in itself might violate due process. It is just a question of the totality of the particular fact situation: if he is not warned, if his request for counsel is denied, if he is of subnormal mentality, these are all factors. I think it is fair to say the length of time a man is held incommunicado is becoming an increasingly significant factor in the court's overall assessment of whether or not due process has been violated in obtaining the confession.

Now, I have some doubts, some serious doubts, one way or the other, about whether you could constitutionally repeal this; and I must confess at the moment I would say you can. But I want to point out the law is moving. That is my only point. The law is moving. And we don't know what will happen, because there has been a constitutional void—if the *McNabb-Mallory* rule is repealed, the void will fill. All these years nothing has happened, nothing of constitutional dimensions in these Federal prosecutions, because you had the *McNabb-Mallory* rule. And undoubtedly the court will begin to develop the constitutional safeguards in this area, if and when you repeal the rule.

But I have no doubt that title III is unconstitutional. I will state categorically that that will never survive litigation. And if it does, I will give up teaching criminal law and teach property and trust and estates—a fate worse than death, to me.

Now this title III—as Prof. Caleb Foote of the University of Pennsylvania Law School has said of a similar measure—"this is Madison Avenue at its best"—[Foote, "The Fourth Amendment: Obstacle or Necessity in the Law of Arrest, in Police Power and Individual Freedom," 29, 30 (Sowle edition, 1962)]. The statement is, "may detain any person whom he has reasonable grounds to suspect."

Now that sounds very reasonable—"reasonable grounds to suspect." But no matter how many times you use the word "reasonable" in formulating the standard for detention or arrest—"reasonable suspicion," I have seen, "reasonable grounds to believe," "reasonable circumstances"—any standard less than probable cause is unreasonable in the constitutional sense.

I do not know what "reasonable grounds to suspect" means. I think I can say this much. The whole idea, the whole point of it is that it means something less than reasonable grounds. Otherwise there is no point putting it in there.

It is a very interesting thing, as Fred Inbau said this morning, a similar provision in a State code has been sustained. I know of one case where it was sustained. You know how? The Court said "reasonable grounds to suspect" means "reasonable grounds to believe," means "probable cause." They sustained it, all right. But they wrote out the whole purpose of the statute. (See Foote, supra, at p. 30.)

My only point is if "reasonable grounds to suspect" means something less than the constitutional standard for arrest—and obviously that is the intent—it just won't stand up.

The CHAIRMAN. Although Senator Ervin and you seem to have a difference of opinion on title I, I assume you are in complete agreement on title III, insofar as investigative arrests.

Mr. KAMISAR. Yes.

The CHAIRMAN. You both think it is unconstitutional.

Mr. KAMISAR. I think I am a little more emphatic about it.