

in this case, and if it was not complied with as a method of forcing the police to comply with the rule of the Court requiring prompt arraignment, they are going to exclude the confession no matter how voluntary, no matter how true, no matter how accurate that confession is, if there is a suggestion that the confession was obtained during a period of time which constituted an unnecessary delay prior to the arraignment. I don't believe—well, one of the bases for the rule 5(a) may have been, and it is suggested again in *Mallory*, that the longer the delay, the more opportunity for improper police conduct. I don't believe that the *Mallory* rule rests entirely on that. It is a way which the Court has chosen, the Supreme Court chose in that case, of making sure that the rules of the Court were complied with by putting a sanction upon the prosecution in the form of excluding any confession which was obtained.

It is for that reason that it would be our view that if other effective means of insuring that the proper safeguards were in fact complied with, that the constitutionality of some questioning during that period would be preserved. But if the law contains no safeguards in this respect except the safeguard of voluntariness, it is our suggestion that the Court might find some of these other safeguards ignored or jeopardized, and thus elevate the *Mallory* case which is presently simply a rule of evidence, into a constitutional decision. Would you agree with that?

Mr. ACHESON. I would agree with that.

Senator MCINTYRE. It is pretty hard for me to understand why the common law test, the real essential test of a confession, got so out of whack, here with this Federal procedure. Is it criminal procedure, that an arbitrary determination of a number of hours should be sufficient to rule out the confession so long as the confession is free and voluntary. I would say yes, 14 hours, 16 hours or something like that, where there are circumstances showing that a delay went to the essential elements of the confession, but I don't see one and a half hours or 30 minutes. This doesn't make very much sense.

Mr. KATZENBACH. That certainly doesn't make very much sense in terms of voluntariness and I think that is why the courts did not put that on the basis of voluntariness. What the court is suggesting is that there are other rights in addition to the right to be protected against a coerced confession. There is, for example, the right to consult counsel, the right to know what it is you are charged with which is what you get on the arraignment and prior to that that may be just a little bit vague as to just exactly what it is you are charged with.

Those would be primary other rights in addition, I suppose to the voluntariness not to be tricked into a confession, not to be coerced, not to be misled by the police in terms of just get it off your chest and nothing serious will happen to you, or something of that kind. I am not suggesting that does occur. I am only suggesting that absent a record of what does occur, there is always the possibility that, one, that it could occur and, secondly, that the defendant would claim that it has occurred. But it is not really simply a test of voluntariness, and I don't think the court of appeals has any idea that these confessions are not voluntary in the usual sense of the word. In fact, in the 25-minute business, the theory I think of the judge who took that view is that since you then had all the evidence that you needed to arraign this person, it was improper to ask him any questions.