

consent before you can interrogate him further. In a number of cases, I would say over half of the recent District of Columbia Court of Appeals cases I have read, the police get that consent.

Now, if they can get the consent from a man in jail in writing, that he is willing to talk further—then, if ever, the blue chips are on the line—they do not need any greater power.

Now, if, as is another possibility, they deceive these people into giving their consent, then they should not be given the power, or any more power. I mean it seems to me you have to have it one way or the other. The fact is they are getting consent in writing.

All right.

Now—

The CHAIRMAN. Your theory is that the *Mallory* rule should remain just as it is.

Mr. KAMISAR. Well, I'm going to get to why I do not think it should be changed. I mean I admit it is much easier to counterpunch than to lead. And I am just here to counterpunch. I am against a specific proposal; I am just counterpunching.

Now, the fact that I may not be able to come up with a golden solution does not mean I can't say this one is not the golden solution.

I suggest that some clarification could be made as to the power of the policeman to interrogate a person after he has appeared before the magistrate and been given the warning, and perhaps had an initial contact with counsel.

Now, there have been cases in the District of Columbia, the *Goldsmith* case (277 F. 2d 335 (D.C. Cir. 1959)), where the judge ordered the man, after he was given the warning, back to the custody of the police and he confessed, and that was upheld. And it seems to me the *Killough* case is not inconsistent with that.

Now, I know that Senator Ervin read from the *Killough* dissent. But I think it is fairly obvious that dissents are not always the most reliable commentary on what happened. Dissenting judges sometimes get rather angry, and they tend to exaggerate.

You may recall some years ago the famous *Jencks* case (353 U.S. 658 (1957)), where Justice Clark dissented on the ground that:

The Court has opened [the FBI] files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information (*Id.* at 681-682).

And that was not even remotely what the majority held.

The majority limited it to prior statements of those witnesses who appeared for the Government, only to prior inconsistent statements by them, and when the Congress of the United States got through considering the problem, in effect they reaffirmed the majority opinion. (See generally Note 67, Yale L.J. 674 (1958).)

Now, perhaps they thought they were preventing what the dissent was predicting. But that is an example of exaggeration.

Now, what happened in the *Killough* case—there is no question about it. Every judge on the Court agreed that the defendant was held flagrantly in violation of law—he was held 34 hours. Everybody agreed—even Judge Burger—that the first confession was illegal (*Killough v. United States*, 315 F. 2d 241 (D.C. Cir. 1962)).

Then what did the police do? When he appears before a magistrate, he is not told that the first confession cannot be used against him. All right. Here is a man who has made a confession, under illegal