

and that they could use the tape to play to the other alleged coconspirators. Well, in the confusion some of the police officers left and others came in, not knowing they were on tape.

When I played that tape in my seminar—I wish you could hear it. This is a typical interrogation, no interrogator aware that he is being taped. The tricks they used, the deception. It is true there was no violence. We are past that stage, fortunately. The promises they made—which could not be kept.

Now, we do not very often have a tape. And that is the problem.

As far as I'm concerned, if a man's lawyer could just be given earphones and listen, and not be able to even appear physically, and not be able to say, "Stop"—just to listen, so we actually know what happened, on tape, the problem would be solved in large measure.

The CHAIRMAN. You say the problem would be solved just so long as the accused's lawyer knew what occurred at police headquarters?

Mr. KAMISAR. Well, the point is—all right. I am suggesting that if he could not be interrogated without some disinterested person listening, just listening—we remove the problem of proof. Now, it seems to me rightly or wrongly, whether we agree with the *McNabb* rule or not, that is what the Court is trying to do. It was just frustrated. It was convinced—and many commentators have said this—all the coerced confession rules in the world are illusory, as a practical matter, when the prestige of the police testimony prevails almost invariably.

Now, you may say the police do not do such things, they never do such things. I don't know how to resolve that problem. I think there is some evidence that some police do it often enough to make it a problem.

So I think that that is the basic problem, that is what the *McNabb-Mallory* rule is trying to get at.

Another problem the rule is trying to get at is the practice of arresting without probable cause in the first place. This is a point that Francis Biddle, as Attorney General, made back in 1943 when the hearings were held on *McNabb* (hearings before the Subcommittee on the Study of Admission of Evidence of the House Committee on the Judiciary, 78th Cong., 1st sess., sec. 12, at p. 30 (1943)). He said it fits perfectly, the whole idea is you cannot arrest a man without probable cause, you promptly bring him before a committing magistrate, and if there is no probable cause, let him go.

Now, the example Professor Inbau gave this morning—and I thought, Mr. Chairman, you hit it right on the nose when you said if you have probable cause, why don't you bring the man before the magistrate. And Professor Inbau said it would not hold up. Why wouldn't it hold up? Because there was no probable cause to arrest him in the first place. That's the problem. And the whole thrust of the *McNabb-Mallory* rule, another main thrust, is just this.

To make meaningful the protection against unlawful arrest the Court is saying, "Look, you cannot arrest a man without probable cause and then get him to give you enough evidence to give you probable cause." Now, that is really what Professor Inbau was driving at.

The troublesome cases are the cases where you do not even have probable cause to hold him in the first place.

Now, it seems to me it is kind of a strange logic to say if you illegally take a man into custody, you ought to have the power to make