

We don't want to burden your record; if it has not been placed in the record, we can do so.

The CHAIRMAN. It will be adopted by reference. We won't incorporate it in full, but it will certainly be referred to by reference, because this is the basis of the termination of the so-called investigative arrests in the District of Columbia.

Mr. HELLER. We think section 302, the material witness section, is in effect an alternative means of making arrest for investigation as it is now drafted. And this concerns us just as greatly as section 301, which actually is a sort of a Uniform Arrest Act provision, and allows arrests for investigation.

I might just start with this by saying that while this is conceptually distinct from the *Mallory* rule, it is in very sharp pragmatic fact closely related to it.

The problem of the *Mallory* rule in one sense, the proposal to repeal it in title I, is in effect, we think, a proposal to repeal criminal rule 5(a) without saying so.

Title III would do so in effect—would quite clearly repeal criminal rule 5(a) for the District of Columbia alone. That bothers us somewhat as an organization which is concerned with the District's right to self-government, and as long as it doesn't have it, to at least be treated the same as other Federal jurisdictions in criminal matters.

But it is true, in a sense, that if you repeal the *McNabb-Mallory* rule legislatively—and I agree fully with the statements that have been made that there is a constitutional basis for it—what you in effect do is repeal criminal rule 5(a), you in effect tell the police that they are free to disobey the rule. That is really the only purpose of repealing *McNabb-Mallory*.

It is transparently what the police want. I am not charging them with bad faith or anything. I think they have simply put their testimony on a better ground than we would. But what it does is that it simply says criminal rule 5(a) is of no great concern to you, at least the unnecessary delay phrase of it. You may now question at the police station, and all that will be left to consider is whether you gave the proper warning and voluntariness is involved in any confession.

Now Judge Fahy of our court of appeals has expressed his concern in a case which I am afraid I cannot remember the citation of, about trials in the police station. And that is what title III really is concerned with, and it is what *McNabb-Mallory* is concerned with.

We are concerned about trials in the police station. We recognize the hopelessness of the task of the criminal defendant to come in later into court and say contrary to the testimony of five or six policemen—who obviously have records as fine public servants, as far as the jury knows, and generally this is true, no doubt—that he was mistreated, or he was pressured. This is a hopeless task for a court to resolve any way but one; namely, in favor of the police.

So it is in a sense a meaningless form for people to be warned and then detained in the police station. That is what section 301 would have done. And now, as I want to state, it is what section 302 will do.

The Horsky report, at a page which I cannot find any more, did say that there were problems with the existing material witness statute