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# Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code

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## FEDERAL HOSPITALIZATION OF INSANE DEFENDANTS UNDER SECTION 4246 OF THE CRIMINAL CODE\*

PRIOR to 1949 the federal government had to release criminal defendants if they were insane. They could not be tried for a crime. Criminal defendants are constitutionally incompetent to stand trial if they are unable to comprehend proceedings against them and aid in their own defense.<sup>1</sup> Nor could they be confined in federal hospitals. Power over the general field of insanity resides exclusively in the states as *parens patriae*,<sup>2</sup> and it was thought that the federal government was wholly without jurisdiction in the field.<sup>3</sup> Whenever possible,

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\*63 STAT. 687 (1949), 18 U.S.C. § 4246 (1952).

1. *Youtsey v. United States*, 97 Fed. 937, 943-44 (6th Cir. 1889); *United States v. Chisolm*, 149 Fed. 284, 287 (C.C.S.D. Ala. 1906); *Freeman v. People*, 4 Denio 2, 24-25 (N.Y. 1847). Nor could persons incompetent to defend be tried at common law. Case of John Frith, 22 How. St. Tr. 307 (1790); 4 BLACKSTONE, COMMENTARIES \*24-25; *cf.* Criminal Lunatics Act, 1800, 39 & 40 GEO. 3, c. 94, s. 2.

2. "The State alone, as *parens patriae* is charged with the duty of caring for the insane within its borders. . . ." *Shapely v. Cohoon*, 258 Fed. 752, 755 (D. Mass. 1918); *accord*, *Hammon v. Hill*, 228 Fed. 999-1001 (W.D. Pa. 1915); *United States v. Jackson*, 16 F. Supp. 126, 129 (W.D. Pa. 1936). In England, power over insane persons was vested in the sovereign as *parens patriae*. *Sporza v. German Savings Bank*, 192 N.Y. 8, 14, 84 N.E. 406, 408 (1908); *Hammon v. Hill*, *supra*. "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States." *Wheeler v. Smith*, 50 U.S. (9 How.) 55, 77-78 (1850); *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1854). *Cf.* *Mormon Church v. United States*, 136 U.S. 1, 57 (1890). Powers not granted to the federal government either expressly or by necessary implication are reserved to the states. U.S. CONST. amend. X; *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

3. In 1857, Congress provided for the hospitalization of incompetents charged with federal crime. 11 STAT. 158 (1857), 24 U.S.C. § 211 (1952). But in 1881, the Attorney General announced that he could apply the statute only to the Army and Navy, and citizens of the District of Columbia. Since it was a state duty to treat insanity, he thought indictment in a federal court was insufficient to render the insane resident of a state a proper responsibility of the federal government. 17 OPS. ATT'Y GEN. 211 (1881). Congress forthwith amended another act to provide for hospitalization of *all* incompetents in the custody of federal officers. 18 STAT. 251 (1874), as amended, 22 STAT. 330 (1882), 24 U.S.C. § 212 (1952). Nevertheless, federal authorities continued to resist assuming custody of incompetent defendants. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF COMMITTEE TO STUDY TREATMENT ACCORDED BY FEDERAL COURTS TO INSANE PERSONS CHARGED WITH CRIME 9 (1945) (hereinafter cited as REPORT); *Hearing Before the Subcommittee of the Senate Committee on the Judiciary on S. 850*, 80th Cong., 2d Sess. 5 (1948) (hereinafter cited as *Hearing*). *But see* *United States v. Torrez*, and *United States v. Hooks* (unreported cases cited in REPORT 9).

The statute discussed *supra*, 24 U.S.C. § 212 (1952), also provided for hospitalization of federal convicts who were insane at the expiration of their sentence. But in 1916 the Attorney General stated that this statute did not authorize detention after expiration of sentence. 30 OPS. ATT'Y GEN. 569, 571 (1916); see 35 OPS. ATT'Y GEN. 366, 369 (1927). In 1930, Congress specifically limited detention to the maximum period for which the convict had been sentenced. 46 STAT. 271, 272 (1930), as amended, 18 U.S.C. §§ 4241, 4243 (1952); *but cf.* *Kuczynski v. United States*, 149 F.2d 478, 481 (7th Cir. 1945).

the incompetents were transferred directly to state asylums.<sup>4</sup> But the states, with inadequate facilities and limited budgets, were often unable or unwilling to assume additional burdens<sup>5</sup>—especially when the insane persons were of unknown domicile.<sup>6</sup> Many incompetents were released outright;<sup>7</sup> many of those initially hospitalized were released while still insane.<sup>8</sup> Thus, federal criminal enforcement was hampered by inability to hold insane defendants expected to recover capacity to stand trial.<sup>9</sup> And many dangerously insane persons indicted for federal crimes were left at large, where they constituted a threat to themselves and to society.<sup>10</sup>

In 1949 Congress sought to remedy this situation by enacting section 4246 of the Criminal Code.<sup>11</sup> The first sentence of this section authorizes the federal government to confine incompetent defendants expected to recover capacity to stand trial.<sup>12</sup> These incompetents may be held until they are tried or until the

4. Letter from James V. Bennett, Director of the Bureau of Prisons, to Judge Calvert Magruder, Chairman, Committee to Study Treatment Accorded by Federal Courts to Insane Persons Charged with Crime, June 25, 1945, at p. 2, appended to REPORT. Cf. *Hearing 5, 7, 14*; Pollack, *Insanity as a Bar for Prosecution in the Federal Courts*, 7 FED. B. J. 55, 70 (1945).

5. *Hearing 5, 14*; Letter from James V. Bennett to Judge Calvert Magruder, June 25, 1945, at p. 3, appended to REPORT; Letter from Winfred Overholser, Superintendent of Saint Elizabeths Hospital, Washington, D.C., to the *Yale Law Journal*, April 15, 1954, on file in Yale Law Library, at p. 2.

6. 2 U.S. CODE CONG. & AD. NEWS 1928, 1929 (1949). Cf. REPORT 9; Letter from James V. Bennett to Judge Calvert Magruder, June 25, 1945, at p. 3, appended to REPORT.

7. Persons not directly transferred to state hospitals were turned over to local sheriffs in the state of their domicile, when known, or the state of their indictment or conviction. *Hearing 7*; cf. Letter from James V. Bennett to Judge Calvert Magruder, June 25, 1945, at p. 3, appended to REPORT.

8. *Id.* at 2-3. Mr. Bennett "suspected" that this situation was aggravated when the domicile of the incompetent was unknown.

9. At common law it was routine criminal procedure to incarcerate such a prisoner until he became triable. Case of John Frith, 22 How. St. Tr. 307 (1790); 1 HALE, PLEAS OF THE CROWN \*35. The states follow this procedure either by authority of common law or statute. See, e.g., *In re McWilliams*, 254 Mo. 512, 164 S.W. 22 (1914); *Crocker v. State*, 60 Wis. 553, 19 N.W. 435 (1884). In the absence of statutory provision, federal criminal procedure is determined by the common law. *Howard v. United States*, 75 Fed. 986, 990-91 (6th Cir. 1896); *United States v. Nye*, 4 Fed. 888, 890-91 (C.C.S.D. Ohio 1880). Therefore it was arguable that incompetent defendants might be hospitalized by federal authorities until triable. REPORT 6; *Forthoffer v. Swope*, 103 F.2d 707 (9th Cir. 1939). However, this procedure was not followed and, for lack of alternative procedure, incompetent defendants were often tried and convicted. *Hearing 5*; Letter from James V. Bennett to Judge Calvert Magruder, June 25, 1945, at p. 3, appended to REPORT.

10. *Hearing 5*. Judge Magruder discusses this problem by deliberate reference. *Id.* at 7, 8.

11. 63 STAT. 686 (1949), 18 U.S.C. § 4246 (1952). See 2 U.S. CODE CONG. & AD. NEWS 1928 (1949).

12. The trial court "may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." 63 STAT. 687 (1949), 18 U.S.C. § 4246 (1st sentence) (1952). See *Hearing 7*. Such a commitment

charges against them are dropped.<sup>13</sup> The second sentence of the section permits the government to hospitalize incompetent defendants unlikely ever to stand trial. Confinement of these incompetents must be preceded by a judicial determination that their release will "probably endanger the safety of the officers, the property, or other interests of the United States," and that suitable state care is not available.<sup>14</sup> But the charges need not be continued;<sup>15</sup> commitment is an end in itself, wholly unrelated to any prospect of eventual prosecution. Release is mandatory whenever the incompetent ceases to endanger federal interests or suitable state care becomes available.<sup>16</sup>

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may be made only after a determination of incompetence under procedures provided in § 4244.

Commitment to the custody of the Attorney General is not mandatory under this section. U.S. DEPT OF JUSTICE, *INSANE PERSONS CHARGED WITH CRIME* (Circular No. 4126, 1950). Moreover the Attorney General may, at his option, transfer an incompetent already committed under this provision to state authorities willing to receive him. 63 STAT. 688 (1949), 18 U.S.C. § 4248 (1952).

13. 63 STAT. 687 (1949), 18 U.S.C. § 4246 (1st sentence) (1952).

14. 63 STAT. 687 (1949), 18 U.S.C. §§ 4246 (2d sentence), 4247 (1952).

Section 4247 provides that the court may commit a prisoner whose sentence is about to expire if it determines that he is "insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for [his] . . . custody and care are not otherwise available." Section 4246 (2d sentence) provides for commitment of insane defendants *without regard to prospective competency to stand trial*, if the court determines that "the conditions specified" in § 4247 exist. See *Hearing 7*. Convicts insane upon expiration of sentence are not given separate treatment in this note, but the constitutional discussion set forth concerning § 4246 (2d sentence) applies as well to them as to incompetent defendants.

The difficulty posed by disposition of federal convicts insane upon expiration of sentence was one of the significant problems which motivated the enactment of §§ 4247-48. *Hearing 7-8*. See note 3 *supra*. But, although 329 convicts were markedly insane at discharge during the five years prior to 1944, only one insane convict has been committed upon expiration of sentence under § 4247. Letter from James V. Bennett to Judge Calvert Magruder, June 25, 1945, at p. 2, appended to REPORT; Letter from James V. Bennett to the *Yale Law Journal*, April 16, 1954, on file in Yale Law Library.

15. Compare § 4248, determining the conditions for release under § 4246 (2d sentence), with § 4246 (1st sentence), requiring mandatory release when charges are dropped.

The purpose of commitments under § 4246 (2d sentence) is to protect society against the consequences of state inaction. *Hearing 7-8*; REPORT 7-9; Letter from Judge Calvert Magruder to the *Yale Law Journal*, April 13, 1954, on file in Yale Law Library, at p. 1.

16. 63 STAT. 688 (1949), 18 U.S.C. § 4248 (1952). The incompetent has a statutory right of habeas corpus to test the continued validity of his commitment. *Ibid.* Moreover, his mental condition is evaluated by the psychiatric staff at least every six months. Letter from Ivan W. Steele, Warden & Chief Medical Officer of the Medical Center for Federal Prisoners, Springfield, Mo., to the *Yale Law Journal*, April 15, 1954, on file in Yale Law Library.

Federal authorities were at first unwilling to transfer incompetents to state institutions unless they were not considered dangerous to United States interests. *Id.* This was explained on the ground that to transfer an incompetent would not be in the public interest unless "there is every reasonable expectation that his opportunities for escaping from state custody . . . will be minimized." Letter from James V. Bennett to the *Yale Law*

The new statute alleviates serious problems created by prior federal inability to retain jurisdiction over insane defendants. However, since the states are vested with exclusive power over the general field of insanity,<sup>17</sup> section 4246 has presented the courts with serious questions of constitutional law and statutory interpretation. One court has found the statute's first sentence unconstitutional;<sup>18</sup> others have upheld it, but in so doing have created unresolved problems of administration.<sup>19</sup> And the rationale employed to uphold first-sentence detention casts doubt upon the constitutionality of the long-term provisions of the second sentence; many courts would seem prepared to invalidate it as an encroachment upon the domain reserved to the states by the tenth amendment.<sup>20</sup> These doubts have not been satisfactorily resolved by the single case which has arisen under the second sentence, although a satisfactory solution is available.<sup>21</sup>

*Short-term confinement of insane defendants expected to stand trial: Section 4246 (first sentence)*

Most courts have upheld the constitutionality of the provision authorizing the federal government to hospitalize defendants expected to recover competency.<sup>22</sup> Congress intended confinement under this sentence only in actual anticipation of trial,<sup>23</sup> but it set no limit on the period of detention.<sup>24</sup> One court interpreted this provision to permit permanent confinement, and accordingly

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*Journal*, March 15, 1955, on file in Yale Law Library. Absent such expectation state facilities would not be "suitable." However, "the increasing trend is to transfer [an incompetent] to a state hospital whenever possible." Letter from Ivan W. Steele to the *Yale Law Journal*, Feb. 7, 1955, on file in Yale Law Library.

Since 1949, 276 defendants have been committed under § 4246 (both sentences): 126 have been returned to court as competent to assist in their own defense; 116 are presently in federal hospitals; 32 have been transferred to state institutions under § 4248; and two have died. Letter from James V. Bennett to the *Yale Law Journal*, April 16, 1954, on file in Yale Law Library.

17. See note 2 *supra*.

18. See text at notes 23-26 *infra*.

19. See notes 27-40 *infra* and accompanying text.

20. See notes 41-43 *infra* and accompanying text.

21. See text at notes 44-60 *infra*.

22. The chronological development of cases considering the validity of § 4246 (1st sentence) is as follows: *Higgins v. McGrath*, 98 F. Supp. 670, 674 (W.D. Mo. 1951) (constitutional) (dictum); *Dixon v. Steele*, 104 F. Supp. 904 (W.D. Mo. 1952) (unconstitutional); *Edwards v. Steele*, 112 F. Supp. 382 (W.D. Mo. 1952) (unconstitutional); *Wells v. Attorney General*, 201 F.2d 556 (10th Cir. 1953) (constitutional); *Kitchens v. Steele*, 112 F. Supp. 383 (W.D. Mo. 1953) (same); *Higgins v. United States*, 205 F.2d 650 (9th Cir. 1953) (same); *Craig v. Steele*, 123 F. Supp. 153 (W.D. Mo. 1954) (same); *Wright v. Steele*, 125 F. Supp. 1 (W.D. Mo. 1954) (same).

23. 63 STAT. 687 (1949), 18 U.S.C. § 4246 (1st sentence) (1952). See note 12 *supra*. If this were not true the additional safeguards provided in §§ 4246 (2d sentence), 4247, and 4248 would have been meaningless. See notes 14, 15 *supra*.

24. 63 STAT. 687 (1949), 18 U.S.C. § 4246 (1st sentence) (1952). See note 12 *supra*.

held the statute unconstitutional.<sup>25</sup> Given the court's interpretation, the decision seems sound; holding a defendant for a prolonged period ceases to bear practical relation to future prosecution and becomes detention because of insanity.<sup>26</sup> Other courts, however, have avoided the constitutional problem by interpreting the statute to permit detention only for a period reasonably related to criminal prosecution.<sup>27</sup> This interpretation validates the section as an exercise of criminal power ancillary to prosecution<sup>28</sup> and at the same time aligns it more closely with the actual intent of Congress.<sup>29</sup>

The courts have attempted to create a workable formula by which to define the period of commitment reasonably related to eventual prosecution. A relatively short period is necessary. Experience suggests that, generally, incompetents who do not regain capacity within one or two years will regain capacity—if at all—only after many years.<sup>30</sup> In *Wells v. Attorney General*<sup>31</sup> the tenth

25. *Dixon v. Steele*, 104 F. Supp. 904, 908 (W.D. Mo. 1952) (petitioner permanently insane); *Edwards v. Steele*, 112 F. Supp. 383 (W.D. Mo. 1952) (duration of petitioner's insanity undetermined). Both cases were decided by Judge Duncan.

26. *Hearing 7*; Letter from Judge Calvert Magruder to the *Yale Law Journal*, April 13, 1954, on file in Yale Law Library.

So long as a defendant is not permanently insane, his detention may be rationalized as necessary to insure eventual trial. But at some point during prolonged detention, the desire to protect society from a dangerous psychotic supersedes the desire to prosecute. See text at note 30 *infra*. But see Note, 6 VAND. L. REV. 928 (1953) (failing to make this distinction). After what period of detention this point is reached will depend upon the particular circumstances of each case—including, perhaps, the nature of the incompetent's alleged crime. See *Wright v. Steele*, 125 F. Supp. 1, 3-4 (W.D. Mo. 1954). But practical considerations require that this point be determined by objective criteria. See text at notes 33-40 *infra*.

27. *Wells v. Attorney General*, 201 F.2d 556, 560 (10th Cir. 1953); *Higgins v. United States*, 205 F.2d 650, 653 (9th Cir. 1953); *Wright v. Steele*, 125 F. Supp. 1, 4 (W.D. Mo. 1954); *Higgins v. McGrath*, 98 F. Supp. 670, 674 (W.D. Mo. 1951) (dictum). But see *Craig v. Steele*, 123 F. Supp. 153, 156 (W.D. Mo. 1954) (permitting detention until petitioner shows he is permanently insane); *Kitchens v. Steele*, 112 F. Supp. 383 (W.D. Mo. 1953) (same by implication). The courts above have limited detention to a "reasonable" period, by which they have meant one reasonably related to detention for prosecution. See text at notes 30-40 *infra*. The *Craig* and *Kitchens* cases, *supra*, seem unsound in this respect. See text at note 26 *supra*.

28. *Higgins v. McGrath*, 98 F. Supp. 670, 674 (W.D. Mo. 1951); see also *Wells v. Attorney General*, 201 F.2d 556, 559 (10th Cir. 1953); *Higgins v. United States*, 205 F.2d 650, 653 (9th Cir. 1953).

29. See note 23 *supra* and accompanying text.

30. Letter from Ronald H. Kettle, Superintendent of Norwich State Hospital, Connecticut, to the *Yale Law Journal*, April 9, 1955, on file in Yale Law Library; Letter from Edgar C. Yerbury, Superintendent of Connecticut State Hospital (Middletown), to the *Yale Law Journal*, April 13, 1955, on file in Yale Law Library; Letter from William F. Green, Superintendent of Fairfield State Hospital, Connecticut, to the *Yale Law Journal*, April 7, 1955, on file in Yale Law Library. See Letter from Winfred Overholser to the *Yale Law Journal*, April 8, 1955, on file in Yale Law Library. Definitive statistics are not available; the conclusions advanced are based upon the experience and opinions of the above cited authorities.

31. 201 F.2d 556 (10th Cir. 1953).

circuit decided that only a "temporarily" insane person might be held.<sup>32</sup> This formula is unworkable. The court must determine before commitment whether an accused will recover; but recovery is scientifically unpredictable.<sup>33</sup> Furthermore, a finding that insanity is "temporary" is not a guarantee of short commitment; it is simply a prediction that the incompetent may some day recover.<sup>34</sup> The ninth circuit sought to avoid the latter difficulty in *Higgins v. United States*<sup>35</sup> by requiring a further determination that defendant would regain competency in a "reasonable" time.<sup>36</sup> This test is even more unworkable: it requires a prior determination of both whether and when recovery will occur. Finally, the district court in *Wright v. Steele*<sup>37</sup> held that a year and a half constituted a "reasonable" time as a matter of law.<sup>38</sup> Since the accused remained incompetent at the end of this period, discharge was mandatory.<sup>39</sup> The objective standard established in *Wright* points the way to a more workable formula. At commitment the court should determine a relatively short period that, as a matter of law, is "reasonably" related to prosecution. A defendant still incompetent to stand trial at expiration of the prescribed period should be released.<sup>40</sup>

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32. *Id.* at 560. Wells had been found mentally incompetent, but there had been no finding as to whether his incompetency was temporary or permanent. *Id.* at 558. The court remanded for determination of this question. *Id.* at 560-61.

33. It is impossible to determine whether insanity is incurable, *i.e.*, "permanent." "As a psychiatrist I do not know what permanent insanity is. . . . The [*Wells*] decision, to my mind therefore, is highly impractical. . . ." Letter from Winfred Overholser to the *Yale Law Journal*, April 15, 1954, on file in Yale Law Library. "The matter of permanent or temporary insanity is ordinarily not inquired into [by psychiatrists] except when requested by the court. . . . [A psychiatrist] is at best able to only speculate in the matter following a course of adequate treatment for the mental illness. Our Chief Psychiatric Service has on several occasions requested the court to define temporary and permanent insanity, and they appear to be unwilling or unable to provide such a definition." Letter from Ivan W. Steele to the *Yale Law Journal*, April 15, 1954, on file in Yale Law Library. Dr. Overholser and Dr. Steele are directors of the two federal hospitals in which incompetents are confined under 63 STAT. 686-87 (1949), 18 U.S.C. §§ 4246-47 (1952).

34. Insanity is considered "temporary" if it is not incurable—or, as the *Wells* court said, "hopelessly permanent" *Wells v. Attorney General*, 201 F.2d 556, 560 (10th Cir. 1953).

35. 205 F.2d 650 (9th Cir. 1953).

36. *Id.* at 653. See note 27 *supra*.

37. 125 F. Supp. 1 (W.D. Mo. 1954).

38. *Id.* at 4. Petitioner had been hospitalized for over a year and one-half, but there had been no finding as to whether he was temporarily or permanently incompetent. *Id.* at 3. The court stated that, although a reasonable time "will be dependent upon the particular circumstances of each case, it seems to me, as a matter of law, that one and one-half years is, at least, a 'reasonable time' within which to determine the competency of this accused. . . ." *Id.* at 4.

39. The court thought it followed from the *Wells* and *Higgins* cases that "if petitioner is not, within a reasonable time after his commitment under Section 4246, Title 18 U.S.C., found mentally competent to stand trial upon the charges against him, he must be discharged." *Id.* at 3.

40. By establishing a short but definitive time period at the termination of which

*Long-term confinement of dangerous incompetents: Section 4246 (second sentence)*

The rationale of most cases permitting short-term detention has cast doubt upon the constitutionality of the broader provision of section 4246 permitting long-term detention of incompetents whose release would endanger federal interests.<sup>41</sup> The courts have limited or invalidated pre-trial detention under the narrow provision in order to keep the federal government out of the general field of lunacy.<sup>42</sup> These courts would seem prepared to strike down the broader provision for the same reason, and without further analysis.<sup>43</sup> Other courts have managed to rationalize long-term detention as an adjunct to the criminal power,<sup>44</sup> but have left important questions unanswered.

In *Greenwood v. United States*<sup>45</sup> the eighth circuit upheld the confinement

hospitalization must end the courts would (1) eliminate constitutional difficulties, (2) avoid speculative predictions, (3) eliminate needless litigation by incompetents seeking to discover whether a "reasonable" period had elapsed, and (4) facilitate hospital administration by permitting treatment to be planned over a known period of time. *Query* whether a uniform period, fixed without regard for the nature of the illness or the type of crime charged, would be preferable to a period established from case to case within the sound discretion of the court.

The period need only be a maximum. The patient should be released as soon as it appears that he will not recover for many years. However, if it appears that release would probably endanger United States interests, the cause should be remanded for adjudication of this issue before the incompetent is released from federal custody. See note 14 *supra*.

41. See text at notes 12-15 *supra*, comparing 18 U.S.C. § 4246 (1st sentence) (1952) with §§ 4246 (2d sentence), 4247 (1952). See note 42 *infra*.

42. See notes 25-27 *supra* and accompanying text. *But see* *Craig v. Steele*, 123 F. Supp. 153 (W.D. Mo. 1954) and *Kitchens v. Steele*, 112 F. Supp. 383 (W.D. Mo. 1954), rejecting permanent detention under § 4246 (1st sentence) not because it was beyond federal power but because it was not contemplated by the statute.

43. In *Dixon v. Steele*, 104 F. Supp. 904, 908 (W.D. Mo. 1952), the court stated that "it is difficult for me to conceive of Federal constitutional authority to invade the rights of the states in the confinement of its citizens on ground of insanity." And in *Wells v. Attorney General*, 201 F.2d 556 (10th Cir. 1953), the court felt that § 4246 would not be constitutional if it applied to the permanently insane. *Id.* at 560. Its decision was limited to the first sentence of the section, but apparently the court felt that it would apply with equal force to the second sentence — unless the court did not recognize that the second sentence referred to an entirely different problem. *Id.* at 559. The court seemed unaware that the second sentence of § 4246 incorporates the dangerous-to-federal-interests test of § 4247 by reference. *Dixon v. Steele*, 104 F. Supp. 904 (W.D. Mo. 1952) (*passim*). See text at notes 11-16 *supra*.

44. *Greenwood v. United States*, 219 F.2d 376 (8th Cir. 1955); *Craig v. Steele*, 123 F. Supp. 153, 155 (W.D. Mo. 1954) (dictum by Judge Ridge); *Kitchens v. Steele*, 112 F. Supp. 383, 387 (W.D. Mo. 1954) (same). Judge Ridge stated in *Craig* and *Kitchens* that such confinement was a proper means of federal self-protection against dangerous incompetents, pursuant to the government's power to enact a criminal code. "For Congress to do so provides not to commit a citizen for insanity . . . but to protect the sovereignty of the United States from law violators." *Craig v. Steele*, *supra* at 154. The question is, of course, to what violation is commitment pursuant?

45. 219 F.2d 376 (8th Cir. 1955), *affirming* 125 F. Supp. 777 (W.D. Mo. 1954).

of a potentially dangerous incompetent pursuant to federal criminal power.<sup>46</sup> Greenwood was indicted for robbing a post-office, but was incompetent to stand trial.<sup>47</sup> It was adjudged that he was dangerous to federal interests and that state care was not available, so that the statutory prerequisites of long-term detention were present.<sup>48</sup> The court stated that the purpose of section 4246 (second sentence) was to protect government and society by isolating just such an "insane and potentially dangerous offender," and upheld the statute "incident to" the criminal power.<sup>49</sup>

The court did not make clear, however, what offense the "offender" had committed, nor what crime brought a "criminal" power into operation. The statute did not make dangerous insanity a present crime.<sup>50</sup> Nor could it have made the likelihood that the incompetent might thereafter break a federal law the basis for present confinement under criminal power.<sup>51</sup> The criminal power cannot, by definition, uphold confinement of an incompetent who has not been convicted of a criminal act and who, by the terms of the statute, is not being held in anticipation of a criminal trial.<sup>52</sup>

46. *Id.* at 386-87.

47. *Id.* at 378, 380. The court noted that Greenwood had a "penchant for robbing post offices and otherwise violating the law." *Id.* at 387.

48. *Id.* at 380. See 63 STAT. 687 (1949), 18 U.S.C. §§ 4246 (2d sentence), 4247 (1952).

49. *Greenwood v. United States*, 219 F.2d 376, 387 (8th Cir. 1955). The court considered the statute as "devising in the interest of federal law enforcement some practical and legal method of dealing with prisoners, in lawful custody, charged with or convicted of federal crimes . . . who would be a menace to society if released." *Id.* at 386. See notes 14-16 *supra*. See also *Kitchens v. Steele*, 112 F. Supp. 383, 387 (W.D. Mo. 1954).

50. The statute is procedural, not substantive. "There is no right of trial by jury on the question of commitment for insanity. Insanity is not a crime. You are not being held on the theory that you have been convicted of a crime." Judge Magruder in *Hearing 9*.

An attempt to make such insanity a present crime would raise serious constitutional questions. Propensity to endanger federal interests is a product of insanity, and the crime would be based upon an involuntary condition rather than a willful act. This would seem to conflict with the underlying philosophy of Anglo-American criminal law.

51. "The law acts in retrospect only, never prospectively. It deals only with people who have committed crime; not with those who are likely to commit crime." WAITE, *CRIMINAL LAW IN ACTION* 12 (1934). See *Stoutenburgh v. Frazier*, 16 App. D.C. 229 (D.C. Cir. 1900). *Cf.* *Hague v. Committee for Industrial Organization*, 101 F.2d 774, 781-82 (3d Cir. 1939); *Greene v. Briggs*, 10 Fed. Cas. 1135, No. 5,764, at 1140 (C.C.D.R.I. 1852).

52. Confinement under § 4246 (2d sentence) is not based upon eventual prosecution. See text at notes 15-16, 49 *supra*. Since Greenwood is incompetent he cannot be convicted of having committed a crime. See note 2 *supra*. Therefore confinement is not punishment for a crime he has committed. But confinement under the criminal power must be either pending trial or as punishment for a criminal act. *Ex parte Burford*, 7 U.S. (3 Cranch.) 448 (1806); *Stoutenburgh v. Frazier*, 16 App. D.C. 229 (D.C. Cir. 1900). ". . . [A]n offense which may be the subject of criminal procedure is an act committed or omitted in 'violation of a public law, either forbidding or commanding it.'" *United States v. Eaton*, 144 U.S. 677, 687 (1892); *accord*, *Viereck v. United States*, 318 U.S. 236, 241 (1942).

Judge Huxman, dissenting in *Wells v. Attorney General*, 201 F.2d 555, 561 (10th Cir. 1953), advanced another argument attempting to sustain detention under the criminal

*Greenwood* reaches a correct result for the wrong reasons. The statute should have been sustained as an exercise of civil rather than criminal power. Insanity proceedings are civil, not criminal, in nature.<sup>53</sup> The federal government is not the *parens patriae*, and ordinarily it does not have jurisdiction to commit state citizens for insanity.<sup>54</sup> The statute gives it jurisdiction to commit only persons whose insanity endangers federal officers, property and interests.<sup>55</sup> The exercise of power is valid not because the federal government has the powers of a *parens patriae*, but because under the Constitution the federal government may take whatever steps are "necessary and proper" to protect itself.<sup>56</sup> As a sovereign, it has the inherent constitutional power to pro-

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power. He stated that arrest and indictment brought the incompetent within federal jurisdiction, and "it then becomes its duty to adequately care and provide for" the incompetent. *Ibid.* (Emphasis added.) Express constitutional authority is unnecessary. *Id.* at 563. In several of its special relationships with citizens, such as servicemen, the federal government does have a duty to care for them if they become insane. See 12 STAT. 23 (1860), 14 STAT. 93, 94 (1866), 24 U.S.C. § 191 (1952). Here federal authority is upheld as a "necessary and proper" incident of maintaining armed forces. But it is not a "necessary and proper" incident of criminal power that the government be allowed to care for insane persons who are not awaiting trial or being punished.

Nor does the federal government bear the same relation to a prisoner charged with federal crime as it does to a resident of a federal district or territory. Over them it may exercise all powers normally reserved to the states. U.S. CONST. art. I, § 8, cl. 17; U.S. CONST. art. IV, § 3, cl. 2. True, when an insane person has no ascertainable domicile and no state will accept responsibility for his care, his only operative citizenship is federal. Arguably, the federal government should treat him as it would an insane resident of a district or territory. But this argument is inconsistent with the theory of the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77-78 (1872) (specifying the privileges and immunities of United States citizenship).

53. *Hook v. Simes*, 98 N.H. 280, 98 A.2d 165, 167 (1953); *Hirst v. Cramer*, 195 S.W.2d 738, 741 (Mo. 1946); *People ex rel. Edwards v. Superintendent of Bellevue*, 235 N.Y. 398, 401, 139 N.E. 553, 554 (1923).

Apart from concern for the welfare of the incompetent, the factors motivating commitment under the federal statute are identical with the purposes of a state in permitting his civil commitment. See SMOOT, *INSANITY* §§ 136-38 (1929).

Commitments under § 4246 (2d sentence) and § 4247 were intended to be founded purely on grounds of dangerous insanity formally adjudicated under § 4244. See *Hearing 7*, 8, 9. See note 50 *supra*.

54. See notes 2, 3 *supra*. An old statute, 18 STAT. 251 (1874), as amended, 22 STAT. 330 (1882), 24 U.S.C. § 212 (1952), authorized federal confinement of insane persons charged with federal crimes purely as a public health measure. This section was rarely used because it was thought to endow the federal government with *parens patriae* powers.

55. 63 STAT. 686 (1949), 18 U.S.C. §§ 4246 (2d sentence), 4247 (1952). The statute's limitation to this narrow class of incompetents distinguishes it from the older statute, see note 54 *supra*, and was added with the constitutional question in mind. Letter from Judge Calvert Magruder to the *Yale Law Journal*, April 13, 1954, on file in Yale Law Library. Cf. *Hearing 7*, 8 (by inference).

56. "Congress, undoubtedly, possesses that power [of self-protection], as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *accord*, *United States v. Metzendorf*,

tect itself, its officers, property and interests.<sup>57</sup> When those interests are endangered by insane persons, it is necessary for the federal government to be certain that those persons are confined.<sup>58</sup> If the states will not confine them the federal government may do so itself, provided that it observes the limits of due process of law.<sup>59</sup> And the proper way to confine insane persons is by civil commitment for insanity.<sup>60</sup> They cannot be committed criminally because they have not committed criminal acts.

As *Greenwood* recognized, the dangerously insane person may jeopardize federal interests to the same extent as the criminal.<sup>61</sup> In order to effectuate the policy of the statute, a liberal interpretation of what endangers federal interests is desirable. Persons indicted for violating federal laws and released while still insane are likely to endanger the interests those laws were enacted

252 Fed. 933, 935-36 (D. Mont. 1918); *cf.* *Dennis v. United States*, 341 U.S. 494, 501 (1951).

The criminal power itself is an "implied" rather than "enumerated" power. Except with regard to a few specified types of crime, such as treason, the federal criminal power exists because it is "necessary and proper" to protect the federal government and its institutions and interests. *United States v. Fox*, 95 U.S. 670, 672 (1878); *United States v. Hall*, 98 U.S. 343, 357 (1879). See BREWSTER, FEDERAL PROCEDURE § 934 (1940).

57. *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *United States v. Metzdorf*, 252 Fed. 933, 935-36 (D. Mont. 1918); *cf.* *Dennis v. United States*, 341 U.S. 494, 501 (1951).

58. See *Hearing 7, 8*; Letter from Judge Calvert Magruder to the *Yale Law Journal*, April 13, 1954, on file in Yale Law Library, at 2.

59. "Certainly, if no state will assume responsibility for locking up such an insane person, the federal government must have incidental power, in the protection of its officers, to detain such a person in an insane hospital to keep him out of harm's way. Of course such a person could not be committed to an indefinite federal commitment of that sort without affording him due process of law. . . ." *Ibid.*

The courts' fears that federal action in this area would encroach upon rights reserved to the states by the tenth amendment, see note 42 *supra*, raises a false issue. The statute explicitly provides that federal commitment must terminate when the states become willing and able to provide suitable care. See note 16 *supra*. It would not be "necessary and proper" for the federal government to protect itself against dangerous incompetents if the states were willing and able to provide for them. The danger to federal interests arose because the states did not do so; it was aggravated because of the large number of incompetents who had no ascertainable domicile. See notes 5-10 *supra*.

60. In *Greenwood v. United States*, 219 F.2d 376, 387 (8th Cir. 1955), the court made clear that confinement was justified because the incompetent, if released, would be just as dangerous to society as if he were a criminal. But it sustained commitment under the criminal power even though *Greenwood* was not a criminal. See text at notes 50-52 *supra*. The court in *Kitchens v. Steele*, 112 F. Supp. 383 (W.D. Mo. 1953), stated that confinement under § 4246 (2d sentence) was not "punishment of insane citizens solely for violation of a criminal law . . . but is, in effect, investing federal courts with chancery jurisdiction. . . ." *Id.* at 387 (dictum). Yet, it too would have upheld the second sentence under the criminal power. If these courts had recognized that commitment is civil in nature, see note 53 *supra*, the constitutional doubts as to what crime brought the criminal power into action would never have arisen.

61. *Greenwood v. United States*, 219 F.2d 376, 387 (8th Cir. 1955).

to protect.<sup>62</sup> Therefore, indictment for a federal crime should constitute a prima facie case that the incompetent's release would probably endanger federal interests.<sup>63</sup> And once that danger to its interests is established, the federal government may properly protect itself by civil commitment.

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62. A person can be indicted for feloniously violating a federal law only if a grand jury is convinced there is probable cause to believe he is guilty. See *Beavers v. Henkel*, 194 U.S. 73, 84 (1904); *United States v. Smythe*, 104 F. Supp. 283, 300 (N.D. Calif. 1952); *In re Cravens*, 40 F.2d 931, 932 (W.D. Mo. 1929). See also AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE § 140 (1931). If he is released while he is still insane, it is likely that he will again commit acts which are forbidden by federal law even though, because of his insanity, they are not "criminal." Greenwood, with his "penchant" for robbing post offices, is "typical." *Greenwood v. United States*, 219 F.2d 376, 386, 387 (8th Cir. 1955). Release would not only jeopardize the federal interests which the laws were enacted to protect; it would also jeopardize the federal interest in enforcing its laws. "Insanity which will enable a law violator to escape conviction is not a license to violate the law. . . ." *Id.* at 387.

63. The evidentiary value of indictments may vary. The type of act charged, considered with the nature of the illness, may fail to indicate that repetition is likely. However, in the light of the policy behind the statute, the burden of showing lack of danger should fall upon the indicted psychotic.