

1. The Supreme Court has had two main purposes in mind in formulating and enforcing *McNabb-Mallory*. The first of these, of course, is to insure that the arrested person, the potential defendant, is not overborne as to his constitutional right to a fair trial and his constitutional right to refrain from incriminating himself. The safeguards proposed by Mr. Katzenbach are directed to this concern. Secondly, however, *McNabb-Mallory* is meant to preserve the equally basic liberty of the citizen to be free from arrest and detention on less than probable cause as promptly found by an impartial judicial officer. The requirement of a prompt preliminary hearing under criminal rule 5(a) contemplates not only that the magistrate shall advise the accused of his rights and insure that they are respected, but that he shall forthwith release those who have been improperly arrested.

Mr. Katzenbach's proposals are not addressed to this second purpose at all. Indeed, on its face, H.R. 5726 would in effect license arrest and detention without magistrate approval for as much as 6 hours; moreover, at page 717 of the November 5 hearing transcript, Mr. Katzenbach appeared to suggest that the 6-hour limitation could also be dropped. I agree that if you set a 6-hour limitation it is likely to become the minimum as well as the maximum (i.e., the standard) time of detention. On the other hand, Mr. Katzenbach was in error in stating that a time limitation was of no importance since the normal case "involves 1 or 2 hours" (transcript, p. 717), if the past practice of arrests for investigation provide any clue. The Horsky committee found that in 1960 out of 3,960 such arrests, over 2,800 involved detention more than 2 hours and over 1,300 involved detention over more than 8 hours (Horsky committee report, table VIII-A, p. 97).

It is no good saying that those figures have no relevance to arrests on specific charges, for H.R. 5726 really permits the police to revive investigative arrests substituting a specific charge for the former word "investigation." I cannot stress this point too strongly, especially since the committee members and all witnesses who appeared before it opposed section 301 of H.R. 7525 because it purported to authorize the unconstitutional practice of making arrests on less than probable cause. But if the police can arrest a man on a specific charge and need not bring him before a magistrate without unnecessary delay, they can use the nominal charge as a device to do precisely what the Supreme Court forbade in *Mallory*: "to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause'" (354 U.S. at 456). With the best will in the world the police will surely use this power if there is no sanction such as the *Mallory* rule to forbid them. What H.R. 5726 does is to remove that sanction, the only effective one to deter such practices.

In sum: If H.R. 5726 or any substantial equivalent is enacted, the inevitable effect will be to revive what we formerly called investigative arrests. I urge the committee not to permit this result.

2. The foregoing objection is, for us, insuperable. On the score of providing increased protection to the accused who is actually charged before a magistrate and made a defendant, H.R. 5726 does improve substantially on existing practice. However, I do not agree at all that the Supreme Court will for that reason admit evidence taken in violation of rule 5(a) and the fourth amendment. I think it is an error to assume that the Court will allow Congress to dictate the admissibility of such evidence. Moreover, the safeguards in section 3 of H.R. 5726 are not really satisfactory in these respects (apart from Mr. Katzenbach's seeming agreement to drop subsections (a) and (c)):

(i) It is meaningless to permit the friendless and indigent to call a relative or a lawyer. If a lawyer is not furnished to such a person, the statute merely gives him a theoretical right of no practical value. Moreover, a relative or friend is no substitute for legal counsel during questioning by the police.

(ii) Six hours is more than enough time to overcome the resistance of a man detained in the police station and subjected to continuous questioning, notwithstanding the other safeguards provided. Again and again the hopelessness of a criminal accused's proving the duress which he feels in such a situation has been pointed out to the committee and the courts. One man is weak, another strong. Rule 5(a) was intended to settle this issue by a flat rule requiring in all cases a preliminary hearing "without unnecessary delay." If that rule seems too mechanical it is so precisely because any other rule is impossible to apply with fairness to the accused. The absence of third-degree tactics is not proof against compulsion during 6 hours of questioning. Of course, the hardened criminal will not be the victim of this sort of duress.