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LIMITATION ON REAL PROPERTY ACTIONS AND INCONSISTENT STATEMENTS BY WITNESSES

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HEARING

BEFORE THE

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SUBCOMMITTEE ON
BUSINESS, COMMERCE, AND JUDICIARY

OF THE

COMMITTEE ON
THE DISTRICT OF COLUMBIA
UNITED STATES SENATE

NINETY-SECOND CONGRESS

SECOND SESSION

ON

S. 1524

TO AMEND TITLE 12, DISTRICT OF COLUMBIA CODE, TO
PROVIDE A LIMITATION OF ACTIONS FOR ACTIONS ARISING
OUT OF DEATH OR INJURY CAUSED BY A DEFECTIVE
OR UNSAFE IMPROVEMENT TO REAL PROPERTY

H.R. 12410

TO PROVIDE FOR THE EVIDENTIARY USE OF PRIOR INCON-
SISTENT STATEMENTS BY WITNESSES IN TRIALS IN THE
DISTRICT OF COLUMBIA

APRIL 20, 1972

Printed for the use of the Committee on the District of Columbia



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LIMITATION ON REAL PROPERTY ACTIONS AND INCONSISTENT STATEMENTS BY WITNESSES

THURSDAY, APRIL 20, 1972

U.S. SENATE,
SUBCOMMITTEE ON BUSINESS, COMMERCE, AND JUDICIARY,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 6226, New Senate Office Building, Senator Adlai E. Stevenson III (chairman of the subcommittee) presiding.

Present: Senator Stevenson.

Also present: Robert B. Washington, Jr., counsel.

Senator STEVENSON. The Subcommittee on Business, Commerce, and Judiciary of the District of Columbia Committee will now be in order.

This morning's hearing concern two bills, S. 1524 and H.R. 12410.

S. 1524 would provide a limitation on the period of time during which action may be brought to recover damages or indemnification against architects, designers, engineers or contractors on the grounds of a defective or unsafe condition of an improvement to real property.

The second bill H.R. 12410, passed the House of Representatives on March 13, 1972, and would provide for the evidentiary use of prior inconsistent statements by witnesses in trials in the District of Columbia.

I now place in the record copies of S. 1524 and H.R. 12410.

(The bills follow:)

(1)

S. 1524

IN THE SENATE OF THE UNITED STATES

APRIL 14, 1971

Mr. MATHIAS introduced the following bill; which was read twice and referred to the Committee on the District of Columbia.

A BILL

To amend title 12, District of Columbia Code, to provide a limitation of actions for actions arising out of death or injury caused by a defective or unsafe improvement to real property.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. (a) Chapter 3 of title 12 of the District of
4 Columbia Code (relating to limitation of actions) is amended
5 by adding at the end the following new section:

6 "§ 12-310. Actions arising out of death or injury caused by
7 **defective or unsafe improvements to real**
8 **property**

9 "(a) (1) Except as provided in subsection (b), any
10 action—

1 “(A) to recover damages for—

2 “(i) personal injury,

3 “(ii) injury to real or personal property, or

4 “(iii) wrongful death,

5 resulting from the defective or unsafe condition of an

6 improvement to real property, and

7 “(B) for contribution or indemnity which is

8 brought as a result of such injury or death,

9 shall be barred unless in the case where injury is the basis of

10 such action, such injury occurs within the five-year period

11 beginning on the date the improvement was substantially

12 completed, or in the case where death is the basis of such

13 action, either such death or the injury resulting in such death

14 occurs within such five-year period.

15 “(2) For purposes of this subsection, an improvement

16 to real property shall be considered substantially completed

17 when—

18 “(A) it is first used, or

19 “(B) it is first available for use after having been

20 completed in accordance with the contract or agreement

21 covering the improvement, including any agreed changes

22 to the contract or agreement,

23 whichever occurs first.

24 “(b) The limitation of actions prescribed in subsection

25 (a) shall not apply to—

1 “(1) any action based on a contract, express or
2 implied, or

3 “(2) any action brought against the person who, at
4 the time the defective or unsafe condition of the improve-
5 ment to real property caused injury or death, was the
6 owner of or in actual possession or control of such real
7 property.”

8 (b) The table of sections for such chapter 3 is amended
9 by adding at the end the following new item:

 “12-310. Actions arising out of death or injury caused by defective or
 unsafe improvements to real property.”

10 SEC. 2. The amendments made by section 1 of this Act
11 shall apply only with respect to actions brought after the date
12 of enactment of this Act.

92^D CONGRESS
2^D SESSION

H. R. 12410

IN THE SENATE OF THE UNITED STATES

MARCH 14, 1972

Read twice and referred to the Committee on the District of Columbia

AN ACT

To provide for the evidentiary use of prior inconsistent statements by witnesses in trials in the District of Columbia.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That section 14-102 of the District of Columbia Code is
4 amended to read as follows:

5 "§ 14-102. **Prior inconsistent statements**

6 "Evidence of a prior statement, oral or written, made
7 by a witness is not made inadmissible by the hearsay rule
8 if the prior statement is inconsistent with his testimony at a
9 hearing or trial. After the witness has been given an oppor-
10 tunity at such hearing or trial to explain or deny the prior
11 statement, the court shall allow either party to prove that

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1 the witness has made a prior statement, oral or written,
 2 inconsistent with his sworn testimony. Such prior statement
 3 shall be admissible for the purpose of affecting the credibility
 4 of the witness or for proving the truth of the matter asserted
 5 therein if it would have been admissible if made by the
 6 witness at the hearing or trial. Each party shall be allowed
 7 to cross-examine the witness on the subject matter of his
 8 current testimony and the prior statement."

Passed the House of Representatives March 13, 1972.

Attest:

W. PAT JENNINGS,

Clerk.

Senator STEVENSON. At the conclusion of today's hearings the record will remain open for 2 weeks so that any new or supplemental statements may be included.

Before we hear from the first witness, I would like to enter into the record a letter from Senator Mathias expressing his regrets he could not be with us this morning and also his support for S. 1524 which he introduced.

(The letter follows:)

U.S. SENATE,
 COMMITTEE ON THE DISTRICT OF COLUMBIA,
 Washington, D.C., April 18, 1972

HON. ADLAI E. STEVENSON III,
 Chairman, Subcommittee on Business, Commerce and Judiciary, Senate Committee on the District of Columbia, New Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I deeply regret that a longstanding prior commitment will keep me out of Washington on the morning of April 20 and I shall be unable to attend the hearing of the Subcommittee on Business, Commerce and Judiciary on S. 1524.

Under existing statute, architects and engineers who seek work in the District of Columbia open themselves to lifetime liability for suit. This bill seeks to establish a reasonable limit to this liability, in line with the practice of most states.

The witnesses you have scheduled for this hearing will, I am confident, develop in greater detail the background to this question, and I believe we shall be able to reach a solution which will adequately protect both the affected professionals and the public interest.

Thank you for your consideration.

With best wishes.

Sincerely,

CHARLES McC. MATHIAS, JR.,
 U.S. Senator.

Senator STEVENSON. Our first witness is Mr. Ted Kuemmerling, Office of the Corporation Counsel of the District of Columbia.

**STATEMENT OF TED D. KUEMMERLING, OFFICE OF THE
CORPORATION COUNSEL, DISTRICT OF COLUMBIA**

Mr. KUEMMERLING. Mr. Chairman, I am pleased to appear before the subcommittee today to testify on S. 1524, a bill to amend the District of Columbia code to provide a limitation on actions arising out of the death or injury caused by defective or unsafe improvements to real property.

The provisions of S. 1524 would add a new section to title 12 of the District of Columbia Code, relating generally to limitation on actions, which would bar any action in court to recover damages or for contributions or indemnity, for personal injury, injury to real or personal property, or wrongful death, resulting from the defective or unsafe condition of an improvement to real property, unless the injury or death occurs within 5 years beginning on the date the improvement was substantially completed.

The bill provides that an improvement to real property would be "substantially completed" when it is first used, or is first available for use, after having been completed in accordance with the contract or agreement, including any modifications thereof. The bill also excludes from the period of limitation any action based on contract or any action against the owner or person in actual possession or control of the real property at the time the defective or unsafe condition of the improvement complained of caused injury or death.

The effect of S. 1524 is to insulate from liability such persons as engineers, architects, designers, contractors, builders, and others for their negligent work which results in personal injury, injury to real or personal property, or wrongful death more than 5 years after substantial completion of their improvements to real property. It is a matter of common knowledge that a significant number of claims for injury or wrongful death occur after this 5-year period, and persons suffering such misfortune would thus be left without a right of action against those responsible.

The Commissioner believes that a person so injured should have an opportunity in court, even after 5 years, to prove that his injuries resulted from the negligence of any of the parties referred to in the bill, and that it would not be in the public interest to preclude by a statute of limitations, the right of one so injured from seeking his remedy in court.

In view of the foregoing, the Commissioner opposes passage of S. 1524. Thank you.

Senator STEVENSON. Thank you, Mr. Kuemmerling.

Would you feel any differently about this bill if instead of a 5-year limitation it was 10 years?

Mr. KUEMMERLING. Our sister jurisdiction, Maryland, has a 20-year statute. The plurality of jurisdictions have at least a 10-year period of limitation. Of course we have not recommended any period; we have just simply opposed on the ground we feel a person so injured should have an opportunity to prove negligence in court. Of course, we would be more comfortable if it were a longer period of limitation.

Senator STEVENSON. I think a pretty strong argument can be made for some limitation to the liability of such persons as the architects and the engineers. Without that limitation, they are, of course, exposed

indefinitely to liability. I don't know what the practice is in all of the States who do have an analysis, at least some States—there are 12, apparently with no limitations. The others have one limitation or another. Very few with limitations as short as 5 years. There are some.

I thank you very much, Mr. Kuemmerling.

Our next witnesses are Mr. Cornelius Milstead, chairman of the legislative committee of the American Institute of Architects, Washington chapter; Mr. Claude R. Engle, president of the Consulting Engineers Council, Washington; and Alexander J. Czernowski, executive secretary of the Master Builders' Association of the District of Columbia.

Gentlemen, I think it would be best if you would all come forward and form a panel.

STATEMENT OF CORNELIUS R. MILSTEAD, CHAIRMAN, LEGISLATION COMMITTEE, WASHINGTON METROPOLITAN CHAPTER, AMERICAN INSTITUTE OF ARCHITECTS

Mr. MILSTEAD. May I have Mr. Cornbluth of the Department of Professional Services for AIA sit with me as attorney and architect?

Senator STEVENSON. Mr. Milstead, you have a prepared statement? If so, you can either summarize and enter it in the record or we would be glad to have you read it.

Mr. MILSTEAD. It is comparatively short. I would like to read it if I may.

My name is Cornelius R. Milstead, a practicing architect with offices and residence in the District of Columbia. I am chairman of the legislation committee of the Washington Metropolitan Chapter of the American Institute of Architects, Inc., a professional organization with a membership of some 650 registered architects living and practicing in the Washington metropolitan area.

The Washington Metropolitan Chapter of the American Institute of Architects wishes to register its strong support of S. 1524, which provides a statute of limitations in connection with improvement to real property.

At present the only limitation we have provides that action for damages to persons or property shall be brought within 3 years after the "cause of action accrues." The cause for action, however, may not accrue for many years after the work is completed, leaving us potentially liable at any time. Under existing law, we or our heirs could be sued 10, 20, 30 or more years after our work of providing architectural services has been completed. The proposed bill would provide a 5-year statute of limitations for claims connected with improvements to real property and would, we believe, correct the inequity inherent in the present law.

The difficulty in preparing a defense against such claims, many years after the architectural service has been provided, when drawings, specifications and pertinent records have been lost or dissipated, or when building code requirements or design standards may have undergone considerable change, imposes a real hardship on our profession. With the growing tendency in our present society to sue anyone remotely connected for damages to property and persons, the lack of a fair and reasonable time limitation places a burden, not only on the

design professions and the construction industry, but on others as well. The increased cost of professional liability insurance and legal services have been reflected to some degree in the increasing cost of construction. In addition, the courts are being burdened with complex liability cases, which add to the cost of running our Government.

The need for such legislation for the District of Columbia is evidenced by the fact that since 1961 some 40 States have enacted statute of limitation laws similar to the proposed bill, although they may vary in certain details. In addition, a number of the remaining States have such a bill under consideration. I am submitting, as an item to be entered into the record, a list of States that have enacted such statutes. Please note that, although the statutory period in some States is indicated to be more than 5 years, it may be misleading to compare the State bills with the bill being considered at this hearing, for the basic starting points of the statutory periods may be different. In 12 of the States having such legislation the statutory period begins upon performance or furnishing of construction or services. In case of design professionals, the service may be completed and the statutory period begun long before the improvement is constructed and put to a test. In S. 1524, with the statutory period starting upon substantial completion, the entire 5-year period would be a time of actual use and testing.

Under the present situation an architect from another State, having a statute of limitations for design professionals, could be liable for some project that he may have designed for the District of Columbia long after the statutory period for the same cause may have expired in his home State. Conversely, the design professional or the contractor, who either maintains his residence, or his office, or employment in the District of Columbia and can be reached for suit in this jurisdiction, can be sued without any limit of time except for the general 3-year period previously noted, even though he might be protected from suit in the jurisdiction in which the work was done and where in almost every instance the effect of the negligence occurred. This is a matter which receives serious consideration by contractors and design professionals in making decisions as to where they maintain their places of business and where they do work.

It should be understood that this bill would not limit the injured party's rights against the owner or landlord of property, whose liability for maintaining an unsafe structure would be unaffected by the proposed statute.

Nor would it limit the owner's contract and warranty claims against the architect, the engineer or the contractor.

As members of a responsible profession, we feel strongly about our commitments to the general public, and we assume the responsibilities inherent in those commitments. We do not believe the proposed bill would decrease those commitments or responsibilities.

We do believe, however, that S. 1524 would correct an existing inequity and would be, not only in the interest of our profession, but in the best interest of the general public. We believe this bill would provide the necessary and reasonable protection against outdated or stale claims in an equitable manner.

Mr. Chairman, in addition I have been authorized to submit the prepared statements from the following organizations, and I respectfully request that they be made a part of the record of this hearing.

(1) The National Society of Professional Engineers; (2) the statement from the District of Columbia Chapter of the Society of Professional Engineers. Mr. Leslie Weaver is in the hearing room and he's available for questions if you might have any. (3) The Associated Builders & Contractors Inc. Mr. Roland L. Woodfield is here at the hearing if you would like to ask him any questions.

Thank you.

Senator STEVENSON. Thank you. Those papers will be entered in the record, including your analysis of the laws of other jurisdictions.

(The prepared statements follow:)

PREPARED STATEMENT OF NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

The National Society of Professional Engineers is a nonprofit organization composed of 53 state and territorial professional engineering societies with more than 500 chapters and over 67,000 members, all of whom are qualified engineers by education, experience and registration under the state engineering registration laws, where applicable. The membership includes professional engineers engaged in virtually every specialized branch of engineering practice and type of employment—in education, industry, government and private practice.

We appreciate the opportunity to present this statement to support the enactment of legislation which will be of material assistance in rectifying an inequitable situation relating to the liability of engineers, architects and contractors.

Sound public policy dictates that persons and organizations which have incurred potential liability for their acts shall not be confronted with their potential liability until the end of time; that at some reasonable point in time after the act has taken place the potential claim or suit for alleged negligence or default shall be barred. For this reason the law has provided statutes of limitation for various types of claims or actions. Such statutes are often referred to as "statutes of repose."

Although the District of Columbia has such statutes of limitations for various types of claims or actions, they are not as a practical matter applicable to the potential liability of engineers, architects and contractors because these statutes start to run from the time the cause of action accrues. But in the case of engineers, architects and contractors the cause of action may not accrue until many years after the project has been designed and built. When this lapse of time extends beyond a reasonable period it is often most difficult or even impossible for the defendant to reasonably defend the suit. Witnesses to the original transaction may have died or moved away; physical evidence, such as the original plans, may have been lost or discarded; and it is a well-known fact that with the passage of time the memories of potential witnesses become hazy or uncertain of the facts.

Those who support this legislation agree that there should be some reasonable period of time for an aggrieved party to have an adequate period of time to perfect and process a claim or suit from the date of occurrence which caused the alleged damage. The pending bill provides that this reasonable period of time shall be five years from the date the improvement was substantially completed. We agree with this period of time to arrive at a fair and equitable balance of the interests of the parties. This period of time is in line with a "model" statute of this type as developed by the National Society of Professional Engineers, the American Institute of Architects and the Associated General Contractors of America.

Statutes of this type have been enacted in thirty-nine jurisdictions, attesting to the recognition that such enactments are reasonable expressions of achieving a fair approach to the problem as expressed in a recent decision by the Supreme Court of Oregon:

"It has always been considered a proper function of legislatures to limit the availability of causes of action by use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest. It is in the interest of the public that there be a definite end to future litigation resulting from past actions. It is a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against the public need that at some definite time there be an end to potential litigation." (*Josephs, et al. v. Burns, et al.*, December 1, 1971)

PREPARED STATEMENT OF LESLIE F. WEAVER, NATIONAL DIRECTOR, D.C. SOCIETY OF PROFESSIONAL ENGINEERS

My name is Leslie F. Weaver. I am a National Director of the D. C. Society of Professional Engineers which represents more than 700 engineers practicing in the District of Columbia. We are one of the many organizations favoring this proposed Bill, S1524.

Three quarters of the states of this nation now provide a statute of limitations for design professionals. The District of Columbia does not provide such protection for its professionals. While we recognize that a reasonable time must be permitted to settle design and construction deficiencies, we do not feel that liability should ensue on the part of the architect, engineer, or contractor until his death. Claims brought 10, 20 or 30 years after substantial completion of construction are almost impossible to equitably adjudicate. Witnesses may be dead or impossible to locate. Documents pertaining to the claim such as plans, correspondence files, personnel rosters, job notes, etc., will be difficult if not impossible to locate. Without a reasonable statute of limitations, architects, engineers, and contractors must endeavor to preserve all of these documents for every job *forever*. This of course is impossible and makes an adequate defense practically impossible. Further, with no statute of limitations, architects, engineers, and contractors must carry expensive liability insurance after their retirement until their death.

Failure of a structure many years after it is completed could be caused by one of several factors. While admittedly, design and construction deficiencies may be one cause, improper building maintenance is a much more likely cause. Inadequate or improper maintenance of wooden frames, inadequate or improper caulking, inadequate or improper maintenance of flashings and roofs can all cause serious deterioration which may eventually result in a failure after an extended period of time. It would seem inequitable to require the designer or constructor of a structure to prove that such a failure was not his fault. In view of the rising tendency for third party and nuisance suits against architects, engineers and construction contractors for enormous claims for damages to property and persons, we believe it is only fair to put some practical limitations on the period during which actions of this sort can be brought.

In view of the above facts, our Society respectfully, but strongly urges the adoption of S. 1524.

PREPARED STATEMENT OF ROLAND L. WOODFIELD, MEMBER, ASSOCIATED BUILDERS & CONTRACTORS, INC.

My name is Roland L. Woodfield, I am president of R. T. Woodfield, Inc. a general contracting company doing business in the metropolitan Washington area and a member of the Associated Builders & Contractors. Our association favors and strongly recommends the passage of Senate Bill S. 1524, which would provide for the limitation of actions arising from improvements to real property in the District of Columbia.

The majority of the States now have such a law in effect while others have one pending before their legislatures. It seems to us patently unfair that an architect or an engineer who designed, or a contractor who erected, a building should be held liable for any damages or injuries sustained in connection with such improvements for an unlimited length of time. That could conceivably affect his heirs who were not remotely involved years after his death. Even if a party involved lived, after an extended period of time records are usually discarded, memories fade and situations are forgotten. Building codes change as well as their administration by the governing body through its inspectors who are involved in no small way.

There are many possibilities for causes of failure aside from improper design or poor construction. One would be lack of maintenance; another, loading the structure beyond its intended capacity. These are beyond the control and possibly even the knowledge of any one except the owner or user.

In these days of entering suit against any and all at the slightest pretext some limitations are needed to ease the burden on the courts. The rising costs of insurance for this sort of thing are reflected in the cost of construction and the rising costs of the judicial system are reflected in taxes. The consumer-taxpayer always pays in the end and he must be getting weary.

We urge the passage of Senate Bill S. 1524 without further delay and hope the House concurs.

Senator STEVENSON. Do you have a statement you would like to make for the record?

STATEMENT OF CLAUDE R. ENGLE, JR., CONSULTING ENGINEERS
OF METROPOLITAN WASHINGTON

Mr. ENGLE. My name is Claude R. Engle, Jr., a practicing consulting engineer in the District of Columbia. My prepared statement is relatively long and for the Consulting Engineers of Metropolitan Washington. I would prefer you just enter this in the record.

Senator STEVENSON. I would be delighted to enter it in the record and would be delighted, too, if you would like to summarize or make a statement.

Mr. ENGLE. Our statement is quite similar to the one of Mr. Milstead, covering somewhat similar situations. The engineers are subjected to the same situations which the architects are, and, therefore, we cover practically the same thing Mr. Milstead did in our statement.

(The prepared statement of the Consulting Engineers Council follows:)

PREPARED STATEMENT OF CONSULTING ENGINEERS COUNCIL

GENERAL

My name is Claude R. Engle, Jr.; a practicing consulting engineer in the District of Columbia for more than twenty-five years. I am President Elect of the Engineers Council of Metropolitan Washington, a non-profit organization of more than sixty firms practicing consulting engineering in Metropolitan Washington.

I am grateful to your committee for permitting me to give you the views of the Consulting Engineers Council. We consider Senate bill S. 1524 warranted by reason of the fact that there is presently under existing law in the District of Columbia, *no absolute legal limit* on the time in which action can be brought for damages to persons or property against architects, engineers or builders in connection with improvement to real property.

The purpose of proposed statutes of limitation is to bring repose and to bar efforts to enforce stale claims as to which evidence may have been lost or destroyed. *Poole v. Terminix Co. of Maryland and Washington, Inc.*, 91 App. D.C. 287, F.2d 746 (1953). In other words, hardship can result from claims being brought long after they can be properly defended. Suppose the engineer who worked on the job has died, or suppose the superintendent who handled its construction is not to be found, or suppose the files have been destroyed after a reasonable holding time, or suppose merely that the state of the art has changed from the time of construction to the time when the claim is brought. All of these things expose a builder, architect or engineer to a potential liability to which he should not be exposed. A statute of limitations is designed to protect against this potential liability.

We recognize that an injured party should have ample time to seek redress in the Courts. We likewise recognize that a statute of limitations creates an arbitrary time limit beyond which an action may not be enforced in Court. S. 1524 provides that the injury for which relief is sought against the architect, engineer, etc., must occur within 5 years of substantial completion of an improvement to real property. If the injury occurs before the end of such 5 year period, the injured party has the usual time thereafter to commence his legal action (1 year for death, 3 years for injury). We think this Bill represents a fair balance between the need for an injured party to be entitled to press claims for which relief is warranted; and the ability of the builder, architect, etc., to defend himself. Such a balance is necessary to prevent an unreasonable advantage to either the injured party or the engineer, etc.

Building codes are an important factor to be considered in this regard also. They have been adopted and enforced in the District of Columbia in such a way as to result in improvements to real estate which are basically sound. Hence, our problem is not one of reducing the engineer's liability at the expense of an unprotected public. On the contrary, *building codes, and insurance carried by building owners, adequately protect the public.* Our concern is to provide a limitation of

the contractor's and engineer's liability over and above the owner's liability after a reasonable period of time during which the building will have been used and exposed to weakness.

EXISTING LAW

Injury Claims (Torts). The general statute of limitations in the District of Columbia, D.C. Code Section 21-301, provides that actions for damages to persons shall be brought within three years after the "cause of action accrues". (Emphasis added). In actions for damages for injury to person or property, the cause of action does not accrue until injury occurs, and until this happens, there is no statute of limitations running.

Hanna v. Fletcher, 97 App. D.S. 310, 231 F.2d 469 (1956), is the leading case on this point involving negligence in improving real property. In that case, a railing on the front steps of an old house was repaired in 1942 by an iron works company. The hollow iron railing they installed was alleged to have rusted from the inside, and 1949, seven years later, a tenant fell and was injured when the railing failed. The tenant filed suit against the landlord and the iron works company, alleging faulty design of the repaired railing. The Court held that in tort actions (actions for injury not based on contract) against a contractor performing improvements or repairs to real property, the cause of action accrues when the injury occurs. In that case, the injury occurred approximately seven years after the repair work was done. The action could have been brought within three years after the date the injury occurred, which was ten years after the repair work was done. *Had the injury not occurred for fifteen years, or for twenty years, the same reasoning would have applied.*

As an example of the time lapse which can occur, there is the New Jersey case of *Fredericks v. Dover*, 125 N.J.L. 288 15 A 2d 784 (1940). In that case, the City of Dover did some sidewalk work in 1924. Thereafter, it conveyed that particular sidewalk and adjoining streets to Norris County. Subsequently, and we do not know exactly when, the plaintiff was injured, allegedly because of the unsafe construction of the sidewalk. Her case was argued in Court in 1940, 16 years after the sidewalk had been built. Hence, other courts have used the same rule set forth in *Hanna v. Fletcher* in even more extreme situations.

Contract Claims. The Court in *Poole v. Terminix*, supra, recognized that a statute of limitations will no doubt lead to hardship, but it also recognized that the complete absence of limitations could also lead to hardship. The Court was considering the question of when the statute of limitations starts to run with regard to a breach of warranty under a contractor's contract (not "tort") obligation to improve real property. The Court held that the warranty was breached when the work was improperly done, and not when the improper work was discovered several years later. Hence, the rule is different as to contract actions than as to tort actions. In contract actions, faulty design or construction alone, without damage, starts the statute of limitations running. In tort actions, the statute starts only when damage occurs.

Existing Statute. In order to have some perspective of other statutes of limitations in the District of Columbia, we set forth below Section 12-301 of the 1961 District of Columbia Code, as amended:

"12-301. *Limitation of Time for Bringing Actions.*

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

- "(1) for the recovery of lands, tenements, or hereditaments—15 years;
 - "(2) for the recovery of personal property or damages for its unlawful detention—3 years;
 - "(3) for the recovery of damages for an injury to real or personal property—3 years;
 - "(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment—1 year;
 - "(5) for a statutory penalty or forfeiture—1 year;
 - "(6) on an executor's or administrator's bond—5 years; on any other bond or single bill, covenant, or other instrument under seal—12 years;
 - "(7) on a simple contract, express or implied—3 years;
 - "(8) for which a limitation is not otherwise specially prescribed—3 years.
- "This section does not apply to actions for breach or contracts for sale governed by Section 28:2-725."

Sections 12-302 to 12-309 cover various special situations relating to these limitations.

PURPOSE OF THE BILL

The purpose of this bill is to prevent stale claims against architects, engineers, builders, and the like, after the personnel and documents they would have to rely on to defend themselves might be missing, and at the same time to do this in such a way that the valid rights of injured persons are upheld to the fullest extent possible. Statutes of limitations have been recognized in many jurisdictions, including the Congress of the United States, as a means of protecting persons against stale claims which they would have difficulty defending against. Senate bill #1524 would serve this purpose in a rather limited area where, because of judicial decisions, there is currently no limitation whatsoever.

In an effort to fairly balance the hardship between the person who is injured by reason of negligent design or construction of real property on the one hand, and the engineer, architect and contractor whose alleged negligence in construction caused the injury on the other hand, and the property owner, who is responsible for the initial quality of the work and its upkeep thereafter, S 1524 limits the period in which a cause of action may accrue against the architect, engineer, etc. to five years after substantial completions of the improvement to real property. The architect, engineer, builder, etc., could not be held liable for damages for injuries which occur after such period, unless the claim is for breach of a contract warranty.

Please note that S 1524 applies not only to actions for damages for injury, either to property or to person (including fatal injury), and not to contract actions. It is the actions for injury that now have no effective statute of limitations because the cause of action does not accrue until the injury occurs.

S 1524 would not apply if the person against whom the action is brought is not in actual possession and control of the improved real property as owner, tenant, or otherwise at the time the defective and unsafe condition of such improvement constitutes the approximate cause of the injury or damage for which the action is brought. In other words, this bill is designed to protect the person who was interested in the property only by reason of helping to improve it, and not the person who (possibly in addition to such help) is responsible for the continued condition of the property as owner, tenant, or other possessor of the property.

SIMILAR LAWS OF OTHER STATES

Forty of the states have already enacted laws to create limitations similar to S. 1524. No state has enacted an identical law. However, S. 1524 represents what we believe to be a satisfactory bill.

CONCLUSION

In conclusion, and as stated above, we believe that some reasonable statute of limitations is necessary to limit the time during which actions can be brought against persons who were once involved in a particular improvement to real property but who are no longer interested in that property.

The period of five years following substantial completion in which the injury may occur, plus the usual time thereafter for suit to be filed, is fair and reasonable. After such time such actions should be barred.

On the basis of the above, we strongly urge your support for the passage of S 1524.

Thank you for permitting me to present the views of the Consulting Engineers Council of Metropolitan Washington.

Senator STEVENSON. Any other statements?

STATEMENT OF ALEXANDER J. CZERNOWSKI, EXECUTIVE SECRETARY-TREASURER, MASTER BUILDERS' ASSOCIATION, INC.

Mr. CZERNOWSKI. I am Mr. Czernowski of the Master Builders'.

I think Mr. Milstead covered the subject pretty well and also our feelings on the subject. I would like to submit my prepared statement.

Senator STEVENSON. Your prepared statement will be entered into the record.

(The prepared statement of the Master Builders' Association, Inc., follows:)

PREPARED STATEMENT OF THE MASTER BUILDERS' ASSOCIATION, INC.

The Master Builders' Association, Inc., D.C. Chapter of the Associated General Contractors of America, would like to be placed on record in strong support of S. 1524.

Our Association was chartered in 1929 and is composed of 42 contractors who perform 80% of the commercial construction in the Metropolitan Washington Area.

My name is Alexander J. Czernowski, Executive Secretary-Treasurer of the Master Builders' Association, Inc.

We feel that current law is vague and does not properly cover situations which may arise in connection with action resulting from death or injury caused by improvements to property in the District of Columbia. S. 1524, in our opinion, corrects the situation without in any way being unfair to the general public and, further, offers a degree of protection for the design and architectural profession as well as contractors.

Our members recognize the responsibilities we in the construction industry have to the general public with regard to construction principles and methods involving the public's health, safety and welfare. However, we believe that this legislation is also necessary to provide protection to those persons, including architects, engineers, and contractors once involved in particular construction or improvement to real property who have completed their work and are no longer involved in that particular property.

The injured party is protected against defects in construction and design which may have been committed by the contractor or the engineer or architect. During the period of limitations set forth in S. 1524, their remedy would be against the architect, engineer, contractor or owner, and after such period, during which the improvement is tested in use, the injured party would still have a remedy against the owner, who must necessarily accept more responsibility as the age of the building goes up.

The physical problem for the contractor of preserving adequate records such as contract drawings, specifications, correspondence and Government payrolls within a few years becomes impossible.

The ability of the contractor to defend himself against suit disappears within a few years due to the above, changes in personnel, ownership, and similar causes.

Senator STEVENSON. Let me ask all of you why you start the limitations period upon substantial completion and how, if at all, you define substantial completion.

STATEMENT OF ARTHUR CORNBLUTH, ADMINISTRATOR, DEPARTMENT OF PROFESSIONAL SERVICES, AMERICAN INSTITUTE OF ARCHITECTS

Mr. CORNBLUTH. Mr. Chairman, my name is Arthur Cornbluth, administrator of the Department of Professional Services, American Institute of Architects. The reason the date of substantial completion is most common in these kinds of statutes and has been proposed for the District of Columbia statute is that this is a well-defined date in the construction industry, a date effected by the architect with the builder agreeing on that specific date by signing a certificate.

The date of substantial completion is generally defined as that date in which the building of the project is sufficiently completed for the purpose for which it is intended. In other words, the owner may move in and start using the project and it's a well-defined date, that is the reason.

Senator STEVENSON. Is that a starting point for the period of limitations in the statutes of other jurisdictions or is this unusual?

Mr. CORNBLUTH. I believe in about 22 of the existing 40 statutes, that is the date that it is used as the starting point. In the statute, it says here, an improvement to real property shall be considered substantially completed when: (A) it is first used, or, (B) it is first available for use, after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes in contract or agreement.

Senator STEVENSON. You don't anticipate and there hasn't been difficulty in other jurisdictions after the fact, for example 5 years or whatever the period is, in determining that point at which the statute would begin to run?

Mr. CORNBLUTH. By definition, substantial completion.

In my own opinion, this is probably the best date to use as the starting point. This is well defined, as opposed to something like completion of services, which can be quite vague.

Senator STEVENSON. There must be a statute of limitation for injuries. The limitation period commencing, I suppose, when action accrues. What is that period now?

Mr. MILSTEAD. Three years.

Senator STEVENSON. Doesn't that fairly and effectively protect the people in your business?

Mr. ENGLE. Three years after the cause of action—

Senator STEVENSON. Your point is that cause of action may occur 30 years from now?

Mr. CORNBLUTH. A little history on the occurrence of these actions might be helpful, Senator. This type of statute was first enacted in 1961 when there had been a general trend in the law to eliminate the concept of privity of contract. Prior to this, architects who had performed design services were not subjected to suits from injured third parties. However, with the derogation of the concept of privity of contract, this kind of statute has become quite necessary. A good example of this, I think, is the *Silver Bridge* case involving the bridge that crossed between Ohio and West Virginia. That bridge collapsed in 1967—I believe. The engineering firms that had designed that bridge almost a century earlier were involved in the litigation as possibly negligent defendants even though I believe they were subsequently dismissed.

Senator STEVENSON. We have an analysis from a study made back in 1964 based on a random sample of 570 professional liability claims against architects and electrical engineers and which indicates approximately 90 percent of all such claims are brought within the first 5 years and 100 percent within 14 years. Those figures don't quite square with your anxiety, do they, about possibilities and dangers of claims accruing long after the completion of the building? Are you familiar with this study?

Mr. CORNBLUTH. Yes, sir. I think, really, what these figures point out, the reason we are interested in seeing this bill passed is to eliminate spurious claims, the necessity of having to defend oneself, having one's estate defend itself and so forth, that the fact is that most claims where the architect or engineer may be negligent are brought within the first 5 to 10 years after the date of substantial completion. This bill is merely to eliminate the suits that do occur long after and become more of a nuisance value to defend against.

Senator STEVENSON. It wasn't very long ago we reported out of this committee, and it has since become law, a bill permitting professionals, such as yourself, to incorporate as a means of limiting liability, among other things, in the District of Columbia. That, of course, only provides a method for limiting personal liability of professionals. But doesn't it relieve some of your concern and eliminate, not entirely, some of the arguments needed for legislation such as this, which also deprives people who may be seriously injured or could be their only remedy and their only means of recovery for injuries caused by the negligence of someone else?

Mr. MILSTEAD. If I remember correctly the professional corporation act did not eliminate or negate the personal liability of the professionals forming the corporation.

Senator STEVENSON. You may be right. My recollection is this was one of the reasons all of the witnesses were in here, asking for this power to incorporate, just as other people can, in order to limit personal liability. We may be wrong about that but we are going to check.

I don't believe I have any further questions. We will try to consider the bill in the near future. I think it's possible, if we do act favorably, there is a great deal of support for this bill in this committee. It might come out with a slightly longer period, which probably won't come as a great surprise to you. I hope if it doesn't happen it doesn't come as a great disappointment.

Mr. MILSTEAD. It is true that Maryland has a 20-year statute of limitations law. It is the longest of any of the 40 States. They have been, for the past 2 years, trying to get this reduced in the State legislature. At the same time the other adjoining State, Virginia, has a 5-year statute of limitations law.

Senator STEVENSON. Are you suggesting there should be some uniformity?

Mr. MILSTEAD. No. I am only suggesting that 20 years is too great and I think too long a statute period. I think they are finding that.

Senator STEVENSON. There is a big space between 5 and 20 years.

Mr. MILSTEAD. That's right.

I have some notes here that indicate Hawaii, for instance, is trying to reduce their 10 years to 3 years. There is some bill pending in Hawaii.

Senator STEVENSON. How come we are not hearing this morning from the bar association or more specifically the Trial Lawyers' Association? How do they feel about this proposal? Have you heard from them?

Mr. MILSTEAD. I have not heard from them. I am not in a position to speak for them.

Mr. CORNBLOTH. I think the Trial Lawyers' Association opposes any statute of limitations on its face. I am not speaking for them but this has been my recollection of how they react to these kinds of bills, regardless of merit.

Senator STEVENSON. Gentlemen, I thank you very much. We will act promptly on this bill.

Any new or supplemental material pertaining to S. 1524 will be placed in the record at this point.

(The material follows:)

VICTOR O. SCHINNERER & Co., INC.,
Washington, D.C. May 4, 1972.

Re Senate Bill S. 1524, D.C. Statute of Limitations.

HON. ADLAI STEVENSON III,

Chairman, Senate Subcommittee on Business, Commerce, and Judiciary; District of Columbia Committee; Washington, D.C.

DEAR SIR: In behalf of the Washington Metropolitan Chapter of the American Institute of Architects and the D.C. Society of Professional Engineers, we ask that the enclosed statement be made a part of the record of testimony on Senate Bill S. 1524.

Please note that our statement includes:

1. A list of states with existing Statutes of Limitations.
2. A study of distribution of claims by length of time.
3. A list of states where Statutes of Limitations have been upheld by the courts.

Cordially,

J. SPRIGG DUVALL,
President.

Enclosures.

PREPARED STATEMENT OF J. SPRIGG DUVALL, PRESIDENT, VICTOR O. SCHINNERER & Co., INC.

Victor O. Schinnerer & Company, Inc. serves as professional liability consultants to the American Institute of Architects, the National Society of Professional Engineers, the American Society of Landscape Architects and the American Congress on Surveying and Mapping.

In 1928 an architectural firm designed an auditorium, which was built in the same year. In 1965, a visitor to the auditorium was injured when she fell on a stairway leading from the balcony. She sued the owner, alleging that her injury was due to improper location of a handrail. The owner in turn filed suit against the architect for alleged negligence in designing the stairway and handrail. The architectural firm is now defending itself against a \$50,000 law suit, brought thirty-eight years after the architectural services were performed.

In 1934 an engineering firm designed a grain elevator which was built in the same year. In 1957 the grain elevator was destroyed by an explosion. In 1959 the owner sued the engineer for \$250,000, alleging that the explosion was due to errors in designing the ventilation system. This suit, brought twenty-five years after the work had been completed, was successfully defended only after lengthy and costly legal proceedings.

These and similar cases underscore the need for a statutory limitation on the time permitted for bringing an action against architects and engineers. The defendant architect or engineer is severely handicapped by the passage of time between the completion of his services and the accident or occurrence.

Those persons involved in the design and construction of the building may have died or can no longer be located. Even if they can be found they can not reasonably be expected to recall events and discussions that took place years ago. In the first case I cited, none of the architects involved in the design of this project are alive today.

Plans, specifications and contracts may have been lost or destroyed. Building codes and statutes applicable to the work may be unavailable. In the handrail case, the building code requirements concerning stairways and handrails are a key factor. The defense lawyers have been unable to locate any record of the building code as it existed in 1928.

Building codes, design standards and construction technology have been steadily improved over the years. However, when a claim is made against an architect or engineer, based on work done years ago, the tendency is to evaluate that past work by today's standards. In the grain elevator case the plaintiff in effect alleged that the engineer should create in 1934 a ventilation system based on 1959 standards and technology.

No matter how well designed and constructed, every building requires some degree of care and maintenance. The architect or engineer has no control over the owner's neglect which might cause dangerous conditions to develop over the years. Nor can he prevent the owner from using the building for purposes for which it was not designed, nor can he prevent alterations or changes to the building.

The law has long recognized the difficulties involved in obtaining a fair trial many years after alleged negligence took place. Statutes of limitations have been imposed on many types of damage suits. Even the criminal is protected by statutes limiting the time for prosecution for his crimes.

The lack of a time limit on claims creates a special injustice in the case of the retired architect or engineer. Even though his work may have been free of fault, his life savings could be wiped out by the cost of defending his past actions. At the time when he has reached the end of his productive life and is living on a reduced income, he remains vulnerable to claims arising out of his past practice. He has no practical alternative but to continue to carry costly professional liability insurance for the remainder of his life.

Fairness and equity require passage of legislation which imposes a reasonable limit on the time when suits can be brought against the professional designer and builder. Since 1960, forty states have enacted statutes of limitation similar to that proposed for the District of Columbia.

We urge this Sub-Committee to give favorable consideration to the pending bills.

We thank the Sub-Committee for the opportunity of expressing our views on this subject. We are prepared to furnish the Sub-Committee with whatever additional information it may wish.

ADDENDUM NO. 1
EXISTING STATUTES OF LIMITATIONS

State	Year of passage	Statutory period (in years)	State	Year of passage	Statutory period (in years)
Alabama.....	1969	4	Mississippi.....	1966	10
Alaska.....	1967	6	Montana.....	1971	10
Arkansas.....	1967	5	Nevada.....	1965	6
California ¹	1967	10	New Hampshire.....	1965	6
Colorado.....	1969	10	New Jersey.....	1967	10
Connecticut.....	1969	7	New Mexico.....	1967	10
Delaware.....	1970	6	North Carolina.....	1963	6
Florida.....	1967	12	North Dakota.....	1967	10
Georgia.....	1968	8	Ohio.....	1963	10
Hawaii.....	1967	10	Oklahoma.....	1967	5
Idaho.....	1965	6	Oregon.....	1971	8
Illinois.....	1969	6	Pennsylvania.....	1966	12
Indiana.....	1967	10	South Carolina.....	1970	10
Kansas.....	1963	10	South Dakota.....	1966	10
Kentucky.....	1966	5	Tennessee.....	1965	4
Louisiana.....	1964	10	Texas.....	1969	10
Maryland.....	1970	20	Utah.....	1967	7
Massachusetts.....	1968	6	Virginia.....	1964	5
Michigan.....	1967	6	Washington.....	1967	6
Minnesota.....	1965	10	Wisconsin.....	1967	6

¹ 10 years for latent defects; 4 years for patent defects.

ADDENDUM NO. 2
STUDY OF DISTRIBUTION OF CLAIMS BY LENGTH OF TIME

Number of years after completion of project before claim is brought	Number of claims	Percentage of claims	Cumulation percentage of claims
1.....	215	37.7	37.7
2.....	106	18.6	56.3
3.....	96	16.8	73.1
4.....	64	11.2	84.3
5.....	31	5.4	89.7
6.....	18	3.3	93.0
7.....	28	4.9	97.9
8.....	5	.8	98.7
9.....	3	.5	99.2
10.....	2	.4	99.6
11.....	0	-----	-----
12.....	0	-----	-----
13.....	1	.2	99.8
14.....	1	.2	100.0
15.....	0	-----	-----
Total.....	570	100.0	-----

ADDENDUM No. 3

Cases in which the special statute of limitations has been upheld:
 Carter vs. Hartenstein, 248 Ark. 1172, 445 S.W. 2d 918 (1970).
 Gilliam vs. Admiral Corporation, 111 N.J. Super. 370, 268 A. 2d 338 (1970).
 Josephs vs. Burns, . . . Or . . . , 491 P. 2d 203 (1971).

ADDENDUM No. 4

DISTRIBUTION LIST

Alexander J Czernowski, Executive Secretary, Master Builder's Association, 2430 Pennsylvania Avenue NW., Washington, D.C.
 James Harland, CEC Representative, Hazelet & Erdal, 1511 K Street NW., Washington, D.C.
 Roland L. Woodfield, Associated Builders & Contractors, Inc., 4510 Arkansas Avenue NW., Washington, D.C.
 L. F. Weaver, D.C. Society of Professional Engineers, c/o LBC&W, 1120 Connecticut Avenue NW., Washington, D.C.
 Philip A Hutchinson, Jr., Legal Adviser, 485 L'Enfant Plaza SW., Suite 2450, Washington, D.C.
 Cornelius R. Milstead, Chairman, Legislation Committee, Washington Metropolitan Chapter AIA, 2011 K Street NW., Washington, D.C.
 Mrs. Thelma Dawson, Executive Director, Washington Building Congress, 1211 Connecticut Avenue NW., Washington, D.C.
 Mrs. Amalie Dobres, Potomac Valley Chapter of Maryland AIA, 912 Thayer Avenue, Silver Spring, Md.
 Milton F. Lunch, National Society of Professional Engineers, 2029 K Street NW., Washington, D.C.
 Edward L. Feggans, Executive Director, Washington Area Contractors Association, 404 Rhode Island Avenue NW., Washington, D.C.
 Gene Godley, General Counsel, District Subcommittee, Room 6222, New Senate Office Building, Washington, D.C.

THE AMERICAN INSTITUTE OF ARCHITECTS,

April 21, 1972.

Re: S. 1524 "To provide a Statute of Limitations in the District of Columbia."
 Hon. ADLAI E. STEVENSON III,
 Chairman, Subcommittee on Business, Commerce, and Judiciary Committee on
 District of Columbia, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The American Institute of Architects, a professional society representing 24,000 licensed architects, wishes to reaffirm its support for legislation to establish a statute of limitations for architects, engineers, and builders in the District of Columbia.

At present, architects, engineers, and builders in the District are subject to suit for injury with no time limitation except that the action must be filed within three years after the injury occurs. We believe that the pending bill, S. 1524, would provide much needed protection against stale claims filed after the personnel and documents required for defense might be missing. At the same time, the valid rights of the injured persons are upheld to the fullest extent possible. They will not have to seek relief from many sources at extraordinary legal expense because responsibility of action will be fixed among the architect, builder, engineer and owner of the property. In addition, we believe that enforcement of existing building code requirements should provide for sound construction, and that insurance carried by building owners should adequately protect the public.

Accordingly, the American Institute of Architects urges favorable action by the committee on this bill.

Sincerely,

MAX O. URBACH, FAIA, *President.*

Senator STEVENSON. We will now turn to H.R. 12410. The first witness will be Hon. Harold Titus, the U.S. attorney for the District of Columbia.

**STATEMENT OF HAROLD TITUS, U.S. ATTORNEY FOR THE
DISTRICT OF COLUMBIA**

Mr. TITUS. Mr. Chairman, with the Chair's permission, may I introduce my executive assistant who is here today for the purpose of the hearing.

Senator STEVENSON. By all means. I apologize to you, Mr. Titus, for keeping you waiting.

Mr. TITUS. On the contrary, sir, it was not a wait at all; I enjoyed it.

Mr. Chairman, I would like to express to the Chair that I am delighted to appear before the subcommittee this morning on behalf of the Department of Justice in support of H.R. 12410, a bill to provide for the evidentiary use of prior inconsistent statements by witnesses in trials in the District of Columbia.

The provisions of H.R. 12410 would change existing District of Columbia law by providing that either party to a trial or hearing in the District of Columbia could introduce as affirmative evidence, bearing on the merits, a prior statement of a witness which is inconsistent with testimony by that witness given during the trial or other hearing. Present law, set out in section 14-102 of the District of Columbia Code, permits the use by the party producing the witness of prior inconsistent statements only for impeachment of the witness' credibility and not as affirmative evidence.

The proposal contained in the bill receives my special support as U.S. attorney for the District of Columbia, since the application of the present law has necessitated in the past the termination of criminal proceedings under circumstances which may be considered contrary to the public interest. For instance, in the case of *United States v. Jordan Washington, Criminal No. 297-69*, the defendant was charged with the murder during an attempted robbery of one Meyer Kanter, a 63-year-old proprietor of a furniture store. The Government's case consisted primarily of statements given to the police by three witnesses, one a codefendant, identifying Jordan Washington as one of the trigger men who shot Meyer Kanter. Shortly before the trial, each of these witnesses repudiated his prior signed statement to the police and refused to testify in accordance with it at trial. Because of existing District of Columbia law, the Government was left without any evidence and had to dismiss the case. There was no reason for the case to have come to that posture. The Supreme Court, in the case of *California v. Green*, cited at 399 U.S. 149, a 1970 decision, upheld a California statute upon which the provisions of H.R. 12410 are modeled as not being subject to constitutional infirmities. The Court specifically stated that provisions such as are contained in this bill are "supported by most legal commentators and by recent proposals to codify the law of evidence."

The present law applicable in the District of Columbia purports to be founded on the hearsay rule which generally makes inadmissible on the merits out-of-court statements of a witness who is testifying in court and is available for cross-examination, ought not to be considered to fall within the scope of hearsay. The view that the purpose of the hearsay rule has been already satisfied because the witness is present and available for cross-examination was voiced by the Supreme Court in *California v. Green* where the Court stated: "The whole purpose of

the hearsay rule has been already satisfied because the witness is present and subject to cross-examination and there is ample opportunity to test him as to the basis for his former statement."

The proposals contained in H.R. 12410 have received the support of legal authorities such as Wigmore and McCormick and the approbation of outstanding judges such as former Judge Learned Hand and Chief Judge Friendly of the U.S. Court of Appeals for the Second Circuit.

Besides California, Kentucky and Wisconsin have rules of evidence which permit the use of prior inconsistent statements as evidence on the merits where the witness who made the statement is available in court for purposes of cross-examination.

Recent attempts to codify rules of evidence contain proposals similar to those in the bill. The Model Code of Evidence, the Uniform Rules of Evidence, and the Proposed Rules of Evidence for the U.S. courts and magistrates drafted by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States contain provisions in keeping with the proposals in H.R. 12410.

I think that the adoption of this legislation will be a substantial contribution in aiding the truth-seeking function of the courts in the District of Columbia. As you know, the provisions of the bill are not restricted in their application to either Government or defense witnesses. Not only would the Government be able to introduce prior inconsistent statements so as to put the whole truth before the factfinder, but counsel for defendants could avail themselves of the same opportunity. I believe that with the enactment of this legislation the courts in the District of Columbia will be able to render their judgments of guilt or innocence, not on the basis of a technicality which contributed nothing to the truth in the *Jordan Washington* case, but on the basis of the entire truth.

Thank you, Mr. Chairman.

Senator STEVENSON. Thank you, Mr. Titus.

I never was a very good student of evidence. It's been a long time. I would like to ask a few questions.

As I understand, this bill would make it possible in the case of the defendant who repudiates the prior statements to nonetheless be convicted on the basis of those statements and without any further evidence; is that correct?

Mr. TITUS. Mr. Chairman, I don't think we would say it would be the statement of the defendant we are mainly concerned with, it would be the statement of any witness testifying in the case. If I may use an example?

The example that I used in my statement, the case of *Jordan Washington*, these were government witnesses who had been, apparently and purportedly, witnesses to the murder. They had given signed statements to the police. Then before the trial began they informed the assistant prosecutor that they were unable and would not substantiate that statement if they were called as witnesses. And, of course, under the present rule, if the prosecutor produced those witnesses at trial he would be bound by their testimony and he knew in advance their testimony would be contrary to what they had given to the police, so that the factfinders, the jury, was not able to hear the disparity and to resolve it on the question of whether or not the witness was now telling the truth or had told the truth at the prior time when

he had been interviewed by the police. We are not, I think, Mr. Chairman, relating this entirely to the testimony of a defendant, but as to any witness who would be called to testify.

Senator STEVENSON. But in my situation, or your situation, it would be possible to convict on the basis of a repudiated statement by the defendant or the witness and without any additional evidence; is that not so?

Mr. TITUS. It is possible, yes. I would not want to classify it in the category, for instance, Mr. Chairman, of it being a conviction solely on a repudiated statement because I would submit that the fact that the witness would be called, and of course the Government cannot call the defendant to testify—we are talking about a statement given by a witness for the Government, in this instance, or if a defense called a witness who repudiated his prior statement.

Senator STEVENSON. Isn't it true that the vast majority of cases, the evidence of the inconsistent statements is just necessary as a means of impeachment?

Mr. TITUS. I'm sorry, Mr. Chairman?

Senator STEVENSON. As a mean of impeachment, attacking the credibility of the witness. Isn't your example, in other words, a very rare, unusual case?

Mr. TITUS. No; I wouldn't say rare, Mr. Chairman. It is rare perhaps in one aspect, and the aspect would be that in this case apparently three witnesses, who were the primary and only available witnesses to the Government to produce the testimony which we felt to be obviously important to the conviction of the defendant, we felt it would be legitimate evidence, eliminating the possibility of our proceeding to trial at all. Therefore, in that aspect it would be rare, but in many instances we would have one witness who would testify and not repudiate a prior statement but a second witness who might come along who would be, we could say, essential to the government's case, who would repudiate his statement. I think that what I'm advocating here is that the jury be permitted in that instance to hear that witness' statement which he gives at the time of trial, which is a repudiation of a prior statement, then permit the introduction of the prior statement into evidence for the jury as a trier of facts to determine the credibility of that particular witness. It may not be the only witness who would be available to the Government to convict the defendant or to proceed for probative evaluation of the defendant by the jury, but I would submit that it is an important function to have the jury be the trier of the credibility of every witness, whether he repudiates his prior statement or not.

Senator STEVENSON. Does the introduction of prior inconsistent statements have any effect upon the burden of proof? Does this then shift to the defendant to disprove the assertions in the inconsistent statement? Doesn't this affect the burden of proof?

Mr. TITUS. No; Mr. Chairman. The burden of proof remains with the Government beyond a reasonable doubt, to prove the guilt of the defendant.

Senator STEVENSON. I didn't really mean so much the burden of proof as I mean the burden of going forward, the burden of production.

Mr. TITUS. Mr. Chairman, the situation could arise in several different manners. For example, if a witness had been interviewed by

the police prior to trial—we will take the example of a robbery case. This witness said that he saw a defendant on the date of the robbery in the vicinity of the store that was robbed. He gave that statement to the police, the police took it down in a written document or heard it orally. In this bill I think it makes no difference whether it be a written or oral statement, the Government is preparing for trial and may be 2 months or 3 months after the time that he gave that statement to the police, the witness in the interview process tells the prosecutor that he will not abide by his previous statement. Now, the prosecutor knows he is an essential witness to that case because of the fact that he saw the defendant at the time and place and circumstances described in the indictment.

If the prosecutor knew in advance that that particular witness was going to repudiate the statement which he had given to the police and which the prosecutor had relied upon as being part of his case in chief, he could not call that witness with that advance knowledge because he would be bound by the testimony of that witness and he would have no way to get into evidence what might be the truth of the matter because all he could do—in fact he doesn't do it if he knew it in advance, Mr. Chairman—but should the witness, under the prior existing code, take the stand without the knowledge of the prosecutor in advance and change his testimony on the stand, all the prosecutor could do would be confront him for the purpose of impeaching his credibility. But the court then instructs the jury that they must consider that testimony, that is the impeachment testimony, only for the purpose of impeachment and not as substantive evidence. And I submit that seems to me highly—and I think the Supreme Court in the Green case was pointing to this—that when a trier of the fact, which is a jury and also the trier of the credibility of witnesses, is unable to consider the testimony of a witness who is there at trial and the prior inconsistent statement which he has made, which has been used under our present law for impeaching him and then determine which of the two versions is true, and to adopt or reject those two versions or one of them, I think is to prohibit the jury from fulfilling its total function.

Senator STEVENSON. On the other hand, it makes it possible for the jury to convict on the basis of a prior unsworn oral, uncorroborated, inconsistent statement. I could see your argument, and the jury ought to have that opportunity, it ought to have the chance to weigh all of the evidence. In my own mind at the moment, it is a closed question. You can get it in for impeachment purposes, that does get it to the jury.

Mr. TRUS. It gets to the jury, Mr. Chairman, but the difficulty there is that the jury is instructed that it is limited and that the Government, if it could not prove anything other than that, if that is all the Government had, the Court would entertain a motion for judgment of acquittal at the conclusion of the Government's case. We would not get to the jury.

We feel it is unfair we cannot get to the jury on the probative function that a jury has to resolve where the truth lies.

Now, the question of it being an unsworn, uncorroborated prior statement I think is eliminated. That is the hearsay doctrine and I think that is eliminated, Mr. Chairman, in my view, by the presence of that witness before the jury. I think that's really the essence of what I am arguing to the Chair at this time. But I do not feel that it is in

the category of a hearsay statement when the witness is present and is available to be cross-examined. This applies also to deposition witnesses. I can't cite many instances of trials that I have had in the years I have been prosecuting cases where I have seen alibi witnesses for the defense who were called to the stand—and I knew this in advance—that the defense counsel was going to use these witnesses as alibis in his case. This witness repudiated what he had told counsel previously. Counsel then proceeded to announce surprise and to impeach him on the basis of prior interviews. But again that counsel for the defense was limited to only the impeachment element and the witness' testimony was not substantive testimony to be considered by the jury and the jury was instructed. I think it is a two-way street. Practically, it more involves Government witnesses because it is likely to arise more in Government cases but it applies in both sides.

Senator STEVENSON. If the defendant takes the fifth amendment, refuses to testify, are his prior statements admissible because they are inconsistent?

Mr. TITUS. The defendant I think, Mr. Chairman, is in a little different position—the defendant doesn't have to testify at all in a criminal case as the Chair well knows.

Senator STEVENSON. Are the witness' statements admissible because they are inconsistent with the defendant's?

Mr. TITUS. If he refuses to testify at all, Mr. Chairman.

Senator STEVENSON. Well, if the defendant or a witness refuses to testify on the fifth amendment grounds, are the defendant's or witness' statements then admissible as inconsistent with the claim of that fifth amendment?

Mr. TITUS. I would have to divide your question. First taking the defendant, Mr. Chairman, the defendant's statements could not be construed as inconsistent in that type of circumstance because the Government would have used any admission used by a defendant or confession made by a defendant before the defendant was put in the position of having to go forward, so that I would submit that in the case of a defendant, we are talking about confessions or admission, so the question of inconsistency doesn't arise. If the Government put in an admission made by a defendant and then rests his case and the defendant chooses either to go forward or testifying or not that is up to him. If he chooses to go forward and reject the confession—which may not be admitted—but if the court admits the prior confession or admission of the defendant, the defendant can then take the stand and say that that confession was extracted by force or inadmissible for other reasons. The court then is in the position to rule upon that. The inconsistent element there does not apply, Mr. Chairman, that's why I distinguished your question.

Where your question, I think, applies is when a witness by either party refuses to testify on the grounds of some fifth amendment claim, there the court would be confronted with, (1) does the witness have a legitimate fifth amendment claim? The court has to rule on that as a matter of evidence, which is not related to the statement. If the witness has a legitimate fifth amendment claim, I would submit that at that point the court would rule that we could not proceed with any prior inconsistent statements because inconsistency would not be established.

Senator STEVENSON. You mentioned California, Kentucky, and Wisconsin: Do other jurisdictions have rules of evidence which do permit the use of prior inconsistent statements as evidence?

Mr. TITUS. Those are the ones that I know of, Mr. Chairman. I'm sorry, because of the short time and the pressures that I've been working under, I haven't had time to do the research. I learned of this hearing a short while ago, as you know, and I did not have time to go into States other than those I previously submitted.

Senator STEVENSON. I thank you very much, Mr. Titus. As I mentioned to the other witnesses, we will try to move ahead expeditiously one way or the other.

Mr. TITUS. Thank you, Mr. Chairman. I appreciate being here.

Senator STEVENSON. And now, Mr. Kuemmerling we will hear from you again on H.R. 12410.

STATEMENT OF TED D. KUEMMERLING, OFFICE OF THE CORPORATION COUNSEL, DISTRICT OF COLUMBIA

Mr. KUEMMERLING: Mr. Chairman, I am pleased to appear before the committee today to testify on H.R. 12410, a bill to provide for the evidentiary use of prior inconsistent statements by witnesses in trials in the District of Columbia.

H.R. 12410 would amend existing District of Columbia law found in section 14-102 of the D.C. Code, to permit at a hearing or trial the introduction of prior inconsistent statements of a witness, either oral or written, for the purpose of affecting the credibility of the witness or for proving the truth of the matter asserted therein. Existing law permits a party to impeach his own witness when surprised by the inconsistent statements of his witness. The inconsistent statements, however, can only be used for the purpose of challenging the credibility of the witness.

The bill further provides that the witness shall be given an opportunity at a hearing or trial to explain or deny the prior statement and permits cross-examination of the witness with respect to the subject matter of his current testimony and the prior statement.

The Commissioner believes that the amendment offered in H.R. 12410 will bring about an improvement in the administration of criminal justice, without impairing the constitutional rights of those accused of crimes. The bill allows more complete examination of testimony in criminal trials in order to determine its accuracy in light of prior inconsistent statements.

In a recent decision of the Supreme Court, *California v. Green*, the Court upheld a State statute similar to that proposed in this bill and declared that the confrontation clause of the sixth amendment is not violated by admitting a declarant's out-of-court statements, so long as he is testifying as a witness and subject to full and effective cross-examination. These constitutional considerations have been discussed at some length in the material presented to the committee by the U.S. Attorney for the District of Columbia.

The Commissioner of the District of Columbia believes that H.R. 12410 may be of substantial benefit in the successful prosecution of certain serious crimes, and, if enacted, should result in improvement of the administration of justice in criminal trials, and, for these reasons, urges favorable consideration of the bill.

Thank you.

Senator STEVENSON. We want to thank you, Mr. Kuemmerling. We have had a helpful discussion with Mr. Titus. I don't believe I have

any more questions to ask. We will, as I indicated to him, try to act expeditiously on both these bills. And as I also mentioned before, we will keep the record open for 2 weeks should anyone want to give us any additional statements.

Thank you very much, Mr. Kuemmerling.

(Subsequent to the hearing the following letter was received:)

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., April 27, 1972.

Senator ADLAI E. STEVENSON III,
Old Senate Office Building,
Washington, D.C. 20510

DEAR SENATOR: This letter is in response to your request for my views on H.R. 12410 relating to the evidential use of prior inconsistent statements of witnesses.

It is not clear to me that it is wise for the Congress to enact this bill at this time.

As you know, this subject has been argued back and forth by legal scholars and practitioners for a long time and neither side has been able to land a knockout blow on the other side's arguments. My own view inclines somewhat to the traditional rule, which limits the use of prior inconsistent statements to impeachment and prohibits their full evidential use. Some of the arguments put forward by the Supreme Court of California in *People v. Johnson*, 68 Cal. 2d 646 (1968), seem rather persuasive to me and not wholly met by the opinion of Mr. Justice White for the Supreme Court of the United States in *California v. Green*, 399 U.S. 149 (1970). In the situation presented by these cases, the inescapable fact is that the accusatory statement was made when the declarant was not under oath, his demeanor when making the statement was not observed by the trier of fact, he was not under the apprehension of cross-examination and he was not subject to immediate cross-examination. There is never an occasion when the declarant makes his accusation against the defendant under these safeguarding conditions. At the trial the declarant exculpates the defendant. This to some extent counters the probative impact of the extrajudicial accusation. At the same time the witness repudiates or attempts to explain away in some fashion his earlier accusation. But doubt is left as to whether there inheres in this situation a fully satisfactory opportunity to demonstrate to the jury the unreliability of the extrajudicial accusation.

It must be kept in mind that the decision of the United States Supreme Court in the *Green* case deals only with the constitutional question of whether full evidential use of a prior inconsistent statement violates the Confrontation Clause. The decision does not settle the question of the best way to handle this problem so far as concerns the law of Evidence. This distinction was expressly stated by the Court in the *Green* case and indeed the whole point of the decision is that no constitutional barrier should be erected to impede legislative judgment on this manner. What legislative judgment should be, the Court does not venture to say.

An important point to consider is the impact of abandoning the traditional doctrine on judicial rulings regarding the sufficiency of the evidence. Under present law, when the prior inconsistent statement of a witness is introduced, the jury is instructed that it may take this evidence into account solely for the purpose of discrediting the testimony that the witness has given in court, but not for its full evidential value. In other words, the evidence of the prior statement may be used defensively, to advance the case of the party who introduces it. Here fairness reaches an accommodation with concern about the reliability of the extrajudicial accusation. There is much skepticism about whether the jury will heed such a limiting instruction. Perhaps they do not in many cases. But whether they do or not, the rule limiting the use of the evidence has a significant effect on judicial rulings in regard to the sufficiency of the evidence. If the extrajudicial statement may only be used to discredit—to cancel out the value of in-court testimony—the judge cannot recognize it as part of the corpus of evidence that is to be considered in determining whether a prima facie case has been made out. It is precisely here that an important policy question is presented as to whether we are willing to let cases go to the jury when the only substantial evidence is an extrajudicial accusation, and whether we are willing to allow convictions to rest upon such evidence. With the overthrow of the traditional rule, it will be extremely difficult for a judge to keep a case from the jury on the ground of the insufficiency of the evidence, when the law is that the extra-

judicial statement may be given whatever weight the jury reasonably finds it to have. In his concurring opinion in the *Green* case, Mr. Justice Harlan suggests that Due Process may impose some limits to allowing convictions to rest upon extrajudicial accusations by persons who later become witnesses, but it is hard to say at this time where those limits are.

H.R. 12410 has apparently been precipitated by the recent case of *United States v. Washington* in the District Court for the District of Columbia. It should be pointed out that the bill if enacted might well have no effect on a case of that sort. From the statement of the case in the House Committee's Report, it appears that certain persons first made statements accusing the defendant of a crime and then later told the police that they would not testify in accordance with those statements. At least one of these persons was himself a suspect. Of course if these persons refused to testify at the trial, invoking the privilege against self-incrimination, their prior statements could not come in even under H.R. 12410. Introduction of the statements would also violate the Confrontation Clause. *Douglas v. Alabama*, 380 U.S. 415 (1965). Further, if these persons when called to the stand claimed not to be able to remember or for some reason or other were not able to say that the defendant committed the crime, it is arguable that the prior statements could not come in under H.R. 12410. What is required by the bill—and the Proposed Federal Rules of Evidence—is testimony and a prior statement inconsistent with that testimony. The inconsistency, it can be maintained, is inconsistency in regard to the facts recited in the extrajudicial statement. Any inconsistency that exists between an earlier statement that the defendant committed the crime and present testimony that the witness cannot say whether the defendant committed the crime is probably not enough. Two reasons may be cited for this conclusion: 1) Since the witness' inability to say whether the defendant committed the crime does not do any damage to the prosecution's case, but simply leaves it where it was before the witness took the stand, the impeachment rationale for the introduction of the prior inconsistent statement is destroyed. There is no damaging testimony to cancel out. With the rationale for impeaching use destroyed, it is no longer possible to argue that since the prior inconsistent statement can come in for impeachment use in any event, we may as well let the jury give it its full evidential value. 2) Where the witness has so little recollection of what occurred that he can no longer say whether the defendant committed the crime, the adequacy of a present opportunity to expose the unreliability of the prior accusation is seriously in doubt.

As you know, the Proposed Federal Evidence Rules contain a provision similar to H.R. 12410. These Rules are now the subject of the elaborate deliberative process that will eventually put them before the Congress. I have been informed that the Supreme Court has recently returned the Rules to the Committee on the Rules for reconsideration in light of certain points that have been raised. No doubt in due course the Rules will again be placed before the Court and ultimately before Congress. H.R. 12410 applies to "trials in the District of Columbia." The Proposed Federal Rules are intended to apply in the United States District Court for the District of Columbia. So far as this court is concerned, it would seem a mistake to seek to anticipate the ultimate results of the deliberative process to which the Federal Evidence Rules are being subjected.

Even in regard to trials in other courts in the District, it seems preferable to await the final disposition of the Federal Evidence Rules. It is a mistake, surely, in response to a single publicized criminal case, to pluck out for adoption one provision from a carefully integrated body of rules. Perhaps at a later date it will seem desirable to adopt for the courts of the district the entire body of the Federal Evidence Rules. In those rules, the provision about prior inconsistent statements finds its place in an entire scheme for dealing with the hearsay problem. I would go even further to say that, given the borderline character of this question of the proper use of prior statements of witnesses, the District of Columbia might be well-advised to let other jurisdictions experiment for a time with this change from the traditional rule. The report of California's experience after a few years should be illuminating.

Sincerely,

JOHN MANSFIELD,
Professor of Law.

Senator STEVENSON. The hearing is adjourned.
(Whereupon, at 11 a.m. the hearing was adjourned.)