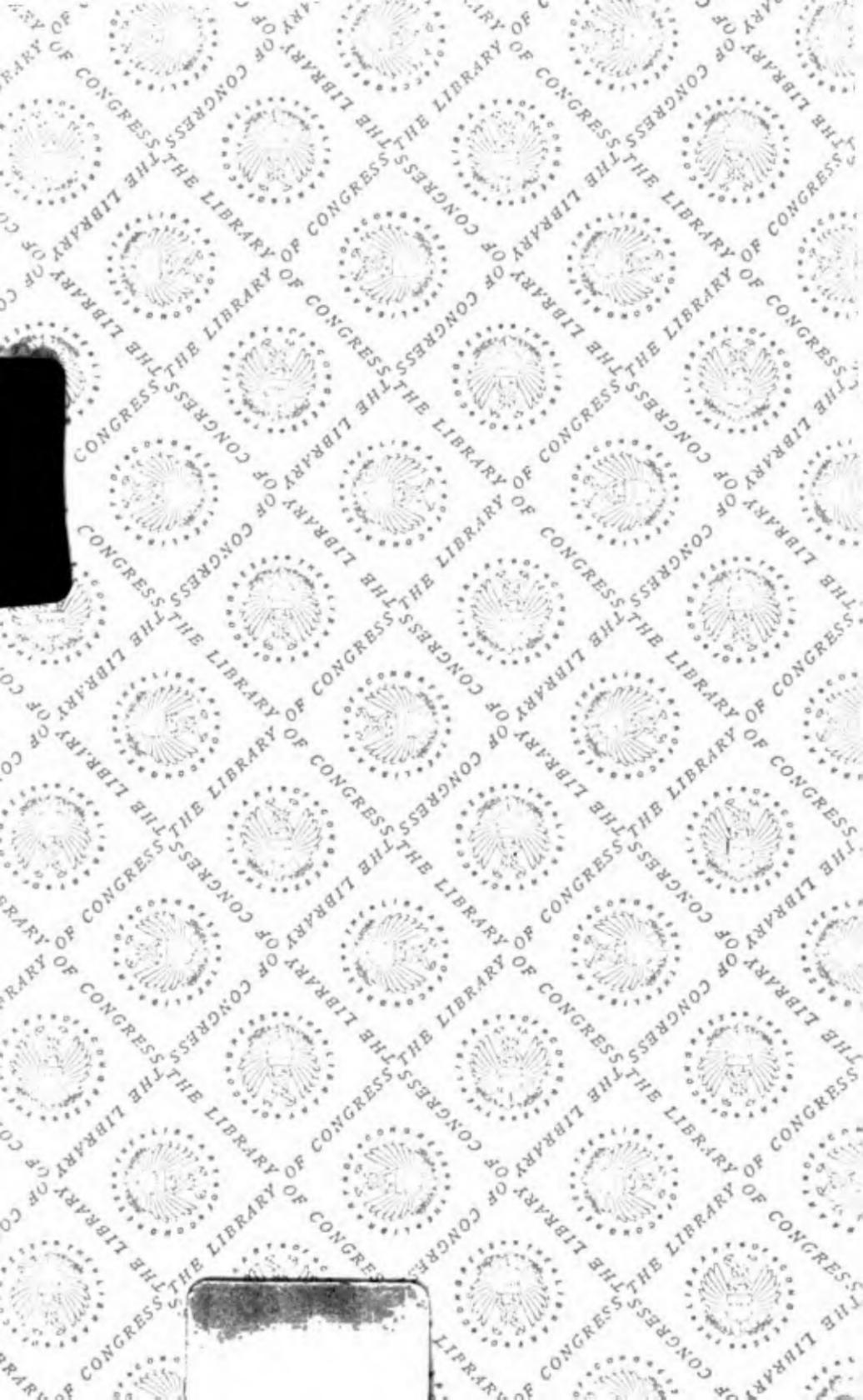


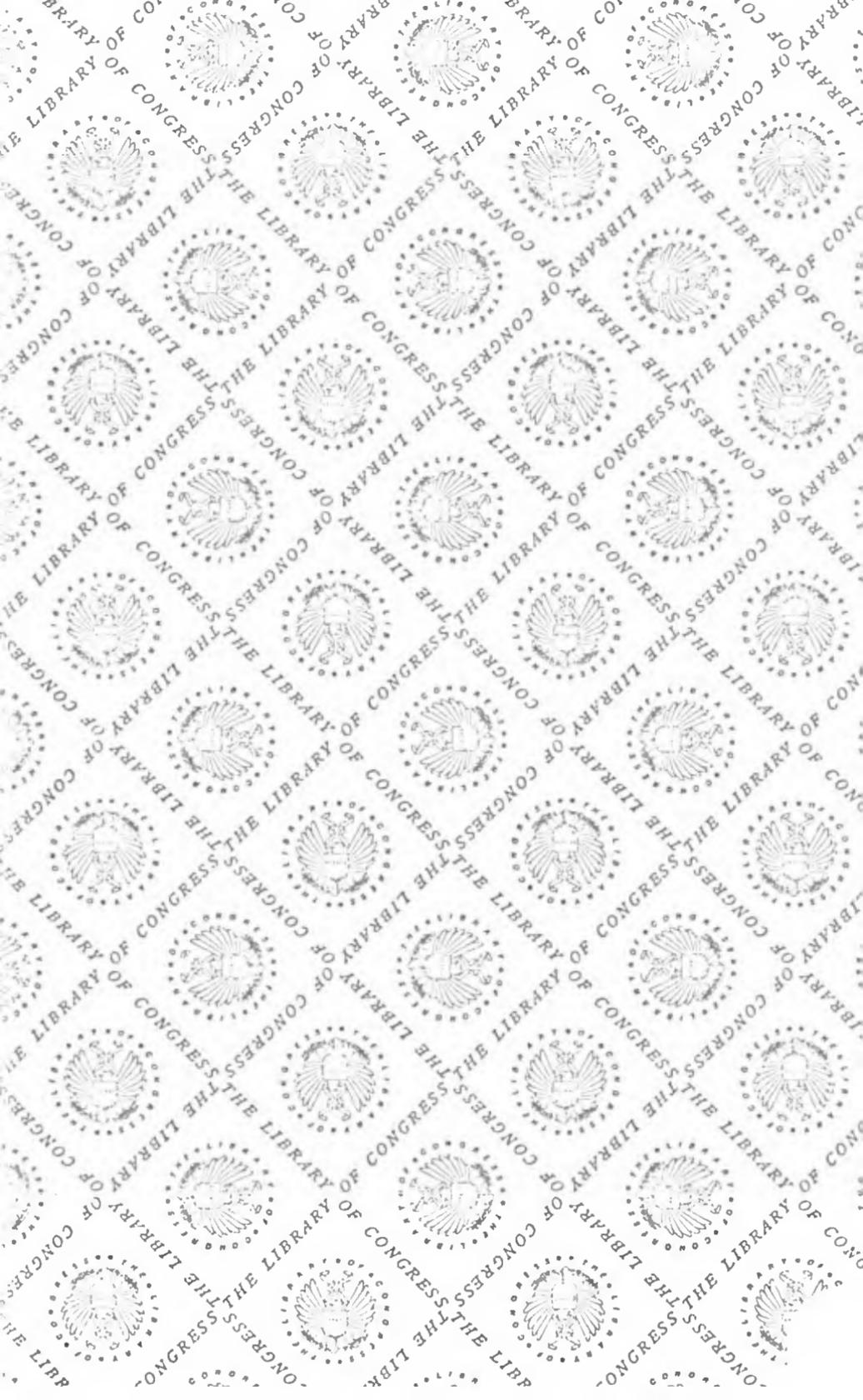
KF 27

.J8

1953

No. 15





1
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

GRANTING APPEALS BY THE UNITED STATES FROM
DECISIONS SUSTAINING MOTIONS TO SUPPRESS
EVIDENCE

4 JUN 4
Copy ----- 1954

HEARING

BEFORE

SUBCOMMITTEE NO. 2

U.S. Congress, House. OF THE

COMMITTEE ON THE JUDICIARY,

HOUSE OF REPRESENTATIVES

EIGHTY-THIRD CONGRESS

SECOND SESSION

ON

H. R. 7404

A BILL TO AMEND SECTION 3731 OF TITLE 18 OF THE
UNITED STATES CODE RELATING TO APPEALS
BY THE UNITED STATES

MAY 19, 1954

Printed for the use of the Committee on the Judiciary

Serial No. 15



UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1954

COMMITTEE ON THE JUDICIARY

CHAUNCEY W. REED, Illinois, *Chairman*

LOUIS E. GRAHAM, Pennsylvania	EMANUEL CELLER, New York
KENNETH B. KEATING, New York	FRANCIS E. WALTER, Pennsylvania
WILLIAM M. McCULLOCH, Ohio	THOMAS J. LANE, Massachusetts
EDGAR A. JONAS, Illinois	MICHAEL A. FEIGHAN, Ohio
RUTH THOMPSON, Michigan	FRANK L. CHELF, Kentucky
PATRICK J. HILLINGS, California	J. FRANK WILSON, Texas
SHEPARD J. CRUMPACKER, Jr., Indiana	EDWIN E. WILLIS, Louisiana
WILLIAM E. MILLER, New York	JAMES B. FRAZIER, Jr., Tennessee
DEAN P. TAYLOR, New York	PETER W. RODINO, Jr., New Jersey
USHER L. BURDICK, North Dakota	WOODROW W. JONES, North Carolina
GEORGE MEADER, Michigan	E. L. FORRESTER, Georgia
LAURENCE CURTIS, Massachusetts	BYRON G. ROGERS, Colorado
JOHN M. ROBSON, Jr., Kentucky	HAROLD D. DONOHUE, Massachusetts
DEWITT S. HYDE, Maryland	SIDNEY A. FINE, New York
RICHARD H. POFF, Virginia	

BESSIE M. ORCUTT, *Chief Clerk*
VELMA SWEDLEY, *Assistant Chief Clerk*
WILLIAM R. FOLEY, *Committee Counsel*
MALCOLM MECARTNEY, *Committee Counsel*
WALTER M. BESTERMAN, *Legislative Assistant*
WALTER R. LEE, *Legislative Assistant*
CHARLES J. ZINN, *Law Revision Counsel*

SUBCOMMITTEE No. 2

PATRICK J. HILLINGS, California, *Chairman*

JOHN M. ROBSON, Jr., Kentucky	MICHAEL A. FEIGHAN, Ohio
RICHARD H. POFF, Virginia	J. FRANK WILSON, Texas
	JAMES B. FRAZIER, Jr., Tennessee

MALCOLM MECARTNEY, *Counsel*

KF27

J8
1953

2/15

CONTENTS

	Page
Text of H. R. 7404	1
Testimony of—	
Hon. Kenneth B. Keating, a Representative in Congress from the State of New York	1
Walter Armstrong, Esq., Memphis, Tenn., chairman, criminal law section, American Bar Association	4
Robert Erdahl, Esq., Chief of the Appeals and Research Section, Criminal Division, Department of Justice	7
Letter dated April 22, 1954, from Hon. William P. Rogers, Deputy Attorney General, Department of Justice	13

6
11

GRANTING APPEALS BY THE UNITED STATES FROM DECISIONS SUSTAINING MOTIONS TO SUPPRESS EVIDENCE

WEDNESDAY, MAY 19, 1954

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE No. 2 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met at 10:00 a. m. in the committee room, 346 House Office Building, Hon. Patrick J. Hillings (subcommittee chairman) presiding.

(H. R. 7404 is as follows:)

[H. R. 7404, 83d Cong., 2d sess.]

A BILL To amend section 3731 of title 18 of the United States Code relating to appeals by the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3731 of title 18 of the United States Code is amended by inserting after the fifth paragraph of such section (relating to appeal by the United States from the district courts to a court of appeals) the following new paragraph:

"From a decision sustaining a motion to suppress evidence, when the defendant has not been put in jeopardy."

Mr. HILLINGS. The committee will come to order.

We will proceed this morning with testimony on three different bills that are on the committee agenda. We expect two other members of the committee to arrive shortly, but in the meantime I think it might be well to proceed in order to accommodate the witnesses who have been waiting.

We will call for testimony this morning first on H. R. 7404, introduced by our distinguished colleague from New York, Mr. Keating, to amend section 3731 of title 18 of United States Code relating to appeals by the United States.

Mr. Keating, would you like to begin the testimony on this legislation?

STATEMENT OF HON. KENNETH B. KEATING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. KEATING. Thank you, Mr. Chairman.

I appreciate this opportunity to be heard on H. R. 7404, a bill which would permit the United States to appeal, in criminal prosecutions, from orders granting motions to suppress evidence. It is a very brief amendment. It is clear on its face, and so far as I know, it is absolutely noncontroversial. It has the support of the house of delegates of the American Bar Association and is an integral part of the association's anticrime program. With a suggested amendment, it is urged by the Department of Justice.

The Criminal Appeals Act, section 3731 of title 18 of the United States Code, confers carefully defined and limited rights of appeal upon the Government in criminal cases. No such rights existed at common law. And of course once a defendant has been placed in jeopardy, constitutional protection comes into play.

It follows, and quite properly, that the statute and court decisions make the lines very sharp, and allow appeals only in particular instances specified.

When a defendant prevails on a matter of construction of the underlying statute, resulting in an order quashing the indictment or arresting judgment, the prosecution may appeal directly to the Supreme Court. Likewise, such a direct appeal may be taken if the defendant prevails on a motion in bar.

Appeals to the court of appeals of the proper circuit lie on behalf of the United States from orders dismissing indictments, and orders arresting judgments, where statutory interpretation is not involved.

H. R. 7404 adds a new right of appeal to the foregoing. It would permit the Government to appeal in cases where the defendant successfully moves to suppress evidence upon which the Government's case depends. Thus, if, prior to trial, the court is persuaded to knock out the Government's evidence, and thus effectively to destroy its case in many instances, the prosecutor would be able to have this decision reviewed. Such a provision is of great practical importance. At present, the prosecutor is very much put on the spot by such an order to suppress evidence. He cannot appeal, even though he is convinced that the evidence is proper and the court was in error. If he goes to trial without it, his case may be so weak that an acquittal is certain. So, in effect, the defendant prevails, whether right or wrong.

A spokesman for the Department of Justice is here today to support this measure, and he will tell you about some of the legal opinions which have produced this impasse.

I would like to note, very briefly, 2 or 3 practical situations which have actually come up, and which have resulted virtually in acquittals without trial. One recurring example is in the field of narcotics-law enforcement. There the Government most frequently depends for convictions on showing that the accused was apprehended in possession of illegal narcotics. In all such cases, obviously if the seized drugs themselves are ruled out, the Government's proof must fail. The same is true in most smuggling cases, and in other types of frauds involving the Federal excise taxes.

And there is some concern that this same deficiency in the law might operate to defeat successful prosecutions of persons accused of espionage or sabotage. It is far easier to build cases of this latter type around tangible evidence—for example, the packets which were passed in the Coplon case and the notes and drawings in the Rosenberg case—than upon oral testimony and the observations of witnesses only. And in times of high tension, where subversive plots are more vigorous and more deeply concealed beneath the strata of our society, the problems are even more acute.

I do not believe I need to labor the point further. This is a simple, clear, and important change, which I strongly urge you to consider favorably.

It has been called to my attention by spokesmen for the Department of Justice that the words in the bill at the very end, "when the defend-

ant has not been put in jeopardy" might actually defeat appeals to which the Government would otherwise be entitled. In drafting the bill, we took those words, somewhat uncritically, from the present language of section 3731, dealing with an appeal to the Supreme Court from a decision sustaining a motion in bar, which adds the same words, "when the defendant has not been put in jeopardy." I am persuaded by the reasoning advanced against their inclusion and am therefore perfectly willing to strike those last nine words from the bill. I think the representative of the Department of Justice will elaborate on the reasons why he feels that those words should be eliminated from the bill.

Mr. HILLINGS. I would like to say, Mr. Keating, it is your persistence and hard work in this field that has persuaded the committee to take up this bill at this time. I know you have other bills pending before this committee in which the criminal law section of the American Bar Association has been interested. We will be considering those, also.

Mr. KEATING. I appreciate that. Mr. Armstrong, the chairman of the criminal law section of the American Bar Association, is here today and will testify about this bill and may add a word, with your permission, about some of the other bills pending before this committee in which the American Bar Association is very much interested and on which they have taken action, not only in the criminal law section but the house of delegates of the American Bar Association.

Mr. HILLINGS. Do you know of any opposition to this bill?

Mr. KEATING. No, I do not.

Mr. HILLINGS. This particular bill, H. R. 7404?

Mr. KEATING. I am not aware of any opposition to it.

Mr. HILLINGS. In your position as a lawyer and as a member of the Judiciary Committee, in your opinion would the traditional rights that have been granted to defendants be jeopardized in any way by the passage of this legislation?

Mr. KEATING. No, in my opinion they would not be. I think in most States there is authority in the prosecutor to appeal from an interlocutory order which in effect would kill his case before it ever came to trial. That is the situation dealt with in this bill.

Mr. HILLINGS. If this bill becomes law and a court sustains a motion to suppress evidence, the trial would be stopped while an appeal could be taken?

Mr. KEATING. No. This would be a motion made ahead of trial. Where the defendant makes a motion ahead of trial which is denied and he is convicted, he can appeal his conviction and on that appeal test the propriety of the court's order denying suppression of the evidence. But the Government has no way to review an order granting a motion to suppress evidence. As it is now, the defendant's counsel can make such a motion and if he is successful in suppressing some important evidence on one ground or another, whether or not the court was in error in granting that motion, that is often the end of it and he is able to spring his defendant without the matter ever reaching the trial stage.

Mr. HILLINGS. Do you know of any particular cases at the present time, that is, contemporary cases, perhaps in the field of subversive activities, where such a motion was sustained, perhaps in cases of wiretapping evidence or such as that?

Mr. KEATING. I do not know of any specifically. Perhaps the Department of Justice will know. I am told it is a very frequent occurrence. These cases I have given as examples, the Coplon and Rosenberg cases, are not intended to be examples of what happened there, but are cited to bring out the importance to the case of a particular piece of evidence and how damaging it would be if a motion were made ahead of trial and the packet in the Coplon case or the drawings in the Rosenberg case were suppressed for some reason. As far as I know, it did not happen in those cases.

Mr. HILLINGS. Does the State of New York have such a law as is proposed in this bill?

Mr. KEATING. I believe the State of New York allows the prosecutor to appeal from an interlocutory order of this character.

Mr. HILLINGS. Do most States have such a law?

Mr. KEATING. I believe so, but I would prefer that you address that inquiry to the Department of Justice.

Mr. HILLINGS. Any questions, Mr. Robsion?

Mr. ROBSION. No.

Mr. HILLINGS. Mr. Poff?

Mr. POFF. Would you prefer that I defer questions on the double jeopardy clause until the witness from the Department of Justice appears?

Mr. KEATING. I believe it would be best to question them on that. I was persuaded by their reasoning to drop those last words.

Mr. POFF. Has the American Bar Association taken any specific stand on the elimination of the double jeopardy clause?

Mr. KEATING. No. The American Bar Association approved H. R. 7404 in the house of delegates as written. I believe that is correct. It has not gone back to them with the suggestion that those words be eliminated.

Mr. POFF. I have no further questions.

Mr. HILLINGS. Thank you very much, Mr. Keating. We will proceed with other witnesses on this legislation. The next witness scheduled to testify is Mr. Walter Armstrong, of Memphis, Tenn., who is chairman of the criminal law section of the American Bar Association. Mr. Armstrong.

STATEMENT OF WALTER ARMSTRONG, CHAIRMAN, CRIMINAL LAW SECTION, AMERICAN BAR ASSOCIATION

Mr. ARMSTRONG. Mr. Chairman and members of the committee, I am Walter Armstrong, of Memphis, Tenn., chairman of the criminal law section of the American Bar Association, and I appear here today representing that association. I will say at the beginning that I very much appreciate this opportunity to do so.

As Mr. Keating has indicated, this particular bill, H. R. 7404, was approved by the house of delegates of the American Bar Association, which is its governing body, and therefore it bears the approval of the association as a whole. This was done on the recommendation of the criminal law section at the midwinter meeting of the association on the 8th of last March. At that time the bill was presented in its present form with the clause relating to the defendant not having been put in jeopardy. However, there was a brief report made at the same time

which was also approved by the association, and with your permission I would like to read from that report:

H. R. 7404 is a noncontroversial measure which closes a small but important loophole in the Federal Criminal Code. At present if the defense succeeds in obtaining an order suppressing evidence in a criminal prosecution prior to the trial, the Government has no appeal from such order. The Government may proceed to trial, of course, but frequently there is no hope of winning without the suppressed evidence. So the defendant wins, in effect, by default. And no review of the fatal order is possible.

Manifestly, such orders should be appealable. H. R. 7404 makes them so, by a simple addition to section 3731 of title 18, United States Code. The new provision is qualified by the phrase "when the defendant has not been put in jeopardy," to avoid possible constitutional difficulties, though quare if this qualification is necessary in the full context of the appeals section being amended.

That report was likewise approved, and therefore the association did have the question of the necessity of that particular phrase before it and that question was raised at that time although it did not specifically pass on it.

That is all I have to say on that particular bill unless you have questions.

Mr. HILLINGS. We have had testimony from the author of the bill, our distinguished colleague, Mr. Keating, and will have testimony from the prosecution end of our Government, the Department of Justice. In a sense your testimony reflects the feeling of the lawyers who would serve as defense counsel?

Mr. ARMSTRONG. Yes, sir.

Mr. HILLINGS. Of course defense counsel are usually very critical of anything that might in any manner, shape or form make it difficult for a defendant to have his opportunity of being relieved of the charges against him. In your conversations with attorneys who specialize in criminal law, have you heard any objections to this proposed legislation?

Mr. ARMSTRONG. Mr. Chairman, I may answer your question in this way. In the consideration of this bill in the criminal law section, which handled it, and in the house of delegates, consisting of several hundred lawyers a great many of whom are involved in the defense of criminal cases, there was no objection raised to this bill. The opinion was unanimous in each case. In my own discussions of the bill, everyone I have talked to has expressed himself as favorable to it.

Mr. HILLINGS. Any questions, Mr. Robsion?

Mr. ROBSION. No.

Mr. HILLINGS. Mr. Poff?

Mr. POFF. Just at what point in a legal proceeding is the defendant considered to have been put in jeopardy?

Mr. ARMSTRONG. I do not want to fall back on Mr. Keating's statement on that, but I am somewhat in the same position. The only authority I have to approve this bill is with the clause in it providing "when the defendant has not been put in jeopardy." I understand the Department of Justice has reasons why those words should be removed. The association has indicated that in their position on the bill they now question having the phrase in there. I could express my own personal opinion on when the defendant is in jeopardy, but in my official position I can only express the approval of the bill with the clause in it.

Mr. POFF. In your personal opinion, do you feel a defendant has been put in jeopardy when the jury has been impaneled?

Mr. ARMSTRONG. I understand the motion to suppress evidence is a pretrial motion, and it is quite possible, and in my opinion it is a fact, that at that stage the defendant is not in jeopardy. When the jury has been impaneled and the trial has begun, I believe he has been put in jeopardy.

Mr. POFF. So you foresee the possibility that during the course of a trial the prosecution may offer some evidence which it did not have prior to the trial and a motion to suppress on the part of the defendant might be made, in which case the jeopardy clause would be very material?

Mr. ARMSTRONG. I can only express my own opinion that once the trial has begun it might raise a serious question of double jeopardy.

Mr. POFF. If the jeopardy clause is excluded, the statute would be certain and positive as to any eventuality, whether the motion to suppress were made prior to or during the trial?

Mr. ARMSTRONG. My own feeling is that the constitutional safeguards and the other sections of the statute might very well take care of that problem without making it necessary to have that specific clause in this bill.

Mr. POFF. Let us assume that the jeopardy clause is excluded from this bill and that during the course of the trial the prosecution presents evidence and a motion is made by the defense to suppress the evidence and the court sustains the motion. Then, at that point, would the trial cease and an appeal be allowed to the prosecution?

Mr. ARMSTRONG. If that situation arose, my understanding of the effect of this bill is that it would, that that would be an appealable order at that time. However, it is also my understanding that in the natural course of events the motion would be made prior to the trial.

Mr. POFF. Assuming it was anticipated evidence?

Mr. ARMSTRONG. Yes. If it arose after the trial began, it would necessitate postponement of the trial.

Mr. POFF. And if the appellate court upheld the trial court, the trial would proceed along its natural course?

Mr. ARMSTRONG. I must concede that I myself see possibilities of procedural and substantive difficulties if that should arise.

Mr. POFF. I take it then, from your remarks, that you feel that assuming there would be no constitutional objection, it would be preferable to eliminate the jeopardy clause from the statute?

Mr. ARMSTRONG. That is my opinion, definitely.

Mr. POFF. That is all.

Mr. HILLINGS. Just to clarify the intent of the criminal-law section of the American Bar Association in supporting this legislation, was it your feeling at the time that the criminal-law section approved this bill, that this legislation would only apply to pretrial motions, or did you contemplate in the course of your discussions the possibility that a motion to suppress evidence would be made in the course of the trial?

Mr. ARMSTRONG. It was contemplated that it would apply to any such motion whenever it arose but that the vast number of those motions would arise prior to trial in the natural course of events.

Mr. HILLINGS. Do you think the criminal-law section of the American Bar Association and the American Bar Association itself would

be opposed to any restrictive language that would confine motions to which this legislation would apply to pretrial motions?

Mr. ARMSTRONG. I think so, because the intent of the criminal-law section of the American Bar Association was to make the application as broad as possible.

Mr. HILLINGS. If there are no further questions, we appreciate your coming here. I know your section has been very much interested in other legislation pending before this committee, and I might say to you that through the diligence and persuasiveness of our learned colleague, Mr. Keating, that legislation has been brought to my attention and to the attention of the committee on numerous occasions, and Mr. McCartney, our counsel, has discussed it with me also. If you would wish to make additional comments on such other legislation, we shall be glad to have you do so.

Mr. ARMSTRONG. I should like to do so in connection with two other bills which have been approved by the association through the activity of the criminal law section.

(The further remarks of Mr. Armstrong are filed in connection with H. R. 7118 and H. R. 7975, respectively.)

Mr. HILLINGS. The next witness is Mr. Robert Erdahl of the Criminal Division of the Department of Justice.

Would you state your position with the Department of Justice and the length of time you have served in the Department?

STATEMENT OF ROBERT ERDAHL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. ERDAHL. I am the Chief of the Appeals and Research Section of the Criminal Division of the Department of Justice. I have been in that section since 1941 and Chief of the Section since 1943 or 1944.

Mr. HILLINGS. You have heard the previous testimony of Mr. Keating and Mr. Armstrong.

Mr. ERDAHL. Yes, sir.

Mr. HILLINGS. I presume the Department concurs in their feeling that this legislation should be enacted?

Mr. ERDAHL. Yes, we do. The Department has submitted a favorable report recommending that the bill pass with an amendment which I will discuss.

Mr. HILLINGS. Before commenting on the amendment, do you have anything you would like to add to the testimony we have received so far in support of the legislation?

Mr. ERDAHL. Yes, sir. Mr. Keating's and Mr. Armstrong's statements have demonstrated the need for this legislation. I might add the reasons why, in the development of the law, there is a need for this legislation.

As Mr. Keating pointed out, I think, at common law the sovereign had no right of appeal in a criminal case, even from the discharge of a defendant on a determination of law. Thus, the United States has only such rights of appeal as Congress gives it by statute. In the absence of statutory authorization we have no rights of appeal in criminal cases.

The Criminal Appeals Act, which spells out the United States rights of appeal, is completely silent on this point of suppressed

evidence. The courts of appeal have jurisdiction on appeal only over final judgments of the district courts. Where a motion to suppress evidence is made before an indictment or information is filed, the proceeding is an independent proceeding in the nature of an equity proceeding. It is independent because there is no criminal proceeding yet; and there is mutuality in the rights of appeal in that case. Where, however, an indictment or information intervenes is filed, then there is a criminal case on file, and if a motion is made thereafter that motion is deemed to be an interlocutory matter in the criminal case, with the result that the United States cannot appeal from the suppression; similarly, the defendant cannot appeal from a denial of suppression. However, the defendant can get a review in the event he appeals from a conviction. The United States never has that right.

As a result of that development of the law, it has been our experience that defendants generally will withhold motions to suppress until after an indictment or information is returned, knowing full well if that they are successful on a motion to suppress they will eliminate the Government's evidence and therefore its case. The Government is usually left with no case when such evidence is suppressed.

Mr. HILLINGS. Is it your conclusion, then, that it makes it difficult to prosecute and handicaps the Department of Justice to some degree because of that situation?

Mr. ERDAHL. Yes. There have been instances of that sort. I do not say we would have appealed every adverse decision on suppression of evidence had the right existed. There have been instances where the motion to suppress was prior to indictment or information where we have not appealed. But there have been instances where we thought we had a good case in support of the admissibility of the evidence—these are usually fourth amendment, search and seizure, cases—but had no right of appeal.

I think I can illustrate that by reference to two cases. One, in the third circuit, arose in New Jersey, I believe. There was an indictment of one Janitz and several others involved in the illicit manufacture of liquor. The codefendant Conklin, whose premises were searched and who was the so-called victim of the search and who was the only one who had the right at that juncture to complain, moved to suppress the still apparatus and other things seized, and he was successful. As a result of the suppression, the case as to him was dismissed.

There was a first trial which resulted in a mistrial. Before the new trial the Federal Rules of Criminal Procedure were promulgated and Janitz and the remaining codefendants moved to suppress the evidence which had been suppressed as to Conklin. Their motion was based on subsection (c) of rule 41, which reads in part as follows:

If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial.

The district judge felt that that was an innovation in the law and that suppressed evidence is not admissible against anyone at any hearing or trial; he enjoined the Government from using the evidence against any of the codefendants of Conklin. We took an appeal to the Third Circuit on the theory that the district judge's judgment as

to the remaining codefendants was appealable as a plea in abatement, which cuts in from the outside and relates to matters outside the indictment.

Mr. POFF. You took that appeal from the conviction?

Mr. ERDAHL. I left out some steps. After the injunction against the use of the evidence against the codefendants, the district judge, in the spirit of being cooperative in providing an appealable ruling upon the suppression of the evidence as to the defendants, other than Conklin, entered an order of dismissal, and we took an appeal from the order of dismissal.

The Third Circuit held that the judgment was not appealable. They said it was not an abatement matter because it was not addressed to the indictment or its return, and they said the Government's case failed because it had no evidence to support it. However, in a dictum they did, in a footnote, say that they thought the district judge was wrong in his interpretation of rule 41.

Mr. MECARTNEY. May we have the citation of that case?

Mr. ERDAHL. Yes. It is *United States v. Janitz* (161 Fed (2) 19).

A few years later, the case of *United States v. Cefaratti*, 202 Fed. (2) 13, arose. In the District of Columbia Code there is a section giving the United States and the District of Columbia the same right of appeal in a criminal case as the defendant has, with a proviso that there shall be no reversal of an acquittal for any error that may have occurred during the trial. That preserves the rights under the double jeopardy clause.

The situation was different in the Cefaratti case. After indictment and before trial the defendant moved to suppress on the ground of unlawful search and seizure. The motion was granted, with the result the Government had no evidence with which to proceed with the trial. The Government therefore moved to dismiss and it was dismissed and the Government appealed, not from the dismissal, but from the order of suppression.

The court of appeals pointed out that outside the District of Columbia the rights of appeal are limited by the Criminal Appeals Act. Then it referred to the District of Columbia appeal statute and said that under that statute the only question was whether this was a final decision, and they held it was because the suppression left the Government with no evidence.

They also said that the fact that there was no mutuality in the rights of appeal at that point—the defendant could not have appealed if the motion had gone against him, because he could appeal from his conviction and preserve the point—did not deprive the United States of its right of appeal from a final decision.

Those two cases point out very graphically the difficulty we have because of the silence of the Criminal Appeals Act on any right of appeal by the Government on a suppression. This bill would remove that artificial distinction which cuts off the Government's right of appeal in suppression matters at the point of indictment, and would deprive defendants of what we feel is an unwarranted advantage they have of defeating the chance of appeal by waiting until an indictment is returned and then making an interlocutory motion to suppress.

That brings me to our suggestion that the clause of H. R. 7404, "when the defendant has not been put in jeopardy," be eliminated. Very simply, our suggestion in that regard is based upon the principle

of waiver. Jeopardy, of course, is something which a defendant may waive and he does waive it when by his own action he defeats an opportunity to have a determination on the merits of guilt or innocence.

We had an illustration in the case of *Bryan v. United States*, 338 U. S. 552, a tax case. The defendant in that case claimed on appeal that the evidence was insufficient to support his conviction. The court of appeals agreed with him. He claimed that the court of appeals, having agreed with him, should have remanded the case with directions to the district court to enter a judgment of acquittal. The court of appeals disagreed with him and instead remanded the case for a new trial.

Certiorari was granted by the Supreme Court and there, again, the defendant made the contention that the court of appeals should have remanded the case with directions to the district court to enter a judgment of acquittal. The Supreme Court rejected that contention and said the court of appeals had broad power to direct such further proceedings as it felt would be just and proper. The Supreme Court also rejected the contention of double jeopardy, holding that where an accused successfully seeks review of a conviction there is no double jeopardy upon a new trial.

In the Department's report on H. R. 7404, we also recommend that in the paragraph of the Criminal Appeals Act, section 3731 of title 18 of the United States Code, dealing with appeals from judgments sustaining motions in bar, the same clause, "when the defendant has not been put in jeopardy," likewise be eliminated.

Mr. HILLINGS. You say the Department has made that recommendation?

Mr. ERDAHL. Yes; in our report on H. R. 7404.

Mr. HILLINGS. But no legislation covering that has been introduced in our committee?

Mr. ERDAHL. No, sir.

In making a motion in bar during trial, we think the defendant waives the jeopardy which has attached and that the elimination of that clause would in no way deprive the defendant of his rights under the double jeopardy clause.

Mr. HILLINGS. Does that conclude your argument?

Mr. ERDAHL. No, sir. That brings me to something else. I am a little embarrassed in broaching this for the reason we had thought until we received advice that this hearing was set that other revisions of the Criminal Appeals Act which the Department of Justice would like made had been recommended, either to the Senate or to the House. But I have found that those suggestions are not in the hopper.

The general pattern of the Criminal Appeals Act is this. It is limited, in granting rights of appeal to the United States, to pretrial, prejeopardy decisions adverse to the Government, with one exception. We have a right of appeal from a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded, and that would go directly to the Supreme Court. In the paragraph on appeals where construction or invalidity is not involved, such appeals go to the court of appeals.

That paragraph, which has been in the Criminal Appeals Act from the beginning, since 1907, is grounded upon the principle of waiver of jeopardy; a motion in arrest is in effect a delayed demurrer.

With respect to pretrial motions to dismiss—everything is by motion to dismiss now, or should be if the rules are followed—anything that is determinable in advance of trial should be raised in advance of trial, but that is not always the case. Sometimes the motions come after jeopardy has attached.

There have been situations where constitutionally, under the double jeopardy clause, the United States could have a right of appeal on the waiver of jeopardy principle. But the legislative history of the Criminal Appeals Act shows that back in 1907 when it was passed Congress was much concerned, and rightly so, with the double jeopardy protection of the Constitution, and, in a nutshell, the inference is there in the legislative history that with the exception of decisions in arrest of judgment, it was the purpose to limit the United States' rights of appeal to pretrial, prejeopardy adverse decisions.

It is not surprising that Congress was so concerned at that time. At that time suggestions of rights of appeal in the sovereign were rather novel. In the early 1890's the Supreme Court had held that the United States had no right of appeal in a criminal case. The Court in that case reviewed the English common law and held that absent a statute the sovereign has no right of appeal in a criminal case.

But experience since 1907 has pointed up this deficiency which H. R. 7404 would cure, and experience has also pointed up a deficiency in not allowing an appeal—it has never been tested, I must say—from a post-jeopardy dismissal occurring during trial on the defendant's motion. Of course it would have to be on defendant's motion in order to invoke the waiver principle.

We would like to suggest that that deficiency likewise be cured. I have a bill which we drafted—and I am sure there would be no difficulty in having it formally submitted to the committee—which would cure that deficiency and others in the Criminal Appeals Act and expand the rights of appeal to the limits which the double jeopardy clause of the Constitution permits.

The bill follows the pattern of the Criminal Appeals Act as it stands, and is perhaps a roundabout way of providing the same rights of appeal that the District of Columbia statute provides.

Mr. HILLINGS. I do not want to cut off your time, but we have several other bills and several Members of Congress are waiting to testify. Insofar as the latter part of your testimony is concerned, your views would certainly be considered very seriously by the committee, and if you wish to send us a copy of the proposed legislation you are talking about, I assure you that this subcommittee, if the proposed legislation is referred to it, will consider it. We appreciate your advising us of this particular situation.

Mr. ERDAHL. I should add that we would not want any such proposal to jeopardize or delay the enactment of H. R. 7404.

Mr. HILLINGS. Any questions, Mr. Robsion?

Mr. ROBSION. No.

Mr. HILLINGS. Mr. Poff?

Mr. POFF. I want it understood that I am very much in sympathy with this bill and I would like to grant the Department of Justice as

broad powers as possible in that regard, but I am a little concerned about a couple of things.

First, do you think it would be possible, if this bill is enacted, that the Government, or the Justice Department, could appeal from an adverse decision on a motion to suppress after conviction?

Mr. ERDAHL. After conviction? You mean after acquittal, do you not?

Mr. POFF. I mean after acquittal. I beg your pardon.

Mr. ERDAHL. That is a difficult question, sir. An acquittal may be called an acquittal but it may not be an acquittal in the true sense of the word; that is, in the sense of an acquittal on the merits of the cause, or in the sense of a finding of innocence or reasonable doubt.

Similar situations have arisen. The Supreme Court has said that in testing appealability under the Criminal Appeals Act you look at the substance of what the motion was and what the decision was. If it was in fact something that was appealable, it is appealable and it is not made unappealable because it is called something else. More recently the Court of Appeals for the District of Columbia had a situation where an arrest of judgment was called an acquittal, but the appellate court said it was not an acquittal.

We would to the extent constitutionally permissible make appealable those orders regardless of what they are called, and would incorporate language to that effect. For example, we would have the first paragraph on motions to dismiss read, "from a decision or judgment in whatever form and whether entered before or after trial had begun."

Mr. POFF. The point I am trying to make is that the Government may conceivably elect to proceed with trial even in the absence of the suppressed evidence and later the defendant would be acquitted on the merits. My question is whether the Government would be allowed to appeal after acquittal in that case.

Mr. ERDAHL. No. The Government would make its election at the point of suppression. If the Government felt it had enough evidence to go to the jury without the suppressed evidence, it would proceed.

Mr. POFF. Another question that disturbs me is the possible unconstitutionality. I am unable to follow the logic of your reasoning with respect to a waiver. It is clear there he has voluntarily proceeded with the trial in the hope he might win and has, as you said, taken advantage of a delayed demurrer. I can see where that would be a waiver. But I cannot see that it would be a waiver for him to wait until after the jury was impaneled and the trial was started and then make the motion to suppress.

Mr. ERDAHL. Because by making it he makes it in the hope of success, and if as a result the Government is left with no evidence, he has defeated a determination on the merits by his own action.

Let me illustrate with a case in the 10th circuit. The trial was almost over when the defense suggested that the indictment was bad. The judge agreed, and over the defendant's protest dismissed before any result was reached. The Government reindicted and the defendant interposed a plea of double jeopardy and it was rejected, the court holding that the trial on the prior indictment which was washed out at the defendant's instance was not double jeopardy.

Men have been released on habeas corpus after serving a large part of a sentence. There was this situation once. For certain post office offenses, such as robbery, there was a mandatory minimum sentence of 25 years. I do not know if that is still the law or not. In the particular case I am referring to the defendant was discharged on habeas corpus years after he had commenced service of his sentence, for lack of counsel or some such thing. That did not discharge him from his guilt of the crime. He was returned to the original court and convicted again and got the 25-year mandatory minimum. The court had no discretion in the matter.

We have, as you know, in the revision of title 28 of the code, a procedure by motion to set aside a conviction which is a substitute for habeas corpus. In that procedure the defendant must go back to the court of conviction to make his attack. That generally goes to matters of jurisdiction of the trial court in the first instance. So in the setting aside of a conviction under that section the man is not freed. The indictment is there. He has to answer it. So in the case where a man appeals and gets a reversal.

Mr. POFF. Let me see if I can sum up your position on this. You feel if the jeopardy clause is excluded from this bill it will not be open to a constitutional objection because if the defendant makes a motion to suppress after having been put in jeopardy he will be deemed to have waived that right?

Mr. ERDAHL. That is it in a nutshell.

Mr. HILLINGS. Mr. Feighan, do you have any questions?

Mr. FEIGHAN. No.

Mr. HILLINGS. Mr. McCartney?

Mr. MECARTNEY. No.

Mr. HILLINGS. That concludes the testimony on H. R. 7404. Thank you very much for coming here and giving your views on this and on other legislation in which your Department is interested, and we will be glad to consider any proposed legislation if you will forward it to us.

The committee will consider H. R. 7404 in executive session in the very near future.

Mr. ERDAHL. Thank you, sir.

(The letter from the Department of Justice follows:)

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, April 22, 1954.

HON. CHAUNCEY W. REED,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice relative to the bill (H. R. 7404) to amend section 3731 of title 18 of the United States Code relating to appeals by the United States.

The bill would amend section 3731 of title 18, United States Code, by providing that an appeal may be taken by and on behalf of the United States from the district courts to the courts of appeals "from a decision sustaining a motion to suppress evidence, when the defendant has not been put in jeopardy."

At present, the Government has no right to appeal from an order granting a motion to suppress evidence made after an indictment has been returned or an information has been filed. Yet, it has a right to appeal from such an order if the motion was made before such return or filing. This anomalous condition exists because in the former situation the motion is considered as being an interlocutory motion in the criminal case, whereas in the latter situation it is considered a separate proceeding in the nature of an equity suit.

4 5 5 - 19

This Department recognizes the fact that the Government may not be given a right of appeal in criminal cases which would infringe a defendant's constitutional rights under the double jeopardy clause. However, it is well recognized that jeopardy can be waived by a defendant, and that he does waive it when on his own motion he defeats the opportunity to have a determination on the merits or has such determination set aside. (*Bryan v. United States*, 338 U. S. 552; *Francis v. Resweber*, 329 U. S. 459; *Stroud v. United States*, 251 U. S. 15; *Trono v. United States*, 199 U. S. 521.)

It is therefore suggested that the bill should be amended so as to delete the words "when the defendant has not been put in jeopardy." This would further prevent defendants from circumventing the Government's right of appeal by waiting until trial has begun to make their motions to suppress evidence.

The attention of the committee is invited to the fourth paragraph of section 3731 which provides for direct appeal to the Supreme Court "from a decision or judgment sustaining a motion in bar when the defendant has not been put in jeopardy." Just as in the case of motions to suppress evidence, a defendant's constitutional rights under the double jeopardy clause of the United States Constitution would not be infringed upon by a congressional enactment which in effect would provide that a motion in bar made after trial has begun constitutes a waiver of jeopardy. It follows, again as in the case of a motion to suppress evidence, that when a defendant defeats the opportunity to have a determination of his case on the merits by reason of a motion in bar made voluntarily by him, the Government should be entitled to appeal the decision or judgment sustaining such motion. Accordingly, it is suggested that this paragraph of the section should be amended by deleting the words "when the defendant has not been put in jeopardy."

The Bureau of the Budget has advised that there is no objection to the submission of this report.

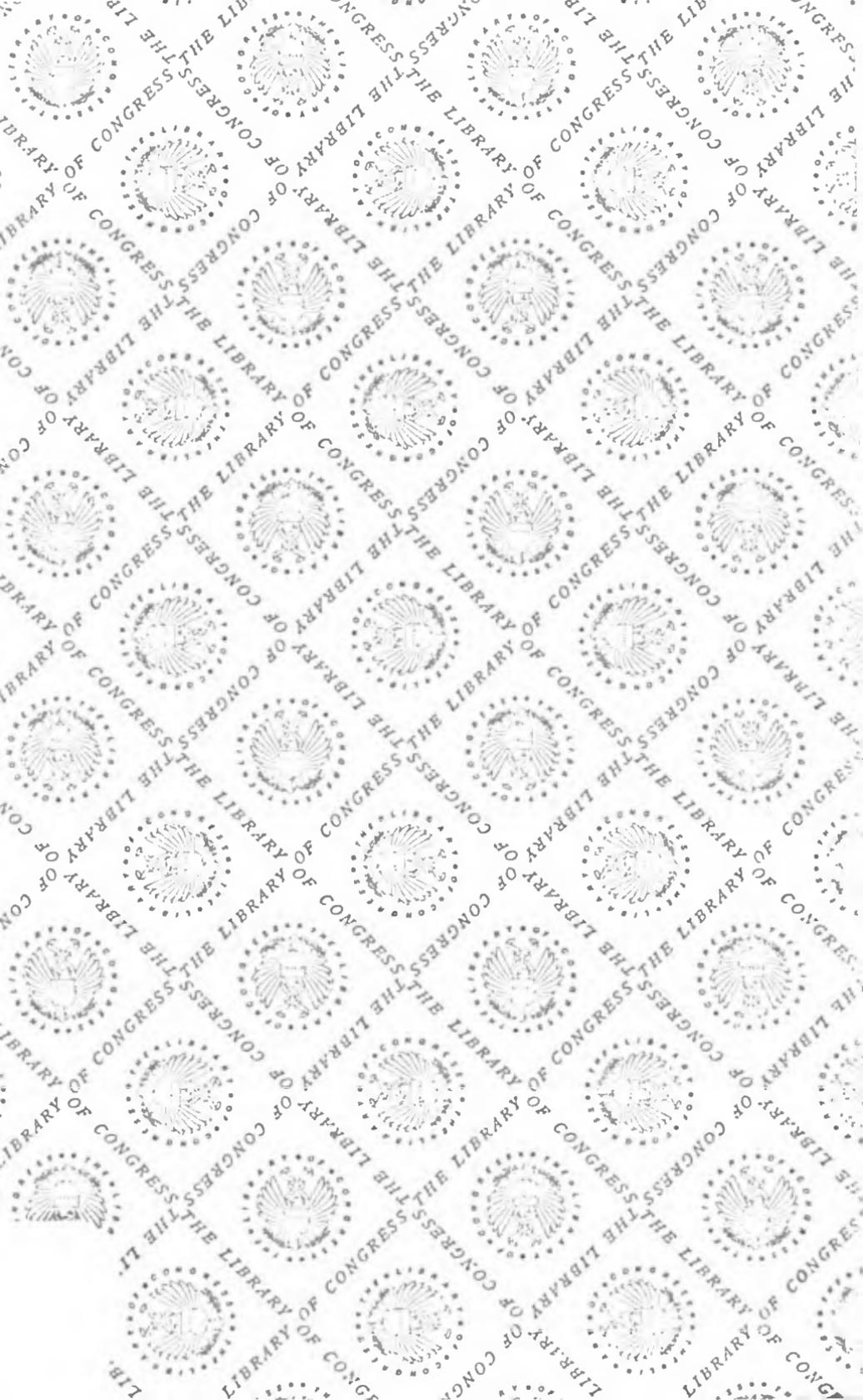
Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

(Thereupon the hearing on H. R. 7404 was adjourned.)

×

PD - 77, 4





DOBBS BROS.
LIBRARY BINDING

ST. AUGUSTINE
FLA.



32084

LIBRARY OF CONGRESS



0 018 423 937 1