Introduction and History of Position Statement on the Insanity Defense for the Proposed Federal Criminal Code

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To understand the following position statement and testimony on the Insanity Defense that I submitted on May 15, 1974, to the United States Senate Sub-committee on Criminal Laws and Procedure of the Senate Judiciary Committee, it is necessary to review the legislative history of these recent efforts to reform Federal criminal laws.

Need to reform the archaic collection of laws in the present United States Criminal Code has long been recognized. The last update of Federal criminal laws occurred in 1909, almost 70 years ago.

In 1966, under Congressional Statute, President Johnson appointed a bipartisan National Commission headed by former California Governor Pat Brown to update and reform the present Federal Criminal Code. After five years, the Brown Commission submitted its final report to President Nixon and the Congress on January 7, 1971. Dissenting members of this Commission, United States Senators McClellan, Hruska, and Ervin, then succeeded in introducing their minority views to the 93rd Congress as S. 1. President Nixon subsequently called upon the Attorney General's office to rewrite the bipartisan Commission's Final Report; and the Nixon Administration's "Criminal Code Reform Act of 1973" was introduced to the Congress as S. 1400 by Senators McClellan and Hruska.

During 1974, the Sub-committee on Criminal Laws and Procedures of the Senate Judiciary Committee under Senators McClelland and Hruska held hearings to consolidate S. 1 and S. 1400. These Sub-committee Hearings terminated in August 1974; and on October 21, 1974, under President Ford, the consolidation was announced as complete. The Department of Justice, under the Ford administration, made important changes in the final version of this legislation. On January 15, 1975, this consolidated version was introduced to the Congress of the United States as S. 1—the Criminal Justice Reform Act of 1975. Senate Bill No. 1 is a 753-page revision of Title 18 of the United States Criminal Code. Although there are a number of new provisions in this reform act, S. 1's main thrust is to codify what is now existing law in the Federal Jurisdiction. The definition of Insanity does present a major change, however, and is of interest and significance to forensic psychiatry.

The following position statement and testimony on the proposed definition of Insanity were presented by me to the Senate Judiciary Sub-committee on May 15, 1974, in Washington, D.C., after the Spring 1974 AAPL Meeting had voted to support the original Brown Commission's definition of the Insanity Defense. The Brown Commission's draft provided a definition of the Insanity Defense that followed the ALI Rule, whereas the Mitchell-Kleindienst draft, as S. 1400, provided the Nixon Administration's definition of Insanity, which was much more limited, admitting Insanity as a defense *only* if the Insanity caused a lack of "the state of mind required as an element of the offense charged." An overwhelming majority of the AAPL members at the Spring, 1974, AAPL

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Meeting approved of the ALI definition of Insanity and voted that I present this position to the Senate Sub-committee. The American Psychiatric Association, through its Psychiatry and the Law Committee, presented a similar position on the definition of Insanity at the Senate Sub-committee Hearing on May 15, 1974.

Since then, as already noted, the consolidated and revised Administration version was introduced as S. 1. S. 1 is now actively being debated by Congress. It includes the definition of the Insanity Defense as outlined by the Nixon Administration, *not* the ALI.

Many leading constitutional scholars consider S. 1 to be a myriad of markedly repressive and regressive features strongly infringing upon the Bill of Rights. In addition to the S. 1 definition of Insanity, which many believe represents an important regression from existing laws, other repressive features of S. 1 are believed to relate to the areas of wiretapping, "leading" a riot, entrapment, sedition, government secrecy, obscenity, sabotage, civil demonstrations, contempt of Congress, marijuana possession, illegal evidence, and hand gun possession.

Mounting criticism of S. 1 has appeared in both lay and professional media. These strictures are largely directed to the encroachment of S. 1's measures on individual rights in the United States. Many amendments have already been made to this Bill and many more have been suggested. The S. 1 definition of Insanity, however, has not been amended to date. Many legal scholars believe that S. 1 is not amendable and should be scrapped.

Although opposing opinions by legal scholars and by authorities in mental health have been expressed about the S. 1 definition of Insanity, I believe that this definition is subject to the same major and severe criticisms directed to many of the other features in this Bill; it is both regressive and restrictive, infringing upon the civil rights of the individual citizen.

Ongoing concern about the problem of crime in the United States has led to inroads upon the Bill of Rights that are demonstrated in S. 1. In my opinion, the restrictive definition of Insanity is another manifestation of the point of view that the crime problem can be solved, or at least significantly improved, by means of such restrictions upon our civil rights that infringe upon our constitutional safeguards of freedom.

Professor Louis B. Schwartz, Benjamin Franklin Professor of Criminal Law at the University of Pennsylvania and Director of the Brown Commission, summarized the opposing positions of S. 1 and the Brown Commission. In June 1975, in a critique addressed to the United States Senate, Professor Schwartz stated:

"S. 1 expresses the view that the crime problem can be solved by extending government's power over individuals. This extension can take the form of wire tapping and other secret surveillance, of giving broad discretion to individuals in decisions about punishment, of authorizing exceptionally severe sentences, or of restricting access to critical information about government operations. The other school of thought, represented by the Brown Commission, are skeptical about the gain in law enforcement that can be expected from such measures, and more concerned about impairing the quality of civic life by aimless restraints on liberty."

Because of numerous dangers to our constitutional liberties that exist in S. 1, those concerned with its threats to civil liberties have recommended that S. 1 be scrapped and that new attempts should be initiated to reform the Federal Criminal Code that can codify and reform Federal Criminal Law without infringing upon the Bill of Rights.

The danger of crystalizing the S. 1 definition of the Insanity Defense in a Federal Criminal Code is readily apparent. Federal legislation of this moment would have significant impact upon state legislatures throughout the nation. During the past thirty years, we have witnessed a national trend toward liberalization of the Insanity Defense, a movement away from the narrow M'Naghten Rule to the broader American Law Institute Model Penal Code definition of Insanity. All Federal Circuits except one subscribe to a version of the ALI definition of Insanity.

From the point of view that the definition of Insanity represents an aspect of civil rights and impinges upon constitutional freedoms guaranteed by our Bill of Rights, it can be recognized that the proposed definition of Insanity in S. 1 represents a definite threat to civil liberties. It substantially tips the balance of power between the government and its citizens to increase the amount of power that our government can exercise over its citizens. Criminal law is a fundamental expression of the balance that exists between the government and its citizens and defines the maximum power that the government can exercise over its citizens. The S. 1 definition of Insanity increases such government power.

With respect to the point that the proposed definition of Insanity in S. 1 represents a regressive movement for forensic psychiatry, psychiatrists in forensic psychiatry have struggled for years to broaden the psychiatric evidentiary data that could be considered by the trier of fact in assessing and evaluating the mental state of the mentally ill or disordered criminal defendant. The intent of the S. 1 definition of Insanity is markedly to restrict and limit the psychiatric evidentiary data on the Insanity Defense that could be considered by the trier of fact. In this sense the proposed definition of Insanity in S. 1 is regressive.