TESTIMONY OF THE ATTORNEY GENERAL
SENATE JUDICIARY COMMITTEE
WASHINGTON, D. C.
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Chairman Thurmond, members of the Committee. I am pleased to have this opportunity to appear before you to testify in favor of basic changes in the insanity defense. The Administration's proposal to reform the insanity defense is one part of a larger program of legislation that would restore the balance between the forces of law and the forces of lawlessness. In recent years, through actions by the courts and inaction by the Congress, an imbalance has arisen in the scales of justice. The criminal justice system has tilted too decidedly in favor of the rights of criminals and against the rights of society.

After many years of debate -- and growing public outrage -- a substantial and bipartisan consensus has formed behind a carefully crafted set of basic reforms. Those proposed reforms would, among other things:

-- Reform our bail system to prevent the most dangerous offenders from returning to the streets once they've been caught;

-- Make jail sentences more certain and abolish the frequently abused process of parole;

-- Provide stronger criminal forfeiture laws that will take the profit out of crime, especially organized crime and drug-trafficking;

-- Increase the other federal penalties for drug-trafficking;

-- Recognize the rights of the victim more fully and require judges to weigh in sentencing the criminal's impact upon the innocent;

-- Make it a federal crime to kill, kidnap, or assault senior federal officials, including Justices of the Supreme Court; and

-- Permit the federal government to transfer surplus property to the states, free of charge, when the property is needed by the states for prisons.

The importance of these reforms to our system of justice and to the safety of the public cannot be overstated. It is now time for the full Senate to act. Perhaps then, the House will follow suit.

As you know, the Administration has supported other legislative reforms that would also help to restore the balance between the forces of law and the lawless. Those important reforms include modification of the exclusionary rule, limiting federal habeas corpus -- and, the subject of my testimony today, changing the insanity defense.

Modification of the insanity defense is a major element of the program needed to restore the effectiveness of federal law enforcement. Combined with the other reforms I have outlined, reform of the insanity defense would improve our system of justice -- and heighten public confidence in the effectiveness and fairness of the criminal justice system. Like those other reforms taken individually, modification of the insanity defense will lead to different judicial results in only a small percentage of all federal criminal cases. Taken together, however, the procedural reforms will affect nearly all federal criminal prosecutions -- either in terms of results or in terms of reallocating resources presently misspent in dealing with outmoded procedures.

The insanity defense is of great concern even though the number of occasions in which the defense is successfully employed is not large. The manner in which the defense is defined involves policy decisions about the nature of criminal responsibility that are of basic importance to the criminal justice system. In addition, the defense tends to be raised in cases of considerable notoriety, which serves to influence, far beyond the numbers, the public's perception of the fairness and efficiency of the entire criminal justice process.

Although the insanity defense is of fundamental significance to the federal justice system, it is ironic that neither the Congress nor the Supreme Court has yet played a major role in its development. Its evolution in England and in this country over several centuries has been haphazard and confusing. As the Committee knows from its work over the past decade or more on the

Criminal Code revision bills, Congress has never enacted legislation defining the insanity defense. Similarly, the Supreme Court has generally left development of the defense to the various courts of appeals. As a result, the federal circuits do not even today apply a wholly uniform standard. In recent years, however, all of the federal circuits have adopted, with some variations, the formulation proposed by the American Law Institute's Model Penal Code. According to that model, a "person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform to the requirements of the law."

In our view, this model statement of the insanity defense contains two critical flaws. First, it undermines basic concepts of criminal responsibility by introducing motivation into the determination of guilt or innocence. Second, it invites the presentation of massive amounts of conflicting and irrelevant evidence by psychiatric experts.

Many have long questioned whether mental disease or defect should excuse a defendant from criminal responsibility. Congress has by statute defined the elements of all federal offenses, including required mental elements or states of mind. Using murder as an example, Congress has said, in essence, that it is a crime intentionally to take the life of another human being. Ordinarily, under our law, the reason or motivation for such an act is irrelevant to guilt. For instance, the fact that a killing is politically motivated -- that the defendant genuinely believed that his act was morally justified because the victim was a "bad" man whose death would end injustice, be just recompense for past wrongs, or lead to a better social order -- is clearly, and properly, viewed as irrelevant to his guilt or innocence. One would expect such an assassin to be found guilty. Motivation, if deemed to involve mitigating circumstances, would be taken into account only by the judge in sentencing.

Under the prevailing insanity test, however, an analogous situation can lead today to the opposite result: acquittal. A defendant who intentionally killed another person could now be found not guilty by reason of insanity, for example, if some mental defect caused him to believe that God had ordered the murder because the victim was an agent of the devil interfering with God's work.

Not only is this difference in outcome difficult to explain, indeed in our judgment it is indefensible. A person who has intentionally killed another human being, or committed some other crime, should be held responsible for the act. Any mental disease or defect, like any other motivation, should be taken into account only at the time of sentencing.

The present insanity defense also frequently leads to a gross distortion of the trial process. Commonly, in a trial involving an insanity defense, the defendant's commission of the acts in question is conceded. The trial focuses on the issue of insanity. Both sides present an array of expert psychiatric witnesses who offer conflicting opinions on the defendant's sanity. Unfortunately for the jury -- and society -- the terms used in any statement of the scope of the defense -- for example, the phrase "disease or defect" -- are usually not defined and the experts themselves do not agree on their meaning. Moreover, the experts often do not agree even on the extent to which certain behavior patterns or mental disorders that have been labeled "inadequate personality," "abnormal personality," and "schizophrenia" actually impel a person to act in a certain way. In short, medical disagreement is implicit in the issue of whether a person could conform to the requirements of the law.

Since the experts disagree about both the meaning of the terms used to discuss the defendant's mental state and the effect of particular mental states on actions, it is small wonder that trials involving an insanity plea are arduous, expensive, and worst of all, thoroughly confusing to the jury. Indeed, the disagreement of the supposed experts is perhaps so basic that it makes the jury's decision rationally impossible. Thus, a rational jury's decision can be in a sense ordained by the procedural question of burden of proof.

The Department of Justice has sought legislative change in the insanity defense for more than a decade. As a result of the intense debate and discussion following the recent verdict in the Hinckley case, the Administration again considered the proper scope of the insanity defense. We have concluded that the general approach adopted in Title VII of S. 2572 would best protect the public and promote efficiency. That approach has undergone years of thoughtful consideration both in the Department and in hearings before the Congress on criminal code reform measures. Nothing in recent events detracts from the soundness and

superiority of that approach. It would best meet the three goals of reform -- protecting the public, ensuring that the guilty do not escape punishment, and avoiding an illogical choice between competing psychiatric opinions.

The bill provides for civilly committing defendants who are dangerously disturbed and who, for one reason or another, are not convicted. At present, other than in the District of Columbia, there is no federal statute authorizing or compelling the commitment of an acquitted but presently dangerous and insane individual. Today, when faced with such a situation, federal prosecutors can do no more than call the matter to the attention of State or local authorities and urge them to institute appropriate commitment proceedings. The absence of such a requirement or federal procedure creates the very real potential that the public will not be adequately protected from a dangerously insane defendant who is acquitted at trial. The Task Force on Violent Crime which I appointed last year strongly recommended that legislation be enacted "to establish a federal commitment procedure for persons found incompetent to stand trial or not guilty by reason of insanity in federal court." Such provisions were developed in connection with S. 1630, the criminal code revision bill, and are also embodied in Title VII of S. 2572. I strongly support the recommendation of the Task Force on Violent Crime that these commitment procedures, about which there appears to be little doubt or controversy, be promptly enacted into law.

In addition, S. 2572 would effectively eliminate the insanity defense except in those rare cases in which the defendant lacked the state of mind required as an element of the offense. Under this formulation, a mental disease or defect would be no defense if a defendant knew he was shooting at a human being to kill him -- even if the defendant acted out of an irrational or insane belief. Mental disease or defect would constitute a defense only if the defendant did not even know he had a gun in his hand or thought, for example, that he was shooting at a tree.

This would abolish the insanity defense to the maximum extent permitted under the Constitution and would make mental illness a factor to be considered at the time of sentencing, just like any other mitigating factor. It would eliminate entirely as a test whether a defendant knew his actions were morally wrong and whether he could control his behavior. It would also, of course,

eliminate entirely the presentation at trial of confusing psychiatric testimony on the issue.

S. 2572 incorporates the one approach that would assure both that defendants do not inappropriately escape justice and that the criminal trial is not diverted into a time-consuming, confusing swearing contest between opposing psychiatrists. As the Committee's Report on the Criminal Code revision legislation has documented, this approach has been endorsed in the past by numerous legal scholars, bar associations, and psychiatrists. We share their view that it is the best way to revise the law from the perspective both of ensuring the public safety and of improving the efficiency of criminal trials.

One point should be emphasized in view of some recent debate. Under any approach, the government will always be required to prove every element of the statutory offense that is charged. This includes any specific intent or knowledge required by the statute. In the rare case, therefore, in which a defendant is so deranged that, for example, he did not know that he was shooting a human being, one of the elements of the offense could not be proved [the mental element or mens rea] and he could not be convicted under current law or under any constitutionally supportable change in the law. Under S. 2572 this is the only situation in which a defendant committing a criminal act could not be found guilty. In that case, however, the defendant would no longer be set free -- as he would be under current Federal law outside the District of Columbia -- but would be subject instead to civil commitment.

The need to change the law of insanity is urgent and clear. I am hopeful that the Congress will act to effect the reforms contained in Title VII of S. 2572 during this session -- as well as the many other criminal justice reforms that the Administration has proposed and the public needs.