

really the best evidence. It satisfies perhaps the general public as well as the jury more than any other thing one can think of where it is voluntary and the person admits it. Subsequently to have this reversed some time later in the court of appeals and have to retry the case raises difficulties of time involved, and, of course, in recent cases there has even been a suggestion if you got the confession and then got other evidence as a result of it, that was tainted, and by giving the confession there might virtually be an immunity. Maybe the thing for criminals to do is to confess quickly in this situation and then have the court find that the confession is no good, and any leads that are gotten from it are no good. I am not being entirely facetious when I say that.

I also think as a matter of wisdom when I raise these constitutional questions that it seems to me fairly clear that there are four Justices still sitting on the Supreme Court who think that there are serious constitutional questions raised if you are not permitted to have counsel, and by the fact of interrogation. I find nothing of this kind in the *Mallory* case itself when I read it. I find it to be quite a reasonable decision in this respect. The facts were very different from the facts of these cases. The confession was for longer delays. The questioning made was of a far longer period of time. It involved some rather tricky questioning, the use of a polygraph and lie detectors, and in Mr. Justice Frankfurter's opinion there is a suggestion that it would not be an unnecessary delay if, for example, a witness volunteered a story which could easily be checked through going to third persons, and other normal police techniques. Now our concern is that if you simply modify directly the *Mallory* rule as this proposed title I would do, that that will be really an invitation to the Court to go along with the four dissenting Justices and to hold it unconstitutional. We believe that the reason behind the *Mallory* rule was the safeguards, the warning that had to be given and the additional safeguards of being able to contact a friend or contact a lawyer, to have the questioning witnessed so that you have independent verification of the process of questioning that there was no use of improper police techniques and that the confession was voluntary, and that given that kind of safeguard in the legislation the possibility of holding that legislation unconstitutional would be greatly minimized.

I would think that that would be the wise course of action to take. To simply modify the rule and to modify the decision would seem to me to be an invitation to have further constitutional discussion of this problem which might well go along the line of the dissenting opinion and leave the situation more difficult from the point of view of law enforcement than it presently is. That is the sum and substance, really, of the Department's position.

Senator DOMINICK. Mr. Katzenbach, in these cases they are all court of appeals cases. At least two of them are specifically referred to as a divided court.

Mr. KATZENBACH. Yes.

Senator DOMINICK. I don't know whether the *Jones* case was a divided court or not. I gather it is your feeling that the Court of Appeals has expanded the *Mallory* procedural or evidential rule and there were constitutional issues far beyond its originally intended scope. Now the question that I have in my mind is has there been any indication in the Supreme Court cases that the Court of Appeals extension of