

ing statement could be included in the printed record of the Senate District of Columbia Committee hearings, perhaps as a supplement to my testimony of October 23.

At the outset, let me say that the balanced, thoughtful, judicious testimony of Mr. Katzenbach, and David Acheson, U.S. attorney for the District of Columbia, who accompanied the Deputy Attorney General, is a refreshing change from some of the semihysterical outbursts some other law enforcement spokesmen have made.

Assuming that a person is not taken into custody and questioned absent "probable cause," and I think this is assumed. (See Daily Report of Proceedings, Nov. 5, 1963, at p. 700.) Mr. Katzenbach's proposed safeguards do fulfill the main purposes of the *McNabb-Mallory* rule: to bypass conflicts over the nature of the secret interrogation and to minimize both the "temptation" and the "opportunity" to obtain confessions improperly; to effectuate or implement various constitutional rights, such as the right to counsel, the privilege against self-incrimination, and the protection against arbitrary arrest.

I would be still happier with the proposal if the maximum time between arrest and confession were reduced from 6 hours to 4. I believe this could be done without significantly hampering police interrogation. In this connection, Mr. Acheson's comments are most illuminating (pp. 704-705):

I think in some very high percentage of the cases a confession is made, *if it is going to be made at all*, within an hour or two, perhaps 3 hours after arrest. * * * In the great majority of cases a confession is made fairly promptly after arrest. Of course, a confession is withheld because the defendant thinks the police have nothing on him. When he finds out they do, he very frequently confesses. You get some cases like *Killough* in which the police cannot get anything on him and he will not confess even though he is held for a few days. *We certainly don't suggest that there is any legislation that is practicable which would cope with a situation like that.* [Emphasis added.]

I share the doubts Senator Dominick (pp. 697-698) and, to a lesser extent, Senator McIntyre manifested (p. 706) about the feasibility of locating and producing a "responsible witness other than a law-enforcement officer" to observe the questioning. Therefore, I would prefer the alternative: a verbatim recording of the interrogation. I think disputes about when and how the police issued the warning that the suspect is not required to make any statement at any time and that any statement made by him may be used against him, could be avoided by assuring that this too is recorded.

Since, under Mr. Katzenbach's proposal, the recording would be the suspect's main protection against coercion, promises of special or favorable treatment and other deception, I do not think it unfair to make any editing or tampering of the recording a serious offense and, further, to take the position that once it is established that any such tampering has occurred, the confession must be thrown out.

Whether such legislation would survive constitutional attack, especially on the ground that the suspect was subjected to interrogation without being permitted to have the presence and aid of counsel, is, as Mr. Katzenbach has indicated, a matter of some speculation. His proposal would mean that persons accused of crime in the District would have significantly more protection than they do in many States, and I, for one, think such legislation would be sustained by the Supreme Court of the United States.

However, if we are prepared to go this far to protect the rights of those accused of crime—and I think we ought to be—the persistent question I have is: Then why not stick with the *McNabb-Mallory* rule?

Inasmuch as the Department of Justice's proposal requires that a suspect be plainly advised of his privilege against self-incrimination and permits him to consult with an attorney, I fail to see how it would "hurt" law enforcement one whit more if an arrested person were first brought before the nearest available judicial officer "without unnecessary delay," as rule 5(a) now requires; issued the warning by him, as rule 5(b) now requires (perhaps also permitted to consult briefly with an attorney), and then remanded to police custody for several hours of interrogation.

I realize, of course, that in the District of Columbia, if the accused is committed he is placed in the custody of first the U.S. marshal and next the prison warden and that prison regulations require the police to obtain the defendant's written consent (which they have managed to get in a number of recent cases) before they can pursue or resume interrogation. But I share the view that "the present practice of immunizing an arraigned person from interrogation does not rest on inviolable principles of law. The Constitution would appear to permit