

The *Mallory* rule was extended even further in the decision of *Killough v. United States*, decided on October 4, 1962, by the Court of Appeals for the District of Columbia. In *Killough*, the prisoner had confessed two separate times to the murder of his wife, once prior to arraignment and once thereafter. Not only did the court use the *Mallory* doctrine to throw out the voluntary confession of the accused made prior to his arraignment, but the court extended this doctrine to invalidate an admission made after the arraignment. The court reasoned that the second confession was prompted by the first admission, which was illegal under *Mallory*. Judge Burger alluded to the departure from precedent and the ramifications of this decision in his dissenting opinion; he stated, as follows:

"The majority holding today is one of the most significant and far reaching of this court in many years. It goes far beyond the statute it purports to 'interpret' and far beyond any prior opinion of this court or the Supreme Court. No statute remotely authorizes the holding. No one even suggests that any right under the Constitution is involved.

"The majority holding constructs an entirely new 'statute' and takes a step neither contemplated by Congress nor remotely warranted by the *Mallory* case. The *Mallory* doctrine operated to exclude or suppress incriminating statements made during 'unnecessary delay' before taking the arrested person to a committing magistrate. The entire rationale of *Mallory* is that the statements are barred because made while detention is unlawful—unlawful for failure to have a prompt hearing. Today's majority holding, carries the 'fruit of the poisonous tree' doctrine to new lengths and means in effect, that statements made either before or after the hearing are to be excluded unless the statements are made with the defendant's lawyer at his elbow. For all practical purposes the majority bars any admissions except where the accused is advised and prepared to enter a guilty plea. It would be difficult to overstate the enormity and scope of this incredible 'interpretation' of rule 5(a). *Mallory* to a large extent foreclosed police investigations prior to preliminary hearing; this holding eliminates any interrogation of an accused after he has had the judicial warning until he secures a lawyer * * *. In light of this holding it is ironic that in the *Mallory* opinion Justice Frankfurter characterized rule 5(a) as 'a part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement.'"

Mr. Chairman, I contend that it is both unsound and unreasonable to apply time alone as a measure of admissibility. This subverts a rule of procedure relating to the duty of an arresting officer into a rule of evidence. Because a police officer fails to observe the requirements of rule 5(a) a self-confessed criminal may be turned back to society, even though he may have confessed again subsequent to his arraignment. In other words, the supposed sins of the policeman are visited upon an innocent society.

I submit that when Congress approved the promulgation of the Federal Rules of Criminal Procedure, it did not intend to throw on the scrapheap the time-honored test of voluntariness concerning the admissibility of a confession. I submit that Congress had no intention of making convictions impossible simply because a police officer failed to take a prisoner before a committing magistrate until 7½ hours had elapsed.

As chairman of the Subcommittee on Constitutional Rights, I am, of course, not unmindful of the many protections which the Constitution of the United States bestows upon the persons accused of crimes within our society. But, in the words of Judge Alexander Holtzoff, U.S. District Judge for the District of Columbia, who testified at subcommittee hearings on the subject of "Confessions and Police Detention," in 1958:

"We must bear in mind that the purpose of the criminal law is to protect the public. On the one hand, it is essential that no innocent person be convicted of a crime and that oppressive methods be not used against the guilty. On the other hand, it is equally indispensable that victims of a crime and potential victims of possible future crimes receive protection. The victim must not become a forgotten man. As was said by Mr. Justice Cardozo in *Snyder v. Massachusetts*, (291 U.S. 97, 122), 'Justice, though due the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.'"

In considering the effect of these decisions, we should keep in mind that the Supreme Court did not base its decisions on any constitutional issue. It did not suggest that to admit *Mallory's* confession into evidence would be a vio-