

action to override some ruling or decision of the Supreme Court. That has never been construed as a showing of disrespect to that august tribunal.

If I may take one striking illustration—we would not have the income tax today if some very fine people, some very fine people who were leaders in Congress were not instrumental in securing the enactment of the income tax amendment in order to override a decision of the Supreme Court holding that under the Constitution, the Federal Government could not levy an income tax.

So it is in that spirit I am going to discuss the *Mallory* case, with all respect for the Court.

At the outset I want to say that the rule in the *Mallory* case—and I think this should be emphasized—is not a rule of constitutional law. It is a rule of evidence. And as a rule of evidence, it can be changed by subsequent decision of the Court, it can be changed by legislation.

The CHAIRMAN. Right at that point, Judge, I thoroughly agree with you that this is not a decision that hinges upon the construction of the Constitution. I think Justice Frankfurter made that very clear in his opinion.

But the Justice Department now, in their official report before us, states that any modification of rule 5(a) as proposed by title I of H.R. 7525, raises serious constitutional difficulties in dispensing safeguards which the *Mallory* rule assured to persons charged with crime.

Now, this is the current position of the Department of Justice, as evidenced by their official opinion, signed by Mr. Katzenbach, under date of September 13, 1963.

I would be pleased to have your observations on that position, because I agree with you that the decision of the U.S. Supreme Court in the *Mallory* case does not turn on a constitutional point; it turns on a strict interpretation of rule 5(a) of the Federal Rules of Criminal Procedure. I am sure you and I are in complete agreement on that.

But over and above that, do you have any doubt as to whether or not the present title I which is before us in H.R. 7525 would or would not be constitutional under the various provisions of the Constitution?

Judge HOLTZOFF. I respectfully disagree with the views expressed by the Department of Justice. But I do know this: The communications from the Deputy Attorney General which you have just read does not go so far as to say that the *Mallory* rule is a rule of constitutional law. It does not venture any further than to suggest that possibly there lurks a constitutional question. But even on that I disagree.

The CHAIRMAN. The point that concerns me in the *Mallory* decision, and in Justice Frankfurter's pronouncement, is this one sentence where he says:

But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

Justice Frankfurter thereafter discusses the duty that is enjoined upon an arresting officer to arraign without unnecessary delay. In this regard he says:

But the delay must not be of a nature to give opportunity for the extraction of a confession.