

1622

88Y4
P84/10
Ob 7/3/pt. 2

PROTECTING POSTAL PATRONS FROM OBSCENE
(AND OBNOXIOUS MAIL AND COMMUNIST
PROPAGANDA

Part II

Y 4
P 84/10
Ob 7/3/
PT. 2

GOVERNMENT
Storage

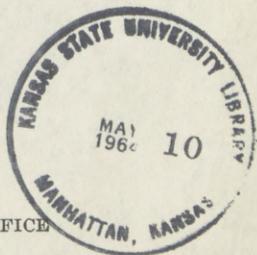


HEARINGS
BEFORE THE
COMMITTEE ON
OFFICE AND CIVIL SERVICE
USE OF REPRESENTATIVES
EIGHTY-EIGHTH CONGRESS
SECOND SESSION

ON
H.R. 142, H.R. 319, and Similar Bills
BILLS TO PROTECT POSTAL PATRONS FROM OBSCENE AND
OBNOXIOUS MAIL AND COMMUNIST PROPAGANDA

APRIL 16, 1964

Printed for the use of the
Committee on Post Office and Civil Service



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1964

COMMITTEE ON POST OFFICE AND CIVIL SERVICE

TOM MURRAY, Tennessee, *Chairman*

| | |
|------------------------------------|----------------------------------|
| JAMES H. MORRISON, Louisiana | ROBERT J. CORBETT, Pennsylvania |
| THADDEUS J. DULSKI, New York | H. R. GROSS, Iowa |
| DAVID N. HENDERSON, North Carolina | AUGUST E. JOHANSEN, Michigan |
| ARNOLD OLSEN, Montana | GLENN CUNNINGHAM, Nebraska |
| MORRIS K. UDALL, Arizona | GEORGE M. WALLHAUSER, New Jersey |
| DOMINICK V. DANIELS, New Jersey | ROBERT R. BARRY, New York |
| LINDLEY BECKWORTH, Texas | KATHARINE ST. GEORGE, New York |
| HARLEY O. STAGGERS, West Virginia | EDWARD J. DERWINSKI, Illinois |
| ROBERT N. C. NIX, Pennsylvania | ROBERT F. ELLSWORTH, Kansas |
| JOE R. POOL, Texas | HOMER E. ABELE, Ohio |
| ALBERT W. WATSON, South Carolina | ALBERT W. JOHNSON, Pennsylvania |
| EDWARD R. ROYBAL, California | |
| CHARLES H. WILSON, California | |

CHARLES E. JOHNSON, *Staff Director*

JOHN H. MARTINY, *Counsel*

B. BENTON BRAY, *Professional Staff member*

WILLIAM A. IRVINE, *Professional Staff Member*



CONTENTS

| | Page. |
|--|-------|
| Statement of— | |
| Miller, Hon. Herbert J., Jr., Assistant Attorney General, Criminal Division, Department of Justice, accompanied by Herbert E. Hoffman, Chief, Legislative and Legal Section, Office of the Deputy Attorney General, and Edward J. Pesce, attorney, Criminal Division, Department of Justice----- | 181 |

III



CONTENTS

181

181

181

181



PROTECTING POSTAL PATRONS FROM OBSCENE AND OBNOXIOUS MAIL AND COMMUNIST PROPAGANDA

(Part II)

THURSDAY, APRIL 16, 1964

HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., room 215, Cannon House Office Building, Hon. Tom Murray (chairman of the committee) presiding.

Mr. MURRAY. The committee will come to order.

This committee, at the last session, agreed that the first order of business this morning would be the presentation of testimony on H.R. 319 as reported from the subcommittee by representatives of the Department of Justice.

The witness for the Department is Herbert J. Miller, Jr., Assistant Attorney General. The committee will be glad to receive Mr. Miller's testimony at this time.

STATEMENT OF HERBERT J. MILLER, JR., ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE; AC- COMPANIED BY HERBERT E. HOFFMAN, CHIEF, LEGISLATIVE AND LEGAL SECTION, OFFICE OF THE DEPUTY ATTORNEY GEN- ERAL; AND EDWARD J. PESCE, ATTORNEY, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. MILLER. I would like to introduce Herbert Hoffman, Office of the Deputy Attorney General, and Edward Pesce, lawyer, in the Criminal Division.

Mr. Chairman and members of the committee, for the record, my name is Herbert J. Miller, Jr. I am the Assistant Attorney General, in charge of the Criminal Division of the Department of Justice.

We appreciate your invitation to have us comment on H.R. 319 with the subcommittee amendment. The proposed bill provides that an individual who receives mail matter, which, in his opinion, appeals to prurient interest, may request the Post Office Department to notify the sender to remove that individual's name from the mailing list. The postal authorities must notify the sender and fix a time limit after which the sender is prohibited from sending any mail to that individual.

If matter is received in violation of the notice and the mailed matter, in the opinion of the recipient, appeals to prurient interest, the re-

recipient may return the matter to the postal authorities together with an affidavit of the facts. Whereupon the sender is liable to a fine not exceeding \$5,000 or imprisonment up to 5 years, or both. The objective of the bill is to protect postal patrons from what, in their opinion, is obscene.

The primary difficulty with the proposed statute is its failure to comply with those standards required by the due process clause of the Constitution.

Thus, as the Supreme Court has stated, due process requires that language of a penal statute, and I quote:

convey (a) sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices * * * (*United States v. Petrillo*, 332 U.S. 1, 7-8).

The principle was well stated by Mr. Justice Frankfurter in the *Burstyn v. Wilson* case (1951) (343 U.S. 495, 532), as follows:

Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards, offends due process * * * [in that] it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law enforcing authority, whether court, or jury or administrative agency.

Here the action of the mailer in placing the matter in the U.S. mails would be a legal act and become criminal only when the recipient, by his own subjective standard, determined that the matter appealed to his prurient interest.

The sender would be unable, even assuming he were a law-abiding citizen, to comply with an ascertainable legislative standard. Thus, he could innocently run afoul the provisions of the criminal statute carrying substantial penalties.

This result flows from the undisputed fact that it is impossible to predict what fancy or whim might cause the recipient of matter sent through the mails to determine that the matter appealed to his prurient interest. It would seem clear that the proposed bill does not meet those minimum due process requirements established by the Constitution.

There is an additional constitutional problem which should be mentioned. An effect of H.R. 319 is to impose a restraint on the free dissemination of material through the mails by a sender. In cases involving broader restraint than is involved in the proposed bill, for example, as in *Near v. Minnesota* (283 U.S. 697), where a newspaper was enjoined from publishing future issues because a previous issue had been found to be "defamatory," the Supreme Court has said that any system of prior restraint of expression comes to the Court bearing a heavy presumption against its constitutionality.

This poses the basic issue of whether Congress can constitutionally provide criminal sanctions for causing mail to be delivered to a particular recipient after the mailer is given notice that the recipient does not desire to receive such matter through the mail. Case law does not resolve this problem, but it obviously points out an area of concern as to this particular bill.

Nothing in H.R. 319 requires proof of knowledge or wilfulness on the part of the sender. The bill imposes a liability on the sender, which the Supreme Court in *Smith v. California* ((1959) (361 U.S.

147)) indicates would skirt the border of unconstitutionality in a criminal obscenity statute. However, this could be easily modified by adding a requirement of knowledge.

Finally, insofar as the bill is aimed at punishing dissemination of the obscene by mail, it is unnecessary. Chapter 71 of the Criminal Code prohibits the mailing of obscene matter imposing a penalty of up to \$5,000 or 5 years' imprisonment, or both, for the first offense, and a fine of up to \$10,000 or 10 years' imprisonment, or both, for each subsequent offense.

That concludes my prepared statement, gentlemen.

Mr. MORRISON. Mr. Chairman.

Mr. MURRAY. Mr. MORRISON.

Mr. MORRISON. Mr. Miller, the Department of Justice is opposed to enactment of this bill?

Mr. MILLER. It is.

Mr. MORRISON. You spoke of the unconstitutionality of H.R. 319. In your opinion, is it unconstitutional?

Mr. MILLER. Yes; it is. I feel that it causes a real area of concern, primarily for this reason:

The bill gives to every individual who received mail in the United States, in effect, a determination as to whether certain matter is or is not obscene, and subjecting an individual to substantial criminal penalties on the basis of that determination. That determination is not any legislative standard, but it is the subjective determination of the recipient of the mail.

For example, if I received or if someone received a copy of the Bible through the mail, or a Ward's or Sears, Roebuck catalog through the mail, each of those books or periodicals could be considered by some individuals in the United States as appealing to their prurient interest, and that is what concerns the Department of Justice about this bill as drafted.

Mr. MORRISON. According to that explanation, you feel that it could be unconstitutional if this bill were enacted.

Mr. MILLER. Yes, sir.

Mr. MORRISON. And it would be absolutely impossible to enforce?

Mr. MILLER. It would be exceedingly difficult, exceedingly difficult.

Mr. MORRISON. By way of explanation of my position, I had an opportunity when the subcommittee came to New Orleans to sit in the hearings on obscene literature, and various public officials testified. We had, as I remember, members representing the schoolteachers and parent-teacher associations, and the district attorney for the State who stated that he had adequate laws in which to stop this obscene literature. As a matter of fact, he gave examples of where the State's attorney had just about stopped the source of all obscene literature in New Orleans—and at one time it was of considerable volume. And as a result of his active enforcement, there was very little, if any, obscene literature being distributed in that area.

When we asked him if they had adequate laws to prosecute violators, he said they had the laws to stop the distribution and dissemination of this obscene literature.

Are there present Federal statutes on the books that give you all the tools and implements that your Department needs to cope adequately with this situation?

Mr. MILLER. Yes. The basic statutes, of course, are those which make it a Federal crime to send obscene matter through the mail or carry it in interstate commerce through the express companies or common carriers.

The real problem in this field, and I'm sure you and the other members of the committee recognize this—the real problem in this area is what is obscenity? What constitutes obscenity? You could get a varying view from every person in this room as to whether something was or was not obscene. You can read the varying decisions of the States and Federal courts attempting to determine what is, or laying down standards as to what is or is not obscene, and you can see the variance in different areas of the country and you can see the variance of decisions today contrasted with those, say, of 20 years ago.

So that as far as the statutes which make it a criminal offense to pander obscene materials, I feel that the statutes are adequate. The real problem comes—and it is a constitutional problem—how far the Federal Government can or should go in the area of ideas, thoughts, which are embodied in periodicals and other written items.

Mr. MORRISON. It seems to me I recall reading in the paper several weeks ago that there was a conviction, I believe, in New York City for sending out obscene material. Do you recall that?

Mr. MILLER. There have been—

Mr. MORRISON. I momentarily can't think of the name but I remember reading about it.

Mr. WATSON. Mr. Ginzburg.

Mr. MILLER. Mr. Ginzburg, I believe, sir, was convicted in Philadelphia. He was the publisher of Eros and other publications.

There was a conviction of a man named Klaw in the southern district of New York, a Federal case. There was a recent case where you had a large-scale seizure of paperback books. This was done by the local police department. I don't know the status of that case. I think it is currently in litigation.

Mr. MORRISON. This conviction of Ginzburg, who was convicted in Philadelphia, and the other case, Klaw, that you mentioned in New York, were they convicted under existing statutes?

Mr. MILLER. That is correct; existing Federal statutes.

Mr. MORRISON. And you feel that those statutes are adequate to cope with the problem in the future?

Mr. MILLER. I do, sir.

Mr. JOHANSEN. Will the gentleman yield just at that point?

Mr. MORRISON. Yes.

Mr. JOHANSEN. Have either of those two cases that have been cited yet gone to the U.S. Supreme Court?

Mr. MILLER. They have not gone to the U.S. Supreme Court. In fact, they have not even been passed on by the court of appeals yet.

Mr. MURRAY. Anything further, Mr. Morrison?

Mr. MORRISON. No, sir.

Mr. MURRAY. Mr. Cunningham, do you have any questions?

Mr. CUNNINGHAM. Yes; I do.

Mr. MURRAY. Mr. Cunningham is author of this legislation.

Mr. CUNNINGHAM. I first of all refute the reasons given by the Justice Department for their opposition to this bill as well as the arguments made by the gentleman from Louisiana.

Mr. MORRISON. Mr. Chairman, will you kindly yield?

Mr. MURRAY. The gentleman refuses to yield. Regular order. All right; go ahead, Mr. Cunningham.

Mr. CUNNINGHAM. Mr. Miller says that he feels they have adequate statutes on the books to deal with this problem. This will come as a great shock and surprise to millions of parents because if you have such statutes, you are either not enforcing them and prosecuting these violators, or you are not gaining victories in the courts, because the Supreme Court has knocked these cases down right and left under your so-called existing statutes. And in the *Ginzburg* matter, they are going to probably do the same.

You can usually get a conviction on a lower level. When it gets up to a higher level, you lose. Now, if you have adequate statutes on the books and you are not making any headway in curbing this cesspool activity, there is something radically wrong somewhere.

Now our subcommittee doesn't use the word "obscene" here because it is hard to define. If something comes to my minor child and an action brought, this action is heard before an adult jury. An adult jury under the law has to decide in his mind whether he thinks it is obscene. And he may not think so. You may not think so or I may not think so, and we just throw it in the wastebasket and forget about it.

But where the gap is is that the jury is not allowed to determine whether this would be obscene to my minor child, and this is the purpose of this legislation. My home is my castle and the mailbox is a part of my home, and I have a right to determine whether I want this type of trash coming into my home or not.

There was a recent Supreme Court decision on a prayer case. A woman didn't want her child to be subjected to prayer or bible reading in a public school. The Supreme Court ruled in her favor on the basis of parental right. Well, I have a parental right in this matter with six children of my own and it has happened in my own home, where my son, who was a member of the Boy Scouts, sent in for a little packet of stamps from the Boy's Life magazine, 25 cents, a legitimate transaction, and 3 or 4 years later he starts getting this trash because of the transfer or the sale of these lists of names of boys who sent in for a legitimate item. The lists are sold to the dealer in obscenity at a very high price.

And so there is a tremendous traffic in this list brokerage operation, and the only way we are going to meet that problem is through some statute like this. I don't agree with the Supreme Court's decision in the *Prayer* case—but I will have to say that I have just as much right to tell my children or to intercept mail that might be addressed to my minor children. I have just as much a parental right to do that as the Supreme Court said this lady had in the *Prayer* case.

But I'm amazed to hear you say that you feel that you have the necessary statutes when this problem is getting bigger and bigger and bigger and it is a multi-billion-dollar business. So where is the breakdown? I'm asking you if you have adequate statutes, where is the breakdown?

Mr. MURRAY. You may answer.

Mr. MILLER. I would like to run through the various points that you have raised.

Starting out with whether or not the Department of Justice is enforcing those statutes which are currently on the book, I think, Congressman, that you and I have both got to realize that you have to start with the basic proposition that you are here dealing with a constitutional principle that deals with two conflicting rights. One is the right to freedom of speech and the other is the right, as you put it, to privacy—to be left alone.

Mr. CUNNINGHAM. I must interrupt you because there are now Supreme Court decisions that limit the right to freedom of speech. There are many cases on that. There are certain things that they have ruled on to limit the freedom of speech.

Mr. MILLER. That is correct. In the *Roth* case—

Mr. CUNNINGHAM. I am not denying anybody else freedom of speech. I am only saying I don't want this trash coming into my home when I didn't ask for it.

Mr. MILLER. Congressman, I didn't make the statement—the Supreme Court did—that whatever is taken from the area of free debate by reason of being declared obscene or held to be defamatory, is a limitation on the right of freedom of speech. True, courts have flatly held in many cases that obscene matter is not covered by the first amendment, that defamatory matter is not covered by the first amendment, but whatever is encompassed within those terms is taken from the area of free debate.

And what I am saying to you, Congressman, is that although I may personally feel that pictures of nude males posed in suggestive ways and which are sent through the mails may be obscene by my standards, may be patently offensive by my standards, my standards as a prosecutor do not govern what is or is not obscene. Those standards—

Mr. CUNNINGHAM. I'm only saying what is obscene as far as I'm concerned. I'm not saying what my neighbor would want to receive.

Mr. MILLER. Those standards are decided upon by the Supreme Court. And I would say, Mr. Cunningham, that under the bill as drafted, you would in effect be saying what is obscene or at least what appealed to your prurient interest is determinative of whether or not I should prosecute a man and attempt to convict him so that he would be subject to 5 years' imprisonment. It would be your personal subjective determination which controls whether or not I, as a Federal prosecutor, would indict that man, bring him to trial and try to convict him and sentence him to jail.

So I say, sir, that it is the subjective testimony—

Mr. CUNNINGHAM. Mr. Miller, if I say that this appeals to the prurient interest of me or my minor child, that I don't want any more of it, then if a person says, "I'm going to send you more of it," and I get some more, this is where the penalty comes in.

Mr. MILLER. Mr. Congressman, I agree. Therein lies the problem. What are individuals going to do who are recipients of mail which they do not ask for and which shows up in their post office box—how is this taken care of? How can this be handled?

I say that the way that is suggested that it be handled in H.R. 319 is unconstitutional because of the subjective standard type of approach

I mentioned. And I would point out that there is already on the books a civil statute which enables an individual—and I'm no expert in this civil matter—who is the recipient of mail which he considers obscene, lewd, or lascivious, to go to postal officials and demand that such mail not be delivered to this individual.

Mr. CUNNINGHAM. Mr. Miller, that is as far as—

Mr. MILLER. All I know about that statute is what is provided in the code, Mr. Cunningham. I have no knowledge as to how it is enforced, or how it operates.

I read the testimony of Mr. Doyle, who is the General Counsel of the Post Office Department—

Mr. CUNNINGHAM. I'm very familiar with that and I will explain it to you.

Mr. MILLER. I will be very interested.

Mr. CUNNINGHAM. If I get a piece of mail and I don't like it, I can say to my postman, take it back to the post office. Millions of people are upset about this obscenity problem. Can you imagine my letter carrier. He is going to have a whole space, maybe as big as this room, pasted with notices from the people to whom he delivers mail saying they don't want a particular piece of mail. So he is going to spend half of his day looking at what is coming in and checking all of these notices to see if this man or this householder wants this piece of mail.

And it doesn't stop the repetition of it. It can go on and on and on. So it is not workable. It has no effect. If I want to do that, all I have to do is tear it up and throw it in the wastebasket, but my children may get the mail first. It in no way stops the selling of a legitimate list of names to a dealer in obscene material.

Mr. MILLER. I would say, however, that there is a provision. Now maybe it is lack of personnel in the Post Office Department. Perhaps they don't have a sufficient number of letter carriers to run through these various notices that are stacked, or pasted to the wall, but here you do have a provision, as I read it. I have no expertise or knowledge as to this civil statute, other than what I read here from the public law, where notice may be given to the postmaster, he then shall not deliver this mail to the addressee.

Mr. CUNNINGHAM. Well—

Mr. WALLHAUSER. Will the gentleman yield for a question?

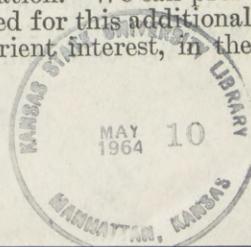
Mr. CUNNINGHAM. Yes.

Mr. WALLHAUSER. What protection does a person have if somebody walks into his home without invitation. What can he do about it?

Mr. MILLER. Well, I suppose you have the ancient right of self-help, which is to a certain extent frowned upon. You have a right to sue civilly for trespass and seek damages for the wrong done you. And if the man has entered the house with a felonious intent to commit some act thereafter, then you can call the prosecutor who will come and ascertain what the facts are, and if they violate an existing statute, then you would have him prosecuted.

Mr. WALLHAUSER. The person who sends prurient mail is invading your home with felonious intent, in effect.

Mr. MILLER. If the material is in fact obscene, or if you prefer, appealing to the prurient interest, there is a violation. We can prosecute under the existing statute. There is no need for this additional law. If mail matter which appeals to the prurient interest, in the



subjective determination of the recipient of that mail, then that would be prosecutable under the proposed statute.

Mr. JOHANSEN. Will the gentleman yield?

Mr. WALLHAUSER. After one question.

The prosecution only comes after the second violation in this case?

Mr. MILLER. Well, there would be a notice given and then subsequently mail received from the same sender.

Mr. WALLHAUSER. Right.

Mr. MILLER. But it need not be the same mail. For example, if I may throw out one example which would give me great concern. Let's assume that pictures of nude women were in fact sent into the home, or advertisements as to where to procure them. Notice was given to the postmaster. Subsequently that same sender sent out a catalog from a legitimate store he also operated. This catalog contained pictures of women in underwear, which the recipient—in all due honesty—determined to be offensive and appealed to his prurient interest. And he so stated in an affidavit and forwarded it to the Post Office Department.

Now that sender has violated the statute, as I read it, even though the second mailing is something which is commonplace. You can see it in your newspaper, your various periodicals, to a certain extent; even on television, which comes right in the home. And yet that man would be committing a felony under the provisions of that statute.

Mr. WALLHAUSER. But we are talking only about unsolicited mail. However, he has the right of appearance in court. He has the right of defense. He just isn't automatically fined and automatically sent to jail. It has all to be proved.

Mr. MILLER. All that would need to be proved—and this is really the vice—is that he had the original notice given and he subsequently received mail which, in his judgment, by his own subjective standard, appealed to his personal prurient interest. That is the violation.

If I were prosecuting, I would prove the original notice; I would prove the subsequent receipt; I would prove the affidavit which this fellow, in his own opinion, said that this appeals to his prurient interest, even though it might be the Bible, for example; and then I would have completed my presentation and would have made out a violation of this statute as written.

Mr. JOHANSEN. Will the gentleman yield?

Mr. CUNNINGHAM. Yes. But mentioning the Bible is a smoke-screen. Nobody sends Bibles through the mail unless they are ordered, and this bill does not apply to anything a person subscribes to.

Mr. JOHANSEN. What is the dividing line, so far as law and judicial precedent is concerned, between objective proof of obscenity and this subjective judgment that you speak of?

Mr. MILLER. The subjective judgment as to what is or is not obscene is the judgment that you or I make upon being presented with a particular piece of printed matter. The judgment that the law makes as to what is or is not obscene is garnered from going through the many Supreme Court and other decisions, judicial decisions, which have established certain standards as to what is or is not obscene.

Now, for example, you had in the *Manual Enterprises* case pictures of nude males suggestively posed. The court of appeals held them to be obscene within the meaning of the statute as they applied the

standard, finding that the material appealed to the prurient interest of the group of homosexuals for whom this matter was obviously designed and sent through the mails.

Mr. JOHANSEN. Didn't they get into subjective aspects when they said that it appealed? Wasn't their judgment that it appealed to the prurient interests? Wasn't that in itself a subjective judgment?

Mr. MILLER. It was a subjective judgment within the framework of the laws and the cases which have grown up through the history of the common law.

And one further thing was developed when that case was reversed by the Supreme Court and this matter was held not to be obscene. Justice Harlan, announcing the judgment of the Court, pointed out that not only was there a problem from an appeal to the prurient interest standpoint but he went on to say that the court of appeals had to consider another element implicit in the *Roth* case, whether or not the material was patently offensive. You can call it a subjective judgment, if you will—

Mr. JOHANSEN. Certainly.

Mr. MILLER (continuing). Or you can call it taking a definition which has grown up in the body of law; but it was said under a standard previously established in case law that these photographs were not patently offensive, and, consequently, were not obscene.

Now the trouble is, Congressman—and I know the problem that this has created, because I spent some little time on it, and I am sure you have, too—I don't want pictures such as this coming into my home any more than you do, but the real difficulty is with the definition of what is obscene. And you and I both are bound by that definition from a constitutional standpoint.

Mr. JOHANSEN. I reserve the right to have further time.

Mr. CUNNINGHAM. I want to pursue this for a moment or two. You say the whole trouble is with the definition of obscenity. And that is the reason we have been losing cases right and left. This is the reason we use prurient interest, and allow the homeowner, whose home is invaded, to make that decision. And so we are following the Supreme Court's decision in its latest case, the *Roth* case, when we use the word "prurient"—which is defined by the dictionary as longing of persons, having lascivious longings of desire, curiosity, or propensity, lewd, and so on.

By using the word "prurient" we define what we think is obscene. But we don't use the word "obscene" because you can get a million different opinions on that.

But, anyway, this is a tremendous problem throughout the country, and people are more concerned with this at the grassroots level than almost any other problem.

I wrote the late President Kennedy and asked for help. I asked, with all of the talent down in the executive branch—and primarily in the Justice Department—if they wouldn't study this problem and come up with some recommendations to meet it. The Justice Department comes up with almost every other kind of a study such as suggestions on dope addiction, and juvenile delinquency, and all this. But I get back a letter from somebody in the Justice Department saying, in effect: "No; we are not going to make any such study" "freedom of speech," and all that sort of stuff. And so nothing came of it.

I noted, however, there is a tremendous effort to arouse the people in New York City right in the downtown area called Operation Yorkville. This is headed up by a Jesuit priest. And it has on its steering committee Protestant ministers and Jewish rabbis. And they are doing a tremendous job up there. They support this bill. In fact, they sent literally hundreds and thousands of communications to the President urging that he establish a commission to make a study of this problem.

Evidently the Justice Department became concerned enough about their activities that they invited 12 of them to come down to the Justice Department. Mr. Robert Kennedy invited them down. And maybe you were in that meeting.

Mr. MILLER. No. I believe my executive assistant met with them.

Mr. CUNNINGHAM. And it was reported to me that they were concerned and they were hopeful that Operation Yorkville would continue its activity, and left the thought that the Justice Department would come up with some recommendations in this field. But this has never happened. It has never taken place.

As far as the Justice Department's opposition is concerned, I will say now what I have said many times: if this committee is only going to consider those pieces of legislation that are sent down here or have the approval of the departments downtown, then we may as well just rubberstamp everything, shut up shop, and go home.

The Justice Department vigorously fought the amendment that I sponsored, having to do with the free delivery of Communist political propaganda. Every agency of the Government practically, including the Treasury and Edward R. Murrow and Justice, and I don't know who all, fought it. But the people wanted that type of legislation and the Congress passed it. And it is working fairly well, although some liberal-oriented groups out on the west coast are going to bring a suit on it.

I wrote the Attorney General and asked that even though they opposed it would they vigorously prosecute it, and he assured me he would. We'll see what happens.

I don't think you can say, sir, what is and what is not constitutional, make a definite statement to that effect. Just like we in the Congress can't say, as we debate legislation, that you better not pass this because the President is going to veto it: we never say that, or very rarely; because we don't know.

Mr. MILLER. I agree that any statement I make here, that a statute may or may not be unconstitutional, has no definitive weight or effect. But I would hope that the cases, particularly the Supreme Court cases, which deal in this area of due process, and which are as available to the members of the committee as they are to me, would provide a guide which we could sit down and read to come to our own conclusions.

I have done that. And I assume that you have done that.

I would like to go on to Operation Yorkville, if I may, for a minute and point out that I do feel that this type of an operation is something which has demonstrated success.

In reading again, in skimming through your hearings, I find that there is a similar organization which is based, I believe, in Cincinnati, Ohio. I forget the name.

Mr. CUNNINGHAM. Citizens for Decent Literature.

Mr. MILLER. I read with great interest the impact that these individuals had made by bringing the problem to the attention of the local police, the local district attorney, and people who were at the local level.

The interest of the Federal Government is, of course, only where interstate commerce or where the mails are involved. Once these publications are on the stands, the newsstands around the various cities of the United States, there is nothing that we can do.

Mr. JOHANSEN. May I interrupt right here—

Mr. MILLER. Yes.

Mr. JOHANSEN (continuing). To say if we applied as liberal an interpretation of interstate commerce to this problem as is applied to the civil rights legislation, we might even be able to do something with magazines on the newsstands.

Mr. MILLER. I am not particularly familiar with the civil rights legislation, but I rather doubt that the interstate commerce clause could be applied to reach publications which may not even have been in interstate commerce.

But what I am saying is that you have a twofold interest here: in the first place the Federal Government has traditionally been looked upon very carefully by the courts whenever it has ventured in the field of obscenity. Indeed, the same thing is true when the Federal Government ventures into the area of sedition and seditious statements; and this is the history of this country. Concerning the Federal Government, on the one hand, if something is determined to be obscene at the Federal level, then you have in effect blocked it, as it were, from transmission among the 50 States. The Supreme Court noticed this in a recent decision when it said if an individual State determines that something is obscene, that publication is barred only in that State, but may in fact be available in the other 49. I think—

Mr. CUNNINGHAM. Operation Yorkville does an excellent job; but, as you say, it is a two-headed problem. They are working at the local level, trying to educate the people and do whatever they can to keep this type of thing off the newsstands, and it doesn't move in interstate commerce. A tremendous amount of prurient matter is published right there in New York City. So the only thing that we are concerned with here is what moves through the mails. That is our responsibility.

You made the statement that you feel that the statutes are adequate. This, as I say, will be somewhat of a shock to quite a few people. The Justice Department therefore does not have any suggestions for meeting this problem?

Mr. MILLER. The Department of Justice, so far as the Criminal Division is concerned, does not request or desire additional statutes in the criminal field.

Mr. CUNNINGHAM. You are speaking for the Department of Justice?

Mr. MILLER. I am speaking for the Department of Justice. I have not had a chance to talk to John Douglas in the Civil Division, or go into this matter as to what areas the Department might be interested in in the civil field. I was asked to come down here to comment upon this bill and that is what I have done.

I am very sorry. I should have taken the time to check so I could give you a complete answer.

Mr. CUNNINGHAM. Thank you very much.

Mr. MURRAY. Mr. Dulski.

Mr. DULSKI. Thank you very much, Mr. Chairman.

First of all, you probably know that this committee has been functioning for a few years. We have gathered information from all parts of our country, and after getting our heads together we have amended the bill to read: "A bill to protect postal patrons from prurient mail matter," and we have eliminated the word "obscene." According to Webster, he defines "obscene" as "ill looking, filthy, foul, disgusting, and offensive."

You mentioned that a man who receives a catalog or a Bible could say that it might appeal to his prurient interests. Webster defines "prurient" as "having lascivious longings."

How could you say that the Bible or any piece of material that is in that catalog would have lascivious longings?

Mr. MILLER. The answer is I probably wouldn't. But as I read the statute—and if I am wrong I stand corrected; but the way the statute reads, after the notice provisions have been complied with—

if such person or his minor child receives mail matter mailed in violation of such notice, which—

And I emphasize this phrase—

in the opinion of such person appeals to prurient interests, and such person returns such mailed matter to the Department together with his sworn statement of the pertinent facts, the sender shall be fined not more than \$5,000 or imprisoned for not more than 5 years.

Now, Congressman, as I read that, what I think as a prosecutor—whether this appeals to the prurient interest or not—has no bearing on the issue. The issue is whether or not the recipient in his own subjective judgment felt that it appealed to the prurient interest. And I know for a fact that there are individuals around the country who feel that lingerie ads appeal to the prurient interest.

I would have no determination to make as to whether the material was obscene, that it appealed to the prurient interest or not. That would be a determination for the recipient.

Mr. DULSKI. That is correct.

Mr. Miller, pursuing the question a little further: I am sure that there are thousands of cases on the docket right now that are not being tried because it would be foolish for us to enter into the courtroom.

I know that in many of the internal revenue cases they are settled because you couldn't prove fraud. There might be a civil penalty and the Treasury Department settles out of court. But from the beginning the agent who presented the case presented fraud, and it was accepted at a district level. When it reached a higher level, though, we couldn't prove it. We would have a hard case to prove fraud, which is 100 percent penalty plus imprisonment. So they settle for 50 percent, 25 percent: any kind of penalty to settle out of court. Wouldn't you do the same thing on cases of this nature, Mr. Miller?

Mr. MILLER. In the first place, if the violation was complete, as it would be once the affidavit was filed, then we would go ahead and prosecute.

Mr. DULSKI. Regardless of the evidence that you have?

Mr. MILLER. The evidence would be airtight. You would have, assuming we could prove the notice, assuming that we could prove that the man executed an affidavit, and that he would still testify that this matter appealed to this prurient interest: that is all we need prove.

So if I fail to prosecute, then I could be accused, as has happened in the past, of failing to perform my duties and obligations that I swore I would perform at the time I undertook this job.

What you are referring to, I am sure, is the normal prosecutive discretion that is vested in any prosecutor. If it is a bad case you don't like to bring it, and you don't. But here, where you would have, in effect, a flat direction of Congress that this was a crime, you probably would not have too much choice in the matter.

Mr. DULSKI. I yield to the gentleman.

Mr. HENDERSON. Is there any other provision in this bill that makes it a crime?

Mr. MILLER. No.

Mr. HENDERSON. Upon the proper filing of the notice and then the complaint, every district attorney would have to take every case properly presented to him as a violation and put it on the docket and try it?

Mr. MILLER. That is right.

Mr. MURRAY. Mr. Udall.

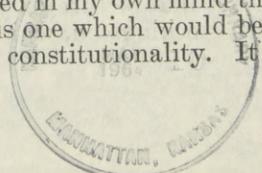
Mr. UDALL. I have no question; but I want to make a very brief statement, which I hope will not terminate my beautiful and rewarding friendship with the gentleman from Nebraska, who is a most valuable and fearless and independent member of this committee.

I was a sponsor of one of the original bills—not the bill that is before us; 2 years ago Mr. Cunningham and I started off jointly sponsoring legislation on this subject in this Congress. Our bills in the 88th Congress are somewhat different. I have come to the conclusion that, while we need additional laws on the obscene material, I don't think we need this bill as written by the subcommittee. I think that it would be a mistake to pass it, and I am going to vote against reporting it to the House.

I am bothered by the question of constitutionality. I think there is a serious question.

The bill, as I originally drafted it, had no criminal penalties. All I was trying to do was to make an end run around this whole problem of what is and what isn't obscene, and to simply establish a householder's right to get off the mailing lists. The penalty I provided was simply that the mailer, who we give through the Post Office Department the privilege of sending third-class mail at a subsidized rate, that if he didn't set up facilities to take my name off mailing lists when I wanted to get off the lists, whether he was mailing the Bible, or ads for the Bible or the latest Beatle record, or Shakespeare, or whatever it might be, he might lose his mailing permit. This was all I was trying to do.

Now the subcommittee has labored long and hard. I have good friends on the subcommittee. I am reluctant to depart from their company in this particular issue at this time. But I pondered this for many recent months, and I am satisfied in my own mind that the solution that the subcommittee reached is one which would be impossible to administer. It is one of doubtful constitutionality. It is one that



would put a tremendous burden on the prosecuting agencies of this country. I don't think it would accomplish what I set out to accomplish. And while I regret parting company with good friends at this time, I have come to this conclusion, and I want to apprise the committee accordingly.

Mr. MURRAY. Mr. MORRISON.

Mr. MORRISON. I don't think there is anyone in this room who is in favor of receiving obscene literature or vulgar matter through the mail or by any other means of transportation. Nor do I think anybody necessarily has a monopoly on being against obscene literature. I think members of our committee are all honest, upright, honorable, God-fearing, decent citizens, as well as Members of Congress. And I think that we deplore children or anyone else getting obscene literature, just as much as anyone does. If the proper bill were brought before the committee, that was constitutional and could be enforced, and would remedy the situation, I think the majority of the members would certainly vote for it. It seems to me that we would be getting on very dangerous ground were this particular bill passed and became law. Say a hosiery manufacturer sent ads through the mail displaying hosiery. Sometimes stockings are shown on a woman's leg or there is a picture of it above her knee. Assuming that advertisement came to a person and this law was in effect and they said, "I don't like that ad." Or they said, "I don't like that mail coming to me." So they follow the procedure this bill provides and make an affidavit. Would that hosiery manufacturer be subject to imprisonment and a fine or both under this act?

Mr. MILLER. He would if the prior notice required by statute had been given. In other words, the first notice had been given and subsequently he received additional mail and he executed the affidavit.

Mr. MORRISON. Suppose the notice was given. For instance, the hosiery mill is in operation today and that is the customary ad. The notice was given so he has a choice of either going out of business or continuing as he has been doing. Now, he has gotten the notice and then he continues as he has been doing over the years.

Mr. MILLER. He would be subject to prosecution under this statute.

Mr. MORRISON. To go a little further, wouldn't it be possible that some competitor of his, who doesn't sell through the mail, might want to put him out of business? This would certainly be a good means, as his competitor, to put him out of business, wouldn't it?

Mr. MILLER. This is an area which I have not discussed, but this statute, obviously by placing such a power in the hands of the individual who receives the mail, it does open up the possibility for blackmail and extortion, there is no question about it. I haven't discussed that here this morning, but it is a real possibility. In other words, notice is given through inadvertence or for any other reason, the man gets another piece of mailed matter. He goes around to the sender and says, "Listen, you have 5 years and \$5,000 facing you. Maybe we better talk in the back room." That is definitely a possibility.

Mr. MORRISON. But getting back to that picture which comes in through the mails today, which hasn't been declared obscene at all and which is in all kinds of magazines. If you walk into a department store, you see a like picture or you see two plastic women's legs, we will say, with stockings on, which is the only way you can advertise,

he could just take that one picture, which as far as the general public of the United States is concerned, has been an accepted way of advertising women's hose for years, he could just say, "Well, I object to it," and send the notice and then make the affidavit. If the person didn't stop his advertising, which by mail was the way he distributed it, and if he couldn't continue he would have to close down, then he would be faced with either going to jail or closing down his mill.

Mr. MILLER. That is correct.

Mr. JOHANSEN. Mr. Chairman.

Mr. MURRAY. Mr. Johansen.

Mr. JOHANSEN. Would you be able to tell me what and when was the last case involving obscenity or obscenity in the mails which was appealed to the Supreme Court in which the Court ruled for the Government?

Mr. MILLER. We won the *Roth* case. You mean that certiorari was granted and the case was fully briefed and argued? I think the *Roth* case was the last case.

Mr. JOHANSEN. When was that?

Mr. MILLER. 1956.

Mr. JOHANSEN. I'm not familiar with that case. What basically was the issue there?

Mr. MILLER. The first issue was whether or not the first amendment prohibited Congress from enacting a statute which barred obscenity from the mails. That was the first issue.

There were, as I recall, two Justices who dissented from the majority opinion saying that in their opinion the first amendment prohibited Congress from enacting any statute which would bar obscenity from the mails or interstate commerce. The majority held that the first amendment carved out an area where Congress could pass laws which prohibited obscenity.

The next issue was whether or not the particular publications were in fact obscene and the Court there established a so-called community standard test and ruled that the publications involved were in fact violating the statute and confirmed the conviction.

Mr. JOHANSEN. Were there criminal penalties?

Mr. MILLER. That was a criminal case.

Mr. JOHANSEN. And there was a conviction that stood up?

Mr. MILLER. Yes.

Mr. WALLHAUSER. Would the gentleman yield?

Mr. JOHANSEN. Yes.

Mr. WALLHAUSER. Mr. Miller, if we amended this bill to define the word "prurient" very carefully, make it apply only to juveniles and substituted on page 5, line 11, "* * * in the opinion of reasonable persons" rather than "in the opinion of such person," which in effect brings it into the community standard area, would this bill then be satisfactory to the Justice Department?

Mr. MILLER. You must understand, Congressman, I am giving you an off-the-cuff reaction here.

Mr. WALLHAUSER. I realize that.

Mr. MILLER. Let me run through and give you the thoughts that come to my mind as to your suggestion. First, if you amend the bill so that it is applicable to juveniles, you are faced with a Supreme Court decision which passed on the validity of a Michigan State

statute. That statute in effect prohibited the sale of publications to adults if they adversely affected children. That was *Michigan v. Butler*, I think. My recollection is that the Supreme Court said in that case that what Michigan was attempting to do was to make the reading level of juveniles apply to all adults, which the State constitutionally had no power to do. So that there is a constitutional issue inherent in any attempt to bar this type of material to juveniles.

Mr. WALLHAUSER. Let's forget the juveniles.

Mr. MILLER. That would be one thing I would want to research and go into further.

The second thing is, and this gives me problems, when we are talking about appeals to the prurient interest. Now I assume from what you have said here today that by using that phraseology, you were attempting to move away from the standard well-known definition of the word "obscene" which is a part of most of the so-called obscenity statutes.

Now, what I am concerned about, in using that phrase, is that if you take that phrase, in conjunction with *Manual Enterprises*, a recent Supreme Court decision which suggested you have to have two things to have something which is "obscene," you have got to have an appeal to the prurient, the test we have here, but you also have to have a publication which is patently offensive. That is the second part.

So, if I take the test, which is in the statute, and there is no patent offensiveness listed here, then I believe that, from the committee's intending that this bill should not apply only to publications which are obscene in the judicial sense or statutory sense, it would go further and apply to things which are not legally obscene.

Now, once this is accomplished—and I hope I am not falling off the boat there—once you go beyond the idea of obscene, then immediately you are into a first amendment problem, because what we are trying to do is limit something that is not obscene, but only appeals to the prurient.

Mr. WALLHAUSER. But if we define "prurient," we don't leave it to the judgment of the Supreme Court, do we?

Mr. MILLER. Well, whether you leave it to the judgment of the Supreme Court or not, I think that the courts are going to pass upon whether or not the material is protected by the first amendment, or is, in fact, obscene, regardless of the definition placed in the statute. This is my personal belief from reading the case.

Mr. WALLHAUSER. We are avoiding the word "obscene," so they would have to rule on whether it is prurient or not.

Mr. MILLER. That is correct. That is what I am saying.

Mr. WALLHAUSER. Let's assume we have defined it.

Mr. MILLER. Let's assume you have defined it. Once that happens, then you really have run into a first amendment problem, because you are talking about matter which is not obscene. You are talking about matter which only appeals to the prurient and, consequently, is not obscene in the statutory or judicial sense.

Then the first amendment comes into play immediately. Then, if I can go on to the next step, Mr. Congressman, then you get down to the issue: you use the phrase "opinion of reasonable persons."

Mr. WALLHAUSER. Or "community standards," or something along those lines.

Mr. MILLER. Well, frankly, I would want very much to take a look at the language. When you say "opinion of reasonable persons," you are getting, I suppose, into the area of "community standards," in any event.

Mr. WALLHAUSER. Of course, your major point in opposing this bill is that it was the opinion of one person.

Mr. MILLER. That is one of the major points.

Mr. WALLHAUSER. That is what I am trying to overcome.

Mr. MILLER. Opinion of one person.

Mr. WALLHAUSER. As to whether it was prurient or not.

Mr. MILLER. Plus the fact that that meant there were no established standards. Now you would be moving toward establishing constitutional standards which would take out the due process argument, once you amended the statute to provide an ascertainable standard which was a part of the law itself.

Mr. WALLHAUSER. Would you say, in summation, that with this type of approach we are moving toward a more supportable bill by the Justice Department?

Mr. MILLER. I would certain say, if standards were placed in the statute, that we are moving away from the due process objection that I have and we are moving toward something more constitutional on that score.

And I would offer one other thing which I mentioned in my statement, and I have great difficulty with this. I don't know what the answer is, to be perfectly frank, but you have decisions of the various courts as to the right to use the mail—this is a right and not a privilege.

I am sure you are familiar with these and probably more familiar than I, but you are going to get into the issue, and I notice it was raised in the hearings, as to whether or not placing a limitation of the nature you have here on the right to send something through the mails does, in fact, create a limitation on the right of freedom of speech. Basically, the issue would come down to, is it a right under the first amendment that a man can send something through the mail? Is that covered by the first amendment?

Mr. WALLHAUSER. I will say this, in conclusion, that you may think the war on poverty is very important, and it undoubtedly is as far as the administration is concerned, but I think a war on obscenity is equally important, because the minds of juveniles, we know, from having received testimony all over the country, are infected by a dread disease that cannot be obliterated, even as a narcotics habit is obliterated in some cases.

I say that the Department of Justice, the administration, this committee, the Congress, and everybody else connected with this problem—citizens, States, counties, and everybody else—should give almost first priority to it.

Thank you.

Mr. MILLER. I would like to say, while I am opposing this bill as a lawyer on constitutional grounds, please don't let my opposition indicate that I, personally, or the Department is not concerned with difficult problem, as we certainly are.

Mr. WALLHAUSER. You have been responsive and I congratulate you.

Mr. JOHANSEN. Mr. Miller, may I ask you one or two other questions. Would you tell me again the date of the *Roth* decision of the Supreme Court, or approximately the date?

Mr. MILLER. 1956.

Mr. JOHANSEN. Now, is that prior to or subsequent to—was it the *Manual Enterprises, Inc.*, case?

Mr. MILLER. The *Manual Enterprises* case was—I have it right here—1962—*Manual Enterprises v. Day*.

Mr. JOHANSEN. My question goes to this, as to whether the findings in the latter case, or the grounds on which the findings were based, have the effect of reversing the Government's victory or reversing, at least, the grounds of the Government's victory in the *Roth* case?

In other words, I notice that the Court no longer abides by its previous decision, or that basic principle is pretty well discarded, so is it true that, as of now, in consequence of cases and decisions subsequent to the *Roth* case, it is, or would be next to impossible to get a conviction that would stand up in the Supreme Court in this area?

Mr. MILLER. Well, you have to actually take the various issues that were in the *Roth* case. The most important issue in the *Roth* case, as I said, is whether or not Congress could enact a statute which prohibited the sending of obscene matter through the mail. Now, the Supreme Court said yes, you could, and that is still law. So as far as the *Roth* decision on that point, it has not changed a bit.

As to the second issue, which is basically the test of obscenity, I would say that the *Manual Enterprises* case has added an element which perhaps was not present in the *Roth* case—at least, not emphasized in the *Roth* case—the element of “patent offensiveness.”

I don't think that it creates any great change or any remarkable change because, obviously, where you have some hard core pornography which is obscene, it is obviously going to be “patently offensive,” too. Where it will add another factor to be considered is in the borderline cases.

But I would not say that the *Manual Enterprises v. Day* case had substantially affected the ruling of *Roth*.

Mr. JOHANSEN. In other words, then, it is your feeling that there is some basis, at least, yet, for Supreme Court decisions that will uphold convictions?

Mr. MILLER. Oh, yes, sir. Otherwise, we wouldn't be bringing any prosecution for violations.

Mr. MURRAY. Mr. Watson.

Mr. WATSON. I have two or three questions. I think you will all agree and certainly the gentleman testifying, that this is a serious problem and you probably know better than anyone in this room that you have had extreme difficulty in getting convictions under chapter 71, title 18. You have had extreme difficulty, haven't you?

Mr. MILLER. Yes.

Mr. WATSON. Very difficult. Now, as I understood your testimony, you object to this particular piece of legislation because, first, it violates the due process principle, and secondly, because it permits a subjective determination of what is prurient rather than an objective determination. Is that basically it?

Mr. MILLER. Yes.

Mr. WATSON. You agree with us that it is a very serious problem and that something should be done about it, something which is con-

stitutional and something which you could work actively on in order to prosecute the offenders; is that not correct?

Mr. MILLER. Yes.

Mr. WATSON. All right, sir. Agreeing on those and the fact that we have a serious problem and you want to do something about it, would your Department not work expeditiously in drafting a bill which would cope with this particular problem and present it to the committee?

Mr. MILLER. Congressman, we will be happy to work with the committee, as we have done in the past, and will in the future. Again what I would want to do, frankly, if I were posed with this problem, is to go back to this civil statute, which is 39 U.S. 4001, and section 307, Public Law 87-793, and find out why this is not an efficacious method of solving the problem we are talking about.

Mr. WATSON. Do you not think, sir, that the criminal provision of the law is a much stronger way rather than the civil procedure?

Mr. MILLER. The criminal method is a very strong way of enforcing the statute, there is no question about that, but by the same taken, if you go too far in the criminal area, you have to remember that there is going to be reaction on some of the constitutional questions. I'm thinking of civil fraud versus criminal fraud, which is the best example. We can go into a mail fraud case with a criminal statute and you need a much stronger case than, say, a private plaintiff or even the Federal Government would need to bring a civil fraud case.

Mr. WATSON. Don't you think that we, as representatives of the people, should take collective action to try to protect society against this menace or leave it up to each individual to pursue the matter civilly? You don't agree to that, do you?

Mr. MILLER. I was not even implying that. I was trying to point out the distinction that sometimes when you conduct a criminal case, which basically perhaps should be handled on a civil basis, the criminal standard is not as efficacious as might be hoped.

Mr. WATSON. Let me ask you specifically as it relates to this bill, would you be amenable to the bill or support it if we were to let the initial determination be a subjective one, that is, so far as a matter of giving the notice to the sender that the recipient does not want to receive further such mail, and let the second part, when it comes to the criminal provision, let that be on an objective basis?

Mr. MILLER. As I stated before, that moves toward solving the constitutional problem, but I would want to sit down and look at the language. I would hate to make a statement here and then come back tomorrow and say I made a mistake, I didn't mean that at all. This is too close a question and it is too fraught with peril from the Supreme Court standpoint and freedom of speech standpoint to try to draft legislation. If we are talking in generalities, the answer is yes, but what I would want to do is see exactly what the proposal was and sit down and study it very carefully.

Mr. WATSON. One final question and then a suggestion, if I may. If we were to amend this bill so as to provide a hearing, as I understand it, that is the only problem then so far as getting around the due process provision. In the *Walker* case they said the postmaster could not take this action without first providing the sender with an opportunity to have a hearing. If we would provide for a hearing, we would get around the constitutional provision by allowing an ob-

jective determination of what is prurient. Do you believe that would then meet your objections?

Mr. MILLER. I think it would certainly move toward it. It would raise again, as I stated earlier, the additional problem which, frankly, I haven't gone into deeply enough to be able to give you an informed judgment, but you are getting into this question of suppression of sending items through the mail, which was brought up earlier in the hearing. I just haven't had time to go into it deeply. It is a constitutional issue and I do know it requires further study.

Mr. WATSON. Is the sending of material through the mail a privilege or a right?

Mr. MILLERS. As far as I am concerned, reading the decision, it is a right.

Mr. WATSON. It is a right. Do you not believe if a person has a right to send such material through the mail or mail matter through the mail, a fortiori, isn't there a corresponding right of the recipient to determine what should come into his home?

Mr. MILLER. That is the very constitutional issue which I attempted to raise just a second ago.

Mr. WATSON. I won't pursue it further, but I would like to urge the gentleman, in view of the job that was done by the Justice Department last November in getting together a rather voluminous bill, that you should immediately get together and try to work out some legislation to meet this very grave problem. We can talk about it, we can come together, and I am a great one for not saying that this thing is bad unless I have something to correct it or a substitute which would meet the problem, and if I might respectfully urge you and your Department to help us out on this particular thing as expeditiously as possible.

Mr. MILLER. We will happy to.

Mr. DERWINSKI. Mr. Chairman.

Mr. MURRAY. Mr. Derwinski.

Mr. DERWINSKI. I would like to associate myself with the remarks and questions Mr. Watson raised except to make this one general observation. We discussed this in committee last week and some of the members voiced objection to having the Justice Department voice their opinion on the grounds that we are putting ourselves in the position, as a legislative committee, of asking the executive branch to screen all our legislative thoughts. Now this is a bad precedent, even though it is followed rather consistently. We have our committees, we have our own sources of information and our job is to legislate. Their job is to enforce and prosecute and I presume the Supreme Court properly interprets. For us to put ourselves in the position on every issue of asking, what will the Supreme Court say or what will the Justice Department do, is really denying ourselves our own legislative powers. While I am pleased to have all the help that the genius of the Justice Department may give, I would like to feel that they were following our lead rather than leading us along and I would certainly hope that the Justice Department isn't so blind that they don't recognize the abuses in this field of pornographic material.

We have Members of the Congress who are of the opinion that the Justice Department advice in other areas has been less than constitu-

tional. Now, the point is, Mr. Miller, granted that we are entering a very delicate legal field, we also recognize that there is consistent abuse by the peddlers of filth and I would think that this would call for efforts on the part of your Department to be understanding of our objectives rather than being technically rigorous in objecting. I would presume, and I can't judge the thoughts of the committee, but I would think you would continue to pursue this and, therefore, you cooperation rather than a cold-blooded interpretation of the law would be much more helpful.

If you care to comment in any way—

Mr. MILLER. I would only say that I feel that I have performed my job whenever I make a cold-blooded interpretation of the statute.

Mr. DERWINSKI. Thank you, Mr. Chairman.

Mr. MURRAY. Any other questions?

Mr. Corbett.

Mr. CORBETT. First of all, I have to disagree somewhat with my colleague because in writing legislation here, we certainly should consult with those that have to enforce it or administer it and I welcome the gentleman's appearance here this morning and welcome all the help we can get in trying to arrive at a determination. I will agree with the gentleman that ultimately the decision is ours, but to deny ourselves access to any and all available thinking is a mistake. The question I would like to ask, Mr. Chairman, of the witness is whether or not in using the word "prurient" instead of "obscene" hasn't the subcommittee made the problem much greater? If they had use the word "obscene," we have definitions and we have court cases on it. Obscenity is certainly more blatant than prurient.

Mr. MILLER. I would say that it introduces a new concept into a field where you have a settled concept of what is obscene. I assumed, however, that the intent of the drafter was to go beyond the old concept of obscene and into, in effect, a new area and talk about using the phrase "appeals to the prurient."

Mr. CORBETT. When you get into that field, then you get into the field where most anything that is even slightly suggestive might, in the opinion of some person, be prurient.

Mr. MILLER. That is correct.

Mr. CORBETT. And we have no definition that would be anywhere near as binding as the definitions that have come about as to what is obscene.

Mr. MILLER. I agree with that.

Mr. CORBETT. Now, I'm thinking if we went back and reenforced existing civil statutes with some criminal implications, wouldn't it then be possible for the prosecution to determine whether to bring a civil or a criminal case?

Mr. MILLER. Well, a civil procedure would be all the additional tools, if you want to call it that, the Department of Justice would need because if the matter is obscene a statute is on the books and we could prosecute now. What I understood the statute was aiming at was attempting to let each recipient decide what would come into his home. If it is obscene matter, there is no problem.

Mr. CORBETT. The problem they are trying to attack, and I couldn't agree more, is having this material come to either adults or adolescents

in somewhat of an invasion of their privacy. And how you get at this, they have adopted the language of "within the person's opinion." I objected to that. I think it has to be in the opinion of somebody else or some group or something because this would just leave the situation open to anybody, even on a whim, to bring legal action and that is just not in accordance with our form of Government.

Mr. MILLER. That is what we felt.

Mr. CORBETT. Therefore, I would go along with the suggestion of Mr. Watson, that recognizing fully what Mr. Cunningham and others are driving at, is can we have some alternative to consider? That is what you wanted, isn't it, Mr. Watson?

Mr. WATSON. I want something to take care of the problem; yes, sir, that they would be able to support us because I recognize a fact that if we don't have the support of the Department, it would make the job of passage a lot more difficult.

Mr. CORBETT. I want to concur with the gentleman.

Mr. CUNNINGHAM. Would the gentleman yield?

Mr. OLSEN. Mr. Chairman.

Mr. MURRAY. Mr. Olsen.

Mr. OLSEN. I will yield to the gentleman.

Mr. CUNNINGHAM. I want to say the reason we had to put "prurient" in there, and I certainly disagree with you, Mr. Miller, is that they can't define "obscenity." The courts are knocking us down right and left because there is no good definition of obscenity. So we are following what the court said was obscene by using the word "prurient." It is all right to be in favor of the so-called principle of all of this, but I want to do something about this problem. I have been working on it for 8 years with the subcommittee all over the country. This is one thing we think we can use to deal with the problem. If anybody else has any other suggestions, I wish they would have given them to us.

Mr. OLSEN. Mr. Miller, do you know of any other criminal act, defined by Congress, wherein the subjective test plays such a dominant role?

Mr. MILLER. There may very well be some but I sure can't think of any.

Mr. OLSEN. Several of us have been sitting here and we have been trying to think if there was any precedent at all for a subjective test to be the dominant factor in defining a crime.

Mr. MILLER. I will say this, we tried to find, in the brief time we had to do research, any case which would have a direct bearing on this type of a statute and none was found.

Mr. UDALL. Will you yield?

Mr. OLSEN. Yes.

Mr. UDALL. I simply want to concur with the general point made here by a number of members. I haven't given up trying to do something on the problem. I think it can be done. I feel the bill I originally introduced had certain deficiencies which led me to the conclusion that it wasn't the answer. I think I was on the right track. I have also concluded that the bill we now have before us from the subcommittee is not the answer and has many defects. And, as I say, I haven't given up. I hope we can send this back to the subcommittee and working with the Justice Department and Post Office Department come up with something that will meet the problem. This

is what I would like to see done. I want to make my position clear that I haven't given up.

Mr. JOHANSEN. Will the gentleman yield?

Mr. OLSEN. Just a minute, I have the floor. Mr. Miller, the usual standard, when defining the crime, is determined by a legislative body, isn't it?

Mr. MILLER. Yes.

Mr. OLSEN. And that is something that has been lacking in this field. No legislative body has attempted a definition of "prurient."

Mr. MILLER. No definition of "prurient." Even a definition of "obscene" has been left pretty much to the courts, although if you will look at 18 U.S.C. 1461, you will see that in conjunction with the term "obscene," you get into lascivious, lewd, and several other words which are of the same type.

Mr. OLSEN. If in this act there were an adoption of the court test or an objective test, defined by this committee, then the constitutional objection would be less?

Mr. MILLER. The due process argument would go by the board if there were in fact a legislative standard so that people could ascertain whether the conduct would or would not violate the statute. It is just a fair play argument.

Mr. OLSEN. Would you be willing to work with the subcommittee on this subject now of trying to make a standard?

Mr. MILLER. Certainly.

Mr. OLSEN. I think that Mr. Watson has come upon what would be a fair solution to continue work on this subject and have the matter go back to the subcommittee for that purpose.

Mr. GROSS. Mr. Chairman.

Mr. MURRAY. Mr. Gross.

Mr. GROSS. Mr. Miller, you need not comment on this because I believe you have already stated that you are not too well acquainted with the pending civil rights bill, but I have been very much interested in the Justice Department's response this morning to the statement that this proposal to curb obscene literature would cause a lot of complaints to be filed. I believe you responded in the affirmative when you were asked a question if under the terms of this bill there would be a great many complaints filed?

When the civil rights bill was drawn by the Justice Department, it apparently had no such concern with respect to that proposal because it invited complaints, so this is quite interesting to me from that standpoint. You can comment on that if you like, but I am not asking you to.

Mr. MILLER. I would like to comment on it. I merely stated in answer to a question that there would be a number of complaints and I will go further and say this, that we want complaints at the Department of Justice because there are many Federal criminal statutes on the book and I solicit, every time I go out to give a talk, the people to come in and tell me about violations of Federal criminal statutes because without the citizen performing that duty, my job is a very difficult one to perform.

Mr. GROSS. So there would be no opposition to this bill from the standpoint of the fact that it would result in a great many complaints being filed?

Mr. MILLER. That will be a determination for the committee to make.

Mr. GROSS. I am glad to clear that up. Now, let me ask you this question. Would one who has been complained against as having violated the provisions of this proposed bill be entitled to trial by jury?

Mr. MILLER. I assume so.

Mr. GROSS. I would hope so.

Mr. MILLER. I have assumed that throughout.

Mr. GROSS. I would hope your answer would be in the affirmative because under the Justice Department's civil rights bill many people are denied the right of trial by jury, as I'm sure you know. That is one of my objections to it, I might add.

Mr. MILLER. I wish that I were more familiar with the civil rights bill, Mr. GROSS, because I would be very happy to discuss it with you.

Mr. JOHANSEN. Mr. Chairman.

Mr. MURRAY. Mr. Johansen.

Mr. JOHANSEN. Let me clear up one point as to the Justice Department's position. My friend from Arizona, Mr. Udall, said that he felt there was some way, by further pursuit of the matter, we could work out a solution of the problem. If I understood your testimony, the Justice Department doesn't acknowledge a problem here in the sense of requiring any additional legislation. Do I correctly understand that is the position of the Department?

Mr. MILLER. The position of the Department is that additional criminal statutes are unnecessary. I might say that additional criminal statutes, if they go beyond those on the books now, I think you will find, will be stricken as unconstitutional. I do think, however, that there is a formula that might be followed which is already on the statute books and which I did not even realize existed, as a matter of fact, and that is where a person receives matter through the mail that he does not want or considers it obscene, lewd, or what have you, he notifies the Postmaster General and the Postmaster General then retains mail of that nature which is addressed to him. Now this, to me, obviates many of the issues that we have been discussing here this morning. I didn't come here to discuss that type of a thing, but just looking at the picture, I think probably this is the way, and it is already on the books, that we could take which would balance—which is basically what we are trying to do—the right of somebody to communicate through the mail with the right of the person, including myself, not to have this trash dumped in my mailbox.

Mr. JOHANSEN. Is the gentleman saying then, and I'm not arguing the point, is the gentleman saying that the discovery of this provision is—is that a regulation or a law?

Mr. MILLER. I understand it is a statute, section 307, Public Law 87-793, which was passed in 1962.

Mr. JOHANSEN. I would assume, therefore, that you are arguing that the existence of section 307 is a further argument against the need for any other legislation?

Mr. MILLER. I probably would argue that, once I got into it. I would have to read this and see the legislative history.

Mr. JOHANSEN. Let me ask a further question, if the gentleman will yield.

Mr. GROSS. Yes.

Mr. JOHANSEN. Has there been previous testimony before the subcommittee—and perhaps I ought to direct this to the chairman of the subcommittee. For my information, has there been previous testimony by the Justice Department or is this the very first appearance?

Mr. DULSKI. Very first appearance.

Mr. JOHANSEN. Has there been a reluctance on the part of the Justice Department to testify?

Mr. DULSKI. No; not any reluctance.

Mr. JOHANSEN. There were requests for a report?

Mr. DULSKI. No; no request. H.R. 319 as introduced did not include the penalty provision and there was no basis on which to request the Department to comment. The penalty provisions are included in the amendment proposed by the subcommittee.

Mr. JOHANSEN. Well, I differ in a slight measure with my good friend from Illinois. I think it is helpful to have those reports. I don't think it is binding on the committee or the Congress to accept the judgment of the Justice Department, that is the last thing I would suggest. I realize again we are getting into the area of the civil rights issue, but it strikes me that there is a parallel. The objection is raised very strenuously here with respect to prurient or obscenity, that it involves a subjective determination or judgment. Wouldn't that apply also to the statutorily undefined concept of discrimination? Doesn't that involve an element on the part of the complainant of subjective judgment?

Mr. MILLER. I would think that if the term "obscene" had withstood attack in the Supreme Court, that the term "discrimination" would also.

Mr. JOHANSEN. I didn't get that last?

Mr. MILLER. I would think that if the term "obscene" had withstood attack in the Supreme Court on the basis that it was too vague and did not establish a discernible, ascertainable standard, that the same thing would be true of the term "discrimination."

Mr. JOHANSEN. Has that been true with respect to the term "obscene"?

Mr. MILLER. The term "obscene" has been upheld as establishing enough of a legislative standard so that the statute is not unconstitutional.

Mr. JOHANSEN. One final question. Is it your judgment that, recognizing you have just encountered it, that this statute governing refusal of the mail is an adequate weapon against the financially vested interests of those that are promoting this type of obscene literature as a massive commercial enterprise?

Mr. MILLER. I certainly think that this provision can be used very effectively. I wouldn't want to say that it is the complete answer, I don't know whether it is or not, but certainly as I read it, this is attempting or has done much of what is attempted to be accomplished in H.R. 319 on a civil basis.

Mr. JOHANSEN. I would be interested in knowing—I'm not sure you are in a position to answer.

Mr. MILLER. I really am not.

Mr. JOHANSEN. As to the extent to which the Post Office Department itself has given publicity to this provision as a device for the protection of privacy in the home.

Mr. MILLER. That I do not know. I know that Mr. Doyle, the General Counsel of the Post Office Department, when he appeared here, made mention of this and I think he said that they were utilizing it and it was effective. I would have to go back and check his testimony.

Mr. JOHANSEN. That is all.

Mr. MURRAY. Any other questions?

Mr. JOHANSEN. I wonder if the chairman of the subcommittee could enlighten the record any as to the extent to which the Post Office Department has utilized the statutory provision and I would like to have the comments from the gentleman from Nebraska as to his feelings, as to the inadequacy of it.

Mr. DULSKI. Mr. Doyle commented on that in his statement to the subcommittee which may be found on page 111 of the hearings held on June 25, 1963.

Mr. JOHANSEN. Will the gentleman from Nebraska care to comment as to what inadequacies he feels this statute involves?

Mr. CUNNINGHAM. It is ridiculous. It is like when we tried to get through the Communist political propaganda legislation and the Post Office Department said they were going to put a poster up in all of the post offices. It is an impossible monster for the post office people to administer. As I said, you could have a room this big and the letter carriers every morning would have to look around and see whose names are listed and then check those letters that are addressed to homeowners to see whether they are supposed to get them or not. It hasn't done a thing about the problem and it doesn't do anything about the invasion of my privacy when I don't want this. People don't know there is such a statute as far as this is concerned, but it is ineffective because it doesn't get at the list broker, the guy that takes my child's name, who sends in for an innocent little article, and sells that for a profit to an obscene dealer. It doesn't do anything to reach that problem and this is the crux of the whole thing.

Mr. MILLER. That may well be.

Mr. WALLHAUSER. If the obscene material comes in a plain envelope, there is no way in knowing from whom it is mailed.

Mr. MILLER. They have to rely on the return address.

Mr. JOHANSEN. Actually, the administration of this provision could be completely circumvented merely by the evasion of a no return address on the envelope.

Mr. MILLER. I assume that is the case.

Mr. JOHANSEN. Then this isn't a very substantial crutch.

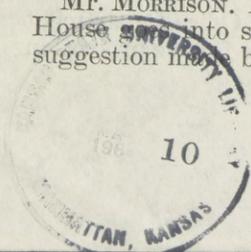
Mr. MILLER. By the same token, an individual such as myself could inform the Postmaster that I wanted no mail that did not have a return address on the outside of the envelope.

Mr. JOHANSEN. I am certain the gentleman wouldn't want to inform the Postmaster of that.

Mr. MILLER. It would keep away a lot of bills.

Mr. JOHANSEN. Now you are in an area I would be glad to legislate on.

Mr. MORRISON. It is 2 minutes to 12 and I wish to inquire before the House ~~surveys~~ into session if we couldn't dispose of the matter by the suggestion made by the distinguished gentleman from Montana, Mr.



Olsen, that the bill be referred back to the subcommittee for further study.

Mr. CUNNINGHAM. I will make a point of order, Mr. Chairman. A quorum isn't present. I want to dispose of the bill that Mr. Dulski has on post office leasing and have this continued to next Thursday as time has run out and the House will be in session in a few minutes. So I would have to make a point of order of no quorum if the gentleman persists.

Mr. MURRAY. There is no quorum present.

Mr. CUNNINGHAM. I don't make the point, but I will if the gentleman from Louisiana persists in his suggestion.

Mr. MORRISON. I was just trying to find a solution to this matter, that it should go back for further study, and the Department representative said he would give you further information, suggestions, and the like toward getting out a bill.

Mr. CUNNINGHAM. The gentleman only speaks for the Criminal Division. I would like to have something more concrete from the Department.

Mr. MORRISON. It wouldn't be constitutional and something he could enforce. So I believe—I talked to the chairman and he said he had no objection to the bill being returned to his subcommittee. I was just trying to be helpful.

Mr. CUNNINGHAM. I prefer that it go over to be the first order of business next Thursday.

Mr. JOHANSEN. I make a point of order. The House is in session.

Mr. MURRAY. Bells are ringing. The committee will stand adjourned until next Thursday, a week from today, at 10 o'clock.

(Whereupon, at 12 noon, the committee was adjourned to reconvene on Thursday, April 23, 1963, at 10 a.m.)



