is here to stay. And so are some of the other developments in the confession area.

Now, as long as the *McNabb* rule was on the books, the Supreme Court had no necessity or occasion—in Federal criminal cases—to develop at what point the right to counsel begins, or whether self-incrimination exists at the police station and so forth. The Federal courts had the *McNabb-Mallory* rule. And contrary to what Professor Inbau suggested this morning, the last thing the Supreme Court does is decide a constitutional question, not the first thing. If there is a statutory way out, they will resolve it in terms of the statute. They do not want to get to a constitutional question unless they have to.

Now, if the *McNabb-Mallory* rule is repealed, they have to reach the constitutional question. We don't know what they would have done, because the whole development has been checked for 20 years under the *McNabb-Mallory* rule. But there has been a great deal of agitation about when the right to counsel begins. There are at least four, as I count them, perhaps five justices who have made sounds as if it might begin soon after a man is arrested. This obviously will affect the repeal of the *McNabb-Mallory* rule.

Certainly, the Supreme Court is finding that a delay of 1 or 2 days might be unconstitutional. In other words, there were times when a man was held incommunicado 25 days, and the Supreme Court found no violation of due process.

In a case last year, *Haynes* v. *Washington* (373 U.S. 503 (1963), 16 hours' delay, plus the refusal to let him see his wife and a little bit more, knocked out that case on due process grounds.

Now, I think that another possible suggestion is this:

The Chief of Police has said, at least in U.S. News & World Report (Oct. 21, 1963, pp. 92, 95), where he seems to be a favorite contributor, that it has always been the rule that when a man asks for a lawyer, you throw him a telephone book. Well, if that has always been the rule, I must confess I do not understand what the shouting is all about. Because if you give a man a telephone book as soon as he asks for a lawyer and let him call a lawyer, there goes your interrogation opportunity.

It may suggest that you are counting on the guys who are too dumb to ask for a lawyer, who don't know about their rights, or don't have any lawyer, cannot afford a lawyer.

Now, there was some suggestion in *Griffin* v. *Illinois*, more particularly *Douglas* v. *California*, dealing with the right to counsel on appeal, that this could conceivably—a distinction as to when the right to counsel "begins" drawn between a man who can afford a lawyer and a man who cannot afford a lawyer might be unconstitutional. The crucial period is at the beginning. And if a rich man can get a lawyer by naming one, as soon as he names one, and a poor man must wait, has nobody to get because he has no lawyer to name, this might raise some serious constitutional problems.

So I think there are some serious difficulties in this area, although I am not prepared to say that a repeal of the *McNabb-Mallory* rule would be unconstitutional.

Of course, it depends upon the fact situation.

You have to resolve this thing in terms of the actual case, the particular case. Suppose the man is held 24 hours or 22 hours, that