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EVIDENCE-FEDERAL CRIMINAL PROCEDURE-ADMISSIBILITY OF CONFESSION OBTAINED DURING ILLEGAL DETENTION

William F. Snyder S. Ed.
University of Michigan Law School

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EVIDENCE—FEDERAL CRIMINAL PROCEDURE—ADMISSIBILITY OF CONFESSION OBTAINED DURING ILLEGAL DETENTION—Petitioner was arrested without a warrant on suspicion of larceny. He was held without commitment for a period of thirty hours during which he was intermittently questioned but was not subjected to any form of physical coercion. At the end of this period, he signed a confession which was the basis for his conviction in the district court. On certiorari to the United States Supreme Court, following affirmation in the court of appeals,¹ held, reversed. The detention was unlawful as a violation of rule 5 (a) of the Federal Rules of Criminal Procedure,² and the confession thus obtained was inadmissible in evidence. *Upshaw v. United States*, (U.S. 1948) 69 S.Ct. 170.

For thirty-five years the federal courts have made an exception to the common law rule that admissibility of evidence does not depend on the manner in which it was obtained.³ Thus it seems well accepted that evidence will not be received in a federal court which has been obtained through unlawful search and seizure,⁴ by means of wire-tapping,⁵ or in deprivation of due process.⁶ Though much condemned as an unjustified effort to regulate the police⁷ and as a case of "misplaced

¹ *Upshaw v. United States* (App. D.C. 1948) 168 F. (2d) 167.

² 18 U.S.C. following §687 (Rules of Criminal Procedure) rule 5 (a) (1946); "An officer making an arrest . . . shall take the arrested person without unnecessary delay . . ." before the nearest available committing magistrate.

³ 8 WIGMORE, EVIDENCE, 3d ed., §2183 (1940).

⁴ *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341 (1914); cf. *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098 (1947). It should be noted that the prohibitions considered here and in note 5, infra, apply only when the action was by federal officials.

⁵ *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266 (1939); *Weiss v. United States*, 308 U.S. 321, 60 S.Ct. 269 (1939).

⁶ *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461 (1936); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921 (1944). This prohibition applies to actions either by state or federal government officers.

⁷ Harbo, "Evidence Obtained by Illegal Search and Seizure," 19 ILL. L. REV. 303 (1925); Waite, "Public Policy and the Arrest of Felons," 31 MICH. L. REV. 749 (1933).

sentimentality,"⁸ the doctrine was extended in *McNabb v. United States*⁹ to deny admission of a confession obtained during a detention unlawful under rule 5 (a). The wisdom of such a policy, which is based expressly on the legislative mandate rather than the Constitution,¹⁰ has been much debated.¹¹ Critics of the *McNabb* case were encouraged by a later Supreme Court holding in *United States v. Mitchell*,¹² where a confession was admitted although there was a *subsequent* unlawful detention. Language in that opinion indicated that the real inquiry was still, as at common law,¹³ whether the confession was trustworthy.¹⁴ It is submitted that any such explanation of the *Mitchell* case is dissipated by the instant case, and that the full force of the *McNabb* rule is reasserted. The qualification of the *Mitchell* case seems to do no more than limit the ban to evidence which was "the fruit of the poisonous tree," a concept already developed in the wire-tapping¹⁵ and unlawful search¹⁶ situations. From the standpoint of *stare decisis*, the holding seems unimpeachable; but, as indicated above, from the standpoint of policy, there is more room for doubt. The decision reiterates that this is not a constitutional point, so it would seem that policy can best be served by a legislative enactment. However, at least one state court has followed the rule without benefit of statute,¹⁷ and the trend of federal decisions leaves a strong possibility that very nearly the same result can be reached on the basis of due process.¹⁸ If the matter is to be governed more explicitly by statute, there appears to be much value in the English system providing comprehensive rules for interrogation of prisoners.¹⁹

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⁸ 8 WIGMORE, EVIDENCE, 3d ed., §2184 (1940).

⁹ 318 U.S. 332, 63 S.Ct. 608 (1943); see also the companion case, *Anderson v. United States*, 318 U.S. 350, 63 S.Ct. 599 (1943). Based on a federal statute, this limitation is applied only to federal arrest.

¹⁰ *McNabb v. United States*, 318 U.S. 332 at 341, 63 S.Ct. 608 (1943): "Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded."

¹¹ See the Judiciary Committee Hearings on H.R. 3690, 78th Cong., 1st sess., pp. 1-142 (1943). For discussions opposing the rule, see Inbau, "The Confession Dilemma in the United States Supreme Court," 43 ILL. L. REV. 442 (1948); 42 MICH. L. REV. 679 (1944). For favorable comment see McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 TEX. L. REV. 239 (1946); 28 MINN. L. REV. 73 (1943); 22 TEX. L. REV. 473 (1944).

¹² 322 U.S. 65, 64 S.Ct. 896 (1944). For the effect of this decision in the lower federal courts, cf. *United States v. Bayer*, (C.C.A. 2d, 1946) 156 F. (2d) 964 with *Brinegar v. United States*, (C.C.A. 10th, 1947) 165 F. (2d) 512.

¹³ McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 TEX. L. REV. 239 (1946); 94 A.L.R. 1036 (1935).

¹⁴ 322 U.S. 65 at 70, 71, 64 S.Ct. 896 (1944). See 47 COL. L. REV. 1214 (1947).

¹⁵ *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266 (1939).

¹⁶ Corwin, "The Supreme Court's Construction of the Self-Incrimination Clause," 29 MICH. L. REV. 1 (1930).

¹⁷ *State v. Schabert*, 218 Minn. 1, 15 N.W. (2d) 585 (1944).

¹⁸ Many cases have denied admission of confessions for deprivation of due process on very meager showings that anything further than detention was involved. *Haley v. Ohio*, 332 U.S. 596, 68 S.Ct. 302 (1948) (tender years); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921 (1944) (lack of rest); *Malinski v. New York*, 324 U.S. 401, 65 S.Ct. 781 (1945) (psychological fears).

¹⁹ For a discussion of "Judge's Rules" in England, see 6 POLICE JOURNAL 342, 353 (1933).