikingly similar to those of the instant case. The case of Waterhouse v Saltmarsh, Hob 263, 80 Eng Rep 409, arose out of the service by a sheriff and several bailiffs of execution upon a bankrupt. These officers, having entered the outer door of the house by means not described, "'ran up to the chamber, where the plaintiff and his wife were in bed and the doors locked, and knocking a little, without telling what they were, or wherefore they came, brake open the door and took him. . . .'" The sheriff was fined the substantial sum of £200 for what the court later described in a collateral proceeding as "the unnecessary outrage and terror of this arrest, and for not signifying that he was sheriff, that the door might have been opened without violence. . . ." Hob, at 264, 80 Eng Rep, at 409. Compare another early case involving similar problems, Park v Evans, Hob 62, 80 Eng Rep 211, in which the Star Chamber held unlawful an entry effected by force after the entering officers had knocked but failed to identify their authority or purpose. The Star Chamber concluded that "the opening of the door was occasioned by them by craft, and then used to the violence, which they intended."

[32] Any doubt concerning the scope of the California test which may have survived People v Maddox, 46 Cal 2d 301, 294 P2d 6, must have been removed by the later case of People v Hammond, 54 Cal 2d 846, 854, 855, 9 Cal Rptr 233, 357 P2d 289, 294:

"When there is reasonable cause to make an arrest, and the facts known to the arresting officer before his entry are not inconsistent with a good faith belief on his part that compliance with the formal requirements of . . . section [844] is excused, a failure to comply therewith does not invalidate the search and seizure made as an incident to the ensuing arrest."

[33] I think it is unfortunate that this Court accepts the judgment of the intermediate California appellate court on a crucial question of California law—for it is by no means certain that the Supreme Court of California, the final arbiter of questions of California law, would have condoned the willingness of the District Court of Appeal to excuse noncompliance with the California statute under the facts of this case. For the view of the California Supreme Court on the scope of the exception under § 844, see e.g., People v. Martin, 45 Cal 2d 755, 290 P2d 855; People v. Carswell, 51 Cal 2d 602, 335 P2d 99; People v. Hammond, 54 Cal 2d 846, 9 Cal Rptr 233, 357, P2d 289.

An examination of the California decisions which have excused noncompliance with § 844 reveals the narrow scope of the exceptions heretofore recognized—confined for the most part to cases in which officers entered in response to cries of a victim apparently in imminent danger, e.g., People v Roberts, 47 Cal 2d 374, 303 P2d 721; or in which they first knocked at the door, or knew they had been seen at the door, and then actually heard or observed destruction of evidence of the very crime for which they had come to arrest the occupants, see e.g., People v Moore, 140 Cal App 2d 870, 295 P2d 969; People v. Steinberg, 148 Cal App 2d 855, 307 P2d 634; People v Williams, 175 Cal App 2d 774, 1 Cal Rptr 44; People v Fisher, 184 Cal App 2d 308, 7 Cal Rptr 461. See generally, for summary and discussion of California cases involving various grounds for noncompliance with § 844, Fricke, California Criminal Evidence (5th ed 1960), 432–433; Comment, Two Years With the Cahan Rule, 9 Stan L Rev 515, 528–529 (1957).

Mr. ERVIN. I am not going to belabor this decision at length. I do wish to emphasize again the fact that eight of the Justices of the Supreme Court—that is, Justice Clark and the three who concurred in his opinion and Justice Brennan and the three who concurred in his opinion—agreed that the obligation of an officer of the law to inform the occupants of the house of his presence and purpose, and to give them a reasonable time to admit him before breaking into the house, constitutes a part, and an integral part, of the fourth amendment.

Mr. President (Mr. MATHIAS), what I assert is the decision of these eight Justices is pretty well summarized in the opinion of Justice Brennan, in which he says:

Mr. Justice Clark, Mr. Justice Black, Mr. Justice Stewart, and Mr. Justice White do not believe that the Federal requirement of reasonableness contained in the Fourth Amendment was violated in this case. The Chief Justice, Mr. Justice Douglas, Mr. Justice Goldberg, and I have the contrary view. For even on the premise that there was probable cause by Federal standards for the arrest of George Ker, the arrests of these petitioners were nevertheless illegal, because the unannounced intrusion of the arresting officers into their apartment violated the Fourth Amendment. Since the arrests were illegal, *Mapp* v *Ohio*, 367 U.S. 643, 6th Law Edition 2d 1081, 81 Supreme Court Reporter 1684, 84 ALR 2d 933, requires the exclusion of the evidence which was the product of the search incident to those arrests.

Here is the crux of the opinion:

Even if probable cause exists for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or destruction of evidence is being attempted.

Justice Brennan proceeds and says these three exceptions, which he enumerates, only come into play from facts and circumstances known to the officer at the time he breaks in without announcing his presence or purpose. One of these is where the people in the house already know the officer is there—know his presence and purpose. There is no necessity in that case to give notice. Or where the officer knows, at the time he breaks and enters without notice, that someone in the house is in peril of bodily harm; or where, because they are made aware of the presence of someone outside the house, the officer knows from the activity inside the house at the time that the occupants of the house would escape or destroy evidence. Manifestly, an officer cannot know in advance whether these conditions exist.

Mr. President, the Lord's Prayer says: "Lead me not into temptation."

One of the arguments against the District of Columbia crime bill is that that provision of the crime bill violates the injunction of the Lord's Prayer and leads the officers of the law into a temptation to make false affidavits or to indulge in false prophecies, without any basis for them.

The provisions of the District of Columbia crime bill about search warrants are found in section 23–522, which appears on page 160. In order to save time, I ask unanimous consent that section 23–522, as it appears on page 160 of the conference report, be printed in full at this point in the RECORD.

There being no objection, the section was ordered to be printed in the RECORD, as follows:

"§ 23–522. Applications for search warrants

"(a) Each application for a search warrant shall be made in writing upon oath or affirmation to a judicial officer.

"(b) Each application shall include—

"(1) the name and title of the applicant;

"(2) a statement that there is probable cause to believe that property of a kind or character described in section 23–521(d) is likely to be found in a designated premise, in a designated vehicle or object, or upon designated persons;

"(3) allegations of fact supporting such statement; and

"(4) a request that the judicial officer issue a search warrant directing a search for and seizure of the property in question.

The applicant may also submit depositions or affidavits of other persons containing allegations of fact supporting or tending to support those contained in the application.

"(c) The application may also contain—

"(1) a request that the search warrant be

made executable at any hour of the day or night, upon the ground that there is probable cause to believe that (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances; and.

"(2) a request that the search warrant authorize the executing officer to break and enter dwelling houses or other buildings or vehicles to be searched without giving notice of his identity and purpose, upon probable cause to believe that one of the conditions set forth in subparagraph (A), (B), or (D) of section 23-591(c)(2) is likely to exist at the time and place at which warrant is to be executed.

Any request made pursuant to this subsection must be accompanied and supported by allegations of fact supporting such request.

Mr. ERVIN. Section 23-591, which I have already mentioned, provides that an officer can break into a house without knocking, without advising the occupants of the house of his presence and purpose, and without giving them an opportunity to open the house to him, if the warrant expressly authorizes breaking and entering without such a prior announcement. How does an officer get a warrant such as that? The only way he can do it is to succumb to the temptation which is presented to him by section 23-522. So how does he get a warrant to authorize him to break in without notice or warning? He has to apply for a search warrant. Of course, under the fourth amendment, his application must be supported by an oath or affirmation. The bill says that he can request that the search warrant authorize him to break and enter the house or building or vehicles to be searched without giving notice of his identity and purpose, if he has probable cause to believe that one of the conditions set forth in subparagraphs (A), (B), or (D) of section 23-591 is likely to exist at the time and place at which such warrant is to be executed. The provisions in subparagraphs (A), (B), and (D) of section 23-591 attempt to embody the exceptions to the announcement provisions of the fourth amendment as laid down substantially in the Ker case.

How does an officer who goes to get a search warrant from a U.S. judge or from a U.S. magistrate, miles away from the place he wants to search, know in advance that it is likely that at the time he undertakes to execute that search warrant miles away, one of these exceptions may exist. It says—and this is just an exercise, for all practical purposes, in linguistic hypocrisy—"Any request made pursuant to this subsection will be accompanied and supported by allegations of facts supporting such request."

How is an officer who makes application to a judge to obtain a no-knock warrant to search my apartment to know that when he gets to my apartment sometime later that I am going to be engaged in disposing of some contraband, or that somebody in my apartment is in imminent peril of bodily harm, or that I am going to know that he is outside my door when he has not knocked, or done anything to apprise me of his presence and purpose to search my apartment?

The truth is, he cannot know. There is no possibility of his knowing any of these things. So he goes and gets a search warrant, which he can only get on the basis of false prophecies; and no amount of sophistry can convert a false prophecy into a fact. Yet, to get the search warrant to enter a house, such as Mrs. Mallory's was entered, why he has to be able to establish the facts showing that at some subsequent time, things of which he is necessarily ignorant will be existing at the place where he undertakes to execute the search warrant.

The simple truth of it is that the no-knock provision of the bill leads U.S. magistrates and leads U.S. judges, who may be great law and order men in the most acceptable sense of that term, and law-enforcement officers, into the temptation to concoct false prophecies and foretell things that no human being on earth can foretell, in order to get what I call a no-knock warrant.

I do not believe that the law should lead an officer of the law into the temptation to lie, but that is precisely what the no-knock provision of this bill would do, because it would authorize the issuance of a warrant to be executed at some future time without announcement of the officer's presence or purpose.

Mr. President, I should like to emphasize what Associate Justice Brennan had to say in this opinion. He pointed out that this rule, that an officer should announce his presence and purpose before entering the home of a citizen, was not only adopted to make the citizen's home his castle, but was also adopted for the protection of the officer of the law.

Mr. ALLEN. Mr. President, will the senior Senator from North Carolina yield to the junior Senator from Alabama at some convenient place?

Mr. ERVIN. I am happy to yield to the Senator right now.

Mr. ALLEN. It is the opinion of the junior Senator from Alabama that the distinguished senior Senator from North Carolina is the greatest living constitutional lawyer in the United States bar none.

Although the junior Senator from Alabama always enjoys the discussion by the distinguished senior Senator from North Carolina of any constitutional issue, or any point of law, he would like the distinguished senior Senator from North Carolina to recall the occasion when he was speaking against the no-knock provision in the drug control law, and he recited an argument made in a similar controversy, I believe, in the British Parliament where a similar provision was under discussion. I believe it possibly was the great William Pitt who said something about the sanctity and inviolability of the Englishman's home, that it was his castle.

I was very much impressed with the Senator's statement wherein he quoted William Pitt as saying that the elements could come into an Englishman's home, the rain, the snow, the sleet, but that the King of England could not.

Would the distinguished senior Senator from North Carolina refresh the recollection of the junior Senator from Alabama on that point?

Mr. ERVIN. Yes, I am delighted to do so. I was referring to a speech which William Pitt made in the House of Commons against the proposal of English officials who had been charged with the duty of collecting excise taxes on cider, that they believed they should have the right to enter the homes of people without apprising them of their presence or purpose; in other words, a no-knock provision back there was being advocated in the British Parliament.

In speaking in opposition to the proposal, William Pitt had this to say:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail. Its roof may shake. The wind may blow through it. The storm may enter. The rain may enter. But the King of England cannot enter. All his force dares not cross the threshold of the ruined tenement.

Mr. ALLEN. I would say to the distinguished senior Senator from North Carolina that is a great and stirring statement of the common law upon which the law of the various States in this country is based. Certainly that same argument would apply now just as it applied more than 200 years ago.

Mr. ERVIN. It would seem to be even stronger now because at that time people did have some veneration for the power of the King of England. The King was supposed to have some autocratic powers which our U.S. Constitution, of course, denies to our Government.

Mr. ALLEN. I thank the distinguished senior Senator from North Carolina and would like to recall to him that the junior Senator from Alabama followed his leadership in opposition to the no-knock provision in the drug control bill that was passed by the Senate, in voting against the no-knock provision; and he wishes to state that he wishes again to vote against the no-knock provision, that he feels it is obnoxious, that it is inadvisable, that it is unfair, that it would be dangerous for police officers, that it does invade the homes of our people, and he would like very much to be able to vote again against the no-knock provision.

Is there any way in which the junior Senator from Alabama will be able to vote against the no-knock provision and at the same time vote in favor of all other provisions of the bill?

Mr. ERVIN. The Senator from Alabama can do that in the event, and only in the event, the Senate rejects the conference report. The conference report cannot be amended.

The only way the Senator from Alabama can vote in that fashion is to vote against the conference report. In the event the conference report is rejected, he can then vote for the bill which has been introduced by 19 other Senators and me which will make law every provision of the conference report that is worthy of a place in any system of civilized justice.

Mr. ALLEN. Mr. President, under the parliamentary procedure then, as the Senator from North Carolina has explained it, there will be no opportunity to vote yes or no on the no-knock provision.

Mr. ERVIN. No. And I will say to the Senator that I am a very trusting person and I do not look unfavorably on other people. However, at the same time, this

whole thing has been more or less strange.

The Senate has never yet been given an opportunity to vote up or down on any provision for preventive detention. The bill we passed that came from the House District Committee had no provision for preventive detention.

We have been conducting hearings in the Subcommittee on Constitutional Rights on the proposal of the administration and certain other proposals that preventive detention be made Federal law applicable throughout the 50 States. But the Department of Justice, I suspect, came to the conclusion that Senators were not going to impose that. They might vote to impose preventive detention on the people of the District of Columbia, but they were not going to be willing to vote preventive detention upon the people of their States.

After the Senate bill had passed the Senate without any preventive detention provision in it, it was sent to the House. There it slept and slept and slept for many weeks. Then suddenly, according to what Representative BROCK ADAMS of Washington—a man who entertains views similar to those of the Senator from Alabama and myself and who is not willing to sell the everlasting liberties of the American people for the purpose of some temporary thing like getting a few people in jail without being tried—testified before my committee that on the day the House District Committee approved the provision, it had announced in advance that the only thing the committee would consider was some provision to aid police officers.

On that day those who were opposed to preventive detention, assured that no preventive detention was being suggested, absented themselves from the committee in order to attend other official duties. And in their absence a representative of the Department of Justice came there and presented the recommendations of the Department of Justice for a preventive detention provision.

Under those circumstances it was adopted. The representative of the Department of Justice was the only man permitted to be heard on that subject before the District Committee. Those were the circumstances. It was put in the bill.

I might state that the bill as it came from the House so outraged the Members of the Senate that on the motion of the senior Senator from Maryland, it rejected the House bill by a unanimous voice vote.

It then went back to the House. Now we are being asked to swallow this thing lock, stock, and barrel, the no-knock provision and everything else, without ever being given the opportunity to vote on these things separately.

Why the House District Committee could not find anyone except one representative from the Department of Justice to testify, I do not know. As chairman of the Subcommittee on Constitutional Rights, I found literally hundreds of liberty-loving Americans who have been willing to appear before the Constitutional Rights Subcommittee to testify against preventive detention.

We are now told that unless we bow down obsequiously and permit all of these constitutional inequities to be perpetrated on the people of the District, we will not have any bill.

I find it difficult to accept the proposition that House Members take the position that we have no right to exercise our intelligence but must swallow the medicine they have concocted over there on these matters no matter how distasteful it is, no matter how unconstitutional it is, no matter how unwise it might be, no matter how unfair it might be, and no matter how unworkable it might be.

I will not take any medicine like that. I think that my oath to support the Constitution of the United States requires me to stand on the floor of the Senate and fight for the preservation of the liberty of all people of the United States as guaranteed to them by the Constitution, whether they live in the District of Columbia or somewhere else.

Mr. ALLEN. Mr. President, I greatly admire the distinguished Senator from North Carolina. I appreciate his statement. I admire him for his ability, knowledge, and courage to stand here and speak out for his convictions and for the freedoms that the people of the United States are guaranteed under the Constitution.

The junior Senator from Alabama would welcome once again the opportunity of voting against the no-knock provision. He regrets that this issue is not going to be presented to the Senate so that the Senate can meet it head on.

In that event, the junior Senator from Alabama would cast his vote against the no-knock provision which he regards as being an invasion of the liberties and freedom that the people are guaranteed under the Constitution.

Mr. ERVIN. Mr. President, I thank the Senator from Alabama. I would say that if I were not a trusting person who is not inclined to think evil of others, I might succumb to the temptation to believe there was a little bit of legal chicanery in the House committee, the House committee being aided and abetted by the Department of Justice. But being a trusting person who thinks no evil of another person, I will not make that accusation on the floor of the Senate.

But I will absolve any Senator from any part in it.

Mr. ALLEN. Mr. President, I commend the distinguished Senator from North Carolina on his trusting nature. However, having seen some of the legislative proceedings and enactments that take place here, it is doubtful that the junior Senator from Alabama would go as far as the distinguished Senator from North Carolina has gone in this connection.

Mr. ERVIN. Mr. President, in the future I may be wiser. I always hope to be wiser tomorrow than I am today. It may be that the next time I will follow that old proverb that says, "'If you fool me once, it is your fault; if you fool me twice, it is mine."

Mr. ALLEN. Mr. President, it having happened three, four, or five times now, I wonder that the Senator can continue to be so trustful.

Mr. ERVIN. It is very difficult.

I thank the Senator from Alabama for his contribution to the argument. I further say that the Senator from North Carolina entertains a very high admiration for the Senator from Alabama.

The Senator from North Carolina has noted during the service of the Senator from Alabama in this body that the Senator from Alabama has never succumbed to the temptation to sell the constitutional truth to serve the political hour.

Mr. ALLEN. I thank the distinguished Senator.

Mr. ERVIN. I know of no higher tribute I can pay any man than that, because sometimes that temptation is very strong, all of us being political animals.

Mr. ALLEN. I thank the Senator.

Mr. ERVIN. Mr. President, I was emphasizing what Justice Brennan emphasized in the Ker case, that this requirement that a police officer shall inform the occupants of a house of his presence and purpose before he enters and gives them an opportunity to open the house to him is designed to protect the life of the officer as well as to protect the occupants of the house in the enjoyment of their rights of privacy.

In the Ker case he pointed out this situation. He stated in his opinion:

> It was firmly established long before the adoption of the Bill of Rights that the fundamental liberty of the individual includes protection against unannounced police entries. "[T]he Fourth Amendment did but embody a principle of English liberty, a principle old, yet newly won, that finds another expression in the maxim 'every man's home is his castle.'" Fraenkel, Concerning Searches and Seizures, 34 Harv L Rev 361, 365 (1921); Frank v Maryland, 359 US 360, 376–382, 3 L ed 2d 877, 887–891, 79 S Ct 804 (dissenting opinion). As early as Semayne's Case, 5 Co Rep 91a, 91b, 77 Eng Rep 194, 195 (1603), it was declared that "[i]n all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . .*" (Emphasis supplied.) Over a century later the leading commentators upon the English criminal law affirmed the [374 US 48] continuing vitality of *that principle. 1 Hale, Pleas of the Crown (1736), 583; see also 2 Hawkins, Pleas of the Crown (6th ed 1787), c. 14, § 1; Foster, Crown Law (1762), 320–321. Perhaps its most emphatic confirmation was supplied only 35 years before the ratification of the Bill of Rights. In Curtis' Case, Fost, 135, 168 Eng Rep 67, decided in 1756, the defendant, on trial for the murder of a Crown officer who was attempting an entry to serve an arrest warrant, pleaded that because the officer had failed adequately to announce himself and his mission before breaking the doors, forceful resistance to his entry was justified and the killing was therefore justifiable homicide. In recognizing the defense the court repeated the principle that "peace-officers, having a legal warrant to arrest for a breach of the peace, may break open doors, *after having demanded admittance and given due notice of their warrant*"; the court continued that "no precise form of words is required in a case of this kind" because "[i]t is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority. . . ." Fost., at 136–137, 168 Eng Rep, at 68. (Emphasis supplied.) The principle was again confirmed not long after the Fourth Amendment became part of our Constitu-

tion. Abbott, C. J., said in Launock v Brown, 483 (1819): ". . . I am clearly of opinion that, in the case of a misdemeanour, such previous demand is requisite. . . . It is reasonable that the law should be so; for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost."

This holding of the English law is the law in virtually every American common law jurisdiction. When the officer undertakes to enter the house of a person without announcing his presence and without announcing his purpose and without giving the person a reasonable opportunity to open the doors to him, he runs the risk of being killed by the householder who has the right to protect his home against what he understands to be unwarranted intrusion; and the killing of an officer under these circumstances, under this decision and a multitude of decisions in this country, is justifiable homicide.

Congress should not by law put officers in a position of running the risk of being justifiably killed in their efforts to enter homes of our citizens without acquainting those citizens of their presence and purpose.

The Supreme Court had occasion to talk about some of these things some time ago in the case of *McDonald* v. *United States*, 335 U.S. 451.

In that case, the accused was a roomer in a boarding house operated by a woman in the District of Columbia. For some days plain clothes officers of the law had suspected that the accused was operating an illegal lottery. They kept the house under surveillance long enough to convince themselves that their suspicion was well founded. Instead of procuring a search warrant, they undertook to enter the house and apprehend the accused by prying open the woman's bedroom window. The accused was convicted in the District Court of operating an illegal lottery on the basis of evidence seized by the officers at that time. The Supreme Court reversed his conviction on the ground that the entry made by the officers was illegal. The Court said:

The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.

The Court said that was the reason the fourth amendment was written. They said:

We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Justice Jackson had something to say about exceptions existing in circumstances like those. He said this in agreeing with the holding of the Court that this was an illegal search and seizure, in violation of the fourth amendment, in his concurring opinion, which appears on pages 457 to 461. I will read from his opinion on pages 460 and 461:

I am the less reluctant to reach this conclusion—

Says Justice Jackson; that is, that it was an illegal search and seizure—

because the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.

In other words, Justice Jackson intimates that this woman, seeing a man attempting to enter her house, would have been justified in shooting him, and he also intimates that if the officer, seeing her draw the gun to shoot him, shot her, the officer would be guilty of murder.

Why should the Congress of the United States adopt laws which, as Justice Jackson observed, are a discredit to law enforcement agencies and which are so reckless as this?

Justice Jackson condemned the officers for prying open the bedroom window and climbing in, and yet that is exactly what the no-knock provision in the D.C. Crime Bill would authorize law enforcement officers to do. It would make it legal for them to pry open windows and enter the bedrooms of women in the District. In lieu of so doing they could break down the door with a sledgehammer.

PREVENTIVE DETENTION

Well, Mr. President, at long last I have reached a point where I want to talk a little about preventive detention.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield for a unanimous-consent request with the understanding that he does not lose his right to the floor?

Mr. ERVIN. I am delighted to yield with that understanding.

ORDER FOR RECOGNITION OF SENATOR McGOVERN ON MONDAY NEXT

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that on Monday next, upon the disposition of the reading of the Journal, the able Senator from South Dakota (Mr. MCGOVERN) be recognized for not to exceed 20 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970

The Senate continued with the consideration of the report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the amendment of the House to the text of the bill (S. 2601) to reorganize the courts of the District of Columbia, and for other purposes.

Mr. ERVIN. Mr. President, when America was established there was a great deal of ferment in another nation of the earth, that is, France. The ferment arose out of the fact that France had a prison known as the Bastille and that the government threw people in there for preventive detention purposes. They arrested people and confined them in the Bastille. Instead of trying them, they just left them in the Bastille. The French people stood this suppression as long as they could, and finally they rebelled and stormed the Bastille and destroyed it, and Lafayette sent to his good friend, George Washington, the key to the Bastille. And to this day the French people celebrate as their national holiday July 14, the day on which the Bastille was stormed and destroyed by the French people, thus starting what we call the French Revolution.

The purpose of the bill before us is to convert places of imprisonment in the District of Columbia into Bastilles. It is ironic that on July 14, the anniversary of the storming of the Bastille, the conference recommended a preventive detention provision which would transform American jails into Bastilles.

We hear a great deal said to the effect that an accused, under this bill, is to be imprisoned only for 60 days. I challenge that statement. I assert that notwithstanding the fact that the bill is 243 pages long—that is, the conference report and the bill it incorporates—not only is there no word, but there is no syllable in it that says whoever is preventively detained under the provisions of this bill is going to be released after he has been imprisoned for 60 days if he has not been tried.

What happens after 60 days? The provision of the bill dealing with that subject appears on page 194. Here is what is says:

Upon the expiration of sixty calendar days . . . such person—

That is, the person who has been preventively detained—this is in section 23–1322, subsection (d) and subsection (2):

Such person shall be treated in accordance with section 23–1321—

(A) Upon the expiration of sixty calendar days.

In other words, upon the expiration of 60 days, they return him to the point where he got on the merry-go-round for the first 60 days. This is section 23–1321. It appears on pages 191 and 192 of the conference report.

What happens then? They put him back exactly where he was when he was first arrested. They take him before the judge or the magistrate——

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. ERVIN. Yes.

Mr. TYDINGS. On page 194, the report specifies and requires, upon the expiration of 60 days, that, if the trial is not in progress, then the defendant must be treated under the general release section, 23–1321, not the pretrial detention section, 23–1322. Specification of section

23–1321 was put in there for that purpose.

Mr. ERVIN. Where does it say that, I ask the Senator?

Mr. TYDINGS. It says that right on page 194, in the middle of the page, subparagraph (d)(2):

The following shall be applicable to persons detained pusuant to this section:

Mr. ERVIN. Yes.

Mr. TYDINGS. It continues:

Upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the person other than by the filing of timely motions (excluding motions for continuances);

It says:

Such person shall be treated in accordance with section 23–1321—

Mr. ERVIN. Yes.

Mr. TYDINGS. And section 23–1321 is the section in subchapter II which deals with the release conditions in noncapital cases, with the setting of conditions of release. That is a person held every night——

Mr. ERVIN. And also——

Mr. TYDINGS. And permitted to go and work during the day. It spells it out:

(1) Place the person in the custody of a designated person or organization agreeing to supervise him.

And so forth.

Subsection 23–1322(d)(2) does not mention section 23–1322, or any part thereof, or section 23–1323. The reference is to 23–1321 and not to 23–1322. If the purpose had been to start the whole procedure over again, we would have said "in accordance with the provisions of subchapter II, including subsection 23–1322," the detention prior to trial provision. But we did not.

Mr. ERVIN. Mr. President, I challenge the Senator from Maryland to show anywhere in here that says he is to be released.

Mr. TYDINGS. The whole section 23–1321 deals with release. It is entitled "Release in Noncapital Cases Prior to Trial." The whole section deals with conditional release—the entire section, every word and condition in there. The plain meaning of "section 23–1321" is "release."

Mr. ERVIN. Mr. President, I still reiterate my statement that there is not a single syllable, much less a sentence, in this whole conference report, 243 pages long, that provides a man is to be released after he has been preventively detained for 60 days.

What the Senator from Maryland has just read is what I read just before him. Here is what it says. This is the only provision that has any reference to what is to happen to the man after he has been preventively detained. It says, on page 194, subsection 23–1322, that:

Such person shall be treated in accordance with section 23–1321—

(A) upon the expiration of 60 calendar days.

Now, what does that mean? You take him back to where he started.

Mr. TYDINGS. What is 23–1321?

Mr. ERVIN. It is the one which says if he is dangerous he is not to be released.

Mr. TYDINGS. No, it is not, either. That is 23–1322. Section 23–1321 is "Release in Noncapital Cases Prior to Trial." It deals with conditions of release which a judge may set in the event he does not wish to detain a person prior to trial. Section 23–1322, "Detention Prior to Trial," is the section which deals with the 60-day pretrial detention.

Mr. ERVIN. I say again, the third time, that there is not a syllable in the 243 pages of this conference report which says anywhere that a man is to be released after the expiration of 60 days.

Let me read what the bill says—and I read it for the third time—

Such person—

That is, the person who has been preventively detained under this bill—

shall be treated in accordance with section 23–1321—

(A) upon the expiration of 60 calendar days.

Now let us go see what section 23–1321 says. That is where he started. Here is what it says:

Any person charged with an offense—

This man is still charged with an offense. He has not been tried; he has just been held in jail 60 days on pretrial detention, so he is to be dealt with as provided here. What does it say?

Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer—

This is the second time we have sent him there—

be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer—

If they had stopped there, the Senator from Maryland would have been right and the Senator from North Carolina would have been wrong. But it does not stop there. It says he shall be released upon his personal recognizance or an appearance bond—

unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required or the safety of any other person or the community.

Now, it says there, in the first sentence, that he shall be released on a personal recognizance or on a bond unless—

Mr. TYDINGS. Do not stop there. Read the rest of the paragraph.

Mr. ERVIN. I shall get down to that in just a minute.

Mr. TYDINGS. Read the rest of the paragraph.

Mr. ERVIN. Yes. In the first sentence, it says that he shall be released on his personal recognizance or on an appearance bond unless the judge finds that such release will not assure his appearance at the trial, or the safety of any person or the community.

So he is not to be released after the expiration of 60 days and returned to where he started, if the judge finds that his release will not secure the safety of any person or the community. The judge has already found against him one time, and I do not think the judge is going to reverse his previous finding. That is the first sentence.

To turn it around, it says that at the expiration of 60 days, when he is returned to the judicial officer, he is not to be released upon his personal recognizance or upon the appearance bond if the judge finds that his release will not assure the safety of any person or of the community. So he is not to be released, under the first sentence of this section, if the judge so finds.

Now I will read the second sentence:

When such determination is made—

That is, when the judge finds it will not secure the safety of any person or the community—

the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure appearance of the person for trial or the safety of any other person or the community, or, if no single condition gives that assurance, any combination of the following conditions:

What does that mean, in plain English? The judge has already found, 60 days before, that this is a dangerous man and he cannot be released and assure the safety of any person or the community. So they preventively detain him.

The second sentence says that if the judge finds that release under personal recognizance or on an appearance bond will not reasonably assure the safety of any person or the community—exactly what was found before—he shall not release him on a personal recognizance or an appearance bond, but he will proceed then to determine which of the conditions if any will reasonably assure the safety of any other person or the community.

That means, by implication—if not by express words—that the judge is not going to release him under the second sentence unless he finds that the conditions or a combination of the conditions will reasonably assure the safety of any other person or the community. So the judge cannot release him on conditions unless those conditions assure the safety of any other person or the community. The judge has already found that none of the conditions will give that assurance. Subsection (b) also uses the words "if any," which surely implies there may be no release conditions at all which will assure the safety of the community.

So one continues to read through section 23–1321 and pages 191 and 192, and nothing there says that the man gets released. Then you get back to the detention prior to trial. So you have section 23–1323, which prohibits the judge from releasing the man upon his own recognizance or upon an appearance bond or upon any conditions which do not reasonably assure the safety of any individual or the community. You read all these sections and you get down to the second section that put him in jail without a bond, section 23–1322, detention prior to trial.

So it is just as clear as the noonday sun in a cloudless sky that at the end of 60 days a man is returned to the judicial officer, and the judicial officer is required to do exactly what he did before—to deny him release if his release threatens the safety of any person in the community.

So you have a merry-go-round. You put the man on the merry-go-round with the first provision, and he rides for 60 days; and you put him on the merry-go-round again and he rides 60 days more; and you put him on the merry-go-round again and he rides 60 days more; and he keeps riding the merry-go-round until the last, lingering echo of Gabriel's horn trembles into the ultimate silence. Not one provision in this bill says he is ever going to be released before trial if he is found to be dangerous.

Furthermore, I called this to the attention of the Deputy Attorney General back in May. I raised the point that there is a provision here for a regular old merry-go-round of preventive detention. The man never gets off the merry-go-round, except that he gets off at the place he started and gets back on, and takes another 60 days. The Deputy Attorney General said he did not think it meant that, and he promised that he would show me something in this bill that would indicate that my interpretation was incorrect. He has not done so.

Now the distinguished Senator from Maryland has attempted to do so, and all he has referred to is that the man goes back to where he started; and then the provision where he started says that the judge cannot release him at all on his personal recognizance or on an appearance bond or upon any conditions unless they assure the safety of other people or of the community. So the preventive detention just goes on, like Tennyson's brook, forever.

As I said earlier, this bill authorizes preventive detention as long as this man is still charged with an offense and as long as his life lasts, and not one syllable in the entire bill is susceptible to an intelligent construction to the contrary. It is putting a man in jail forever and preventively detaining him.

The proponents of the D.C. Crime Bill are not as merciful as the South Carolinian who said that he hated Senator Ben Tillman more than anything which walked or crawled on earth, but he would not send Ben Tillman to hell for more than 30 years.

I do not think a man will get off this preventive detention machine in 30 years, according to its terms, unless he gets tried or gets some kind of pardon. So we have a bill authorizing preventive detention forever.

I do not mean to discuss too long the matter of preventive detention, but I may have made it apparent that I have some very profound convictions on preventive detention and no-knocks. I am not going to discuss no-knocks any more at this time, but I am going to invite attention to the eighth amendment and to the Judiciary Act of 1789.

George Washington took his oath of office as President of the United States in 1789, and the first Congress assembled in 1789. One of the first things Congress did was to submit the Bill of Rights, including the eighth amendment, to the States for ratification. The eighth amendment says that excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted.

Congress did something else in 1789; it passed the Judiciary Act of 1789. In that act, the first Congress of the United States provided that every person charged by the Federal Government with a noncapital crime should have an absolute right to release on bail pending his trial. Why did Congress do that? The Supreme Court of the United States had something to say on this subject in the case of Stack versus Boyle, reported in 342 U.S. 2. The Court declared that bail was to be taken only for the purpose of assuring the presence of the accused at the trial, and that a judicial officer violated the eighth amendment whenever he required an accused to give bail in excess of the amount reasonably necessary to accomplish that purpose.

Chief Justice Vinson, who wrote the opinion in Stack against Boyle, said on page 4:

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocably provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See *Hudson* v. *Parker*, 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.
>
> The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. *Ex parte Milburn*, 9 Pet. 704, 710 (1835). Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. See *United States* v. *Motlow*, 10 F. 2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit).
>
> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.

In other words, Judge Vinson said that we have had this right ever since 1789.

I would assert, without fear of successful contradiction, that any person who undertakes to change a law that has been the uniform law of this Nation since 1789, the year in which George Washington took his first oath of office as President of the United States, the year in which the First Congress met, has a great burden to show that that law should be changed. That is what the preventive detention provision would undertake to do.

I am not going to discuss the eighth amendment at any great length, but I am going to say that I do not believe the Constitution undertakes to secure a man merely against excessive bail and then provides that the Congress could abolish all bail. Yet, that is the argument to which those advocating preventive detention necessarily have to resort to, in the final analysis.

Let us see what some of the judges have said. I wish to make it clear that I do not contend, and I do not think that anyone can contend, that there is any decision of the Supreme Court which fully states the meaning of the eighth amendment; but I will call attention to the case of Carlson versus Langdon in 342 U.S.C. page 5, 24, which was a case involving a proceeding seeking to deport certain aliens, and in which Justice Reed, the writer of the majority opinion, said by way of dicta that there was no absolute right to bail in noncapital cases under the Federal system under the eighth amendment.

I also point out that Justice Burton who dissented in that case said:

> I join the dissenting opinion of Mr. Justice Frankfurter and add the suggestion that the Eighth Amendment lends support to the statutory interpretation he advocates. That Amendment clearly prohibits federal bail that is excessive in amount when seen in the light of all traditionally relevant circumstances. Likewise, it must prohibit unreasonable denial of bail. The Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing. The same circumstances are relevant to both procedures. It is difficult to believe that Congress now has attempted to give the Attorney General authority to disregard those considerations in the denial of bail.

Mr. President, I think that one of the best discussions on the meaning of the eighth amendment was that of Prof. Lawrence H. Tribe of the Harvard Law School.

Incidentally, I received a telegram from him and a number of other members of the faculty of the Harvard Law School, which stated that the pending conference report contained many unconstitutional and unwise provisions and should not be adopted by the Senate.

Later, Mr. President, I shall place that telegram in the RECORD, for the information of Members of the Senate.

Professor Tribe testified before our subcommittee and wrote a most illuminating article for the Virginia Law Review entitled "An Ounce of Detention: Preventive Justice in the World of John Mitchell." In his testimony before the Subcommittee on Constitutional Rights in opposition to the pending measure, which is incorporated in other bills before the committee, he had this to say and I think it is the most lucid interpretation of the eighth amendment that I have been able to find:

He says:

> In my researching through the statutory and case law on the bail system and its antecedents from the 13th to late 18th century convinces me the eighth amendment should be construed as a mandate directed to all branches of Government to grant pretrial liberty unless the risk of flight or other interference with prosecution requires detention.
>
> The Supreme Court explored this question only once in *Stack* v. *Boyle*, 342 U.S. 1 (1951). That opinion is often cited, but it is much less often understood. The Supreme Court said in *Stack* that unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.
>
> The Court concluded, although the "right to release before trial is conditioned upon the accused's giving adequate assurance that

he will stand trial and submit to sentence if found guilty," bail "set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the eighth amendment."

Now, it is vital to understand the basic rationale underlying that conclusion. It is simply this: to secure the public interest in preventing certain forms of conduct, our society has established a system of sanctions, calculated to deter outlawed behavior. That system cannot function at all if the threatened sanctions are not effectively imposed.

Thus, various restraints on liberty—from arrest to pretial detention—may be needed to provide assurance that a reliable trial can be held and society may justly demand this assurance, even if the defendant is innocent.

It is critical to notice the imposition of pretrial detention to prevent flight implies no judgment of guilt. An innocent man as well as a guilty man might be motivated to flee. But apart from the restraints needed to assure a trial will proceed, a person accused of crime has as great a right to liberty as any other citizen.

Viewed in this perspective, the presumption of innocence, of which the Supreme Court spoke in *Stack* v. *Boyle*, represents far more than a rule of evidence or procedural technicality applicable only to the trial itself. The presumption of innocence, of which the Court spoke, represents a constitutional commitment by this society to the basic proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as a member of the community. Only those deprivations necessary to assure the progress of the proceeding pending against him—deprivations which do not rest on any assumption of guilt—may be squared with this basis postulate of dignity and equality.

Mr. President, I submit that is a total interpretation of the purpose of our Founding Fathers in inserting the eighth amendment into the Constitution.

Mr. President, I ask unanimous consent to have printed in the RECORD the article written by Laurence Tribe, to which I earlier referred.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

AN OUNCE OF DETENTION: PREVENTIVE JUSTICE IN THE WORLD OF JOHN MITCHELL

(By Laurence H. Tribe, Assistant Professor of Law, Harvard University, A.B., 1962; LL.B., 1966, Harvard University)

In the land of Erewhon, punishment was replaced with social hygiene, and all those with criminal tendencies were committed for indefinite periods of cure. Moved perhaps by his own small vision of utopia, President Nixon recently proposed legislation "whereby dangerous hard core recidivists could be held in temporary pretrial detention when they have been charged with crimes and when their continued pretrial release presents a clear danger to the community." [1]

More recently, Attorney General John Mitchell published a constitutional defense of the President's proposal in the *Virginia Law Review*.[2] That the Administration's chief legal officer should think it necessary to take so unusual a step may seem strange in light of the dubious ability of pretrial preventive detention to contribute to the control of crime. Offenses committed by persons awaiting trial represent only a small component of the total crime problem.[3] Indeed, if sensible steps were taken to shorten the delays between arrest and trial, impose additional penalties for crimes committed during the pretrial period, and more closely supervise the behavior of those released, this component would become even smaller.[4] Many judges have tried to deal with the problem of practicing a *sub rosa* form of preventive detention in bail determinations, but the practice has met with little success in separating likely offenders from safe risks.[5] Given the present state of the predictive art, codification of this practice would probably not measurably enhance the safety of the community.[6]

The proposed legislation's capacity to reduce crime is, however, a poor indicator of its political popularity. Its adoption would create the impression that the Administration was taking substantial steps to restore safety to our communities. Since such a delusion might ease the frustration and fear of those who feel helpless in the face of mounting violence, even a false impression of progress would have some value. But the legislation would operate as a dangerous palliative by relieving public pressure for the less dramatic and more expensive types of reform that alone might restore peace to urban life. And, although the Administration's proposal might purchase psychological comfort for the silent majority, its costs would include the heightened insecurity of the many minorities, both racial and political, who would view themselves as the new law's primary targets.[7] Furthermore, this insecurity would eventually spread beyond these groups, for the approach underlying the proposed legislation threatens the fundamental security provided for all of society by a system that guarantees that no one need fear prolonged imprisonment as a criminal until it is proved beyond a reasonable doubt that he has engaged in clearly prohibited conduct.[8]

Mr. Mitchell has defended the President's proposal in a scholarly journal in part, no doubt, because the Administration sees the legislation as an opportunity to create the image of a vigorous assault on crime. But Mr. Mitchell may also understand more to be at stake in the controversy than the fate of this particular law. For while the Attorney General stresses the supposed narrowness of the pending measures,[9] the demands of the not-so-silent majority for security would make a further expansion of preventive incarceration too attractive to resist.

The appeal of preventive imprisonment is as old as it is seductive. Witness this classic exchange in Lewis Carroll's *Through the Looking Glass:* [10] The Queen observes that the King's Messenger is "in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all." Perplexed, Alice asks, "Suppose he never commits the crime?" "That would be all the better, wouldn't it?" the Queen replies. Indeed it would, and for that very reason we can hardly expect either the Queen or the constituency the Attorney General represents to limit its logic to narrow categories of defendants.

Even as an experiment, the Administration's proposal has the distinct air of an episode from Alice's Wonderland, for it is an experiment that can only confirm and never rebut the experimenter's hypothesis. Once the government has instituted a system of imprisonment openly calculated to prevent crimes committed by persons awaiting trial, the system will appear to be malfunctioning only when it releases persons who prove to be worse risks than anticipated. The pretrial misconduct of these persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease. But when the system detains persons who could safely have been released, its errors will be invisible. Since no detained defendant will commit a public offense, each decision to detain fulfills the prophecy that is thought to warrant it, while any decision to release may be refuted by its results.

The inevitable consequence is a continuing pressure to broaden the system in order to reach ever more potential detainees. Indeed, this pressure will be generated by the same fears that made preventive detention seem attractive in the first place. What begins as an ounce of detention, therefore, may well become the first step of a profound shift in our system of criminal justice—a system that, at least until now, has operated on the premise that crime should normally be prevented by the threat of subsequent punishment rather than the imposition of prior imprisonment.

Apart from its inherent capacity for unrestrained growth, an equally significant implication of the President's proposal is its inevitable reliance on a mode of constitutional discourse exceptionally hospitable to the authoritarian values of "order" and dangerously inimical to the libertarian values of "law." The Attorney General's constitutional *apologia* for the President's legislative program furnishes an ideal illustration of this thinking. "The test," says Mr. Mitchell, "is one of reasonableness, which inevitably involves a weighing of the individual's interest in freedom against society's just demands for varying degrees of restraint under particular circumstances." [11] Applying this "test," the Attorney General unsurprisingly concludes that the President's proposal is "reasonable." Mr. Mitchell's guide, as he explains elsewhere, has been "the ancient common law guide of the 'reasonable man' whom our forefathers established as the enlightened compromiser in a pluralistic society." [12] Hence, the constitutional position of the Justice Department has been, "in general, to negotiate a practical middle-of-the-road solution." [13] But the Constitution does not always straddle dead center, and its compromises are not always dictated by a utilitarian calculus. The general thesis of this Article is that the Constitution mandates more than Mr. Mitchell's willingness to take certain individual interests into account when striking a pragmatic balance among the conflicting goals and values; that the basic function of constitutional limitations is to set constraints of moral principle upon the extent to which society may pursue collective aims at the expense of unwilling individuals; that the President's proposal violates several such constraints; and that the acceptance of the proposal, particularly in terms of the defense offered by the Attorney General, would undermine the role of the Constitution as an embodiment of principled restraints on Government.

THE ADMINISTRATION'S PROPOSAL AND BASIC CONCEPTS OF CRIMINAL JUSTICE

Throughout history, governments have been tempted to establish order by identifying and imprisoning in advance all likely troublemakers. Our society, however, has made the basic decision not to entrust such sweeping power to the state. We have relied instead upon the moral and deterrent effects of laws which define particular acts as criminal and which punish all who violate their proscriptions. For those believed dangerously ill and hence incapable of controlling their behavior in response to this system of deterrents, we have devised programs of civil commitment. For the rest, we have relied on the threat of sanctions. Recognizing that this threat will not deter all those who can control their behavior, we have accepted some risk of crime as the inevitable price of a system that promises to punish no man until it is shown beyond a reasonable doubt that he has committed a specific illegal act.

At the same time, we have realized that a deterrent system cannot function at all unless society can successfully prosecute lawbreakers. Hence we have traditionally detained individuals likely to flee or otherwise avoid prosecution. This limited form of pretral detention is considered essential to the preservation of a system that seeks to control crime by threatening subsequent punish-

Footnotes at end of article.

ment rather than by imposing prior imprisonment. It does not, however, provide precedent for the proposed legislation. On the contrary, detention to insure prosecution for a past crime is the antithesis of detention to prevent the commission of a future crime.

The Attorney General denies that the President's proposal represents so sharp a break from our legal traditions. He argues that there is ample precedent for imprisoning unconvicted citizens to prevent future offenses.[14] To support his thesis, he repeatedly stresses that alleged capital offenders have traditionally been denied pretrial liberty.[15] Expressing an opinion shared by others,[16] the Attorney General claims that such defedants have ordinarily been subjected to pretrial detention because of their "anticipated danger to other persons or the community." [17] Mr. Mitchell offers no evidence, however, to support his contention. The most plausible explanation for pretrial detention of alleged capital offenders is the assumption that few men facing the death penalty can be trusted to appear for trial.[18] As the Attorney General himself points out, "[t]he common law . . . imposed capital punishment for most felonies," [19] not simply those indicating particularly dangerous tendencies. It is doubtful that very many people, even in the eighteenth century, thought that persons charged with larceny of goods valued at over $50 or forging United States currency were too dangerous to release into the community before trial. Yet under the Federal Crimes Act of 1790,[20] both of those offenses were punishable by death and hence nonbailable. Furthermore, the same treatment was applicable in a number of states to such offenses as horse theft [21] and sodomy.[22]

The classic capital offense, premeditated murder, may provide the strongest refutation of the Attorney General's thesis. Having argued early in his article that alleged capital offenders are routinely detained pending trial "because of danger to the community," [23] Mr. Mitchell later observes that "most persons who are charged with [premeditated murder] murder family members or paramours and therefore are the least likely of all offenders to be recidivists." [24] Precisely. There could be no better proof that fear of flight, not assumed dangerousness, accounts for the exceptional treatment of persons awaiting trial on capital charges.

As another justification for pretrial detention, the Attorney General emphasizes the fact that civil commitment has been widely authorized for sexual psychopaths, narcotics addicts, chronic alcoholics, and other mentally disturbed persons, in part to prevent future behavior dangerous to the community.[25] To the limited extent that medical science furnishes techniqucs capable of objectively ascertaining the presence of dangerously incapacitating illness,[26] these precedents are obviously inapposite to the Attorney General's position, for neither a comparable body of knowledge nor a comparable technology of prediction is yet available for dealing with criminal behavior generally.

In addition to its role as a predictive device, the requirement of a medically identifiable affliction raises another, more fundamental objection to the Attorney General's thesis. Mr. Mitchell notes that several decades ago the Supreme Court sustained a state sexual psychopath statute authorizing commitment of persons "likely to attack or otherwise inflict injury" on others.[27] In sustaining that law, however, the Court carefully observed that the statute required the existence of a condition that rendered the individual wholly unable to control his impulses.[28] There is a striking difference between the involuntary confinement of an individual who is considered dangerous for reasons beyond his control and the involuntary confinement of one who is thought to be capable of conforming his conduct to the requirements of law but is suspected of being unwilling to do so. The Administration's proposal goes beyond involuntary detention of the uncontrollably dangerous and would imprison persons presumptively able to choose between violating and obeying the proscriptions of the criminal law. To imprison such persons on the assumption that they will make the wrong choice impairs personal autonomy in a way that incarceration of the dangerously ill does not. More importantly, since our jurisprudence proceeds on the normative premise that certain cases of antisocial conduct result from morally culpable choices,[29] the preventive detention of an individual believed capable of conforming to society's demands entails a peculiarly offensive anticipatory condemnation. For if such an individual were released, and if he were to engage in the behavior predicted, he would be confined not as a sick man but as the author of a morally reprehensible act. To imprison a man because he might choose to break society's rules is to condemn and therefore punish [30] him for nothing more than his supposed intentions—something for which civil commitment, at least, furnishes no model.

Thus, although the desire to prevent future offenses obviously informs much of our law,[31] there are important respects in which the Administration's proposal goes beyond any of the precedents cited in its support. The crucial question is whether, in so doing, it goes beyond what the Constitution allows.

THE DUE PROCESS CHALLENGE

Any assessment of the constitutional validity of pretrial detention that is designed to prevent anticipated crimes must confront the due process challenge to such confinement. Since the Petition of Right of 1628,[32] it has been clear that the promise of the Magna Charta "that no man . . . shall be . . . taken nor imprisoned . . . without being brought in answer by due process of law." [33] applies to imprisonment before, as well as after conviction.[34]

Application of the Attorney General's test

Even under the Attorney General's conception of due process as no more than a mandate for reasonable compromise, it is difficult to regard the proposed legislation as a serious effort to balance the interests of the accused with the claims of society. Mr. Mitchell concedes that due process requires "value judgments . . . concerning the degree of harm to be anticipated from particular categories of defendants." [35] Surely he is correct—yet the President's proposal says absolutely nothing about the sort of harm the defendant must be found likely to commit before he can be imprisoned pending trial. Once it is predicted that "on condition or combination of conditions of release will reasonably assure the safety of any other person or the community," [36] confinement is authorized so long as the accused falls into any detainable category. Under this standard, the fear of political disruptions [37] or of trivial property offenses may be deemed sufficiently threatening to warrant preventive imprisonment. No tenable concept of due process could condone a balance that gives so little weight to the accused's interest in pretrial liberty.

Moreover, even the Attorney General's notion of due process as the embodiment of enlightened compromise concedes the critical importance of minimizing "the chance that an innocent defendant who is not dangerous will be detained." [38] Yet the proposed legislation's safeguards of reliability are more illusory than real.[39] Although the proposal purports to reduce the risk of preventive detention based on a groundless accusation by providing that the judge must first find "a substantial probability that the person committed the offense [charged]," [40] it imposes no such requirement when the accused is claimed to have attempted to threaten, injure, or intimidate any prospective witness or juror.[41] In no case would the proposal require that an indictment be returned prior to the decision to detain, or that the judge find conviction to be likely. Particularly in light of the long tradition of judicial deference to prosecutorial discretion at the charging stage, requiring a judicial finding of a "substantial probability" of guilt is unlikely to provide any real protection for the individual who finds himself unjustly accused. Indeed, such a finding might well be detrimental to him, for it would induce the public to perceive his pretrial incarceration as "beginning what is in substance a mandate of punishment." [42]

Even if a defendant is certain to be convicted, this certainty does not imply ipso facto that he is likely to constitute a danger to the community if released. In obvious recognition of the inability to predict with even the slightest confidence which defendants would pose such a threat, the Administration's proposal does not attempt to deal with every defendant, but focuses instead on selected categories of defendants considered especially high risks because of their prior records or present charges. Of course, there would be a tendency to resolve doubts within these categories in favor of detention, in part because judges could thereby make fewer demonstrable mistakes, and in part because it would be extraordinarily difficult to make predictive distinctions among persons with similar records and charges. Indeed, it has been noted that "nothing in the D.C. statistics or any others now available indicate [*sic*] that those defendants who did commit crimes while released were distinguishable beforehand from other defendants who had similar records and charges but who did not commit crimes while released." [43] Nor does an examination of the categories created by the proposed legislation yield much basis for confidence.

The President's proposal would make it possible to detain any person charged with "a crime of violence" who is a narcotics addict,[44] or who is alleged to have committed his offense while he "was, with respect to another crime of violence, on bail or other relase," [45] or who "has been convicted of a crime of violence within the ten-year period immediately preceding the alleged crime of violence for which he is presently charged." [46]

But the proposed law fails to require any finding concerning the strength of the evidence on the prior charge in the case of an offense alleged to have been committed while on bail, and it includes as "crimes of violence" such offenses as "attempting to take immoral, improper, or indecent liberties" with a person under sixteen, all attempted robberies, and "assault with intent to commit any offense." [47] Thus, a person convicted of indecent exposure in 1960 and charged with purse-snatching in 1970 is among the President's "hard-core recidivists."

And the proposal is not limited to recidivists alone. It also provides that a defendant never before charged or convicted of any offense may be detained if the present charge is for a "dangerous crime," [48] a category including such offenses as "attempting to take property from another by . . . threat of force," "unlawfully . . . attempting to enter any [dwelling or place of business] with the intent to commit an offense therein," "attempting to take immoral, improper, or indecent liberties" with a person under sixteen, and unlawfully selling "a narcotic or depressant or stimulant drug." [49]

Those who wonder why a first offender in such cases should be deemed particularly threatening are assured by Mr. Mitchell that the lack of a criminal record in these categories probably signifies that the accused managed to elude apprehension during his earlier ventures into crime.[50] One is reminded of General DeWitt's remarkable argument that the subversive threat posed by Ameri-

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cans of Japanese descent on the West Coast after Pearl Harbor was confirmed by the sinister absence of any overtly subversive activities in that area.[51] One might also recall the King's reply to the Knave in *Wonderland* who, denying that he had written a certain document, pointed to the absence of any "name signed at the end." "If you didn't sign it," the King answered, "that only makes the matter worse. You *must* have meant some mischief, or else you'd have signed your name like an honest man."[52] Any detention scheme spun on this sort of logic reflects less than a responsible concern for minimizing the incidence of erroneous imprisonment.

Finally, the proposed legislation fails to satisfy the last criterion that the Attorney General concedes is implicit in due process: It does not "minimize, as far as practicable, the burdens of pretrial detention."[53] Those burdens not only include deprivation of liberty, but they also encompass the diminished ability to prepare one's defense, the public stigma of having been found too dangerous to release (a stigma that could itself prejudice subsequent proceedings) and, more often than not, severe economic hardships for the accused and his family.[54] Although the proposal allows private consultation between the accused and his counsel[55] and permits the temporary release of the accused to prepare his defense, it does so only "for good cause shown" and "in the custody of . . . [an] appropriate person."[56] These limitations could easily be applied to frustrate the defendant's ability to seek out witnesses unhampered by the presence of a conspicuous federal agent and unconditioned by the required disclosure of defense strategy.

The proposal suggests that persons preventively detained might be confined "in facilities separate from convicted persons," but it does not guarantee such treatment and simply indicates that separate facilities will be employed "to the extent practicable."[57] And, although an existing statute allows defendants to credit their period of pretrial detention towards service of their sentences if they are convicted,[58] the proposed act does not provide for the compensation of unjustly detained defendants who are ultimately acquitted. If the Government were truly concerned with striking a fair balance between costs to the accused and benefits to the community, one would expect at least some recognition of the need to pay for an erroneous deprivation of liberty, not only to redress the wrong done, but also to discourage excessive use of the preventive scheme.[59]

In sum, even the Attorney General's utilitarian concept of due process demands significantly more than the President's legislation provides—more care to tailor the instances of preventive confinement to the specific kinds of danger anticipated, more assurance that neither innocent nor harmless persons will be detained, and more effort to mitigate the burdens of imprisonment for those who are eventually acquitted as well as those who, are ultimately convicted.

Suppose, then, that after appropriate study and experimentation the proposed legislation were markedly improved in these deficient areas. The Administration might then contend that it had finally struck a constitutionally acceptable balance between the personal costs and social benefits of its proposal. At that juncture, it would be necessary to ask a more fundamental question: Does due process permit the *kind* of balancing on which event a greatly improved system of pretrial preventive detention would have to rest?

Analysis of the Attorney General's view of due process

The Attorney General's affirmative reply to the question just posed is premised on the view that, considering the nature of the harms prevented and the extent of the hardship inflicted, due process requires only an acceptably low ratio of erroneous to correct confinements. At first, this position may not seem controversial. Indeed, scholars sensitive to questions of personal liberty have taken a similar approach in assessing the justifiability of preventive detention. For example, Professor Alan Dershowitz recently framed the issue in terms of "how many defendants we should be willing to confine erroneously in order to prevent how many acts of violence."[60]

Implicit in this formulation, however, is the assumption that the answer will be something more than zero. After all, Mr. Mitchell argues, "due process of law requires fundamental fairness, not perfect accuracy."[61] And Professor Dershowitz points out that even when "we establish rules for convicting the guilty, we do not require certainty; we only require that guilt be proved 'beyond a reasonable doubt.'"[62] This may suggest that society is "willing to tolerate the conviction of some innocent suspects in order to assure the confinement of a vastly larger number of guilty criminals."[63] The obvious corollary is that society should be willing to tolerate the preventive imprisonment of some innocent individuals in order to avoid the occurrence of an appropriately larger number of violent offenses.

But in precisely what sense does our society willingly tolerate the conviction of innocent individuals in order to confine the guilty? When we say "better that ten (or a hundred) guilty men go free than that one innocent man be condemned," do we thereby suggest that we would countenance the deliberate conviction of one innocent man to prevent the erroneous acquittal of twenty (or two hundred) guilty ones? Surely these celebrated formulas[64] do not mean that society may knowingly sacrifice innocent men so long as the terms of the trade are sufficiently favorable to the community as a whole. These aphorisms speak in the language of ratios, but we mistake their significance if we understand them to deny the fundamental postulate that deliberately to punish a man of whose guilt we feel unsure is wrong. Whatever the resulting social gain, such action is morally and constitutionally reprehensible. Given a system known to contain imperfections, there is a qualitative difference between the outcome of erroneously convicting a man when the trier has been fully convinced of his guilt and the outcome of erroneously convicting a man when the trier has reason to believe that he may be innocent. In the first of these situations, the trier is not called upon to make an explicit decision to risk morally condemning and punishing an innocent man. In the second situation such a decision is required, it cannot be made without greatly undermining society's commitment to the dignity of the individual as an end in himself.[65]

Thus one cannot adequately describe the characteristics of a criminal process by comparing its frequency of erroneous imprisonments to its frequency of erroneous releases. Indeed, of several possible systems of criminal justice, the one that yields the fewest erroneous confinements might still be the most unjust: if its errors were to reflect deliberate decisions to ignore doubts as to guilt, the system would be no more tolerable than if those errors reflect a systematic bias against racial or political minorities. The final balance sheet obviously matters, but the *process* by which it is achieved matters more. Indeed, the very enterprise of formulating a tolerable ratio of false convictions to false acquittals puts an explicit price on an innocent man's liberty and defeats the concept of a human person as an entity with claims that cannot be extinguished, however great the payoff to society.[66]

This argument does not imply that we do or should insist on absolute certainty; we properly instruct juries to convict if they believe that guilt has been established "beyond a reasonable doubt" rather than "beyond all doubt." We do so, however, only because total certainty is incompatible with the human condition, and we do not wish to immobilize the system by demanding the impossible.[67] Thus, guilt beyond a reasonable doubt represents not a lawyer's fumbling substitute for a specific percentage, but a standard that seeks to come as close to certainty as human knowledge allows—one that refuses to take a deliberate risk of punishing any innocent man.

The first time it was squarely confronted with the issue,[68] the Supreme Court explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[69] The Court reached this conclusion in a juvenile case that resembled preventive detention in that the state had denominated the proceeding civil rather than criminal and had not conceived its design as inflicting punishment. The Court insisted that, these factors notwithstanding, "a society that values the good name and freedom of every individual should not condemn a man for commisison of a crime when there is reasonable doubt about his guilt."[70] The Court found it critical that people not be left "in doubt whether innocent men are being condemned," in part because such doubt would dilute "the moral force of the criminal law" and in part because it would impair the confidence of "every individual going about his ordinary affairs . . . that his government cannot adjudge him . . . a criminal . . . without convincing a proper factfinder of his guilt with utmost certainty."[71] The Court evidently recognized that it would be incompative with these purposes to treat the reasonable doubt standard as a mere probabilistic device to assure a sufficiently low frequency of erroneous convictions, for it expressly rejected any concept of reasonable doubt that would call for an "abstract weighing of the evidence"[72] without regard to its effect in bringing the trier of fact to a "subjective state of certitude on the facts in issue."[73] If due process stood for less than this demand for "moral certainty,"[74] there would be no stopping point to the principle of sacrificing innocent individuals and the basic security conferred by a system that promises never to punish in the face of real doubt would be irreparably eroded.

Yet the President's proposal, however carefully administered and imaginatively refined, would inevitably imprison a significant number of innocent individuals who would, if released before trial, have been completely harmless. Indeed, in *every* case, a substantial risk of erroneous condemnation would be inescapably clear to those with authority to confine the accused. Their only uncertainty would be precisely how often this risk would result in mistaken punishment. Part of the uncertainty would be resolved by the system's operation; society would witness the ultimate acquittals of men who had been wrongly imprisoned for weeks or months before they could finally establish their innocence at trial. A significant part of the uncertainty would remain unresolved, however, for no one could ever feel wholly satisfied that even those detained men who were eventually convicted had not been imprisoned before trial on the basis of erroneous predictions of futurecriminality. A dip in the crime rate cannot justify such calculated and obvious injustice. To institute a scheme that condemns and incarcerates unconvicted defendants in order to prevent unspecified crimes, in the face of what will inevitably be a grave doubt *in each case*, is to approve the proposition that deliberately risking the punish-

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ment of some individuals who have committed no offense, and would commit none even if released, is an acceptable means to the end of reducing crime. Due process of law should not tolerate that compromise.

Individualized criminality

Apart from the statute's calculated sacrifice of innocent individuals, the factual determinations involved in pretrial detention raise other preplexing questions under the due process clause. These determinations at first appear to treat the suspect more as a member of a class than as a unique person. To be detained, the accused must be found representative of a particularly recidivous category, inevitably defined in such terms as prior record, present charge, economic status or educational level. As Professor Ronald Dworkin has stated: "The prediction . . . must be actuarial, like the prediction an insurance company makes about the likelihood of teenagers to have automobile accidents." [75] Professor Dworkin's conclusion is that pretrial preventive detention is necessarily unjust; it is wrong "to put someone in jail on the basis of a judgment about a class, however accurate, because that denies his claim to respect and treatment as an individual." [76]

At first, this position appears to be an attractive one, deeply consonant with the values of personal dignity and individual worth. On closer analysis, however, it becomes clear that Professor Dworkin's argument is untenable in the form stated here, for the peculiar and paradoxical vice of preventive detention is that it treats the suspect too *much* as an individual, and not *enough* as a member of a class.

The broad principle that it is wrong to treat persons collectively rather than as unique individuals cannot be maintained. No legal system could function without often disregarding individual distinctions; no injustice inheres in treating a person in some contexts as a nonresident, in others as a teenage driver, in still others as a male employee, disregarding in each instance all those personal characteristics which are reasonably deemed irrelevant to the law's purpose. Even in the criminal law, with moral condemnation at stake, we almost always treat people as members of groups, deliberately disregarding many, if not most, of their unique characteristics as individuals. We decide, for example, that most persons who attempt robbery unsuccessfully are so likely to pose a continued threat that all persons in this category should be regarded as criminals,[77] although some undoubtedly would pose no threat at all. We decide that so many of the persons who possess burglar's tools are likely to make antisocial use of them that possession itself should be a crime,[78] although we thereby treat the well-meaning possessor as a member of a class whose features he does not wholly share. And we adopt laws that penalize repeaters more heavily than first offenders [79] on the basis of certain assumptions about the characteristics of recidivists as a class, assumptions that might prove false as applied to particular individuals.

Some will protest that, when we find a man guilty of a crime, we at least make an additional "judgment entirely about what [that] particular person did," [80] a judgment different in kind from the preliminary legislative conclusion about the class of people who engage in the proscribed category of conduct. But this final judgment typically represents little more than an effort to determine whether the facts make the person charged a member of the class punishable by law—something the Administration's proposal does as well.[81]

Additionally, we often base sentencing judgments on information about how the class of people who share the defendant's prior record and general background are likely to behave. But sentencing is instructive for another reason, for the decision of how to treat a person already convicted of a criminal offense is one that we frequently attempt to personalize by taking into account all we know about the individual.[82] Yet one must not conclude too quickly that such attempts reflect a general ideal of personalized treatment. There is a world of difference between making the *punishment* fit the criminal in this way and making the *crime* fit the criminal by fully personalizing the grounds on which we decide whether to regard a man as an offender in the first instance.

Nevertheless, Professor Dworkin is right when he says that a criminal conviction traditionally entails "a judgment entirely about what a particular person did." [83] Stressing the word "did" rather than the word "particular" reveals the heart of a major objection to preventive justice of the sort advocated by the President and Mr. Mitchell. Because imprisonment on grounds of dangerousness is predicated on a finding about the sort of person the defendant *is* rather than a finding about the sort of thing he has *done*, it has all the vices inherent in a law that makes the crime fit the criminal—a law that is too personal in application to meet the fundamental requirement that punishment may be inflicted only if it has been made clear in advance precisely what one must do to trigger its imposition and precisely how one can avoid doing so.

Problems of proof

To every man, the suggested system of preventive detention makes this threat: Even if you have never before been charged or convicted of any offense, you may be jailed for sixty days [84] as a criminal menace to public safety simply because a judge finds a "substantial probability" [85] that you have committed any of nine "dangerous crimes" [86] and finds that "no . . . conditions of release will reasonably assure the safety of any other person or the community." [87] If at the end of sixty days you are not ready to present your defense, your confinement will last as long as you find it necessary to delay your trial.[88] If you are tried and acquitted, you may be subject to the same process again on a new charge.[89] And if you have been convicted of any of fifteen "crimes of violence" at any time in the past decade, your liability to such incarceration becomes broader still.[90]

The real vice of the accusation of dangerousness underlying this proposed statutory scheme is not that it looks to the future but that its content is so amorphous. Imagine again the impact on the accused. He is told: There is a substantial probability that you have committed a crime and that your release would endanger the community in some unspecified way. We know you can control your behavior, for we are about to try you as a criminal, but we do not trust you to refrain from crime. How could the accused possibly respond? Would he not feel, with Kafka's bewildered hero in *The Trial*, that the completion of a responsive "plea was a sheer impossibility?" [91] For the accused to meet this open-ended and ultimately personalized sort of "accusation . . . the whole of [his] life would have to be recalled to mind, down to the smallest actions and accidents, clearly formulated and examined from every angle." [92]

Mr. Mitchell contends that "[t]he burden of proof of dangerousness would, of course, rest upon the Government." [93] The proposed statute, however, says no such thing, and even if it did the words would be meaningless. Once the Government shows that the accused may well be guilty of the pending charge and has previously been charged with a similar crime, it has made a plausible case for suspecting possible danger. The burden will, for all practical purposes, shift to the accused, who will be able to offer nothing more than general assurances of his own good intentions. If those assurances are believed and the accused released, the manner is forgotten unless he is implicated in a future crime. But if the accusation of dangerousness is accepted and the accused detained, he can never fully establish that it would in fact have been safe to release him, even if he is later acquitted. Any law that places defendants in so hopeless a procedural posture while holding out the promise that they can somehow win their freedom seems inconsistent with due process.

Punishment of status

The consequences of the proposed law outside the courtroom raise even more fundamental objections. The proposed statute would undercut each man's control over his own fate and substitute the oppressive control of discretionary authority, for every man would have cause to fear that he might be labeled a likely criminal and imprisoned for at least two months for reasons ultimately beyond his control. Although one who is willing to obey society's commands can so order his life as to be virtually certain that he will never be found guilty beyond a reasonabe doubt of any specific criminal act, a man cannot possibly achieve the same measure of assurance that no judge will ever find a "substantial probability" that he has committed an offense, and no man can so pattern his conduct as to feel secure that he will never be thought to pose a danger to "any other person or the community."

If the proposed statute required clear and convincing evidence that the potential detainee would commit a specific crime involving a specified victim, accusations under it would be easier to meet, and its impact on primary conduct would be less oppressive. Presumably such evidence would have to include repeated attempts or explicit threats; most men can conduct their lives so as to prevent such evidence from arising.[94] But cases in which the likely commission of a specified crime can be demonstrated are rare in the extreme and represent a miniscule fraction of the situations to which the Administration's proposal would apply. Typically, the only charge would be that the defendant seems to have committed a crime and is probably too dangerous to release.

A world in which any man, through his own misstep or another's malice, could find himself entangled in a degrading trial and ultimately imprisoned as a criminal would be intolerable. For precisely that reason, we insist upon limiting the criminal law to enforceable rules about the specific conduct in which men may or may not engage rather that confining all persons with criminal propensities before their deeds are done.[95] The Administration's proposal departs from this tradition by permitting punishment to be triggered by circumstances other than convincing proof of conduct whose criminal consequences the actor could have known.

In a variety of settings, the Supreme Court has found constitutional infirmities in laws sharing this basic vice. In *Robinson v. California*,[96] for example, the Court held it cruel and unusual punishment violative of the eighth amendment and the due process clause of the fourteenth amendment for a state to make it a crime to be a narcotics addict. The majority opinion discussed the inhumanity of treating the sick as criminals,[97] but the soundest explanation of the result is the proposition that "the criminal law ought to be presented to the citizen in such a form that he can mold his conduct by it, that he can, in short, obey it." [98] Due process forbids punishment that one has no assured way to avoid.

In *Lanzetta v. New Jersey*,[99] the Supreme Court overturned a law condemning as a criminal "[a]ny person not engaged in any

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lawful occupation, known to be a member of any gang consisting of two or more persons, who have been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State." [100] Noting that "[a]ll are entitled to be informed as to what the State commands or forbids," [101] and that the challenged provision condemned no clearly defined act or omission, the Court concluded that conviction under the law could not be squared with the due process clause.[102] Again, the principle underlying the result is that a man should be condemned only for specific actions the criminal consequences of which he could have predicted.

It is important to recall that the proposed system of pretrial preventive detention would inflict punishment rather than merely impose a restraint, for it would imprison persons on the basis of a finding that, if given the opportunity, they would make a morally culpable choice to commit a crime.[103] Because the system would inflict such punishment on persons who could not have avoided it by conforming their conduct to laws clearly promulgated in advance, that system would deprive defendants of liberty without due process of law.

EIGHTH AMENDMENT

The preceding arguments need not invalidate the Government's right to detain a defendant on the basis of persuasive reasons to believe that, if released, he would frustrate the proceedings against him by fleeing, destroying evidence or intimidating witnesses or jurors. So long as the Government's fears relate to a particular anticipated event and are based upon highly specific evidence, a prediction of such activities would be analogous to a highly particularized claim that the defendant threatens to commit a specific crime.[104] However, courts have long inferred at least the risk of flight from evidence substantially less specific than is contemplated here,[105] and the question arises whether their having done so can be squared with the due process argument of the preceding section.

To some extent, the detention of a person as likely to flee or otherwise interfere with the proceedings against him entails far less a moral condemnation than a recognition of human frailty. Several years ago the Supreme Court employed an analogous rationale to distinguish a law prohibiting Communists from holding union office from conflict-of-interest statutes, reasoning that the latter, insofar as they expressed condemnation of anyone, condemned all men.[106] If this argument were truly persuasive, it might be used to justify detention to prevent flight or interference on the theory that such detention resembles civil commitment more than criminal punishment. By making bail-jumping or witness-intimidation a crime, however, we express the ultimate judgment that the accused is to be blamed if he chooses to frustrate the government's efforts to prosecute him. To that extent, the practice of pretrial detention to prevent flight or other interference in the absence of highly particularized evidence appears in conflict with the principles so far explored.

A partial reconcilation may be possible if one looks beyond due process to the one constitutional provision explicitly concerned with the problem of pretrial liberty—the excessive bail clause of the eighth amendment. [107] Operating in part to qualify and in part to amplify the general demands of due process, the constitutional prohibition against excessive bail points the way to a rounded doctrine of permissible and forbidden restraints between arrest and trial.

The eighth amendment's reference to bail implies a constitutional recognition of the Government's special interest in securing the presence of the accused at trial.[108] That interest has always been thought to justify the denial of bail in capital cases on the theory that persons on trial for their lives are under such pressure to flee that no further evidence of their likelihood to do so is necessary.[109] To the extent that the excessive bail clause imported this historic assumption into the eighth amendment, persons charged with capital offenses may be entitled to a less particularized showing of probable flight than other defendants may claim as a matter of due process.

For purposes of this Article, however, the central problem is expressed by the converse question: To what extent, if at all, does the excessive bail clause impose limits *beyond* those of due process on the exercise of governmental authority to detain non-capital defendants in order to prevent crimes between arrest and trial? The language of the eighth amendment is not particularly informative in this regard. The relevant part provides simply that "excessive bail shall not be required." Furthermore, the history of its adoption is not in the least illuminating. We know only that one Congressman found the proposed text curiously opaque: "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? [110] Beyond these forty-nine words, the proceedings of the First Congress record no discussion of the excessive bail clause. The same Congress enacted a statutory right to bail in non-capital cases,[111] but again no debate is recorded in either chamber.

The statutory right to bail and the constitutional prohibition against excessiveness seem to represent the culmination of two distinct lines of evolution. The statutory right may be traced through the Northwest Ordinance of 1787 [112] to the Massachusetts Body of Liberties of 1641; [113] the constitutional prohibition is traceable through the Virginia Declaration of Rights of 1776 [114] to the English Bill of Rights of 1689.[115] Why these two strands of history failed to converge in the First Congress remains something of a mystery.[116]

Given the murkiness of the constitutional text and its origins, it is not surprising that several distinct interpretations of the provision should have evolved. One view has been that the prohibition against excessive bail implies an underlying right to be admitted to bail in all cases, or at least all non-capital cases.[117] The principal competing view has been that the prohibition simply limits judicial abuse of the power to set bail in those cases where Congress has authorized that it be set.[118] Mr. Mitchell argues that "[w]hile the first of these two interpretations would prohibit pretrial detention of criminal defendants, the second would not." [119] But there remains a third possibility, more plausible than either of these. Before that possibility can be explored,[120] it is necessary to look more closely at Mr. Mitchell's argument.

Noting that persons charged with a wide variety of offenses were not entitled to release on bail under applicable state or federal laws when the eighth amendment was adopted, the Attorney General properly concludes that the excessive bail clause cannot be read to imply an absolute right to pretrial release for all defendants.[121] This conclusion implies only that some governmental interests may justify the denial of pretrial liberty, and leaves open the question of which interests have this character. It is plainly a *non sequitur* to conclude, as does the Attorney General,[122] that the excessive bail clause leaves Congress entirely free to establish the circumstances under which pretrial release may be withheld. Under Mr. Mitchell's view, the excessive bail clause may be invoked by a defendant whose pretrial detention Congress has forbidden, and who claims that a judge is thwarting Congress' will by detaining him, but not by one whose pretrial detention Congress has required, and who claims that Congress has no valid reason to deprive him of his liberty. It makes functional sense to give the clause this meaning, for the interests at stake, both the government's and the individual's, are identical whether a legislature or a court has made the basic decision resulting in the defendant's pretrial imprisonment. Moreover, this reading would render the excessive bail clause superfluous, since the due process clause standing alone would forbid the judicial imprisonment of a man specifically entitled to release under the congressional "law of the land." Furthermore, although an unlimited legislative power to define the boundaries of the citizen's rights may be consistent enough with the English theory of civil liberties,[123] in which Parliament is the ultimate authority, such power would be totally inconsistent with a Bill of Rights concerned almost exclusively with curtailing the powers of Congress. Finally, the other clauses of the eighth amendment, those prohibiting cruel and unusual punishments and excessive fines, have traditionally been construed as limitations on legislative abuse.[124] In the absence of any historical or functional reason to construe it otherwise, the excessive bail clause should be interpreted to limit the circumstances in which pretrial liberty may be denied, by whatever branch of government.

Such an interpretation permits one to focus immediately upon what must, under any view of the clause, be the central inquiry: Precisely what limits should the excessive bail clause impose on governmental power to incarcerate a man between arrest and trial? To answer that question, the Attorney General turns to English and colonial history, observes that persons charged with certain felonies were not admitted to release on bail at the end of the eighteenth century,[125] asserts without proof that the non-bailable offenses were "those which posed a substantial danger of injury or death to others," [126] and concludes that "anticipated danger to other persons or the community was a substantial motivating factor in legislative decisions to make bail unavailable to certain classes of dangerous offenders." [127] Just as the Attorney General's parallel argument with respect to capital offenses proved to be lacking in historical support,[128] the view here quoted finds support neither in the historical materials cited by the Attorney General nor in any others thus far examined.

The most comprehensive compilation of the statutory and case law on the English bail system in the late eighteenth century nowhere suggests that fear of danger to the community before trial motivated the distinctions typically made between bailable and non-bailable offenses.[129] On the contrary, the underlying assumption seems to have been that certain classes of offenders, particularly those whose lives were at stake, ought to be detained simply to assure their presence at trial.[130] Pretrial release was more readily denied during this periods in cases of particularly heinous crimes,[131] but the reason, apart from the fact that such offenses carried heavier penalties and therefore involved a greater temptation to flee, was the fear that persons guilty of especially atrocious offenses might well be killed before they could appear for trial.[132]

Nor do the more ancient origins of the bill system support the hypothesis that pretrial detention was employed to protect the community from repeated crimes. The institution of requiring financial security of criminal defendants awaiting trial derives in part from

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a system of private contractual arrangements designed to assure that the victim's relatives would receive payment (wergeld),[133] and in part from a network of collective agreements whereby members of a community undertook to arrest any of their number who broke the law (frankpledge) and to secure the presence of such violators at trial (bail surety).[134] Nothing in this older history indicates a concern to prevent lawbreakers from causing further harm, as distinct from the desire to asure that they be brought to justice. On the contrary, even offenders who could not be bailed by local authority could be, and often were, released by order of the King when it was thought that private sureties would be more likely than the frequently corrupt local sheriffs to produce the accused for trial.[135]

The absence of any explicit reference to the fear of pretrial misconduct between the 13th and 18th centuries can hardly reflect an oversight. A fourteenth century English statute,[136] absorbed into the common law of the colonies and now reflected in many state statutes,[137] authorized judges to require, of all persons whose past behavior gave just reason to fear future misconduct, a secured pledge (peace bond) that they would behave lawfully. If the pledge was broken, the bond would be forfeited to the King, and if the required security was provided, the person could not be imprisoned. Given the availability of this explicit method of deterring misconduct, the conspicuous absence of any similar concern in the contemporaneous materials dealing with pretrial detention can only be taken to reflect an assumption that no special measures to prevent crime were thought warranted by the mere pendency of a criminal charge.

The history of bail therefore suggests that, for a substantial period lasting at least until the adoption of the excessive bail clause, the only legitimate function of pretrial incarceration was to provide assurance that the accused could be prosecuted and, if guilty, sentenced. But our incomplete knowledge of the social and legal history of bail, coupled with our ignorance of the expectations of those who wrote the eighth amendment, would make exceedingly hazardous any attempt to deduce from history the appropriate scope of the right conferred by the excessive bail clause.

An examination of the contemporary purposes of the clause would prove more fruitful. The Supreme Court has explored those purposes only one, in *Stack v. Boyle*.[138] The twelve petitioners in that case had been charged with conspiring to violate the Smith Act. Bail had been fixed at $50,000 for each, and they were detained pending trial because they could not raise that amount. Holding that the bail fixed by the district court was excessive under the eighth amendment,[139] the Court began its analysis by noting that the "traditional rights to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[140] The Court added that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[141] Although the "right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty," bail "set at a figure higher than an amount reasonably calculated to fulfill this purpose its 'excessive' under the Eighth Amendment."[142] Because there was not showing that amounts less than $50,000 could not have assured the presence of each accused at trial, the Court remanded the case for a new bail determination proceeding.[143]

Oddly enough, the Attorney General fails even to discuss the holding of *Stack v. Boyle* in his review of the excessive bail clause.[144] Instead he dwells at length on a dictum in *Carlson v. Landon*[145] to the effect that the "Eighth Amendment has not prevented Congress from defining the classes of cases in which bail should be allowed," since the English Bill of Rights Act, from which the eighth amendment provision was adopted, was never thought to provide a right to bail in all cases, but merely to provide "that bail shall not be excessive in those cases where it is proper to grant bail."[146] The word "proper" is sufficiently ambiguous to beg the question involved here, and the bare majority in *Carlson*, in upholding the denial of bail to prevent sabotage by alien Communists pending deportation, indicated that it did not even regard the eighth amendment as clearly applicable to civil proceedings of the sort there involved.[147] Given the majority's emphasis, however misguided, on Congress' special power over resident aliens in cases touching the national security,[148] the opinion's brief remarks cannot be said to determine the reach of the excessive bail clause in criminal cases. Moreover, as Professor Caleb Foote has shown, the majority clearly misunderstood the historical material to which it referred.[149] In any event, a decision denying the claims of Communists during the heyday of the McCarthy era is unlikely to give rise to enduring constitutional doctrine.

In sharp contrast to his extended discussion of *Carlson*, the Attorney General refers to *Stack* only in connection with his mention of the presumption of innocence, dismissing the Court's reliance on that presumption in Stack as "dictum."[150] In Mr. Mitchell's view, that presumption simply has no application to pretrial proceedings; if it did, he reasons, the practices of arrest, presentment and pretrial detention for those found likely to flee, intimidate witnesses or jurors, or otherwise interfere with the trial, would be impermissible.[151] This argument completely ignores the basic rationale underlying the decision in *Stack*. To secure the public interest in preventing certain forms of conduct, we have established a system of sanctions calculated to deter outlawed behavior. That system cannot function at all if the threatened sanctions are not effectively imposed, and various restraints on liberty, from arrest to detention, may at times be needed to provide assurance that a reliable trial can be held. Moreover, society may justly demand this assurance even if the defendant is innocent. Apart from the restraints needed to provide this basic assurance, however, a person awaiting trial has as great a right to liberty as any other citizen.[152]

Viewed in this perspective, the presumption of innocence of which the Supreme Court spoke in *Stack v. Boyle* represents far more than a rule of evidence. It represents a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community. Only those deprivations necessary to assure the progress of the proceedings pending against him—deprivations which do not rest on any assumption of guilt—may be squared with this basic postulate of dignity and equality.[153] If a defendant is to be subjected to preventive restraints beyond those necessitated by the pendency of criminal proceedings, they must be restraints to which all citizens are subject. The defendant's special status as an accused must not be allowed to trigger imprisonment that is not needed to effectuate the government's interest in prosecuting him to determine his guilt or innocence.[154]

To this extent, the excessive bail clause imposes more severe restraints on pretrial imprisonment than those imposed by the due process clause alone. Although due process might well permit preventive detention to restrain dangerously ill individuals,[155] or to restrain persons from committing specific crimes in circumstances of reiterated threats or attempts,[156] the prohibition against excessive bail should prevent the state from similarly restraining individuals simply because they are awaiting trial on criminal charges.

Indeed, it is difficult to imagine any governmental interest unrelated to the integrity of pending proceedings that might justify singling out for special disabilities those persons charged with crime. It may be asserted that this group is more likely, as a class, to pose a threat of future criminal behavior. Certainly, however, there are persons not charged with any crime who give every indication of being at least as dangerous as anyone awaiting trial on a pending charge. If two men appear equally likely to commit a violent crime, it is arbitrary to imprison the man who is about to be tried for a past offense while imposing no restraint on the man who is not facing trial. Nor is it easy to explain why a man subjected to preventive confinement before trial should suddenly become immune to such detention upon acquittal. When a preventively detained defendant has been acquitted, either because critical evidence against him was ruled inadmissible, or because the jury failed to agree or found a reasonable doubt as to his guilt, the grounds on which he was imprisoned before trial ordinarily remain unchanged. There may still be a "substantial probability" that he committed the offense charged, and whatever reasons previously existed for thinking him likely to commit a further crime are as valid after trial as before. Yet such a defendant will be released under the Administration's proposal, as of course he must be,[157] because criminal charges are no longer pending against him. A system so organized simply makes no sense. The only bases for detention that can rationally be said to arise with a criminal charge and vanish with an acquittal are those directly related to the demands of judicial administration—a risk of flight, witness or jury intimidation, evidence destruction, or other interference with trial.[158]

There may be other valid reasons for preventive detention, such as convincing evidence that an individual is uncontrollably dangerous, or repeated attempts or threats to perform specific criminal acts. But the uncontrollably dangerous are by hypothesis undeterrable and should not be tried as criminals, whereas those who threaten specific crimes, either verbally or by repeated efforts, present a separate problem unrelated to the pendency of a criminal charge and not requiring the creation of sweeping governmental authority to detain for generalized dangerousness. Persons awaiting trial should not be immune to whatever lawful procedures may be devised to deal with individuals who clearly threaten specific crimes;[159] but to carve out a special form of imprisonment applicable only to the criminally accused and yet not demanded by the needs of holding a trial is to give the state a wholly unwarranted power over those it chooses to charge with crime, a power that the eighth amendment should be held to forbid.

CONCLUSION

The proposed bill violations the basic principle that an accusation of crime should not subject any man to imprisonment unless the government's need to prosecute him compels incarceration. The bill creates a regime in which no man can be assured that his conduct, however lawful, will protect him from the stigma of imprisonment as a probable criminal. Perplexed by the accusations this bill authorizes, a suspect can never fully prove them false. And whenever the sequel to a successful plea is a further crime, the pressure to expand the system mounts. At every stage of its growth, its calculated sacrifice of innocent defendants

Footnotes at end of article.

would be intolerable even if it could promise a significant reduction in crime. The great irony is that Attorney General Mitchell, "the enlightened compromiser in a pluralistic society,"[160] has offered us not even that. He has offered us instead a pound of detention for an ounce of cure.

FOOTNOTES

[1] 27 CONG. Q. WEEKLY REP. 238 (Feb. 7, 1969). The proposal passed the House of Representatives on March 19, 1970, 28 CONG. Q. WEEKLY REP. 847 (Mar. 27, 1970), as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, H.R. 16196, 91st Cong., 2d Sess. §§ 23–1321 to 1331 (1970). The text of the proposal appears in CONGRESSIONAL RECORD, vol. 115, pt. 14, p. 19261. The Senate's D.C. crime bill did not provide for preventive detention, *see* 28 CONG. Q. WEEKLY REP. 848, 849 (Mar. 27, 1970), and the bills are now before a conference committee, *see* Wash. Post, Apr. 13, 1970, at 1, col. 3. The Administration is also apparently interested in the proposal of Dr. Arnold Hutschnecker for the identification, compulsory "treatment" and preventive incarceration of children who evidence criminal tendencies. *See* TIME, Apr. 20, 1970, at 8.

[2] Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969) [hereinafter cited as Mitchell].

[3] Only 5.9% of all persons indicted in the United States District Court for the District of Columbia in 1968 allegedly committed an offense while on bail awaiting another charge. JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA, REPORT 19 (May 1969) [hereinafter cited as REPORT OF THE JUDICIAL COUNCIL COMMITTEE]. Less than 9.2% of all defendants released between arrest and trial through the D.C. Bail Project during the 2½ years of its operation were charged with committing offenses (including the most trivial) during the period of release. Of these charges, 35.4% had been dismissed, nolled, ignored by the grand jury or inadequately proven at trial as of July 1, 1966, leaving a conviction rate of under 6%. BAIL REFORM IN THE NATION'S CAPITAL: FINAL REPORT OF THE D.C. BAIL PROJECT 44 (1966). A study by the District of Columbia Crime Commission found that 7.5% of all persons released while awaiting trial on felony charges were arrested and held for grand jury action for other offenses allegedly committed prior to trial. PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 515 (1966), but only 4.5% of the defendants studied were arrested for crimes of actual or potential violence. *Id.* at 931.

The Attorney General attempts to paint a more serious picture with respect to a single offense by pointing out that "of 557 persons indicted for robbery in 1968 [in the District of Columbia], 70.1 percent of the persons released prior to trial were rearrested while on bail." Mitchell, *supra* note 2, at 1236. The Attorney General fails to note, however, that the report he cites contains, after the quoted figure, a footnote stating that five of its eleven authors found "little probative value in a figure which measures only rearrests without regard to conviction or acquittal. . . ." REPORT OF THE JUDICIAL COUNCIL COMMISSION, *supra*, at 20 n.2. Moreover, the Administration's proposal does not require any indictment as a prerequisite to preventive detention. Chief Judge Greene of the District of Columbia Court of General Sessions has cautioned that studies that compare (a) the number of persons arrested while on bail to (b) the number of persons originally indicted greatly inflate the relevant ratio, which is that between (a) the number arrested while on bail and (b) the total number *originally arrested. Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 42 (1969) (testimony of Chief Judge Harold H. Greene) [hereinafter cited as *1969 Hearings*]. Chief Judge Greene doubted that such a "study really shows anything much beyond what the author . . . was looking for." *Id.*

[4] All the figures cited in note 3, *supra*, could be reduced to less than half their present magnitude, if only the time lag between arrest and trial could be held to under 60 days, quite apart from the further reductions in pretrial crime that could be achieved by closer supervision and additional penalties. *See* REPORT OF THE JUDICAL COUNCIL COMMITTEE, *supra* note 3, at 23; *1969 Hearings, supra* note 3, at 22–23 (testimony of Judge George L. Hart, Jr.); McCarthy, *Practical Results of Bail Reform*, 29 FED. PROBATION 10, 12 (Sept. 1965); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1508 (1966).

[5] It is widely acknowledged that bail determinations are frequently influenced, however illegitimately, by an unarticulated desire to imprison particular defendants to prevent them from committing crimes before trial. *See, e.g.*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PRETRIAL RELEASE 6 (Tent. Draft, Mar. 1968) [hereinafter cited as ABA STANDARDS REPORT]; PROCEEDINGS OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 151 (April 1965); Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1083–43 (1954). People v. Melville, 6 CRIM. L. REP. 2442 (N.Y. County Crim. Ct., Mar. 11, 1970), is the only case to recognize preventive detention explicitly as a ground for denial of bail prior to trial. Bringing the *sub rosa* practice to the surface, the court declared that "bail may be denied for two reasons. First, where it is reasonable to assume that the defendant will flee the jurisdiction and avoid trial if admitted to bail. Secondly, if his release on bail poses a threat to the welfare and safety of the community."

Id. at 2443.

The *sub rosa* approach has generated much dissatisfaction, not least because it has enjoyed no conspicuous success in detaining the right individuals. *See, e.g., 1969 Hearings, supra* note 3, at 69–71 (testimony of Bruce D. Beaudin, Director, District of Columbia Bail Agency), comparing the pretrial conduct (pretrial offense rate of 8%) of the defendants released by a judge who gave great weight to the risk of crime in his release decisions, and therefore detained 51% of all defendants, with the pretrial conduct (pretrial offense rate of 9%) of the defendants released by a judge who regarded the risk of future crime as essentially immaterial, and therefore detained under 21% of all defendants.

[6] There is no basis for the assumption that bringing dangerousness to the surface as a criterion for pretrial detention would significantly improve the predictive performance of the judges administering the system. Although dangerousness has always been recognized as a legitimate basis for denying bail on appeal, *see, e.g.*, Carbo v. United States, 82 S. Ct. 662, 666 (Douglas, Circuit Justice, 1962) (dictum); Leigh v. United States, 82 S. Ct. 994, 996 (Warren, Circuit Justice, 1962) (dictum); Hansford v. United States, 353 F. 2d 858 (D.C. Cir. 1965); United States v. Wilson, 257 F. 2d 796 (2d Cir. 1958); 18 U.S.C. § 3148 (Supp. IV, 1969), the fact that the real reasons for detention pending appeal have been candidly exposed and subject to appellate review has not made judicial predictions of dangerousness after conviction any more accurate than such predictions before trial. On the contrary, it appears that judges release a significantly higher percentage of bad risks on appeal, where the recidivism rate for defendants on bail in the District of Columbia is roughly 15%, than they do before trial, where the rate is under 9%. *See 1969 Hearings, supra* note 3, at 81 (testimony of Senator Joseph D. Tydings). A similar phenomenon may be observed in the juvenile field, where a recidivism rate of 11% persists despite an openly recognized judicial authority to detain for dangerousness. *See 1969 Hearings, supra* note 3, at 131 (testimony of Mrs. Patricia M. Wald). Openness and candor may be desirable, but they will not turn judges into prophets.

[7] The apprehensions of these groups were hardly alleviated by the recent decision of District Judge Julius Hoffman to imprison the Chicago Seven pending appeal of their convictions for crossing state lines with intent to incite a riot. Explaining his denial of their motion for bail, Judge Hoffman reasoned that the defendants, if released, might continue the sorts of political activities for which they had been tried, and that the resulting "danger to . . . the community," 18 U.S.C. § 3148 (Supp. IV, 1969), warranted the denial of bail as they pursued their appeals, even though one of the major questions on appeal would be the constitutionality of punishing the very conduct at issue. *But see* Roth v. United States, 77 S. Ct. 17, 19 (Harlan, Circuit Justice, 1956) (when the constitutionality of a statute is at issue, the likelihood that a defendant might continue to violate it if released cannot be used to justify his imprisonment pending appeal); *cf.* Carbo v. United States, 82 St. Ct. 662, 667 (Douglas Circuit Justice, 1962) (dictum). The Seventh Circuit Court of Appeals later reversed Judge Hoffman's ruling, N.Y. Times, Mar. 1, 1970, at 1, col. 5, but the Justice Department's willingness to press Hoffman's position is difficult to ignore in any assessment of how the Administration might employ the power the proposed bill would confer.

[8] See text at notes 71, 95 *infra*.

[9] Mitchell, *supra* note 2, at 1235, 1237.

[10] L. CARROLL, THROUGH THE LOOKING GLASS 88 (Harper & Bros. ed. 1902).

[11] Mitchell, *supra* note 2, at 1232 (footnote omitted).

[12] Mitchell, *Wiretapping and Pretrial Detention—Balancing the Rights of the Individual with the Rights of Society*, 53 J. AM. JUD. SOC'Y 188 (1969).

[13] *Id.*

[14] Mitchell, *supra* note 2, at 1225–30, 1232–36, 1240–41.

[15] *Id.* at 1225, 1227, 1232, 1235–36, 1240.

[16] *See, e.g., 1969 Hearings, supra* note 3, at 86 (testimony of Senator Joseph D. Tydings); Address by Deputy Attorney General Richard G. Kleindienst, "The Case for Pretrial Detention," Mid-Winter Meeting of the American Trial Lawyer's Association, Freeport, Grand Bahama Island, Jan. 30, 1970, at 26; Address by Daniel J. Freed, then Acting Director of the United States Office of Criminal Justice, Institute on the Operation of Pretrial Release Projects, New York City, Oct. 14, 1965.

[17] Mitchell, *supra* note 2, at 1225; *cf.* People v. Melville, 6 CRIM. L. REP. 2442 (N.Y. County Crim. Ct., Mar. 11, 1970).

[18] The underlying motive for denying bail in the prescribed type of capital offenses is to assure the accused's presence at trial. In a choice between hazarding his life before a jury and forfeiting his or his sureties' property, the framers of the *Constitution* obviously reacted to man's undoubted urge to prefer the latter.

State v. Konigsberg, 33 N.J. 367, 373, 164 A.2d 740, 743 (1960).

[19] Mitchell, *supra* note 2, at 1229 (footnote omitted).

[20] Ch. 9, Stat. 112.

[21] Mitchell, *supra* note 2, at 1226 n.17.

[22] *Id.* at 1228–29 n.24.

[23] *Id.* at 1230.

[24] *Id.* at 1236.

[25] *Id.* at 1233–34, 1241.

[26] *See* P. BRIGGS & R. WIRT, PREDICTION, JUVENILE DELINQUENCY, RESEARCH AND

THEORY 170 (1965); S. GLUECK & E. GLUECK, PREDICTING DELINQUENCY AND CRIME (1959); Wirt & Briggs, *The Efficacy of Ten of the Gluecks' Predictors*, 50 J. CRIM. L.C. & P.S. 478 (1960). There is serious skepticism, however, about the ability to predict dangerousness, and sizable empirical data suggest the inadequacy of available techniques. *See* Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 77 (1968); Sawyer, *Measurement and Prediction, Clinical and Statistical*, 66 PSYCH. BULL. 178 (1966).

[27] Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 273 (1940).

[28] *Id.* See *In re* Williams, 157 F. Supp. 871, 876 (D.D.C.), *aff'd per curiam*, 252 F. 2d 629 (D.C. Cir. 1958), relied on by Goldstein & Katz, *Dangerousness and Mental Illness*, 70 YALE L.J. 225, 237–38 (1960), for the proposition that, as a matter of due process, only an individual's illness can justify a deprivation of liberty predicated on potential dangerousness.

[29] Chief Justice, then Judge, Burger, concurring in Blocker v. United States, 288 F. 2d 853, 865 (D.C. Cir. 1961), expressed the matter thusly:

"While philosophers, theologians, scientists and lawyers have debated for centuries whether such a thing as "free will" really exists, society and the law have no choice in the matter. We must proceed, until a firm alternative is available, on the scientifically unprovable assumption that human beings make choices in the regulation of their conduct and that they are influenced by society's standards as well as by personal standards."

[30] This Article describes the Administration's proposed treatment of detained defendants as "punishment," for it is the expression of community condemnation rather than any necessarily retributive purpose that characterizes a particular disability as punishment. As the Supreme Court said in striking down Congress' attempt to prohibit Communists from holding union office:

"It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."

United States v. Brown, 381 U.S. 437, 458 (1965). *See also* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

[31] A preventive purpose is evident in the substantive definitions of many offenses "so defined that their commission does not rest on proof of the occurrence of the evil that is the object of the law to prevent." MODEL PENAL CODE art. V, Comment 24 (Tent. Draft No. 10, 1960). A similar purpose is at work in criminal legislation penalizing recidivists more heavily than first offenders. *See* Note, *Court Treatment of General Recidivist Statutes*, 48 COLUM. L. REV. 238 (1948). And, as Blackstone put it, "[I]f we consider all . . . punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes than to expiate the past." 4 W. BLACKSTONE, COMMENTARIES *251–52.

[32] 3 Car. 1, c. 1.

[33] Confirmation of Magna Charta, 28 Edw. 3, c. 1 (1354).

[34] The Petition of Rights emerged from the Parliamentary debates that followed the decision in Darnel's Case, 3 How. St. Tr. 1 (1627) (the debates appear immediately following, *id.* at 59–234 (1628), where the King's Beach had denied pretrial release to five knights committed by command of Charles I. The judges had accepted the Attorney General's argument that only imprisonment pursuant to final prosecution must be by "due process of law" within the meaning of Magna Charta. The argument of Lord Coke prevailed in Parliament, however, and it was resolved that henceforth "no freeman in any such manner . . . [shall] be imprisoned or detained." *Id.* at 224, ¶X. Thus the period between arrest and trial, which the United States Supreme Court has long recognized as "perhaps the most critical period of the proceedings," Powell v. Alabama, 287 U.S. 45, 57 (1932), came within the purview of the Great Charter. Pretrial liberty could no longer be denied without "due process of law."

[35] Mitchell, *supra* note 2, at 1235.

[36] H.R. 16196, 91st Cong., 2d Sess. § 23–1322 (a) (1970).

[37] See note 7 *supra*.

[38] Mitchell, *supra* note 2, at 1239.

[39] Whether the procedures established by the proposed legislation are constitutionally deficient in other respects, *cf. In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605, 610 (1967), is beyond the scope of this Article.

[40] H.R. 16196, 91st Cong., 2d Sess. § 23–1322 (b) (2) (C) (1970).

[41] *Id.* § 23–1322(a) (3).

[42] United States v. Alston, 420 F.2d 176, 180 (D.C. Cir. 1969). See note 30 *supra*.

[43] ABA STANDARDS REPORT, supra note 5, at 68.

[44] H.R. 16196, 91st Cong., 2d Sess. § 23–1323 (1970).

[45] *Id.* § 23–1322(a) (2) (ii).

[46] *Id.* § 23–1322(a) (2) (i).

[47] *Id.* § 23–1331(4).

[48] *Id.* § 23–1322(a) (1).

[49] *Id.* § 23–1331(3).

[50] Mitchell, *supra* note 2, at 1236.

[51] J. DEWITT, FINAL REPORT, JAPANESE EVACUATION FROM THE WEST COAST, 1942, at 34 (1943, released 1944).

[52] L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 182 (MacMillan & Co. ed. 1866).

[53] Mitchell, *supra* note 2, at 1235.

[54] *See* ABA STANDARDS REPORT, *supra* note 5, at 2–3.

[55] H.R. 16196, 91st Cong., 2d Sess. § 13–1321 (h) (2) (1970).

[56] *Id.*

[57] *Id.* § 23–1321(h) (1).

[58] 18 U.S.C. (Supp. IV, 1969), *amending* 18 U.S.C. § 3568 (1964).

[59] *See generally Frankel, Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229, 256–67 (1968).

[60] Dershowitz, *Preventive Detention: Social Threat*, TRIAL, Dec.-Jan. 1969–70, at 22, 24. *See also 1969 Hearings, supra* note 3, at 174, referring to the "constitutional ratio" of erroneous to correct confinements.

[61] Mitchell, *supra* note 2, at 1242.

[62] Dershowitz, *supra* note 60, at 22.

[63] *Id.*

[64] Hale remarked that five guilty men should be acquitted before one innocent man is convicted. 2 M. HALE, PLEAS OF THE CROWN * 289 (1694). Blackstone raised the ratio to ten to one. 4 W. BLACKSTONE, COMMENTARIES * 358. Others have favored still higher ratios. *See generally* G. WILLIAMS, PROOF OF GUILT 186–90 (3d ed. 1963).

[65] The distinction between these two outcomes is in some ways related to a distinction that has received attention with respect to "the apparent anomoly that we are prepared to expand far greater resources in saving the lives of known persons in present peril [e.g., a few men trapped in a mine shaft], than we are prepared to devote to measures that will avert future dangers to persons perhaps unkown or not yet even in existence."

Fried, *The Value of Life*, 82 HARV. L. REV. 1415, 1416 (1969). In the setting of the criminal trial, the analagous proposition would be that we try harder to avoid the punishment of a particular innocent defendant in visible peril of imminent erroneous conviction than we do to avert future dangers to innocent persons generally, including prospective defendants as well as prospective victims of crime. Even if one accepts Professor Fried's conclusion that a preference for allocating life-saving resources to known persons in present peril can only be justified to the extent that it in fact maximizes total lives saved in the long run (discounting future lives as appropriate in light of increasing uncertainty), one must be wary of applying in the present context Professor Fried's rejection of the argument "that in showing some preference in the case of the person in immediate peril, we demonstrate the value we place on human life." *Id.* at 1425. *See* Calabresi, *Reflections on Medical Experimentation in Humans*, DAEDALUS 387 (Spring 1969); Schelling, *The Life You Save May Be Your Own*, in PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS 127-62 (S.B. Chase ed. 1968).

Professor Fried's view is that one cannot justify as symbolizing the concern for human life a strategy that does less than it might to maximize lives saved or spends more on human life than it is in fact worth in relation to other values. Fried, *supra*, at 1425. But at least in the context of a criminal trial, one can justify some such strategy. If a refusal to convict in the face of visible uncertainty subjects a few more innocent individuals to injury in the long run than would a more tough-minded attitude toward criminal trials, the great virtue of such a refusal is that it reinforces society's ability to resist the temptation to treat innocent individuals as ultimately expendible when the "total good" can be enhanced by their sacrifice—the sort of treatment that transgresses first principles of mutual respect and common humanity. And if a refusal to run a calculated risk of punishing an individual whose guilt seems in doubt costs society more than the liberty of innocent men is in fact "worth" in some objective sense, one cannot ignore the problem of the typical, imperceptive observer who will regard a visible decision to condemn in the face of such doubt as a lesson that the sacrifice of an innocent man is not so serious a matter, however clearly he may be told that a strategy of minimizing total injuries to the innocent is in fact being pursued.

[66] The misleading tendency to regard the concept of "guilt beyond a reasonable doubt" as an inarticulate effort to express an essentially mathematical measure of how many innocent men we are willing to convict, *see, eg.*, Finkelstein & Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489, 504 (1970); *see also* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 183 (1969), finds its most recent and sophisticated expression in several attempts to apply to the factfinding process the methods of an emerging field known as statistical decision theory. The most readable account of the basic theory is H. RAIFFA, DECISION ANALYSIS (1968).

Using decision theory, a number of legal scholars have tried to formulate a more rationale model of the criminal trial than the less formalized, more intuitive materials familiar to lawyers seem to have provided. They propose that a criminal trial can usefully be viewed as analagous to any process in which one must chose between two or more courses of action on the basis of a body of data which reduces, but does not wholly eliminate, the decision-maker's uncertainty about the "true state of the world," and about the consequences in that world of any chosen strategy of conduct. *See, e.g.*, Cullison, *Probability Analysis of Judicial Factfinding: A Preliminary Outline of the Subjective Approach*, 1969 TOLEDO L. REV. 538, 563–68; Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1066–83 (1968).

Building on this model, these scholars suggest that the rational trier would vote

to convict (or detain) rather than acquit (or release) whenever the "expected utility" of the former action would exceed the "expected utility" of the latter, much as a rational gambler would prefer the bet that would maximize his expected gains, taking into account his present position, his needs and his attitudes toward risk. Thus the trier would first decide how much he would like or dislike each of the four possible outcomes of the proceeding (convicting or acquitting a guilty man, convicting or acquitting an innocent man). After assigning quantitative "utilities" to each of these four outcomes, the trier would arrive at a measure of the regret he would feel at convicting an innocent man (the difference between the utility of acquitting him and the utility of convicting him) and the regret he would feel at acquitting a guilty man (the difference between the utility of convicting him and the utility of acquitting him). According to the proposed model, the trier would then convict if and only if he regarded the probability of the defendant's guilt (P) as sufficiently high that this probability, when multiplied by the trier regret at erroneous acquittal, would yield a product exceeding the corresponding probability of innocence (1–P) multiplied by the trier's regret at erroneous conviction.

If the utility of convicting a guilty man is designated U(C,G); the utility of convicting an innocent man, U(C,I); the utility of acquitting a guilty man, U(A,G); and the utility of acquitting an innocent man, U(A,I), then the decision-maker in this model would prefer conviction to acquittal if and only if P(U(C,G)—U(A,G)) exceeds (1–P)(U(A,I)—U(C,I)), which is the case if and only if P exceeds the quotient.

$$\frac{1}{\dfrac{U(C,G)-U(A,G)}{1+U(A,I)-U(C,I)}}.$$

The most glaring of the many difficulties with this model is its assumption that the decision-maker should have some fixed attitude toward an event like "convicting an innocent man" or "acquitting a guilty man," events that cannot be evaluated apart from the process that produces them. Furthermore, the model can be shown to posit the wrong decision-maker, to confuse ends with means, and to ignore a variety of crucial values. These and related problems will be explored in a more extensive essay by the author on the potentialities and dangers of mathematical methods and models in the trial process.

[67] *See generally* G. WILLIAMS, THE PROOF OF GUILT 154 (2d ed. 1958); Fridman, *Standards of Proof*, 33 CAN. B. REV. 665, 670–72 (1955); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 257–58, 264–68 (1944).

[68] *In re* Winship, 397 U.S. 358 (1970).

[69] *Id.* at 364.

[70] *Id.* at 363–64.

[71] *Id.* at 364.

[72] *Id.* at 368, *quoting* Dorsen & Rezneck, *In re Gault and the Future of the Criminal Law*, 1 FAMILY L.Q. No. 4, at 26–27 (1967).

[73] *Id.* at 366, *quoting* Dorsen & Rezneck, *supra* note 72, at 26. Although Mr. Justice Harlan's concurring opinion did stress the impossibility of ever acquiring "unassailably accurate knowledge of what [in fact] happened," *id.* at 370, and did emphasize the statistical importance of the reasonable doubt standard in influencing "the comparative frequency of [the] two types of erroneous outcomes," *id.* at 371 there was no suggestion in that opinion, and certainly none in Mr. Justice Brennan's opinion for the Court, that due process would be satisfied by a standard that directed the trier to convict whenever the evidence was such that sufficiently few innocent men would be erroneously condemned if guilty verdicts were returned each time the evidence seemed as strong.

[74] *See* Wilson v. United States, 232 U.S. 563, 569–70 (1914).

[75] Dworkin, *Morality and the Law*, N.Y. REV. OF BOOKS, May 22, 1969, at 29, 33.

[76] *Id.*

[77] *E.g.*, D.C. CODE ANN. § 22–2902 (1967); *cf.* OHIO REV. CODE ANN. § 2901.24 (Page Supp. 1969) (assault with intent to commit robbery).

[78] *E.g.*, ARK. STAT. ANN. § 41–1006 (1964) (possession or manufacture); *cf.* N.Y. PENAL LAW § 265.05 (McKinney 1967) (possession of machine gun or like weapons a felony).

[79] *E.g.*, D.C. CODE ANN. § 22–104 (1967); MASS. GEN. LAWS ANN. ch. 279, § 25 (1968)

[80] Dworkin, *supra* note 75, at 33.

[81] H.R. 16196, 91st Cong., 2d Sess. § 23–1322 (b) (1970).

[82] *See, e.g.*, Williams v. New York, 337 U.S. 241, 247–48 (1949).

[83] Dworkin, *supra* note 75, at 33.

[84] H.R. 16196, 91st Cong., 2d Sess. § 23–1322 (d)(2) (1970).

[85] *Id.* § 23–1322(b)(2)(C).

[86] *Id.* §§ 23–1322(a)(1), 23–1331(3).

[87] *Id.* § 23–1322(a).

[88] Any detained person is entitled to be processed under the bail provisions of the new act, *id.* § 23–1321, "upon the expiration of sixty calendar days, *unless the trial . . . has been delayed at the request of the person.*" *Id.* § 23–1322(d)(2)(A) (emphasis added).

[89] Nothing in H.R. 16196 would limit the number of times a defendant could be detained, apart from the requirement that each charge reflect "a substantial probability that the person committed the offense for which he is present before the judicial officer." *Id.* §23–1322(b)(2)(C).

[90] *Id.* §§ 23–1322(a)(2)(1), –1331(4).

[91] F. KAFKA, THE TRIAL 161 (W. Muir & E. Muir transl. 1957).

[92] *Id.*

[93] Mitchell, *supra* note 2, at 1238.

[94] Such evidence was present in the case of a Texas defendant who, while under indictment on at least eight offenses and out on bail, had not only threatened to kill a number of people but had shown his sincerity by shooting one in the eye and another in the back. Jailed because he was unable to raise a $35,000 peace bond, see text at notes 136–37 *infra*, he challenged the bond as excessive. Rejecting his claim, the appellate court recounted the story told by one lady to the trial judge. The lady had described the accused's threat to kill her and his behavior in firing upon several people in her home. Her equanimity was truly remarkable: "I didn't take it he meant he was going to kill me," she explained, "until he threw the bomb in my window." *Ex parte* Whatley, 136 Tex. Crim. 144, 146, 124 S.W.2d 357, 358 (1939).

[95] *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 73–102 (1968). *See also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 23, 47, 181–83 (1968).

[96] 370 U.S. 660 (1962).

[97] *Id.* at 666–67.

[98] L. FULLER, THE MORALITY OF LAW 105 (1964). The Supreme Court's recent refusal to extend *Robinson* to the case of a chronic alcoholic convicted of public intoxication rested on an explicit recognition that *Robinson* implies not a broad immunity to punishment for disease-based behavior but simply a limitation of criminal penalties to *overt conduct* which society has an interest in preventing and which a specific law has prohibited. *See* Powell v. Texas, 392 U.S. 514, 533 (1968) (Marshall, J); *id.* at 542–44 (Black, J., concurring). *See generally* Fingarette, *The Period of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 HARV. L. REV. 793 (1970).

[99] 306 U.S. 451 (1939).

[100] *Id.* at 452.

[101] *Id.* at 453.

[102] *id.* at 458; *cf.* Stoutenburgh v. Frazier, 16 App. D.C. 229 (D.C. Cir. 1900) (invalidating a law making it a crime to be a "suspicious person"). *See also* Ricks v. District of Columbia, 414 F. 2d 1097 (D.C. Cir. 1968) (invalidating a vagrancy statute as impermissibly vague).

[103] See note 29 *supra*.

[104] See text at note 94 *supra*.

[105] *Cf.* United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969). The routine denial of bail in capital cases, for example, has reflected a willingness to infer risk of flight from the possibility of a death sentence without any further evidence about the defendant's background or previous conduct. See text at notes 16–24 *supra*.

[106] United States v. Brown, 381 U.S. 437, 454 (1965).

[107] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[108] This interest is recognized as so compelling that bail probably cannot be deemed excessive simply because it exceeds the financial ability of the accused, so long as no lesser amount could reasonably assure his presence at trial. *See* Stack v. Boyle, 342 U.S. 1, 10 (1951) (Jackon, J., concurring); White v. United States, 330 F.2d 811, 814 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964); United States v. Hinton, 238 F. Supp. 230 (D.D.C. 1965).

[109] See text at notes 15–24 *supra*.

[110] 1 ANNALS OF CONG. 754 (1789) (remarks of Representative Livermore).

[111] Judiciary Act of 1789, ch. 20, § 33(b), 1 Stat. 91: "[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death. . . ." The rule has long been embodied in FED. R. CRIM. P. 46(a)(1): "A person arrested for an offense not punishable by death shall be admitted to bail."

[112] An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, enacted July 13, 1787, provided in article II that "all persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great; all fines shall be moderate; and no cruel or unusual punishments shall be inflicted."

[113] "18. No mans person shall be restrained or imprisoned by any Authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behaviour in the meane time, unlesse it be in Crimes Capital, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." COLONIAL LAWS OF MASS. 37 (Whitmore ed. 1889).

[114] The Virginia Declaration of Rights, in clause 9, adopted verbatim the standard of the English Bill of Rights. See note 115 *infra*.

[115] 1 W. & M., c. 36, § 10, at 69 ("Excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

[116] For a persuasive suggestion that the difference in phraseology between the excessive bail clause of the eighth amendment and the right to bail embodied in federal statute was entirely accidental, see Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 971–79, 982–89 (1965).

[117] *See, e.g.*, Trimble v. Stone, 187 F. Supp. 483, 484 (D.D.C. 1960). *See also* United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926) (dictum); Dye v. Cox, 125 F. Supp. 714, 715 (E.D. Va. 1954); United States v. Fah Chung, 132 F. 109, 110 (S.D. Ga. 1904) (dictum); Foote, *supra* note 116, at 965–89.

[118] *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 545–46 (1952) (dictum); Mastrian v. Hedman, 326 F.2d 708, 710–11, (8th Cir.) (dictum), *cert, denied*, 376 U.S. 965 (1964); People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 397–98, 49 N.E.2d 498,

500 (1943); Vanderford v. Brand, 126 Ga. 67, 69, 54 S.E. 822, 823 (1906) (dictum).

[119] Mitchell, *supra* note 2, at 1224.

[120] See text at notes 138–56 *infra*.

[121] Mitchell, *supra* note 2, at 1230.

[122] *Id.* at 1224, 1230.

[123] *See* Foote, *supra* note 116, at 969.

[124] *Id.* & n.46

[125] Mitchell, *supra* note 2, at 1225–30.

[126] *Id.* at 1225.

[127] *Id.*

[128] See text at notes 14–24 *supra*.

[129] A. HIGHMORE, A DIGEST OF THE DOCTRINE OF BAIL; IN CIVIL AND CRIMINAL CASES (1783).

[130] *See id.* at 153, 156, 170, 199.

[131] *Id.* at 191.

[132] *Id.*

[133] E. DE HAA:, ANTIQUITIES OF BAIL 11–12 (1940).

[134] *Id.* at 12–27, 30–50.

[135] *Id.* at 51–57.

[136] The Statute of Westminster, 1361, 34 Edw. 3, c. 1, § 6, at 135 (1360), empowered the justices "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise for their good behavior towards the King and his people . . . to the intent that the people be not by such rioters troubled nor endamaged, not the peace blemished." *See* 4 W. BLACKSTONE, COMMENTARIES *252.

[137] *See* Note, *"Preventive Justice"—Bonds to Keep the Peace and For Good Behavior,* 88 U. PA. L. REV. 331 (1940); Note, *Peace and Behavior Bonds—Summary Punishment for Uncommitted Offenses,* 52 VA. L REV. 914 (1966). *See also* 18 U.S.C. § 3043 (1964), assimilating the peace bond provisions of the several states into federal law. The only reported cases invoking § 3043 or its predecessor, the Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, are United States v. Greiner, 26 F. Cas. 36 (No. 15,262) (E.D. Pa. 1861), and *In re* Mineau, 45 F. 188 (D. Vt. 1891).

[138] 342 U.S. 1 (1951).

[139] *Id.* at 5–7.

[140] *Id.* at 4.

[141] *Id.*

[142] *Id.* at 4–5. *See also* United States v. Foster, 79 F. Supp. 422, 423 (S.D.N.Y. 1948).

[143] 342 U.S. at 5–7.

[144] Mitchell, *supra* note 2, at 1224–31.

[145] 342 U.S. 524 (1952).

[146] *Id.* at 545.

[147] *See id.* at 537, 544–45 & n.41.

[148] *Id. at* 534–37, 541, 544.

[149] See Foote, *supra* note 116, at 979 & nn. 104–05.

[150] Mitchell, *supra* note 2, at 1231.

[151] *Id.* at 1231–33.

[152] It is possible to argue, although the Attorney General does not, that pretrial detention to prevent future crimes furthers several of the functions of the pending prosecution—incapacitation, rehabilitation, even retribution and general deterrence—and thereby helps to effectuate the purposes of the conviction the government is seeking. But if the presumption of innocence of which the Court spoke in *Stack* is to mean anything, it must point to a fundamental distinction between restraints without which there could be no meaningful prosecution at all—restraints to which even the innocent may justly be subjected—and restraints that merely further the aims of convicting persons found to be guilty. It should not be surprising, therefore, that those courts that have been confronted with it have rejected any suggestion that, even pending appeal, bail may be denied for the purpose of inflicting a punitive sanction or deterring similar misconduct, both of which are broadly ancillary to the aims of the pending prosecution. *See, e.g.,* Reynolds v. United States. 80 S. Ct. 30 (Douglas, Circuit Justice, 1959); Davis v. United States, 345 F.2d 441, 444 (D.C. Cir. 1965) (Bazelon, C.J., concurring), *cert, denied,* 385 U.S. 868 (1966).

[153] A similar value helps to explain the fourth amendment requirement that a search of a person or his premises instituted in connection with a lawful stop, arrest or other seizure must not go beyond the intrusion necessary to effectuate the purposes of the seizure that justified its initiation. *See* Chimel v. California, 395 U.S 752, 762–68 (1969); Terry v. Ohio, 392 U.S. 1, 20–21, 23, 25, 26, 29 (1968); Sibron v. New York, 392 U.S. 40, 65–66 (1968).

[154] Compare the Supreme Court's unanimous conclusion that a man's status as a convicted state prisoner cannot constitutionally trigger civil commitment for dangerousness without the safeguards provided by statute for all other persons civilly committed in the same state. Baxstrom v. Herold, 383 U.S. 107 (1966) (denial of equal protection).

[155] See notes 25–31 *supra* and accompanying text.

[156] See text at note 94 *supra*.

[157] There is no federal statutory power to commit as potentially dangerous a sane defendant acquitted of the charge against him. *See In re* Williams, 157 F. Supp. 871, 876 (D.D.C.), *aff'd per curiam,* 252 F.2d 629 (D.C. Cir. 1958). Although one court has held that it would be unconstitutional to require a peace bond of an acquitted defendant, Commonwealth v. Franklin, 172 Pa. Super. 152, 182, 92 A.2d 272, 287 (1952), there is no obvious reason why a device for preventing individuals from carrying out specific criminal threats could not constitutionally be applied to an acquitted defendant if it were deemed constitutional in other contexts.

[158] That all these risks may justify detention notwithstanding the eighth amendment is not open to serious doubt. *See, e.g.,* Fernandez v. United States, 81 S. Ct. 642, 644–45 (Harlan, Circuit Justice, 1961); United States v. Bentvena, 288 F.2d 442, 444 (2d Cir. 1961); United States v. Rice, 192 F. 720 (S.D.N.Y. 1911).

[159] When Mr. Justice Jackson, sitting as Circuit Justice, refused to imprison defendants "to protect society from predicted but unconsummated offenses" pending appeal of their conspiracy convictions under the Smith Act, he took care to note that such devices as peace bonds, see text at notes 136–37 *supra,* remain available as "ways of dealing with certain threats to commit crime." Williamson v. United States, 184 F.2d 280, 282 & n.7 (2d Cir. 1950).

[160] Mitchell, *Wiretapping and Pretrial Detention—Balancing the Rights of the Individual with the Rights of Society,* 53 J. AM. JUD. SOC'Y 188 (1969).

Mr. ERVIN. Mr. President, let me read, for emphasis, the conclusion of the article:

> The proposed bill violates the basic principle that an accusation of crime should not subject any man to imprisonment unless the government's need to prosecute him compels incarceration. The bill creates a regime in which no man can be assured that his conduct, however lawful, will protect him from the stigma of imprisonment as a probable criminal. Perplexed by the accusations this bill authorizes, a suspect can never fully prove them false. And whenever the sequel to a successful plea is a further crime, the pressure to expand the system mounts. At every stage of its growth, its calculated sacrifice of innocent defendants would be intolerable even if it could promise a significant reduction in crime. The great irony is that Attorney General Mitchell, "the enlightened compromiser in a pluralistic society," has offered us not even that. He has offered us instead a pound of detention—for an ounce of cure.

Let us see what preventive detention does to a man. In the first place, it takes a man and puts him in jail for a crime he has not committed and which he may never commit, because the provisions for preventive detention do not detain the man for the crime he has committed or for a crime of which he has been convicted. It puts him in jail for fear he may commit another crime if he is permitted to be free.

Incidentally, one of the most illuminating interpretations of this act was made by my good friend, Don Santarelli. I do not know whether to accuse Don of being the putative father of this provision or the midwife. But he was present at its conception and he was present at its delivery.

I asked him when he appeared before the Subcommittee on Constitutional Rights if it had to be prophesied that a man would commit another violent crime as defined in the preventive detention proposal or another dangerous crime as defined in the preventive detention proposal.

He answered that question with an emphatic "No." He said that if the judge that passed on the question considered he might do anything, whether it was a crime or not, that might injure some person, the judge had a right to preventively detain him, that the judge did not have to fear that he would commit another dangerous crime or another violent crime as defined in the preventive detention proposal.

All he had to find was that in the judge's opinion he would do something in the future if he was released prior to his trial that would be dangerous to an individual or a community.

If I recall his testimony correctly, he stated in substance that the judge could detain him if he was afraid that he might go out and drive an automobile while drunk, because that would be a dangerous thing to do.

He said the law did not undertake to describe the danger that the man might be prone to commit or cause, that anything the judge out of his own head or imagination thought might be a danger to any individual or the community could be used as the basis for the judge to preventively detain him.

During the hearings of the Subcommittee on Constitutional Rights, we had a most illuminating witness who testified as to the danger of authorizing preventive detention because of the impossibility of predicting with any accuracy what would happen. I refer to the testimony of Prof. Alan M. Dershowitz, professor of law at Harvard University. That testimony appears at pages 172 through 185 of the 1969 hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary when considering amendments to the Bail Reform Act of 1966.

This article is very illuminating and should be read by every Member of the Senate, for it points out the fact that the science of prediction has not reached the point where any judge or any other person can predict accurately the subsequent behavior of any human being.

For that reason, I ask unanimous consent that the entire article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

Senator ERVIN. Professor Dershowitz, we are delighted to have you with us and we appreciate very much your willingness to appear and give us the benefit of your observations on what I consider some very serious questions dealing with the rights of persons charged with crimes and also with the interests of society. At this point in the record I shall insert a short biographical statement on Professor Dershowitz.

Name: Mr. Allen M. Dershowitz.

Assistant Professor, Harvard University Law School; AB, 1959 Brooklyn University; LLB, Yale University 1962; Editor and Chief, Yale Law Journal; Law Clerk, Justice Goldberg and Judge David Bazelon.

Teaches: Criminal Law, Psychopathic Theory and the Law, Legal Status of the Mentally Ill, and Family Law.

STATEMENT OF ALAN M. DERSHOWITZ, PROFESSOR OF LAW, HARVARD UNIVERSITY, CAMBRIDGE, MASS.

Mr. DERSHOWITZ. Thank you very much, Senator, for the opportunity to appear before this committee on this very important subject.

The general issues raised by problems of preventive detention are of course not new ones. Many years ago they were captured most perceptively in a dialog between Lewis Carroll's Alice in Wonderland and the Queen. The Queen said:

"Here is the King's messenger. He is in prison now being punished and the trial does not even begin until next Wednesday, and of course the crime comes last of all."

"But suppose he never commits the crime," asked Alice.

"That would be all the better, wouldn't it?" the Queen responded.

Alice felt there was no denying that. "Of course it would be all the better," she said, "but it wouldn't be all the better his being punished."

"You are wrong," said the Queen. "Were you ever punished?"

"Only for faults," said Alice.

"And you were all the better for it I know," the Queen said triumphantly.

"Yes, but I had done the thing I was punished for," said Alice. "That makes all the difference."

"But if you hadn't done them," the Queen said, "that would have been better still, better better and better."

Her voice went higher with each better until it got to quite a squeak.

Alice thought "There is a mistake somewhere."

But is there a mistake? That is the question that I would like to explore this morning.

Preventive detention, broadly defined, is not a novel problem. In fact it is widespread throughout this country and throughout the world. Though, as Mr. Speiser mentioned, Justice Jackson said that preventive detention was foreign to our system, and that he was loath to resort to it, perhaps a justice of the Burma Supreme Court came closer to the truth than Justice Jackson when he observed some years ago that "preventive justice which consists of restraining a man from committing a crime which he may commit but has not yet committed is common to all systems of jurisprudence."

My research suggests that no society has ever relied exclusively on the threat of punishment to deter all crime. Predicted criminals have been confined in this country and throughout the world by a variety of devices including commitment of the dangerously mentally ill, a subject which this committee paid attention to some years ago, material witness statutes, sex psychopath laws, juvenile laws, preventive arrests, and of course denial of pretrial release, the subject of today's hearings. Each of these devices rests upon the felt need to detain persons whom we feel sure would otherwise commit serious crime and on the assumption that there are experts capable of making accurate predictions of such crimes.

The need is understandable. The assumption is far more questionable.

Predictions of human conduct are generally difficult to make, and this should not be surprising, for man is complex, and the world he inhabits is full of unexpected occurrences. Predictions of rare human events are even more difficult. And predictions that a rare human event will occur within a short span of time are the most difficult of all. Acts of violence committed by persons released pending trial are rare events, and the relevant time span is realtively short. Accordingly, the kind of predictions under consideration here begin with heavy odds against their accuracy. A predictor is likely to be able to spot a large number of true positives (that is, persons who would, if released, in fact commit acts of violence) only if he is willing also to include a very much larger number of false positives (that is, persons who seem to have similar characteristics to the true positives, but who would not, in fact, engage in the predicted violence if they were released).

It should be added here that in order to evaluate the accuracy of predictions, you have to have data about both sides of the coin. You must know how many and what percentage of the target events of violent crimes were actually spotted, and you must also know how many and what percentage of the predictions were false positives. Either of these alone tells you very little indeed. It is no trick at all to spot a very high percentage of defendants who would commit acts of violence while awaiting trial. You simply predict that all of them or almost all of them would commit crimes. Of course the number of false positives would be extremely high, perhaps 10 or 20 to 1, but most or all of the target acts would in fact have been spotted. Conversely, it is very easy to avoid false positives, if that is your only aim. You simply predict that few or none of the defendants would engage in violence pending trial. In that case, you would spot very few if any of the target acts, the violent crimes, but the number of false positives would be minimal or nonexistent.

The difficult task is to select the category which includes the largest possible number of the target acts, in this case defendants who engage in violence pending trial, and also the smallest number of false positives. If it were possible to select a category which included all the target acts and few false positives, there would be little problem. Since this—or any approximation of it—is impossible, a value choice must be made. It must be decided how many false positives—that is, defendants who would be confined on the basis of an erroneous prediction that they would engage in violence—we should be willing to confine in order to prevent how many true positives, people who would actually commit violence, from committing such acts.

It is very surprising how little jurisprudential thought has been devoted to this critical issue. Every schoolboy knows the maxim: "Better 10—some say 100—guilty men go free, than one innocent man be wrongly imprisoned." But that goes to the issue of proof that a crime has been committed. We have no similar maxim—or common law—about the permissible ratio of erroneous confinements when its issue is whether a crime of violence will be committed.

Before an effective and just system of pretrial preventive detention can be implemented, two important issues must be faced. It must first be decided what ratio of erroneous confinements to correct confinements is morally acceptable, whether a 10-to-1 ratio, whether a 2-to-1 ratio is acceptable, whether we want 80 percent to be true positives. This is a normative question of policy and I, submit, constitutionality, because I think the constitutionality of the statute would very much depend on the accuracy required of the predictions. But then it must be learned whether this optimum ratio, whether this constitutional ratio, or anything approximating it, can be achieved under the present state of the art. This is an empirical question subject to validation or invalidation.

It is this second question—the state of the art of prediction today—to which I would like to address the remainder of my remarks. I have done a considerable amount of research and thinking about predictions of violence made by one type of expert, the psychiatrist. I have done this in connection with some writing and with some courses I have been teaching at Harvard Law School on the prediction of crime. My conclusions, which are stated elsewhere in detail, are that psychiatric predictions of violence generally include a very large number of false positives. The reasons for this overprediction of violence are varied. Some inhere in the psychiatric technique itself, others in the nature of mental illness. But there is one reason, and the single most important reason in my view, which has critical relevance to the subject under consideration here. The psychiatrist almost never learns about his erroneous predictions of violence. The reason he never learns about them is because predicted assailants are generally incarcerated on the basis of his prediction and have little opportunity to prove or disprove the prediction itself. But the psychiatrist always learns about his erroneous predictions of nonviolence, often from newspaper headlines announcing the crime. This higher visibility of erroneous predictions of nonviolence inclines the psychiatrist, whether consciously or unconsciously to overpredict rather than underpredict violent behavior, to resolve all doubts in favor of confinement; and I submit that this phenomenon will be equally true of judicial decisions to confine predicted violence-doers pending trial. Judges, like psychiatrists, will rarely learn about their erroneous predictions of violence, because these defendants will be confined on the basis of these judicial predictions and will not have an opportunity to demonstrate that they would not in fact have committed the predicted crimes if released. But every time a judge makes an erroneous prediction of nonviolence, every time he decides to release somebody who then does commit a violent act, he will learn about his mistakes swiftly and dramatically.

Thus if a statute is enacted authorizing pretrial preventive detention on the basis of judicial predictions of violence, we will never know how much overprediction is being authorized. And as more and more information is accumulated—all or at least most of it concerning defendants who were erroneously released—judges will include more and more false positives in the category of defendants detained.

Now it may well be that eventually criteria for confinement can be refined to the point that overprediction is minimized. Perhaps the high rate of violent crime by certain categories of released defendants will permit a high level of spotting without too much overprediction. I notice Senator Tydings' bill specifies armed robberies. But if a statute were to be enacted now authorizing the confinement pending trial of all persons who, on the basis of specified criteria, were predicted to commit violent crime, then the development of such refined criteria would be seriously retarded. It must never be forgotten that many years of experience administering an untested system will not always increase the accuracy of that system. Many years of experience is often only 1 year of experience repeated many times. The unknown mistake of the past becomes the foundation for a confident, but erroneous, prediction of the future. This was demonstrated many years ago in a famous, and hu-

morous, "experiment" conducted by the Harvard psychologist Thorndike who had a student throw darts repeatedly at a board to test the thesis that aim improves with "experience"; but he blindfolded the student and never told him when he hit or missed the target. Needless to say, his aim did not improve with "experience." Nor I suspect would the accuracy of judicial predictions necessarily improve as a result of spending more and more years meting out preventive detention of predicted violence-doers without any accurate feedback on the accuracy of their predictions.

The time is simply not yet ripe for definitive legislative resolution of the dilemma of pretrial preventive detention. We have just begun to understand what the problem is, but we do not yet have enough information to know what the optimum solutions are—or whether there are any optimum solutions. What must be avoided is a solution which freezes knowledge at its existing low state. And this is precisely what would occur if there were enacted a statute authorizing confinement of all defendants predicted to commit acts of violence pending trial. What must be encouraged is an approach that is tentative; that continues to gather information; and that is in the nature of an experiment.

What I proposed is that tentative criteria for confinement be devised—for example, the criteria suggested by Senator Tydings—and that these critera be tested to determine how accurate—or inaccurate—they are in predicting violence. Specifically, I suggest that an experiment be conducted whereby defendants who are predicted to engage in violence on the basis of certain criteria, say those in the statute proposed, actually be released in the face of these predictions. This suggestion is not free of all difficulties, for the status of experimentation under law is far from clear, especially if some are released while others are detained, but I am confident that a workable and constitutional approach can be devised. Then we can see how many of these defendants would, in fact, fulfill the predictions. We would see whether it is 4 percent or 20 percent or 10 percent or 60 percent or perhaps 90 percent.

We would learn other things as well. Do judges differ in the accuracy of their predictions? I suspect they do. Does the quantity of informational input into the prediction increase its accuracy? How do the various professional experts—psychiatrists, psychologists, probation officers, judges—compare with each other and with laymen in their ability to predict violence? Do we know enough today to devise criteria which spot a high percentage of violent criminals, without also including an inordinate number of false positives? What we learn may be discouraging, but it is far better to know the discouraging truth than to build a house, especially a house with bars, on a foundation of untested assumptions.

Senator ERVIN. Professor, I have had one or two things on my mind that have caused me to have grave misgivings about preventive detention, and your statement on the whole corroborates my misgivings.

In my hometown we have one of North Carolina's institutions for the mentally ill. A number of years ago the medical staff released a man, a young man who had been a patient there for some time, and about 2 weeks later he killed his sweetheart, just outside the door of a church on Sunday. Prior to that time the medical staff had been rather liberal in releasing patients from confinement, permitting their return to home. After that time, it was virtually impossible to ever persuade them to release anybody, and as a consequence anyone who wanted to get a discharge from confinement in the hospital would have to apply for a writ of habeas corpus. On one occasion I applied for a writ of habeas corpus for a man, and had a hearing on it before one of our very wise, very experienced judges, Judge James L. Webb. The superintendent of the hospital was a witness. He testified in the course of his testimony that the applicant for the writ was no more insane in his judgment than a lot of people who were walking around free in North Carolina, and the judge put this question to him. He said, The responsibility for releasing this man devolves on me since the hospital board has not seen fit to release him and I want to ask you what would you predict about his future behavior? I don't want to turn loose on society a dangerous man. Do you think I could safely release him with reasonable assurance that he would not commit any crime of violence in the future, or give trouble to the community?" The physician, who was very cautious as a result of this experience, told the judge, "Judge, you might release him, and he might return to the community from which he came and be a very peaceful citizen, live a long, long time and give nobody any trouble." He said, "On the contrary you might release him and he might become violent and insane tomorrow and kill his best friend." The judge said, "Doctor, can't you say the same thing about me?"

We have testimony here from Senator Tydings to the effect that he has studied the English system and the law of England vests in the judges discretionary power to detain persons charged with felonies until their trial. He also testified, as I recall, that the judges exercise this power and detain persons charged with felonies in virtually all cases. All of us are appalled by crimes of violence, and I fear that if we authorized preventive detention at this uncertain state of our capacity for judges and other human beings to predict future behavior, that the judges would naturally want to do the safe thing and would tend to detain persons prior to trial in all cases where the charge under the law permitted him to do so. I think that would be the conservative, safe course of action for them to take. And if they did not take it, they would be under grave temptation all the time to take it, and that is what makes me fear preventive detention. I fear it is an effort to find a very simple solution for a very complex problem.

Mr. DERSHOWITZ. There is a related issue as well which is a serious one, and that is any system of preventive detention always seems to be working well, even if it is working poorly, because you reduce the number of crimes by jailing a large number of people. For example, the way in which mental hospitals work. Many people thought that mental hospitals were working very satisfactorily for years. The assumption was that when a psychiatrist predicted that a person was dangerous he was indeed dangerous. In the last few years a few events have occurred which have shaken that belief very fundamentally. The Supreme Court for example rendered its decision in *Baxtrum* v. *Herold* which released hundreds and hundreds of dangerous criminals found to be insane, from the hospitals of New York. It was thought that these alleged mentally ill and dangerous criminals would engage in very violent and very serious conduct, because phychiatrists had predicted that they would. Well, followup studies conducted 2 years after the *Baxtrum* decision showed that there was very little basis in that, that very few indeed of the predicted violent criminals in fact engaged in violence. In Baltimore also there were two recent studies of people who were predicted to be dangerous by psychiatrists, and in one case they evaluated escaped mental patients and found that they engaged in no more violence than the general population, and also they evaluated people who had been released on "legal technicalities" in the face of psychiatric predictions of dangerousness and found that they, too, with one or two minor deviations, engaged in few acts of violence.

I think the problem with the system of preventive detention is it will seem to work. The crime rate probably will go down slightly, and perhaps might be traceable to preventive detention; but what we won't know is how many, what proportion, of the people confined would actually not commit the crimes. That dark side of the moon is the hard one to evaluate, and that is why I take very little comfort in claims that the English system has worked well, that Norwegians system has worked well, the continental European systems have worked well. They only work well if one looks at one side of the coin, because there is rarely an opportunity to look at the other side, unless some kind of experiment is conducted whereby people who are predicted to be dangerous, not all perhaps but some, a large enough sampling, are released in the face of these predictions and we actually see how many of them would commit the crimes that they are predicted to commit.

Senator ERVIN. Sometimes we reduce the thing to an absurdity. Of course I think it is undoubtedly true that if you can find some way to incarcerate everybody, there would not be any crimes committed anywhere except in prison. In other words, our streets would probably be safe except in rare cases where persons escaped from custody; but if they did, in that case there would be nobody to commit a crime on.

You have written several articles dealing with the subject of predictability, and we would like to have your permission to review them and put some of them in the record for the benefit of the Senate when it considers these questions.

Mr. DERSHOWITZ. By all means.

(The articles referred to appear in the appendix of these hearings.)

Senator HRUSKA. Mr. Chairman, I join you in thanking the witness for being here. In your testimony, Professor Dershowitz, you of course raised the proposition that judges rarely learn about their erroneous predictions of violence because if they put the defendent away, he has no chance to commit violence, and therefore they never know. The fact never becomes known.

Isn't the basis of the habitual offenders acts the proposition that after a man has engaged in a certain type of conduct, two or three or four times, and has been convicted and served his time, and then he does it again, meeting the required number of times under the act, that there is a reasonable probability, in fact such a high probability, of his repeating his criminal conduct, that he ought to be put away for a longer time? Isn't that the basis of the habitual offender acts?

Mr. DERSHOWITZ. I think that is the basis.

Senator HRUSKA. Is it good or bad?

Mr. DERSHOWITZ. Well, I think its application is certainly bad, as anybody who has studied habitual offender acts knows, it is used primarily as a plea-bargaining tool. It is not used primarily to prevent recidivism among habitual offenders by incarcerating them for a long time, but used primarily against one class of offenders, those who are arrogant enough to challenge their most recent conviction. Prosecutors throughout the country are willing to waive the habitual offender treatment of those defendants who are willing to plead to the offense. So we do not get a complete sampling of how habitual offender acts work. However, as they do apply they are based on a prediction that a person who, say, committed three or four violent acts or acts of certain category, is likly, not certain, is likely, to commit another one over a long period of time, over a lifetime or over a period of 5 or 10 years. I think they do not rest on any claim of being able to predict that a person will recidivate within, say, a 6-month period. There is simply no predictions that have been proved accurate which are limited in time to that extent.

Now I am not claiming it cannot be done. The evidence seems to suggest that certain categories of armed robbers and burglars do recidivate within a short period of time. I am simply saying that the data upon which the habitual offender acts are based upon much longer range predictions, over 5, 10, 20 years, and not on a claim that one can predict violence within a short period of time between arrest and bail.

Senator HRUSKA. We have had our attention called to instances where, within a period of a year, a year and a half, a man under indictment and awaiting trial is indicted may be three or four additional times for similar acts, and it is not over a long period of time. What justification would there be for requiring a judge, after he had been confronted with such a record, to say, "Very well, you are indicted, now get on your way. We are going to get to your trial one of these days, and if you commit another act, come back here and we will indict you again and we will put your name on the calendar the sixth time." What justification would there be for that?

Mr. DERSHOWITZ. I think the justification is that he is more likely to be right if he releases them than he is if he holds them. If the judge were able to say with confidence backed up by followup studies, "You are a man who fits into a class of people in which it is 80 percent likely that within the next 6 months you will in fact recidivate," I would think there would be a basis, certainly a basis in policy. Whether there would be a basis in policy in my view in holding him. But today I do not think it can be predicted accurately that anybody will commit an offense within 4 or 6 months.

My research suggests that a judge is generally going to be correct more often if he says that a man will not commit a crime within 6 months than if he says that a man will commit a crime in 6 months. What I am suggesting is that my thesis be tested. Perhaps your thesis is correct. Perhaps a judge can be more correct if he says confine him than if he says release him. Perhaps it is more likely that certain categories of criminals will in fact commit crimes. I would like to see that thesis tested. I would like to see somebody administer and apply criteria. I would like to see a judge say, "Now, you, defendant, I really think that there is more than a 50-percent likelihood that you will commit a crime in 6 months," and then have a large enough sampling of those defendants, perhaps all, perhaps just some, released in the face of those predictions, and then after 6 months let us see how often the judges were right when they predicted crime within 6 months, and how often they were wrong. If they were right more often than they were wrong perhaps there would be a basis in policy for this kind of detention.

Senator HRUSKA. You yourself have stated they will never know it, because if they find they are wrong and they start confining these people or detaining them, they are not in a position to engage in violence so you never know. But after all we live in a practical world, most of us do. Some people don't, and they engage in a lot of theories and a lot of reasoning and rationalization, but we live in a practical world.

After a while, a judge and a prosecutor kind of get the hang of these things, and they form a basis for a high probability that the man, if he is turned loose, is going to engage in more of the same kind of crime. There are some people such as Senator Tydings, who believe that when that situation confronts us we ought to have powers in the judge to do something about it.

Mr. DERSHOWITZ. You mentioned that judges and prosecutors after a while kind of get the hang of things. Well, that is precisely what we don't know. For example, in something I have written which I will send a copy along, there was a judge in Illinois who had been sitting as a sentencing judge for 20 years and he really felt strongly that he knew what made defendants tick and which defendants would recidivate and which would not. He had before him four defendants, three of whom had pleaded guilty to the crime and one of whom had not pleaded guilty to the crime. The judge said, "I really think this man who has pleaded not guilty does not have remorse and is going to go out and attack society and be very bad. The other three defendants on the basis of my 20 years experience I really think won't ever commit crimes again," and he imposed sentences accordingly. I have been following up these kinds of sentences and I followed this up by writing a letter to the Department of Justice, Bureau of Prisons and I found out—and probably the judge to this day does not know this—that he was wrong in every respect. The defendants who he said would not recidivate recidivated, some of them up to six times in 5 years. All of them have been in trouble. But the defendant who had pleaded not guilty and who the experienced judge thought would engage in many further crimes in fact had had no confrontations with the law at all.

I think very often prosecutors and judges think they get the hang of things on the basis of experience, but because there are rarely opportunities to followup the kinds of predictions they make, it may very well be that they are not getting the hang at all. Of course it may very well be that they are. But we have not been able to separate out those judges and prosecutors that are getting the hang of things from those who simply are not learning from experience.

Senator HRUSKA. Of course by imposing a standard of absolute certainty, we do violence to, and deny the use of, such things as parole, such things as the habitual offenders acts, and probation, even suspended sentence. We do not know, you say, and we must be positively sure, and that is not the way life goes, because we go on the basis, don't we, of probable cause, reasonable cause, degrees of probability, in many areas of human activity. We will never know, and if we are going to proceed on that basis, what can we do? Is there anything we can do?

Mr. DERSHOWITZ. I certainly could not agree with you more. I believe that all human conduct is always taken on conditions of uncertainty and probability. That is the thesis of the course I teach at the Harvard Law School. I think even when we try to decide whether a man has committed a crime, we are doing it on probabilities. Our rule of burden of proof is not that it must be proved to a certainty but only beyond a reasonable doubt. I believe for every say 100 or 200 people that are convicted we are willing to convict a certain percentage of innocent people as well.

What I am saying is not that we should act on certainty but that we should act on where the likelihoods fall. We should act on what is more likely, and we simply do not know today whether a judge who predicts that a man will commit a crime when he is on bail is going to be right or going to be wrong, not going to be certainly right or certainly wrong but whether he is more likely to be right or more likely to be wrong and I think we simply need a lot more information that we have or are likely to get if we enact a statute of this kind now.

Senator HRUSKA. Of course you are saying, in other words, that in the trial of criminal cases the burden of proof is that one must prove beyond the shadow of a doubt, and in most cases that is the burden.

Senator ERVIN. Reasonable doubt.

Senator HRUSKA. Reasonable doubt, that is the burden, and we never know, but we go forward. We go forward, and it is at a price. Of course it is at a price. But in this instance, you say no, we do not know for sure, so I advise you not to pass a bill or a law of preventive detention. Is that the burden of your thrust?

Mr. DERSHOWITZ. No, that totally misunderstands my argument. What I am saying is that we should not wait for certainty. We should know enough for us to be able to decide whether a judge is more likely to be right or more likely to be wrong. We have to know more about the range.

Senator HRUSKA. Well, how will you ever know that because judges change. Will you ever know that? Is there any possibility that it can be known?

Mr. DERSHOWITZ. Yes, I think there is.

Senator HRUSKA. Judges change. The person changes. Sometimes the personality of a judge changes. Will you ever know if he is going to be right?

Mr. DERSHOWITZ. That is why one has to always have a large enough sample to account for these kinds of changes, to account for changes in personnel.

Senator HRUSKA. What value are they as against judges who are going to be there 5 years from now? Of what value are they?

Mr. DERSHOWITZ. I think they are of great value. One can in a general way know how judges are going to behave. For example, you talk about proof beyond a reasonable doubt. There is a pattern to the way judges react. Some are more liberal, some more conservatime. There is a spectrum, but within the range of that spectrum every judge has had something in common, a law school education, some practice in the world. They are going to react in similar ways.

What I am suggesting is that we have enough judges today administering criteria which you think perhaps are valid criteria. We release people, some, perhaps all, in the face of predictions of dangerousness and then, not over a long period of time, but in 6 months, 12 months, perhaps 2 years at the outside, we will know how accurate these predictions are. We will know how to devise criteria which become more accurate. Then I think we will be able to seriously consider whether or not the policies of preventive confinement, valued against the policies of freedom, require or permit the enactment of this kind of statute.

Senator HRUSKA. You make an interesting argument and I look forward to reading some of those articles which you will put in the record.

Mr. DERSHOWITZ. Fine.

Senator ERVIN. A man goes to the doctor suffering with a headache. Now if the doctor takes a pistol and shoots him through the head and kills him, he won't suffer with the headache any longer. If the doctor gives him some aspirin tablets, why, he may clear up his headache without resorting to such a drastic remedy as the first one I suggested.

We have before us evidence that the time of the average trial of a person charged with a crime in the District of Columbia is 8 months, and the evidence is that that means that some of the trials are not had until fifteen months or a year after the crime is alleged to have been committed. We also have testimony, from a committee headed by Judge George L. Hart, Jr., a very experienced judge of the District of Columbia, much experienced in holding criming trials, that as near as they could figure out, the Commission after much study, that about 9 per cent of the persons granted pretrial release in the District, if I recall his testimony right, commit a crime while out on bail. There is testimony from others indicating that the percentage may be as little as 7 or 7½ per cent.

Now wouldn't the best thing to do, rather than impose preventive release at this time in the absence of more accurate data than we have, wouldn't it be better for the Congress to make arrangements to grant speedy trials, put enough judicial manpower in and add enough people to the District Attorney's staff to enable them to process cases within

a relatively short period of time? In other words, if you could bring all cases to trial within a period of 3 months, that is, the average case in a period of 3 months and even less in the case of misdemeanors, and the man was tried and convicted and given adequate punishment, he would not likely be repeating his crime time after time over a period of 6 or 8 or 10 months or a year or a few years. It seems to me that we ought to resort to aspirin to try to cure this headache in the District before we go to more drastic methods.

Mr. DERSHOWITZ. I certainly agree.

Mr. WOODARD. Professor Dershowitz, we had a judge testify before this subcommittee yesterday who told this subcommittee that he had gotten the hang of it, that he could pick out the bad eggs and the good eggs.

Mr. DERSHOWITZ. That is wonderful. Perhaps he would be willing to submit to the experiment I have suggested.

Mr. WOODARD. He already has submitted to it, although he did not know it. In anticipation of his testimony, we had asked the Bail Agency to pick out a couple of periods in early 1968 for him and a couple for another judge who follows the Bail Reform Act rather explicitly and has a very lenient release policy. We asked the agency to follow the defendants dealt with by both judges through the system and find out how many of them did in fact commit more crimes. The statistics they gave us showed that out of 285 defendants who were presented before the judge who "had the hang of it," he found 144 bad risks. Out of that group of 285, 144 bad risks were detained by high money bond, and 141 good risks were released. The other judge, Judge A, out of 226 defendants, found only 46 bad risks.

He released 180 good risks, 79 percent. Judge A, the tough judge, had detained over 50 percent.

Of those two groups of defendants, of the large group released by the lenient judge, there were 16 more offenses while on bail, including both misdemeanors and felonies. Of the much smaller group released by Judge B, there were 12 bail offenses. The difference in the recidivist rate was 8 percent for the judge who had weeded out all the bad risks and 9 percent for the judge who released almost everybody a difference of 1 percent.

On the other hand, of the 144 bad risks who were detained by Judge B, 36 subsequently had their cases dismissed before trial. Another large percentage of them, which is not shown here, were acquitted. And of the ones who were tried and convicted, very few of them received any time in jail after being convicted.

How do these figures square with your balancing of the true positives and false positives?

Mr. DERSHOWITZ. I think these figures confirm what I have come up with in the psychiatric area, that is, in order to spot say four extra criminals, which is what the judge in this case did, he had to make erroneous decisions about what, 50 or 60?

Mr. WOODARD. More like 80 or 90.

Mr. DERSHOWITZ. Perhaps 80 or 90, and included in that amount were what you call double false positives in the sense that they were not even guilty of the crime for which they were initially charged, or at least the process so concluded. I would think that if the experiment of the kind that I am suggesting were to turn up data like this, that there would be little chance for the constitutionality of preventive detention to succeed, and there would be no reason and policy for enacting preventive detention.

Mr. SANTARELLI. Mr. Dershowitz, let us put the constitutional issue aside and speak to this policy question. It seems to me you are saying criminal conduct is not sufficiently predictable. Is that a fair statement of your position?

Mr. DERSHOWITZ. Yes.

Mr. SANTARELLI. If we could find a category of defendants in which there was a significant degree of predictability possible, what degree of predictability would satisfy you on the policy question? Fifty per cent, 60 per cent, 80, 40, what percentage area, roughly, would satisfy you?

Mr. DERSHOWITZ. Well, I would think, at the minimum, one would want it to be more likely than not that a person would engage in a crime. That would be more than 50 percent. I am not saying that is a satisfactory criterion. Perhaps one might want to use the criterion in criminal cases of beyond a reasonable doubt. Now, I might convert that in mathematical term say to 75 or 80 percent. I am not certain. All I am clear on is that we ought to find out what the likelihood of percentages are, and then we can focus the debate in more realistic terms. I think there is range for disagreement here. I think it is very possible for some people to feel strongly that 50 percent likelihood is enough, for others to say that it is not even enough if there is 90 percent accuracy. I think this is an area for legislative resolution subject to judicial supervision. I would suspect that the courts would sustain the constitutionality, to get back to that subject for a minute, if it were beyond 50 or 60 or 70 percent. But I just do not think we are anywhere near that today. Now we may get there. It may be that one can come up with a category of criminals and criteria which when combined by a sensible and sensitive judge would result in a high percentage of spotting and a low percentage of false positives. But, again, I think one really has to have the data to do that. One cannot speculate about that kind of thing.

Mr. SANTARELLI. My question is posited on having the data. That is what I am saying. Let us strike a median figure. If we could find a category of crimes or those who commit them that would produce a 75 percent degree of accuracy in prediction of subsequent offenses, that would probably not be troublesome to you, is that correct?

Mr. DERSHOWITZ. It would depend on what you were predicting. Let me make another point. It is very much easier to predict frequent events than rare events. If what you are looking to predict is simply will the person get into trouble, then I think 75 pecent accuracy would be possible to achieve, but for me that would not be enough. If what you are trying to do is predict violent crimes, then I think 75 percent, this is a personal view, would be enough for me. But as you get more narrow in your definition of the crime, as the event becomes rarer and rarer, it becomes harder and harder to predict it and that is the paradox of preventive detention. It is easy to predict frequent events, but you do not much want to do that and it is very hard to predict infrequent events and that is precisely what you want to do.

Mr. SANTARELLI. I understand you find it hard to predict, but I am asking a hypothetical question. If we could predict, notwithstanding the fact that it is hard to predict, I understand that, if we could predict in a category up to 75 percent probability that the defendant will commit a subsequent serious unlawful act, then we would probably not be too troubled with the policy question, is that what you are saying?

Mr. DERSHOWITZ. I am always troubled with the policy question. I would resolve the policy question then in favor of confinement.

Mr. SANTARELLI. We had testimony yesterday from a trial judge that narcotics offenders constituted an almost certain probability of repeat offenses of one kind or another. His testimony was that a man who is addicted to narcotics and who is impecunious, the second condition, to support his narcotics habit, will with certainty, to quote the judge, engage in unlawful conduct, probably of a violent nature, to satisfy that habit, usually larceny or robbery, crimes which involve getting some material goods that he can convert into money to satisfy his habit. Now aside from relying on what that judge said, is your experience that narcotics addicts constitute a category that could be as high as 75 percent predictability for future serious unlawful acts?

Mr. DERSHOWITZ. I would suspect that narcotics offenders under the existing state of the law in the United States today probably come closest to constituting a class of offenders with a high percentage of predictable crimes. I would very much doubt that one could predict violent crimes with 75 percent accuracy even among that class.

I notice that you included larceny; I suspect there are a lot of acquisitive property crimes. After all, we know narcotics, especially heroin, does not make anybody more violent. All it does is make him want more heroin and since under American law the price is artifically raised to hundreds or thousands times its natural price, the law itself prompts people to go out and acquire property. There are many ways of acquiring property. I would suspect that most narcotics addicts use violence as a last resort, and again I would be willing to test the thesis that 75 percent of narcotics addicts released on bail engage in acts of violence. I would seriously doubt that we would come anywhere near that figure but I would suspect that we would come up to 75 percent if one included all kinds of acquisitive illegal behavior for narcotics addicts who were impecunious as well as seriously addicted to heroin.

Mr. SANTARELLI. That is serious enough. Would that risk of harm to society by acquisitive property crimes, if it could be predicted to a 75 percent certainty, be sufficient to satisfy you on policy?

Mr. DERSHOWITZ. If you are asking me a personal question, the answer has to be no with respect to narcotics offenders, because I simply think we are going about the issue of controlling narcotics in this country in an incredibly barbarous and inefficient way. It is the law that causes the offender to go out and steal and then it is the law that punishes him for stealing. There are so many easier ways, more sensible ways, more humane ways of getting at this problem. People are citing the English approach to preventive detention. Why not adopt the English approach to heroin addiction? Once a person becomes an addict, once he has this insatiable craving for drugs, they recognize that as a fact of life and they give him the drugs at 25 cents a day which is its natural market price rather than elevating it by force of the law to $40 or $50 a day, which requires that he go out and steal. Were I a resident of the District of Columbia or the City of New York or any city which had a high narcotic heroin problem, the first order of priority I would have, as a person afraid of crime, would be to start giving out heroin free. Make it available free to all addicts who are going to commit crimes. That is the aspirin in this case, and the pistol to the head is the present approach we have to narcotics violations. Therefore, I simply cannot subscribe to a system of preventively detaining a category of criminals that we have in effect created.

Mr. SANTARELLI. Thank you.

Senator ERVIN. If you are going to have preventive detention for narcotic addicts, should not that preventive detention be for the purpose of trying to see if you can rehabilitate them and give them the strength to refrain from the use of the drugs, rather than to restrain them from committing crimes?

Mr. DERSHOWITZ. I would certainly prefer that, and there are some experiments, as you probably know, going on in New York with outpatient treatment of narcotics offenders which seem to show some indication of success. Surely if you are going to detain

them, the purpose ought to be to try to break them of the habit rather than to try in this very artificial way to keep them from raising the money which we force them to raise.

Senator ERVIN. And I certainly agree with you in your observation about narcotics. It seems to me that if a person has become—I hate to abandon hope for anybody but if he has become—a hopeless addict, it would be much better to recognize him as a medical or psychiatric problem and even give him what he actually requires at a reasonable price that enables him to stay on a fairly even keel, rather than adopting these more drastic measures which our law does.

Mr. DERSHOWITZ. I certainly agree.

Senator ERVIN. I think we try to treat as a criminal law problem something which is fundamentally a medical or psychiatric problem in our treatment of addicts in this country.

Thank you very much, Professor Dershowitz. We certainly will appreciate receiving the articles you have written on the subject.

Mr. DERSHOWITZ. Thank you for the opportunity and I will certainly send them.

Mr. WOODARD. Mr. Chairman, the next witness is Major General Charles L. Decker, Director of the national defender project of the National Legal Aid and Defender Association. General Decker, will you come up, please?

Senator ERVIN. General, I am delighted to welcome you to the subcommittee. I wish to express my regret that your path and mine do not cross as often nowadays as they did before your retirement from the service.

Mr. ERVIN. Mr. President, the preventive detention provision is absolutely inconsistent with the policies that have prevailed in this Nation since it became a republic. The demand for preventive detention is based upon figures which are not available, which have been plucked out of the air by the imaginations of people. And when this attempt to establish the law of preventive detention in the United States was first broached, I insisted that there were no figures available—that is, figures of a reliable nature—which would justify preventive detention.

As the result in part of my heckling the Department of Justice on that point, the Department of Justice commissioned the Bureau of Standards to make a study of this question. The Bureau of Standards took the names of every person who entered the criminal court system of the District of Columbia during 4 selected weeks during the first half of the year 1968.

One of these weeks was in January. Another was in February. Another was in the last part of May or first part of June. The fourth was the last week of June.

The Bureau of Standards traced the subsequent records of all of these persons who had entered the criminal court system of the District of Columbia during these 4 selected weeks. They followed them through the fall of 1968. They followed them throughout 1969. In some cases, as I recall, they followed them down to the early part of 1970.

They then filed a report which was most illuminating. It showed that of these people they actually traced, that of those persons charged with violent crimes and dangerous crimes in the District of Columbia during the 4 weeks, only 5 percent were rearrested—not convicted, but rearrested—for violent or dangerous crimes during the period of time covered by their study.

What does this mean? It means that a judge, in order to make a preventive detention system work, would have to be gifted with enough prophetic power to determine which five out of each 100 persons arrested for violent or dangerous crimes as defined in this bill would be likely to be rearrested for another crime of that character within a period of 2 years or thereabouts.

No judge has enough prophetic foresight to do that. During his appearance before my subcommittee on a preventive detention proposal, the Deputy Attorney General asserted that the rate of recidivism was nearer 40 percent than the 5 percent reported by the Bureau of Standards. To sustain his position, he declared that we must take into consideration the fact that many people who commit crimes are never apprehended, and that many crimes are never reported or discovered. He inferred from this that if it were possible to apprehend all persons who commit crimes, and it were further possible to discover all of the crimes which are perpetuated, we would find that the rate of recidivism would be at least 40 percent.

I addressed this question to the distinguished Deputy Attorney General:

Please tell me how you are going to make a preventive detention law applicable to men who commit crimes and are never apprehended for those crimes.

I have never received an answer to that question yet.

I asked him the further question:

How are you going to have a preventive detention law that would detain the people for crimes not reported and never discovered?

He has not answered that question yet.

So the fact still remains that one of the scientific agencies of the Government, the Bureau of Standards, has made an actual investigation in the District of Columbia and has found that we can reasonably anticipate that only five men out of every 100 who are arrested for a volent crime or a dangerous crime, as defined in this act, are likely to repeat that crime. That is what is involved in this preventive detention.

Mr. President, I would ask, Where are you going to put these people who are preventively detained? We find on page 192 this pious hope expressed. I might state that this pious hope is set out in section 23–1321, subsection (h) and subsection (1):

The person shall be confined, to the extent practicable, in facilities separate from convicted persons awaiting or serving sentences or being held in custody pending appeal.

In other words, they are going to be confined in facilities separate from criminals. That is the pious hope. I would like to ask how that is going to be done in the District of Columbia in view of the fact there is no room in our jails now. That is somewhat like an insolvable problem of how to preventively detain people never apprehended or how to preventively detain men who commit crimes that are never discovered.

In May we had an investigation made to learn something about the capacity of the jails, the bastilles, of the District of Columbia. We found that the combined District of Columbia detention facilities have a capacity of 3,053 inmates, which on May 15, 1970, housed 3,275 inmates. Out of that total of 1,408, more than 80 percent were in jail awaiting trial at that time. Of these 934 had been awaiting trial 30 days or more; nearly one-half, 675 or 48 percent, had been incarcerated without trial for more than 60 days; over 10 percent or 149 had been in prison for more than 1 year with no trial. Incredibly, 20 had been there more than 2 years and 4 had been there for more than 3 years.

Mr. President, how are you going to preventively detain people for 60 days and try them within that 60 days in a governmental agency that has jails where over 10 percent of the inmates have been in jail awaiting trial for more than 1 year?

Then, a few days ago we had another investigation made of this question. We found that of 1,408 inmates, some of them had been awaiting trial, namely four, for more than 36 months; one had been awaiting trial for more than 35 months; two had been awaiting trial for more than 34 months; two had been awaiting trial for more than 33 months, and so on.

Mr. President, I ask unanimous consent that a chart reflecting this information be printed in the RECORD at this point.

The PRESIDING OFFICER (Mr. BELLMON). Without objection, it is so ordered.

The table ordered to be printed in the RECORD, is as follows:

District of Columbia Department of Corrections, Data Processing Division—Inmates awaiting trial—Reporting date—May 2, 1970

Number of months awaiting:	*Number of inmates*
Less than 1	474
1	143
2	116
3	118
4	97
5	77
6	35
7	69
8	41
9	26
10	22
11	20
12	21
13	25
14	18
15	22
16	22
17	5
18	10
19	5
20	7
21	5
22	5
23	1
24	4
25	5
26	1
27	1
28	2
31	2
33	2
34	2
35	1
More than 36	4
Total inmates	1408

Average number of months awaiting 4.3

Mr. ERVIN. Mr. President, it is absurd to talk about filling the jails of the District of Columbia with preventively detained people for crimes they never committed and may never commit when there are people in the jails who have been there now for months on end awaiting trial and who have not been tried.

Why is preventive detention wrong? In the first place, preventive detention places a man in jail, not for a crime he committed, not for a crime of which he has been convicted, but for a crime which he has never committed and which he may never commit. It puts the stigma of the jailbird on a man who may be innocent. A very substantial percentage of people arrested in the District of Columbia and in all other jurisdictions on charges of crime are acquitted.

When a man is placed in jail, a stigma is placed on him of being a jailbird when, perhaps, he was never convicted of anything. This bill provides the man who is charged with a dangerous crime does not have to have a prior record to be preventively detained; in crimes of violence he has to have a record of prior conviction some time within 10-years before the present case arises. Just an assault with a deadly weapon where no one was hurt and no one was injured would constitute a crime of violence. Under this bill originally it was a crime of violence to be armed with a toy pistol at the time the man committed the crime of violence.

Under the D.C. Crime Bill as originally proposed, it was declared burglary in the second degree to rob a vending machine. Under this provision, a 16-year-old juvenile, who jiggled a few pennies out of a gum vending machine on three occasions, would be subject to a mandatory life sentence without eligibility for probation or parole until he had served 20 years. There are still penal provisions in this bill which cannot be reconciled with any civilized system of criminal justice.

When men are put in jail, we handicap them, because most people who are arrested for crime are poor. They do not have much in the way of financial resources. The average lawyer who appears for the average person charged with crime has to depend, in the nature of things, upon his client to assist him in preparing his case for trial. He would be denied the right to assist the lawyer in preparing his case for trial. When he is preventively detained, he is deprived of his job, because an employer is not going to keep a job open for a man who is in jail.

So he is deprived of his liberty for a crime he has not committed, he is deprived of the opportunity to aid his counsel in the preparation of his trial, he is deprived of his job, his family is deprived of his efforts to earn a livelihood, and all of that is done not because he has been convicted of a crime, but because some judge thinks he might do something dangerous if he is admitted to bail and permitted to remain with his family.

Those of us who have spent long years in the practice of criminal law know that any man who is in custody at the time of his trial is heavily prejudiced when it comes to getting a fair trial, because a jury cannot help but think that if he is in jail, he is unworthy in the eyes of the public to have his freedom. He has a much better chance to be acquitted, or at least to get a more lenient sentence, if he is permitted to remain with his family instead of being incarcerated, not for a crime he has already committed, but for a crime which he has not committed and which he may never commit.

A former Judge Advocate, one of the finest lawyers I have been privileged to know, supervised the work of a foundation which made funds available to certain bail agencies and provided some assistance in the defense of persons charged with crime. He testified before the Subcommittee on Constitutional Rights that the estimate of those who worked for this project was that a man's chance of being convicted was increased at least 20 percent by the fact that he was incarcerated during the time preceding his trial.

Mr. President, I have talked longer than I intended to. I mentioned the fact that the constitution of my State says that eternal vigilance is the price of liberty and that frequent recurrence to fundamental principles is essential to the preservation of the blessings of liberty.

I believe that this bill ought not to become law. We have provided the mechanism by which we can reject the provisions of the bill which are objectionable, the provisions that try to destroy a man's right to be indicted by a grand jury, the right to be tried by a petit jury, the right not to incriminate himself, the right to be released on reasonable bail pending his trial, and the right not to have officers knocking one's door down and entering his house as burglars now make their entries.

We have taken every good provision out of this bill and put it in two other bills. I want to assure the Senate that, in the event the Senate does what I think it should do in order to protect our basic liberties, and that is to vote down this conference report, we will ask unanimous consent to proceed to the immediate consideration of the two bills which we have introduced and which embody all the sound provisions of the conference report, and have them placed before the Senate for prompt passage. If there is objection to that unanimous-consent request, we propose to make a motion to discharge the committee and bring the bills before the Senate for immediate consideration, a motion which I understand requires a vote of only a majority of the Members of the Senate. Under the rules of the Senate, we can vote on that motion the following day.

I implore the Senate not to enact a bill which contains provisions which are absolutely hostile to the traditions which have prevailed in our country ever since it became a republic, not to adopt a bill which will deprive men of the right to be free pending their trial, not to adopt a bill that will allow men to be incarcerated for crimes which they have never committed and which they may never commit, and not to adopt a bill which destroys in the District of Columbia the ancient boast of our law that every man's home is his castle.

These liberties, once gone, are gone forever.

I implore the Senate to see that they are continued here.

In closing, I assert, as I have asserted several times, there is not a single sentence in the whole bill that provides that a man who is preventively detained under its provisions will be released after 60 days; but, on the contrary, he will go through the same merry-go-round at the expiration of 60 days, and at the expiration of 120 days, unless he is tried in the meantime.

I say the thing to do is to preventively detain prosecutors long enough to prepare the cases for trial and preventively detain judges long enough to try these cases rather than put the accused in preventive detention awaiting trial. Then you will go back to the only sound method of enforcing the criminal law, namely, swift trials for those accused of crime and quick judgments for those who are convicted. Do not swap that kind of system for a system where officers of the law can enter the homes of private individuals, as burglars now do, and a system under which men are jailed, not for crimes which they have committed or for which they have been convicted, but for crimes they have not committed and may never commit.

Just remember that the price of liberty is eternal vigilance, and the way to exercise eternal vigilance in a case of this kind is to vote against the adoption of a conference report containing a bill which has these inequities in it.

ORDER FOR RECOGNITION OF SENATOR TALMADGE ON MONDAY NEXT

Mr. BYRD of West Virginia. Mr. President, at the request of the junior Senator from Georgia (Mr. TALMADGE), I ask unanimous consent that following the remarks by the able junior Senator from South Dakota (Mr. MCGOVERN) on Monday next, the able Senator from Georgia (Mr. TALMADGE) be recognized for not to exceed 30 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

EXTENSION OF TIME FOR REPORTING SENATE JOINT RESOLUTION 207

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the time for reporting Senate Joint Resolution 207 be extended from July 15 to July 22, 1970.

The PRESIDING OFFICER. Without objection, it is so ordered.

DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970

The Senate resumed the consideration of the report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the amendment of the House to the text of the bill (S. 2601) to reor-

ganize the courts of the District of Columbia and for other purposes.

THE FACTS ABOUT NO-KNOCK

Mr. TYDINGS. Mr. President, as I have at some length already made clear in the Senate debate yesterday on behalf of the managers on the part of the Senate, the conference resolution of the so-called no-knock issue represents a major victory for the Senate position.

Specifically in the interest of safeguarding the individual rights of the residents of the National Capital and of forestalling repressive practices in the name of improved law enforcement, the Senate conferees insisted upon what I have for convenience summed up as five critical points:

First. The statutory exceptions to the knock-and-wait rule are strictly limited so as to confine no knocking to those few circumstances where it is already permitted under existing law.

Second. Existing law is substantially improved by requiring that, when grounds constituting exceptions to the knock-and-wait rule are known in advance, then a police officer can no-knock only after obtaining court permission in advance.

Third. The conference report restores the classic standard of "probable cause," derived from the Federal Constitution, for testing the sufficiency of the grounds for police conduct in the no-knock area.

Fourth. It is expressly set forth in the statement of managers on the part of the House, as it is stated likewise in similar reports to the Senate, that advance permission is required, not only when the applicant literally knows of facts in advance falling within the exceptions to the knock-and-wait rule; advance permission is also required when the applicant should know of such facts, in the sense that minimal ordinary diligence on the part of the police would have alerted the applicant to the facts.

Fifth. It is also expressly set forth in the House statement of managers that the no-knock provision is not to be bound by or otherwise construed in light of the House District of Columbia crime the mere destructibility of the evidence being sought might be grounds for departing from the knock-and-wait rule.

It is true that the conference substitute on no-knock—like the existing common law approved by the Supreme Court, and unlike the much more limited Seante version—applies to arrests as well as searches. Nevertheless, by insisting on the five points just mentioned, the Senate conferees have seen to it that the conference substitute contains nearly every safeguard in the original Senate version. We have seen to it that the conference substitute surpasses existing case law in the number and scope of the safeguards provided. In point of fact, the conference report conforms quite precisely to the recommendations of the Bar Association of the District of Columbia and is well within the parameters of the no-knock legislation supported by the District of Columbia government.

In all candor, I must inform you that the Senate conferees were not only mindful of the depth of opposition in the Washington community to the enactment of legislation touching upon the knock-and-wait rule; the Senate conferees were for a while, in fact, inclined to defer to that opposition. We entertained for a while the notion that little good could come of the legislation—no matter how just on the merits—if it had to be advanced in an unreceptive, hostile atmosphere. In time we chose another course, however; and determined to perfect the legislation, and to change that atmosphere through the process of public education. The need for stabilizing police practices in the no-knock area is too great, the safeguards of the conference substitute are too valuable and too many, for us to abandon the issue or temper our resolve.

In the judgment of the Senate conferees, it is far better to have the limited exceptions to the knock-and-wait rule spelled out and frozen on the statute books, instead of leaving the exceptions to grow in a disordered fashion and to change in Federal and local court case law. It is far better to have the limited exceptions spelled out clearly, statutorily, for the police to observe, instead of leaving police officers as at present to their own devices.

Similiarly, in the judgment of the Senate conferees, any police encroachment on the privacy of the individual should issue where possible upon express judicial authority only. It is in the best interest of a just and ordered society that the conference substitute relieves the police officer in most situations of having to make the difficult decision of whether to no-knock. As protection for the individual residents of the National Capital, the decision whether to no-knock is placed at the very outset in the hands of a judge.

What is equally important, at present the courts can supervise and limit police no-knocking only by means of the exclusion of evidence at a criminal trial. In contrast, by requiring judicial approval in advance for no-knock, the conference substitute promises to add court supervision in the myriad cases where the defendant pleads guilty and there is no trial, or where there is no trial because the evidence is insufficient or simply not found. Under the conference substitute, in other words, court supervision is required on two separate occasions—at the time of the request for no-knock authority and at the time of the motion to exclude the fruits of any no-knock search. Likewise defense counsel, under the conference substitute, can move to exclude evidence on two grounds—the absence of facts comprising an exception to the knock-and-wait rule, and the failure of the police to ask the court for no-knock authority in advance.

Again, in many, many respects the conference substitute on the so-called no-knock issue—like the Senate-passed amendment to the crime bill—represents an important advance in both the stability of the law and in the protection afforded the individual under the criminal law of the National Capital.

Now that the conferees on S. 2601 are no longer enjoined from discussing the work of the conference, I am especially anxious to dispel the wealth of misinformation which has circulated in the past few months on the subject of no-knock and S. 2601. Time and time again, I heard it said that the District of Columbia crime bill gives the police the power to conduct no-knock searches and arrests. Once and for all, this statement as understood by most nonlawyers is 100-percent untrue; even as understood by lawyers the statement is misleading at the very least. The power to no-knock does not derive from this legislation or any other. No-knock searches and arrests have been permissible, have been authorized, since common law times, and have expressly been allowed in American criminal jurisprudence for 150 years. Regardless of what may have been in the House version of S. 2601, the Senate version and the similar conference substitute merely continue existing authority and add to it reasonable further safeguards.

Time and time again, I heard it said that the so-called no-knock provision in the District of Columbia crime bill experiments with the rights of the residents of the District and treats them as guinea pigs for the Nation. In this same vein, it has been charged time and time again that no-knock is designed to establish a precedent for the States. Again, nothing could be farther from the truth. An overwhelming majority of the States already have no-knock authority spelled out in their case law, and perhaps as many as a dozen or so of the States have no-knock provisions in their criminal statutes as well.

The no-knock law in my own State of Maryland was spelled out not long ago by the court of appeals of the State. In the case of *Henson* v. *State*, 236 Md. 518, 204 A. 2d 516 (1964), the police had probable cause to believe, on the basis of extensive, personal experience, that certain narcotics evidence would be flushed down the toilet or otherwise irretrievably thrown out if they were to adhere to the knock-and-wait rule; the police indeed had had the premises under surveillance for a week, during which time 43 known addicts had visited the premises often comporting themselves in a manner bespeaking the transaction of sales of narcotics. The Maryland court ruled unanimously in the Henson case that the police had authority to no-knock. The conference version of S. 2601 is intended merely to codify this and similar court rulings, and to add the further safeguard of a requirement of prior judicial scrutiny.

Lastly, it should be noted that the no-knock warrant provision in the conference report on S. 2601 is patterned after the equivalent no-knock warrant provision in the New York Code of Criminal Procedure, as well as comparable provisions in the codes of Nebraska, South Dakota, South Carolina, and Utah.

It has been suggested that the inclusion of the "useless gesture" in the list of exceptions to the knock-and-wait rule creates a loophole, permitting the police to take the law into their own hands, to no-knock pellmell. Again, however, it must be understood that at least under the conference substitute the "useless gesture" exception positively has no such

meaning. The term "useless gesture" under the conference substitute is specifically utilized as a legal term of art, with narrow and exclusive reference to prevailing case law. In this way the term is restricted to situations as where the officer's identity and purpose are already known to the occupant of the premises to be searched, or as where the occupant has failed to respond to a knock on the door and is known to be asleep and incapable of being given notice. (See *Miller* v. *United States* (357 U.S. 301 (1958)); and *Bosley* v. *United States*, decided April 9, 1970, No. 21,513, U.S. Court of Appeals, District of Columbia circuit.)

To the question, "Does the no-knock provision give the police the power to enter over the occupant's objection?" the answer is decidedly, "No." Already the police may enter, even break and enter, over the occupant's objection, under a Federal statute applicable throughout the country (18 U.S.C. 3109). Similarly, under the time-honored common law of warrants, when a court issues a warrant, it decides quite specifically that the interests of the public are such as to make entrance requisite regardless of the occupant's wishes. The complementary knock-and-wait and no-knock rules, to be exact, have nothing to do with whether or if the police may break and enter uninvited. Rather, they affect only the procedures by which the police execute said breaking and entering; the rules under discussion affect only the manner in which the police go about their rightful business.

Next, I have heard it argued that the exceptions to the knock-and-wait rule, the so-called exigent circumstances, do not admit of being known in advance. Despite its theoretical appeal, this objection finds no support in commonsense or actual practice. In a gambling case, if it is known, for example, that the prospective defendants regularly use water soluble paper, that they conduct their operations near a disposal facility, that they have defeated searches previously by immediately and effectively disposing of all evidence upon receiving preentry notice from the police, and that the prospective defendants are aware of the police surveillance and are primed to effect the disposal of the necessary evidence—if these so-called exigent circumstances are known at the time of the execution of the search warrant, they are almost invariably also known at least 1 hour in advance of the execution, in time for the police to apply for court permission to depart from the knock-and-wait rule.

Let me give another example: in a case involving both armed robbery and murder, if it is known that the prospective defendant is armed and will shoot it out rather than surrender to the police, for example he has just shot and killed a police officer in the process of escaping, if his recent conduct in escaping has made it evident that he knows the police are hot on his trail—if these so-called exigent circumstances are known at the time of the execution of the arrest warrant, they are almost invariably also known the 1 hour or so in advance, in time for the court to rule on whether complete surprise is warranted and on whether the knock-and-wait rule must be complied with strictly.

S. 2601 as reported by the House-Senate conference does not itself authorize no-knock in cases like those I have described. No-knocking in such cases is fully and clearly authorized under the law today as it has been for many years. What S. 2601 does is to continue that existing authorization in clearer, statutory language, all the while enhancing the protection afforded in the interest of individual privacy by stipulating that where possible a judge and not the policeman in the street must make the no-knock or knock-and-wait decision. I submit that this course is both advisable as a matter of public policy, and, as my examples demonstrate, also feasible in actual practice.

Without question the most troubling criticism that has been leveled on the subject of the so-called no-knock issue in S. 2601 is the suggestion that the legislation will heighten the level of violence in this community. Critics have suggested that when police officers depart from the knock-and-wait rule, occupants of the premises to be searched will, and perhaps should respond with a blast from a rifle. Mr. President, if I believed that the net effect of the conference substitute would be an increase in shoot-outs with the police, I would immediately align myself in opposition to this bill. My support of the conference substitute, however, reflects my firm conviction that the effect of the legislation will not be what the critics have supposed; indeed, I am amply convinced that most of the critics address an issue not now before the Congress.

First, it is a simple fact, as well as a matter of commonsense, that the danger of shot-outs arises more out of strict adherance to the knock-and-wait rule, rather than out of the limited no-knock authority in existing law codified in S. 2601. Shoot-outs, violence, death, occur more frequently when the police signal their presence and purpose, and give a dangerous suspect time to get his weapon—not when the police take the dangerous suspect by surprise before he can arm himself to shoot, We need only reflect on the recent, publicized case of the local bank robber, Billy Austin Bryant. Bryant killed two FBI agents at the door of his wife's apartment after the agents identified themselves as police—and clearly not because he mistook them for burglars. Again, I am convinced that on balance the consequence of limited no-knocking is less violence, not more. And I am equally confident that the police, especially with increased court supervision, will continue to utilize their law enforcement tools so as not to endanger human lives, including their own.

Next, it is essential that we keep in mind what the basic issue is now before the Congress. Opposition to the concept of no-knocking is deep and widespread, in the Congress and in the community. What we have pending before us, however, is not the general question of whether police officers may or should ever execute warrants without knocking and waiting. That question was settled long ago in the recesses of our legal history, and has been reaffirmed and reaffirmed by the Supreme Court of the United States. Despite our cautious reservation, no-knock has been for years now a fact of American life and law.

The issues that are before us, Mr. President, are whether the exception to the knock-and-wait rule should be stabilized, clarified, in legislative form, and whether prior judicial approval is feasible and well-advised. On these, the genuine issues before us, the Senate conferees have expressed their view and ask the concurrence of the Senate; public order and individual privacy merit the safeguards of codification and prior approval; prior approval, moreover, not only constitutes valuable protection, but also is practicable in fact. While I tend to disfavor, and fully know the dangers of the broad concept and practice of no-knocking, I count myself among the most vigorous supporters of reform of the manner of statement and procedures surrounding the knock-and-wait rule. Notwithstanding the no-knock slogans, disavowals, threats, and misstatements, the public must understand that it is only this reform that is to be found in the conference report on the District of Columbia Court Reform and Criminal Procedures Act, only codification and further protection by substituting an objective judge to make vital decisions in place of the police.

Mr. President, I invite attention to the opinion of the Supreme Court in the case of *Ker* v. *California*, 374 U.S. 23, which was printed in the RECORD earlier today.

Mr. TYDINGS. Mr. President, I ask unanimous consent that the opinion of the United States Court of Appeals for the District of Columbia in the case of *Bosley* v. *United States*, No. 21,513, decided April 9, 1970, be printed in the RECORD.

There being no objection, the opinion was ordered to be printed in the RECORD, as follows:

[U.S. Court of Appeals for the District of Columbia Circuit, No. 21,513]

DAVID E. BOSLEY, APPELLANT *v.* UNITED STATES OF AMERICA, APPELLEE—APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Decided April 9, 1970]

Mr. R. Timothy Hanlon, with whom *Mr. Murdaugh Stuart Madden* (both appointed by this court) was on the brief, for appellant.

Mr. Donald T. Bucklin, Assistant United States Attorney, with whom *Messrs. Thomas A. Flannery*, United States Attorney, *Roger E. Zuckerman* and *Victor W. Caputy*, Assistant United States Attorneys, were on the brief, for appellee. *Messrs. David G. Bress*, United States Attorney at the time the record was filed, and *John A. Terry*, Assistant United States Attorney, also entered appearances for appellee.

Before WILBUR K. MILLER, *Senior Circuit Judge*, and WRIGHT and MACKINNON, *Circuit Judges*.

MACKINNON, *Circuit Judge:* Appellant was charged in a three count indictment with housebreaking (D.C. CODE § 22–1801), rape (D.C. CODE § 22–2801), and sodomy (D.C. CODE § 22–3502). He was found guilty by a jury of housebreaking and sodomy as charged and of the lesser included offense of assult with intent to commit rape. He was sentenced to four to twelve years for housebreaking, four to twelve years for assault with intent to commit rape, and three to nine years

for sodomy, the sentences for the assault with intent to commit rape and sodomy to run concurrently but consecutively to the sentence for housebreaking.

The Government's evidence may be briefly summarized. The complaining witness, a young lady, testified that she resided by herself in an apartment on Connecticut Avenue, N.W. in Washington, D.C. She testified that on the night of March 16, 1966, she went to bed around 11:30 P.M., having locked both the door and window to her apartment. She testified that she was awakened later that night by a man standing over her bed. Her testimony that Bosley entered her apartment without her consent is corroborated by a broken window glass in her apartment opposite the fire escape. Both complainant and a girl friend testified this was not broken earlier in the evening. Thus the fact that the window was broken in a manner to permit unlatching the lock from the outside is corroborative of the Government's contention that Bosley had gained admission to the apartment in this manner. Also corroborative of an outside entrance by Bosley into the apartment is complainant's testimony that he was wearing gloves when she first noticed him standing by her bedside. Bosley admitted he had gloves with him at the time.

The complaining witness recognized the intruder as appellant, whom she had met on two previous occasions,[1] and who lived in the apartment above her. She screamed and was told by appellant that he would kill her if she continued to scream. She testified that appellant then raped her and forced her to engage in oral sodomy. She testified that a cycle of rape and sodomy continued throughout the night. Her description of the rape and sodomy can only be described as bestial. She further testified that appellant left her apartment by way of the fire escape the next morning, and she then promptly went to a girl friend's apartment and called the police.

A detective of the Metropolitan Police arrived at her girl friend's apartment in answer to her call, and together they proceeded to her apartment. Shortly thereafter, another detective arrived at complainant's apartment and the two officers then went upstairs to appellant's apartment. As testified to by the detective:

"We knocked on the door. The door was a little bit ajar. We knocked on the door. No answer. We could look through and see someone laying on the couch. So we just pushed the door open and walked in." The officers then shook the appellant awake,[2] placed him under arrest, and took him to the police station. Here certain items of appellant's clothing were seized and a sample of his pubic hair was taken.[3] Apparently no evidence was taken from the appellant's apartment.

Appellant defendant on the claim of consent. He testified that he had twice met the complaining witness in or about their apartment building,[4] that preceding the early morning hours of March 17th he had been to a bar and, upon returning to his apartment, had felt lonely. The girl in whose apartment he was staying was out of the city. He further testified he went downstairs to the apartment of the complainant, knocked on the door, was admitted and that after some conversation, he made advances which were accepted by her, after which he fell asleep, that when he awoke the next morning, complainant was upset about the possibility of pregnancy and about her fiance learning of the episode; that he was feeling poorly and could offer her little sympathy, so he left her apartment by the window and returned to the upstairs apartment where he was staying by way of the fire escape. He stated he took this route because he had left the keys to his apartment in his apartment. When he found there was no food in his apartment, he went to a nearby store and picked up some groceries, then returned and fell asleep on the couch, and the next thing he remembered was being awakened by the police.

I

The appellant first argues that the trial court erred in admitting, over objection, a certain statement allegedly made by him while in police custody and before he had been advised of his rights as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The statement in question was allegedly made by appellant in his apartment after the police had entered and shaken him awake. The detective was allowed to testify that after they had awakened him they first informed him that the girl downstairs had charged him with rape and appellant stated that he had not been in the apartment of the complainant witness but rather had been in a tavern until 2:00 A.M., at which time he had come home and gone to bed. The appellant denied making this statement; rather he testified as follows:

"As far as I can recall, when they came in, he said the girl downstairs . . . complained I had broken into her apartment and raped her.

"The only thing I can recall telling him was I didn't know what he was talking about, that I did not break in and I had not raped anybody."

Appellant was next arrested and taken to the police station.

The Government first argues that the trial court properly admitted the detective's testimony as impeachment evidence; the defense argues that the statement was used to discredit appellant's consent defense. In any event, we need not dwell long on this point since *Miranda*, if violated, under our decisions would prohibit the introduction of the statement even if it were used only for impeachment purposes. *Miranda* v. *Arizona*, *supra*, 384 U.S. at 477; *see also Proctor* v. *United States*, 131 U.S. App. D.C. 241, 404 F 2d 819 (1968); *Blair and Suggs* v. *United States*, 130 U.S. App. D.C. 322, 401 F. 2d 387 (1968).

The Government next argues that appellant's statement was voluntary and as such comes within the "volunteered statement" exception to *Miranda*. On this point *Miranda* states:

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444.

We note that the Court drew on distinction between voluntary and involuntary statements, and we may assume that *Miranda* applies to all statements that come within its purview whether volunteered or not.

However, the Court also made it clear that not all statements come within the purview of its rule. We quote (384 U.S. at 478):

"In dealing wtih statements obtained through interrogation, we do not purport to find all confessions inadmissable. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." (Emphasis added).

The emphasized portion of the quote shows that the question to be asked is not solely whether the statement was voluntary, but rather in what circumstances was the voluntary statement made.[5] The rest of the quote sheds light on this question. It would indeed be a harsh rule with respect to a volunteered statement made by one who walked into the police station in order to confess, or who volunteered his confession over the telephone, to prohibit its admission in evidence because the volunteered statement was offered before the police could give the required warning. In these situations, there would be no opportunity for overreaching or other abusive practices on the part of the police and consequently one of the main purposes of the *Miranda* decision—the deterence of such police practices—would not be involved. Exclusion in such situations would serve no useful purpose and the Court wisely limited its rule to those

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[1] At the first meeting, the complaining witness had locked herself out of her apartment. She went upstairs to the apartment of another girl she knew and was surprised to find appellant staying there also. The appellant then assisted her in gaining entry by climbing from the upstairs apartment via the fire escape to her apartment, going in through the window, and opening the locked door. The second meeting was apparently a brief enconter in front of the building, more properly described as a rooming house than as an apartment building. It was an older home that had been subjected to some remodeling. Appellant testified that he was invited to the complainant's apartment during this encounter but this was denied by her.

[2] An indication of how soundly appellant was sleeping can be gained from the testimony that the police awakened him at about 8:45 A.M. on March 18th and that he had a hangover at the time; that from 10 P.M. of the day previous he had been out celebrating his birthday and had consumed 13 cans of beer, a couple of mixed drinks and some sherry; engaged in three acts of sexual intercourse and several acts of sodomy and had been awake until about 7:45 A.M. when he went to sleep. He had about one hour's sleep according to this version. His own testimony reduced the instances of sexual intercourse to one and stated he had slept from about 3:00 A.M. to 6:00 A.M. The jury did not believe his testimony in other particulars and the other version of his night's activity seems to be the most reliable.

[3] The items taken from the appellant at the police station included a shirt, T-shirt, undershorts, handkerchief, sweater and trousers. This property was turned over to the FBI for analysis. This analysis revealed that the fibers taken from appellant's trousers and sweater were similar to those found on the complainant's sheets, nightgown, and panties. Pubic hairs which matched the sample taken from appellant were found on complainant's nightgown and sheets. Evidence of these and similar analyses were introduced into evidence by stipulation. Appellant here challenges the introduction of this evidence. *See note 8 infra.*

[4] *See* note 1 *supra.*

[5] In Orozco v. Texas, 394 U.S. 324, 326 (1969), the police "officers questioned petitioner about incriminating facts" in his own room without advising him of his rights. The facts there are thus distinguishable from this case because here the police never questioned Bosley about the crime either at his own room or at the police station and no evidence was offered or admitted as to any response Bosley gave to any question by the police.

statements "stemming from custodial interrogation."[6]

Turning to the case at bar, we note that appellant's statement whatever its exact content[7] was a spontaneous denial of guilt which he volunteered when the police informed him of the charges levelled against him. We consider the reasoning of *Miranda* is applicable here which allows the admission of a voluntary statement that is not the result of "in-custody interrogation." We note here that there was no opportunity for the police to employ any abusive practice in order to obtain an incriminating statement. At the time the statement was made, there had been no interrogation whatsoever, and thus appellant's statement could not have been one "stemming from custodial interrogation." And no claim is made that appellant was subjected to any custodial interrogation.

We are not ready to condemn the police practice of announcing to a person they may seek to arrest the charges against him as early as possible in the encounter. In this instance the police were only doing what was required of them by 18 U.S.C. § 3109. Upon learning the charges, the arrested person may quite naturally make a spontaneous statement of innocence or noninvolvement. At this point, the police may have had no opportunity to give the *Miranda* warnings or to prevent the statement from being made. They had no such opportunity here. Exclusion of a statement made in these circumstances would not effectuate the purposes of the *Miranda* decision.

We recognize that at some point in time during the course of the arrest it could no longer be contended that the police were without opportunity to give the *Miranda* warning. We believe that *Miranda* does require the police to warn an arrested suspect of his rights as immediately as practicable after arresting him. A heavy burden rests on the Government to prove any contention that the arrested suspect volunteered a statement without any "interrogation," explicit or implicit, on the part of the police and before he could be warned of his rights. *See Miranda* v. *Arizona, supra*, 384 U.S. at 475. We also recognize that the case before us would be quite different had the police interrogated the appellant in conjunction with informing him of the charges against him, *i.e.*, had the police informed the appellant of the charges and then *asked* him to respond to these charges. But the case at bar is not such a case. Here the appellant's statement was a spontaneous denial of guilt which he volunteered in response to the announcement of the charges levelled against him before the police had an opportunity to give the usual warning. We do not think the *Miranda* decision was intended to apply to such facts. Its entire thrust, as it reiterates so many times, is at "in-custody interrogation."

The appellant next argues that the statement allegedly made by him, along with certain physical evidence,[8] should not have been admitted on the grounds that they were obtained following his arrest which was in violation of 18 U.S.C. § 3109 (1964). That statute provides:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

It is clear that appellant's point does not raise constitutional issues because it is unquestioned that the police did have probable cause to enter to arrest Bosley for felonies. What is raised is the application of the statute to the entry and its effects on certain evidentiary matters. In *Miller* v. *United States*, 357 U.S. 301 (1958), the Supreme Court held section 3109 to be applicable to arrests,[9] and the Court has since broadly construed the section to proscribe an "unannounced intrusion," *Sabbath* v. *United States*, 391 U.S. 585, 590 (1968).

On the other hand, the Supreme Court has left open the question of whether there may be exceptions to the requirements of section 3109 in certain circumstances. *See Sabbath* v. *United States, supra*, 391 U.S. at 591; *Ker* v. *California*, 374 U.S. 23, 40 (1963); *Wong Sun* v. *United States*, 371 U.S. 471, 482–83 (1963); *Miller* v. *United States, supra*, 357 U.S. at 309–10. Mr. Justice Brennan was clearly of the opinion there would be certain exceptions to any constitutional ruling on the subject, *Ker* v. *California, supra*, 374 U.S. at 47, and Mr. Justice Marshall has suggested that these exceptions may be applicable to section 3109, *Sabbath* v. *United States, supra*, 391 U.S. at 591 n.8. Lower courts have, in fact, engrafted certain exceptions onto section 3109. One of these may be termed the "useless gesture" exception. *Cf. Miller* v. *United States, supra*, 357 U.S. at 310; *Hair* v. *United States*, 110 U.S. App. D.C. 153, 155 n.9, 289 F.2d 894, 896 n.9 (1961). In the past it has been applied when the arresting officers were justified in being virtually certain that the person to be arrested knew their purpose, and hence compliance with section 3109 would be a "useless gesture." *See, e.g., Wittner* v. *United States*, 406 F.2d 1165, 1166 (5th Cir. 1969); *Der Garabedian* v. *United States*, 372 F.2d 697, 699 (5th Cir. 1966); *Chappell* v. *United States*, 119 U.S. App. D.C. 356, 358–59, 342 F.2d 935, 937–38 (1965).

We think application of the "useless gesture" exception to the case at bar is appropriate. We note that the officers originally attempted to comply with section 3109 by knocking on the partially open door. They received no response and apparently knocked again. Then, noting that appellant was asleep on the couch they entered the apartment through the open door, awakened appellant and announced their purpose. Since appellant had not been awakened by their knocking, the officers could reasonably have concluded that further knocking or verbal announcement would be a "useless gesture." Indeed, it appears that at this point the most practical means available to the officers to carry out their duty of giving notice of their authority and purpose was to enter the apartment and awaken the appellant. We note that the officers, after they had awakened the appellant, did immediately state their purpose (and impliedly their authority) by informing the appellant of the charge levelled against him. To have done so before entry would have been useless gesture as the person the statute is designed to protect, the occupant, was asleep and the indications to the officers were that he was not capable of hearing them as he had not been awakened by their knocking. We conclude that the entry through the open door in these circumstances did not violate section 3109.

Affirmed.

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[6] Miranda v. Arizona, 384 U.S. 436, 444. (1966).

[7] *See* p. 4, *supra*.

[8] See note 3, *supra*. We note that this physical evidence was not seized at the appellant's apartment, but rather was taken from him at the police station after his arrest. Appellant argues that this evidence should have been suppressed as "fruits of the poisonous tree" under Wong Sun v. United States, 371 U.S. 471, 487–88 (1963). However, granting *arguendo* the primary illegality, we are far from clear that the seizure of this evidence was not so remote so as to be "purged of the primary trait." *Id.* In any event, our disposition on the merits of the § 3109 question renders decision of this question unnecessary.

[9] This circuit had reached a similar result prior to *Miller* in Accarino v. United States, 85 U.S. app. D.C. 394, 179 F. 2d 456 (1949).

Mr. TYDINGS. Mr. President, the thrust of the remarks I have just completed is that the so-called no-knock provisions in the Senate bill in no way enlarge existing law with respect to the circumstances under which a police officer is justified in following the common law exceptions to the normal knock-and-wait procedure in executing an arrest under a search warrant.

One of the great problems with this issue is that the average citizen, indeed, the average lawyer, indeed, the average, I am afraid, Member of Congress, does not know what the common law exceptions to the knock-and-wait rule of executing an arrest under a search warrant are; most, I am afraid, have no knowledge of the decisions, laws, statutes, either of the United States, of the District of Columbia, or of the several States. It is for that reason that I have placed in the RECORD the leading Supreme Court case, Ker against California, and the most recent District of Columbia case, Bosle against United States, which set forth basically the common law exceptions to the basic requirement that a police officer must knock and wait before executing a search warrant or an arrest warrant.

In the case of Ker against California, the situation involved entering and seizing illegally obtained marihuana without knocking, stating the purpose, or following the normal procedure in executing a search or an arrest warrant. Of course, in that case there was not even an arrest or a search warrant, but the Supreme Court found that the circumstances were sufficient to justify the arrest. The issue with which we are concerned, of course, is whether the seizure was justified because it was a breaking without following the normal knock-and-wait procedure.

The issue in the California case was that the California statute specifically codified the whole knock-and-wait principle, namely, that in the execution of a warrant a police officer must knock and wait prior to the actual entry.

I shall read from page 38 of the Supreme Court decision in Ker against California, as follows:

Since the petitioners' federal constitutional protection from unreasonable searches and seizures by police officers is here to be determined by whether the search was incident to a lawful arrest, we are warranted in examining that arrest to determine whether, notwithstanding its legality under state law, the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search. We find no such offensiveness on the facts here. Assuming that the officers' entry by use of a key obtained from the manager is the legal equivalent of a "breaking," see *Keiningham* v. *United States*, 109 U.S. App. D.C. 272, 276, 287 F. 2d 126, 130 (C.A. D.C. Cir. 1960), it has been recognized from the early common law that such breaking is permissible in executing an arrest under certain circumstances. See Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 798, 800–806 (1924). Indeed, 18 U.S.C. § 3109,[10] dealing with the execution of search warrants by federal officers, authorizes breaking of doors in words very similar to those of the California statute, both statutes including a requirement of notice of authority and purpose.

I continue by reading from page 39:

Here, however, the criteria under California law clearly include an exception to the notice requirement where exigent circumstances are present. Moreover, insofar as violation of a federal statute required the exclusion of evidence in *Miller*, the case is inapposite for state prosecutions, where admissibility is governed by constitutional standards. Finally, the basis of the judicial exception to the California statute, as expressed by Justice Traynor in *People* v. *Maddox*, 46 Cal. 2d, at 306, 294 P. 2d, at 9, effectively answers the petitioners' contention:

"It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Suspects have no constitutional right to destroy or dispose of evidense, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844.

Section 844 is the basic California search and warrant law, which requires an officer to knock and identify himself and his purpose before entering. I continue to read:

Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. (*Read* v. *Case*, 4 Conn. 166, 170 [10 Am. Doc. 110]; See Rest., Torts, § 206, com. d.) Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance.

Mr. President, one of the most difficult problems confronting the criminal justice system is how to handle a dangerous criminal defendant whom a judge believes will commit another crime if released pending trial on a criminal charge.

In many Western countries, the problem is resolved by an open process in which the defendant has a chance to show why he ought not to be detained, but in which the judge has the power to protect society from defendants who are deemed to be dangerous. In our country, historically and today, we have handled the same situation through a hypocritical system of high money bond which imprisons poor defendants, who may not be dangerous, but releases the more affluent defendants, who may be the most dangerous of all, when they post their money bail.

The District of Columbia crime bill conference report now pending before the Senate contains provisions for reform of this hypocritical practice and conforms it to the practice of other nations in the Western world. It is called pretrial detention. I would call it bail reform.

While considerable difference of opinion characterizes the various interpretations of statistical evidence on the subject, recent studies have demonstrated, at least, that crime committed by persons on court-ordered release, or bail recidivism, is of large enough proportions to be considered of major consequence to law enforcement. The National Bureau of Standards report indicate that 25 percent of persons charged with dangerous crimes and 17 percent of those charged with violent crimes can be expected to be rearrested for further crime while on pretrial release. These figures must be further adjusted to reflect the fact that many crimes are not reported to the police, and that only 30 percent of reported crimes, even, result in arrest and criminal charges.

The conference report provides several solutions to this problem in addition to the pretrial detention alternative: court reorganization to promote speedy trials and increased bail supervision by an expanded bail agency should have an especial impact. Pretrial detention remains as an essential technique, however, for dealing with certain incorrigible criminals who feel they have little to lose by committing more crimes while on bail or for controlling compulsive narcotics addicts who must engage in crime to support their habits.

The Bail Reform Act of 1966, while partially achieving its goal of decreasing reliance upon money bond as a condition for release, also deprived the courts of any legal authority to consider potential dangerousness in setting conditions of release. Examples of increased bail recidivism under the current law are familiar to nearly every citizen in the District of Columbia. The recent publicized shoot-out—discussed on the floor of the Senate—between a police officer and two armed robbers, which resulted in serious injury to the patrolman and death to one of the suspects, is but one of many such cases. Franklin Moyler had previously been convicted of one robbery and, at the time of the most recent holdup in which he met his death, was on bail in connection with two other armed robbery charges. A narrowly confined and adequately safeguarded pretrial detention alternative, as approved by the conference, constitutes a significant part of the needed response to cases such as this one.

Equally, if not more important, however, is the fact that enactment of the conference report will constitute a major reform in existing bail practices which, in conjunction with the bail agency expansion, will clearly result in a net decrease in the percentage of persons who are detained prior to trial. Historically, danger to the community has always been considered by trial courts in setting money bond which could be manipulated to effect complete detention prior to trial, unencumbered by procedural safeguards. Pretrial detention is not a new concept, the thousands of persons who have waited in the District of Columbia Jail, often as long as a year or more, for the trial dates to come can testify that pretrial detention is a daily reality. In spite of the Bail Reform Act of 1966 the practice of pretrial detention through high money bond persists on a large scale in the National Capital. This irony is attributable in large part to two shortcomings in existing law: First, the failure of Congress to implement the Bail Reform Act by providing resources for supervision of persons who would be eligible for release were such supervision readily available, and second, the prohibition against consideration of dangerousness in setting release conditions—which have forced actual and inevitable consideration of dangerousness to be shrouded in hypocrisy.

Recent studies of the bail practices in the District of Columbia show that over 30 percent of persons charged with criminal offenses are currently being detained because of their inability to post a money bond. The detention rate for felony suspects is 40 percent. Nor does money bond need to be high to be unreachable for the indigent defendant. These studies show that a sizable portion of these detained defendants were merely charged with misdemeanors. These persons were held, not on grounds of dangerousness, but simply because court and counsel were not able to devise adequate release conditions. The expansion of the bail agency's functions to include supervision of persons on court-ordered release will provide an adequate release alternative in the vast number of marginal cases where personal recognizance is counterindicated, and will free other, more rigorously policed supervision resources for the more difficult cases.

The 30-percent figure for all arrests and the 40-percent figure in felony cases also represent, however, many persons who are currently detained on the basis of their dangerousness. Today when a trial judge is faced with a bail decision involving an extremely dangerous suspect, the judge is forced to choose between ignoring his better judgment and the consequence to the community upon the release of the suspect or engaging in the subterfuge of setting an intentionally high and unreachable money bond. Nominally the money bond is calculated to assure appearance at trial, but in reality it is designed to detain the defendant in order to protect the community from his dangerous or violent behavior. This practice can no longer be tolerated. It permits an approach to pretrial detention that is both overinclusive and underinclusive in effect. It is overinclusive because the process is committed solely to the unreviewable discretion of the trial judge's mental processes. As a result, through the lack of procedural safeguards many persons who should be released are often detained. It is underinclusive because the hypocrisy of present bail practices does not permit the courts to focus directly, forthrightly, and in an adversary proceeding upon the question of dangerousness. As a result, many persons are being released to commit new crimes while on bail. In both instances, in addition to being arbitrary, the present practice is totally discriminatory, since it permits the detention of the poor but allows the rich defendant to be released regardless of what may be his greater danger to society.

Any objective appraisal of the bail policies currently in effect in the District of Columbia would dictate that another major reform if the bail laws is essential. The provisions approved in the conference report represent an important step in that direction. Reform is achieved first

by making visible the consideration of dangerousness in setting release conditions or in ordering detention. Henceforth, the pretrial detention provisions of this legislation, not financial conditions, will be imposed to assure the safety of the community, and conversely, high money bond may not be used as a means to deny release on the untested assumption of dangerousness. Second, if release is to be denied, it must be denied forthrightly in an adversary proceeding which fulfills the constitutional promise of due process of law. The detention decision is surrounded by a panoply of safeguards including limits relating to detention eligibility, procedural due process, and the actual detention itself.

First, detention can be ordered for a limited number of categories of defendants of the type which available evidence demonstrates pose an appreciable danger to society. If charged with a crime of violence, a defendant is not eligible for detention unless he is currently on bail, probation or parole, or has recently been convicted of another crime of violence. The Senate conferees furthermore insisted that persons who are charged with an extremely dangerous crime—limited to forcible robbery, first degree burglary, arson, forcible rape, and felonious sale of narcotics—must be shown to have a prior pattern of dangerous behavior. A confined narcotics addict charged with a crime of violence may be held for treatment, and any defendant who threatens or injures witnesses or jurors in order to obstruct justice may be held. None of these defendants may be detained unless, after a thorough and exhaustive exploration of alternative release conditions, the court finds that no condition would reasonably assure the safety of the community. Most important, with the exception of the obstructor of justice, the Government must establish in each case that there is a substantial probability of the defendant's ultimate conviction.

Second, procedural due process is assured by the requirement that these findings be made after an adversary hearing of record with the defendant represented by counsel and with the right to present witnesses on his own behalf and to cross-examine witnesses presented against him. The Government must bear the burden of proof, and a prompt appellate resolution of any detention order is provided.

Finally, additional safeguards are required in the event detention is ordered. The Senate conferees receded to the House limitation of any detention order to 60 days, but insisted upon an expedited trial calendar and an agreement to urge budgetary appropriation for 25 new prosecutors for the District, to assure that the time limits will be met and in most cases met in substantially less than 60 days. To this end the Senate conferees also insisted that the time limits not be extended by virtue of the filing and resolution of pretrial defense motions. In addition, during his confinement, the defendant should be set apart from convicted offenders, have liberal access to counsel, and be released for short periods in custody to secure witnesses and prepare his defense.

It bears mentioning that the Senate conferees were not unmindful of the serious constitutional questions raised by any legislatively sanctioned pretrial detention on grounds of dangerousness. This concern should be fully aired in the decision to adopt the conference report; however, on the basis of existing authority the conferees could not locate persuasive evidence that a narrowly limited and fully protected detention alternative violates either the due process clause or the eighth amendment. The prohibition against excessive bail cannot be read to mandate bail in all cases; it merely forbids the imposition of high money bail in cases where the defendant has a right to statutory bail. This reading is supported by the Judiciary Act of 1789, passed by the same Congress that adopted the Bill of Rights, which limited the right to bail to noncapital cases. Moreover, in the early days of the Republic capital offenses included murder, burglary, arson, forcible rape, and many other offenses. The eighth amendment does not speak of exceptions for capital cases, nor does it authorize the detention of a defendant when witnesses or jurors are threatened or when a defendant is charged with an offense while on probation or parole or pending extradition. Yet these exceptions have repeatedly been approved.

In *Carlson* v. *Landon*, 342 U.S. 524 (1952), the Supreme Court observed:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.

This interpretation was reaffirmed in the recent District Court case of *United States ex rel. Covington* v. *Coparo*, 297 F. Supp. 203 (S.D.N.Y. 1969), in which the court said:

> Congress could, without running afoul of the Eighth Amendment, . . . provide . . . that persons accused of kidnapping, bank robbery with force and violence, or other serious non-capital crimes are not entitled to bail as a matter of right.

The ultimate test of constitutionality is due process of law. It is inconceivable that for decades de facto detention through high money bond and absent any procedural protections could avoid constitutional condemnation, while a measured response to bail recidivism fully surrounded by due process protections, the net result of which will guarantee the release of many persons wrongfully detained, will not pass constitutional muster. The amendment to the Bail Reform Act, as approved in conference, is such a measured response. The pretrial detention alternative, approved in the conference report, in fact, is much more carefully limited than the actual practice in the Federal system or the practice as it has existed in virtually every State and most countries of the Western World. Dangerousness is a typical consideration in setting bail in France, West Germany, Sweden, Norway, the Netherlands, most states of Australia, and most provinces of Canada.

The British success with pretrial detention over hundreds of years demonstrates that a carefully safeguarded system can be consistent with the concept of the Bill of Rights and still meet the public safety needs of a modern society.

As the Right Honorable Lord Denning, Master of the Rolls (third-ranking member of the judicial system in England) has said:

> Be it murder, rape, bank raid, or the like, in England we do not allow that man out on bail; we keep him imprisoned pending his trial. It isn't necessary to show that he may abscond. If there is reason to think that he may make another offense, we do not let him out so that he may do it pending trial. We keep him in prison until he is tried.
>
> But I believe here, and I have heard the controversy, that it is an unfair procedure; you are imprisoning him without trial; he has not been convicted; what right have you to imprison him like this pending trial?
>
> In England we do. I think it is right, myself, but this is important: We make sure that he is tried speedily. In England, every man, after his arrest, we arrange for him to be tried within 8 weeks, the greatest length between arrest and trial.
>
> I have been most interested to hear of the bill now before Congress in which proposals are made for preventive detention in this country providing always that the man is tried within 60 days. To my mind, our experience in England, we would have thought that very desirable. It is a matter of controversy for you, but I let out that thought because in our experience in England it is better for society that criminals or potential criminals should not be let loose pending trial. We do not let them out on bail, although we have in our bill of rights, like you, the prohibition against excessive bail being demanded.

As we consider the provisions for pretrial detention, remember the District of Columbia busdriver who on the night of March 12, 1968, was threatened with having his throat slashed by a robber who, only 10 days before, had been released without bail after he robbed another busdriver only a few blocks away. Subsequently, the culprit was convicted of both offenses.

Recall the downtown bank teller who, on the morning of May 4, 1968, faced down the barrel of a pistol held by a thug who had robbed a Safeway store 4 months earlier, but had been released without bond. He was subsequently convicted of both crimes.

Consider the young woman who was choked and raped in her own apartment near Capitol Hill on June 11, 1968, by an assailant who, three weeks later, after he was released without bond on the rape case, appeared at his victim's place of work, fired five shots at her, and struck her down with a bullet in the shoulder.

The revision of the District's bail laws will provide a visible, reliable, and fully safeguarded procedure for dealing with cases such as these, and, at the same time hasten the prompt release of many persons who are presently being needlessly detained. I urge the Senate to approve this important reform measure.

Mr. ERVIN. Mr. President, in my remarks earlier I mentioned a telegram I

had received from members of the Harvard Law School faculty. I have located the telegram, and I ask unanimous consent to have it printed at this point in the RECORD.

There being no objection, the telegram was ordered to be printed in the RECORD, as follows:

CAMBRIDGE, MASS., JULY 16, 1970.

Senator SAMUEL ERVIN,
Washington, D.C.

The undersigned members of the Harvard Law School faculty believe that a number of provisions of the conference version of the District Crime bill including those on mandatory sentencing and preventive detention are unfair and undesirable and would be a bad precedent for other jurisdiction.

Ervin we support your efforts.

James Vorenberg, Frank E. A. Sander, Laurence Tribe, Allan A. Stone, Albert M. Sacks, Vern Countyman, Leonard M. Ross, John T. Dawson, Lloyd E. Ohlin, Robert E. Keeton, Oliver Oldman.

PRETRIAL DETENTION

Mr. DOLE. Mr. President, in recent months there has been a great outcry about the various legislative proposals in Congress to authorize the limited pretrial detention of dangerous defendants. Inasmuch as these proposals raise important issues of public policy and constitutional law, debate and controversy are quite in order.

To date, however, most public criticism of pretrial detention has been marked by strident rhetoric and an almost complete unwillingness to acknowledge the merit in opposing arguments. When criticism of this nature springs from partisan sources, as it usually does, one questions whether the critic is trying to enlighten or trying to inflame—whether his purpose is to resolve the issues reasonably or berate the administration.

What is particularly unfortunate is the tendency of some newspapers to accept and repeat the misstatements and exaggerations of these critics as gospel truth.

Just 2 weeks ago, the Solicitor General of the United States, a man whose record of distinction as dean of the Harvard Law School and in his present post is well known, had something to say about this phenomenon. Commenting on the difficulty the Department of Justice has encountered in getting a balanced account before the public, Dean Erwin Griswold said:

> I might mention the considerable furor which is raised about a proposal which the press and others attack as the "preventive detention" bill. Now, if one will read this proposal, he will find that it might just as fairly be called the "prompt trial" bill.

Then the Solicitor General went on to say:

> I keep hoping that some truly scholarly person, genuinely interested in the sound development of our criminal law, in this period when it confronts very difficult problems, will give this proposal full and fair consideration. More consideration might well be given to the history of the bail provision, to long accepted practices in this country, and to the methods followed in other countries, particularly in Great Britain, Canada, and Australia where there is high regard for civil liberties, as there is here. Instead the approach is almost entirely in terms of shibboleths, and the efforts of department officers to deal with the problems generally receive short shrift.

Mr. President, I am glad to report that a truly scholarly person, genuinely interested in the sound development of our criminal law, has given pretrial detention a full and fair consideration.

Paul E. Wilson, Kane professor of law at the University of Kansas, is recognized in my State and throughout the country as a distinguished scholar with an impressive commitment to public service. A former assistant attorney general of Kansas, he has taught criminal law at the University of Kansas School of Law since 1957 and is now an editor of the American Criminal Law Quarterly, which is published by the section on criminal law of the American Bar Association.

Writing in the spring issue of the Journal of the Kansas Bar Association, Professor Wilson examined the full range of issues in bail reform, including pretrial detention. His treatment of these issues reflects a balance and perspective that is all too often lacking in discussions on this subject.

He can say, for example, that "pretrial detention imposes burdens both on the accused and on the community." He can outline those burdens in detail.

Yet he can conclude that "pretrial detention and the conditions of pretrial release ought to be available to protect the integrity of the criminal process as well as to protect the community against extraordinary risks of danger from a defendant's future crimes."

While observing candidly that there are constitutional arguments on both sides of pretrial detention, Professor Wilson nonetheless states:

> I have no difficulty in accepting the proposition that when there has been a sufficient showing, in a proceeding involving adequate procedural safeguards, that the release of one accused of crime poses an extraordinary danger to the community, the Government has the power to deny pre-trial release to one charged with crime. . . . I take the view that the Congress may constitutionally authorize a court to find in a proper judicial proceeding that the hazards of an accused person's release in the community pending trial are sufficiently great to justify his detention and the denial of bail.

The plain alternative to professor Wilson's position is that Congress may not constitutionally authorize a court to detain a defendant before trial, regardless of the fairness of the proceedings or the danger the defendant's release would pose to others.

In my view, this alternative is unrealistic, unreasonable, and unacceptable. It does not square with the traditional power to hold capital defendants before trial; and it does not accommodate the legitimate interests of society at large. As Deputy Attorney General Richard Kleindienst has put it:

> Society has the inherent right to protect its members, for limited periods through due process procedures, from persons who pose a serious threat to life and safety.

Congress must face up to the problem of crime on bail. It is not a myth. It is a fact of life in every metropolitan area, particularly in the District of Columbia. We must come to grips with defendants who are so reckless and so dangerous that they cannot be released without seriously jeopardizing the public safety. Such defendants include:

First. Professional armed criminals whose sole occupation is to break into homes or stage holdups on the street;

Second. Narcotics addicts who resort to serious felonies and crimes of violence to support their habits;

Third. Incorrigible troublemakers with long records and demonstrable streaks of viciousness;

Fourth. Compulsive sex offenders and arsonists; and

Fifth. Persons with special motives to engage in crime.

Speedy trials are not the whole answer to the problems posed by these people, because as long as we live in a society that affords criminal defendants important procedural protections, there will always be a gap between arrest and trial. During this period, some defendants cannot be trusted to conform to lawful behavior.

When the release of a defendant before trial would create a clear and obvious danger to the public safety, a court should have the power to deny release for a limited period until a prompt trial can be held.

I ask unanimous consent to have printed in the RECORD the article by Prof. Paul Wilson on pretrial detention, published in the spring 1970 journal of the Kansas Bar Association.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

NEW APPROACHES TO PRETRIAL DETENTION

(By Paul E. Wilson)

INTRODUCTION

In 1969 I was invited to testify before the Subcommittee on Constitutional Rights of the United States Senate Committee on the Judiciary with reference to the proposed amendments to the federal Bail Reform Act of 1966.[1] This article is an adaptation of my statement to the Subcommittee.[2] As the pre-trial release provisions of the proposed Kansas Code of Criminal Procedure [3]—which may have been enacted by the time this is published—are substantially like the present federal statute, the views that I expressed to the Subcommittee may be quite revelant to current Kansas concerns. I admit that my statement is polemic—an argument for bail reform. In summary, I take the position that money bail, as the exclusive criterion of pre-trial release, is an inadequate and irrational standard. To the extent that bail imposes a burden upon persons whose appearance for trial can be assured by other, less onerous means, it places too high a price upon justice. To the extent that money bail permits the release of dangerous persons, whose propensities to commit other violent crimes can be demonstrated, it affords the community an insufficient measure of protection.

THE CASE FOR BAIL REFORM

The Bail Reform Act of 1966 and its state counterparts represent significant steps toward the realization of the goal of equal justice. Perhaps, in view of the widespread commitment to the idea of bail reform, arguments in its support are no longer timely or appropriate. But skeptics remain. Many jurisdictions adhere to the traditional concepts. Also, I am aware that deficiencies and imperfections of the acts and their administration have been commented on by law

Footnotes at end of article.

enforcement officers, prosecutors, judges, and indeed, by members of the Congress. As in the case of all new legislation, experience has demonstrated a need for amendment and for additional implementation. I should hope, however, that any amendments will be carefully devised and will reflect a determination not to retreat from the basic purposes expressed.

The use of money bail as the pervasive means of securing the appearance of persons charged with crime is an anachronism. Without questioning its historical soundness, I would suggest that presently the practice of conditioning pre-trial release upon the supplying of monetary security, fixed in accordance with a pre-devised schedule, is an inadequate approach to most pre-trial detention and release problems.

Any statute dealing with pre-trial detention must be drawn with a view to reconciling important, yet conflicting, social interests. The interest of the accused person in his freedom so that he may pursue the normal course of his life, assist in the unhampered preparation of his defense and be free of punitive restraints while he is yet presumed to be innocent must be reconciled with the interest of society in bringing the accused to trial and preserving the orderly administration of justice. Notwithstanding the efforts at bail reform during the current decade, I am inclined to feel that still in the typical case when an accused is brought by the police before a committing magistrate or judge, bail is routinely set in a monetary sum based solely upon the crime charged and reference to a standard schedule. If the accused person is financially solvent, or is able to pay a bondsman to post bail for him, he is released. If he is financially unable to make bail, he is detained in jail pending trial. Those who go free on bail are released, not because they appear to be more innocent than those jailed, or because they are more likely to appear at the time appointed for trial, but because they can pay for their liberty. Those who remain in jail are detained not because they are guilty or are unlikely to appear, but because they are poor. Such a result is repugnant to our idea of equal protection of the laws.

The prejudice that is incident to detention in jail is obvious. The jailed person loses his liberty, his job, his status in the community, the companionship of his family who may become public charges and he suffers serious impediments to the preparation of his defense. And he may be innocent of the crime charged.

Numerous empirical studies have established the validity of these propositions. Perhaps it might be useful to illustrate the points by reference to a study conducted by one of my students. An examination was made of one hundred consecutive felony cases in a Kansas County.[4] The cases examined involved charges of larceny, burglary, robbery and felonious assault. The objective of the survey was to gain some insight into the relationship between pre-trial detention and the probability of subsequent conviction and imprisonment. The following table summarizes the findings.

DISPOSITION OF 100 FELONY CASES

[In percent]

Case disposition	Bailed accused 67 cases	Jailed accused 33 cases
Dismissed by prosecutor	38	18
Plea of guilty	41	60
Trial and conviction	5	12
Trial and acquittal	16	10
Granted probation [1]	54	26
Sentenced to penitentiary	46	74

[1] Includes 59 convicted, 33 bailed, and 26 jailed.

Footnotes at end of article.

Conceding the existence of variables not shown, we cannot escape the significant fact that at each stage the chance of a favorable disposition is substantially greater for the person admitted to bail than for the accused who remained in custody pending trial. Fifty-four percent of the bailed cases were disposed of by dismissal or acquittal, while only twenty-eight percent of the persons detained in jail had similar success. Seventy-four percent of those who were convicted after having been detained prior to trial went to prison, while only forty-six percent of those convicted after being bailed were actually committed to the penitentiary. A possible inference is that the convicted accused who has been at liberty on bail has twice as good an opportunity to be granted probation as does the accused who has been detained pending disposition of his case. While unknown factors, such as a prior criminal record, may help to produce this difference the fact is that the jailed accused will usually have lost his job and thus be deprived of a very strong argument for probation which the bailed accused may still have. It is indeed difficult to escape the conclusion that pre-trial incarceration creates a disadvantage to the accused even at the point of sentence.

Pre-trial detention imposes burdens both on the accused and on the community. Some of its more obvious consequences are these.

(1) The accused in custody who is not working will likely lack the resources necessary to finance an adequate pre-trial investigation of his case. He is not free to locate and induce reluctant witnesses to come forward, a task which often only he can perform effectively. Detention may impede the lawyer's contacts with his client. It is often difficult for a defense counsel to travel to the place of detention and the facilities available there for interviewing are often inadequate.

(2) The accused who has been released prior to trial and who has been able to retain his job and continue his family relationships is a much more likely candidate for probation. An accused who has been subject to the debilitating experience of pre-trial detention somehow seems less ammenable to rehabilitation via probation than the accused who has not been subject to such deleterious contacts and influences.

(3) The governmental expense of maintaining detention facilities is an important factor. In an urban area, where the jail population is high, these costs amount to many thousands of dollars each year. Another public cost which should not be overlooked is that of providing assistance to families of the accused who is not at liberty and cannot provide for his dependents.

(4) Many detention facilities are overcrowded, lack proper santitation equipment and recreational facilities and indiscriminately mix offenders of all kinds. Persons awaiting trial ordinarily are not confined separately from, or treated differently than, those who have been convicted. Conditions in these local jails are far inferior than those in state penitentiaries. It is ironic that the innocent accused may be confined under conditions more oppressive and restrictive than those applied to persons convicted of crimes.

(5) Finally there is the economic and social burden that detention imposes on both the detained person and his family. The accused in custody may lose his job or at least lose pay during his absence from work during the time when his need for financial resources is greatest. His family is humiliated and his relationship with his wife and children may be severely damaged.

By these criticisms of money bail which are by no means original, I do not propose the abolition of the bail system. If we could divorce ourselves from our history and devise a wholly new system of standards for pre-trial release, I suspect that we might omit the historic institution of bail. However, the concept is deeply imbedded in our thinking about criminal justice and, I suspect, has a considerable amount of public confidence and support. Moreover, in some cases it is a feasible means of assuring the appearance of the defendant at the time appointed for trial. To the extent that the secured bail bond contributes to an effective and just system of pre-trial release it has a legitimate place in our courts. To the extent that the requirement of money bail does not facilitate the appearance of the accused for trial, and results in the unnecessary detention of the accused, its continued use is indefensible.

An adequate pre-trial release system ought to be designed to allow to the accused person the maximum amount of personal freedom consistent with the interests of society and ought to require detention only when society's interests demand such drastic measures.

OBJECTIVES OF PRE-TRIAL DETENTION

A spirited, and not entirely fruitful, debate continues as to the purposes of bail. The most visible purpose, and, indeed, the only one recognized by the Supreme Court is to assure the presence of the defendant for trial.[5] However, other interests of society are relevant and ought to be regarded as legitimate concerns of the system of pre-trial detention. Pre-trial detention and the conditions of pre-trial release ought to be available to protect the integrity of the criminal process as well as to protect the community against extraordinary risks of danger from a defendant's future crimes. Conceding that *Stack v. Boyle* may not seem to 'end support to this proposition, I would suggest that the Supreme Court was there concerned only with money bail and the question raised was whether bail had been fixed in an excessive amount. I would argue that regardless of the traditional understanding of bail, implicit in the system of criminal justice of which bail is a part is the power of the state to take effective measures to protect the judicial process and to protect the community from the acts of predators. The entire concept of pre-trial detention and release has been in a period of evolution since the beginning of the last decade. The range of alternatives for release and the conditions of release has been greatly expanded. I would urge that the system is now sufficiently mature to recognize that it may have functions other than the narrow purpose of assuring the presence of the accused for trial. An equally justifiable objective is to protect the public from further crime where the risk is patently very great.

Although I take an expanded view of the proper uses of pre-trial detention, I hasten to condemn its use for punitive purposes. Outrage at an accused's alleged crime or the belief that he may be able to evade conviction and should, therefore, be confined until acquittal requires his release, can never justify pre-trial detention and safeguards against that result should be provided by law.

ALTERNATIVES TO DETENTION

Recent bail reform legislation has been characterized by the recognition that circumstances other than money bail be relied on to assure the appearance of an accused for trial.[6] When an investigation indicates that an accused person has firm roots in his community, that he has stable family relationships and job commitments, that he has no history of default—in short, if he appears to be a good risk for appearance when required, his release upon his promise to appear or upon an unsecured appearance bond is favored. Pre-trial detention is minimized and secured appearance bonds are required only when circumstances are not persuasive that he is likely to appear.

The basis of an effective system of pre-trial release is the individual evaluation of cases. To accomplish the kind of individual evalu-

ation required, adequate and competent personnel must be supplied to and utilized by the courts. Only thus can we be assured that the most appropriate pre-trial release conditions are imposed in each case.

Citation and Summons in Lieu of Arrest. A paramount objective of the procedure for the pre-trial processing of criminal cases is to reduce custody pending court appearance. As I have suggested, such custody is costly, both in monetary and human terms. In addition to the expansion and implementation of practices for the pre-trial release of accused persons upon conditions other than money bail, attention should be given to a more extensive use of the citation and summons in lieu of arrest, particularly in the case of minor offenses. The idea is not new.[7] The District of Columbia Code now authorizes an officer of the Metropolitan Police Force to issue a citation requiring appearance before an appropriate judicial officer instead of arresting without a warrant for a misdemeanor. Also, in the event of the arrest of a person without a warrant for a misdemeanor, after he is booked and processed according to law, the clerk of the Court of General Sessions may issue him a citation for an appearance at a specified time and place and release him from custody. The power conferred upon the officer and upon the clerk of the court is limited to cases of arrests for misdemeanors without warrants and the power may be exercised when the officer has reason to believe that the arrested person will not cause injury to persons or damage to property and will make an appearance in answer to the citation. Failure to comply with the citation subjects the offender to the maximum fine provided for the misdemeanor for which the citation was issued or imprisonment for not more than one year, or both.

Consideration ought to be given to legislation or rules amendments that will accomplish the following:

(a) Authorize all law enforcement officers to issue citations in lieu of arrest without a warrant under appropriate conditions;

(b) Require the issuance of summons in lieu of arrest in misdemeanor cases, unless a warrant is requested by the attorney for the government. In other cases the summons may be issued upon request of the attorney for the government;

(c) Both the citation and summons procedure ought to be available in cases other than misdemeanors.

Pattern legislation along these lines may be found in Sections 3.02 and 6.04 of Tentative Draft No. 1, model Code of Pre-Arraignment Procedure, prepared by a drafting committee of the American Law Institute. The first section cited authorizes the issuance of citations both in lieu of arrests and after arrests. It permits the issuance of a citation in cases where the officer is not empowered to make an arrest without a warrant. When an officer arrives at the place where a misdemeanor has already been committed he is precluded from arresting without a warrant inasmuch as the misdemeanor has not been committed in his view. In such an instance, the officer may properly issue a formal citation requiring the suspected offender to appear and respond to the accusation to be made against him. The proposal extends the discretion to issue citations in lieu of arrests without warrants to all crimes, subject to administrative regulations designed to provide the maximum use of citations. Persons believed to have committed offenses are to be taken into custody only when necessary to protect the public interest. In the other section cited, the drafters of the Model Pre-Arraignment Code propose that judicial officers before whom complaints are filed may issue a summons for the defendant in lieu of a warrant for his arrest. A summons must issue if requested by the prosecuting attorney, although the judge has authority to issue a summons even over the objection of the prosecutor. He is required to issue a summons when the crime charged is a minor one or belongs to a specified class unless he has reasonable grounds to believe that the defendant will not respond to the summons. The prosecutor is required to request a summons whenever he is satisfied that there is no substantial risk of nonappearance.

Reform in pre-trial detention practice compels a re-evaluation of the laws relating to arrest. The traditional purposes of arrest are quite like those of bail—to assure the presence of the defendant in court. Indeed, a classic definition of arrest, as found in the statutes of Kansas, is "Arrest is the taking of a person into custody, that he may be held to answer for a public offense."[8] The paramount purpose of arrest, like bail, is to assure that the accused may be accessible to the court where he is charged. The result of arrest is detention. When less drastic means are sufficient to assure the presence of the accused, reason and justice suggest that such means should be used. Still, the almost universal action of the policeman who has grounds for arrest is formally to arrest the accused. "Almost no thought is given to the question, whether, in any given case, there is a *need* for custody or whether, on the other hand, society's interests might be just as well or better served if the accused were to be issued a citation. It makes little sense to jail a man, who, when he appears before the judge, will be clearly qualified for release without bail."[9]

In cases involving serious crimes arrest may be necessary in order to carry out an adequate investigation. Where a search of the person arrested is deemed necessary, where interrogation is proposed, when it is necessary to fingerprint and photograph the accused, or where considerations of public safety or the well-being of the accused indicate the necessity for arrest, such action is imperative. On the other hand where these considerations are not present and there is every reason to believe that the accused will appear in court when wanted, the formal arrest would appear to be unnecessarily oppressive to the arrested person and to impose an undue burden upon the public. Use of the citation under such circumstances avoids detention; the cited person has no record of arrest; the officer does not risk possible liability for false arrest; and it is advantageous to the public in that it enables the conservation of the community's personnel and physical resources for law enforcement.

Supervision of Releasees. The Bail Reform Act of 1966 provides a broad spectrum of options from which the court may select appropriate conditions of release for an accused person. Assuming that the magistrate in authorizing pre-trial release has the benefit of the staff and other resources necessary to make an adequate evaluation of the person concerned, he should be able to impose such conditions of release as will be most likely to assure the appearance of the accused for trial and protect society's interests. The requirement of money bail is the exception and not the rule. Whatever conditions of release may be imposed, compliance with their terms can be best assured by maintaining an effective liaison between the accused person and the court during the pre-trial period and by keeping him aware that failure to appear or other violation of the conditions of his release will certainly result in the imposition of additional penalties.

Probation and parole systems have demonstrated the importance of effective supervision in accomplishing the objectives of probation and parole. The same considerations are applicable here. Supervision may be expedited by frequent reporting to designated offices, release to the custody, control and supervision of third persons, imposition of conditions designed to encourage a lawful pattern of conduct, part-time jail custody, and other circumstances which may be specifically adapted to the person concerned. Obviously conditions imposed upon pre-trial release must be realistic and have relevance to the purpose for which they are imposed. It is imperative that significant punishments be imposed by statute or upon citation for contempt for the breach of conditions of the release. Particular attention should be given by law enforcement agencies to the apprehension of bail violators and by the prosecutor's offices to the prosecution of such offenders. Penalties for bail jumping should be substantial and, in event of conviction for the principal offense, the penalties for bail jumping should be in addition to the penalties provided for the principal offense.

Review of Conditions of Release. Section 3146(d) of the Bail Reform Act provides that one who is unable to meet the condition of his release shall, upon application, be entitled to have the conditions reviewed after the lapse of twenty-four hours from the time of the release hearing. It appears that this provision has not been wholly effective because of the frequent failure of counsel to file the application required to call the matter to the court's attention. The accused person who is unable to supply bail or otherwise to satisfy the conditions of pre-trial release is also likely to be dependent upon the services of assigned counsel. It is probably safe to say that in most instances the pre-trial services provided by such counsel are minimal. The fact is that counsel does not routinely seek the review authorized by statute with the result that the accused who is unable to obtain his release at the initial bail hearing does not have a subsequent opportunity for his release status to be considered. A proposal for an automatic seventy-two hour review has been suggested.[10] This would seem an important step in the direction of assuring that every detained person would have the conditions of his detention re-examined in the light of circumstances that might be disclosed by a more deliberate investigation process. Prior to the first hearing, time limitations may have prevented the development of evidence which would justify release. Seventy-two hours is adequate in most cases to complete the investigation necessary to make a sound release decision. The requirement of an automatic review after seventy-two hours of detention would assure consideration of all facts and produce a more mature determination. In order that automatic review might be a meaningful procedure, legislation or court rule ought to identify the persons responsible for making the further investigation and define the extent of that responsibility. Perhaps the probation staff or other court personnel could be used for this purpose. Presumably the responsibility for preparing an adequate showing at the bail hearing rests upon counsel assigned to represent the accused. Perhaps it is appropriate to consider legislation emphasizing this responsibility. Also it might be appropriate to consider amendments to the Criminal Justice Act which would authorize assigned counsel more adequate compensation for his pre-trial services to indigent defendants.

Crimes by Releasees—Expediting Trials. A necessary complement to an effective system of pre-trial release is the expeditious disposition of criminal cases. This involves management of trial dockets and calendars. Both the accused and the public have high interest in the prompt disposition of criminal cases. The ABA Project on Minimum Standards for Criminal Justice suggests:

"To effectuate the right of the accused to a speedy trial and the interest of the public in prompt disposition of criminal cases, insofar as is practicable:

Footnotes at end of article.

(a) The trial of criminal cases should be given preference over civil cases; and

(b) The trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases." [11]

Without a statute or rule on the subject this standard is partially complied with in most jurisdictions. The trials of criminal cases are usually expedited and disposed of more readily than civil cases. In assigning criminal cases for trial those defendants who are in custody are usually tried earlier than defendants who are at liberty under some form of pre-trial release. Apparently less attention has been given to the matter of expediting the trial of bailed persons who are thought likely to flee or to commit another crime. It is unnecessary to point out that the longer the period between the pre-trial release of the accused and the disposition of his case, the more chances he has to flee or commit another crime. Speaking at the National Conference on Bail and Criminal Justice in 1965, Edward Bennett Williams of the District of Columbia Bar, made this statement:

"Giving priority on the trial calendar to those cases (the high risk recidivist) would narrow the potential for harm to the community to a point, I suggest, of insignificance. I don't think that any advocate of preventive detention can point to a single federal case in the last few years where a defendant has committed a crime within thirty days of his release on bail. The crimes that are committed are crimes that are committed by defendants who are on a congested calendar, and who are waiting four, five, six and seven months for their trial." [12]

While Mr. Williams' statement may not be wholly substantiated by other surveys,[13] it cannot be denied that delay increases opportunity for violation. Coupling a speedy trial requirement for the high risk accused with an effective system of liaison and communication between the accused and the court ought materially to decrease the incidence of crime committed by persons at liberty on bail.

The problems of expediting the trials of criminal cases are broader than the matters now under consideration. Elimination of delay is a function of judicial administration and may involve new methods of scheduling and monitoring cases. Alleviation of delay may require more money and manpower to deal with case loads. Because the circumstances of criminal cases vary greatly from one case to another and because the resources for the processing of cases differ from one jurisdiction to another it may not be wise to attempt to impose a statutory system of deadlines upon criminal proceedings.[14]

It would seem appropriate to include in the statute a provision requiring the early disposition of cases involving custody or high risk. An illustration of one aspect of what I am talking about is the Montana provision which states, "Prosecutions against defendants held in custody must be disposed of in advance of prosecution against defendants on bail unless for good cause the court shall direct that an action be tried out of its order." [15] To this might be added additional provisions requiring the early trial of those accused persons who are at liberty under pre-trial release conditions when acceleration is recommended by the prosecutor or police and it is shown that there is likelihood that the accused may flee or commit another crime. Also it would seem appropriate to advance for trial cases of any persons who after release may be charged with subsequently committed crimes. Perhaps this might be accomplished by court rule. However, I am inclined to feel that legislative encouragement might help to accomplish the objective.

Footnotes at end of article.

PREVENTIVE DETENTION

A particular problem in current pre-trial detention is the use of bail, or rather the denial of bail, to prevent the commission of further crimes by persons who might be expected to commit other crimes while at liberty on bail. A proposed amendment to the federal act would authorize the magistrate who prescribes conditions of release to deny bail on the grounds that the release of the person for whom pre-trial release is sought "will pose a danger to other persons or to the community" and to take into consideration the objective of providing "the necessary protection against such danger in fixing the conditions of release." [16]

Another proposal would permit the denial of bail to any person "who is charged with a crime of violence other than an offense punishable by death and who previously was convicted by a court of competent jurisdiction of the United States or of any State of any crime of violence and such previous conviction has not been reversed or set aside." [17] "Crimes of violence include voluntary manslaughter, murder, rape, mayhem, kidnapping, robbery, burglary, house breaking, extortion accompanied by threats of violence, assault with a dangerous weapon, assault with intent to commit any felony, arson punishable as a felony, or an attempt to commit any of the foregoing." Apparently the incidence of crime committed by persons on bail is not insignificant, as some persons have contended in the past. A survey [18] indicates that in 1967 about fifteen per cent of the persons released on bail pending appeal to the United States Court of Appeals for the District of Columbia were indicted for crimes allegedly committed while on appeal bail. During the first half of 1967 about nine per cent of the persons released on bail pending trial in the United States District Court for the District of Columbia were indicted for offenses allegedly committed within six months after pretrial-release. Interesting but admittedly incomplete data suggest that conditions of release being used in the District of Columbia are not sufficiently effective in controlling crime. They also indicate that robbery is the most frequent offense for which persons on bail are re-indicted; that narcotics offenders are most frequently charged with crime on bail; and that many of the offenses are charged within ninety days of release.

The proposed amendments raise obvious issues of constitutionality as well as questions concerning the policy of preventive detention. Insofar as I am able to determine, the federal constitutional issue remains open. There are strong arguments to be found on both sides of the problem. However, I have no difficulty in accepting the proposition that when there has been a sufficient showing, in a proceeding involving adequate procedural safeguards, that the release of one accused of crime poses an extraordinary danger to the community, the government has the power to deny pre-trial release to one charged with crime. It seems to me that the considerations involved in the Eighth Amendment right to bail are not determinative of the issue raised in these situations. Conceding that the Eighth Amendment [19] prohibition against excessive bail guarantees a right to have bail fixed if the offense with which the accused is charged is a bailable one, I take the view that the Congress may constitutionally authorize a court to find in a proper judicial proceeding that the hazards of an accused person's release in the community pending trial are sufficiently great to justify his detention and the denial of bail.

A more difficult constitutional question may arise under the Kansas constitution which, in addition to the prohibition against excessive bail, states "All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or presumption great." [20] It may be argued that any person charged with a non-capital crime has a constitutional right to be released on bail. Patently, this is not so. Consider the case of a person who has been convicted and imprisoned for Crime A but is also subject to an untried charge of Crime B. He may be bailable on Charge B but he is not entitled to release. He is detained because of his conviction of Crime A. Or consider the case of the accused person who is found to lack capacity to stand trial and committed to a hospital. He is not bailable, notwithstanding the constitutional guarantee. The conclusion is that while all persons are bailable, under special circumstances a particular accused may be detained when other overriding social considerations require his detention. The question is not one of right to bail. It is a question of society's ability to protect itself.

It is an accepted fact that notwithstanding the limited purpose of bail, most magistrates commonly take into consideration the likelihood that the defendant will commit another crime and frequently use high bail as a practical means of preventive detention.[21] This procedure is not honest, visible, controllable or subject to effective review. Moreover, I suspect that it is ineffective in that insofar as money supplies the condition upon which the release is granted, the system may result in the detention of some people who are less dangerous than others who are released. Also, the decreased reliance on money bail embodied in bail reform would appear to diminish the opportunities for judges to practice preventive detention in the guise of bail fixing. I agree with those authorities who suggest that the system should face up squarely to the question of whether the courts ought to be authorized to deny release to potentially dangerous offenders, and whether magistrates should be authorized to exercise their power to detain openly so that it may be reviewed and controlled.

Authorizations for the non-punitive detention of persons when their presence in the community creates a hazard to significant social interests are common in our law. Mentally ill persons may be involuntarily confined when their presence in the community would be dangerous to themselves and to others. Persons suffering from certain infectious diseases may be committed or quarantined as the public health requires. Aliens may be detained pending deportation and extradition determinations. I find nothing in the idea of limited preventive detention which is offensive to the presumption of innocence. As I understand it, the main function of the presumption of innocence is to cast upon the government the burden of proving beyond a reasonable doubt all elements of the crime charged and to require that the accused be acquitted if the government fails to carry that burden.

The presumption of innocence does not preclude denying bail in capital cases nor does it prevent the court from ordering any defendant held in custody if he does not supply money bail for his appearance or comply with other pre-release conditions. I should think that nothing in the presumption of innocence would forestall the detention of one who has shown a capacity and disposition to do serious injury to society and whose continued presence in the community constitutes a demonstrable threat to the public safety. Nor do I feel that a procedure that is properly limited and safeguarded with procedural standards would violate due process of law simply because it may result in depriving the defendant of his liberty prior to conviction.

Many of those who agree that abstractly a limited kind of preventive detention is constitutionally permissible are still inclined to oppose the grant of such power for policy

consideration. This position has been eloquently stated by Professor Foote:

"The addition of the label 'preventive' does not cleanse the detention of its vices: pretrial punishment and impairment of a fair trial. The overwhelming objection to such detention is that the kinds of precise prediction of future conduct which it requires cannot be made with significant reliability even under the best of fact finding and diagnostic circumstances. As it would have to be administered on a mass scale for the lowest level judiciary with no practical possibility of fast effective appellate review, it would deteriorate into the worst kind of uncontrolled discretion.

"The impossibility of individualized preventive prediction in this area and the statistical demonstration that the least number of mistakes will be made by releasing everyone is a convincing modern vindication of the wisdom of the absolute right to bail which has been an important part of our history since the Massachusetts Body of Liberties in 1641." [23]

Although I reach a different conclusion about the problem than does Professor Foote, I think that his statement emphasizes the difficulties that must be recognized and overcome if the validity of such legislation is to be sustained.

Certainly a serious problem concerns the lack of techniques for prediction of future conduct. However, there are criteria for prediction that would, I believe, have some validity. I have been informed by my associates in the field of psychiatry that given the proper opportunity for diagnosis they can in many cases make a judgment as to whether an individual will commit a crime within a period of six months. The preliminary studies in the District of Columbia indicate that with respect to certain kinds of criminals—those who commit robberies and narcotic offenses—the likelihood of recidivism is greater than in cases of other kinds of offenses. Continuing empirical studies will, I think, produce additional criteria upon which predictions can be based. I suppose there will always be misgivings in cases where detention is ordered. We can never be certain that the detained person would have committed a crime if released. Conceding that the prediction of specific future conduct is impossible, there is evidence that judgments may be made as to probability. Similar judgments are necessarily made in the administration of parole and probation systems. Elsewhere in the administration of justice we deal in probabilities. Moreover, the paramount interest of society in its own safety may require the toleration of a limited possibility of error in individual cases. Despite our effort to avoid such a result, we are aware that innocent men are occasionally convicted of crimes and are sentenced to terms of imprisonment.

This fact is one that we accept as a necessary incident of a system of criminal justice administered by men, in whom the capacity to err is inherent. Conviction is obviously more detrimental to the individual than detention, yet the possibility of error does not require that we abandon the process. It only requires that we employ all feasible methods of avoiding erroneous results.

If pre-trial release is to be denied and detention ordered in the interest of the public safety, it is imperative that attention be given to procedural safeguards adequate to protect the individual. The detention order should be made only by a court of general jurisdiction, upon application by the prosecuting attorney after notice to the accused and an evidentiary hearing. Counsel should be provided to the accused and the prosecution should have the burden of proving the allegations of its application by clear and convincing evidence. A prompt review should be afforded.[23]

It seems appropriate that there should be a statutory declaration of the rights to which an accused is entitled while in custody before trial. As his detention is for the dual purpose of protecting the interests of society and assuring his appearance at his trial, and not for the purpose of punishment, the elements of punishment which inevitably accompany any deprivation of liberty should be minimized insofar as possible. Ideally this would involve separate detention facilities where the only restrictions would be those necessarily required by considerations of custody. However, the expense incident to such a system may make it impracticable. Also, ideal detention facilities are susceptible of being used to punish the untried defendant and prejudice his efforts to prepare a defense. Therefore, in such cases every effort should be made to guarantee free communication between the untried defendant and the outside world.

Legislation pertaining to this matter should include the following guarantees to any person who is detained pending trial: (1) Use of the telephone with reasonable frequency during the entire period of detention and particularly upon being booked at the police station or being admitted to jail or prison; if the accused is an indigent person, calls should be made at state or government expense. (2) The privilege of writing and receiving an unlimited number of letters relevant to the charges against him; the indigent accused should be supplied with free stationery and postage for this purpose. (3) The privilege of talking with any visitor who comes to see him at reasonable hours, subject only to such minimum limitations as may be needed to assure the prisoner's security. Visits by counsel and others concerned with the preparation of the defense should be allowed at any time, unless precluded by considerations of necessity. (4) Freedom from police surveillance and censorship of letters, telephone calls, and conferences with visitors. (5) Employment of an effective sanction to enforce compliance. The problem posed here is difficult. Criminal and civil sanctions against anyone who willfully deprives the accused of his rights under the statutes should be provided, although such remedies are often ineffective when as in this situation, they must be applied against law enforcement officers. The civil cause of action would be more effective if it were designed to reach a joint liability of the government and the offending officer.

While the statutorily defined standards suggested above may be difficult to implement, a declaration of this nature seems important in seeking improvement of the conditions under which untried defendants are confined.

FOOTNOTES

[1] 18 U.S.C. Secs. 3141 to 3152.

[2] The statement presented appears in Hearings, Subcommittee on Constitutional Rights Committee on Judiciary, U.S. Senate, 91st Congress, 1st Session, *Amendments to the Bail Reform Act of 1966*, 1969, pp. 407–417.

[3] See *Kan. Jud. Council Bull.* Oct. 1969, pp. 45–50.

[4] The findings are shown by a survey conducted in Wyandotte County by Roger L. Sherman who was graduated from the University of Kansas School of Law in 1966.

[5] *Stack v. Boyle*, 342 U.S. 1 (1951).

[6] This approach is illustrated by 18 U.S.C. Sec. 3146, and its state counterparts.

[7] See Title VII, Public Law 9–226, 89th Congress.

[8] K.S.A. 62–1201.

[9] ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Pre-Trial Release*, 2.1, Commentary.

[10] Report of *Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia*, D.C. Circuit, 1968, p. 14.

[11] *Standards Relating to Speedy Trial*, 1.1.

[12] Proceedings National Conference on Bail and Criminal Justice, 1965, p. 173.

[13] *Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia*, D.C. Circuit, 1968.

[14] See Model Time Table for the Processing of Criminal Cases, *Task Force Report on the Courts, President's Comm. on Law Enforcement and Criminal Justice*, 1968, pp. 84, 86.

[15] Mont. Code of Crim. Proc. Sec. 95–1006.

[16] § 3551, 91st Congress, 1st Sess.

[17] § 3552, 91st Congress, 1st Sess.

[18] *Report of the Judicial Council Committee to Study the Operations of the Bail Reform Act in the District of Columbia*, D.C. Circuit, 1968, app. ct.

[19] "Excessive bail shall not be required—." Amend. 8, *U.S. Const.*

[20] *Kan. Const.*, B. of R., Sec. 9.

[21] The New York Times, Jan. 4, 1970, reports the following:

"A Federal judge yesterday doubled the $50,000 bail of a man accused of conspiring to bomb government buildings when friends and acquaintances appeared to post bond for his release.

"In doubling the bail to $100,000, Judge Milton Pollack said that those putting up the money were not responsible and would not mind forfeiting the sum to insure "the freedom of their friend and ally'."

The judge continued saying that the defense had " 'failed to establish ties or roots' within the community that would tend to make the defendant be on hand for his trial."

[22] Foote, "The Coming Constitutional Crisis in Bail," 113 *U. Pa. L. Rev.* 1125, 1183 (1965).

[23] Illustrative of the necessary procedural safeguards are those found in the Draft Proposal for Preventive Detention, Appendix C, *Standards Relating to Pretrial Release*, ABA Project on Minimum Standards for Criminal Justice, Pars. 1.4 through 1.10. The draft was not recommended by the advisory committee on Pre-trial Release.

ORDER OF BUSINESS

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that further consideration of the pending conference report be temporarily laid aside and that the Senate proceed to the consideration of the conference report on S. 3685.

The PRESIDING OFFICER (Mr. BELLMON). Without objection, it is so ordered.

EMERGENCY HOME FINANCE ACT OF 1970—CONFERENCE REPORT

Mr. SPARKMAN. Mr. President, I submit a report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3685) to increase the availability of mortgage credit for the financing of urgently needed housing, and for other purposes. I ask unanimous consent for the present consideration of the report.

The PRESIDING OFFICER (Mr. BELLMON). The report will be stated.

The report is as follows:

CONFERENCE REPORT (S. REPT. No. ———)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3685) to increase the availability of mortgage credit for the financing of urgently needed housing, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That this Act may be cited as the "Emergency Home Finance Act of 1970".

TITLE I—REDUCTION OF INTEREST CHARGES FOR MEMBERS OF THE FEDERAL HOME LOAN BANK SYSTEM

SEC. 101. (a) There is authorized to be appropriated not to exceed $250,000,000, without fiscal year limitation, to be used by the Federal Home Loan Bank Board for disbursement to Federal home loan banks for the purpose of adjusting the effective interest charged by such banks on short-term and long-term borrowing to promote an orderly flow of funds into residential construction. The disbursement of sums appropriated hereunder shall be made under such terms and conditions as may be prescribed by the Board to assure that such sums are used to assist in the provision of housing for low- and middle-income families, and that such families share fully in the benefits resulting from the disbursement of such sums. No member of a Federal home loan bank shall use funds the interest charges on which have been adjusted pursuant to the provisions of this section to make any loan, if—

(1) the effective rate of interest on such loan exceeds the effective rate of interest on such funds payable by such member by a percentile amount which is in excess of such amount as the Board determines to be appropriate in furtherance of the purposes of this section; or

(2) the principal obligation of any such loan which is secured by a mortgage on a residential structure exceeds the dollar limitations on the maximum mortgage amount, in effect on the date the mortgage was originated, which would be applicable if the mortgage was insured by the Secretary of Housing and Urban Development under section 203(b) or 207 of the National Housing Act.

(b) Not more than 20 per centum of the sums appropriated pursuant to subsection (a) shall be disbursed in any one Federal home loan bank district.

TITLE II—AUTHORITY FOR THE FEDERAL NATIONAL MORTGAGE ASSOCIATION TO PROVIDE A SECONDARY MARKET FOR CONVENTIONAL MORTGAGES

Section 201. (a) Section 302(b) of the National Housing Act is amended—

(1) by inserting "(1)" immediately following "(b)"; and

(2) by adding at the end thereof the following new paragraph:

"(2) For the purposes set forth in section 301(a), and with the approval of the Secretary of Housing and Urban Development, the corporation is authorized, pursuant to commitments or otherwise, to purchase, service, sell, lend on the security of, or otherwise deal in mortgages which are not insured or guaranteed as provided in paragraph (1) (such mortgages referred to hereinafter as 'conventional mortgages'). No such purchase of a conventional mortgage shall be made if the outstanding principal balance of the mortgage at the time of purchase exceeds 75 per centum of the value of the property securing the mortgage, unless (A) the seller retains a participation of not less than 10 per centum in the mortgage; (B) for such period and under such circumstances as the corporation may require, the seller agrees to repurchase or replace the mortgage upon demand of the corporation in the event that the mortgage is in default; or (C) that portion of the unpaid principal balance of the mortgage which is in excess of such 75 per centum is guaranteed or insured by a qualified private insurer as determined by the corporation. The corporation shall not issue a commitment to purchase a conventional mortgage prior to the date the mortgage is originated, if such mortgage is eligible for purchase under the preceding sentence only by reason of compliance with the requirements of clause (A) of such sentence. The corporation may purchase a conventional mortgage which was originated more than one year prior to the purchase date only if the seller is currently engaged in mortgage lending or investing activities and if, as a result thereof, the cumulative aggregate of the principal balances of all conventional mortgages purchased by the corporation which were originated more than one year prior to the date of purchase does not exceed 10 per centum of the cumulative aggregate of the principal balances of all conventional mortgages purchased by the corporation. The corporation shall establish limitations governing the maximum principal obligation of conventional mortgages purchased by it which are comparable to the limitations which would be applicable if the mortgage were insured by the Secretary of Housing and Urban Development under section 203(b) or 207 of the National Housing Act."

(b) Section 5202 of the Revised Statutes (12 U.S.C. 82) is amended by adding at the end thereof the following:

"Eleventh. Liabilities incurred in connection with sales of mortgages, or participations therein, to the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.".

TITLE III—FEDERAL HOME LOAN MORTGAGE CORPORATION

SHORT TITLE

SEC. 301. This title may be cited as the "Federal Home Loan Mortgage Corporation Act".

DEFINITIONS

SEC. 302. As used in this title—

(a) The term "Board of Directors" means the Board of Directors of the Corporation.

(b) The term "Corporation" means the Federal Home Loan Mortgage Corporation created by this title.

(c) The term "law" includes any law of the United States or of any State (including any rule of law or of equity).

(d) The term "mortgage" includes such classes of liens as are commonly given or are legally effective to secure advances on, or the unpaid purchase price of, real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby, and includes interests in mortgages.

(e) The term "organization" means any corporation, partnership, association, business trust, or business entity.

(f) The term "prescribe" means to prescribe by regulations or otherwise.

(g) The term "property" includes any property, whether real, personal, mixed, or otherwise, including without limitation on the generality of the foregoing choses in action and mortgages, and includes any interest in any of the foregoing.

(h) The term "residential mortgage" means a mortgage which (1) is a mortgage on real estate, in fee simple or under a leasehold having such term as may be prescribed by the Corporation, upon which there is located a structure or structures designed in whole or in part for residential use, or which comprises or includes one or more condominium units or dwelling units (as defined by the Corporation) and (2) has such characteristics and meets such requirements as to amount, term, repayment provisions, number of families, status as a first lien on such real estate, and otherwise, as may be prescribed by the Corporation.

(i) The term "conventional mortgage" means a mortgage other than a mortgage as to which the Corporation has the benefit of any guaranty, insurance or other obligation by the United States or a State or an agency or instrumentality of either.

(j) The term "security" has the meaning ascribed to it by section 2 of the Securities Act of 1933.

(k) The term "State", whether used as a noun or otherwise, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

ESTABLISHMENT OF THE CORPORATION

SEC. 303. (a) There is created the Federal Home Loan Mortgage Corporation, which shall be a body corporate and shall be under the direction of a Board of Directors composed of the members of the Federal Home Loan Bank Board, who shall serve as such without additional compensation. The Chairman of the Federal Home Loan Bank Board shall be the Chairman of the Board of Directors. The principal office of the Corporation shall be in the District of Columbia or at such other place as the Corporation may from time to time prescribe. The Corporation shall be a member of each Federal home loan bank and, except as otherwise provided by the Federal Home Loan Bank Board, shall have all the benefits, power, and privileges, and in the exercise thereof shall be subject to all liabilities, conditions, and limitations (except those relating to Federal home loan bank stock and subscriptions thereto and those under provisions of the Federal Home Loan Bank Act preceding section 9) which are provided by the terms of such Act or other Federal statute for members of any such bank.

(b) The Corporation shall have power (1) to adopt, alter, and use a corporate seal; (2) to have succession until dissolved by Act of Congress; (3) to make and enforce such bylaws, rules, and regulations as may be necessary or appropriate to carry out the purposes or provisions of this title; (4) to make and perform contracts, agreements, and commitments; (5) to prescribe and impose fees and charges for services by the Corporation; (6) to settle, adjust, and compromise, and with or without consideration or benefit to the Corporation to release or waive in whole or in part, in advance or otherwise, any claim, demand, or right of, by, or against the Corporation; (7) to sue and be sued, complain and defend, in any State, Federal, or other court; (8) to acquire, take, hold, and own, and to deal with and dispose of any property; and (9) to determine its necessary expenditures and the manner in which the same shall be incurred, allowed, and paid, and appoint, employ, and fix and provide for the compensation and benefits of officers, employees, attorneys, and agents, all without regard to any other law except as may be provided by the Corporation or by laws hereafter enacted by the Congress expressly in limitation of this sentence. Nothing in this title or any other law shall be construed to provent the appointment, employment, and provision for compensation and benefits as an officer, employee, attorney, or agent of the Corporation, of any officer, employee, attorney, or agent of any department, establishment, or corporate or other instrumentality of the Government, including any Federal home loan bank or member thereof. The Corporation, with the consent of any such department, establishment, or instrumentality, including any field services thereof, may utilize and act through any such department, establishment, or instrumentality and may avail itself of the use of information, services, facilities, and personnel thereof, and may pay compensation therefor, and all of the foregoing are hereby authorized to provide the same to the Corporation as it may request.

(c) Funds of the Corporation may be invested in such investments as the Board of Directors may prescribe. Any Federal Reserve bank or Federal home loan bank, or

any bank as to which at the time of its designation by the Corporation there is outstanding a designation by the Secretary of the Treasury as a general or other depositary of public money, may be designated by the Corporation as a depositary or custodian or as a fiscal or other agent of the Corporation, and is hereby authorized to act as such depositary, custodian, or agent. When designated for that purpose by the Secretary of the Treasury, the Corporation shall be a depositary of public money, under such regulations as may be prescribed by the Secretary of the Treasury, and may also be employed as fiscal or other agent of the United States, and it shall perform all such reasonable duties as such depositary or agent as may be required of it.

(d) The Corporation, including its franchise, activities, capital, reserves, surplus, and income, shall be exempt from all taxation now or hereafter imposed by the United States, by any territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The provisions of this subsection shall be applicable without regard to any other law, including without limitation on the generality of the foregoing section 3301 of the Internal Revenue Code of 1954, except laws hereafter enacted by Congress expressly in limitation of this subsection.

(e) Notwithstanding section 1349 of title 28 of the United States Code or any other provison of law, (1) the Corporation shall be deemed to be an agency included in sections 1345 and 1442 of such title 28; (2) all civil actions to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions without regard to amount or value; and (3) any civil or other action, case or controversy in a court of a State, or in any court other than a district court of the United States, to which the Corporation is a party may at any time before the trial thereof be removed by the Corporation, without the giving of any bond or security, to the district court of the United States for the district and division embracing the place where the same is pending, or, if there is no such district court, to the district court of the United States for the district in which the principal office of the Corporation is located, by following any procedure for removal of causes in effect at the time of such removal. No attachment or execution shall be issued against the Corporation or any of its property before final judgment in any State, Federal, or other court.

CAPITAL STOCK

SEC. 304. (a) The capital stock of the Corporation shall consist of nonvoting common stock which shall be issued only to Federal home loan banks and shall have such par value and such other characteristics as the Corporation prescribes. Stock of the Corporation shall be evidenced in such manner and shall be transferable only to such extent, to such transferees, and in such manner, as the Corporation prescribes.

(b) The Federal home loan banks shall from time to time subscribe, at such price not less than par as the Corporation shall from time to time fix, for such amounts of common stock as the Corporation prescribes, and such banks shall pay therefor at such time or times and in such amount or amounts as may from time to time be fixed by call of the Corporation. The amount of the payments for which such banks may be obligated under such subscriptions shall not exceed a cumulative total of $100,000,000.

(c) Subscriptions of the respective Federal home loan banks to such stock shall be allocated by the Corporation.

(d) The Corporation may retire at any time all or any part of the stock of the Corporation, or may call for retirement all or any part of the stock of the Corporation by (1) publishing a notice of the call in the Federal Register or providing such notice in such other manner as the Corporation may determine to be appropriate, and (2) depositing with the Treasurer of the United States, for the purpose of such retirement, funds sufficient to effect such retirement. No call for the retirement of any stock shall be made, and no stock shall be retired without call, if immediately after such action, the total of the stock not called for retirement and of the reserves and surplus of the Corporation would be less than $100,000,000. The retirement of stock shall be at the par value thereof, or at the price at which such stock was issued if such price is greater than par value. No declaration of any dividend on stock of the Corporation shall be effective with respect to stock which at the time of such declaration is the subject of an outstanding retirement call the effective date of which has arrived.

MORTGAGE OPERATIONS

SEC. 305. (a)(1) The Corporation is authorized to purchase, and make commitments to purchase, residential, mortgages from any Federal home loan bank, the Federal Savings and Loan Insurance Corporation, any member of a Federal home loan bank, or any other financial institution the deposits or accounts of which are insured by an agency of the United States, and to hold and deal with, and sell or otherwise dispose of, pursuant to commitments or otherwise, any such mortgage or interest therein. The operations of the Corporation under this section shall be confined so far as practicable to residential mortgages which are deemed by the Corporation to be of such quality, type, and class as to meet generally the purchase standards imposed by private institutional mortgage investors.

(2) No conventional mortgage shall be purchased under this section if the outstanding principal balance of the mortgage at the time of purchase exceeds 75 per centum of the value of the property securing the mortgage, unless (A) the seller retains a participation of not less than 10 per centum in the mortgage; (B) for such period and under such circumstances as the Corporation may require, the seller agrees to repurchase or replace the mortgage upon demand of the Corporation in the event that the mortgage is in default; or (C) that portion of the unpaid principal balance of the mortgage which is in excess of such 75 per centum is guaranteed or insured by a qualified private insurer as determined by the Corporation. The Corporation shall not issue a commitment to purchase a conventional mortgage prior to the date the mortgage is originated, if such mortgage is eligible for purchase under the preceding sentence only by reason of compliance with the requirements of clause (A) of such sentence. The Corporation may purchase a conventional mortgage which was originated more than one year prior to the purchase date only if the seller is currently engaged in mortgage lending or investing activities and if, as a result thereof, the cumulative aggregate of the principal balances of all conventional mortgages purchased by the Corporation which were originated more than one year prior to the date of purchase does not exceed 10 per centum of the cumulative aggregate of the principal balances of all conventional mortgages purchased by the Corporation. The Corporation shall establish limitations governing the maximum principal obligation of conventional mortgages purchased by it which are comparable to the limitations which would be applicable if the mortgage were insured by the Secretary of Housing and Urban Development under section 203(b) or 207 of the National Housing Act.

(3) The sale or other disposition by the Corporation of a mortgage under this section may be with or without recourse, and shall be upon such terms and conditions relating to resale, repurchase, guaranty, substitution, replacement, or otherwise as the Corporation may prescribe.

(b) Notwithstanding any other law, authority to enter into and to perform and carry out any transactions or matter referred to in this section is conferred on any Federal home loan bank, the Federal Savings and Loan Insurance Corporation, any Federal savings and loan association, any Federal home loan bank member, and any other financial institution the deposits or accounts of which are insured by an agency of the United States to the extent that Congress has the power to confer such authority.

OBLIGATIONS AND SECURITIES

SEC. 306. (a) The Corporation is authorized, upon such terms and conditions as it may prescribe, to borrow, to give security, to pay interest or other return, and to issue notes, debentures, bonds, or other obligations, or other securities, including without limitation mortgage-backed securities guaranteed by the Government National Mortgage Association in the manner provided in section 306(g) of the National Housing Act. Any obligation or security of the Corporation shall be valid and binding notwithstanding that a person or persons purporting to have executed or attested the same may have died, become under disability, or ceased to hold office or employment before the issuance thereof.

(b) The Corporation may, by regulation or by writing executed by the Corporation, establish prohibitions or restrictions upon the creation of indebtedness or obligations of the Corporation or of liens or charges upon property of the Corporation, including after-acquired property, and create liens and charges, which may be floating liens or charges, upon all or any part or parts of the property of the Corporation, including after-acquired property. Such prohibitions, restrictions, liens, and charges shall have such effect, including without limitation on the generality of the foregoing such rank and priority, as may be provided by regulations of the Corporation or by writings executed by the Corporation, and shall create causes of action which may be enforced by action in the United States District Court for the District of Columbia or in the United States district court for any judicial district in which any of the property affected is located. Process in any such action may run to and be served in any judicial district or any place subject to the jurisdiction of the United States.

(c) The Federal home loan banks shall, to such extent as the Board of Directors may prescribe, guarantee the faithful and timely performance by the Corporation of any obligation or undertaking of the Corporation on or with respect to any security (which term as used in this sentence shall not include the capital stock referred to in section 304 of this title).

(d) The provisions of this section and of any restriction, prohibition, lien, or charge referred to in subsection (b) shall be fully effective notwithstanding any other law, including without limitation on the generality of the foregoing any law of or relating to sovereign immunity or priority.

MISCELLANEOUS PROVISIONS

SEC. 307. (a) All rights and remedies of the Corporation, including without limitation on the generality of the foregoing any rights and remedies of the Corporation on, under, or with respect to any mortgage or any obligation secured thereby, shall be immune from impairment, limitation, or re-

striction by or under (1) any law (except laws enacted by the Congress expressly in limitation of this sentence) which becomes effective after the acquisition by the Corporation of the subject or property on, under, or with respect to which such right or remedy arises or exists or would so arise or exist in the absence of such law, or (2) any administrative or other action which becomes effective after such acquisition. The Corporation shall be entitled to all immunities and priorities, including without limitation on the generality of the foregoing all immunities and priorities under any such law or action, to which it would be entitled if it were the United States or if it were an unincorporated agency of the United States.

(b) The financial transactions of the Corporation shall be subject to audit by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions under such rules and regulations as may be prescribed by the Comptroller General of the United States. The representatives of the General Accounting Office shall have access to all books, accounts, financial records, reports, files and all other papers, things, or property belonging to or in use by the Corporation and necessary to facilitate the audit, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositaries, fiscal agents, and custodians. A report on each such audit shall be made by the Comptroller General to the Congress. The Corporation shall reimburse the General Accounting Office for the full cost of any such audit as billed therefor by the Comptroller General.

PENAL PROVISION

SEC. 308. (a) Except as expressly authorized by statute of the United States, no individual or organization (except the Corporation) shall use the term "Federal Home Loan Mortgage Corporation", or any combination of words including the words "Federal", and "Home Loan", and "Mortgage", as a name or part thereof under which any individual or organization does any business, but this sentence shall not make unlawful the use of any name under which business is being done on the date of the enactment of this Act. No individual or organization shall use or display (1) any sign, device, or insigne prescribed or approved by the Corporation for use or display by the Corporation or by members of the Federal home loan banks, (2) any copy, reproduction, or colorable imitation of any such sign, device, or insigne, or (3) any sign, device, or insigne reasonably calculated to convey the impression that it is a sign, device, or insigne used by the Corporation or prescribed or approved by the Corporation, contrary to regulations of the Corporation prohibiting, or limiting or restricting, such use or display by such individual or organization. An organization violating this subsection shall for each violation be punished by a fine of not more than $10,000. An officer or member of an organization participating or knowingly acquiescing in any violation of this subsection shall be punished by a fine of not more than $5,000 or imprisonment for not more than one year, or both. An individual violating this subsection shall for each violation be punished as set forth in the sentence next preceding this sentence.

(b) The provisions of sections 215, 607, 658, 1011, and 1014 of title 18 of the United States Code are extended to apply to and with respect to the Corporation, and for the purposes of such section 658 the term "any property mortgaged or pledged", as used therein, shall without limitation on its generality include any property subject to mortgage, pledge, or lien acquired by the Corporation by assignment or otherwise.

(c) The term "bank examiner or assistant examiner", as used in section 655 of such title 18, shall include any examiner or assistant examiner who is an officer or employee of the Corporation and any person who makes or participates in the making of any examination of or for the Corporation.

(d) The term "bank", as used in subsection (f) of section 2113 of such title 18, shall be deemed to include the Corporation, and any building used in whole or in part by the Corporation shall be deemed to be used in whole or in part as a bank, within the meaning of such section 2113.

(e) The terms "agency" and "agencies" shall be deemed to include the Corporation wherever used with reference to an agency or agencies of the United States in sections 201, 202, 203, 205, 207, 208, 209, 286, 287, 371, 506, 595, 602, 641, 654, 701, 872, 1001, 1002, 1016, 1017, 1361, 1505, and 2073 of such title 18. Any officer or employee of the Corporation shall be deemed to be a person mentioned in section 602 of such title 18 within the meaning of sections 603 and 606 of such title.

(f) The terms "obligation or other security" and "obligations or other securities", wherever used (with or without the words "of the United States") in sections 471 to 476, both inclusive, and section 492 of such title 18, are extended to include any obligation or other security of or issued by the Corporation. Any reference in sections 474, 494, 495, and 642 of such title 18 to the United States Code, except in a territorial sense, or to the Secretary of the Treasury is hereby extended to include the Corporation. Section 477 of such title 18 is extended to apply with respect to section 476 of such title as extended by the first sentence of this subsection (f), and for this purpose the term "United States" as used in such section 476 shall include the Corporation.

TERRITORIAL APPLICABILITY

SEC. 309. Notwithstanding any other law, this title shall be applicable to the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

CONSTRUCTION AND SEPARABILITY

SEC. 310. Except as otherwise provided in this title, or as otherwise provided by the Corporation or by laws hereafter enacted by the Congress expressly in limitation of provisions of this title, the powers and junctions of the Corporation and of the Board of Directors shall be exercisable, and the provisions of this title shall be applicable and effective, without regard to any other law. Notwithstanding any other evidences of the intention of Congress, it is hereby declared to be the controlling intent of Congress that if any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of this title, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

TITLE IV—GOVERNMENT NATIONAL MORTGAGE ASSOCIATION SPECIAL ASSISTANCE FUNDS

SEC. 401. (a) Section 305(c) of the National Housing Act is amended by striking out "by $500,000,000 on July 1, 1969" and inserting in lieu thereof "by $2,000,000,000 on July 1, 1969".

(b) Section 305(g) of such Act is amended—

(1) by striking out "$2,500,000,000" and inserting in lieu thereof "$1,750,000,000";

(2) by striking out "at par"; and

(3) by striking out in the first sentence all that follows the word "exceed" and inserting in lieu thereof "the dollar limitation on maximum principal obligation that would be applicable to such mortgage if insured under section 235(i) of the National Housing Act."

SEC. 402. The second sentence of section 302(b)(1) of the National Housing Act (as redesignated by section 201 of this Act) is amended by inserting after "(1)" the following: "is insured under section 236 or".

TITLE V—FUNDS FOR FINANCING MIDDLE-INCOME HOUSING

FINDINGS AND PURPOSE

SEC. 501. The Congress finds that—

(1) periodic episodes of monetary stringency and high interest rates make it extremely difficult for families of middle income to obtain mortgage credit at rates which they can afford to pay;

(2) periods of monetary stringency and high interest rates are directly related to the Government's monetary and fiscal policies;

(3) a disproportionate share of the burden of sustaining these anti-inflationary policies of the Government falls on families of middle income who are buyers or prospective buyers of homes; and

(4) the Government has a responsibility to lessen the disproportionate burden which such families bear as a result of such policies. It is the purpose of this title to provide, during periods of high mortgage interest rates, a source of mortgage credit for such families which is within their financial means.

MORTGAGE CREDIT FOR MIDDLE-INCOME FAMILIES

SEC. 502. Title II of the National Housing Act is amended by adding a new section 243 as follows:

"HOMEOWNERSHIP FOR MIDDLE-INCOME FAMILIES

"SEC. 243. (a) Whenever he determines such action to be necessary in furtherance of the purposes set forth in section 501 of the Emergency Home Finance Act of 1970, the Secretary is authorized to make, and to contract to make, periodic assistance payments on behalf of families of middle income. The assistance shall be accomplished through interest subsidy payments to the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation (hereinafter referred to as 'the investor') with respect to mortgages meeting the special requirements specified in this section and made after the date of enactment of the Emergency Home Finance Act of 1970.

"(b) To qualify for assistance payments a middle-income family shall be a mortgagor under a mortgage which is (1) insured under subsection (j) of this section, (2) guaranteed under chapter 37 of title 38, United States Code, or (3) a conventional mortgage meeting the requirements of subsection (j)(3) of this section. In addition to the foregoing requirement, the Secretary may require that the mortgagor have an income, at the time of acquisition of the property, of not more than the median income for the area in which the property is located, as determined by the Secretary, with appropriate adjustments for smaller and larger families.

"(c) The interest subsidy payments authorized by this section shall cease when (1) the mortgagor no longer occupies the property which secures the mortgage, (2) the mortgages are no longer held by the investor, or (3) the rate of interest paid by the mortgagor reaches the rate of interest specified on the mortgage.

"(d)(1) Interest subsidy payments shall be on mortgages on which the mortgagor makes monthly payments towards principal and interest equal to an amount which would be required if the mortgage bore an effective interest rate of 7 per centum per annum including any discounts or charges in the nature of points or otherwise (but not including premiums, if any, for mortgage insurance) or such higher rate (not to exceed the rate specified in the mortgage), which the mortgagor could pay by applying at least 20 per centum of his income towards homeownership expenses. As used in this subsection, the term 'monthly homeownership expense' includes the monthly payment for principal, interest, mortgage insurance premium, insurance, and taxes due under the mortgage.

"(2) In addition to the mortgages eligible for assistance under paragraph (1) of this

subsection, the Secretary is authorized to make periodic assistance payments on behalf of cooperative members of middle income. Such assistance payments shall be accomplished through interest subsidy payments to the investor with respect to mortgages insured (subsequent to the effective date of this section) under section 213 which are executed by cooperatives, the membership in which is limited to middle-income families. For purposes of this paragraph—

"(1) the term 'mortgagor', when used in subsection (b) in the case of a mortgage covering a cooperative housing project, means a member of the cooperative;

"(2) the term 'acquisition of the property', when used in subsection (b), means the family's application for a dwelling unit; and

"(3) in the case of a cooperative mortgagor, subsection (c) shall not apply and the interest subsidy payments shall cease when the mortgage is no longer held by the investor or the cooperative fails to limit membership to families whose incomes at the time of their application for a dwelling unit meets such requirements as are laid down by the Secretary pursuant to subsection (b).

"(e) The interest subsidy payments shall be in an amount equal to the difference, as determined by the Secretary, between the total amount of interest per calendar quarter received by the investor on mortgages assisted under this section and purchased by it and the total amount of interest which the investor would have received if the yield on such mortgages was equal to the sum of (1) the average costs (expressed as an annual percentage rate) to it of all borrowed funds outstanding in the immediately preceding calendar quarter, and (2) such per centum per annum as will provide for administrative and other expenses of the investor and a reasonable economic return, as determined by the Secretary to be necessary and appropriate taking into account the purpose of this section to provide additional mortgage credit at reasonable rates of interest to middle-income families.

"(f) Procedures shall be adopted by the Secretary for recertifications of the mortgagor's income at intervals of two years (or at shorter intervals where the Secretary deems it desirable) for the purpose of adjusting the amount of the mortgagor's payments pursuant to subsection (d).

"(g) The Secretary shall prescribe such regulations as he deems necessary to assure that the sales price of, or other consideration paid in connection with, the purchase by a homeowner of the property with respect to which assistance payments are to be made is not increased above the appraised value on which the maximum mortgage which the Secretary will insure is computed.

"(h)(1) There are authorized to be appropriated such sums as may be necessary to enable the Secretary to make interest subsidy payments under contracts entered into under this section, The aggregate amount of contracts to make such payments shall not exceed amounts approved in appropriation Acts, and payments pursuant to such contracts shall not exceed $105,000,000 during the first year of such contracts prior to July 1, 1971, which amount shall be increased by an additional $105,000,000 during the first year of an additional number of such contracts on July 1 of each of the years 1971 and 1972.

"(2) No interest subsidy payments under this section shall be made after June 30, 1973, except pursuant to contracts entered into on or before such date.

"(i) In determining the income of any family for the purposes of this section, income from all sources of each member of the family in the household shall be included, except that the Secretary shall exclude income earned by any minor person.

"(j)(1) The Secretary is authorized, upon application by the mortgagee, to insure a mortgage executed by a mortgagor who meets the eligibility requirements for assistance payments prescribed by the Secretary under subsection (b). Commitments for the insurance of such mortgages may be issued by the Secretary prior to the date of their execution or disbursement thereon, upon such terms and conditions as the Secretary may prescribe.

"(2) To be eligible for insurance under this subsection, a mortgage shall meet the requirements of section 221(d)(2) or 234(c), except as such requirements are modified by this subsection: *Provided, however,* That in the discretion of the Secretary 25 per centum of the authority conferred by this section and subject to all the terms thereof may be used for mortgages on existing housing.

"(3) A mortgage to be insured under this section shall—

"(i) involve a single-family dwelling which has been approved by the Secretary prior to the beginning of construction, or a one-family unit in a condominium project (together with an undivided interest in the common areas and facilities serving the project) which is released from a multifamily project, the construction of which has been completed within two years prior to the filing of the application for assistance payments with respect to such family unit and the unit shall have had no previous occupant other than the mortgagor;

"(ii) involve a single-family dwelling whose appraised value, as determined by the Secretary, is not in excess of $20,000 (which amount may be increased by not more than 50 per centum in any geographical area where the Secretary authorizes an increase on the basis of a finding that the cost level so requires).

"(iii) be executed by a mortgagor who shall have paid in cash or its equivalent on account of the property (A) 3 per centum of the first $15,000 of the appraised value of the property, (B) 10 per centum of such value in excess of $15,000 but not in excess of $25,000, and (C) 20 per centum of such value in excess of $25,000."

CONFORMING AMENDMENTS

SEC. 503. Section 238 of the National Housing Act is amended by—

(1) striking out "section 235(i), 235(j)(4), or 237" each place it appears in subsection (a) and inserting in lieu thereof "section 235(i), 235(j)(4), 237, or 243"; and

(2) striking out "235, 236, and 237" each place it appears in subsection (b) and inserting in lieu thereof "235, 236, 237, and 243".

AMENDMENT TO THE FEDERAL NATIONAL MORTGAGE ASSOCIATION CHARTER ACT

SEC. 504. Section 304(a)(1) of the National Housing Act is amended by adding at the end thereof the following: "Nothing in this title shall prohibit the corporation from purchasing, and making commitments to purchase, any mortgage with respect to which the Secretary of Housing and Urban Development has entered into a contract with the corporation to make interest subsidy payments under section 502 of the Emergency Home Finance Act of 1970.".

TITLE VI—FLEXIBLE INTEREST RATE AUTHORITY

SEC. 601. Section 3(a) of the Act entitled "An Act to amend chapter 37 of title 38 of the United States Code with respect to the veterans' home loan program, to amend the National Housing Act with respect to interest rates on insured mortgages, and for other purposes", approved May 7, 1968, is amended by striking out "October 1, 1970" and inserting in lieu thereof "January 1, 1972".

TITLE VII—MISCELLANEOUS

SETTLEMENT COSTS IN THE FINANCING OF FEDERAL HOUSING ADMINISTRATION AND VETERANS' ADMINISTRATION ASSISTED HOUSING

SEC. 701. (a) With respect to housing built, rehabilitated, or sold with assistance provided under the National Housing Act or under chapter 37 of title 38, United States Code, the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs are respectively authorized and directed to prescribe standards governing the amounts of settlement costs allowable in connection with the financing of such housing in any such area. Such standards shall—

(1) be established after consultation between the Secretary and the Administrator:

(2) be consistent in any area for housing assisted under the National Housing Act and housing assisted under chapter 37 of title 38, United States Code; and

(3) be based on the Secretary's and the Administrator's estimates of the reasonable charge for necessary services involved in settlements for particular classes of mortgages and loans.

(b) The Secretary and the Administrator shall undertake a joint study and make recommendations to the Congress not later than one year after the date of enactment of this Act with respect to legislative and administrative actions which should be taken to reduce mortgage settlement costs and to standardize these costs for all geographic areas.

EMERGENCY RELIEF FROM INTEREST RATE CONFLICT BETWEEN FEDERAL LAW AND STATE LAW

SEC. 702. Notwithstanding any other law, from the date of enactment of this title until July 1, 1972, loans to local public agencies under title I of the Housing Act of 1949 and to local public housing agencies under the United States Housing Act of 1937 may, when determined by the Secretary of Housing and Urban Development to be necessary because of interest rate limitations of State laws, bear interest at a rate less than the applicable going Federal rate but not less than 6 per centum per annum.

TREASURY BORROWING AUTHORITY FOR NEW COMMUNITIES PROGRAM

SEC. 703. Section 407(a) of the Housing and Urban Development Act of 1968 is amended by adding at the end thereof the following: "The Secretary may issue obligations to the Secretary of the Treasury in an amount outstanding at any one time sufficient to enable the Secretary to carry out his functions with respect to the guarantees authorized by this title. The obligations issued under this subsection shall have such maturities and bear such rate or rates of interest as shall be determined by the Secretary of the Treasury. The Secretary of the Treasury is authorized and directed to purchase any obligations of the Secretary issued under this subsection, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as now or hereafter in force, and the purposes for which securities may be issued under such Act are extended to include purchases of the Secretary's obligations hereunder."

REAL ESTATE LOANS BY NATIONAL BANKS

SEC. 704. Section 24 of the Federal Reserve Act (12 U.S.C. 371) is amended—

(1) by striking out "80 per centum" and "twenty-five years" in clause (3) of the third paragraph and inserting in lieu thereof third sentence of the first paragraph and inserting in lieu thereof "90 per centum" and "thirty years", respectively; and

(2) by striking out "thirty-six months", each place it appears in the first sentence of the third paragraph, and inserting in lieu thereof "sixty months".

EXTENSION OF TIME FOR CONTINUANCE OF CERTAIN ACTIVITIES

SEC. 705. Section 408(c)(2) of the National Housing Act (12 U.S.C. 1730a(c)(2)) is amended by striking "two" and inserting in lieu thereof "five".

STATEWIDE LENDING FOR FEDERAL SAVINGS AND LOAN ASSOCIATIONS

SEC. 706. Section 5(c) of the Home Owner's Loan Act of 1933 is amended (1) by adding after "their home office" in the first sentence the following: "or within the State in which

such home office is located"; and (2) by substituting the word "section" for the word "proviso" used in the last clause of the second proviso.

RESERVES OF INSURED INSTITUTIONS

SEC. 707. Section 403(b) of the National Housing Act (12 U.S.C. 1726(b)) is amended by inserting after "*Provided*, That" the second place the term appears the following: "the Corporation may extend the twenty-year limitation hereinabove prescribed by not more than ten years in the case of any insured institution if it determines such action to be necessary to meet mortgage needs: *Provided further*, That".

SAVINGS AND LOAN ASSOCIATIONS AS PENSION TRUSTEES

SEC. 708. Section 5(c) of the Home Owner's Loan Act of 1933 (12 U.S.C. 1464(c)) is amended by inserting before the next to the last paragraph a new paragraph as follows:

"Any such association is authorized to act as trustee of any trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan which qualifies or qualified for specific tax treatment under section 401(d) of the Internal Revenue Code of 1954, if the funds of such trust are invested only in savings accounts or deposits in such association or in obligations or securities issued by such association. All funds held in such fiduciary capacity by any such association may be commingled for appropriate purposes of investment, but individual records shall be kept by the fiduciary for each participant and shall show in proper detail all transactions engaged in under the authority of this paragraph."

MAXIMUM LOAN ON SINGLE-FAMILY DWELLING

SEC. 709. Section 5(c) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(c)) is amended by striking out "$40,000" in the first proviso and inserting in lieu thereof "$45,000".

COLLEGE HOUSING GRANT AUTHORIZATION

SEC. 710. Section 401(f)(2) of the Housing Act of 1950 is amended by striking out all that follows "increased by" and inserting in lieu thereof "$6,300,000 on July 1, 1970".

NATIONAL HOUSING PARTNERSHIPS

SEC. 711. Title IX of the Housing and Urban Development Act of 1968 is amended by adding after section 911 the following new section:

"STATE REGULATION

"SEC. 912. Nothing contained in this title shall preclude a State or other local jurisdiction from imposing, in accordance with the laws of such State or other local jurisdiction, any valid nondiscriminatory tax, obligation, or regulation on the partnership as a taxable and or legal entity, but no limited partner of the partnership not otherwise subject to taxation or regulation by or judicial process of a State or other local jurisdiction shall be subject to taxation or regulation by or subject to or denied access to judicial process of such State or other local jurisdiction, or be so subject or denied access to any greater extent, because of activities of the corporation or partnership within such State or other local jurisdiction."

And the House agree to the same.

JOHN SPARKMAN,
WILLIAM PROXMIRE,
HARRISON A. WILLIAMS, Jr.,
WALLACE F. BENNETT,
JOHN TOWER,
Managers on the Part of the Senate.

WRIGHT PATMAN,
WILLIAM A. BARRETT,
LEONOR K. SULLIVAN,
HENRY S. REUSS,
WILLIAM B. WIDNALL,
FLORENCE P. DWYER,
ALBERT W. JOHNSON,
Managers on the Part of the House.

The PRESIDING OFFICER. Is there objection to the present consideration of the report?

There being no objection, the Senate proceeded to consider the report.

Mr. SPARKMAN. Mr. President, I should like to make a statement on the conference report on the housing bill.

Before I comment on the details, I want to say how pleased I am with the fine job done by the members of the conference committee of both Houses of Congress.

In resolving the differences, the conference committee worked together with speed, and a spirit of good will and cooperation. However, as conferees usually do, there were compromises between the two sides. On the part of the Senate, we remained adamant on several items, and the same thing was true with the House. All in all, the conferees were satisfied that the final product represented the best interests of all concerned, and I am pleased to report that every member of the conference committee signed the report.

The Senate conferees were quite satisfied with the results of the conference. Although the Senate conferees receded in a few more items than the House conferees, there is only one provision of major significance in the Senate bill which the conference committee did not agree to. This is section 601(3) of S. 3685 of the Senate passed bill which would have established a dual interest rate program for FHA and VA mortgages. The House conferees were adamantly opposed to this and we had no choice but to recede.

The dual interest rate proposed would have established an experimental dual-interest-rate system for FHA and VA assisted mortgages. At present the ceiling on FHA and VA mortgages is established administratively by the Secretary of Housing and Urban Development. The new proposal would have given a lender and a borrower the option of agreeing on a rate without limit provided there were no discount points charged in connection with the transaction. This plan was recommended by the Commission on Mortgage Interest Rates which made its report to Congress last year.

I regret that the conferees did not agree to this provision. It will mean that we must continue the existing plan which permits discounts.

I hope that someday we can develop a workable plan to rid ourselves of discounts because I consider them most reprehensible and a hidden charge that adds greatly to the cost of housing.

Mr. President, this is a bill which has been developed by the Banking and Currency Committees of the Senate and House of Representatives in an attempt to bring relief to the homebuilding and mortgage credit industries and, further, to provide more housing for our moderate-income people. It is true that the President requested title I of the bill, that is, that portion of the bill which provides a $250 million subsidy to be used by the Federal home loan banks to reduce interest charges on advances to savings and loan associations. The remainder of the bill, some six titles, was all developed by the Banking and Currency Committees of the Senate and the House of Representatives.

The bill has the potential for the stimulation of new mortgage credit amounting to $20 billion. This could finance over 1 million housing units. Whether or not this will in fact be done depends greatly on the will and aggressiveness of the administration in implementing the provisions of the bill.

Our slump in homebuilding has had widespread impact on many facets of our economy and our national life. Housing starts in 1969 were at the low level of 1.5 million, and so far this year, starts are running at 15 to 20 percent less than last year. When compared with the national housing goal which calls for a level of 2 million housing starts this year, the current situation is intolerable. Its effect is widespread—rents are going up—house prices are going up—families are being forced to continue living in slums and substandard units and the job of rebuilding our cities is at virtual standstill.

The basic cause of this is the shortage and high cost of mortgage finance. Despite all the promises of the administration and the monetary authorities, interest rates continue at an intolerably high level. A house sold today under FHA financing requires not only a contract rate of 8½ percent, but in addition, the bank or mortgage lender demands a discount of five and six points, making the effective rate more like 9¼ percent. This is a heavy burden for any family to pay, particularly those of low and moderate income. Furthermore, a larger and larger percent of our middle-income families are coming to the Government for financial assistance to meet these high interest rates, through the interest-subsidy programs approved by Congress as stopgap measures to ease the impact of high interest rates. It is making subsidy seekers out of families who have always carried their own weight and involving them in the redtape of Government and the onerous burden of submitting personal income data to the Government and all that entails in bureaucratic complexities.

High interest rates are inextricably tied in with the availability and use of long-term credit. Mortgage finance needs must compete with other capital needs in our economy. Without government intervention and the appropriate financial institutions, mortgage finance cannot compete favorably with other users such as corporate borrowings.

The bill, S. 3685, contains provisions to remedy the current situation by establishing new institutions and direct Federal assistance to place mortgage credit in a better competitive position with credit for other purposes. Title I of the bill will help by providing a direct subsidy amounting to $250 million to enable Federal home loan banks to reduce their interest charges on advances to savings and loan associations. The congressional intent is well spelled out in the bill that the resulting benefit of this should go to home mortgage borrowers rather than to the participating savings and loan association. To insure that the benefits go to the home buyer, the bill requires the Federal Home Loan Bank Board to establish a maximum "spread" between the rate charged by the home

loan bank and that charged by the savings and loan association.

Titles II and III of the bill would also help increase the flow of mortgage credit for home purchases by establishing expanded secondary market facilities for both federally insured mortgage and conventional mortgages. The secondary market for conventional mortgages is a new endeavor and much needs to be learned about it. To start off, the loan limits the type of mortgages than can be purchased by these new institutions. Basically the eligible mortgage must be limited to one with a loan-to-value ratio of not more than 75 percent. This restriction would not apply to any mortgage: First, if the seller retains a participation of at least 10 percent, second, if the seller agrees to repurchase the mortgage within a stipulated time, and third, if the excess above 75 percent is privately insured.

I believe that this is the first time in our housing laws that private mortgage insurance is recognized. The law specifies that such private insurers are to be "qualified" under regulations to be established by the secondary market corporations. In writing the regulations, the conferees furthermore stated that they expect "both FNMA and the Federal Home Loan Mortgage Corporation to take the necessary steps to assure the prohibition of such conflict-of-interest practices as payment of rebates and commissions or other forms of compensation to officers, directors, or employees of mortgage lenders or groups of mortgage lenders."

Title IV contains new GNMA special assistance authority amounting to $750 million and transfers another $750 million from the congressional authority to Presidential authority. Furthermore the conferees agreed to remove an existing par purchase restriction on the use of the $2.0 billion balance of funds now in program 14 under congressional authority of the GNMA. The net effect of this action is to free up for immediate use a total of $2.750 billion which can be used by the President to purchase mortgages under the Presidential or congressional GNMA authority.

I believe that if the President uses this title, this can be the most effective provision in the bill to improve the flow of mortgage funds for FHA and VA mortgages.

Title V would establish a new program of interest subsidy for middle-income housing. This would establish a subsidy program to reduce the effective interest rate for middle-income borrowers to 7 percent. The borrowers would have to qualify by income and to the extent that the family's income rose above a certain level the subsidy would be reduced and eventually be removed.

Title VI is the miscellaneous title to the bill and contains a number of helpful provisions to encourage more funds to flow into mortagages.

Mr. President, the bill consists of six different titles which represent provisions that were written into the bill largely on the floor of the Senate in the early part of April of this year. I think this is a good bill and that it will mean much toward financing home mortgages for American families. I move the adoption of the conference report.

Mr. PROXMIRE. Mr. President, I want to compliment the members of the House-Senate Conference Committee on their prompt action on the Emergency Home Financing Act of 1970. The Congress and indeed the country is grateful for the leadership shown by Senator SPARKMAN and Congressman PATMAN on this far-reaching measure. In view of the current crisis in the housing market, it is absolutely imperative that this legislation be put into effect.

According to my calculations the bill will stimulate an additional $12.2 billion in mortgage credit from the private sector of the economy. This should result in the construction of an additional 512,000 housing units if fully implemented. When one considers the housing industry is already building 600,000 fewer units than it should be building to meet our national housing goals, the legislation before us goes a long way to remedy the situation.

If this legislation is swiftly implemented by the administration, the impact on unemployment should not be overlooked. According to my calculations, the construction activity stimulated by the bill would result in an additional 429,000 onsite construction jobs. However, this is not the final story. The addition of 429,000 onsite construction jobs will have secondary effects in other industries including building materials and equipment, transportation, trade and related services. When these secondary effects are taken into account, an additional 797,000 jobs should be created for a total of 1,226,000 jobs.

In view of the fact that 3.4 million men are already out of work, this legislation alone, if fully implemented, would reduce unemployment by nearly 33 percent. One unemployed man out of three could be put back to work if the authority in this legislation is used.

Mr. President, I ask unanimous consent to include in the RECORD a table setting forth the estimates on housing starts, mortgage credit, and employment which I have just mentioned.

ECONOMIC IMPACT OF THE EMERGENCY HOME FINANCE ACT

	Number of mortgage loans	Amount of mortgage credit (billions of dollars)	Onsite construction jobs	Total jobs
Title I (Federal Home Loan Bank Board subsidy)	150,000.	4.2	147,000	420,000
Title IV (GNMA special assistance authorization)	112,000	2.2	90,000	255,000
Title V (middle income mortgage credit)	250,000	5.8	192,000	551,000
Total	512,000	12.2	429,000	1,226,000

Mr. President, I want to call particular attention to title V of the bill which I offered on the floor of the Senate on April 16 and which is included in the final legislation. This title is aimed at the plight of the middle income home buyer who is squeezed out of the housing market because of tight money and high interest rates. During 1969, middle-income housing was cut back 23 percent from 1968, whereas upper-income housing and federally subsidized housing for low-income families rose substantially. As in the case of many other Government programs, it is the middle-income family who pays the bill but who receives none of the benefits.

The program under title V would reduce mortgage interest rates for middle income home buyers to 7 percent. These 7-percent mortgage loans could be extended to approximately 300,000 middle-income home buyers a year over a 3-year period for a total of 900,000 mortgage loans.

The assistance would be available on homes costing less than $20,000 in low-cost areas or less than $30,000 in high-cost areas. The home buyer would be required to allocate at least 20 percent of his income toward paying off the mortgage. If his income rose in subsequent years, he would be required to increase his mortgage payments until he paid the full mortgage interest rate at the time the mortgage loan was made.

The impact of this program on the typical family budget can be substantial. For many families, it can mean a difference between owning a home and not owning a home. A reduction in interest rates from the current rate of 9 to 7 percent will reduce a family's monthly payments by an average of $30 a month. It means that for the first time the Government has decided that the middle-income home buyer will not bear the brunt of anti-inflationary policy. High interest rates are not the fault of the home buyer; they are the result of the Government's economic policy. Therefore, the Federal Government has a responsibility to alleviate at least some of the hardship which its policies are afflicting on middle-income home buyers.

Mr. President, it is expected that this program will not be a permanent or continuing subsidy to middle income home buyers. Under the program, the subsidies would come into play only when mortgage interest rates were in excess of 7 percent. If mortgage interest rates decline, the program will be gradually phased out. Since administration officials are predicting that mortgage interest rates will decline to 6 percent by the end of 1972, I am hopeful that the program can be phased out after a few years.

Mr. President, under title V the 7-percent mortgage loans to middle-income families would be made by existing financial institutions, such as commercial banks, savings and loan associations, mutual savings banks, or mortgage banking firms. These mortgages would in turn be sold to the Federal National Mortgage Administration or the newly created Federal Home Loan Mortgage Corporation.

These two agencies would receive a

subsidy from the Department of Housing and Urban Development to compensate them for the difference between their yield on the mortgage and their current average borrowing cost. The bill authorizes new contract authority of $105 million a year over a 3-year period to finance these subsidy payments. If their current cost of borrowing declines, the subsidy would correspondently decline. Thus, we have enacted a flexible subsidy formula which is tailored to current credit market conditions.

Mr. President, this legislation was carefully worked out with the administration, and the Department of Housing and Urban Development. It was fully supported by the administration, and I am hopeful that the necessary funds can be appropriated at the earliest possible date.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Alabama to adopt the conference report.

The motion was agreed to.

AUTHORIZATION FOR THE SECRETARY OF THE SENATE TO RECEIVE MESSAGES FROM THE PRESIDENT DURING ADJOURNMENT OF THE SENATE

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that during the adjournment of the Senate until 11 o'clock on Monday morning next, the Secretary of the Senate be authorized to receive messages from the President of the United States.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR RECOGNITION OF SENATOR SPONG FOLLOWING THE REMARKS OF SENATOR TALMADGE ON MONDAY NEXT

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that on Monday next, immediately following the remarks of the able Senator from Georgia (Mr. TALMADGE), the able Senator from Virginia (Mr. SPONG) be recognized for not to exceed 30 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

ACTION BY NIXON ADMINISTRATION REGARDING PRIVATE AND PUBLIC SCHOOLS

Mr. THURMOND. Mr. President, when I was a Democrat, I did not hesitate to condemn any actions of the Democratic administration which I felt were not in the best interests of the South and of the Nation. As a Republican, my policy is the same: I shall not hesitate to condemn the actions of a Republican administration which are not in the best interests of the people of the South and of the United States as a whole.

In the past week, the Nixon administration has taken two actions which are wholly unnecessary, and which cast grave doubt upon the Nixon administration's commitment to treat all sections of the country with an equal hand. The people of the South are a people of great forbearance, and have great respect for the law. They have abided by court decisions with which they do not agree for the sake of law and order, even though such decisions have been destructive of social custom and traditions. However, they are not willing to accept arbitrary and discriminatory actions by the executive branch, calculated to appease the anti-South elements of the Nation.

In this category, I place the action of the Internal Revenue Service in threatening the tax exemption of private schools. In the same category, I place the proposed invasion by 100 carpetbagging Justice Department lawyers for the purpose of assuring forced integration of the public schools. These actions are arbitrary and discriminatory. They are not required by law or the Constitution, nor by the edicts of any court. These actions were taken on the initiative of the administration itself.

Mr. President, I condemn these actions; I strongly condemn them; without end, I condemn them. They are wrong as social policy, and they are wrong as law. This is the sort of program which we would expect to get from a Democratic administration. They are a breach of faith with the people of the South, who are making many sacrifices to comply with the law. They indicate a distrust of the people of the South. No school district in my State has refused to obey the law, even in its latest twisted interpretation. The overwhelming majority of the school districts in South Carolina have filed desegregation plans that have been accepted by HEW. Why is it necessary to break faith with their good intentions? Why is it necessary to indict them before the act and to presume their misconduct?

Mr. President, the situation was summed up by David Lawrence in his recent column commenting on the IRS action. Mr. Lawrence says:

> Government by law and the Constitution or government by political expediency—that's the choice which the Nixon Administration faced, and it took the *latter* course when it ordered white private schools to open their doors to all, regardless of race, or lose their tax exemptions.

These are strong words, but they are justified by the situation. As Mr. Lawrence points out, other forms of discrimination are permitted under the IRS regulations—discrimination by religion for example. Nor is the tax status of the NAACP threatened. However, the rights of those citizens who wish to achieve quality education through separate educational systems are threatened.

Mr. President, this IRS ruling is vindictive. It is no secret that a major reason for the development of the private school phenomenon throughout the South is that many, if not most, of the white people wish to have the freedom of choice to send their children to school with those of their own cultural group. It is simply the natural and wholesome desire to perpetuate cherished traditions and customs, since, whenever people of either race have a choice, they choose to educate their children among their own kind. This phenomenon is not confined to the South. It is the same throughout the country. The statistics are well known. Chicago has achieved only 3.2 percent desegregation, as defined by HEW. Gary, Ind., which has a Negro mayor, has achieved only 3.1 percent desegregation. St. Louis has only 7.1 percent desegregation. New York City has only 19.7 percent desegregation.

People throughout this Nation make the choice generally in two ways. They either move to a white neighborhood, or they send their children to private schools. When people move, we have the phenomenon of resegregation, such as has taken place in Charleston, Atlanta, Richmond, and Washington, D.C., not to speak of nearly every northern city. In Washington, D.C., which was to be the model for the Nation, the public school system is now 5.8 percent white and 94.2 percent black. But in the smaller towns of the South, particularly because whites and blacks have always been good neighbors, it is not possible to move in order to find a white school. Instead, the whites leave the public school system if possible and establish a private school.

The IRS decision will be an additional burden upon those who are trying to maintain their freedom of choice. It will not defeat them, but it will make the task harder. What is most ominous is that it sets a precedent for depriving private schools of their private status. When a vindictive policy decision is once made, it sets the pattern for other decisions designed to punish those who do not accept certain political theories.

But there is a far more serious matter involved. This decision breaks faith with the people of the South. As recently as February 19, 1970, the President assured me positively that he supported the continuance of the tax-exempt status of private schools. The people of the South were counting upon the President's word. I can only conclude that a group of liberal advisers around the President are misleading him, and that their advice will bring disruption to this Nation.

I am warning the Nixon administration—I repeat, I am warning the Nixon administration today—that the people of the South and the people of the Nation will not support such unreasonable policies. I remind the Chief Executive that the Presidency is an elective office, and that what the people give, the people can also take away.

The private schools are an important resource for freedom of choice today. The people must not be deprived of this alternative. The social structure of this Nation must not be an object of Federal policy, if freedom in our everyday actions is to be preserved. The only fair requirement under law is that everyone be treated the same in Government actions. If private acts come under the same rigid regulation, then the Federal Government will be intruding upon every step we take and every breath we breathe.

The South does not like forced integration any more than the North. It is well

known that the former New York Commissioner of Education, Dr. James E. Allen was a strong proponent of forced integration in the face of the parents' wishes. Dr. Allen was rebuffed by the State Legislature of New York, one of the most liberal legislatures in the country. The New York antibusing law provided the essence of freedom of choice. It said that no one could prevent a child from going to a given school nor can any one force a child to go to a given school.

Thus blocked, Dr. Allen quit his post and became U.S. Commissioner of Education. To the great relief of most sensible people he was fired a few weeks ago, but his spirit apparently lingers on. We now have Allenism without Allen.

If the administration does not use reason and patience, it will destroy both the public and private school systems. I have always supported the public school system, and I shall continue to do so. In the same way, I will uphold the private school system, as a significant contribution to American freedom. As Mr. Lawrence said:

> If these privileges can arbitrarily be withdrawn at the whim of any administration, it can mean that individual rights can suddenly be curtailed by the government for almost any reason by imposing a penalty through income tax regulation.

I have been watching the administration since it came into power a year and a half ago. I have noticed that since the President has been in office he has become surrounded by liberal and ultraliberal advisers. The advice that these people give is not in the best interest of either President Nixon or the country. The philosophy which these people espouse and which they give to the President is a sectional philosophy—the philosophy of the Northeast. It is not the philosophy of the South or of the West or of the Midwest. Those who support the philosophy of the Northeast did not support the President in 1968, and they will not support him in 1972.

If President Nixon is to be successful in 1972, he must listen to the voice of the great majority. He must take the pulse of America's broad heartland. He must keep faith with those who put their trust in him.

When the President is right, I shall say he is right; when he is wrong, I shall not hesitate to say so. My desire is to help the administration in every proper way, but my first obligation is to the people of my State, and of the South, and of the Nation. I would be less than a friend if I did not point out the error of the President's actions. I trust that he will understand my statements. We have worked together in the past for the good of the country, and I hope to be able to do so in the future. But the South cannot and will not stand for the unjustified and arbitrary invasion of the rights guaranteed to all people under the Constitution.

RELEASE OF REPORT ON MILITARY SPENDING BY "MEMBERS OF CONGRESS FOR PEACE THROUGH LAW"

Mr. THURMOND. Mr. President, the "Members of Congress for Peace Through Law" group have made a public release of their report on military spending. I have been advised by the Department of Defense that this report contains highly classified information.

Mr. President, this is shocking information. In my judgment, it represents irresponsibility. This report is another effort to condemn the Defense Department at a risk to our national security. Handing the Soviets our military secrets on a silver platter is an inexcusable act against our national interest.

I am informed that a member of this peace group was advised in writing on July 8, 1970, by the office of the Secretary of Defense, prior to publication of the Peace group's report, that portions of it were classified, and that the Defense Department offered to assist the group in providing a security review of the report prior to the report's release. I understand this offer was not accepted by the group, who appear to be determined to downgrade the U.S. military capability, even at a risk to our security. The Peace group report, which was released on Wednesday, still contains classified information, in spite of the advanced warning by the Department of Defense that it contained classified information.

Mr. President, the American people should know that there are those in Congress who deliberately release classified information, in the face of a warning from the Department of Defense that it could damage our national security.

It must be realized that the Defense Department is the judge of what is classified. The "Peace" group alleged that unclassified sources were used for the report. Nevertheless, this report compounds bad judgment not in our national interest.

In the interest of our national security, I strongly urge those responsible to withdraw immediately all copies of this report. If they wish to make a point about defense spending, then they should remove the classified portions before releasing the report. I will strongly oppose any effort to place this report in the CONGRESSIONAL RECORD if the sponsors attempt to take this action. Such an action would give much greater credibility to classified information which would be detrimental to our Nation.

It was noted in the Evening Star yesterday, July 17, 1970, that Mr. Orr Kelly, staff writer, disclosed this breach of security in his newspaper column.

Mr. President, I ask unanimous consent to have this article by Mr. Orr, entitled, "Report Violated U.S. Security, Pentagon Says," and a letter from the Office of the Secretary of Defense to a U.S. Senator who is a member of this group, dated July 8, 1970, be printed at the conclusion of my remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

REPORT VIOLATED U.S. SECURITY, PENTAGON SAYS

(By Orr Kelly)

The Pentagon accused a congressional group today of violating national security in a report on military spending.

The report, prepared by the Members of Congress for Peace through Law, was made public at a press conference yesterday by Sen. Mark Hatfield, R-Ore.

Pentagon press spokesman Jerry W. Friedheim said the Pentagon had obtained a working draft of the report more than a week ago. On July 8, he said, Richard G. Capen Jr., assistant to the defense secretary, wrote to Hatfield suggesting the report be submitted for security review.

"I have been advised that a preliminary review of a draft document prepared by your committee indicates that there is classified information included," Capen told Hatfield.

HATFIELD STATEMENT

Hatfield was not immediately available for comment today, but at yesterday's press conference he said all the material in the report had come from public, non-classified sources.

Wes Michaelson, an assistant to Hatfield, repeated today that the material, submitted by a number of congressional offices, was all from unclassified sources.

Capen's letter did not arrive until the final report was being printed, he said.

Hatfield replied to the letter Tuesday evening or yesterday morning, he said. Friedheim said the reply from Hatfield had not been received this morning.

Friedheim refused to pinpoint the classified information in the report and he would not say what classification it bore, although he implied that it was "secret" or "top secret."

The information, he said, had to do with the "characteristics of weapons."

"While many figures in the report were not sufficiently accurate, there were some that were sufficiently accurate that if the report had been submitted for review we would have advised them to change those figures," Friedheim said.

Friedheim said he was not aware of any plans for legal action against any of those involved in preparing or publishing the report. To do so, he said, would draw attention to the material the Pentagon wished had not been published.

The report is probably the most ambitious effort ever undertaken by a congressional group to analyze and comment on the military spending and the defense establishment, aside from the annual reviews by the defense and appropriations committees.

Hatfield is chairman of the group's military spending committee. Also on the committee are 10 other senators and 16 representatives.

The 150-page report called for cuts of $4.4 to $5.4 billion in the Pentagon's budget request for 1971.

OFFICE OF THE SECRETARY OF DEFENSE,
Washington, D.C., July 8, 1970.

Hon. MARK O. HATFIELD,
Chairman, Committee on Military Spending, Members of Congress for Peace Through Law, Washington, D.C.

DEAR SENATOR HATFIELD: A copy of the draft Report on Military Spending, as compiled by the Members of Congress for Peace through Law (Committee on Military Spending) has been brought to my attention.

I can assure you that the Department of Defense welcomes thorough and constructive understanding of important issues affecting national security.

Assuming that this report will be published and distributed to Members of Congress, as well as other interested citizens, I would like to offer the assistance of the Defense Department in providing a security review of those sections included in the draft copy.

I have been advised that a preliminary review of a draft document prepared by your Committee indicates that there is classified information included.

I will await your instructions as to how the Peace through Law Committee wishes to

proceed prior to publication and dissemination of its final report.

Sincerely,

RICHARD G. CAPEN, Jr.,
Assistant to the Secretary for Legislative Affairs.

Mr. THURMOND. Mr. President, I notified the distinguished Senator from Oregon that I intended to make these remarks so that he could be present if he desired to do so. I see the Senator is in the Chamber now and possibly he would care to respond.

Mr. HATFIELD. Mr. President, will the Senator yield?

Mr. THURMOND. I am pleased to yield to the distinguished Senator from Oregon.

Mr. HATFIELD. Mr. President, I am grateful to the Senator from South Carolina for giving me notification that he planned to make comments relating to the report on military spending issued by Members of Congress for Peace Through Law.

I say to the distinguished Senator from South Carolina that even though it is within his rights to make these observations, I certainly feel that they are not well-founded observations and I would like to ask if he would yield first for this particular question.

Mr. THURMOND. I yield.

Mr. HATFIELD. First of all, has the Senator read the report?

Mr. THURMOND. I have not read the report but I have been told what the report contains; and the Department of Defense is most disturbed over the report, especially in view of the fact that they wrote the Senator a letter and told the Senator it contained classified information, but in spite of their request to the Senator that they be allowed to work with the Senator and go through this report and remove those classified portions, the Senator did not agree to do so.

Mr. HATFIELD. Mr. President, will the Senator yield further?

Mr. THURMOND. I am happy to yield to the Senator from Oregon.

Mr. HATFIELD. Did either the Defense Department or a staff member of the Committee on Armed Services, on which the Senator from South Carolina serves with great distinction, list for the Senator an item or identify the classified material in this particular report?

Mr. THURMOND. I have not gone over in detail the classified information, but I am told it contains a great deal of classified information, and they were very anxious that that be removed before this report was made public.

Mr. HATFIELD. Do I understand correctly that the Senator was not given any identification or listing of any classified information as to the exact specifics?

Mr. THURMOND. The Defense Department has gone through this report and they say it contains a great deal of classified information. They are experts in this field; they have jurisdiction in this field; and I accept their statement.

Mr. HATFIELD. I see. So the Senator does not have a list of such classification violations, as charged by the Pentagon.

Mr. THURMOND. I do not have that at the moment.

Mr. HATFIELD. Will the Senator yield further for a question?

Mr. THURMOND. I yield.

Mr. HATFIELD. If this report, which I hold in my hand, could be shown to the Senator page by page and item by item to be information from other publications and sources available to the public, such as the New York Times, trade journals and professional journals, would the Senator from South Carolina consider that a violation of classification?

Mr. THURMOND. I would consider it a violation of the classification law if the Senator was put on notice, as the Senator from Oregon was put on notice, about the report, which he formulated I understand, that was to be disseminated and he went ahead and disseminated it anyway.

Mr. HATFIELD. I do not think the Senator answered the question. Let me restate it more clearly. If the Senator could be shown that the information in this report has appeared in public in some way or another, whether it be newspapers, or trade publications, or professional journals, or what, and that, therefore, the general public had access to everything in this report and every evaluation in this report, would he consider that a violation of the classification system?

Mr. THURMOND. I think it is a violation of the classified information law when the Senator or others are put on notice that it is classified information; but even if it were not a violation, if the Department of Defense notified a Member of the Congress of the United States that a report that some outside committee was about to release contained information which would be detrimental to our country, I would be amazed that such a committee would go ahead and print that information anyway.

Mr. HATFIELD. I would certainly agree with the Senator 100 percent. There was no such information given to any member of this committee that we had information that, if published, would be detrimental to the United States.

Mr. President, I ask unanimous consent that the letter I received from Mr. Richard G. Capen, Jr., Assistant to the Secretary for Legislative Affairs, and my answer to that letter be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

OFFICE OF THE
SECRETARY OF DEFENSE,
Washington, D.C., July 8, 1970.

Hon. MARK O. HATFIELD,
Chairman, Committee on Military Spending, Members of Congress for Peace Through Law, Washington, D.C.

DEAR SENATOR HATFIELD: A copy of the draft Report on Military Spending, as compiled by the Members of Congress for Peace through Law (Committee on Military Spending) has been brought to my attention.

I can assure you that the Department of Defense welcomes thorough and constructive understanding of important issues affecting national security.

Assuming that this report will be published and distributed to Members of Congress, as well as other interested citizens, I would like to offer the assistance of the Defense Department in providing a security review of those sections included in the draft copy.

I have been advised that a preliminary review of a draft document prepared by your Committee indicates that there is classified information included.

I will await your instructions as to how the Peace through Law Committee wishes to proceed prior to publication and dissemination of its final report.

Sincerely,

RICHARD G. CAPEN, Jr.,
Assistant to the Secretary for Legislative Affairs.

U.S. SENATE,
Washington, D.C., July 15, 1970.

Hon. RICHARD G. CAPEN, Jr.,
Assistant to the Secretary for Legislative Affairs, Office of the Secretary of Defense, Washington, D.C.

DEAR MR. CAPEN: I have received your letter of July 8th, offering the assistance of the Department of Defense in reviewing the 1970 Military Spending Report.

The Draft to which you refer was a working copy distributed only to the participating offices. Significant modifications were made in this working Draft and the final version has been printed. It will be released on Wednesday, July 15.

Let me assure you, however, that at no time was classified information used during the research and production of this report. As you may have noted, some sections are footnoted for documentation and in all other cases, citations can be supplied from unclassified sources such as the press, Congressional hearings, trade journals, and various magazines.

I quite agree with you that a thorough and constructive understanding of national security issues is in the best interest of the nation. The 1970 Military Spending Report certainly contributes to this discourse.

Sincerely,

MARK O. HATFIELD,
U.S. Senator.

Mr. THURMOND. Mr. President, I might say for the Senator's information that that was the letter I just placed in the RECORD.

Mr. HATFIELD. I would like to have my answer printed in the RECORD also.

Mr. President, I ask unanimous consent to have printed in the RECORD from the Evening Star of Friday, July 17, 1970, an article which would be a response to the one the Senator from South Carolina placed in the RECORD a few moments ago.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

HATFIELD DENIES SECRET DATA USE

Sen. Mark O. Hatfield, R-Ore., staunchly denied today that any part of a congressional report on military spending was based on secret information vital to the national security.

Accusing the Pentagon of "irrationality," Hatfield said a Defense spokesman's contention yesterday that the report contained secret material indicated the department had no realistic defense against growing congressional demands for spending reductions.

Hatfield heads an informal alliance of congressional defense critics which issued a 150-page report Wednesday recommending cutbacks in 14 major weapons systems.

Jerry W. Friedheim, a public relations official for the Defense Department, said some of the information in the report was classified "above confidential"—meaning secret or top secret.

But Hatfield and others who worked on the report said every line was drawn from newspapers, trade journals, congressional hearings

and other publications and sources in the public domain.

The problem, he said, was that the Pentagon regularly keeps the "secret" stamp on information even after it appears in public print.

The Pentagon's quarrel apparently was with the report's disclosure of yields for the Sprint and Spartan antiballistic missiles—components of the controversial Safeguard ABM system.

A spokesman for Hatfield said this information came from public documents but he could not immediately identify them.

Friedheim said Richard G. Capen Jr., assistant secretary for legislative affairs, had sent Hatfield a letter July 8 asking that the report be submitted to the Pentagon for deletion of classified material. He said Hatfield never replied to the letter.

Mr. HATFIELD. Mr. President, for the benefit of the Senator from South Carolina I would like to give an example of the type of thing we have at hand. I know the Senator is very sincere in his feelings and his expressions, but I think he is sincerely wrong. I think we have to consider what we are dealing with in the entire classification system.

First of all, let me make clear I have asked the Department of Defense for a specification of the items they claim in this report are violating the classification system. I have not received any reply to my request, and I have asked not once but twice for an itemized listing. They say it is a violation of the classification but they have not answered. However, they have seen fit to call a public press conference and make this charge through a press conference.

If the security of this country were really in jeopardy I suggest they would have had a person on my doorstep pretty fast because, let me also indicate to the Senator, they had obtained a working copy of this report very early, and this working copy was published only for the staff people on June 11.

When one considers the fact that they had a working copy at least 2 to 3 weeks, I think it is very peculiar that they were not on my doorstep indicating to me some concern if we were violating security.

Second, let me point out that they have refused to give me a list of specifications, and the only thing I can find out is through press statements and press publications. Let me quote:

The Pentagon's quarrel apparently was with the report's disclosure of yields for the Sprint and Spartan antiballistic missiles—components of the controversial Safeguard ABM system.

All right. We went back to our staff work. Let me say for the record that these other matters that are alluded to as a concern of the Pentagon one could have read about on May 4, 1969, in the New York Times which stated that the Sprint warhead has about one-tenth the force of the Hiroshima bomb. The force of the Hiroshima damage was about 20 kilotons, and therefore the Sprint missile's is about 2 kilotons. That is the report, which one could have read about in the CONGRESSIONAL RECORD, also, because that article was placed in the CONGRESSIONAL RECORD by Senator TYDINGS, of Maryland, on May 13. Or one could have read about the same subject in a bulletin of the Atomic Science Bulletin in June 1970 by Ralph Lapp, page 106, which gives the yield of the Spartan warheads. Or one could have read about it in the speech by Mr. Ralph Lapp given to the American Physical Society, titled, "ABM and MIRV," on April 29, 1970.

All I am saying is that in three earlier specific publications and in the CONGRESSIONAL RECORD are the very facts about those points as far as we can determine, where the objections lie.

I think it is quite well known that the Pentagon has maintained the classification of "secret" even after it has appeared in publications around the country. I believe, therefore, we ought to review the classification technique or the application of the classification system.

I would like to add, further, that with respect to every person who worked on this report, on each item and weapons system, the ones who had access to classified material, because of security clearance, can list the reports they used for their work, which all came from unclassified sources.

In other words, I am saying simply this: Each member of the staff knew exactly where he would get the information, and he can cite it by chapter and verse, page by page in this report, and none of it was under classification.

I think the point should be made clear that our committee had no intention of violating classification. I think the Senator from South Carolina knows me well enough to know that I would not be a party to putting my country under jeopardy or putting my country under the gun, so to speak, by violating classification. It is almost impugning the integrity of the Senator from Oregon to even imply that, somehow, we have put our country in grave danger by the publication of this report. All I am saying is I can cite, chapter and verse, page by page, where every one of these items was published in some kind of publication or source open to the public and not classified.

I would further say this, because this might have some political implication rather than military implication—not by the Senator from South Carolina, but by the Pentagon. I feel they are complimenting this report, because this report has raised sensitive and important issues, and therefore they have been trying, by political tactics, to demean or detract from that report. So I wonder if it is military security that is being watched, or perhaps political security.

This report does not attempt to downgrade the military. It is not an attack upon the Pentagon. If one would read and study the report, he would know we have several specific proposals that offer, suggest, and recommend improvement and strengthening of our military weapons systems. We ask for continuation of the Poseidon program, as long as there is no SALT agreement. We ask for continued research on ABM. We ask for increases in this whole base of technology, science, and education, which is the foundation of our future security. We ask for a refiguring of the B–52's. We urge full expenditure for the development of the ULMS program. We ask for a better design for the F–15. We ask for continued extensive research on antisubmarine warfare, urging that systems be deployed when they have been proven to be effective.

This is not a report against the Pentagon. It is an effort to try to show some balance to justify the expenditures of the Pentagon.

Let me close by saying that perhaps this is the best way to get a focus on this report, by what the Senator from South Carolina has done today, by asking these questions, so that we can clarify and explain, but perhaps more important, draw attention to important recommendations in this report.

Let me say again that no violation was intended and no violation could have taken place, because of the fact that we secured all of this information from public materials and publications that are open to the general public.

Mr. THURMOND. Mr. President, in response to the Senator, I would like to say this: If the Defense Department warned the Senator that the report did contain classified material and Mr. Jerry W. Friedheim, Pentagon press spokesman, said it did contain secret and top secret material, does not the Senator think it would have been the part of wisdom to have met with the Defense Department officials and considered screening those portions that did contain classified material, even though the Senator and his colleagues had obtained information from one magazine or another or one newspaper or another, or if someone had stolen it from the Pentagon and gotten it to him somehow. I do not imply that this did happen. But the point is, suppose it did contain secret or top secret material and the Defense Department, as it did in its letter, requested that they be allowed to meet with the Senator before that report was published and disseminated, then I question the wisdom of releasing the information. I believe in the letter to the Senator from Oregon dated July 8, it read:

I have been advised that preliminary review of draft documents prepared by your committee indicates that there is classified material included. I will await your instructions as to how your committee desires to consult before the publication and dissemination of your final report.

Does the Senator feel that if the Pentagon, which is sensitive to classified material, felt so strongly about this and went so far as to put the Senator on notice that they did feel strongly about this, regardless of where the information came from, it was wise to repeat it and repeat it again if it was classified information? Would it not have been the better part of good judgment and security for the Senator to have worked with the Defense Department and eliminated those portions rather than go ahead with a press conference?

Mr. HATFIELD. Does the Senator want a response to that?

Mr. THURMOND. I am glad to yield for that purpose.

Mr. HATFIELD. My office called Mr.

Jerry Friedheim and asked for specifics of where there had been violations of classification. Upon discussing this material with Mr. Jerry Friedheim of the Defense Department—he said, "Well, we just would have preferred that certain sections not be used in that report."

Again, we asked for specifications of item by item of where we were violating security. Even though they have found time to have press conferences and engage in press releases and discussions, they have yet, up to this date, to relate to us, even though we have requested it, exactly what material they would like us to delete or what material was classified material.

Mr. THURMOND. In response, I still say that the Department of Defense felt so strongly about this matter that they contacted the distinguished Senator from Oregon, wanting to meet with him to talk these matters over. We would not expect the Defense Department officials to tell him over the phone what was top secret. That would not make sense. They wanted to meet with the Senator from Oregon in person and discuss these matters, to tell him they were classified, and to see if they could not induce him to withdraw them. Why could not that have been done, rather than to go ahead and have a news conference and release the information to the public?

Mr. HATFIELD. Mr. President, I have been in my office. I am willing, able, and eager to meet with representatives of the Defense Department at any time. I did not ask them for specifications over the telephone. It would be ridiculous to ask the Defense Department to supply them over the phone. I do not know whether my phone is tapped or not. But, by the same token, I have to say that I have had no indication that the Defense Department was interested in communicating with me, other than through a news conference. I think that is not the way to handle a serious matter. If there had been serious thought about this whole report by the Defense Department, they should have been on the telephone, so to speak, seeking an appointment or seeking to counsel with me, rather than to communicate with me through a news conference.

Mr. THURMOND. I respond by saying that they asked for a conference with the Senator. They did not get a conference. The Senator went ahead and held a press conference, and the Defense Department said the report contained classified information. They wanted to point that out to him. I am informed now that the Department of Defense has detailed these security violations. If the Senator had had a meeting with them, they could probably have resolved the situation. It is my belief that the Senator might have agreed not to publish this report after the Pentagon had pointed out the classified portions which should not have been published.

Mr. HATFIELD. Mr. President, in reviewing the letter again—I suggest that the Senator reread it—there is no request at all for a conference.

Mr. THURMOND. That letter informed the Senator that the report contained classified information, and it also said that the Department hoped the Senator would await instructions before proceeding with the publication and dissemination of this report. But the Senator went ahead and disseminated it in a press conference without conferring with Defense Department officials.

Mr. HATFIELD. Mr. President, I think we have made our points. I am not going to belabor the issue. I think, again, that basically the problem of the Defense Department is its medieval system of classification, trying to say something is classified when it has already been published in the newspapers or published in a journal. I do not think it is up to Congress to determine whether published materials are classified. If a Member of Congress who is doing research can find something in a publication of this kind, I do not think it is necessary for him to ask permission from the Defense Department to make a report to his Senate colleagues.

This is not the first time this has happened. It has happened a number of times with Senators. I think that after a while the Defense Department might get a little notice that their system is not functioning correctly.

There is no intention, no desire, to violate classification. I think, again, that the Defense Department is acting more in a political manner than with concern for the security of the Nation, because had they been deeply concerned, they would not have waited to exchange letters; they would not have waited to exchange press releases; they would have had an immediate confrontation.

I have had representatives of the military call at my office before. They know they are welcome and can come at any time for a conference or discussion or to ask for an appointment.

I question the real concern of the Department for the security of the country in this case, because I can prove, by chapter and verse, that every word of this report came out of publications available to the general public.

I would urge the Senator from South Carolina, as a member of the Committee on Armed Services, to perhaps make it an item on the agenda of that committee to review the classified system of the U.S. Department of Defense. I think it might prove to be a worthwhile undertaking. Then we will not have to get into the question of challenging or repudiating the patriotism of any Senator. I think it would be better if the question were studied by the committee and made a committee project.

I urge the Senator from South Carolina, if he is deeply concerned, to have this question taken up as an item of agenda by the committee.

Mr. THURMOND. I think what is most needed is not a new system but to observe the present system.

ADJOURNMENT TO 11 A.M. MONDAY, JULY 20, 1970

Mr. BYRD of West Virginia. Mr. President, if there is no further business to come before the Senate, I move, in accordance with the previous order, that the Senate adjourn until 11 o'clock, Monday morning next.

The motion was agreed to; and (at 4 o'clock and 46 minutes p.m.) the Senate adjourned until Monday, July 20, 1970, at 11 a.m.

NOMINATION

Executive nomination received by the Senate July 17, 1970:

IN THE AIR FORCE

The following-named officer for temporary appointment in the U.S. Air Force under the provisions of chapter 839, title 10 of the United States Code:

To be major general

Brig. Gen. Roy M. Terry, [redacted] FR (colonel, Regular Air Force, chaplain) U.S. Air Force.

WITHDRAWAL

Executive nomination withdrawn from the Senate July 17, 1970:

BUREAU OF MINES

J. Richard Lucas, of Virginia, to be Director of the Bureau of Mines, which was sent to the Senate on May 6, 1970.

EXTENSIONS OF REMARKS

CAPTIVE NATIONS

HON. WILLIAM E. MINSHALL

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Wednesday, July 15, 1970

Mr. MINSHALL. Mr. Speaker, in a recent letter from Dr. Lev E. Dobriansky, of Georgetown University and the distinguished chairman of the National Captive Nations Committee, I was particularly struck by his comments:

> Ironically enough, as all reports at this stage show, the captive nations in Eastern Europe, the USSR, Asia and Cuba, not to speak of the near-captives in Southeast Asia and elsewhere, have far more faith in the historic role of America than some segments of our populace. Congress can responsibly and assertively rectify this lag by (1) creating a Special House Committee on the Captive Nations, which would unquestionably offset the appalling ignorance of our youth and others regarding the captive nations and (2) moving for reconsideration of the Freedom Academy bill in view of the intensification of Red political warfare on our own terrain.

I could not agree more with Dr. Dobriansky's views. For years I have introduced and reintroduced the resolution to create the Special Committee on the Captive Nations. In this Congress it is House Resolution 77. If we in Congress do not take the initiative or have the moral courage to act on this simple resolution, which has so many cosponsors in the House, how, indeed, can we expect our confused and uninformed youth to understand the true nature of the plight of the captive nations and the depredations