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EVIDENCE-POLICE REGULATION BY RULES OF EVIDENCE- RESULTS OF THE McNABB CASE

John B. Waite
University of Michigan Law School

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COMMENTS

EVIDENCE—POLICE REGULATION BY RULES OF EVIDENCE—RESULTS OF THE McNABB CASE—In *McNabb v. United States*¹ the Supreme Court promulgated novel judicial legislation, the gist of which is that confessions or admissions of crime made while the accused is in custody without having been brought before a magistrate as required by law are inadmissible in evidence. That judicial pronouncement assumed that the utterances were made without compulsion, and prohibited their use solely because at the time they were made the officers of justice were themselves disregarding the law—the procedural requirement that persons arrested be taken immediately before a magistrate. In Justice Frankfurter's phrase, "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without

¹ 318 U.S. 332, 63 S. Ct. 608 (1943).

making the courts themselves accomplices in wilful disobedience of law."²

A comment, written shortly after the decision was rendered,³ suggested that—apart from the vice in any legislation enacted without full and open consideration of the need and effect thereof—this hasty judicial enactment would result in the evil of confused law enforcement through uncertainty in application of the rule, and the possible release upon society of criminals known to be dangerous. That result has now begun to appear.

In *United States v. Klee*⁴ the defendant had been arraigned within two hours after his arrest.⁵ In the meantime he had freely admitted his guilt. The trial judge admitted the confession in evidence over objection, but felt obliged to write a seven page justification because of the *McNabb* decision. In *United States v. Haupt*⁶ it appeared that Haupt had been arrested on a charge of treason at 5 P.M., June 28. Early the next morning he made admissions of guilt and made still others on the day following. For some reason which does not appear in the record neither Haupt nor his fellow traitors were arraigned for some time thereafter. At the trial the use of these admissions was objected to on the ground that they were not voluntary. The jury, however, found that they had been voluntarily made. It appeared also that the defendants had voluntarily—so the court assumed—signed papers declaring their "consent to remain under the continuous physical supervision . . . [of the F.B.I.] without immediate arraignment."⁷ Haupt was convicted and sentenced to death, but the appellate court reversed the conviction on the ground that the *McNabb* rule of exclusion applied despite the short time which had elapsed between arrest and making of the admission, and despite the waiver of immediate arraignment. In flat conflict with this decision the court in the second circuit held statements which had been made after a waiver of arraignment to be admissible despite the *McNabb* rule, saying of the *Haupt* case, "With all deference we are inclined to think the result reached in *United*

² *Id.* at 345. It now appears that the Court was itself in error as to the fact situation; the *McNabbs* had actually been "arraigned in timely fashion," though the record did not so show. Statement of Attorney General Biddle, H. Hearings on H.R. 3690, 78th Cong., 1st sess., 1943, serial No. 12, p. 29 (1944) (Committee on Judiciary). These hearings are headed Admission of Evidence in Certain Cases and are dated November 24, December 1, 3, 8, and 10.

³ 42 MICH. L. REV. 679 (1944).

⁴ (D.C. Wash. 1943) 50 F. Supp. 679.

⁵ The bringing of an arrested person before a magistrate for preliminary hearing is not properly called "arraignment." The term is commonly so misused, however, and is so used herein merely for brevity.

⁶ (C.C.A. 7th, 1943) 136 F. (2d) 661.

⁷ *Id.* at 669.

States v. Haupt was not called for by the decisions of the Supreme Court. Here each confession was voluntary and neither [because of the waiver] was in violation of the statutes requiring the defendant to be taken before a magistrate."⁸

Another source of confusion has been the failure of some courts to distinguish between *involuntary* confessions, which were held inadmissible long before the *McNabb* decision, and voluntary statements which are inadmissible because of the extraneous circumstance of collateral wrongdoing by the police. This lack of distinction has led to expressed reliance on the *McNabb* decision when such reliance was uncalled for and improper, with resultant apparent, but unreal, approval of its legislation. Thus in *Gross v. United States*⁹ the *McNabb* case was referred to, but the defendant's confession was declared inadmissible really on the long established rule that it had been involuntary—"a confession so pressed from a cell-confined man over a period of five days"; "after questioning by several investigators for many hours daily over the five days."¹⁰

Such also was the basis of exclusion in *Runnels v. United States*¹¹—incriminating statements extracted by repeated questioning over a period of seventeen days were "not voluntary," hence inadmissible. Unfortunately, to the confounding of confusion, the opinion adds, "the case clearly falls within the rules of *McNabb v. United States*."¹²

The question of whether or not the *McNabb* legislation excludes voluntary confessions obtained *prior* to the time when arraignment should have occurred has also caused more trouble than the mere seven page opinion of the *Klee* case, and the problem is now before the Supreme Court. It appears that James Mitchell was suspected of house-breaking and larceny. Police officers took him to the station. Immediately upon arrival there, Mitchell, having been advised of the evidence against him, admitted his guilt. This was obviously before the permissible time in which to take him before a magistrate had elapsed; the police were not at all in violation of the procedural law at the time the confession was made although afterward they did hold Mitchell for a week without arraignment. At his trial the confession was admitted and he was convicted. The Circuit Court of Appeals reversed the conviction,¹³ because of the "far-reaching innovation in the established rules of evidence" promulgated by the *McNabb* decision. Oddly enough, however, this court paid no attention to the fact that Mitchell's

⁸ *United States v. Grote*, (C.C.A. 2d, 1944) 140 F. (2d) 413 at 415.

⁹ (C.C.A. 9th, 1943) 136 F. (2d) 878.

¹⁰ *Id.* at 880.

¹¹ (C.C.A. 9th, 1943) 138 F. (2d) 346.

¹² *Id.* at 347.

¹³ *Mitchell v. United States*, (C.C.A. D.C., 1943) 138 F. (2d) 426.

confession had neither been obtained by means of police violation of law nor while they were in disregard of law. The court gave the later police wrongdoing an *ex post facto* effect, far beyond the "innovation" of the *McNabb* decision, which precluded evidence obtained "through" wrongful police inactivity. The propriety of this circuit court extension of the *McNabb* rule is now before the Supreme Court and decision may be rendered before this present writing appears in print.

In addition to this confusion in its application, the appalling effect of the *McNabb* rule on effective social protection is indicated by records from the District of Columbia, where, unlike the state agencies, the police and courts must operate in accord with federal rules. The instances cited are taken from the hearings before the Judiciary Committee of the House.¹⁴

Attorney General Biddle referred to three specific cases in which conviction had failed because of the *McNabb* rule. From police reports read into the record, other failures in conviction of clearly guilty persons because of the new rule are apparent.

"Unquestionably law enforcement has suffered a serious blow as a result of the decision of the United States Supreme Court in the case of *McNabb v. the United States*."¹⁵

"After a number of continuances in the criminal branch of the United States District Court, the case against James E. Smith and Kelly Artis, charged with robbing William Herbert Carter, was disposed of on October 6, 1943, when a verdict of 'not guilty' was returned before Chief Justice Eicher, after the Assistant United States Attorney, Mrs. Grace Stiles, was unable, because of the *McNabb* decision to introduce the confession made by Smith or his identification of Kelly Artis. Mrs. Stiles stated that she was unable to introduce any confession, or allow the arresting officers to take the stand, or to introduce in evidence the knife and articles recovered from Smith and Artis."¹⁶

Marion Johnson was arrested during the afternoon of October 25, and taken before a magistrate on the 26th, on a charge of stabbing his wife. At the trial,

"The complainant was called and testified, and then the officer was called to the stand and at this time it was brought out that the defendant was not carried before a magistrate Monday, October 25, 1943, and the case was then declared a mistrial by Judge

¹⁴ H. Hearings on H.R. 3690, 78th. Cong., 1st sess., 1943, serial No. 12, p. 46 ff. (1944) (Committee on Judiciary).

¹⁵ Id. at 46.

¹⁶ Id. at 50.

Nathan Margold, as the confession had been admitted as evidence by the court and should not have been under the *McNabb* ruling."¹⁷

"The petit larceny of the typewriter will be tried in jury court on December 1, 1943, but inasmuch as the confession was not obtained until the following day, this in all probability will not be admitted as evidence."¹⁸

A housebreaking and larceny charge; defendant taken to a hospital after arrest and before being brought before a commissioner.

"Due to the fact that he was not taken before the commissioner on the day of his arrest it is doubtful that his signed statement and his admission of the crime will be admitted by the court as evidence."¹⁹

Arrested 6:55 A.M., October 22, charged with larceny from Railway Express; admission of guilt 4:45 P.M., October 22; arraigned 10:00 A.M., October 23.

"This case was dismissed by the United States Commissioner due to the fact that the statement was taken before the defendant's arraignment and there being no other evidence."²⁰

Arrested morning of October 25 charged with larceny from baggage room; arraigned morning of October 27.

"On November 10, 1943, in jury branch of municipal court, criminal division, all the above cases were dismissed by Judge Nathan Margold because of the ruling in the *McNabb case*."²¹

Arrests January 16 "on an open charge"; statement January 18, \$700 worth of stolen property recovered; arraigned on charge of larceny January 20.

"On March 18, 1943, the three cases came up for trial before Judge Morris in criminal court No. 4. At this time the defense attorneys raised the point as to whether or not this confession had been made before or after the three defendants had been charged or whether or not the defendants had been brought before a committing magistrate before the confession had been made. My answer to this question was that the defendants had made the statements before being charged with grand larceny and that they

¹⁷ Id. at 51.

¹⁸ Id. at 52.

¹⁹ Id. at 53.

²⁰ Id. at 54.

²¹ Ibid.

had not been brought before a magistrate. The defense then cited a recent decision handed down by the Supreme Court of the United States. Judge Morris interpreted this decision as a ruling, making such a statement nonadmissible as evidence and directed a verdict of not guilty. Judge Morris read aloud the main points of the Supreme Court's decision in open court."²²

"Irving Gunter was indicted by the grand jury on nine counts of housebreaking, and when brought to trial in the last part of August, a motion was filed by the defense attorney to suppress the evidence. When the case was heard, all evidence was suppressed, and the defendant was convicted in one case only—in which his fingerprints had been found on one of the music boxes inside the Royale Tavern."²³

"Subject was held 3 days so that the fugitive squad could investigate his status in Georgia and also for the Federal Bureau of Investigation to investigate his draft status. It was subsequently brought out that the subject was a fugitive from the State of Georgia. Subject was indicted by the grand jury on November 15, 1943 for unauthorized use of auto.

"In the light of recent rulings, the fact that this defendant was held 3 days may cause case to be dismissed when he appears for trial on the indictment."²⁴

In addition to these instances of actual or prospective release of obvious criminals, the police reports are filled with instances of ineffective social protection resulting from the feeling of obligation to "immediate" arraignment.²⁵

This raises a question—quite different from that of the consequence of failure to arraign—as to whether arraignment should be required "immediately," or "within reasonable time." That is a problem in and of itself, demanding careful consideration and study of all discoverable

²² Id. at 58.

²³ Id. at 59.

²⁴ Id. at 60.

²⁵ E.g., "One of the interpretations of the *McNabb* case is to the effect he must be arraigned immediately but the instance case was dismissed because the stolen property was not produced in court. Had detective Kite left Leftwich until he located the stolen property he might not have been able to arraign Leftwich until Monday." Id. at 55.

"Attention is invited to the fact other crimes and misdemeanors had been reported in the same locality but same could not be properly investigated due to the fact White, alias Butler, alias Allen, had to be produced in police court November 25, 1943; to conform to the opinion rendered in the *McNabb* case." Id. at 56.

"The necessity of taking these defendants before the Commissioner and their subsequent release on bond did not give us ample time to completely investigate this case or have the defendants viewed by victims of similar robberies." Id. at 52.

facts. It is not, however, directly involved in the judicial rulings that evidence obtained between arrest and arraignment is inadmissible. A combination of rules to the effect that arraignment need be only within a reasonable time and that evidence is inadmissible only if obtained after arraignment should have been held (which latter appears to have been the real, but subsequently misinterpreted, decision of the *McNabb* case) might reduce the evil of the new inadmissibility rule. But not even that combination would cure the evil; known dangerous criminals would still be turned loose on society by the courts merely because the police had also misbehaved; society would still be compelled to suffer doubly. In the committee hearings concerning the Hobbs Bill,²⁶ several participants assumed that to repudiate the *McNabb* rule and concede the admissibility of evidence obtained during delay in bringing the accused before a magistrate would be tantamount to repeal of the law requiring immediate, or even reasonably prompt, arraignment. Such an assumption is a logical absurdity, the product of a peculiar defeatist attitude concerning law enforcement. Turning criminals loose on society when the police misbehave is a fantastic method of persuading the police to behave. Were the judiciary half so astute in compelling observance of the requirement of prompt arraignment by direct action against the offending police officials themselves as they are ready in releasing other offenders, they could compel respect for the law without sacrificing social safety.

*John B. Waite**

²⁶ H.R. 3690, 78th Cong., 1st sess., 1943, provides "That no failure to observe the requirement of law as to the time within which a person under arrest must be brought before a magistrate, commissioner, or court shall render inadmissible any evidence that is otherwise admissible." Quoted from H. Hearings on H.R. 3690, 78th Cong., 1st sess., 1943, serial No. 12, p. 1 (1944) (Committee on Judiciary).

* Professor of Law, University of Michigan—*Ed.*