IMPLIED CONSENT, WAREHOUSEMAN'S LIEN, AND PUBLIC UTILITIES REIMBURSEMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON BUSINESS, COMMERCE, AND JUDICIARY

OF THE

COMMITTEE ON THE DISTRICT OF COLUMBIA UNITED STATES SENATE

NINETY-SECOND CONGRESS

SECOND SESSION

ON

S. 2715—IMPLIED CONSENT OF MOTORISTS FOR CHEMICAL TESTING

H.R. 6968—WAREHOUSEMAN'S LIEN

H.R. 13533—PUBLIC UTILITIES REIMBURSEMENT ACT OF 1972

AUGUST 15, 1972

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IMPLIED CONSENT, WAREHOUSEMAN'S LIEN, AND PUBLIC UTILITIES REIMBURSEMENT

TUESDAY, AUGUST 15, 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 9:35 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; and Clarence V. McKee, Jr., minority counsel.

Senator STEVENSON. The meeting of the Senate District of Columbia Subcommittee on Business, Commerce, and Judiciary will come to order.

We have three bills before us this morning: H.R. 6968—"To amend the Uniform Commercial Code of the District of Columbia to make a warehouseman's lien for charges and expenses in relation to household goods stored with him effective against all persons if the depositor of the goods was the legal possessor."

H.R. 13533—"To amend the District of Columbia Redevelopment Act of 1945 to provide for the reimbursement of public utilities in the District of Columbia for certain costs resulting from urban renewal; to provide for reimbursement of public utilities in the District of Columbia for certain costs resulting from Federal-aid system programs; and to amend section 5 of the act approved June 11, 1878 (providing a permanent government of the District of Columbia), and for other purposes."

S. 2715—"To provide that any person operating a motor vehicle within the District of Columbia shall be deemed to have given his consent to a chemical test of his blood, breath, or urine, for the purpose of determining the alcoholic content of his blood."

I now place in the record copies of these bills.

(The bills, above referred to, follow:)

92D CONGRESS
1ST SESSION

H. R. 6968

IN THE SENATE OF THE UNITED STATES

JULY 14, 1971

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

AN ACT

To amend the Uniform Commercial Code of the District of Columbia to make a warehouseman's lien for charges and expenses in relation to household goods stored with him effective against all persons if the depositor of the goods was the legal possessor.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 28: 7–209 (3) of the Uniform Commercial Code (D.C. Code, sec. 28: 7–209 (3)) is amended by inserting "(a)" immediately after "(3)" and by adding at the end thereof the following:

"(b) A warehouseman's lien under susbection (1) on household goods for charges and expenses in relation to the

goods is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. The term 'household goods' means furniture, furnishings, or personal effects used by the depositor in a dwelling."

Passed the House of Representatives July 12, 1971.

Attest: W. PAT JENNINGS,
Clerk.

92D CONGRESS
2D SESSION

H. R. 13533

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 amend the District of Columbia Redevelopment Act of 1945 to provide for the reimbursement of public utilities in the District of Columbia for certain costs resulting from urban renewal; to provide for reimbursement of public utilities in the District of Columbia for certain costs resulting from Federal-aid system programs; and to amend section 5 of the Act approved June 11, 1878 (providing a permanent government of the District of Columbia), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "District of Columbia Public Utilities Reimbursement Act of 1972".

SEC. 2. Section 5 of the District of Columbia Redevelopment Act of 1945 (D.C. Code, sec. 5–704), is amended by adding at the end thereof the following new subsections:

"(c) Notwithstanding any provisions of law to the contrary, whenever, as the result of urban redevelopment, any utility facilities are required to be relocated, adjusted, replaced, removed, or abandoned in order to meet the requirements of or to conform to a redevelopment plan, or any modification of such plan adopted pursuant to this Act, the utility owning such facilities, shall relocate, adjust, replace, remove, or abandon the same, as the case may be. The cost of relocation, adjustment, replacement, or removal, and the cost of abandonment of such facilities shall be paid to the utility by the Agency as part of the cost of the redevelopment project.

"(d) As used in this section—

"(1) The term 'utility' means any gas plant, gas corporation, electric plant, electrical corporation, telephone corporation, telephone line, telegraph corporation, telegraph line, and pipeline company, whether publicly or privately owned, as those terms are defined in paragraph 1 of section 8 of the Act of March 4, 1913 (relating to appropriation for expenses for the government of the District of Columbia) (D.C. Code, secs. 43–112—43–121).

"(2) The term 'utility facility' means all real and per-

sonal property, buildings, and equipment owned or held by a utility in connection with the conduct of its lawful business.

"(3) The term 'cost of relocation, adjustment, replacement, or removal' means the entire amount paid by such utility properly attributable to such relocation, adjustment, replacement, or removal, as the case may be, less any increase in value on account of any betterment of the new utility facilities over the old utility facilities, and less any salvage value derived from the old utility facilities.

"(4) The term 'cost of abandonment' means the actual cost to abandon any utility facilities which are not to be used, relocated, adjusted, replaced, removed, or salvaged, together with the original cost of such abandoned facilities, less depreciation."

SEC. 3. Section 7(h) of the District of Columbia Redevelopment Act of 1945 (D.C. Code, sec. 5–706(h)) is amended by inserting immediately after the words "include in the cost payable by it" a comma and the phrase: "in addition to the costs provided for in section 5(c) hereof,".

SEC. 4. (a) Notwithstanding any provisions of law to the contrary, whenever the Commissioner of the District of Columbia shall determine that the construction or modification of a project, on or a part of the National System of Interstate and Defense Highways within the District of

Columbia under title 23 of the United States Code, necessitates the relocation, adjustment, replacement, removal, or abandonment of utility facilities, the utility owning such facilities shall relocate, adjust, replace, remove, or abandon the same, as the case may be. The cost of relocation, adjustment, replacement, or removal, and the cost of abandonment of such facilities, shall be paid to the utility by the District of Columbia, as a part of the cost of such project.

(b) As used in this section—

(1) The term "utility" means any gas plant, gas corporation, electric plant, electrical corporation, telephone corporation, telephone line, telegraph corporation, telegraph line, and pipeline company, whether publicly or privately owned, as those terms are defined in paragraph 1 of section 8 of the Act of March 4, 1913 (relating to appropriation for expenses for the government of the District of Columbia) (D.C. Code, secs. 43–112—43–121).

(2) The term "utility facility" means all real and personal property, buildings, and equipment owned or held by a utility in connection with the conduct of its lawful business.

(3) The term "cost of relocation, adjustment, replacement, or removal" means the entire amount paid by such utility properly attributable to such relocation, adjustment, replacement, or removal, as the case may be, less any increase in value on account of any betterment of the new utility

facilities over the old utility facilities, and less any salvage value derived from the old utility facilities.

(4) The term "cost of abandonment" means the actual cost to abandon any utility facilities which are not to be used, relocated, adjusted, replaced, removed, or salvaged, together with the original cost of such abandoned facilities, less depreciation.

SEC. 5. Section 5 of the Act entitled "An Act providing for a permanent form of government for the District of Columbia", approved June 11, 1878 (D.C. Code, sec. 7–605), is amended by inserting at the end thereof after the word "direct" a comma and the following phrase: "except as provided in sections 5(c) and 7(h) of the District of Columbia Redevelopment Act of 1945 and section 4 of the District of Columbia Public Utilities Reimbursement Act of 1972".

Passed the House of Representatives March 13, 1972.

Attest: W. PAT JENNINGS,

Clerk.

92D CONGRESS
1ST SESSION

S. 2715

IN THE SENATE OF THE UNITED STATES

OCTOBER 19, 1971

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

A BILL

To provide that any person operating a motor vehicle within the District of Columbia shall be deemed to have given his consent to a chemical test of his blood, breath, or urine, for the purpose of determining the alcoholic content of his blood.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as used in this Act—

(1) The term "Commissioner" means the Commissioner of the District, or his designated agent;

(2) The term "District" means the District of Columbia;

(3) The term "license" means any operator's permit or

any other license or permit to operate a motor vehicle issued under the laws of the District, including—

(A) any temporary or learner's permit;

(B) the privilege of any person to drive a motor vehicle whether or not such person holds a valid license; and

(C) any nonresident's operating privilege;

(4) The term "nonresident" means every person who is not a resident of the District;

(5) The term "nonresident's operating privilege" means the privilege conferred upon a nonresident by the laws of the District relating to the operation by such person of a motor vehicle, or the use of a vehicle owned by such person, in the District; and

(6) The term "police officer" means an officer or member of the Metropolitan Police force, the United States Park Police force, or the Capitol Police force, or any other person actually and officially engaged in the performance of police duties in connection with guarding the property of the United States or of the District.

SEC. 2. Any person who operates a motor vehicle within the District shall be deemed to have given his consent, subject to the provisions of this Act, to a chemical test or tests, of his blood, breath, or urine, whichever he may elect, for the purpose of determining the alcoholic content of his

blood. The test or tests shall be administered at the direction of a police officer who, having arrested such person for a violation of law, has reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within the District while under the influence of intoxicating liquor.

SEC. 3. Only a physician or registered nurse acting at the request of a police officer may withdraw blood for the purpose of determining the alcoholic content thereof. This limitation shall not apply to the taking of a breath or urine specimen. The person tested may, in addition to submitting to the test administered at the direction of a police officer, also submit to a chemical test or tests administered to him by a physician, registered nurse, or other person of his own choosing who is qualified to administer such test or tests. The failure or inability to obtain an additional test by a person shall not preclude the admission of the test or tests taken at the direction of a police officer. Upon the request of the person who is tested, full information concerning the test or tests taken at the direction of the police officer shall be made available to him.

SEC. 4. Any person who is unconscious, or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by section 2 of this Act and the test or tests may be given;

except, that if such person thereafter objects to the use of the evidence so secured, such evidence shall not be used and the license of such person shall be revoked, or, if he is a resident without a license, no license shall be issued to him for a period of six months.

SEC. 5. If a person under arrest refuses to submit to chemical testing, he shall be informed that failure to submit to such test will result in the revocation of his license. If such person, after having been so informed, still refuses to submit to chemical testing, no test shall be given, but the Commissioner, upon receipt of a sworn report of the police officer that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle upon the public highways while under the influence of intoxicating liquor, and that the person had refused to submit to the test or tests, shall revoke his license for a period of six months; or if the person is a resident without a license to operate a motor vehicle in the District, the Commissioner shall deny to the person the issuance of a license for a period of six months after the date of the alleged violation, subject to review as hereinafter provided.

SEC. 6. (a) Whenever any license has been revoked or denied under the provisions of this Act, the reasons therefor shall be set forth in the order of revocation or denial, as the case may be. Such order shall take effect five days after

service of notice on the person whose license is to be revoked or who is to be denied a license, unless such person shall have filed within such period written application with the Commissioner for a hearing. Such hearing by the Commissioner shall cover the issues of--

(1) whether a police officer had reasonable grounds to believe such person had been driving or was in actual control of a motor vehicle upon the public street or highway while under the influence of intoxicating liquor; and

(2) whether such person, having been placed under arrest, refused to submit to the test or tests, after having been informed of the consequences of such refusal.

(b) If, following the hearing provided in subsection (a) of this section, the Commissioner shall sustain the order of revocation, the same shall become effective immediately.

SEC. 7. Any person aggrieved by a final order of the Commissioner revoking his license or denying him a license under the authority of this Act, may obtain a review thereof in accordance with section 11 of the District of Columbia Administrative Procedure Act (82 Stat. 1204; D.C. Code, secs. 1-1501 to 1-1510).

SEC. 8. The Act approved March 4, 1958 (72 Stat. 30; D.C. Code, sec. 40-609a) is amended (a) by striking out the subsection designation "a" in the first section; (b)

by striking out in paragraph (2) "fifteen one-hundredths", "eight one-hundredths", and "twenty one-hundredths", and inserting in lieu thereof "ten one-hundredths", "six one-hundredths", and "eleven one-hundredths", respectively; (c) by striking out in paragraph (3) "fifteen one-hundredths" and "twenty one-hundredths" and inserting in lieu thereof "ten one-hundredths" and "eleven one-hundredths", respectively; and (d) by striking out subsections (b), (c), and (d) of the first section, and section 2.

Senator STEVENSON. The first witness is Mr. Charles Hanky, General Counsel's Office, Redevelopment Land Agency.

STATEMENT OF CHARLES HANKY, GENERAL COUNSEL'S OFFICE, REDEVELOPMENT LAND AGENCY; ACCOMPANIED BY GEORGE BOYNTON AND LYNDELL McKIBBEN, DEPARTMENT OF HIGHWAYS AND TRAFFIC, DISTRICT OF COLUMBIA GOVERNMENT; ON H.R. 13533

Mr. HANKY. Thank you, Senator.

Senator STEVENSON. Would the two gentlemen accompanying Mr. Hanky identify themselves for the record, please.

Mr. BOYNTON. I am George Boynton, Assistant Director for Business Administration, D.C. Department of Highways and Traffic.

Mr. McKIBBEN. I am L. W. McKibben, Department of Highways and Traffic.

Senator STEVENSON. Very well, Mr. Hanky, you have a prepared statement.

Do you want to read that, or shall we put it in the record and summarize?

Mr. HANKY. At your pleasure, sir.

Senator STEVENSON. It is a short statement. We will read it and put it in the record. It will be helpful if you will just summarize your comments.

(The prepared statement referred to follows:)

PREPARED STATEMENT OF THE D.C. REDEVELOPMENT LAND AGENCY CONCERNING H.R. 13533

We have been asked for our comments on H.R. 13533, a bill to amend the District of Columbia Redevelopment Act to provide for the reimbursement of public utilities in the District of Columbia for the cost of relocating or adjusting utility facilities to meet the requirements of an urban renewal plan, and for other purposes.

The bill provides that, "whenever, as the result of urban redevelopment, any utility facilities are required to be relocated, adjusted, replaced, removed, or abandoned in order to meet the requirements of or to conform to a redevelopment plan . . . (t)he cost of relocation, adjustment, replacement, or removal, and the cost of abandonment of such facilities shall be paid to the utility by the Agency as part of the cost of the redevelopment project."

Except where the urban renewal plan requires the acquisition of real property owned by the utilities, such costs are now borne by the companies, which means that they must ultimately be recovered from the ratepayers. Thus, they are now a purely local cost, although not borne by the local government.

Section 7218.1 of the Urban Renewal Handbook, which sets forth the policies of the Department of Housing and Urban Development applicable to federally assisted renewal projects, provides that "the cost of removal or relocation of utility lines by a private company will not be allowed as a project expenditure unless payment to the company is required under applicable law." H.R. 13533 would have the effect of making the cost of relocating or adjusting utilities a required project expenditure, 75% of which would be paid by federal grant. We have been advised by HUD that few states now require such payments.

Section (d) of the bill provides that "the term 'cost of relocation, adjustment, replacement, or removal' shall mean and include the entire amount paid by such utility properly attributable to such relocation, adjustment, replacement, or removal, as the case may be, less any increase in value on account of any betterment of the new utility facilities over the old utility facilities, and less any salvage value derived from the old utility facilities". Further provides that "the term 'cost of abandonment' shall mean and include the actual cost to abandon any

utility facilities which are not to be used, relocated, adjusted, replaced, removed, or salvaged, together with the original cost of such abandoned facilities, less depreciation".

Under these definitions, the amount of reimbursement to which the companies would be entitled could not be verified without reference to the companies' books of account. As we do not believe that the Agency should be required to accept an unverified statement of cost or attempt to audit the companies' books, we suggest that the bill be modified to provide that the District of Columbia Public Service Commission either compute the eligible costs or certify the companies' computations, and that its findings be deemed conclusively to establish the extent of the obligation for compensation.

The Office of Management and Budget advises that, while there is no objection to the presentation of these views, it recommends that the Committee request the views of the Department of Transportation and the Department of Housing and Urban Development before it gives further consideration to this legislation.

Mr. HANKY. Our principal concern with this bill, Senator, is that the definition of "cost," which it contains, is such that the amount of the cost incurred by these activities could not be verified without reference to the company's books of account. We do not feel that the Redevelopment Land Agency should be put in the position of accepting unverified statements of cost or attempting to audit utility companies' books in order to make that verification.

We have suggested, therefore, that the bill be modified to provide some kind of certification or verification by the District of Columbia Public Service Commission, which we assume to be the appropriate agency to do that as they are engaged in regular audits of the companies' books in the course of their business.

We have also been advised by the Office of Management and Budget that it requests that your committee obtain the views of the Department of Transportation and of the Department of Housing and Urban Development before it gives further consideration to this legislation.

Senator STEVENSON. Do you know the views of the Public Service Commission? Is it agreeable?

Mr. HANKY. I have only discussed it informally with their staff, and I can tell you that they are not enthusiastic about the idea.

Senator STEVENSON. Mr. Boynton or Mr. McKibben, do you have anything to add?

Mr. BOYNTON. Senator, we have no prepared statement. I do not have a copy of H.R. 13533. I have the bill that was originally introduced, H.R. 11782.

We concur in the views of the Commissioner of the District of Columbia on that bill in a letter written to the chairman of the House District Committee in February 1972, in which he stated that we would have no opposition if the language would limit payment reimbursement to utilities on projects that are on the interstate system, which is funded 90–10, 90 percent Federal funds and 10 percent local.

The original bill covered the entire Federal-aid system which would also include the primary, secondary, and urban; which is only 50 percent Federal funding. Our position is that it would create a considerable amount of expenditures for the District Highway Fund, where the Interstate System, which probably has the greatest amount of utility relocation—we would only be faced with a 10 percent funding of the total cost.

Senator STEVENSON. You do not quarrel with the principle, then. It is just a question of who pays for it.

Mr. BOYNTON. I might also add, since Mr. Hanky raised the question of verifying or auditing the cost, I know that this is a custom in

other States. The utility relocation is paid by the State and is eligible for Federal reimbursement. The Federal Highway Administration does require, in all States, that where they pay for utility relocation that the records of the utility company must be audited either by the Federal Highway Administration or by the State—that they will not pay, participate in the cost, without an audit.

Senator STEVENSON. What, in your opinion, would be the appropriate body to perform such an audit or examination of records here?

Mr. BOYNTON. I would believe, under their present procedures and present regulations, that the Federal Highway Administration would perform the audit. Although, in recent years, they have developed a cooperating system with the various States where if a utility, for example, if their headquarters is located in Maryland, then the Maryland State Highway Commission would perform an audit. In the case of the District government, we have no audit staff in our department; and the audit might be performed by the District of Columbia Office of Municipal Audits on a reimbursable basis for the Highway Administration.

Senator STEVENSON. Do you have anything to add?

Mr. MCKIBBEN. I have nothing to add, other than the audit here would be, of course, only relative to the highway program and might not be applicable to redevelopment.

Mr. BOYNTON. That is true. The audit I am referring to would only refer to the highway construction projects.

Senator STEVENSON. Gentlemen, unless you have anything more to add, we will move on. We will try to devise a way of working out this verification of costs problem. Thank you very much.

The next witness is Mr. Joseph Murphy, Director, Department of Motor Vehicles, District of Columbia government.

STATEMENT OF JOSEPH P. MURPHY, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, DISTRICT OF COLUMBIA GOVERNMENT; ACCOMPANIED BY MICHAEL SINDLER, OFFICE OF THE CORPORATION COUNSEL; VERNON GILL, GENERAL COUNSEL'S OFFICE, METROPOLITAN POLICE DEPARTMENT; AND MARVIN WAGNER, U.S. DEPARTMENT OF TRANSPORTATION, ON S. 2715

Mr. MURPHY. Good morning, Mr. Chairman.

With me is Mr. Michael Sindler, assistant corporation counsel, assigned to the Department of Motor Vehicles; Mr. Vernon Gill is from the General Counsel's Office, Metropolitan Police Department; and Mr. Marvin Wagner, who is with the U.S. Department of Transportation, associated with alcohol countermeasures in the department for the past 2½ years.

I have submitted a written statement which contains a lot of factual material that I will not read, Mr. Chairman, with your indulgence.

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

(The prepared statement referred to follows:)

STATEMENT OF JOSEPH P. MURPHY, D. C. DIRECTOR OF MOTOR VEHICLES, REPRESENTING THE GOVERNMENT OF THE DISTRICT OF COLUMBIA, ON S.2715, A BILL "TO PROVIDE THAT ANY PERSON OPERATING A MOTOR VEHICLE WITHIN THE DISTRICT OF COLUMBIA SHALL BE DEEMED TO HAVE GIVEN HIS CONSENT TO A CHEMICAL TEST OF HIS BLOOD, BREATH, OR URINE, FOR THE PURPOSE OF DETERMINING THE ALCOHOLIC CONTENT OF HIS BLOOD."

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE -

The Commissioner of the District of Columbia wishes to thank you for this opportunity to present the views of the Government of the District of Columbia on S. 2715.

Because of the role played by the excessive use of alcohol in a large number of automobile accidents, the problem of control of the drinking driver becomes more acute each year. The problem is a major one, both nationally and in the District of Columbia. On the national level, the National Safety Council reports that studies of fatal automobile accidents show that up to 50 per cent of the drivers involved had been drinking. A report to the Congress from the Secretary of Transportation entitled "1968 Alcohol and Highway Safety Report" (90-34) (printed for the use of the Committee on Public Works, House of Representatives) states:

> "The use of alcohol by drivers and pedestrians leads to some 25,000 deaths and a total of at least 800,000 crashes in the United States each year." (Committee Print, p. 1)

> "Alcohol degrades individual driving performance

in many ways, including deteriorations in judgment, ability to concentrate, comprehension, vision, and coordination. Ability to make rapid and correct judgments is of major importance in driving. In one experiment, the ingestion of as little as two ounces of 80 proof liquor so adversely affected the judgment of experienced bus drivers that they attempted to drive a bus through a narrower space than attempted without alcohol. At the same time they required a larger space to complete the maneuver successfully after drinking the two ounces of liquor."

Despite the best intentions and best efforts of law enforcement officers in the District of Columbia, they have difficulty in obtaining a conviction on a charge of operating a vehicle while under the influence of intoxicating liquor (D. C. Code, sec. 40-609), in the absence of a chemical test to determine how much alcohol is contained in the defendant's blood. Very few drivers are willing to take the chemical test referred to in D. C. Code, section 40-609a, particularly since existing law provides no sanction for refusing to submit to such a test. Accordingly, control of the drinking driver problem is seriously hampered by the lack of an effective law.

The Commissioner is of the view that the steadily worsening drinking-driver situation in the District of Columbia indicates an urgent need for some remedial action to protect both the

motoring public and the non-motoring public from the hazard created by the driver who by his excessive use of intoxicating liquor voluntarily disables himself from safely operating a motor vehicle. Such a driver transforms himself into an irresponsible operator of an instrumentality which all too frequently, by reason of its operation by a voluntarily disabled driver, becomes a dangerous and possibly lethal instrumentality. The remedial action proposed for the District of Columbia, already taken by all of the States, involves the enactment of an "implied consent" law, under which any person operating a motor vehicle on the streets and highways of the District while apparently under the influence of intoxicating liquor shall be deemed to have given his consent to a chemical test of certain of his body substances for the purpose of determining the amount of alcohol therein. The substances to be tested would be his breath, blood, or urine. The person would be requested to take such a test if, after he was arrested for a violation of law, the arresting officer has reason to believe that such person had been driving or was in actual physical control of a motor vehicle on the public streets and highways while under the influence of intoxicating liquor. If a person should refuse to submit to the test, he is to be informed of the effect of such refusal, and, if he persists in such refusal, a report thereof is to be made to the Commissioner for appropriate action. Such action will involve

the revocation of the license of the person so refusing to submit to the required test, if, after opportunity has been given him to be heard on the matter, the Commissioner finds that such person did in fact refuse to submit to such a test.

The proposed law is based upon and is similar to the implied consent law in section 6-205.1 of the Uniform Vehicle Code (Revised, 1968), published by the National Committee on Uniform Traffic Laws and Ordinances. Comparable provisions on "implied consent" are now law in all of the States. The District of Columbia is the sole remaining jurisdiction without an "implied consent" law.

On March 20, 1972, Secretary of Transportation Volpe addressed a letter to Mayor Washington in which he expressed concern that five years after the issuance of Highway Safety Program Standards, many jurisdictions have not implemented many of the standards and that, without such implementation, the job of highway safety cannot be done.

Attached to the letter was the results of an inventory of highway safety activities involving standards 301 to 316 inclusive as implemented in the District of Columbia.

Standard 308, which involves Alcohol Safety, showed the District Government receiving 50 points out of a possible 100, one of the two lowest rated areas of the safety standards

presently being implemented by the District of Columbia. The rating chart showed a minus 20 points for lack of a statutory provision defining the term "under the influence" at blood-alcohol concentrations not higher than .10 percent by weight; minus 25 points because of the absence of an implied consent statute of any kind; and minus 5 points because the District has no statute providing for quantitative tests for alcohol "On all surviving drivers in accidents fatal to others" [Highway Safety Program Standard 308, paragraph IV (B)].

For this and other reasons to follow, the District of Columbia recommends passage of S. 2715, with certain amendments stated below with reasons therefor.

There are certain differences between S. 2715 and the draft bill originally recommended by the Commissioner, some of these representing merely minor variations between the two bills. S. 2715, for instance, contains no short title by which the law may be called. Also, unlike the District's proposed bill, there is no definition of the term "specimen". This omission could result, for example, in the submission of any urine or breath which could be of insufficient quantity for testing, but which would technically comply with the statute in that a "specimen" had been given. No action could be taken for refusal to give same.

On the other hand, the bill before us defines "police officer" so as to include members of the Park Police and U. S. Capitol Police and it is our view that this definition is superior to the one contained in the District draft bill.

A few more serious differences between S. 2715 and the District bill must, however, be pointed out. Section 3 of the Senate bill, unlike section 4 (b) of the District bill, limits the persons allowed to take a blood specimen to a physician or a registered nurse. Because of the possible lack of availability of such personnel at all times, it is recommended that medical technicians be added to the list of persons qualified to take a blood specimen. Also, section 4 (c) of the District bill specifies that a police officer may administer the breath or urine test. Section 3 of S. 2715 contains no such language. Perhaps it should be amended to state that a police officer or other qualified person may conduct the breath or urine test.

Finally, the major difference between S. 2715 and previous bills dealing with implied consent is the lack of a provision similar to the one found in section 3 (b) of the District bill which provides for mandatory testing of an operator who is involved in the District of Columbia in a motor vehicle collision or accident in which death or personal injury results. The Government of the District of Columbia is of the view that such a provision is of the utmost importance in the charging,

prosecution, and determination of appropriate penalties of persons involved in such accidents and urges the amendment of S. 2715 to provide for its inclusion. Such provision would bring S. 2715 totally in line with the Department of Transportation Standard 308 mentioned above which requires a mandatory test in fatality cases. The District's position is somewhat stronger in that it includes cases involving personal injury. It is our view that such language would provide more effective alcohol countermeasures than S. 2715 contains at present.

There seems no longer to be any serious question concerning the constitutionality of such express consent in fatality and personal injury cases.

Existing law in the District of Columbia, D. C. Code, S40-609a (e), allows an apparently intoxicated driver to refuse to take a chemical test; no sanctions are imposed for this refusal. This law is inconsistent with the doctrine laid down in 1966 by the Supreme Court in Schmerber v. California, 384 U. S. 757 (1966). In the Schmerber case, a blood sample was taken from Schmerber by a physician at the direction of a police officer who had probable cause to believe that Schmerber was driving under the influence of liquor. The blood sample was taken over Schmerber's objection. The chemical report indicating intoxication was admitted in

evidence at Schmerber's trial for driving while intoxicated, and he was convicted. The Supreme Court affirmed the conviction, ruling that a chemical test "to secure evidence of blood-alcohol content in this case was an incident to petitioner's [Schmerber's] arrest" and "the test was performed in a reasonable manner". Schmerber v. California, supra at 771. The Supreme Court specifically held that in taking a blood sample from Schmerber over his objection there was no violation of his Fourth Amendment right to be free from unreasonable searches and seizures, of his Fifth Amendment privilege against self-incrimination, of his Sixth Amendment right to counsel, or his Fourteenth Amendment right to due process of law.

It appears, therefore, that there is no constitutional impediment to the enactment of an "implied consent" law for the District of Columbia, and that such a law would substantially strengthen the District's control of the drinking driver.

In light of the fact that the District of Columbia is the only jurisdiction in the nation which does not have legislation designed to meet the problems associated with the drinking driver, and on the basis of the justification set out above, the

Commissioner of the District of Columbia strongly recommends enactment of S. 2715, if amended to incorporate the provisions of the attached proposed legislation.

Thank you again for the opportunity to testify on this matter. I am available for any questions you may wish to ask.

Mr. MURPHY. The present need for alcohol countermeasures all over the United States is a fairly well-documented fact of life today, which I cover in my statement, and which I will not repeat here except as it applies to the District of Columbia.

In the District of Columbia because of the fact that the police officers are without the implied consent tool—it has proved very effective in other jurisdictions—we have great difficulty in obtaining convictions.

Last year we had 344—the fiscal year ending June 1972. The Commissioner feels that in view of the worsening situation that is occurring in the District of Columbia with respect to the total number of traffic accidents and intoxicating liquor involvement therein, that other remedial legislation, such as has been proposed by Senate bill 2715, is needed.

The proposed law is based on, and is similar to implied consent law that is found in the Uniform Motor Vehicle Code.

The District of Columbia happens to be the only such jurisdiction that has no such implied consent law.

In March of this year, the Secretary of Transportation, Mr. Volpe, addressed a letter to Mayor Washington, in which he expressed concern that 5 years after the issuance of the highway safety program standards, many jurisdictions have not implemented many of the standards. And he said without such an implementation, we cannot do the job of highway safety.

Attached to his letter was an inventory of the implementation of various standards issuing from the Department of Transportation by the District of Columbia.

In Standard 308, that involves alcohol safety, is one of the two lowest rated scores the District of Columbia had.

On page 4 of my prepared statement, I show where 50 points out of a possible 100 were deducted from the total which we were credited. And the biggest reason, of course, can be seen that we do not have an implied consent statute.

I recently, just this past week, attended a conference on traffic law at the Fourth Annual Law Institute, University of Colorado, in Boulder. One of the topics of discussion by many of the State representatives was the fact that while the Congress, acting through the Department of Transportation, pursuant to the Highway Safety Act of 1966, has provided that an implied consent statute among many other types of legislation is a must for the States; oddly enough, the same Congress which enacted the legislation from which issued all of these laws in the other States has not adopted one for the District of Columbia.

On page 5, I point out certain differences between S. 2715 and a draft bill originally recommended by the Commissioner, a copy of which is in the files of the committee. They are not major, with one exception, and I will not take the time to repeat them, since they are spelled out pretty well in the statement.

But on the bottom of page 6, I point out that there is a major difference between S. 2715 and the bill recommended by the Commissioner, and that is the provision that it would be mandatory testing of an operator who was involved in a collision or accident in which death or personal injury results. Now, this provision if included in S. 2715 would bring the statute totally in line with the Department of Transportation's standard 308, which I mentioned.

Now, that standard requires mandatory tests only in fatality cases. Therefore, the District's position is somewhat stronger in that it includes cases involving personal injury in addition to fatalities. It is our view that this kind of language would provide more effective alcohol countermeasures than Senate bill 2715 contains at present.

The reasoning behind it was, where there are serious cases, where possible negligence and homicidal manslaughter or second degree murder charges even might arise, the drivers involved will choose to refuse to take the test and avoid scientific evidence that may be needed in order to bring about a conviction for the more serious crimes, and therefore it is the position of the District that we should include the amendment proposed.

The constitutional issues are covered on pages 7 and 8, and in our view there is no constitutional impediment in the enactment of the implied consent law or the amendment which we here proposed. So, in light of the fact the District of Columbia is the only jurisdiction which does not have an implied consent law, and in view of the fact that we do have an increasing statistical problem so far as accidents are concerned in which alcohol is involved, and that very few court actions are successfully prosecuted, we recommend very strongly the enactment of S. 2715, if amended to incorporate the provisions that we here propose.

I thank you for the opportunity to testify, Mr. Chairman. I, and the members that are with me, am free for any questions you might have.

Senator STEVENSON. I thank you, Mr. Murphy. Would any of the other gentlemen at the table like to add anything to Mr. Murphy's testimony?

Mr. GILL. I would like to add two facts of statistics which is not included, one fact is that during 1971 there were some 96 fatalities in the District of Columbia. Of those 96, 52 of the drivers were identified as having had some type of alcohol involved in their system.

The other statistic is that in 1968 there were 127 motor vehicle fatalities during that year, 54 of the drivers had been drinking. I think fatality statistics are important to emphasize our need for alcohol countermeasures in this jurisdiction—the strongest ones available.

Senator STEVENSON. Let me make clear certain points for the record. This bill does not authorize prearrest tests, is that correct?

Mr. MURPHY. No, it does not.

Senator STEVENSON. Except in the case of unconscious individuals.

Mr. MURPHY. That is correct.

Senator STEVENSON. In the case of conscious persons, the officer must have reasonable grounds to believe that the driver was operating the car while under the influence of alcohol.

Mr. WAGNER. Mr. Chairman, even during the time the person is unconscious, he theoretically is under arrest. There is no prearrest breath test lull at all. The bill contains a provision that if the person is unconscious, he is not deemed to have waived his rights, but theoretically the person is under arrest.

Senator STEVENSON. I have two questions. (1) What is intended by that expression "reasonable grounds?" What are the reasonable grounds here for arrest and why should the reasonable grounds requirement apply in the case of conscious drivers and not apparently in the case of unconscious drivers? A reading of section 4 indicates

that there is no requirement that the officer have any reasonable grounds for believing the driver was intoxicated before requiring the test.

Mr. WAGNER. The same requirements for placing persons under arrest while the person is conscious would apply to placing the person under arrest while he is unconscious. I am afraid I am not familiar with reasonable grounds. We do use that description in a potential prearrest test law, but it is not contained in the implied consent law.

Under the implied consent law, the person must have been arrested for a traffic violation.

Senator STEVENSON. I just do not see the reasonable ground requirement in section 4 which reads that any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by section 2 of this act and the test or tests may be given.

Mr. WAGNER. That person would have been placed under arrest. It is a technicality, but he will have been placed under arrest.

Senator STEVENSON. Maybe it is just a drafting problem and perhaps we should make it clear that reasonable grounds must exist in the case of a section 4 violation as well as in the others. That is the intent.

Mr. WAGNER. In the Breithraupt (Abram 352, U.S.C. 432), U.S. Supreme Court case, the person was unconscious, was placed under arrest by the police officer, and a blood sample was taken. This was held to be constitutional, but there must be the arrest first.

Senator STEVENSON. The driver gets his choice between blood, breath, and urine test—is that correct under S. 2715?

Mr. MURPHY. Section 2 provides whichever he may elect.

Senator STEVENSON. Why should that choice be the driver's, instead of the officer's?

Mr. GILL. The District of Columbia bill, which was mentioned in the statement, would give the choice to the police department or those making the test. That is the difference between the S. 2715 bill and that bill which we would——

Senator STEVENSON. What is the basis for the District's preference? Why does the District prefer that the choice be the officer's?

Mr. GILL. This would allow us to use whatever equipment we might have most available.

Senator STEVENSON. The driver, late at night, may elect a blood test and there is no doctor available, and by the time this is administered the alcohol content would be down?

Mr. GILL. That is correct.

Senator STEVENSON. As a matter of curiosity, why do these implied consent laws not permit testing for narcotics in addition to alcohol in the blood?

Mr. GILL. The implied consent laws in some jurisdictions do so provide.

Senator STEVENSON. Is there any basis for differentiating between alcohol and narcotics—are the tests different in one case than in the other? Are there no tests that can be administered under the same circumstances with a reasonable assurance of accuracy? I had understood in the case of recent usage of hard drugs, for example, that urine tests could be taken.

Mr. GILL. With respect to the hard drugs, the urinalysis would give as discriminating a finding as you would have in the case of alcohol.

In the case of some other substances we may discuss, for example, marijuana, you may have some difficulty in making such an identity.

I think the thrust of your bill, S. 2715, and the bill proposed by the District of Columbia is to get some sort of alcohol-drug countermeasure underway. The one which we have been most in need of is the alcohol countermeasures rather than alcohol and drug countermeasures.

Senator STEVENSON. Are drivers under the influence of hard drugs not a problem in the District?

Mr. GILL. They are a problem; yes.

Senator STEVENSON. Do you know how many arrests or convictions there were last year for offenses involving drivers under the influence of hard drugs that took place in the District?

Mr. GILL. I do not have those statistics with me.

Senator STEVENSON. Is it possible for an officer observing the behavior of the driver to make or to come to a reasonable opinion on reasonable grounds, to the belief that the driver was driving under the influence of hard drugs as well as under the influence of alcohol?

Mr. GILL. Could you repeat that?

Senator STEVENSON. Can the policeman who in this case has to have reasonable grounds for believing the driver is under the influence of alcohol, as easily, in a different case, have the reasonable grounds for believing that the driver is under the influence of narcotics?

Mr. GILL. I think he would have some difficulty in telling in which category he may fall. In fact the driver involved may fall into both categories.

Senator STEVENSON. So if he is in both categories, or if he cannot differentiate between alcohol and drugs, you still apply only a test for alcohol content under this bill. Why not apply that test for whatever drug content in the blood can be ascertained from testing?

Mr. GILL. The department certainly would have no objection to that.

Senator STEVENSON. Can you gentlemen shed some light on this question? I do not understand why it should be confined to alcohol.

Mr. MURPHY. There is no logical reason why they should not be combined, Senator.

Mr. WAGNER. There are some States that have a law which says that it is unlawful to operate a motor vehicle while under the combined influence of alcohol and drugs.

Senator STEVENSON. Are they suggesting that it is all right to drive under the influence of narcotics, but not under the influence of alcohol?

Mr. WAGNER. It would also be illegal to operate under the influence of any narcotics. The difficulty we have had on a national basis is the establishment of proof of impairment and that basically is what has to be established. The only type of test that is available today is urine, and that is probably the least type of test that anyone is given. Remembering also that there is a matter of choice generally, a person can refuse to take the test, and under those circumstances you cannot force the test. Obviously, at that point, you have no scientific evidence of a particular narcotic.

The other problems involve the matter, even if you can detect a particular drug, the amount of drug that is required for a person to be impaired. In addition to that, when you do have the combination of alcohol and a particular drug, is the synergistic effect, where a little bit of alcohol and a little big of drugs can create a very serious problem.

The entire drug scene is somewhat confused in the question of the amount of drugs, the ability to detect a particular drug. Some, such as barbiturates and amphetamines, which most probably are the most serious type of drugs, will remain in the body for an extended period of time. The problem would be to say that this particular drug was impairing this driver at the time he was driving.

Urine is obviously a very difficult means by which to establish this, because, as I said earlier, it is rarely given and most often the person who may be impaired would refuse to give it.

Senator STEVENSON. Except the law could be changed to make the choice the officer's choice and not the driver's.

Mr. WAGNER. But an officer would detect an impaired person and would not know what his impairment would be. The manifestations would probably be somewhat similar, if not almost the same. I just do not see him as a normal course giving urine tests. It is expensive, it is difficult, and I am sure many people would be opposed to submitting to a urine test.

The biggest difficulty of all is that we have not been able to apparently establish a relationship with driving while under the influence of drugs as compared to while under the influence of alcohol. We have very definite evidence as to the number of fatalities caused by the abuse of alcohol. We have not been able to establish whether there is a disproportionate number of fatalities caused by people under the influence of drugs.

We are certainly in the process of trying to determine as much as we can and a great deal of research is needed in this area.

Mr. GILL. If I could add something else to that, I think it should be noted that in the District of Columbia, traffic and most vehicle regulations specifically part 1, article 5, section 20, there is specific prohibition against liquor and drugs, and it has been the position of the chief of police previously expressed that we favor the inclusion of drugs and narcotics in such a bill as this. However, this bill has come forward and we support it as is, but would have no objection to the addition of the drugs and narcotics that you have mentioned.

Senator STEVENSON. While Mr. Wagner has described it very clearly and helped me with some real difficulties.

Mr. WAGNER. As a matter of practicality, the only conditions that we know of on a national basis where a person has admitted and confessed to have taken drugs and under the influence; but to try to get a conviction on evidence is almost impossible today.

Mr. MURPHY. I think the problem, Senator, is that we have established 0.10, for example, as being reasonably accurate standard which when applied in a court trial, it is a reasonably accurate standard which will reflect the fact that the man was driving while impaired. To my knowledge we do not have any scientific basis for saying x amount of hard drug—of whatever kind impairs, is that not the big problem?

Mr. WAGNER. Yes. What certain amount of barbiturates might affect people in totally different ways. And so it is just the precise amount of barbiturate in itself might not substantiate an impairment of an individual.

Mr. MURPHY. Mr. Gill referred to the District of Columbia statute that prohibits driving under influence of alcohol or drugs, but he did not mention the qualifying word "narcotic drugs." As I understand

it, there are many, many drugs which can impair that are not considered narcotic.

Senator STEVENSON. It is also provided, is it not, that the driver is entitled to a hearing?

Mr. MURPHY. That is in the bill, section 6. It spells out the issues to be decided.

Mr. WAGNER. I believe that is where you might have gotten the terms "reasonable ground to believe" and that is to substantiate the arrest. In other words, when a hearing is held by the Commissioner, one of the items that he must concern himself with: Was there substantial grounds to make the arrest?

If there were not, if he is arbitrary, the Commissioner can find him not guilty of charge.

Senator STEVENSON. The counsel feels it would be helpful to the record if we had your opinion as to what should constitute reasonable grounds for the arrest, something in the record to give some meaning to that expression. Could you elaborate a little for the record what are reasonable grounds?

Mr. SINDLER. Reasonable grounds is a legal term of art which can only be defined in each fact situation, and the cases that are in existence on it indicate what was or was not reasonable grounds for arrest in that particular fact situation. Obviously, the officer on the street is making a subjective judgment hopefully based upon what he considers objective manifestations of being under the influence of alcohol to an extent that it has impaired the driving ability of the individual in question.

The officer, of course, would be using his experience and expertise in each individual fact situation, and hopefully his expertise will be found out to be correct.

Senator STEVENSON. I think you have given us what we wanted, which is the same standard which will apply in this case as in others, and not a special standard.

Mr. SINDLER. That is correct.

Senator STEVENSON. Gentlemen, unless there is anything further you ought to add, I thank you very much.

Mr. WAGNER. I would like to add one more point in the bill that is quite important, and again part of standards that the Department of Transportation has promulgated, and that is that 0.10 blood alcohol concentration be the legal definition of intoxication or at least presumptive level of intoxication. The present District of Columbia bill uses 0.15, as the presumptive level of intoxication. The bill before us now will bring it down to 0.10, which would be the level that is acceptable to the Department of Transportation.

So, this bill also contains a second very important issue, and that is 0.10 blood alcohol concentration as being the definition of intoxication.

Senator STEVENSON. You support the definition of this bill?

Mr. WAGNER. Yes; I do.

Senator STEVENSON. All right. Thank you very much. I will also enter into the record in connection with S. 2715 a letter from Graham Watt, the Deputy Mayor, to the chairman of the Senate District Committee, Senator Eagleton, and also a letter to me as chairman of the subcommittee from Senator Percy, who is the principal sponsor of the Senate bill. Thank you very much.

(The letters referred to follow:)

THE DISTRICT OF COLUMBIA

WASHINGTON, D.C. 20004

WALTER E. WASHINGTON
Commissioner

GRAHAM W. WATT
Assistant to the Commissioner

August 14, 1972

Honorable Thomas F. Eagleton
Chairman
Committee on the District of Columbia
United States Senate
Washington, D. C.

Dear Mr. Chairman:

The Commissioner of the District of Columbia has for report S. 2715, a bill "To provide that any person operating a motor vehicle within the District of Columbia shall be deemed to have given his consent to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood."

S. 2715 is substantially similar to draft legislation submitted to the Congress by the Commissioner on February 8, 1972. A copy of that proposal is attached for your information.

The essential difference between S. 2715 and the attached legislation is that section 3 of the attachment, unlike S. 2715, contains a provision which requires a motorist, in those cases involving death or personal injury, to give, without a right to refuse, a specimen of his blood, breath, or urine for chemical testing to determine its alcoholic content. In all other cases, a motorist may refuse to give a specimen, subject to revocation of his operator's permit for a period of six months. In all instances, the motorist must be arrested for a violation of law and the police officer must have reasonable grounds to believe that the person arrested has been driving or was in actual physical control of his motor vehicle while under the influence of an intoxicating liquor.

This distinction is based on the seriousness of these kinds of accidents and recognizes the strong public interest in requiring that a specimen be given in those cases involving death or personal injury.

The attached proposed legislation also contains several perfecting amendments not incorporated in S. 2715.

In light of the fact that the District of Columbia is the only jurisdiction in the nation which does not have legislation designed to meet the problems associated with the drinking driver, and on the basis of the justification set out in the attached material, the Commissioner of the District of Columbia strongly recommends enactment of S. 2715, if amended to incorporate the provisions of the attached proposed legislation.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to the Congress.

Sincerely yours,

GRAHAM W. WATT
Assistant to the Commissioner

For: WALTER E. WASHINGTON
Commissioner

Attachment

THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20004

WALTER E. WASHINGTON
Commissioner
GRAHAM W. WATT
Assistant to the Commissioner

February 8, 1972

The President
United States Senate
Washington, D. C.

Dear Mr. President:

The Commissioner of the District of Columbia has the honor to submit a draft bill "To provide that any person operating a motor vehicle within the District of Columbia shall be deemed to have given his consent, under certain circumstances, to give a specimen of his blood, breath, or urine for chemical testing to determine its alcoholic content, and for other purposes", to be cited as the "District of Columbia Implied Consent Act".

The drinking and driving problem is one of the major factors contributing to motor vehicle accidents in the District of Columbia and throughout the United States. In a number of States special studies have shown that as many as half the drivers involved in fatal accidents have been drinking. Because of the role played by the excessive use of alcohol in the large number of automobile accidents occurring in the District of Columbia, the problem of control of the drinking driver becomes more acute each year.

The present District of Columbia law relating to chemical tests for alcohol (D. C. Code, sec. 40-609a) is ineffective in combatting this growing problem. This law prescribes the weight to be given to evidence of tests of alcohol in the blood, urine, or breath of

persons tried in the District of Columbia for certain offenses committed while operating motor vehicles, but does not require that a person submit to the taking of an appropriate specimen for testing. As a result, few chemical tests have been given, and the number of successful prosecutions of persons accused of driving a motor vehicle while under the influence of intoxicating liquor has been limited. In addition, the levels of alcoholic content of the blood specified in the law as proof of whether a driver was under the influence of intoxicating liquor are unrealistic in the light of new research.

The Commissioner is of the view that the attached draft bill, discussed in greater detail in the accompanying Statement of Purpose and Justification, will substantially strengthen control of the drinking driver in the District of Columbia. It requires that a person upon the request of a police officer, give a specimen of his blood, breath, or urine for the purpose of determining its alcoholic content by means of a chemical test whenever the officer arrests such person for a violation of law and has reasonable grounds to believe such person was operating a motor vehicle while under the influence of an intoxicating liquor. The operator's permit of a motorist who refuses to give a specimen for testing, would be subject to revocation for a period of six months. However, a motorist would not be allowed to refuse to give a specimen for testing in those cases involving death or personal injury.

The draft bill also repeals present chemical test requirements and provides more realistic alcohol blood levels to be used as evidence of intoxication. The bill does not change existing standards which provide that a .05% or less blood-alcohol level and an .08% or less urine-alcohol level constitute prima facie proof that a person is not under the influence of any intoxicating liquor. For relevant evidence of intoxication, the bill lowers the present upper limit of .15% for blood to .10% and for urine from .21% to .11%. Proof that a driver's blood contained .10% or more of alcohol or his urine contained .11% or more of alcohol shall constitute prima facie proof that a person was

under the influence of an intoxicating liquor.

The Commissioner believes that the District's lack of an "implied consent" law has seriously hampered control of the drinking driver problem. Accordingly, in order to promote safety on the streets and highways of the District of Columbia, the Commissioner strongly urges the enactment of an "implied consent" law for the District of Columbia.

The enactment of the proposed legislation is not expected to result in any additional cost to the Government of the District of Columbia.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this legislation to the Congress.

Sincerely yours,

GRAHAM W. WATT
Assistant to the Commissioner

For: WALTER E. WASHINGTON
Commissioner

Attachments

WAR:kec
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CCL 32/92

STATEMENT OF PURPOSE
AND JUSTIFICATION

The proposed "implied consent" law is intended to promote safe driving and eliminate the reckless and irresponsible driver from the streets and highways of the District of Columbia by providing that any person operating a motor vehicle within the District shall be deemed to have given his consent, under certain circumstances, to the taking of a specimen of his blood, breath, or urine for chemical testing to determine its alcoholic content.

Because of the role played by the excessive use of alcohol in a large number of automobile accidents, the problem of control of the drinking driver becomes more acute each year. The problem is a major one, both nationally and in the District of Columbia. On the national level, the National Safety Council reports that studies of fatal automobile accidents show that up to 50 per cent of the drivers involved had been drinking. A report to the Congress from the Secretary of Transportation entitled "1968 Alcohol and Highway Safety Report" [90-34] (printed for the use of the Committee on Public Works, House of Representatives) states:

"The use of alcohol by drivers and pedestrians leads to some 25,000

deaths and a total of at least 800,000 crashes in the United States each year." (Committee Print, p. 1)

On the local level, the latest available figures compiled by the Metropolitan Police Department for the calendar year 1968 indicate that 62,633 drivers were involved in motor vehicle accidents in the District of Columbia. The condition of the driver was noted in 43,078 of these cases. Of these, 3,960 (9.2 per cent) were reported by the police to have been drinking. Especially alarming, from the point of view of public safety, is the fact that of these 3,960 drivers who were involved in accidents and who were reported to have been drinking, only 329 (8.3 per cent) were given an objective chemical test to determine whether, and the extent to which, such drivers were under the influence of the intoxicating liquor which they had consumed. Another alarming statistic from the records of the Metropolitan Police Department is that in 54 of the 127 motor vehicle fatalities during the same year (1968) a drinking driver was involved.

While these figures cause concern, they do not show the actual extent of driving under the influence of alcoholic liquor, since they indicate only the number of drivers who, because they were involved in an accident, were found by the police to have been drinking. In many accident cases, the fact that a driver had been drinking is not recorded on a report form, and never reaches the District's motor vehicle records. How many drinking

drivers escape detection because luck or fate enables them to avoid a traffic accident is difficult to estimate. Referring to two studies at Indiana University, the above-cited report of the Secretary of Transportation states (Committee Print p. 53):

> "The limited research available concerning those in the general population who drive after drinking, shows that:
>
> "A majority of persons of driving age also drink, but not necessarily in combination with driving.
>
> "A majority of these drivers who also drink, combine the two activities, at least occasionally.
>
> "Individuals interviewed and tested on the road, who say that they frequently drive shortly after drinking, are more likely to have alcohol present in their blood than others. And, they are much more likely to have very high blood alcohol concentrations than are those who say they combine these two activities less often."

The same report cites certain tests made to determine the relation between blood alcohol concentration and impairment of driving ability. The report concludes (Committee Print pp. 43 and 44) that these tests show:

> ". . . almost three-quarters of 'occasional' drinkers, as much as one-third of moderate drinkers, and a fifth of heavy drinkers were adversely affected in one or more driving task areas even by blood alcohol concentrations at or below 50 mg per 100 ml (0.05% by wt)--concentrations very easily attainable in the

course of social drinking. At concentrations between 50 and 100 mg per 100 ml (0.05-0.10% by wt) virtually all occasional and moderate drinkers, and most heavy drinkers, were adversely affected.

"All drinkers, including very heavy drinkers, were shown in the tests to be adversely affected at blood alcohol concentrations above 100 mg per 100 ml (0.10% by wt) specified in the Department's standard, and even heavy drinkers were among those affected at considerably lower concentrations. (These experiments included individuals capable of consuming prodigious amounts, for example '7-11 bottles of beer in 20-45 minutes (!)', and 'one subject boasting of having taken 96 bottles. . . during 24 hours!' A research worker who tested individuals normally consuming more than 62 bottles of beer per week, observed that, 'Habitual drinking gave no undue advantage.') The experimental evidence shows clearly that many individuals begin to be adversely affected with blood alcohol concentrations as low as 30-50 mg per 100 ml (0.03-0.05% by wt)--a range far below that legally defined as hazardous in most United States jurisdictions.

"Alcohol degrades individual driving performance in many ways, including deteriorations in judgment, ability to concentrate, comprehension, vision, and coordination. Ability to make rapid and correct judgments is of major importance in driving. In one experiment, the ingestion of as little as two ounces of 80 proof liquor so adversely affected the judgment of experienced bus drivers that they attempted to drive a bus through a narrower space than attempted without alcohol. At the same time they

required a larger space to complete the maneuver successfully after drinking the two ounces of liquor."

Despite the best intentions and best efforts of law enforcement officers in the District of Columbia, they have difficulty in obtaining a conviction on a charge of operating a vehicle while under the influence of intoxicating liquor (D. C. Code, sec. 40-609), in the absence of a chemical test to determine how much alcohol is contained in the defendant's blood. Very few drivers are willing to take the chemical test referred to in D. C. Code, section 40-609a, particularly since existing law provides no sanction for refusing to submit to such a test. Accordingly, control of the drinking driver problem is seriously hampered by the lack of an effective law.

The Commissioner is of the view that the steadily worsening drinking-driver situation in the District of Columbia indicates an urgent need for some remedial action to protect both the motoring public and the non-motoring public from the hazard created by the driver who by his excessive use of intoxicating liquor voluntarily disables himself from safely operating a motor vehicle. Such a driver transforms himself into an irresponsible operator of an instrumentality which all too frequently, by reason of its operation by a voluntarily disabled driver, becomes a dangerous and possibly lethal instrumentality. The remedial action proposed for the District of Columbia, already taken by all of the States, involves the enactment of an "implied consent" law, under which any person operating a motor vehicle on the streets and highways of the District while apparently under the influence of intoxicating liquor shall be deemed to have given his consent to a chemical test of certain of his body substances for the purpose of determining the amount of alcohol therein. The substances to be tested would be his breath, blood, or urine. The person would be requested to take such a test if, after he was arrested for a violation of law, the arresting officer has reason to believe that such person had been driving

or was in actual physical control of a motor vehicle on the public streets and highways while under the influence of intoxicating liquor. If a person should refuse to submit to the test, he is to be informed of the effect of such refusal, and, if he persists in such refusal, a report thereof is to be made to the Commissioner for appropriate action. Such action will involve the revocation of the license of the person so refusing to submit to the required test, if, after opportunity has been given him to be heard on the matter, the Commissioner finds that such person did in fact refuse to submit to such a test. A motorist would not be allowed to refuse to given a specimen for testing in those cases involving death or personal injury.

The proposed law is based upon and is similar to the implied consent law in section 6-205.1 of the Uniform Vehicle Code (Revised, 1968), published by the National Committee on Uniform Traffic Laws and Ordinances. Comparable provisions on "implied consent" are now law in all of the States. The District of Columbia is the sole remaining jurisdiction without an "implied consent" law.

On June 26, 1967 the Secretary of Transportation issued the first of thirteen "National Uniform Standards for State Highway Safety Programs". (House Document No. 138, 90th Congress, 1st Session, June 27, 1966, pp. 9-10.) The eighth of these standards, entitled "Alcohol in Relation to Highway Safety", provides that:

> "Each State [the District of Columbia is included within the term], in cooperation with its political subdivisions, shall develop and implement a program to achieve a reduction in those traffic accidents arising in whole or in part from persons driving under the influence of alcohol."

Each such program must provide, inter alia, that:

> "Any person placed under arrest for operating a motor vehicle while intoxicated or under the influence of alcohol is deemed

> to have given his consent to a chemical test of his blood, breath, or urine for the purpose of determining the alcohol content of his blood."

The above-quoted "implied consent" standard has been issued pursuant to section 101 of the Highway Safety Act of 1966 (Pub. L. 89-564; 23 U.S.C. 402), which provides in part that:

> "Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary."

The word "State" includes the District of Columbia (23 U.S.C.A. 101), and "Secretary" means the Secretary of Transportation (49 U.S.C.A. 1652(d)).

The proposed bill not only provides the desired "implied consent" law, but repeals the present chemical test law (D. C. Code, sec. 40-609a). It also lowers the blood-alcohol concentration upper limit from the present .15% to .10%, so that proof of .10% concentration of alcohol in the blood shall constitute prima facie proof that the driver was under the influence of intoxicating liquor. The upper limit in the draft bill would conform to the standards promulgated by the Secretary of Transportation, entitled "Alcohol in Relation to Highway Safety," cited above, insofar as the amendment applies to a test of the blood. The bill also provides a desirable lowering of the limit from .21% to .11% for testing alcohol concentration in the urine. The comparable laws of at least fourteen States presently establish .10% as the limit of blood-alcohol concentration constituting prima facie evidence that a person is under the influence of intoxicating liquor.

There seems no longer to be any serious question concerning the constitutionality of an implied consent law such as that contained in the attached draft bill. In a number of the States which have adopted implied consent laws which are essentially similar in plan and content as that proposed for the District of Columbia, attacks on constitutional grounds have been rejected.

The decisions of some of the State courts in cases involving implied consent laws hold that by driving upon the highways of the State, the driver accepts the law as it is and thus consents to the taking of a test designed to determine the amount of alcohol in his blood, and that by this consent he waives the constitutional provision against self-incrimination. This was the reasoning in Lee v. State, 187 Kan. 566, 358 P.2d 765 (1961); Marbut v. Motor Vehicle Department, 194 Kan. 620, 400 P. 2d 982 (1965); Welton v. City of Roanoke, 204 Va. 678, 133 S.E. 2d 315 (1963); and Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N.W. 2d 75, 88 A.L.R. 2d 1055 (1961). Since those cases were decided, the United States Supreme Court in Schmerber v. State of California (1966), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908, has established controlling constitutional standards for determining the admissibility of the results of the analysis of a bodily substance to determine sobriety as evidence in a criminal case. Schmerber was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor. He was arrested at the hospital where he was being treated for injuries received in the accident and, at the direction of a police officer, a blood sample was taken from Schmerber's body by a physician. The chemical analysis of the sample indicated intoxication and the report was admitted in evidence at the trial. Schmerber objected to the evidence on the ground that the blood had been withdrawn despite his refusal, on advice of counsel, to consent to the test. The Supreme Court held that the report of the analysis was properly admitted in evidence and affirmed the conviction.

Schmerber contended that admission of the evidence pertaining to the alcoholic content of his blood, in view of the means by which it was obtained, violated

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constitutional guarantees of due process of law and his right against self-incrimination. The nature of this kind of evidence and the reasonableness and efficacy of such chemical analyses was dealt with as follows in the opinion (384 U.S. at 770 and 771):

> "We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.
>
> "Similarly, we are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. See Breithaupt v. Abram, 352 U.S. 432, at 436, n. 3, 77 S.Ct. 408, at 410, 1 L.Ed. 2d 448. Such tests are a common-place in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'breathalyzer' test petitioner refused, see n. 9, supra. We need not decide whether such wishes would have to be respected."

With respect to the claim of privilege against self-incrimination, the Schmerber opinion further states:

"We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends." (384 U.S. at 761.)

"It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. * * * On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." (384 U.S. at 763 and 764.)

In State v. Kenderski, 99 N.J. Super. 224, 239 A.2d 249 (1968) the defendant was arrested for driving under the influence of alcohol and was asked to submit to a "Breathalyzer" test. He was advised that no test would be taken forcibly and against physical resistance, but that, if he refused, it might result in the loss of his driving privileges [pursuant to the implied consent law of New Jersey]. The defendant took the test, but at his trial he challenged the admissibility of the results of the test, invoking Miranda v. State of Arizona, 382 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). The court said (239 A.2d at 251):

> "Defendant argues that breatholizer (sic) evidence is subject to the Miranda rule, but clearly this is not the law. Miranda is bottomed on the privilege against self-incrimination and bars the use of communications by or testimonial utterances of a person unless and until the four-fold warning has been given and applied. A breatholizer (sic) test is unrelated to a communication by the subject. Rather, it is a search of the person and therefore subject only to the question of reasonableness. Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966); State v. Swiderski, 94 N.J. Super. 14, 226 A.2d 728 (App. Div. 1967)."

In sustaining the constitutionality of the Oregon implied consent law, the Supreme Court of Oregon, sitting in banc, in Heer et al. v. Department of Motor Vehicles, 450 P.2d 533 (February 13, 1969), referred to the above-cited Schmerber and Kenderski cases and said:

> "With reference to the Fifth Amendment challenge we rest our decision on Schmerber and Kenderski, supra, not upon the theory of waiver or consent. We see no need in this case to discuss whether a person's driving of a vehicle on a public highway is based upon privilege or right."

In Davis v. District of Columbia, 247 A.2d 417 (1968), the District of Columbia Court of Appeals had occasion recently to rule on an objection on constitutional grounds to the admission in evidence of a urine specimen taken at the police precinct station after the defendant's arrest. The Court sustained defendant's conviction of the charge of driving while under the influence of intoxicating liquor, stating:

"Appellant first contends that the specimen and its analysis were inadmissible on constitutional grounds. On this point, however, we are bound by the majority decision in Schmerber v. California, 384 U.S. 757 (1966). In Schmerber a blood sample was taken from defendant at the direction of a police officer over his objection, on advice of counsel, and the report of the analysis of the sample, indicating intoxication, was admitted into evidence at trial. The Supreme Court held that there was no violation of defendant's Fourteenth Amendment right to due process of law, of his Fifth Amendment privilege against self-incrimination, of his Sixth Amendment right to counsel, or of his Fourth Amendment right to be free from unreasonable searches and seizures. The rationale of Schmerber applies equally to the case before us. It was, in part, anticipated in United States v. Nesmith, 121 F.Supp. 758, 762 (D.D.C. 1954), where, in a manslaughter case presenting a like question of the admissibility of a urinalysis report, the court concluded that

> 'The law is clear, therefore that the privilege against self-incrimination is limited to the giving of oral testimony. It does not extend to the use of the defendant's body as physical or real evidence. The conclusion is inevitable that it does not bar the use of secretions of the defendant's body and the introduction of their chemical analysis in evidence.'

"Such physical evidence obtained from the defendant's body has been excluded on

> constitutional grounds only where the conduct used to obtain the evidence was outrageous, unreasonable and offensive to a sense of justice."

It appears, therefore, that there is no constitutional impediment to the enactment of an "implied consent" law for the District of Columbia, and that such a law would substantially strengthen the District's control of the drinking driver.

WAR:kec
2/7/72
CCL 32/92

A BILL

To provide that any person operating a motor vehicle within the District of Columbia shall be deemed to have given his consent, under certain circumstances, to give a specimen of his blood, breath, or urine for chemical testing to determine its alcoholic content, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That this Act may be cited as the "District of Columbia Implied Consent Act".

Sec. 2. As used in this Act, the term --

(a) "Commissioner" means the Commissioner of the District of Columbia or his designated agent.

(b) "District" means the District of Columbia.

(c) "Permit" means any operator's permit or any other license or permit to operate a motor vehicle issued under the laws of the District, including --

(1) any temporary or learner's permit;

(2) the privilege of any person to drive a motor vehicle whether or not such person holds a valid permit; and

(3) any nonresident's operating privilege.

(d) "Nonresident" means a person who is not a resident of the District.

(e) "Nonresident's operating privilege" means the privilege conferred upon a nonresident by the laws of the District relating to the operation by such person of a motor vehicle, or the use of a vehicle owned by such person, in the District.

(f) "Police officer" means an officer or member of the Metropolitan Police Department, or any other person actually and officially engaged in the performance of police duties in connection with guarding the property of the United States or of the District.

(g) "Specimen" means that quantity of a person's blood, breath, or urine necessary to conduct a chemical test or tests to determine its alcoholic content.

Sec. 3. (a) Any person, other than one described in subsection (b) of this section, who operates a motor vehicle within the District shall be deemed to have given his consent, subject to the provisions of this Act, to give a specimen of his blood, breath, or urine, for the purpose of determining its alcoholic

content by means of a chemical test or tests whenever a police officer --

(1) arrests such person for a violation of law, and

(2) has reasonable grounds to believe such person to have been driving or in actual physical control of a motor vehicle within the District while under the influence of an intoxicating liquor.

(b) Any person who operates a motor vehicle within the District of Columbia and who is involved in a motor vehicle collision or accident in which death or personal injury results shall submit, subject to the provisions of this Act, to a chemical test or tests and give a specimen of his blood, breath, or urine, for the purpose of determining its alcoholic content whenever a police officer --

(1) arrests such person for a violation of law, and

(2) has reasonable grounds to believe such person to have been driving or in actual physical control of a motor vehicle within the District while under the influence of an

intoxicating liquor.

Sec. 4. (a) The law enforcement agency by which the arresting police officer is employed shall designate which of the specimens authorized in section 3 shall be required for chemical testing: Provided, That the person tested may elect the breath or urine test, whichever is designated by the law enforcement agency, in lieu of the blood test.

(b) Only a physician, registered nurse, or qualified medical technician acting at the request of a police officer may withdraw blood for the purpose of determining the alcoholic content thereof.

(c) Any police officer may take breath or urine specimens for chemical testing.

Sec. 5. A chemical test of a person's blood, breath, or urine to determine its alcoholic content may be administered by any person the Commissioner determines is qualified to administer such test.

Sec. 6. Full information concerning the test or tests administered under this Act shall be made available to the person from whom a specimen was obtained.

Sec. 7. (a) Any person tested pursuant to this Act shall be permitted to have another chemical test

to determine the alcoholic content of his blood, breath, or urine administered by any person of his own choosing who is qualified to administer such test.

(b) The results of a test administered under this Act shall not be inadmissible solely because a person did not have another test administered as permitted in subsection (a).

Sec. 8. (a) If a person described in subsection (a) of section 3 refuses to give a specimen of his blood, breath, or urine, he shall be informed that such failure will result in the revocation of his permit. If such person, after having been so informed, still refuses to give such specimen, the police officer shall state in a sworn report submitted to the Commissioner that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within the District while under the influence of an intoxicating liquor and that the person had refused to give a specimen of his blood, breath, or urine.

(b) Any person who is unconscious shall be deemed not to have withdrawn the consent provided

by section 3 of this Act and the specimen may be obtained and the test or tests administered: Provided, That if such person thereafter objects to the use of the evidence so secured, such evidence shall not be used, except in those cases specified in subsection (b) of section 3. Such person can only object to such use prior to his being informed of the test results.

Sec. 9. The permit of any person who objects to the use of test evidence as provided in subsection (b) of section 8 or who refuses pursuant to subsection (a) of section 8 to give a specimen shall be revoked for a period of six months; or if the person is a resident without a permit to operate a motor vehicle in the District, the Commissioner shall deny to such person the issuance of a permit for a period of six months.

Sec. 10. (a) Whenever a permit has been revoked or denied under the provisions of this Act, the reasons therefor shall be set forth in the order of revocation or denial, as the case may be. Such order shall take effect five days after service of notice on the person whose permit is to be revoked or who is

to be denied a permit, unless such person shall have filed within such period written application with the Commissioner for a hearing. Such hearing by the Commissioner shall cover the issues of --

(1) whether a police officer had reasonable grounds to believe such person had been driving or was in actual physical control of a motor vehicle within the District while under the influence of an intoxicating liquor; and

(2) whether such person, having been placed under arrest, refused to submit to the test or tests, after having been informed of the consequences of such refusal.

(b) If, following the hearing provided in subsection (a) of this section, the Commissioner shall sustain the order of revocation or denial, such order shall become effective immediately.

Sec. 11. (a) If as the result of the operation of a motor vehicle in the District any person is tried in any court of competent jurisdiction within the District for any offense specified in subsection (b) and in the course of such trial there is received

in evidence, based upon a chemical test administered in accordance with this Act, competent proof to the effect that at the time of such operation —

(1) such person's blood contained five one-hundredths of 1 per centum or less of alcohol, or that an equivalent quantity of alcohol was contained in two thousand cubic centimeters of his breath, or that such person's urine contained eight one-hundredths of 1 per centum or less of alcohol, such proof shall be deeded prima facie proof that such person at such time was not under the influence of any intoxicating liquor;

(2) such person's blood contained more than five one-hundredths of 1 per centum, but less than ten one-hundredths of 1 per centum of alcohol, or that an equivalent quantity of alcohol was contained in two thousand cubic centimeters of his breath, or that such person's urine contained more than eight one-hundredths of 1 per centum, but less than eleven one-hundredths of 1 per centum of alcohol, such proof shall

constitute relevant evidence, but shall not constitute prima facie proof that such person was or was not at such time under the influence of any intoxicating liquor; and

(3) such person's blood contained ten one-hundredths of 1 per centum or more of alcohol, or that an equivalent quantity of alcohol was contained in two thousand cubic centimeters of his breath, or that such person's urine contained eleven one-hundredths of 1 per centum or more of alcohol, such proof shall constitute prima facie proof that such person at such time was under the influence of intoxicating liquor.

(b) The offenses referred to in subsection (a) are as follows:

(1) operating a motor vehicle while under the influence of any intoxicating liquor in violation of section 10(b) of the District of Columbia Traffic Act, 1925 (D. C. Code, sec. 40-609(b));

(2) negligent homicide in violation

of section 802(a) of the Act of March 3, 1901 (D.C. Code, sec. 40-606);

(3) manslaughter committed in the operation of a motor vehicle in violation of section 802 of the Act of March 3, 1901 (D. C. Code, sec. 22-2405); and

(4) murder in the second degree committed in the operation of a motor vehicle in violation of section 800 of the Act of March 3, 1901 (D. C. Code, sec. 22-2403).

(c) The provisions of subsection (a) shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor.

Sec. 12. The Act of March 4, 1958 (72 Stat. 30) as amended (D. C. Code, sec. 40-609a) is repealed.

WAR:kec
2/4/72
CCL 32/92

United States Senate
COMMITTEE ON
GOVERNMENT OPERATIONS
WASHINGTON, D.C. 20510

August 11, 1972

The Honorable Adlai E. Stevenson, III
Chairman
Subcommittee on Business, Commerce and Judiciary
Senate District of Columbia Committee
Washington, D.C.

Dear Senator Stevenson:

I am most pleased that your subcommittee plans to consider S. 2715, to establish an implied consent law for the District of Columbia, on August 15. Regretfully, I shall not be able to appear in person to urge the adoption of this bill. I would like, however, to comment briefly on my reasons for introducing the measure and the obvious need for it.

As you are already well aware, Illinois was the last state to adopt an implied consent law, doing so in January of this year after a long debate in the Legislature. The District of Columbia is now the only political jurisdiction remaining without such a law.

The bill, S. 2715, will give the District of Columbia an effective, workable implied consent law, using the standard of .10 percent blood alcohol level as a determination of intoxication. This law has proven to be objective, constitutional, and a valid means of taking evidence on which to document a charge of driving while under the influence.

An implied consent law basically states that a licensed driver is deemed to have given his consent to a chemical test of his blood, breath, or urine upon arrest for a violation of the law if the arresting officer determines that there is reasonable grounds to believe the person has been driving under the influence of an intoxicating liquor. The Department of Transportation established as one of its National Uniform Standards for State Highway Safety Programs the requirement that each state approve an implied consent law. Failure to do so can result in the withholding of federal aid highway funds, as was the case in Illinois last year.

The D.C. government stated in a February letter to the Congress that the lack of an implied consent law has seriously hampered control of the drinking driver problem in the District of Columbia. Reports on highway fatalities for the District show that in 1968, 54 of the 127 motor vehicle fatalities involved a drinking driver.

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Nationwide, the impact that the drinking driver has on highway accidents and fatalities is significant. Conservative estimates are that at least 50 percent of the deaths occur as a result of intoxicated or drunk driving.

In 1969, the death toll from alcohol-related accidents was 28,000. In addition, four out of every five drivers involved in an accident while under the influence of alcohol is the occasional or social drinker, not the chronic drunk. There is reason to believe that an implied consent law can have some psychological effect on the social drinker. If he faces the possibility of a license revocation for six months and court action, he may think twice before he climbs behind the wheel of a motor vehicle in an intoxicated condition.

Furthermore, the drinking driver imposes an economic burden on society. Alcohol problems cost citizens $5 to $7 for every tax dollar from sales of alcoholic beverages and the drunk driver adds $240 to every driver's cost of living. The nationwide estimate of economic loss attributable to highway accidents is $8 billion.

Examination of the current D.C. Code reveals that it is clearly inadequate with respect to drinking drivers. Present law does not require that a person submit to the taking of an appropriate specimen for testing. He may refuse, although refusal will not result in any sanctions against him. Without a chemical test as documentation of intoxication, it is extremely difficult for the courts to hand down a conviction for that charge.

Having served on the District of Columbia Appropriations Subcommittee, I am aware of the tremendous difficulties that the D.C. Police Department faces in the adequate enforcement of the law. To deny them this additional method of checking the drinking driver problem amounts to tying the hands of law enforcement. In my opinion, every reasonable, constitutionally valid means should be undertaken to control the drinking driver.

Deaths on the highway are a senseless result of caution and public safety thrown to the wind. The citizens of the District deserve greater safety on the streets, whether they be drivers themselves or pedestrians. We can no longer tolerate the irresponsible driver who, by operating a motor vehicle on the public roads, endangers the lives and safety of innocent people. He must be stopped and when he cannot be stopped he must be dealt with responsibly by the courts.

I urge the Senate District of Columbia Committee to approve S. 2715, without delay.

Sincerely,

Charles H. Percy/kbn
United States Senator

Senator STEVENSON. The next witness is Mr. George Porter, Office of the Corporation Counsel, District of Columbia government.

GEORGE PORTER, OFFICE OF THE CORPORATION COUNSEL, DISTRICT OF COLUMBIA GOVERNMENT, ON H.R. 6968

Mr. PORTER. Good morning. My name is George Porter. I am assistant corporation counsel in the District of Columbia government. I understand this hearing relates to H.R. 6968, a bill to amend the uniform commercial code of the District of Columbia to make a warehouseman's lien for charges and expenses in relation to household goods stored with him effective against all persons if the depositor of the goods was the legal possessor.

I ask, sir, that there be incorporated in the record a letter dated August 15 and signed by Mayor Washington.

Senator STEVENSON. Mr. Porter, do you have a written statement?

Mr. PORTER. I have only the letter of the Mayor. I was going to ask you, sir, whether you would hear from other witnesses who are sponsoring this bill? The District of Columbia does not propose the law, but it is sympathetic with the proposal.

There are other witnesses in the room?

Senator STEVENSON. We will hear from other witnesses, and I will enter the letter from the Mayor into the record.

(The letter referred to follows:)

THE DISTRICT OF COLUMBIA

WASHINGTON, D.C. 20004

WALTER E. WASHINGTON
Commissioner
GRAHAM W. WATT
Assistant to the Commissioner

August 15, 1972

Honorable Thomas F. Eagleton
Chairman
Committee on the District of Columbia
United States Senate
Washington, D. C.

Dear Mr. Chairman:

I have for report H. R. 6968, a bill "To amend the Uniform Commercial Code of the District of Columbia to make a warehouseman's lien for charges and expenses in relation to household goods stored with him effective against all persons if the depositor of the goods was the legal possessor."

The purpose of the bill is set forth in its title. The term "household goods" is defined to mean "furniture, furnishings, or personal effects used by the depositor in a dwelling". An effect of the bill is to enable a warehouseman to enforce a lien for charges and expenses incurred in the storage of household goods which were deposited for such storage by the legal possessor thereof.

As a technical matter, I wish to point out that the bill properly should amend section 28:7-209(3) of the District of Columbia Code, rather than the Uniform Commercial Code. Accordingly, I recommend that H. R. 6968 be amended by striking out in lines 3 and 4 on page 1 "Uniform Commercial Code (D. C. Code, sec. 28:7-209(3))" and inserting in lieu thereof "District of Columbia Code". A corresponding change should be made in the title of the bill.

I have no objection to the enactment of H. R. 6968.

Sincerely yours,

Walter E. Washington

Senator STEVENSON. I did not mean to interrupt you. Do you have any further comments in addition to submitting the letter which you would like to add for the record?

Mr. PORTER. No, sir; I have nothing that is not in the letter. Except, again, I understand this is being proposed by the Bar Association, and the Commission on Uniform Laws, and I would defer to their views at this time. As you know, the letter points out that there is a very minor technical error in the bill, which could be easily corrected.

Senator STEVENSON. Well, Mr. Porter, we will continue with the other witnesses unless there is anything more you would like to add?

Mr. PORTER. I have nothing more to add.

Senator STEVENSON. Thank you very much for coming this morning.

The next witness is Mr. Martin Thaler, chairman, Subcommittee on Finance, Securities, and Uniform Commercial Code, Committee on Commercial and Business Law of the Bar Association of the District of Columbia.

MARTIN THALER, CHAIRMAN, SUBCOMMITTEE ON FINANCE, SECURITIES, AND UNIFORM COMMERCIAL CODE, COMMITTEE ON COMMERCIAL AND BUSINESS LAW, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, ON H.R. 6968

Mr. THALER. Good morning, Mr. Chairman. I have a written statement which I submit for the record. I would not propose to read the prepared statement here.

(The prepared statement, referred to, follows:)

STATEMENT
OF
MARTIN S. THALER, CHAIRMAN
OF THE
SUBCOMMITTEE ON FINANCE, SECURITIES,
AND UNIFORM COMMERCIAL CODE
OF THE
COMMERCIAL AND BUSINESS LAW COMMITTEE
OF THE
BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
BEFORE THE
COMMITTEE ON THE DISTRICT OF COLUMBIA
OF THE
UNITED STATES SENATE

on H. R. 6968

August 15, 1972

I.

Introduction

My name is Martin S. Thaler. I am engaged in the private practice of law as a member of Martin, Moore, Thaler & Whitfield at 1701 Pennsylvania Avenue, N. W., in the District of Columbia. Since 1969, I have served as Chairman of the Subcommittee on Finance, Securities and Uniform Commercial Code of the Commercial and Business Law Committee of The Bar Association of the District of Columbia. I also am presently an Adjunct Professor of Commercial Law at the Georgetown University Law Center.

I appreciate the opportunity to appear before your Committee to present the views of the Bar Association concerning H. R. 6968.

II.

The Lien of Warehousemen

H.R. 6968 would amend Section 7-209 of the Uniform Commercial Code as it appears in the District of Columbia Code (§28:7-209).

I suggest to you that there are two independent grounds upon which the proposed legislation could be appropriately enacted. First: the desirability of keeping the U.C.C. uniform; second: your findings that the public interest would be better served by reversing the existing priorities in household goods in storage with warehousemen.

A. The desirability of uniformity

The Uniform Commercial Code (in its "1962 Official Text" version) was enacted into law for the District of Columbia on December 30, 1963 by P. L. 88-243, effective January 1, 1965 and now appears in Title 28 of the District of Columbia Code. The U.C.C. has also been enacted by the legislatures of the Virgin Islands and every state in the Union, except Louisiana. It can be said then that there is an existing uniformity in the laws concerning commercial transactions and it is desirable to maintain it. Indeed, §28:1-102 states that the U.C.C. has, as one of its underlying purposes and policies: "to make uniform the law among the various jurisdictions." In order to implement this notable

objective, the American Law Institute and the Conference of Commissioners on Uniform State Laws organized a Permanent Editorial Board to make recommendations, from time to time, concerning amendments to the Code. By its Report No. 3, published in 1967, this Board, composed of eminent jurists, lawyers, and professors, officially recommended three amendments to the 1962 Official Text of the U.C.C. One of these amendments is to §7-209 and is precisely the same as the bill now before you. The Board's statement as to the reasons for this amendment to §7-209 (and the amendment to the Official Comments to the Code) is set forth at page 3 of House Report No. 92-320, which accompanied H. R. 6968.*

For your additional information, the Board's recommendation regarding §7-209, i.e., the bill now before you, has been adopted by the legislatures of at least nine states: Arkansas, California, Kansas, Minnesota, New Mexico, North Carolina, North Dakota, Oklahoma, and Wyoming.

*There are four typographical errors in the House Report: "projected" should be "protected" (tenth line of the quotation); "When" should be "Where" (fourteenth line); "pledge" should be "pledgee" (sixteenth line); and "(c)" should be "(3)" (twenty-second line).

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B. Policy justification for enactment

Article 9 of the U.C.C. sets forth a highly detailed and elaborate scheme regarding the priority of interests in personal property. The holder of a consensual security interest in personal property (such as a conditional vendor or chattel mortgagee) is no longer spoken of as having "title" or as having a "lien"; such a person has a "security interest," which is either perfected or unperfected. In certain circumstances, however, Article 9 says that even a perfected security interest is subordinate to some other interest; e.g., a good faith buyer from a merchant's inventory takes free of even a perfected security interest. Another example of the subordination of the perfected security interest involves what are known as "statutory liens." The laws of the District of Columbia, as is true in almost all of the states, contain specific statutory provisions granting to third persons liens in personal property which is in their possession for a particular purpose. These liens are not based on consent, as are the security

interests of Article 9, but reflect the law's recognition, since common law days, of the desirability of protecting such persons as innkeepers, garagemen, carriers and warehousemen. Thus, the District of Columbia Code sets forth an innkeeper's lien on personal property of its guests (§34-107), a garageman's lien for storage, repairs and supplies for motor vehicles (§38-205), a carrier's lien on goods shipped (this is incorporated in the U.C.C. itself at §28:7-307), and a warehouseman's lien on goods deposited with it (also in the Code itself at §28:7-209, which is the provision before you today).

In its drafting stages of the U.C.C., consideration was given to the problem of stating a priority between (i) these nonconsensual or "statutory liens" created by various statutes, and (ii) the security interests of Article 9. The solution adopted by the drafters, which is now set forth in Article 9 (§28:9-310) provides that:

> "When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise."
> (emphasis supplied)

The problem is that the statute which creates the warehouseman's lien (§28:7-209) does "expressly provide otherwise." Like its predecessor, §28 of the Uniform Warehouse Receipts Act, the warehouseman's lien is considered to be ineffective against perfected security interests.*

The purpose of the proposed legislation is to reverse the priorities and make the warehouseman's lien come before existing perfected security interests.

This is entirely in keeping with the existing state of law on each of the various other liens referred to above.

The policy considerations have been ably set forth in II Gilmore, "Security Interests in Personal Property" (Little, Brown and Company, 1965), 871-892 (and particularly at pages 878-884, a copy of which is attached hereto as an Appendix).

*The reason for this is the restriction of the priority treatment in §7-209(3) to a hypothetical bona fide pledgee. Since such a person is subordinate to existing perfected security interests in goods (absent the secured party's acquiescence in the bailment), the warehouseman is also subordinated.

After canvassing the various policy justifications and arguments for giving priority to the lienholder versus giving priority to the holder of the prior security interest, Professor Gilmore states:

> ". . . it would be idle to pontificate as to the majority rule, the minority rule or even the better rule. Evidently the claim of the statutory lienor makes a powerful appeal to many courts and to many legislatures. And even when a lien statute apparently subordinates the lien to existing security interests the courts have been able to reverse the statutory priorities on theories of waiver, consent, implied authority, agency and the like. It is arguable that the modern trend is decisively in favor of the lienor . . . [although this] trend, if it exists, is certainly far from overwhelming . . ." (at p. 883).

III.

Conclusion

The Bar Association of the District of Columbia endorses the enactment of H. R. 6968, particularly in light of the desirability of maintaining amongst the various states, the Virgin Islands, and the District of Columbia uniformity of the laws concerning commercial transactions.

Respectfully submitted,

Martin S. Thaler

The arguments for giving priority to the lien tend to become more diffuse and scattered. No doubt the underlying policy justification is the thought that the lienor, through the services or materials which he has furnished, has increased the value of the property; it would be giving the holder of the security interest an unjustifiable windfall to allow him to claim the property, thus improved, while the serviceman remains unpaid. A comparable line of argument is traditionally used to explain the rule of maritime law under which contract liens are said to rank in the inverse order of creation, the most recent lien having priority over earlier liens; the maritime law analogy is not infrequently referred to in the opinions.[2] The facts of a case will occasionally give the lie to the idea that the mortgagee or vendor has in fact received any benefit from the lienor: the amount of the repair bill alone may exceed the value of the property as repaired. But a court which is sympathetic to the "benefit conferred" argument can either overlook the fact that no real benefit was conferred in a particular case, on the theory that a good rule should be maintained even though it works an occasional injustice, or, in an outrageous case, rephrase the rule in terms of the "reasonable value" of the work done; here, as throughout the whole range of quasi-contractual or quantum meruit recovery, it will remain forever unclear whether "value" means the cost of the services to the lienor or the increased market value (if any) of the property.

If the mortgagee or vendor has properly filed or recorded his security agreement, he will of course make the constructive notice argument, pointing to the fact that the usual chattel mortgage or conditional sales act purports to give complete protection once its requirements have been complied with. Courts which are sympathetic to the lienor have not found the argument insuperable. The garageman or the livery stable keeper (depending on the vintage of the case) is not, such a court will say, the sort of person who consults, or can be expected to consult, records. He is a small businessman, ignorant of the law; furthermore he is in no position to refuse his services pending an elaborate search of the records in all the counties (or states) where a valid filing might possibly be found.[3] Although the analogy is not often expressly made, such courts treat the constructive notice argument in this

2 See, e.g., Personal Finance Co. of Hammond v. Flecknoe, 216 Ind. 330, 24 N.E.2d 694 (1940); Goldstein v. Mack Motor Truck Co., 56 R.I. 1, 183 Atl. 136, 104 A.L.R. 261 (1936).

3 See, e.g., Credit Co. v. Marks, 164 Md. 130, 163 Atl. 810 (1932) (out-of-state conditional sale); Jesse Smith Auto Co. v. Kaestner, 164 Wis. 205, 159 N.W. 738 (1916) (locally recorded chattel mortgage).

Appendix to Statement of Martin S. Thaler

[Gilmore, "Security Interests in Personal Property" (1965)]

context in somewhat the same way that it is treated in cases of buyers in ordinary course of trade of inventory subject to security agreements which purport to restrict the dealer's liberty of sale.[4]

It might be said that the approaches just described meet the policy issue head-on and resolve it in accordance with economic and social theories which appeal to the court. A more common approach, however, ducks the policy issue and purports to give priority to the lienor by finding that the holder of the security interest has, in some more or less fictional sense, consented to the making of repairs or improvements and thereby waived the priority of lien to which he would, it is assumed, otherwise be entitled. There are, of course, a few cases in which the imputation of consent and waiver seems to be a reasonable inference from the facts: the mortgagee or vendor, knowing that the repairs are being made, or are about to be made, does nothing and allows the repairman to proceed in the belief that he will be first paid. In the typical case, however, the security holder does not learn of the situation until the repairs have been made and there is no basis for finding actual consent or waiver or for creating an estoppel. But a court which desires to do so can easily conclude that consent or waiver should be implied or inferred from the circumstances. In the case of the automobile, the argument runs like this:

> It is common experience that any automobile in use is going to require repairs, and the older the car the more likely repairs will become necessary in order to keep it in operation. Even in the case of a chattel covered by a recorded mortgage, this court has held that it is proper to infer that the mortgage has assented to the repairs. [Citing cases.] Assent to the repairs is all that is necessary, for the lien is then created by operation of law.[5]

Another way of talking about the issue, which amounts to the same thing, is to use the terminology of agency: the mortgagor or vendee in possession of property which, by its nature, will need periodic maintenance or repairs is constituted the agent of the mortgagee or vendor to have the necessary things done.[6]

In developing the pros and cons of the implied consent or agency theory, the courts not infrequently (in the solemn business

[4] For the buyer in ordinary course of trade cases, see Chapter 26.

[5] Emmert, C.J., concurring in Champa v. Consolidated Finance Corp., 231 Ind. 580, 599, 110 N.E.2d 289, 297, 36 A.L.R.2d 185, 195 (1953).

[6] "When the mortgagee intrusts machinery [railroad engine] . . . to the custody of the mortgagor . . . to be used by the mortgagor . . . it will be presumed against the mortgagee that . . . the mortgagor was, in case of needed repairs, constituted the agent of the mortgagee in procuring such repairs . . . ," Watts v. Sweeney, 127 Ind. 116, 123, 26 N.E. 680, 682 (1891).

of "ascertaining the intent of the parties") make play with two clauses which are often included in security agreements. One clause requires the mortgagor or vendee to maintain the property in good condition. The other clause (often drafted in the form of a covenant) requires him to keep the property free of liens. Many draftsmen, of course, use both clauses together, in double harness. The pro-lienor courts are apt to cite the "keep in good condition" clause as indicating the security holder's "intent" that the debtor have the necessary repairs made, with assent to the repairman's priority:[7] when the clause is found in conjunction with an anti-lien clause, the latter may be dismissed as "fatally inconsistent" with the "intent" disclosed by the former. With, it may be, somewhat more reason, the anti-lienor courts use the anti-lien clause as conclusive of the security holder's intent not to waive his priority and dismiss the "keep in good condition" clause as irrelevant.[8]

There is a distinction which seems to lurk behind many of the implied consent or implied agency cases without ever being clearly stated as a principle of decision: that is, a distinction between income-producing property and property which is used merely for the debtor's pleasure or personal purposes. When a lender takes a security interest in, say, a fleet of trucks or buses, it is a reasonable assumption that he expects the loan to be repaid from the income of the business, which will depend, at least in part, on the continued operation of the fleet. Proper maintenance of the fleet is essential to the lender's security, and the fact that a business enterprise is involved carries some assurance that the maintenance will be carried out in a sensible and proper fashion. Such considerations (which are not unlike those which underlie the theory of maritime liens) may well lead to the conclusion that the service lien should take priority, however the conclusion may be rationalized. These considerations do not apply with equal force, or at all, to the case of the family car: the debtor's continued operation of the car has, in the usual case, nothing to do with repayment of the loan: the debtor may be victimized by a dishonest repairman or by his own folly. The bank or finance company which has advanced the purchase price of the car can plausibly argue that under these circumstances it should not be made to run the risk of subordination without its actual

7 See, e.g., National Bond & Investment Co. v. Haas, 124 Neb. 631, 247 N.W. 563 (1933); Maulhardt v. J. D. Coggins Co., 60 N.M. 175, 288 P.2d 1073 (1955).

8 See, e.g., Colonial Finance, Inc. v. All Miami Ford, Inc., 112 So.2d 857 (Fla. 1959); Goldenberg v. Federal Finance & Credit Co., 150 Md. 298, 133 Atl. 59 (1926) (both clauses); Baribault v. Robertson & Bennett, 82 N.H. 297, 133 Atl. 21 (1926) (interpreting Massachusetts conditional sale contract).

consent. There is some discussion in the opinions of the distinction between income-producing and other property, and the distinction may well have influenced decision more often than appears on the surface.[9]

The lien statutes sometimes condition the lienor's priority on the repairs or services having been ordered by the "owner." This ambiguous term is an invitation to courts to follow their own predilections. To the anti-lienor court, it is clear that the "owner" is the chattel mortgagee or conditional vendor.[10] To the pro-lienor court it is equally clear that "owner" is the "beneficial owner", the owner of the equity, the mortgagor or vendee.[11] This conclusion is sometimes supported by reference to the fact that the motor vehicle registration and highway safety statutes often use the term "owner" with obvious reference to the person in possession of the car. The New York lien statute gives the garageman a lien when he performs services "at the request or with the consent of the owner, whether such owner be a conditional vendee or a mortgagor remaining in possession, or otherwise . . ." The lower New York courts have recently had to construe the statute in several cases where repairs were ordered by a person who had bought the car from the conditional vendee without the knowledge or consent of the holder of the conditional sale contract. Not unreasonably the courts have held that such a person was not within the class whose order would give the garageman a lien against the conditional seller.[12]

The certificate of title acts have played some role in the argument. Some of the title acts themselves expressly give priority to repair liens over noted security interests.[13] Others are ambiguous or say nothing about the problem. Some courts, in giving priority to repair liens over security interests filed or recorded in the traditional manner, have given apparent weight to the argument that garagemen could not reasonably be expected to make a

9 See, e.g., discussion in Personal Finance Co. of Hammond v. Flecknoe, 216 Ind. 330, 24 N.E.2d 694 (1940).

10 See, e.g., Hartford Accident & Indemnity Co. v. Spofford, 126 Me. 392, 138 Atl. 769 (1927) (conditional vendor is "owner," not conditional vendee).

11 Credit Co. v. Marks, 164 Md. 130, 163 Atl. 810 (1932) (conditional vendee is "owner"); National Bond & Investment Co. v. Haas, 124 Neb. 631, 247 N.W. 563 (1933) (mortgagor is "owner" though conditional vendee might not be).

12 See De La Uz v. Car Val Motors Co., Inc., 198 N.Y.S.2d 476 (Mun. Ct. 1960); Manufacturer's Trust Co. v. Stehle, 1 A.D.2d 471, 151 N.Y.S.2d 384 (1956). It has also been suggested that the mortgagor or vendee, after default, has no authority under Lien Law §184 to order repairs so as to give the garageman a prior lien: Bankers Commercial Corp. v. Mittleman, 198 N.Y.S.2d 184 (Sup. Ct. 1960).

13 See Comment, Security Interests in Motor Vehicles Under the UCC: A New Chassis for Certificate of Title Legislation, 70 Yale L.J. 995, 1013 (1961) (collecting illustrative statutory citations).

search of all public records everywhere before agreeing to work on a car brought in for repairs. The certificate of title device (at least in a state which has an "exclusive" title act) dispenses with the hypothetical search and gives actual rather than constructive notice of security interests: if the apparent owner of the car cannot produce a clean certificate he is either a thief or one who holds the car subject to a security interest.[14] Thus the certificate of title act, unless it expressly gives priority to the repair lien, can be used as an argument for subordinating the lien.[15] On the whole, however, the question of notice — whether it is used in favor of the lien under a conventional filing system or in favor of the security interest under a title act — seems to be not much more than a makeweight.

A good many of the automobile cases have involved repairs made in one state on cars registered or certificated in some other state. The question of the recognition in a forum state of out-of-state security interests vis-à-vis local creditors and purchasers is discussed in detail in an earlier chapter;[16] although the "general rule" is said to be one of comity which gives effect to the out-of-state interest, the local interest wins with some regularity against the out-of-state interest which has not been reperfected in the forum. The case is not altered when the local interest is a garageman claiming a lien for repairs; he may be protected against an out-of-state interest even though it is not clear that he would receive equal protection against a domestic mortgage or conditional sale.[17]

The Uniform Trust Receipts Act was the first security statute to deal expressly with the problem of priority of statutory liens. Section 11 of UTRA gave priority over the trust receipt interest, whether or not filed, to [s]pecific liens arising out of contractual acts of the trustee with reference to the processing, warehousing,

14 On certificate of title acts, and the distinction between "exclusive" and "non-exclusive" acts, see §20.1 *supra*.

15 See Goff-McNair Co. v. Phillips Motor Co., 226 Ark. 751, 294 S.W.2d 342 (1956); City Finance Co. v. Perry, 195 Tenn. 81, 257 S.W.2d 1 (1953).

16 See Chapter 22.

17 See, e.g., Credit Co. v. Marks, 164 Md. 130, 163 Atl. 810 (1932) (conditional sale valid in New York, unrecorded in Maryland; Maryland conditional sale, recorded in Maryland, would have had priority over garageman's lien; despite fact that car was only temporarily in Maryland, Maryland law was held applicable with result that lienor's sale to enforce his lien was upheld, the conditional sale never having been recorded in Maryland); Mack Motor Truck Corp. v. Wolfe, 303 S.W.2d 697 (St. Louis Ct. App. Mo. 1957): "We are not required to decide," said the court, "whether the lienor would be protected against a Missouri interest: We deal here with a Florida conditional sale contract, never filed or recorded in this state." The court remarked that no claim was made that the lienor had "actual notice from any source" of the Florida interest; the remark is hard to understand, since it appears that the Florida interest was noted on the certificate of title.

shipping or otherwise dealing with specific goods in the usual course of the trustee's business preparatory to their sale." This priority would cover some, although perhaps not all, of the statutory liens we are discussing. The principal modern use of the trust receipt has been in financing dealer inventories of automobiles and appliances; the service lien priority problem would not arise in this context since the dealer typically does his own servicing. To the extent that the trust receipt has been used to finance manufacturing inventory, the priority problem could easily arise in the situations which the language of §11 clearly contemplates. Either it has not arisen or the entrusters have given up without a fight; no case has yet been reported under §11.[18]

In the welter of confusion which has just been canvassed, it would be idle to pontificate as to the majority rule, the minority rule or even the better rule. Evidently the claim of the statutory lienor makes a powerful appeal to many courts and to many legislatures. And even when a lien statute apparently subordinates the lien to existing security interests the courts have been able to reverse the statutory priorities on theories of waiver, consent, implied authority, agency and the like. It is arguable that the modern trend is decisively in favor of the lienor: he receives priority under UTRA §11, and many of the Factor's Lien Acts, as well as under a number of the certificate of title acts (and apparently none of the title acts expressly subordinates the lien). This trend, if it exists, is certainly far from overwhelming: recent cases, like the older ones, show the lienor losing nearly as often as he wins. For thirty or forty years the cases have been concerned almost exclusively with automobile repairs. It requires no special expertise to say that this is a field in which fraud has become endemic: there is not only the dishonest repairman who falsifies his bills or, more passively, induces a gullible customer to have expensive repairs made to a worthless car; there is also the dishonest debtor who enters into collusion with the garageman to run up a bill which, if it takes priority, will leave the bank or finance company with no security and only a judgment-proof debtor to pursue. It may well be that many of the cases which, on one or another theory, subordinate the repair lien reflect the court's suspicion that the repair lien was tainted with fraud.

§33.4. Liens in favor of warehousemen and carriers: Their pre-Code status. Warehousemen have liens on the goods deposited

[18] Some of the Factor's Lien Acts contained provisions comparable to UTRA §11. This was the case in California, Georgia, Illinois, Indiana, Maine, Maryland, Mississippi, Missouri, New Hampshire, North Carolina, South Carolina, Tennessee, Virginia, West Virginia and Wisconsin.

with them for storage charges; carriers have liens on goods shipped for freight and demurrage.[1] These liens clearly belong to the same family as the "statutory liens" we have been discussing; they are service liens which were originally recognized at common law and subsequently acquired statutory rank; they are non-consensual liens and not security interests. We have reserved these freight and storage liens for separate discussion because the priority problem has been in this context resolved almost without controversy and has almost disappeared from litigation.

The problem arises when goods which are subject to a security interest, are shipped or stored by the debtor, without the consent or authority of the holder of the security interest. The debtor having defaulted on the loan, the mortgagee or vendor claims the goods from carrier or warehouseman. The question is whether the bailee can refuse to deliver the goods until his charges have been paid: that is, whether his lien has priority over the security interest. In the preceding section we noted that, in the automobile cases, the garageman seems to win over the security interest almost as often as he loses. Warehousemen and carriers have traditionally disposed of much political influence: we should expect to see them fare at least as well as their more humble colleagues in the automobile service and repair business. Curiously; they did not; it was long ago decided that their liens were subordinate and the decision seems never to have been changed.[2]

Section 28 of the Uniform Warehouse Receipts Act provided that the warehouseman may enforce his lien against all goods deposited by the owner of the goods and also against goods deposited by a person not the owner: "if such person had been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid." The pledge formula is a curious one. "Valid" evidently means that the depositor must have had sufficient title to the goods so that a pledge by him would have conveyed to the pledgee an interest superior to all adverse claims of ownership. Obviously a thief has no such title and, looking at the formula in the light of the background against which it was drafted, it is clear that mortgagors and conditional vendees do not have such title either, at least if the security interest in the goods has been (in modern terminology) perfected. Trust receipts and factor's lien arrangements, under which the

§33.4. 1 For the common law development of these liens, see Story, Bailments §§453a, 588 (9th ed. 1878).

2 See 1 Cobbey, Chattel Mortgages §461 (1893); 2 Jones, Chattel Mortgages and Conditional Sales §472 (6th ed. 1933).

Mr. THALER. My name is Martin S. Thaler. I am engaged in the private practice of law in Washington, presently serving as chairman of the subcommittee just referred to.

I am presently an adjunct professor of commercial law at the Georgetown University Law Center. I am here to present the views of the Bar Association of the District of Columbia concerning H.R. 6968.

This bill concerns what we have referred to as the warehouseman's lien. The bill does not create that lien. That lien already is in existence by means of the Uniform Commercial Code, 7–209.

The problem the bill addresses itself to is the relation of warehouseman's lien with respect to other security interest against the property. The Bar Association believes there are two independent grounds on which this proposed legislation could be appropriately enacted. The first, and the one we press, is that it is most desirable to maintain uniformity amongst 49 States that have adopted the Uniform Commercial Code, the Virgin Islands, and the District of Columbia. Only Louisiana has not adopted the code.

And in pursuance of this objective of uniformity, the National Conference of Commissioners and American Law Institute have organized a permanent editorial board that considers proposed amendments to the Uniform Commercial Code and considers its assignment very carefully; in fact, has only officially proposed three amendments. This is one of the three amendments.

The effect of the amendment would be to give to the warehousemen a status superior to other creditors against the property, so that, for example, if a person has purchased a sofa and a piano and various household goods and the seller of the goods has retained a security interest by way of a conditional sales contract or chattel mortgage or some other security agreement, that security interest, even though perfected, would be subordinated to the lien of the warehouseman, so that in the case the householder did not pay the warehouseman for storage charges, the warehouseman could, pursuant to the Uniform Commercial Code, sell that property, pay his charges, and only then would the perfected security interest holder be entitled to his payments.

The policy ground for choosing, as it were, between the warehouseman, the banks, the small loan companies, or the finance companies that would hold these perfected security interests is something that is within Congress to consider. I have appended to the statement a discussion by Professor Gilmore, which I think spells out the various considerations, and he concludes that there is no majority rule, that various States will have gone various ways, but with respect to the statutory liens, which a warehouseman's lien is, in the District of Columbia, it would be consistent to give the warehouseman priority. I say that because an innkeeper in the District has a lien on baggage of his guests. A garageman has a lien for work performed on the automobile. A carrier who ships goods has a lien for transportation charges.

All of those liens are superior to a perfected security interest. So we submit that on balance, as it were, from a policy standpoint, it would be desirable to enact proposed legislation. I would simply point out, which I have not in my written statement, I think the House report

is somewhat confusing in reference to the legal obligation of a warehouseman to accept goods. That is an entirely different lien. That is a carrier's lien, and the carrier's lien does not need correction.

It also stands superior to perfected security interests, so that we are not talking about a warehouseman who must take goods, the warehouseman can refuse to take goods.

That argument though, the fact that a warehouseman can refuse to take goods, and he may well do so, if the lien is not superior, I think would also suggest that the legislation would be appropriate, because in case of an emergency or some dire necessity, the householder might be turned away by the warehouseman if the household goods—even though they are sufficient to pay storage charges—if someone else has a prior interest against them.

The proposed amendment, I might say, has been adopted by nine States: Arkansas, California, Kansas, Minnesota, New Mexico, North Carolina, North Dakota, Oklahoma, and Wyoming.

Those nine jurisdictions have already adopted the proposed amendment to the code, and I think it is appropriate for the District of Columbia to have this amendment as well.

Senator STEVENSON. I can see how uniformity and consistency might be served, but I, offhand, do not quite see why as a matter of equity or policy the warehouseman's lien should be preferred over previously perfected liens of the chattel mortgagee or conditional vendor. As you point out, the warehouseman can refuse to accept the goods. The completely innocent conditional vendor, chattel mortgagee, can be deprived of his lien, can he not, under this bill, simply by the acceptance of the goods by the warehouseman?

Mr. THALER. Yes; I suppose it is possible if the storage charges rose to the point where they could only be met by the entire proceeds from the sale of the property. As a practical matter, however, I would suggest the finance companies look to the character and capability of the person that they are financing more than a possible repossession or foreclosure of goods. So that in terms of expectations, while you are quite right, Mr. Chairman, the perfected security interest holder finds someone else now has come in and taken a prior position. I do not think that the expectations are that dramatically disappointing because they run credit reports and base their judgment primarily on that basis.

As I say, it is not unusual for a perfected security interest holder to find that he is not in fact perfected in a perfect sense. A trustee in bankruptcy sometime can take priority, and all these other statutory liens take priority. Specifications vary, say, with a garageman's lien. They say the garage has improved the car and he should come in before the security interest holder. The same argument might pertain here, to the storage of, say, piano or household goods. If the owner of the goods could not place them in proper storage they well might become damaged, vandalized, and in that sense the security interest holder is protected by storage. I do not press the policy argument as much as I do the uniformity of the code, because we could discuss the policy considerations in each and every provision of the Uniform Commercial Code. It is certainly the right and undoubtedly the obligation of Congress to consider all these policy considerations. But that goes back to the original amendment of this code. If that had been done, we

probably would not have the Uniform Commercial Code at this point throughout the country.

So I think some deference has to be paid to the fact that it is to be a code and not individually enacted statutes.

Senator STEVENSON. How many other jurisdictions did you say have——

Mr. THALER. In the 1 day I had to research this, I could only bring up to February 1972, there were nine. There may be some additional ones since then.

Senator STEVENSON. Did I understand from the prior witness that the uniform law commissioners are supporting this amendment?

Mr. THALER. Yes. The commissioners on uniform laws, together with the American Institute, have a permanent editorial board that has made these recommendations. These recommendations have been adopted, not only by the National Council of Commissioners, but the Law Institute. That is reflected in the House report on page 3.

LAW OFFICES: MARTIN, MOORE, THALER AND WHITFIELD,
Washington, D.C., September 5, 1972.

Re H.R. 6968 (Warehouseman's Lien).

ROBERT B. WASHINGTON,
Committee on the District of Columbia of the U.S. Senate,
New Senate Office Building, Washington, D.C.

DEAR MR. WASHINGTON: During my testimony on the above-referenced matter, Senator Stevenson asked me whether the proposed amendment to § 7–209 of the Uniofrm Commercial Code had been approved by the National Conference of Commissioners on Uniform State Laws. I replied that I thought it had been so approved.

Since testifying, I have talked with Dean William Pierce of the University of Michigan Law School, who also serves as the Executive Director of the Conference. Dean Pierce confirmed to me on the telephone today that the Conference had, in fact, officially approved the proposed amendment as part of Report No. 3 of the Permanent Editorial Board for the Uniform Commercial Code.

Sincerely,

MARTIN S. THALER.

Senator STEVENSON. I do not believe I have any more questions though the policy issue troubles me. Thank you, Mr. Thaler.

Mr. Philip L. Gore, president, Security Storage Co., Washington, D.C.

PHILIP L. GORE, PRESIDENT, SECURITY STORAGE CO., WASHINGTON, D.C., ON H.R. 6968

Mr. GORE. Thank you, Senator. You have a written statement from me. I believe I can address myself to the questions you raised with the preceding witness.

Senator STEVENSON. We will enter your prepared statement in the record, Mr. Gore.

(The prepared statement, referred to, follows:)

August 14, 1972

S.6968

TESTIMONY OF PHILIP LARNER GORE IN SUPPORT OF AN AMENDMENT TO THE UNIFORM COMMERCIAL CODE WITH RESPECT TO WAREHOUSEMEN'S LIEN

My name is Philip Larner Gore. I am the President of the Security Storage Company of Washington, a moving and storage firm dealing primarily in household goods and personal effects, and having its places of business entirely within the commercial zone of Metropolitan Washington. I was admitted to practice law before the Bar of the District of Columbia in 1934. In 1935 I joined the Security Storage Company and with the exception of military leave for four years during World War II have been employed by it ever since. I have been President of the Company since 1955. In the year 1964-65 I served as President of the National Furniture Warehousemen's Association and speak today on behalf of the industry in support of an Amendment to the Uniform Commercial Code with respect to Warehousemen's Lien.

The purpose of S.6968 is to amend the Uniform Commercial Code provisions for the District of Columbia Code to make, with respect to household goods, a warehousemen's lien for charges and expenses in relation to the same stored with him superior to recorded chattel mortgages and conditional sales contracts.

The proposed amendment affords the warehouseman appropriate security for his storage and care of the goods, which accrue to the benefit of both the merchant and the owner of the goods, without fear of jeopardizing the merchant.

Under the current provisions of the District of Columbia Code, Title 28, Section 7-209, in the event that a warehouseman or mover receives household goods for storage or moving and the person depositing the goods defaults on the storage charges, the warehouseman's right or lien to proceeds in any sale or auction of the goods is subordinate to prior recorded liens on the goods.

Prior to the initial codification of law under the Uniform Warehouse Receipts Act, the warehousemen's lien was superior to such perfected security interests. Under the Uniform Warehouse Receipts Act this protection was lost and the similar superiority of perfected security interests was continued under the Uniform Commercial Code. This is thoroughly equitable when two businessmen are dealing one with the other. It is not right in the situations involving the storage and moving of household effects.

Throughout our Country more than 99 per cent of the moving and storage firms doing local work are operated by their owner. They are small companies run by men with little legal knowledge, if any, and would be at a complete loss to know where to start to determine if any liens existed against property placed in their custody. As was brought out in the State of California when this amendment to the UCC which we seek here was adopted, most moving and storage companies are what is known as "mom and pop" operations, in that the husband and wife frequently are the entire office and managerial staff. They look to the goods themselves which they are handling as the collateral for their charges and would find overly sophisticated even the most elementary credit checks upon their clients.

Very often a warehouseman is called upon to accept goods into storage with very little advance notice. This particularly happens in cases of family emergencies and distress situations in case of a death in the family, a separation or divorce or a change of or loss of employment. It would be utterly impossible for the warehouseman to investigate the existence of a perfected security interest against any portion of the goods tendered to him for safekeeping prior to taking them into custody. Yet we all know that installment purchases of large items of furniture or of electrical appliances is almost the rule rather than the exception.

It is the practice of the warehouseman of household goods to look to the goods as his collateral and he should not be considered bound by the constructive notice of a perfected security interest such as a chattel mortgage or conditional bill of sale.

I mentioned earlier that the State of California has accepted this amendment to the Uniform Commercial Code. A bill (H.R.6968) to this same effect was passed by the House of Representatives in July 1971. At that hearing it was made known that the Government of the District of Columbia has no objection to this bill as was indicated by letter signed by the Assistant Commissioner dated May 11, 1971.

I urge this Committee to look, and act, favorably upon this amendment which will make the Warehousemen's Lien for charges and expenses in relation to the goods effective against all persons if the depositor was the legal possessor.

Thank you very much.

Mr. GORE. Very good. The first paragraph of my statement identifies myself. I am the president of the Security Storage Co. of Washington, which has its places of business entirely within the commercial zone of Metropolitan Washington. The balance of the first page has to do with legal statements previously made.

Addressing myself more to your questions, sir, of the policy of the matter, I can agree with you wholeheartedly when two businessmen are conducting a warehousing transaction, one with the other, two businessmen are accustomed to dealing with perfected security interests or as when we were in law school, we called them chattel mortgages and conditional bills of sale. However, the situation which pertains in dealing with household goods, with the storage of a household, you almost never have two businessmen dealing together. The man who runs the business such as ours, household goods storage, is dealing almost invariably with the housewife. A person who is not familiar with the legal technicalities, who probably would not know what you were speaking about, if you said, is there a chattel mortgage, or is there a conditional bill of sale on these effects——

Senator STEVENSON. No; but it is not very easy under the Uniform Commercial Code to simply check the records and find out if a security interest has been perfected.

Mr. GORE. With the mobility of this Nation being as it is: one out of every five families moves every year and frequently the moves are across State lines, certainly across county lines. The question would be how effective would a search of records be in a given jurisdiction.

Now a point which was raised in the testimony in California, which was, I believe, the first State which adopted this amendment, was reflected in the second and third paragraphs on page 2 of my testimony; and if I may, I would like to read those two paragraphs.

> Throughout our country more than 99 percent of the moving and storage firms doing local work are operated by their owner. They are small companies run by men with little legal knowledge, if any, and would be at a complete loss to know where to start to determine if any liens existed against property placed in their custody. As was brought out in the State of California when this amendment to the UCC which we seek here was adopted, most moving and storage companies are what is known as "mom and pop" operations, in that the husband and wife frequently are the entire office and managerial staff. They look to the goods themselves which they are handling as the collateral for their charges and would find overly sophisticated even the most elementary credit checks upon their clients.
>
> Very often a warehouseman is called upon to accept goods into storage with very little advance notice. This particularly happens in cases of family emergencies and distress situations in case of a death in the family, a separation or divorce or a change of or loss of employment. It would be utterly impossible for the warehouseman to investigate the existence of a perfected security interest against any portion of the goods tendered to him for safekeeping prior to taking them into custody. Yet we all know that installment purchases of large items of furniture or of electrical appliances is almost the rule rather than the exception.

So, Mr. Chairman, since it is the practice of warehousemen and household goods warehousing industry, and I speak not only from 37 years experience in the industry, 17 of which as president of this Washington company, and as president of the national association, some 6 to 8 years ago, I know that these are small companies, the people who run them do not go to the county courthouse, do not go to the State courthouse, do not go to check security liens because when they find it necessary to sell goods for storage charges, which is not properly

done until the amount that the goods would bring at a forced sale exceeds the amount of those charges. It is bad business practice for a warehouseman ever to enforce his lien until his bill exceeds his charges, because then there would be a question as to what to do with the balance.

This person looks to the goods and is required by the Uniform Commercial Code, as he was under the Uniform Warehouse Receipts Act before him, to notify the owner of the goods by registered or certified mail that the lien was in danger of being enforced.

Then he must publish in the newspaper of general circulation in his area on 2 succeeding weeks that this lien would be enforced. He is required to go through these steps; and by going through these steps, he fills the requirement of the code. We feel that to place him subordinate to a perfected security interest is unduly burdensome.

Therefore, we urge you to look favorably upon this amendment to the code.

Senator STEVENSON. Under this amendment, the warehouseman would have it completely within his power to permit charges to run up to the point at which the goods could then be sold by the warehouseman and cover all of his accrued charges, but to the total exclusion of other creditors. He has the circumstance very much under his control; does he not? He permits the charges to run up until such time as he becomes concerned about his ability to collect for the proceeds of his charges at that point. He can sell the goods and under this amendment deprive the conditional vendor and the bank or anybody else——

Mr. GORE. I submit it is not putting things in quite the right perspective to say he permits them to run up. Every businessman wants his bills paid and paid promptly. It is not a matter of design to have charges run up; he desires to have those charges paid the instant they come due. After all, the warehouseman has taxes to pay and has to pay them promptly. He does not wish to have these charges run up; he wants to have them paid.

Senator STEVENSON. An analogy was drawn between the warehouseman and the carrier who, as I understand it, also acquires a carrier lien, but it has been a long time since I practiced commercial law and it is also my recollection that carriers by law are required to accept goods for transportation. Take that analogy, would not the warehouseman, in this case, in order to come to title to prior lien—should he not be required to accept all goods for warehousing?

Mr. GORE. I am afraid I do not quite see the relevance of that, Senator.

Senator STEVENSON. I did not really expect you to.

Mr. GORE. I do not see the relevance because the common carrier is required to accept shipments which are within his legal jurisdiction, his legal competence, where he has a certificate of convenience and necessity, then he has to do it. He has a superior lien, yes. In this instance, the warehouseman is not required to do it, is not required to accept goods into custody, but I can assure you that the instances in which the warehouseman has much notice prior to placing household goods into storage are far fewer than those where he has little notice.

He is frequently asked to take goods into custody on very short notice. The question there is that you do accept it or not. He is in business for business' sake, in order to make a profit, yes. He accepts

the goods in the storage, because that is how he tries to make a profit, by giving these goods proper protection, proper custody, keeping them in safekeeping. And by doing that, he enhances the value of the goods, vis-a-vis having them placed out into a garage, into an open shed, into the custody of a friend who has no legal liability for their safekeeping. When he becomes a bailee for hire, he has certain liabilities and responsibilities, and those liabilities enhance the value of the goods. He is performing a service for which he should be paid.

It is good practice in our industry—and here I speak as a past president of the National Furniture and Warehouseman's Association—to do as we have done for many years, to ask the depositor, the bailor, if there are any encumbrances upon the property at the time of deposit. We generally have a statement from the depositor that these are his own unencumbered goods. And thus the warehouseman looks to collateral—to the commodity for the security of his charges.

Senator STEVENSON. Can you tell us a little about how severe a problem this is for warehousemen? You mentioned the ma-and-pa service in stores before, but this is the first ma-and-pa warehouse I have encountered.

To what extent do warehousemen really suffer financial losses as a result of prior liens of conditional vendors or chattel mortgages?

Mr. GORE. From my personal experience and knowledge, I cannot say, because we have always been a highly sophisticated operation.

Senator STEVENSON. Yours is not a ma-and-pa operation?

Mr. GORE. Mine is not a mom-and-pop operation. Mine is not one of the 99 percent. We are a public-owned stock company; the Security Storage Co. was started as a safe deposit and storage department of the American Security & Trust Co. of this city in 1890. I was admitted to practice law at the bar in 1934. We are a very sophisticated operation for our industry.

There are not very many which are other than owner-operated outfits. With my 37 years of experience in the industry, I cannot name five companies in this country, nor five overseas, if you please, because our knowledge extends overseas, which are publicly held. They are operated by the owner.

In the city of Washington, every single company other than ours is operated by the owner. So I, from my personal knowledge, cannot tell you how bad a problem it is. I can say merely that as a matter of equity it should be amended. I can say that in the State of California, which was the first jurisdiction to amend the law, that there was much made of the mom-and-pop operation. I can show you many warehouses in this city where it is a mom and pop, where the man is possibly the driver, possibly the warehouseman, the wife takes care of all the office work, all the billing, and everything like that. It is an unregulated business, unfortunately. We have sought regulations and have failed heretofore to have licensing in the District of Columbia.

Senator STEVENSON. I suppose it would be hard to make too much of the mom-and-pop banks in the country that stand to lose their security interests?

Mr. GORE. Mom-and-pop operations have lost their security because of prior perfected security liens. That I know. I cannot tell you the magnitude of it. I do not know.

Senator STEVENSON. We do not have any witnesses from merchants or banks.

Mr. GORE. Senater, there is no problem there where two businessmen are dealing one with the other. Businessmen know what they have to do. They entered into this matter, fully aware of the constructive notice which comes from recording a chattel mortgage or a conditional bill of sale.

The commercial warehousing is a very easy proposition compared to household goods warehousing. Commercial warehousing is two businessmen dealing, one with the other, on commodities whose values are known and whose values are not enhanced by emotional and sentimental considerations. When one is dealing with household goods, one is dealing with both males and females. He is dealing with persons educated in business practices and those completely unversed in business practices. He is dealing with probably the most valuable things which a person has—his household treasures. Certainly sentiment is tied up into it, and clarity of thought is not found too often there.

Every move, frankly, is a traumatic experience, and occasionally it becomes traumatic for the warehouseman as well as the owner of the goods, because he suffers along with the owner of the goods. But two businessmen dealing with, well, banks, finance companies, there is no problem.

Senator STEVENSON. Certainly the exposure of the conditional vendor and the bank which discounts his paper is increased to the extent that the warehouseman's exposure is diminished.

Mr. GORE. That, Senator, was brought up by the previous witness and also in the House hearings stating that the businessman who has the chattel mortgage, who makes the conditional bill of sale, makes credit checks on the purchaser, and on the borrower of the funds. He is accustomed to making credit checks. He asks all the embarrassing questions of the purchaser, and quite properly, too. He has the opportunity to find out the financial background of the purchaser of the goods.

He also looks to that purchaser, rather than primarily looking to the goods. The finance company or a banker, I feel certain, not that I have ever been on it, would rather have the money which he is owed from the purchaser than to have a secondhand refrigerator back from the purchaser. We have not the money from the purchaser. He has obviously not paid our bills when the storage charges accrue. We have only the secondhand refrigerator, and we ask that that secondhand refrigerator be made the subject of our lien, without being subordinated to perfected security interests.

Senator STEVENSON. Well, you stated your case very clearly and persuasively. I will confess as to be a little bit troubled about the merits.

Thank you very much, Mr. Gore. Unless you have anything further that you would like to add——

Mr. GORE. Thank you; no. Thank you, Senator.

Senator STEVENSON. Our next and final witness is Mr. Edward Mitchell, vice president of the Potomac Electric Power Co.

Mr. Mitchell, would you identify the gentlemen who are accompanying you?

EDWARD F. MITCHELL, VICE PRESIDENT, POTOMAC ELECTRIC POWER CO.; ACCOMPANIED BY RALPH W. FREY, VICE PRESIDENT AND GENERAL MANAGER, CHESAPEAKE & POTOMAC TELEPHONE CO.; AND R. H. BUSSARD, SENIOR VICE PRESIDENT, WASHINGTON GAS LIGHT CO., ON H.R. 13533

Mr. MITCHELL. Yes, sir; I will. Mr. Frey of the C&P Telephone Co., and Mr. Bussard of Washington Gas Light Co.

Mr. Chairman, I have submitted a written statement on behalf of the three utilities, and with your permission I will attempt to summarize it in about a paragraph or two, if I may.

Senator STEVENSON. You have that permission. I will enter the prepared statement in the record. Thank you.

(The prepared statement, referred to, follows:)

PREPARED STATEMENT OF EDWARD F. MITCHELL, VICE PRESIDENT—ELECTRICAL ENGINEERING, POTOMAC ELECTRIC POWER CO.

Chairman Stevenson and Members of the Committee:

First let me thank you for the opportunity to appear before you today.

My name is Edward F. Mitchell. I am Vice President—Electrical Engineering of the Potomac Electric Power Company which distributes electricity in the District of Columbia and the adjoining Washington Metropolitan Area. I am appearing today on behalf of Potomac Electric and also for the Chesapeake and Potomac Telephone Company of the District of Columbia and Washington Gas Light Company, all of which are privately-owned utilities.

These utilities support and urge your favorable consideration of H.R. 13533, a bill which provides for the reimbursement to them of the costs of relocating their facilities, or loss due to abandonment, caused by Urban Renewal or Federal Aid Interstate Highway projects in the District. They seek the passage of this bill on behalf of their customers who currently are bearing such costs and losses through the rates they pay for their utility services, despite the fact that these projects benefit the entire metropolitan community or nation as a whole, and are, or should be, supported by the general tax dollars or use taxes collected specifically for such purposes.

URBAN RENEWAL

It is believed that utility relocation costs or losses from abandonment resulting from Urban Renewal projects in the District would cost the District of Columbia little or nothing under H.R. 13533. These costs normally would be included in the cost of the project and passed on to the purchaser (as is now done with regard to the costs of relocating publicly owned water and sewer facilities), and thereafter recovered in the sale or lease price of the project to private developers. Under current law, which would not be changed by H.R. 13533 to the extent that such costs are not recovered from the sale or lease of project properties, these costs are funded by federal tax dollars. Urban Renewal ". . . in the seat of the Government . . ." has been declared by the Congress ". . . to be the policy of the United States . . .". (§ 2, *District of Columbia Redevelopment Act of 1945.*)

As it stands in the District, ultimate purchasers or lessees of property from the Redevelopment Land Agency may get a windfall because part of the costs of the project, namely utility relocation or abandonment costs, have been absorbed by local utility customers. Moreover, on its face, the current situation seems to be inconsistent with the policy of Congress declaring Urban Renewal in the District to be a matter of national concern. It simply is not fair to have local utility customers bear costs attributable to this worthy national project. Currently, a disproportionate amount of costs fall upon the residents of the District, many of whom can least afford it.

FEDERAL AID HIGHWAYS

It is my understanding that Federal Aid Highway projects, including the Federal Interstate System, are funded primarily from taxes keyed to those who use them, by way of taxes on gasoline, tires, vehicles, and the like. This is an eminently fair way to fund such projects, which, after all, are of primary

benefit to their users. Under the Federal Highway Act of 1956, costs of relocation or losses due to abandonment of utility facilities are costs properly accessable to the overall Federal program, which in turn is funded by Federal use tax dollars, provided the state or territory in which such facilities are located have laws which authorize reimbursement to the utilities of such costs.

Again, the financial burden upon the District will be minimal. If the highways involved are a part of the Interstate System, 90% or more of the utility relocation or abandonment costs are reimbursable by the Federal Government. While each of the utilities here involved may be faced with different relocation problems, according to my information, the overwhelming majority of the projects anticipated in the District over the years 1972–1976, insofar as they affect Washington Gas, Pepco, and the Telephone Company, will be Federal Interstate projects.

Forty-five states have taken advantage of the Federal assistance offered for repayment of utility relocation or abandonment costs attributable to Federal Highway projects. The District has no law permitting repayment to utilities of their relocation costs or abandonment losses due to Federal Interstate System. Accordingly, utilities in the District cannot be reimbursed.

In short, we have the anomalous situation, whereby our local utility customers, unlike those in 45 of our states, are paying for utility relocation or abandonment costs truly attributable to the Federal Interstate System instead of having such costs primarily borne by those who use the System. And, for those in the District who may own motor vehicles and use the System, they are, in effect, paying more than their fair share since they pay their use tax dollars into the overall Federal Highway Trust fund, but are not able to have costs incurred by their local utilities paid from that fund. H.R. 13533 would bring the District in line with the 45 states and permit a more equitable funding of utility relocation or abandonment costs in the District caused by Federal Interstate Highway projects.

The utilities have agreed that the bill should limit reimbursement to relocate costs and abandonment losses due to Federal Interstate Highway Projects within the District of Columbia.

CONCLUSION

In a nutshell, we believe the current situation is unfair for the local utility customers. Urban Renewal costs should not be a part of the local utility customer's rate. It is a part of a Federal program. Its costs, if any, should be paid for by Federal tax dollars, largely keyed to an overall Federal tax program which affects the poor the least. As to Federal Interstate Highways, the District's obsolete law should be amended to bring it in line with the majority of the states. The people who use these highways should pay for costs attributable to them—not our local utility customers. I urge your favorable consideration for H.R. 13533.

The companies have filed with the Clerk of the Committee on the District of Columbia copies of the statement I have just made, a memorandum prepared by their Counsel which gives some further details on this subject, and an estimate of the cost of this legislation projected over a five-year period.

CHESAPEAKE & POTOMAC TELEPHONE CO. MEMORANDUM IN SUPPORT OF H.R. 13533

This Memorandum is respectfully submitted on behalf of the Chesapeake and Potomac Telephone Company of the District of Columbia, Potomac Electric Power Company, and Washington Gas Light Company to outline the purposes and objectives of H.R. 13533 which, in essence, provides for reimbursement to the privately owned public utilities in the District of Columbia of their costs of relocation or losses from abandonment due to Urban Renewal and Federal Aid Highway projects in the District of Columbia and for other purposes.

The general purposes of the bill are to prevent unusual expenses and to preserve the investments of public utilities of the District of Columbia in their properties and facilities devoted to the public service from extraordinary losses and costs brought about by Urban Renewal and Federal Aid System projects so that such costs will not unfairly be charged to the rate payers.

It provides reimbursement to utilities for the nonbetterment costs or losses with respect to properties, facilities, or structures required to be abandoned, adjusted, relocated, or removed as a part of these projects. No reimbursement is sought for

any betterments or improvements of facilities. The utilities ask only, on behalf of their rate payers, to be protected from financial injury.

As part of their business, utilities incur and accept the expected risk that their facilities may become inadequate either through technological development, normal depreciation, or normal growth. They also accept the ordinary risks incident to their occupancy of public space, i.e., that facilities located in or above streets and public ways may have to be relocated or otherwise adjusted to accommodate routine improvements or maintenance of streets. Rates authorized by regulatory agencies for utility services are designed with consideration for such normal risks of the business. The extensive changes brought about by urban renewal and Federal Aid System projects are, however, decidedly abnormal and extraordinary.

URBAN RENEWAL (section 2 of the bill)

Urban renewal is a relatively new concept to improve the city by government participation. Past projects, and others to be undertaken in the future have required and will require the condemnation and redesigning of large areas of the District wherein some existing buildings are demolished for new ones to be constructed. In this process of redevelopment certain streets and ways may be closed or rerouted to accommodate the new design. As a necessary incident, adjustments of public utility facilities located in those streets and ways may be required. The costs resulting therefrom should be included and paid as a part of the costs of the whole project. Such conclusion was reached by the Court of Appeals of Maryland in the case of *Mayor and City Council of Baltimore* v. *Baltimore Gas and Electric Company*, 156 A. 2d 447, decided December 11, 1959. In that case the court construed constitutional provisions, enabling legislation, and ordinances applicable to urban renewal in the City of Baltimore. At least seven other states have enacted laws permitting payment for utility adjustment costs in urban renewal projects.[1]

The United States Department of Housing and Urban Development permits payment of relocation costs of privately owned utilities as part of the project costs.[2] A determination as to whether or not such payments may be made is established by a legal opinion submitted by the local public agency administering the urban development program at the local level.

There is local precedent for payment of utility relocation costs incident to urban renewal. The Maryland Constitution was amended in 1960 to permit the General Assembly to authorize and empower any county or municipal corporation to carry out urban renewal projects.[3] Since that amendment 5 counties and 33 cities and towns have been so empowered. Under all of such enabling acts utilities will be paid for costs of relocating their facilities when such relocations are required by urban renewal projects. Although utility relocation costs are not provided for in the District of Columbia Urban Renewal Act, it is significant that such costs will be paid in Montgomery and Prince Georges Counties and in many of the cities and towns in the Maryland-Washington metropolitan area.

Streets and ways become building sites or other restricted areas in many instances, under or through which suitable utility easements cannot be provided. This, in turn, requires the public utilities to relocate many of their facilities and abandon others. Such changes are much more extensive than these ordinarily expected. Unless reimbursement is provided, these changes result in extraordinary expenses of adjustment, loss of use, and loss of the unrecovered investment in the facilities for which abandonment or relocation is required, all of such loss and expense ultimately redound to the detriment of the utilities' customers.

The land formerly occupied by such closed streets and ways in an urban renewal area ultimately becomes the property of the parties who redevelop the area. Former owners are compensated for their land and improvements. Cost of planning, assembling, and demolition, and the costs of publicly owned surface or subsurface facilities—such as water and sewer pipes—are included as part of the cost of urban renewal.

The owners and users of public utility properties should be treated no differently. It is only fair and just that the costs of relocating and abandoning utility facilities should be regarded as proper redevelopment expenses. To the extent possible, they should be recovered from the revenues derived from the sales and rentals of the land.

[1] Connecticut, Georgia, Kansas, Massachusetts, New Jersey, Texas, Oklahoma.
[2] Urban Renewal Handbook, sec. 7209.1, p. 4 (1969).
[3] Article II, sec. 61 (1959, ch. 444, ratified Nov. 8, 1960).

Unless relief is granted to the public utilities for the cost of relocating or abandoning their facilities, such costs eventually must be passed on to the users of the utilities' services. That occurs in the form of added charges resulting from the large, extraordinary property losses on facilities no longer used, and from the higher costs of expenditures for the relocation.

The bill would require the Redevelopment Land Agency of the District of Columbia to include in the costs payable by it the costs of relocating and abandoning facilities of privately owned public utilities when it becomes necessary to adjust such facilities in order to carry out the plan of redevelopment. This is accomplished by inserting a new Subsection (c) at the end of Section 5 of the District of Columbia Redevelopment Act of 1945, 60 Stat. 793, (Sec. 5–704, D.C. Code), and by Section 3 of the bill which makes a correlative insertion in Section 7(h) thereof (Sec. 5–706(h), D.C. Code).

FEDERAL AID SYSTEM PROJECTS

Section 4 of the bill

Similar burdens of large scale relocations and abandonments arise when utility facilities must be adjusted to accommodate the Federal Aid System construction program now in progress in the District. Congress recognized the predicament of public utilities and made provision in the Federal Aid Highway Act of 1956 for reimbursements to states (including the District of Columbia), which pay for utility relocations growing out of the Highway Program. Such reimbursements may not be made, however, unless the state has appropriate authority to do so. At the present time, it is contended that the District of Columbia lacks such authority.

There is, however, precedent in the District of Columbia for payment of utility relocation costs. Under the Washington Metropolitan Area Transit Authority Compact, if the facilities of a utility are required to be relocated because of any project connected with the building by the Authority of any transportation facilities, whether they be bus or rail rapid transit facilities, payment of utility relocation costs are required. Similar requirements are contained in the Potomac Susquehanna and Delaware River Basin Compacts. Additionally, Congress provided for payment of both privately owned and publicly owned utility relocations when it authorized the National Gallery of Art to construct additions on the area of land reserved for that purpose. The justice and reasonableness of such requirements are obvious. The construction of the Rail Rapid Transit System in the Washington metropolitan area, as well as the proposed Federal Aid Highway projects in the District will require extensive relocation of utility facilities. Congress has recognized the serious impact of these systems on the utility and provided means for relief in the Federal Aid Highway Act of 1956.

The impact of the vast road construction projects in the District is so extensive that the local utilities, and ultimately the rate payers, should not, in simple fairness, be required to bear the cost of the resulting relocations of utility properties. Moreover, such adjustments are the result of highway improvements designed to facilitate vehicular movements. They are not changes designed for improvements of utility service; nor do they result from deterioration or ordinary obsolescence. Consequently, the costs of the necessary utility modifications are properly a cost of the Federal Aid Highway Improvement Program—as recognized by Congress—and should be borne by all those who benefit from them, not solely by utility users. This is particularly true with respect to expenditures for utility modifications resulting from extensions of the Federal Aid System in the District of Columbia, financed in the main by Federal taxes of which the citizens of the District contribute their share. Yet, at present, the local utilities bear these costs and pass them along to such citizens in the rates charged for utility services although, at the same time, these same citizens are contributing to defrayment of costs of utility adjustments in other states where participation in Federal Aid funds is taken advantage of.

The bill requires the District of Columbia to include in the costs payable by it, the costs of relocating or otherwise adjusting the facilities of privately or cooperatively owned utilities whenever it is determined that any Federal Aid Highway project within the District of Columbia requires such relocation or adjustment. Relatively recent information indicates that payment for utility

relocation costs in connection with certain Federal Aid Highway projects is permitted in 45 states.[4]

Section 5 of the bill

Because of the peculiar provisions of Section 5 of the Act approved June 11, 1878, 20 Stat. 107 (Sec. 7–605, D.C. Code), the utilities request a purely correlative amendment of such Section for the purpose of eliminating possible conflicts between it and the reimbursement provisions proposed by us with respect to both urban renewal and Federal Aid System projects.

Section 5 of that Act presently contains two requirements: (1) it imposes on the Commissioners of the District of Columbia the duty to see that all water and gas mains, service pipes, and sewer connections are laid upon any street proposed to be paved or otherwise improved before such pavement or improvement is completed; and (2) it requires Washington Gas Light Company, at its own expense, to take up, lay, and replace all gas mains on any street to be paved, as directed by the District.

We propose merely to insert a comma at the end of such Section following the word "direct" appearing therein and to add the following phrase:

> except as provided in Sections 5(c) and 7(h) of the District of Columbia Redevelopment Act of 1945, 60 Stat. 793 and 795, as amended, (Secs. 5–704(c) and 5–706(h), D.C. Code), and Section 4 of the District of Columbia Public Utilities Reimbursement Act of 1971.

Submitted by,
The Chesapeake and Potomac Telephone Company of the District of Columbia.
Potomac Electric Power Company.
Washington Gas Light Company.

ESTIMATE OF COSTS OF H.R. 13533, 5-YEAR PERIOD, 1972–76, INCLUSIVE, BASED ON DISTRICT OF COLUMBIA LONG-RANGE HIGHWAY PROGRAM AND PAST EXPERIENCE RE KNOWN URBAN RENEWAL AND FEDERAL AID PROJECTS

UTILITY RELOCATION AND ABANDONMENT COSTS

Urban Renewal

The Chesapeake and Potomac Telephone Co. of the District of Columbia:

	Amount
1972	$192,000
1973	30,000
1974	30,000
1975	30,000
1976	10,000
Total	292,000

Potomac Electric Power Co.:

1972	74,000
1973	74,000
1974	74,000
1975	74,000
1976	74,000
Total	370,000

Washington Gas Light Co.:

1972	50,000
1973	60,000
1974	60,000
1975	75,000
1976	75,000
Total	320,000

Total Urban Renewal—all companies, 5 years, 1972–76, inclusive.. $982,2000

[4] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wyoming.

Federal Aid Highway

	Amount
The Chesapeake and Potomac Telephone Co. of the District of Columbia:	
1972	$102,000
1973	100,000
1974	460,000
1975	475,000
1976	625,000
Total	1,672,000
Potomac Electric Power Co.:	
1972	680,000
1973	680,000
1974	680,000
1975	680,000
1976	680,000
Total	3,400,000
Washington Gas Light Co.:	
1972	75,000
1973	100,000
1974	100,000
1975	150,000
1976	200,000
Total	625,000
Total Federal Aid Highway—all companies, 5 years, 1972–76, inclusive	5,697,000
Total Urban Renewal and Federal Aid Highway—all companies, 5 years, 1972–76, inclusive	6,679,000

Mr. MITCHELL. We do, as three utilities, ask favorable consideration of bill H.R. 13533. It will go a very long way to thwart a great inequity which now exists. In the case of urban renewal and Federal aid highway projects, our respective utilities incur very large, very substantial costs, and this cost is incurred through the acts of relocation of facilities or loss by abandonment of facilities, in order to make way for these particular projects.

As it now exists, the cost for these losses and relocations are paid by the ratepayer; and in a specific case of the urban renewal, this in effect amounts to a windfall to the developer in that the ratepayer, our ratepayers in the District and our service area, have to pay for these costs, but yet these costs are in truth a factual cost or actual cost for the redevelopment project itself. We feel that these costs should be supported by general tax and youth taxes, since the benefit is to the Nation as a whole or to the community as a whole.

Both of these have been recognized by the Congress earlier. This would in effect let the District of Columbia follow the lead of 45 States. In the case of reimbursement for Federal highway projects, and eight States, at least eight States which includes the State of Maryland, in the case of urban renewal. In regard to the comments that were made earlier this morning from the District of Columbia, we have agreed, and the bill has been changed to show this, that the purely local projects would not be included in the Federal highway

reimbursement program. And with respect to the audit comment that was raised this morning, auditing of our activities really is nothing new.

We have a resident auditor as of now from the Public Service Commission, on our property. This is something that has been going on for a long time. There is no particular difficulty. We will certainly agree to the auditing or the certification of our cost, but we really somehow question the necessity for revising the bill to show this. There will be a great many administrative details that we will have to work out in the future, as we have already worked them out with the Metro development and so forth. And we really do not see the necessity for changing a bill to set up those auditing details.

I think, Mr. Chairman, if you will refer to the written testimony on these comments, that is a reasonably fair summation, and perhaps my colleagues here care to add something to it.

Senator STEVENSON. I would be glad to have any additional comments.

Mr. FREY. No comments.

Mr. BUSSARD. No comments.

Senator STEVENSON. I think you have just touched upon the principal question—in fact, the only real question that has arisen in this hearing—and that is the question of cost verification and audit, in particular. As I understand it, you are suggesting that we ought to be satisfied with an in-house audit, not authorized or required by legislation. Some auditor or other external form of verification by the District Department of Auditors, Public Service Commission, or Redevelopment Land Agency.

Mr. MITCHELL. We would certainly agree to any auditing procedure, but we would suggest that this be left as a matter to be worked out between the various governmental bodies and ours, much as we have done, for example, with metropolitan development.

Senator STEVENSON. You have no objections to an outside audit?

Mr. MITCHELL. No, sir.

Senator STEVENSON. Just work it out with the administration.

Mr. FREY. I might elaborate on that point. We are currently receiving reimbursements from Metro under the bill passed by Congress, which did not specify audit certification. And when you get into these things, there are a great many administrative details that must be worked out and always are. Metro does audit and verify, as Mr. Mitchell said, but it was not in the bill itself.

Senator STEVENSON. Would you have any objections to additional language that is not included that would, in broad terms, simply require reasonable effort on the part of the District to verify the cost furnished by the utilities?

Mr. FREY. Not at all.

Mr. BUSSARD. No.

Mr. MITCHELL. None.

Senator STEVENSON. As between the District of Columbia Department of Audit, Public Service Commission, and Redevelopment Land Agency, which I believe are the agencies, do you have preferences as to which might be the more appropriate if an agency was designated?

Mr. FREY. I would suspect the transportation side has highway requirements, and the Department of Transportation and RLA must have some audit capabilities, and I would suspect one cannot do it alone. We would have no preference, of course.

Senator STEVENSON. Gentlemen, unless you have anything more to add, I do not believe we have any more questions. Thank you very much.

We will move as expeditiously as we can to consider all of these bills and to act on them. With that, the meeting is adjourned.

(Whereupon, at 10:55 a.m., the subcommittee adjourned.)

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