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DETENTION AND CONFESSIONS: THE MALLORY CASE

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Mallory v. United States,[1] decided by the Supreme Court last year, brought once again into open debate and controversy the so-called *McNabb* rule. This rule originated in *McNabb v. United States*[2] decided by the Court in 1943.

In 1940, when the McNabbs were arrested there were two primary statutes requiring federal officers when making an arrest to take the person before a committing officer. One statute required that the person be taken before the nearest United States commissioner or nearest judicial officer having jurisdiction for a hearing, commitment, or taking bail for trial.[3] The other statute applied only to officers of the Federal Bureau of Investigation. It directed them to take the person arrested before a committing officer immediately.[4] Referring to these two statutes, in the *McNabb* case, the Court said:

> Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society.[5]

The McNabbs were arrested and questioned extensively for two days before the federal officers obtained from them satisfactory coordinated confessions. It was not until after these confessions were obtained that the McNabbs were taken before a committing officer. The Court held that these confessions were not admissible, using this language:

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1. 354 U.S. 449 (1957).
2. 318 U.S. 332 (1943).
3. Act of Aug. 18, 1894, c. 301, 28 STAT. 416, Act of May 28, 1896, c. 252, § 19, 29 STAT. 184, Act of Mar. 2, 1901, c. 814, 31 STAT. 956.
4. Act of June 18, 1934, c. 595, 48 STAT. 1008.
5. 318 U.S. at 343.

> Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.[6]

A new rule of evidence was now in effect—a confession obtained before commitment is inadmissible if the arrested person was not taken before a committing officer promptly after his arrest. The confession is inadmissible whether voluntary or involuntary. Where there has been an undue delay, it is no longer necessary to determine this constitutional issue.

The *McNabb* rule is of particular interest to me because I have spent six years as Assistant Circuit Attorney and two years as Circuit Attorney in St. Louis. The many complex problems and difficulties of law enforcement are only too well known to me.

That the *McNabb* rule has caused a certain amount of confusion is shown by the fact that it has been the issue involved in four cases before the Supreme Court in the fourteen years of its existence. In two of these cases the conviction of the defendant below was reversed by the Supreme Court and in the other two the Supreme Court held that the lower appeal court erroneously applied the rule in reversing the trial court's conviction.

The first of these cases, *United States v. Mitchell*,[7] came before the Court in 1944. In this case the defendant was arrested and taken to the police station where he confessed within a few minutes. He was then held by the officers without being taken before a committing magistrate for eight days in an attempt to clear up other similar crimes. The court of appeals reversed the trial court's conviction on the ground that the confession was inadmissible under the *McNabb* rule. The Supreme Court affirmed the trial court's conviction holding that the confession was admissible. The Court said:

> Here there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights, but

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6. *Id.* at 345.
7. 322 U.S. 65 (1944).

> instead the consent to a search of his home, the prompt acknowledgment by an accused of his guilt, and the subsequent rueing apparently of such spontaneous cooperation and concession of guilt.[8]

The Court while deeming the detention illegal, held the confession admissible because it was made prior to the time the detention became illegal.

The Federal Rules of Criminal Procedure became effective in 1946. Rule 5 (a) provides that federal officers must take arrested persons before a committing magistrate "without unnecessary delay." This provision has been the basis for the application of the *McNabb* rule in subsequent cases.

In 1948 *Upshaw v. United States*[9] was decided by the Supreme Court. In this case the petitioner was arrested on suspicion without a warrant and confessed to grand larceny thirty hours later. He was not taken before a committing magistrate until after the confession. The Court reversed the conviction. It distinguished the *Mitchell* case in which the confession was not the result of illegal detention. It found that here the petitioner was detained for the thirty hours for the specific purpose of obtaining the confession, as the police lacked sufficient evidence to hold the petitioner at the time of his arrest. The Court applied the *McNabb* rule because there was an unnecessary delay before the petitioner was taken before a committing magistrate and the confession was obtained during this unnecessary delay. Mr. Justice Reed wrote a very complete dissenting opinion in which he maintained that the majority opinion was an extension of the *McNabb* rule. In his opinion the *McNabb* rule required more than illegal detention. It required a certain amount of psychological coercion which was found in the consistent questioning of the McNabbs and in the refusal of the government agents to accept their original confessions requiring further questioning until all the confessions were consistent. In the *Upshaw* case, the Court definitely took the position that if there is an unnecessary delay in taking an arrested person before a committing magistrate, then any confession obtained during the period after the delay becomes unnecessary is inadmissible, even if the person is left alone in his cell and makes the confession completely of his own accord.

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8. *Id.* at 70.
9. 335 U.S. 410 (1948).

The next case before the Supreme Court in which the *McNabb* rule was an issue was *United States v. Carignan.*[10] The defendant was arrested and promptly committed on a charge of assault with intent to rape. Because of the similarity between this crime and an earlier one which resulted in the murder of the victim, the police questioned the defendant about the earlier crime while he was being legally detained on the other charge. After two days of routine questioning the defendant confessed to the murder and was then charged with this crime and convicted. The trial court admitted the confession but the court of appeals reversed the conviction on the basis of the *McNabb* rule. The court of appeals held that a confession obtained after days of questioning while the defendant is being legally held for a completely different crime is inadmissible, because there is an unnecessary delay in commitment for the crime to which the party confesses.[11] The Supreme Court affirmed the court of appeals' reversal on other grounds but held that the court of appeals had erroneously applied the *McNabb* rule. The Supreme Court held that the police could question a person held lawfully and a confession so obtained, if voluntary, is admissible even if the confessed crime is not the crime for which the person has been charged. The *McNabb* rule applies only where the confession has been obtained after there has been an unnecessary delay in taking the person before a committing officer.

This was the status of the *McNabb* rule when the *Mallory*[12] case came before the Supreme Court last year. On April 7, 1954, a woman in the District of Columbia went to the basement of the apartment house in which she lived to do her laundry. She ran into difficulty detaching a hose so she went to the janitor's basement apartment to obtain help. Mallory, who was the half-brother of the janitor and who lived with him, was alone in the apartment and he detached the hose for her and returned to the apartment. Very shortly thereafter the woman was attacked by a man wearing a mask, who had the general features of Mallory, and the janitor's two sons who also lived with the janitor. The woman had heard no one descend the wooden steps into the basement which was the only entrance. Mallory and the janitor's two sons were arrested about 2:00 p.m. the next day and taken to a police station, where they were all questioned about thirty minutes. Then at 4:00 p.m. they were asked to take a

10. 342 U.S. 36 (1951).
11. Carignan v. United States, 185 F.2d 954 (9th Cir. 1950).
12. *Supra* note 1.

lie-detector test, to which they agreed. While waiting for the polygraph operator to be found the three were fed; then the two sons were given the test. Mallory was given the test from 8:00 to 9:30. Mallory and the operator were the only ones in the room during the test. Mallory admitted the crime during the test. Immediately after the test Mallory repeated his confession and at 10:00 p.m., some eight hours after he was arrested, the police attempted to find a commissioner to commit Mallory. The police were unsuccessful in finding a commissioner at this time. Mallory repeated his confession to several other officers, and then at 11:30 he dictated it to a typist. He was brought before a commissioner the next morning and committed. It must be remembered that Mallory was held by the police most of the previous afternoon in the vicinity of numerous committing magistrates. Mallory's confession was admitted by the trial court and he was convicted. The Supreme Court reversed the conviction. The Court held that the police may not arrest upon mere suspicion but only on "probable cause." An arrested person is not to be taken to police headquarters in order to carry out a process of inquiry that leads itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt. The Court held that police detention of persons beyond the time when a committing magistrate is readily accessible constitutes "willful disobedience of law" as found in rule 5(a) of the Federal Rules of Criminal Procedure. The Court said: "Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession."[13] The Court found that it could not sanction the extended delay in this case, resulting in confession, "without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard. . . . It is not the function of the police 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.' "[14]

It should be noted that the "arraignment" the Court speaks of here is not the formal pleading of "guilty" or "not guilty" which is historically

13. 354 U.S. at 455.
14. *Ibid.*

referred to as the arraignment. This formal pleading by the accused comes later in the procedure after the indictment or information has been filed in the district court and is made before a district judge.[15] The arraignment referred to in the *Mallory* case is the hearing before a committing officer where the complaint is read to the accused. At this hearing he is informed of his right to counsel and his right to remain silent. The date for a preliminary hearing is also set at this time if the accused does not waive such a hearing.[16]

The policy behind the statutes requiring promptness in taking an arrested person before a committing officer or, as now required, "without unnecessary delay," has been spelled out by the Court in every case in which the *McNabb* rule has been applied. For example, in the *McNabb* case the Court stated:

> This procedural requirement checks resort to those reprehensible practices known as the third degree which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.[17]

The *McNabb* rule with its strict application in the *Mallory* case is the basis of an open vocal controversy. Police and law enforcement officers of our nation have a very difficult job. They shoulder a great responsibility. They have the obligation of maintaining peace and order. They must apprehend those who violate the law and secure evidence for their conviction. It is only natural that they would oppose new procedural rules or extensions of old procedural rules which set limits on their field of operation. And the courts must seriously consider any innovation which will make the enforcement of our criminal laws more difficult. However, it must be remembered that the primary responsibility of our police and law enforcement agencies is not to obtain convictions but to see that justice is obtained.

We consider ourselves a civilized nation and therefore we aspire to conduct ourselves in a civilized manner. The Supreme Court has never contended that the *McNabb* rule was required by the Constitution. It has said that we must have procedural safeguards which not only protect the innocent but which secure convictions of the guilty by methods that commend themselves to a progressive and self-confident society.

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15. FED. R. CRIM. P. 10.
16. FED. R. CRIM. P. 5(b).
17. 318 U.S. at 344.

That arraignment without unnecessary delay is a necessary procedure in a civilized society can easily be seen by a survey of several cases which have come before the Supreme Court. These cases point out how easily unnecessary delay can slip into psychological coercion, thereby rendering a confession involuntary. In *Haley v. Ohio*[18] the defendant, a young boy, was arrested about midnight and questioned at the police station until morning when he confessed. He was then held incommunicado for two more days before he was formally charged. The Supreme Court found psychological coercion. In *Malinski v. New York*[19] the defendant was held incommunicado for four days before arraignment, the first day of which he was kept naked or only half clothed. In *Ward v. Texas*,[20] the defendant and several other persons were picked up on suspicion without warrants and were held for several days. During this time the defendant was taken from county to county until he confessed. There are many other such cases. In all of them the defendant was picked up by the police and held without formal commitment for some time. During this unnecessary delay in taking the person before a committing official the police, intentionally or otherwise, applied pressures which resulted in an involuntary confession. The seeds of coercion sprout readily in the earth of illegal detention.

Against this background the decision of the Supreme Court in the *Mallory* case is easily understood. In view of the policy established by Congress by rule 5(a) and in view of our civilized society, the Supreme Court had to hold that Mallory's confession was inadmissible.

There are a number of bills before Congress which would legislate the *McNabb* rule out of existence. One would attempt to set an arbitrary limit on the number of hours before arraignment.[21] Others would apply new tests, such as "voluntariness," to the admissibility of confessions, regardless of when they were made.[22] In my view, the *McNabb* rule, as interpreted by the Supreme Court, is preferable to these various proposals. Its test of reasonableness will go farther toward effective law enforcement, and at the same time provide greater protection to the civil liberties of the citizen suspected of a crime.

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18. 332 U.S. 596 (1948).
19. 324 U.S. 401 (1945).
20. 316 U.S. 547 (1942).
21. S. 2432, 85th Cong., 1st Sess. (1957).
22. H.R. 8521, H.R. 8596, H.R. 8600, 85th Cong., 1st Sess. (1957).