

Senator ERVIN. I do not think there is any question about it. I think the position of the Department of Justice as set out in the extract that you have read is totally unsound, because virtually every State in the Union, and every Federal court in existence prior to the *McNabb* case held to the common law rule of evidence, that a voluntary confession was admissible, and an involuntary confession was inadmissible. That being true, I do not believe, while I would hesitate to predict all of the things that the Supreme Court as presently constituted might decide—I do not believe they will go so far as to hold that the due process clause of either the fifth amendment or of the 14th amendment is violated by a rule of evidence which was recognized as a valid rule in all jurisdictions following the common law system.

In fact, I do not know any stronger evidence of a man's guilt than the fact that he voluntarily says, "I committed the crime charged." And of course you have to have independent evidence of the *corpus delicti*. So there is really no danger of misjustice on that basis.

I think any person who has done trial work in the courtroom, where witnesses appear, knows that a judge of any competence whatsoever has no difficulty ordinarily in determining whether a confession was voluntary or involuntary. I think we should—I would refer to this statute, return to the common law rule of evidence, allowing that matter to be determined by the judge.

But I would certainly go along with title I of this bill, because it would provide a remedy for a very grievous situation.

The CHAIRMAN. As you well know, because you were a member of the committee at the time, in 1958, the Judiciary Committee did report out a bill which was almost—not completely, but almost identical with the language that is now embraced in title I. I think the word "reasonable" was added to the 1958 bill, and I think in conference they added a proviso that delay could be considered as an element in determining the voluntary or involuntary nature of statements or confessions.

You are completely familiar with the history of that legislation. It passed the House, passed the Senate, went to conference and was lost on a point of order in the Senate at the very end of the session.

Senator ERVIN. Because the conferees—the Vice President held when the point of order was made that the language of the conferees went beyond the scope of the language of either bill.

The CHAIRMAN. This very proviso I think I referred to.

Now, how does the bill that you have introduced, that is now before your Judiciary Committee, differ from the bill that was passed by both Houses and lost out on the point of order back in 1958?

Senator ERVIN. The bill I introduced goes back to the common law principle. It provides that notwithstanding this rule, or any similar statute, that a voluntary admission of confession shall be admissible, and that an involuntary confession or admission shall be inadmissible. In other words, it just restores the rule which was developed by the experience of the common law.

The CHAIRMAN. You wanted to comment on title II.

Senator ERVIN. Title II.

I favor title II strongly. I have had a great deal of concern about the *Durham* rule. I have felt that the rule enunciated in the *Durham* case merely lets the jury go out and sail upon the sea without any