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THE NEW BETHEL REPORT: "THE LAW ON TRIAL"

Adopted by the
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NEW BETHEL STATEMENT

On March 29, outside the New Bethel Baptist Church in Detroit, a young man was shot and killed. In the events related to this deplorable violence and tragedy, five more human beings were wounded, and the entire community has been deeply disturbed and seriously divided.

The Chairman of New Detroit acted promptly in the crisis which followed, always urging the community to return to reason and calm. Calling on the entire community, both white and black, for support, he joined with the President in announcing a reward and a means for rapid repair of the church.

There also was a request to our Law Committee to determine whether the administration of justice had functioned effectively in the aftermath of the tragedy.

The Law Committee has now completed its study and deliberations, and it has made its report to us. We have adopted the total report, with its concurring opinion, as submitted.

The report is explicit in stating that it examines only whether the Judge acted in good faith with ample legal basis. It concludes that the Judge's rulings were plausibly based in the law. It clearly recognizes that the police and prosecutor's office faced a difficult task. The report is not intended as a condemnation of them. What the report does is urge avoidance of the type of emotional or ill-considered accusations against the judiciary which can only serve to impair efforts at achieving a lawful and just society.

The report is now available for public review, and we earnestly recommend that everyone read it carefully. We believe it demonstrates that, in the final result, justice was afforded promptly and effectively in this instance. It should provide a basis for renewed confidence that we are a government of laws and not of men.

Every social system must be administered by human beings, and human experience makes it perfectly clear that no such system can be perfect. Decent and honorable people

will no doubt continue to disagree on particular aspects of the law and its application. The most important consideration is that our system of administering justice *can* work equally and effectively for all people, and that it had that result in this very difficult occasion.

Above all, no system of order or justice can fairly be judged by a personal or emotional evaluation of the individuals who are officially responsible for its administration. As private citizens they are entitled to form and express their personal opinions, preferences and attitudes. In their official capacities, everything a judge, a policeman, or a prosecutor says or does is governed and will be tested by the law; and the law is the instrument and protector of *all* the people.

Not only those who enforce the law, but also those who are subject to it, must always be judged without regard to their private opinions, race, religion or economic status. True justice must be based on reason, and not on emotion or prejudice. It can only be fairly evaluated on those very same principles.

Most regrettably, even the most perfect system of justice could not restore the human life that was taken in this instance. The violence which caused that death has no place in a just or reasoning society, and as usual it served here only to increase human suffering and endanger human rights. For those who continue to live as part of our society, time will be needed to heal the physical and the community wounds inflicted by these events. Care and understanding will be required for both.

We can take hope from the fact that this highly provocative set of circumstances did not erupt in a repetition of July 23, 1967. On this occasion, our system of order, with justice, did provide effective protection for the human and constitutional rights of those caught up in these events; and order was preserved. If our community does not let emotion or prejudice overcome its good judgment — if we don't "blow it" — this could be a sound beginning for a better future.

INTRODUCTION

The tragic events of March 29, 1969 at the New Bethel Church have considerably increased racial tensions in our community. To a significant extent the reporting of events subsequent to this incident as they involve the Recorder's Court have contributed to the divisiveness.

In making the statement public, New Detroit seeks to act as a reconciler in the Detroit community through the education of the public to a greater understanding of the laws involved in the case. The integrity of our Constitutional order rests on public support and such support cannot exist without public understanding. Our city desperately needs mutual trust and confidence. Self-government cannot exist without self-discipline. All authority must be accountable. Such mutual trust, self discipline and accountability can be encouraged by greater understanding of our laws and of the role of the judiciary in interpreting and applying them.

At the outset we emphasize that the question is not whether the Judge's rulings were legally flawless. In the interpretation and application of Constitutional standards regarding detention, probable cause and the right of counsel, there is no "perfect ruling."

In evaluating the Judge's rulings, the only legitimate inquiry is whether such rulings had reasonable basis in the law. A judge need not be perfect, for the appellate process assures a remedy for those who dispute a ruling.

In our opinion there is more than merely a justifiable basis for his conduct and exercise of judicial discretion. There is little question that Michigan law placed upon this Judge, as a presiding judge of the Recorder's Court, the responsibility of being available for and making a judicial inquiry into challenges of illegal detention.

Accordingly we adopt the position paper hereto annexed in the hope that, with the understanding that a knowledge of the facts and of the law brings about, our community will be reconciled and reunited. In the name of the rule of law, we urge all in our community to respect and defend the independence and the integrity of the judiciary. Only in this way can we preserve, protect and defend the liberty and security of every person in our City.

STATEMENT OF FACTS

The relevant facts as presented to Judge George W. Crockett appear to be:

1. The Detroit Police Department was called to the New Bethel Church shortly before Midnight on March 29, 1969 as the result of a shooting in which tragically one police officer was killed and another wounded. The police subsequently took into custody some one hundred and forty-two persons who were found inside the Church.
2. Approximately six hours later, the Presiding Judge of the Recorder's Court for the City of Detroit was contacted by two private citizens, and told that the Detroit Police had taken upwards of a hundred people into custody including at least thirty women, some of whom were accompanied by children; that all of the persons were being detained at the First Precinct Station and had been refused permission to make phone calls or otherwise contact attorneys, relatives or friends.
3. The Judge then proceeded to the First Precinct Station where he met with the Detroit Police Commissioner and requested a list of all of those held in custody so that their names could be inserted on a Writ of Habeas Corpus which he had prepared. The Judge also requested and was granted a room for the hearings on the Writ, and he asked that the Wayne County Prosecutor be notified of such hearings.
4. The Habeas Corpus proceedings commenced at 6:40 A.M. Sunday morning and were open to the public. The cases of thirty-nine suspects were then heard and determined as follows: fifteen Detroit residents were released on One Hundred Dollar personal bond to reappear at noon; one man (the Church janitor) was discharged with the consent of the Prosecutor; one man from Ohio was released without bond and ordered to reappear at noon; twenty-two persons from out-of-town were remanded to custody until noon.
5. The Judge then ordered the release of another Detroit resident on One Hundred Dollar personal bond. At this point the Prosecuting Attorney entered the room and countermanded the Court's order releasing this suspect. Notwithstanding the Court's warning of contempt proceedings, the Prosecutor in the presence of the Court directed the police to retain the suspect in custody and further ordered that no additional suspects be brought before the Court. The Court had no alternative but to recess.
6. At noon of the same day, the Court reconvened and approximately one hundred and thirty prisoners were released either at the request of the Assistant Prosecuting Attorney or with his consent. The sixteen suspects who were ordered to reappear did so.
7. The Assistant Prosecuting Attorney requested an adjournment of the hearing for twenty-four hours on seven of the remaining suspects—four of whom had tested positive on a nitrate test; one who, though not tested, was believed to have had nitrate traces on his hands; and two others who showed no signs of nitrate but were wanted by the Assistant Prosecutor for further investigation.
8. The Court denied the motion and granted the Writ releasing the seven suspects on the grounds that the People did not show probable cause to hold them and that the Police violated the Constitutional rights of some of the suspects by denying the right to counsel during the administration of the nitrate tests.

Based upon the foregoing facts, certain legal issues are raised. These issues relate to (1) the Court's prompt inquiry at the police station of the allegations relating to the incommunicado detention of the suspects; (2) the issuance of the Writ of Habeas Corpus; and (3) the release of seven suspects over the Assistant Prosecutor's objections.

At the outset of this discussion we must emphasize that the question is *not* whether Judge Crockett's rulings were legally flawless. In the interpretation and application of Constitutional standards regarding detention, probable cause, and the right to counsel there is no "correct" ruling. The very complexity of these problems demand that a judge be given wide latitude in his judgments, for only he has full access and exposure to all the relevant facts. Thus, in evaluating

Judge Crockett's rulings based upon the evidence presented to him, the only legitimate inquiry is whether such rulings were plausibly based in the law.

I. THE PRESIDING JUDGE OF THE RECORDER'S COURT HAD THE AUTHORITY OF LAW TO GO TO THE POLICE STATION TO INQUIRE AS TO THE ALLEGATIONS THAT PEOPLE WERE THERE BEING ILLEGALLY DETAINED.

At approximately 5:00 A.M. on Sunday morning, March 30, 1969, Judge George W. Crockett, Jr. was awakened at his home by a State Representative, James Del Rio, and the pastor of New Bethel Church, Reverend C. L. Franklin, and told "that a homicide had occurred at or near New Bethel Church . . . sometime around midnight of last evening; that the Detroit Police had taken upwards of a hundred people into custody including at least thirty (30) women, some of whom were accompanied by children; that all of the arrested persons were being detained at the First Precinct Station and had been refused permission to make phone calls or otherwise contact attorneys, relatives or friends; that these prisoners were not being held pursuant to any warrant or other court order."[1] As presiding Judge of the Recorder's Court, Judge Crockett was "charged with the general supervision and superintendence of the work of the Court."[2] Subsection (c) of that rule also requires that applications for Writs of Habeas Corpus be presented to the Presiding Judge.

We believe that Judge Crockett's response to the complaints of Representative Del Rio and Reverend Franklin must be viewed in the context of his duties as Presiding Judge. The purpose of a Habeas Corpus proceeding "is to cause the release of persons illegally confined, to inquire into the authority of law by which a person is deprived of his liberty. . ."[3] The importance of these proceedings in preventing any prolongation of an illegal detention has been explicitly recognized in Michigan. Writs of Habeas Corpus are returnable "forthwith, *or at the nearest available time or place*" (Emphasis added).[4]

[1]Certificate On Habeas Corpus Hearing, March 30, 1969, page 2-3, hereinafter "Certificate."
[2]*Rules for the Recorders Court of the City of Detroit* (Feb., 1955), Rule I.
[3]*People v. McCager*, 367 Mich. 116 (1962).
[4]G.C.R. 712.5.

Moreover, the Michigan Supreme Court recently held that in the protection of a criminal suspect's rights, "Magistrates of Michigan . . . (are) on legal duty at all times; Sunday, holidays or no."[1] It appears that these specific mandates, which show no reverence for either the hour or the day, create a duty in a Presiding Judge notified of an illegal confinement to determine whether immediate judicial intervention is required to preserve the rights of citizens within his jurisdiction.

The facts which confronted Judge Crockett in the early morning hours of Sunday, March 30, 1969, illustrate precisely the kind of exigent circumstances which make the twenty-four hour on-call availability of judges necessary. The law does not require that the one hundred and forty-two (142) persons being held at the police station be without remedy until Tuesday morning (Monday was a court holiday), since this would subordinate the rights of the individual to mere formalities.

II. THE JUDGE HAD THE AUTHORITY OF LAW IN ISSUING THE WRIT OF HABEAS CORPUS WHETHER IT BE DEEMED TO HAVE BEEN UPON THE ORAL APPLICATION OF TWO CITIZENS OR UPON HIS OWN MOTION.

Substantial controversy has surrounded Judge Crockett's issuance of the Writ of Habeas Corpus for the one hundred and forty-two (142) persons held at the First Precinct Police Station. From this controversy the serious charge that the Judge abused his judicial responsibilities has emerged. The import of this charge warrants a thorough examination of the pertinent law.

Under Section 600.4316 of Michigan Compiled Laws, a judge empowered to grant the Writ of Habeas Corpus may do so upon "proper application." The application "may be brought by or on behalf of any person restrained of his liberty."[2]

Thus, either Representative Del Rio or Reverend Franklin *could have* brought a formal complaint requesting the Writ. Nevertheless, Judge Crockett chose to bring the Writ in his own name. Whether this decision was made in order to save time or for some other reason is immaterial. Since it was Del Rio and Franklin who brought the facts to the Judge's attention

[1]*People v. Hamilton*, 359 Mich. 410, 416 (1960).
[2]M.C.L.A. §600.4307.

and requested that the Judge act, in a real sense they were the complaining parties. Although Section 712.3 of the Michigan Court Rules envisions a formal written application for a Writ of Habeas Corpus, it is reasonable to conclude that under the circumstances the oral application was sufficient and that Del Rio and Franklin did "properly apply" for the Writ. This view is consistent with that of the commentators Honigman and Hawkins stating, "the form and sufficiency of all pleadings must be determined 'by construction of the rules which will secure substantial justice on the merits . . .' "[1] Consequently, if the Recorder's Court Judge is deemed *not* to have the power to issue a Writ on his own motion a liberal interpretation of the oral application is appropriate. "(T)echnical defects in the pleadings should not forestall relief if an illegal detention is . . . brought to the judge's attention."[2]

Still another basis for the propriety of the Writ issued in this case is found in the language of M.C.L.A. §600.4307 giving *"any* person" the right to bring an action for Habeas Corpus. The breadth of this provision elevates the scrupulous protection of the Constitutional rights of those detained over technical standing requirements.

Finally, we must go to the provisions of Michigan Court Rule §712.7 which grant at least some Michigan judges the power to issue Writs on their own motion:

> Any Justice of the Supreme Court, any judge of the Court of Appeals, and any judge of the Circuit Court may issue a writ of habeas corpus, or an order to show cause, upon his own motion whenever he learns that any person within his jurisdiction is illegally restrained of his liberty.

The question remains whether a judge of the Recorder's Court of the City of Detroit has the powers enumerated in Court Rule §712.7. Some guidance is provided in M.C.L.A. §726.17 which sets forth the powers of a judge of the Recorder's Court with respect to Habeas Corpus. It reads as follows:

> The judge of said Recorder's Court *shall possess the same power to grant writs of habeas corpus,* returnable before himself, to adjudicate thereon, and do all acts in vacation touching any suit or proceeding in said court, as is now, or may be possessed by the Judges of the Circuit Courts of the State, in matters before said Circuit Court. (Emphasis added.)

[1]M.C.R.A. §712.3, Commentary p. 127.
[2]M.C.R.A. §712.3, Commentary p. 127.

While we have found no case which challenges the power of a Recorder's Court judge to issue a Writ of Habeas Corpus on his own motion it is arguable that the use of the word "grant" in §726.17 as opposed to the word "issue" suggests that a Recorder's Court Judge is denied the power clearly conferred upon judges of both the Circuit Courts and the Court of Common Pleas. This interpretation is not supported by the purport of the legislation establishing the Recorder's Court which has sought to equate the Court's powers with those of the Circuit Courts. The general jurisdictional section of the statute creating the Recorder's Court is M.C.L.A. §726.11. Among other things, it empowers the Court to:

> do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, *and especially to issue all writs and process, and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state . . .* (Emphasis added).

On the basis of the foregoing analysis, we conclude that the Writ of Habeas Corpus issued by Judge Crockett, whether it is deemed to be upon the oral application of Del Rio and Franklin or his own motion is supported by the laws of Michigan.

III. THE JUDGE'S RELEASE OF SEVEN SUSPECTS, NOTWITHSTANDING THE OBJECTION OF THE ASSISTANT PROSECUTOR, IS AUTHORIZED BY THE LAW.

It is important to note that on Sunday, March 30, 1969, there were actually two sessions at which persons held in custody were brought before the Court. The first session (hereinafter, Morning Session) convened at approximately 6:40 A.M. [1] and was recessed at about 8:00 A.M.[2] The second session (hereinafter, Afternoon Session) reconvened at noon and continued through the afternoon.

During the Morning Session thirty-nine cases were heard. Fifteen Detroit residents were released from custody on One Hundred dollar personal bond and one Ohio resident was released on his personal bond. All sixteen were ordered to reappear at noon. Twenty-two persons from out-of-town were remanded to custody.[3] Only one

[1]Certificate 6.
[2]Transcript, Habeas Corpus Hearing, March 30, 1969, p. 31 (hereinafter, Transcript).
[3]Certificate 7.

person, the Church janitor, was discharged and this was with the consent of the Assistant Prosecutor.[1] By virtue of these actions and the Prosecutor's actions, final disposition of the Writ of Habeas Corpus was postponed for several hours until noon.

At the commencement of the Afternoon Session the Assistant Prosecutor, Jay Nolan, informed the Court that the police had released "upwards of a hundred people" in accordance with the understanding he had with the Court because their investigation determined that "we had no basis to hold them."[2] Of those arrested at the time of the hearing neither the Assistant Prosecutor nor the Court knew exactly how many people had been taken from the New Bethel Church.[3]

Contrary to the reporting at the time, it is now clear that virtually all (132) of these persons were released by or at the request of the Assistant Prosecutor. Thus, if there is any dispute it must involve the release of the seven persons whom the Assistant Prosecutor sought to retain in custody. As to these seven the question is: did the prosecution offer sufficient legally obtained evidence against these persons to establish probable cause that each had committed a crime? If such evidence was not offered to the Court, the detention of such persons was improper and the Judge was obliged to order their release.

Recognizing that the Court must rule upon the legality of a detention based only upon the evidence offered at the Habeas Corpus Hearing an examination of such evidence is required. Against two men the Assistant Prosecutor offered no evidence other than the fact that each was inside the Church when taken into custody. A third man had been taken from the Church; although he refused to take a nitrate test, there was evidence that a police detective saw a "speck" of nitrate on his hands. As to the remaining four suspects who had been taken from the Church, the paraffin nitrate tests showed positive signs of nitrate on their hands.

If the seven suspects in question were lawfully under arrest by Constitutional standards at the time of the hearing, their continued custody was legal and the Writ should have been denied. On the other hand, if they were not under arrest or if the arrests were not made upon probable

[1]Certificate 7.
[2]Transcript 11.
[3]Transcript 11, 69.

cause, further restraint would be in violation of their Constitutional rights. The question could be easily disposed of if we can conclude that there was sufficient legal cause to justify the arrest of all one hundred and forty-two persons found in the New Bethel Church. In such instance each of the seven men were lawfully arrested and their continued detention on the same basis as the arrest would be proper. This position is not without appeal and it merits substantial discussion.

A. WERE THE SEVEN SUSPECTS UNDER LAWFUL ARREST AT THE TIME THEY WERE TAKEN INTO CUSTODY AT THE NEW BETHEL CHURCH?

This aspect of the discussion is devoted to the concept of "arrest" as it related to various preconditions set forth by the courts and the United States Constitution. We are aware of the terms, "arrest for investigation" and "limited detention" which imply a lesser standard of cause and a narrower invasion of liberty. Such concepts, if valid, provide a reasonable incubation period during which the detention may mature into a full blown arrest. Insofar as these terms are applicable to the situation at hand they are discussed in another portion of this paper.

The principle that it is better to allow some guilty men to go free than to subject citizens to easy arrest is deeply embedded in the Fourth Amendment.[1] As a consequence, the notion of "probable cause" is an essential safeguard to the individual liberties of every American citizen. Yet while the Bill of Rights protects a person from arbitrary invasions of his person or property, it authorizes arrests where the officer has probable cause to believe that a person has committed a felony. Thus, if the police had probable cause to believe that each of the seven suspects in question had committed a felony at the time they were first taken into custody, it follows that they had probable cause to hold these men and the Writ should have been denied.

In this case the police responded to

[1]*Henry v. United States*, 361 U.S. 98, 104 (1959).

a call for help by a wounded officer. When they arrived at the scene they found two seriously injured policemen—one officer later died in the hospital.[1] According to Commissioner Spreen's statement, which was given to the Judge during the early morning conference at the police station, responding police units "entered the New Bethel Church, Philadelphia and Linwood, and the responding officers were met with a hail of gunfire. When additional officers arrived at the scene, they were successful in entering the church under fire and effected the arrest of many of the participants . . . three rifles, three hand guns and a quantity of ammunition have been confiscated. A group of persons are in custody for questioning in the matter".[2]

If we assume these facts to be true, the officers had probable cause to believe that *a felony had been committed.* Moreover, they had probable cause to believe that *the felony had been committed by some person or persons in the New Bethel Church.* The question remains, however, whether this nature of probable cause was sufficient to justify the arrest of all one hundred and forty-two (142) persons.

In examining this question we are not insensitive to the difficult circumstances which confronted the police. The situation was most volatile—it was late at night in an area of substantial social unrest. An attempt to properly isolate and interrogate the one hundred and forty-two (142) possible assailants and witnesses may have been dangerous as well as impractical. In addition, the crime involved was a most serious one which warranted vigorous pursuit of the criminals.

As Mr. Justice Jackson pointed out in his dissent in *Brinegar v. United States,*[3] when the public interest is great and the offense grave, the courts will strive hard to sustain actions by the police which are fairly executed and in good faith. However, exigent circumstances

[1]Certificate 5.
[2]Certificate 5.
[3]*Brinegar v. United States,* 388 U.S. 160, 183 (1948).

can do no more than justify a liberal construction of probable cause; they cannot dissolve the requirement. "(I)f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police."[1]

One basic principle which must remain inviolate is that guilt is personal. In the absence of evidence of conspiracy each person is entitled to be judged only upon the evidence against him as an individual. Group guilt or guilt by association has no place in our law. Speaking for the majority in the *Brinegar* case, Justice Rutledge stated:

> "The history of the use, and not infrequent abuse of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law abiding citizens at the mercy of the law officers' whim or caprice.'"

Thus, "the constitutional validity of an arrest depends upon whether, at the moment the arrest was made, the officer had probable cause to make it—whether at that moment the facts and circumstances within his knowledge and of which he had reasonably trustworthy information, is sufficient to warrant a prudent man to believe that *the suspect* had committed or was committing an offense." (Emphasis added).[2]

It has been repeatedly emphasized by the Supreme Court, that where there are numerous actual or potential suspects, without further evidence of individual guilt, *all of them may not be arrested,* nor may any one be arrested at random. In Wong Sun v. United States,[3] an informant had said that "Blackie Toy," the proprietor of a laundry on Leavenworth Street, had sold an ounce of heroin. There were several Chinese laundries on this street, and apparently more than one Toy. It was held that the arrest of one of them was unlawful because there was no

[1]*Beck v. Ohio,* 379 U.S. 89, 97 (1964).
[2]*Beck v. Ohio, supra.*
[3]*Wong Sun v. United States,* 371 U.S. 471, 481 (1963)

showing that the officers "had some information of some kind which had narrowed the scope of their search to this particular Toy." (Emphasis added).

Similarly in *Mallory v. United States,*[1] involving a rape by a masked individual, the only three persons who fit the general description of the rapist and who had access to the basement where the rape occurred were arrested. The court said: "Presumably, whomever the police arrest they must arrest on 'probable cause.' *It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause'* " (Emphasis added).

While the police had at the New Bethel Church one hundred and forty-two (142) suspects, it was never shown to Judge Crockett by the Prosecutor that they had information at the time of the detention as to any person or persons which could narrow the focus of guilt to meet probable cause standards. The very fact that all one hundred and forty-two (142) persons including the women and children were taken into custody and that all but ten were ultimately released by the police or the Prosecutor because they "had no basis to hold them"[2] fails to support any contention that the police had probable cause at the time of the arrest. Since the Assistant Prosecutor presented no evidence to the Court which would distinguish the seven suspects he sought to retain from the rest of the persons taken from the Church en masse, it must be assumed that the Assistant Prosecutor's concession of no probable cause was equally applicable to them at the time they were taken into custody.

This conclusion does not suggest that the police are helpless in such situations. Had the prosecution introduced any evidence that the shooting had occurred from inside the Church in the presence and view of all the persons inside, it

[1]*Mallory v. United States,* 354 U.S. 449, 456 (1957).
[2]Transcript 11.

is possible that sufficient inferences of a conspiracy among such persons could be elevated to probable cause. Similarly, had the prosecution offered any evidence which would connect the guns or ammunition with any person or persons, probable cause may have existed. Unfortunately, there was no such evidence presented. Instead, the Assistant Prosecutor's sole reliance on the mere presence of each suspect in the Church was made clear throughout the Transcript.[1]

As a result of the foregoing analysis we conclude that in the absence of evidence and coherent argument to establish a conspiracy among the one hundred and forty-two (142) persons taken from the New Bethel Church, a ruling that there was no showing of probable cause to justify the arrest of any of these persons is amply supported in the law. Consequently, as to those suspects whose continued detention was sought with no further cause than their presence in the Church (only five of the seven showed signs of nitrate), a finding of no probable cause and a granting of the Writ of Habeas Corpus was justified. A more detailed discussion of the release of the two non-nitrate suspects further supports the propriety of the Court's actions.

One of these suspects was a resident of New York. The Assistant Prosecutor asked the Court to retain custody over this man for a short period of time so that the police could check for a criminal record. At this point the Court stated:

> THE COURT: It is not solely whether this man has a record. What is there that you think justifies this Court in detaining this man? What relationship does this man have to the alleged criminal acts or act?
>
> MR. NOLAN: Your Honor, he was arrested in the premises where the—after the shooting on the street and the officers undertook to enter and there was firing inside there. Other than that, that is the extent of what I have.
>
> * * *

[1]Transcript 41, 44, 57.

THE COURT: All you have against this man is that he was among the hundred who were attending whatever the affair was and he is from New York?
MR. NOLAN: Yes, sir.
THE COURT: Is that all?
MR. NOLAN: Yes, sir.[1]

At this point the Judge ordered the suspect released and Mr. Nolan requested that the Court maintain jurisdiction over the person by placing him on bond. The Court asked defense counsel whether he would agree to such a procedure; counsel opposed the suggestion. The Court pointed out that it had no authority to confine the suspect to Detroit by way of personal bond and released him because the prosecution had "not shown anything to establish some probable cause to indicate that this man is guilty."[2]

The other non-nitrate suspect was Alfred Hibbitt. The Assistant Prosecutor requested a 24-hour adjournment. Defense counsel asked the purpose for which the prosecution sought to hold the suspect and the Assistant Prosecutor stated:

MR. NOLAN: In the alternative, his physical presence will not necessarily contribute to our investigation. I want to be frank with the Court. Our concern is that after we—with the possibility of a showup, there could quite likely be a showup. But other than that, we don't intend to question him or give him a nitrate test or anything like that. He had his.[3]

Ultimately, with the assurance of the defense counsel that the suspect could be produced if called, the Court released Mr. Hibbitt on $1,000 personal bond. Over a week later, the Prosecutor's office issued a warrant on Mr. Hibbitt and in accordance with the Court order he voluntarily gave himself up to the police without incident. Based upon the foregoing facts we conclude that the Court's release of these men was totally consonant with the law.

B. WAS THERE LEGAL CAUSE TO HOLD THE FIVE SUSPECTS WHO REVEALED EVIDENCE OF NITRATE WHILE THEY WERE IN CUSTODY?

At a Habeas Corpus hearing the prosecution must show probable cause to hold the suspect at the time of the hearing. This fact indicates that there may have been a legal basis to find such cause against the suspects who revealed particles of nitrate from the paraffin test. Three issues are raised by Judge Crockett's ruling as to these men: 1) does the existence of nitrate on the hands of a suspect combined with the presence at the Church provide probable cause that he was involved in the shooting?; 2) may the results of the nitrate tests be used to show probable cause if they were taken after an arrest made with less than probable cause?; 3) may the results of the nitrate tests be used if such tests were taken while the suspect was being held incommunicado and not advised of his right to counsel?

After an extensive colloquy with the Assistant Prosecutor and defense counsel,[1] the Court discharged one of the suspects who had tested positive for nitrate on the paraffin test administered by the police. The Court stated:

> You still have the right to get a warrant if you have sufficient evidence to show probable cause and you have the right to come back to this Court and I am sure that any judge of this Court will give you a warrant under those conditions. For the present *you fail to show probable cause and the police have violated a Constitutional right of this defendant* (Emphasis added).[2]

It is not absolutely clear whether the Court released this suspect (and the other four) because even with the nitrate test there was no probable cause or on the grounds that the nitrate tests were unconstitutionally administered and without them there was no probable cause. Since he referred to the tests as "impermissible"[3] the latter interpretation is probably the correct one. How-

[1]Transcript 41, 42.
[2]Transcript 43.
[3]Transcript 39.

[1]Transcript 45-51.
[2]Transcript 51.
[3]Transcript 58.

ever, we will evaluate the first alternative as well because it is material to the development of the whole question of probable cause.

1. WAS THERE PROBABLE CAUSE TO BELIEVE THAT THE SUSPECTS EVIDENCING NITRATE TRACES COMMITTED A CRIME?

Although the Supreme Court has indicated in *Mallory v. United States* and *Wong Sun v. United States* that there can be no probable cause where the evidence points equally to several suspects all of whom could not be guilty, the discovery of nitrate traces on five persons found inside the Church adds materially to the likelihood that each was involved in the shooting. Whether it adds enough depends, of course, on the reliability of the nitrate test. If it is reasonably reliable and it may be legally considered, a finding of probable cause is appropriate.

The theory of the test is that nitrates contained in gun powder often become embedded on the surface of the skin after a gun is fired. To perform the test, layers of warm liquid paraffin, interleaved with layers of gauze for reinforcement, are brushed or poured on the suspect's skin. The warm sticky paraffin opens the skin's pores and picks up any dirt and foreign material present at the surface. When the paraffin cools and hardens, it forms a cast which is taken off and processed with certain chemicals. If blue dots appear, it provides evidence that the suspect has recently fired a weapon.

In practice, however, the authorities are virtually unanimous that the test is entirely unreliable. *The President's Commission on the Assassination of President Kennedy* (Warren Report) pointed out that in experiments run by the F.B.I. it was shown that, "A positive reaction is . . . valueless in determining whether a suspect has recently fired a weapon."[1] One reason for this is that "contact with tobacco, Clorox, urine, cosmetics, kitchen matches, pharmaceuticals, fertilizers, or soils, among other things, may result in a positive reaction to the paraffin test."[1]

Henry W. Turkel, M.D., the coroner for the City of San Francisco, ran independent and controlled tests and he concluded: "It is doubtful that anyone would have sufficient trust in the dermal nitrate test to bring a criminal charge or institute a criminal proceeding on the strength of the findings of this test alone . . . In sum total . . . the test (is) less than worthless."[2] Finally, he points out that:

> The inspectors of the Homicide Detail of the San Francisco Police Department were questioned as to their recollection of cases in which paraffin glove tests served in any degree to incriminate or clear a suspect or defendant. Not one instance was recalled where it served a positive role, despite their cumulative forty-nine years on the detail.

On the basis of the foregoing facts, we conclude that the nitrate test is sufficiently unreliable to warrant a finding that a positive result on such test without other substantial evidence does not establish probable cause to believe a suspect has been involved in a shooting.

2. MAY THE RESULTS OF THE NITRATE TESTS BE USED TO SHOW PROBABLE CAUSE IF THEY WERE TAKEN AFTER AN ARREST MADE ON LESS THAN PROBABLE CAUSE?

Assuming the positive results of the nitrate tests would provide sufficient cause to hold the suspects at the Habeas Corpus hearing, serious Constitutional questions are involved in the use of such tests here. The record leaves little doubt that the nitrate tests were administered *after* the suspects had been removed from the Church to the police station. In fact, the Assistant Prosecutor requested additional time from the Court to complete these tests (it is noteworthy that the tests were performed even though the Judge specifi-

[1]Warren Report, p. 561.

[1]Warren Report, supra.
[2]46 *Journal of Criminal Law and Criminology* 281, 283 (1955).

cally denied this request and asked that no tests be given prior to the Habeas Corpus hearing).[1] Thus, if the original detention is deemed to have been an illegal arrest, the evidence which derives immediately from such an arrest is considered the "fruit of the poisonous tree" and it may not be used for any purpose in the prosecution of the arrestee.[2]

If, on the other hand, the detention which led to the nitrate tests was proper even though there was insufficient probable cause to authorize an arrest by Constitutional standards, the evidence might be considered. This result is possible if we can conclude that the police had a legal right to remove the suspects from the Church to the police station without placing them under full arrest. Herein we must discuss the concept of a "limited detention."

To some courts an arrest invoking the Fourth Amendment standards occurs as soon as a person is taken into custody and restrained of his full liberty, even for a short period of time.[3] There is, however, authority for the position that every detention of an individual does not constitute an arrest. These courts would make a distinction between an arrest and an investigatory detention and permit the detention "on grounds less stringent than the probable cause requirement for an arrest."[4] Inasmuch as the Supreme Court declined to decide whether persons may be detained for investigation on less than probable cause,[5] the question is open.

Recently, the highest court in New York endorsed the practice of reasonable investigatory detentions stating that, "The public interest requires that such interrogation (while a citizen is restrained of his liberty) not be completely forbidden so long as it is

[1]Transcript, 49-50.
[2]*Wong Sun v. United States*, 371 U.S. 471, 485 (1963).
[3]*United States v. Mitchell*, 179 F. Supp. 636 (D. C. (1959).
[4]*United States v. Rundle*, 274 F. Supp. 364 (1967).
[5]*Rios v. United States*, 364 U.S. 253 (1960).

conducted fairly, reasonably, within proper limits and with full regard to the rights of those being questioned."[1] The Second Federal Circuit put it more strongly:

> This prerogative of police officers to detain persons for questioning is not only necessary in order to enable the authorities to apprehend, arrest, and charge those who are implicated; it also protects those who are readily able to exculpate themselves from being arrested and having formal charges made against them before their explanations are considered.[2]

Even more to the point the *Vita* court stated at p. 534 "the plain unvarnished fact that without such power society would often find itself helpless to solve crimes and protect its members." The same concern for public safety is reflected in the Uniform Arrest Act, a statute proposed in 1942 by the Interstate Commission on Crime (adopted in three states) which permits the police to detain for questioning any person against whom the officer has a reasonable suspicion.[3]

The case which confronted the Detroit Police at the New Bethel Church provides a perfect example of a situation where a detention for investigation might be appropriate. At the time of the police entry they had no way of knowing which persons of the one hundred and forty-two (142) found in the Church had been involved in the shooting. Moreover, to question all one hundred and forty-two (142) persons at the Church may have been as dangerous as it would have been chaotic. Under the circumstances the removal of these persons to the police station where screening, sorting and questioning could be carried out in a more orderly fashion was reasonable. The importance of preserving material witnesses is recognized in Michigan as in other states by conferring upon the Judge the power to order the custody of such a witness. In view of all of these facts we believe that the police

[1]*People v. Morales*, 290 N.Y.S. 2d 898 (1968).
[2]*United States v. Vita*, 294 F. 2d 524, 530 (1961).
[3]Uniform Arrest Act §2, 28 *Virginia L. Rev.* 351, 321 (1942).

action taken at the New Bethel Church in regard to the detention and subsequent relocation of persons for whom there was insufficient probable cause was not unreasonable.

Assuming then that a pre-arrest detention was appropriate so that the police could pursue a prompt and thorough course of investigation, we must consider whether the discovery of nitrate traces on five of the suspects was a legitimate part of the detention. In this case the nitrate tests were performed at about 9:00 A.M. Sunday morning,[1] that was after the Morning Session and about nine hours after the detention began. This fact raises the important issue of time. The purpose of permitting a pre-arrest detention is to afford the police an opportunity to complete some preliminary investigations which may result in probable cause to arrest. Yet even the few courts which have advocated such detention powers have been emphatic that the detention be brief. The Uniform Arrest Act states, "the total period of this detention shall not exceed two hours."[2] The detention approved of in *United States v. Rundle*,[3] was "reasonably brief . . . only five to ten minutes." The New York Court also expressed a concern for the duration of the detention approving a one hour detention and emphasizing the need for brevity by stating, "Lengthy detention on mere suspicion breeds abuse of those safeguards which a civilized society must erect to protect even the most reprehensible of its members."[4]

Only the *Vita* case provides language which might justify the nine hour detention of the suspects *prior* to finding probable cause. In that case, they approved an eight hour detention where the circumstances justified it and where the "investigation was conducted with dispatch. . ."[5]

[1]Transcript 47.
[2]Uniform Arrest Act, Section 2 (3), *supra.*
[3]*United States v. Rundle, supra,* p. 369.
[4]*People v. Morales, supra,* p. 907.
[5]*United States v. Vita, supra,* p. 531.

These authorities cast substantial doubt upon the legality of the nine hour detention prior to the discovery of evidence which may have permitted a finding of probable cause. Under the law, a pre-arrest detention must result in either release or arrest upon probable cause within a short period of time. If the suspect is detained beyond that point he is considered under illegal arrest and evidence which derives therefrom (e.g., positive nitrate results) cannot be used. In this case, however, the detention of one hundred and forty-two (142) persons complicates the investigatory process substantially. There may have been some reason why the paraffin tests could not have been administered sooner. In any event, the mere passage of time under these extraordinary circumstances should not preclude the evidence.

Unfortunately, other safeguards were ignored during this prolonged detention. Each court which has authorized the use of investigatory detention has insisted upon the zealous protection of the suspect's Constitutional rights. The New York Court concluded its opinion as follows:

> We hold merely that a suspect may be detained upon reasonable suspicion for a reasonable and brief period of time *for questioning* under carefully controlled conditions *protecting his Fifth and Sixth Amendment rights. Mass detentions for questioning are never permissible.* (Emphasis added.)[1]

Not only does this case involve a "mass detention" which runs afoul of the law, but during the detention the suspects were held *incommunicado* and without being informed of their Constitutional rights. Judge Crockett's emphasis of this point at the Habeas Corpus hearing was quite legally sound. Moreover, the suspects in issue were not merely *questioned* during the detention. The courts have made it clear that even when a pre-arrest detention is lawful the police may not search

[1]*People v. Morales, supra,* p. 907.

the suspect without probable cause.[1] A nitrate test is clearly beyond "questioning." Although the Supreme Court has probably conferred the power to take a nitrate test against the will of the suspect, such a test, like the taking of a blood sample, would be considered a search and the requirement of probable cause *prior* to the test is explicit.[2] The search and extraction of nitrate traces from the skin is not conceptually different from the search of one's pockets for a gun. Thus, we must conclude that upon any theory of pre-arrest detention, the Court's ruling that the nitrate tests in this case were impermissible was consistent with the law on this point.

One last possibility must be discussed with regard to the prosecution's legal right to further detain suspects without probable cause. This relates to the concept of arrest for investigation which is a rather unsubtle variation of a "pre-arrest detention."

Professor Wayne LaFave, appointed by the American Bar Association to study arrest procedures in the United States, reported that in Detroit "arrests for investigation" were a common practice.[3]

The importance of this fact is that the concept of arrest for investigation implies, as does pre-arrest detention, that at any time of the detention the police have insufficient evidence to justify an arrest for a specific crime. The difference is that under the arrest for investigation practice, the police detention is thought to be a matter of "right" and few if any safeguards are afforded. The Detroit Bar Association has been concerned with this problem for years and as early as 1960 the Special Civil Rights Subcommittee sought to end the practice in Detroit. The problem was so great in fact that they reported somewhat proudly that the number of "illegal arrests" in Detroit were being reduced by almost 25% (nevertheless they considered about 31% (or 13,000) of all arrests that year as being without probable cause and therefore illegal).[1]

This history makes it clear that when Judge Crockett refused to allow continued detention solely to permit investigation, he was not breaking new ground in insisting that the practice was illegal. Not only had the Civil Rights Subcommittee sought to eliminate such arrests but a well publicized report from Washington D.C. declared in 1962 that arrests for investigation were unconstitutional, unwise, and unnecessary.[2] It pointed out further that in well over 90% of the cases the police ultimately released the suspect without even bringing charges.[3]

LaFave's article further indicates how the practice of holding suspects for the purpose of investigating them has been effectively sanctioned by the Detroit Courts and the Prosecutor's Office. If a Writ of Habeas Corpus was brought by or on behalf of a person held in investigatory custody, it was the practice of the Prosecutor to request and the Court to grant an adjournment for up to seventy-two hours so that the police might complete their investigation. This is precisely the technique employed by the Assistant Prosecutor who in at least one case asked the Court to adjourn for twenty-four hours so the police could check the record of an out-of-state suspect.[4]

In view of the long history of unhampered power of the police to arrest suspects for investigation, it is understandable that both the Prosecutor and the police were disturbed and surprised by Judge Crockett's refusal to permit this illegal method of investigation. Moreover, any rebuke of the police which may be implicit in the

[1]*United States v. Rundle, supra,* p. 370.
[2]*Schmerber v. California,* 384 U.S. 768 (1966).
[3]"Detention Investigation by the Police: An Analysis of Court Practices," *Wash. Univ. L. Quar.,* June 1962, p. 338.

[1]28 Detroit Lawyer 21, 22 (1960).
[2]Kamisar, Book Review, 76 *Harv. L. Rev.* 1502, 1504 (1962).
[3]*Report and Recommendations of the Commissioner's Committee on Arrests for Investigation, District of Columbia,* (Horsky Report) 1962 p. 58.
[4]Transcript 41.

holding that the arrests were improper may be unfair in the face of reasonable reliance on the assumption that the Detroit Judiciary would continue to ratify the practice that the Prosecutor's office sanctioned.

However, notwithstanding the good faith of the police in "removing" the suspects en masse to the police station, the validity of the conduct must be viewed in terms of the individual rights involved. In addition, the long acceptance of a liberal policy toward investigatory arrests should not have affected Judge Crockett's analysis of the Constitutionality of the practice. Indeed, the Canons of Judicial Ethics of the American and Michigan Bar Associations require that a judge resist pressures from whatever source in applying the mandates of the Constitution. Canon Three states: "It is the duty of all judges in the United States to support the Federal Constitution and that of the State whose laws they administer: in doing so, they should fearlessly observe and apply the fundamental limitations and guarantees."

The law on arrests for investigation is not equivocal; an arrest cannot be made for investigation without charging the defendant with the commission of a legally defined crime.[1] Moreover, suspects cannot be arrested and booked on technical charges necessary to give the police time to work on the investigation. [2, 3] The Horsky Report at p. 60 referring to the efficacy of arrests for investigation, on less than probable cause, concludes that "the prosecutor cannot introduce in evidence articles taken from the prisoner—not even his fingerprints." The reasoning of the Horsky Report is directly applicable to the nitrate test results and such evidence is unavailable to the Prosecutor.[4]

[1]*Collins v. United States*, 289 F. 2d 129 (5th Cir. 1961).
[2]*Staples v. United States*, 320 F. 2d 817 (5th Cir. 1963).
[3]*Manual v. United States*, 355 F. 2d 817 (5th Cir. 1965).
[4]See also *Bynum v. United States*, 262 F. 2d 465 (1958).

Finally, we cite the thoughtful opinion of Judge Sobeloff in a case strikingly pertinent to the one at hand:

> In ordering the issuance of an injunction we have not blotted from our consideration the serious problems faced by the law enforcement officer in his daily work. His training stresses the techniques of the prevention of crime and the apprehension of criminals, and what seems to him to be the logical and practical means to solve a crime or to arrest a suspect may turn out to be a deprivation of another's constitutional rights. And where one policeman is killed and another wounded, the police and the public, too, are understandably outraged and impatient with any obstacle in the search for the murderer. While fully appreciating the exceedingly difficult task of the policeman, a court must not be deterred from protecting rights secured to all by the Constitution.
>
> The Police department is society's instrumentality to maintain law and order, and to be fully effective it must have public confidence and cooperation. Confidence can exist only if it is generally recognized that the department uses its enforcement procedures with integrity and zeal, according to law and without resort to oppressive measures. Law observance by the police cannot be divorced from law enforcement. When official conduct feeds a sense of injustice, raises barriers between the department and segments of the community, and breeds disrespect for the law, the difficulties of law enforcement are multiplied.[1]

In view of our analysis of the issues involved we conclude: First that the nitrate tests were not sufficiently reliable evidence to require a finding of probable cause to hold the suspects. This conclusion is supported by the apparent lack of confidence in such tests shown by the Prosecutor's office. Although they had positive test results they neither sought a warrant nor brought a charge. Second that even if the tests were *prima facie* probable cause, the tests were taken in such a questionable time and manner that their exclusion by the Judge was fully justified.

[1]*Langford v. Gelston*, 364 F. 2d 197 (1966) at p. 204.

3. MAY THE RESULTS OF THE NITRATE TESTS BE USED IF SUCH TESTS WERE TAKEN WHILE THE SUSPECT WAS BEING HELD INCOMMUNICADO AND NOT ADVISED OF HIS RIGHT TO COUNSEL?

The Court's ruling in this regard was primarily based upon *Wade v. United States,*[1] a recent United States Supreme Court case which held that a line-up for identification purposes was a "critical" stage which entitled the suspect to the presence of counsel. Thus, if the taking of a paraffin nitrate test is analagous to a line-up in that the lawyer is needed to assure fairness of the procedure, the police committed Constitutional error in failing to offer each suspect the assistance of counsel. On the other hand, if a nitrate test is closer to fingerprints, where the method of taking them is well established and the reliability recognized, no counsel is required. The courts have not yet resolved this issue and the Judge's ruling might well turn upon factual considerations relating to the specifics of nitrate testing and not legal rules. In this regard the well-known deficiencies of the test may be a relevant factor in that a knowledgeable attorney could assure that foreign materials are not touched by the suspect. One court has lent credence to the Judge's position, however, as it refused admission of the results of such a test after specifically distinguishing it from fingerprinting.[2] Although this judgment is probably the most questionable of those discussed, we must conclude that Judge Crockett's ruling was not so far afield of the established law in this area as to warrant even the slightest implication of incompetency or impropriety.

[1]*Wade v. United States,* 388 U.S. 218 (1966).
[2]*Brooke v. People,* 339 P. 2d 993 (1959).

IV. CONCLUSION

The Judiciary is not so sacred that it is beyond criticism. Every judge of this land has an obligation to the people and the right of citizens to disagree with or protest any ruling is ingrained in our political system. However, when the criticism turns to vituperative accusation, and the integrity and competency of a judge is challenged, we think there is a special need for sober examination of the situation. New Detroit is disturbed that much of the criticism surrounding Judge Crockett's rulings after the New Bethel shooting has been provoked by inaccurate reporting of facts and inadequate understanding of the law. We hope that this memorandum will be helpful in dispelling widespread misapprehensions of fact and law, explaining the judicial role in our legal system and restoring calm and perspective to our society.

Not every lawyer or judge will agree with every ruling made by Judge Crockett. There has never been a judicial ruling yet that has met with unanimous approval. Yet neither legal disagreement nor the frustration resulting from our inability to immediately solve every crime and catch every criminal can justify a personal attack upon a Court which has exercised its authority in good faith and with the support of state laws and the United States Constitution. Based upon our examination of the facts and law involved in this case, we are convinced that Judge Crockett's actions were taken in good faith with ample legal basis. We hope that this will be the end of the matter.

CONCURRING REPORT WITH COMMENTS

I concur with the majority report's conclusion that Recorder's Court Judge George W. Crockett, Jr. was not guilty of judicial misconduct in his handling of the 142 arrestees resulting from the horrible events at the New Bethel Church.

To state it positively, I believe that under applicable law Judge Crockett acted within permissible and accepted limits of judicial discretion in holding court at the precinct station and in his decision of the several legal and factual issues that came before him on that Sunday.

Since the majority and I now agree in substance on the validity of Judge Crockett's conduct with respect to his convening of court early Sunday morning his issuance of the Writ of Habeas Corpus and his decision to release the so-called "nitrate suspects" on the evidence (or lack of it) then before him, I shall confine my remarks to the arrest issue (without detracting in any way from the conclusion stated above) and to comments that I think should be made.

I cannot accept the main thrust of the majority as to the original arrests. After all discussion is sifted, I interpret them to conclude that the arrests were probably unlawful. I refuse to decide that issue. We don't know that we have all pertinent facts (and the majority proceeds only on the facts presented to Judge Crockett) and I would leave final determination to a proper tribunal where all the facts are presented and tested. This is one area that likely will be thoroughly explored in any later trial of those who were arrested in the church.

But I don't think the legality or illegality of the arrests is necessarily pertinent to Judge Crockett's hearings on the Habeas Corpus Writ. Obviously, if the original arrests were unlawful the continued detention could not be justified. But I am not at all sure that Judge Crockett made any such determination. At lease his conduct in holding some and bonding others is not consistent with such a ruling.

But assuming the arrests were lawful under present Constitutional law, the persons in custody were entitled to know the charges against them and have a speedy hearing as to the lawfulness of their continued detention. When Judge

Crockett learned early on Sunday morning that there were no charges and no evidence to support a charge, he acted within the permissible bounds of judicial discretion in discharging the janitor and ordering others to return at noon.

By noon, most of those arrested had been released and Judge Crockett had to decide only as to the few remaining. And he could act then only on the basis of the evidence presented to him. While some judges and lawyers might differ with the conclusions he reached, there is no sound basis for saying that there was any judicial impropriety in the action he took.

COMMENTS

1. *The Confusion Inherent in a Mass Arrest Situation*

   Ever since July of 1967, various groups have been working on plans for handling mass arrests and the processing of prisoners in the event of another emergency. At least one of these plans called for the establishment of temporary court facilities in the several precincts to facilitate the speedy processing of arrested persons. It is obvious that these plans have not been perfected and communicated to the necessary officials. I suggest we waste no further time and put the plans in order so that all concerned will know the ground rules under which they will work. I agree that in emergencies the court should be taken to the precinct if safe to do so, but I do not agree that court should be held in a police station. Any coordination and advance planning should take this into account.

   While I have concluded that Judge Crockett had a Constitutionally valid base for his decisions, I cannot say that other judges could not have decided differently and also been legally correct. The facts and circumstances always enter into and control the Constitutional accuracy of a decision as to the violation of a given individual's rights.

   When the facts are confused or unknown, the circumstances in dispute and the pressures great, it is not surprising that reasonable judicial minds might vary in their conclusions. But the judge on the spot can only make them on the basis of the evidence properly before him.

   I am seriously concerned with the possible consequences of the majority conclusion that

the original arrests in the church were probably unlawful. We don't yet have all the facts necessary to decision, but most of us have heard the police network tape which reported shooting from the church. If the police on the scene reasonably believed this to be true, I believe they were fully justified in entering and securing the church, using only the force necessary to do so. To say as some have said that any further investigation must have been conducted on the scene seems to me to require that we must invite a riot rather than make the necessary arrests and conduct the investigation and court hearing in a protected area. I do not believe that this is good sense or good law.

2. *The Nitrate Suspects*

As stated above, I agree with the majority that Judge Crockett faced issues of law and fact which he decided within the bounds of permissible judicial decision. This is not to say that all lawyers and judges would agree with his conclusion. But the right to decide necessarily includes the right to be wrong. And this is the reason for appellate courts. I have no doubt that the Constitutionality and reliability of nitrate testing in the absence of counsel for the accused will be decided soon—perhaps as a result of this incident. Until it is decided, lawyers and judges will differ as to what that decision should be. But Judge Crockett was acting as a judge and not an interloper when he made his decision to refuse to consider the nitrate evidence in determining probable cause for continued detention.

CONCLUSION

If this city is not to be permanently divided, then we must hold fast to the rule of law and not of men. If we don't, the only alternative is law enactment and enforcement by brute force. An independent judiciary is an indispensable part of our rule of law and must be preserved and defended. It may need reforming and enlargement, but it must remain. If it does not, our liberties go with it. I have yet to meet the man or group of men to whom I would entrust the power to decide my rights and privileges independently of the law. Have you?

Respectfully submitted,
THOMAS L. MUNSON

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