

number of criminals who have evaded punishment although there may be some instances in which they received less punishment than they deserved (R. 713, 714).

I do not think that Congress should legislate in matters of such obvious judicial cognizance as the admissibility of evidence in criminal trials unless a strong case is made for the need for a change and unless legislation is necessary in order to accomplish the change. Apparently neither Mr. Katzenbach nor Mr. Acheson object to the *Mallory* decision. They object to "extensions of the *Mallory* rule" in *Elsie Jones*¹ and the two *Coleman*² cases. In addition, Mr. Katzenbach referred to a dissenting opinion in the *Muchette* case³ and a ruling by a trial court in the *Jones*⁴ case. He did not mention that the trial judge who ruled in *Jones* was the same judge who dissented in *Muchette*.

If the Department of Justice thinks that the *Mallory* rule has been interpreted improperly by the court of appeals, it has a remedy in the writ of certiorari. I do not understand the basis for Mr. Katzenbach's conclusion that "there has been no disposition on the part of the Supreme Court to review any of these cases" (R. 692). I have not checked all of the cases in which the court of appeals has interpreted the *Mallory* rule. It is clear that the Government did not seek certiorari in *Jones* or either of the *Coleman* cases. I do not think they have sought certiorari in any *Mallory* rule cases during recent years.

It is particularly inappropriate at the present time for the Congress to legislate on the subject of pretrial interrogation of defendants in criminal cases. The law is in a state of flux and cases are presently pending before the Supreme Court which may have grave implications on the entire subject of pretrial interrogation.

The Supreme Court has recently granted certiorari in *Escobedo v. Illinois*, 32 L.W. 3188; reported in the Supreme Court of Illinois as *People v. Escobedo*, 190 N.E. 2d 825. In the *Escobedo* case the Court will consider again the issue of whether a defendant has a right to counsel during a period of police interrogation. The prior decisions sustaining the right of the police to interrogate in the absence of requested counsel (*Crooker v. California*, 357 U.S. 433; *Cicena v. LaGay*, 357 U.S. 504) will be reexamined during the present term in the *Escobedo* case. The Court has also granted certiorari in *Massiah v. United States*, 31 L.W. 3407, reported below at 307 F. 2d 62, to examine the extent of the Federal right to counsel in pretrial police investigations.

It is too early to know whether the Government will seek certiorari in *Lee v. United States*, 322 F. 2d 770, in which the Court of Appeals for the Fifth Circuit held that an indicted defendant was deprived of his right to counsel and due process of law when interrogated by Federal agents in his cell, although the record did not show that counsel was requested by the defendant.

It is quite conceivable that the Court may determine that a defendant has a right to counsel during a police interrogation and that counsel must be furnished to the indigent. During the last term the Court stated: "But it is settled that where the assistance of counsel does not depend on a request." *Carnley v. Cochran*, 369 U.S. 506.

I respectfully submit that it is wise to delay action on a statute which will permit interrogation by the police in the absence of counsel, until the law is clarified by the Supreme Court.

The study of prearrestment procedures recently undertaken by the American Law Institute is another reason to delay action. I do not agree with Mr. Katzenbach that it is desirable to pass legislation now because Congress "can always consider the recommendations subsequently, and amend any laws in the light of anything that they come up with" (R. 720). The institute's research will deal specifically with the *Mallory* rule as well as other matters. In a letter of November 8, 1963, Prof. Arthur Sutherland, reporter for the institute study, inquired of me concerning the effect of the *Mallory* rule within the District of Columbia and requested that I provide him with the names of persons knowledgeable in the field. I have suggested that he contact Professor Shadoan, Assistant U.S. Attorney Timothy C. Murphy, Chief Layton, and your staff before beginning his study.

I appreciate that some persons sincerely think that some legislation is desirable in this field. I agree with Messrs. Katzenbach and Acheson that title I

¹ *Jones v. United States*, 307 F. 2d 397.

² *Coleman v. United States*, 313 F. 2d 576; *Coleman v. United States*, 317 F. 2d 891.

³ No. 17410, July 25, 1963.

⁴ *United States v. Jones*, Crim. No. 366-63.