DePaul Law Review

Volume 8
Issue 2 *Spring-Summer 1959*

Article 13

Ramifications of the McNabb Rule

DePaul College of Law

There appears to be no logical basis for distinguishing U.A.R.T. violations from Municipal Code violations insofar as the wording of the complaint. The penalties and effects are similar in both cases. The municipality is a mere creature of the state subject to restrictions placed upon it by the legislature. The Municipal Code is subject to the same constitutional restrictions as is the U.A.R.T. Thus, there is extant, an area of law where artificial distinctions have been imposed by judicial decision. The way is open, then, for legislative equalization of treatment under the two bodies of law. At the very least, supreme court clarification is called for.

RAMIFICATIONS OF THE McNABB RULE

INTRODUCTION

At early common law a confession, no matter how obtained, was admissible in evidence against the person making it. In fact, a confession was considered as the strongest evidence of guilt. In England, during the Star Chamber proceedings, which were inquisitional in nature, many tortures were administered to the accused to make him confess.[1] Modern courts, however, have looked with a jaundiced eye on any confessions made in such a manner. As a general rule, a confession will be admitted into evidence only if it is freely and voluntarily made without any inducements made to the accused in order to obtain the confession.[2]

Previous to the 1943 case of *McNabb v. United States*[3] the courts generally held that voluntariness was the only test to be applied in determining admissibility of a confession and a delay in arraignment was only to be considered as a factor in the voluntariness of the confession.[4] In *People v. Vinci*[5] the Illinois Supreme Court had stated the general rule:

> While an officer is frequently justified in subjecting a prisoner to a lengthy and vigorous examination for the purpose of satisfying himself of the guilt of the accused or for the purpose of getting information which would lead to the discovery of crime, whether information thus elicited is a voluntary confession must depend upon the facts of each case.[6]

[1] Baughman v. Commonwealth, 206 Ky. 441, 267 S.W. 231 (1924).

[2] Bram v. United States, 168 U.S. 532 (1897). This comment, however, does not concern itself with confessions made under inducements or promises of immunity.

[3] 318 U.S. 332 (1943).

[4] People v. Devine, 46 Cal. 45 (1873); Cahill v. People, 111 Colo. 29, 137 P.2d 673 (1943); Douberly v. State, 184 Ga. 573, 192 S.E. 223 (1937); People v. Vinci, 295 Ill. 419, 129 N.E. 193 (1920); People v. Crabb, 372 Ill. 347, 24 N.E.2d 46 (1939); Commonwealth v. DiStasio, 294 Mass. 273, 1 N.E.2d 189 (1936); People v. Alex, 265 N.Y. 192, 192 N.E. 289 (1934); Cates v. State, 118 Tex. Crim. 35, 37 S.W.2d 1031 (1930).

[5] 295 Ill. 419, 129 N.E. 193 (1920).

[6] Ibid., at 426, 195.

THE MC NABB RULE AND SUBSEQUENT EFFECT

In *McNabb,* the defendants, ignorant young men, were subjected after their arrest to incessant questioning by officers for a period of two days. Friends were not allowed to visit them, nor was counsel afforded. While in the custody of the officers and prior to arraignment before a United States commissioner or judicial officer, as required by law,[7] they made incriminating statements which were admitted into evidence at their trial. The Court avoided all constitutional issues and exercised its supervisory powers over rules of evidence in federal criminal proceedings. As a guide to admissibility the Court adopted "civilized standards of procedure" in place of the previously announced test of "general authority and sound reason."[8] Thus the Court excluded the confessions on the ground that they had been obtained in violation of the legal rights of the defendants and by willful disobedience of the law on the part of the arresting officer.

Justice Reed dissented on the grounds that the confessions were voluntary and were not inadmissible merely because there was a delay in defendant's arraignment in contravention of the statute.

In subsequent decisions of the Supreme Court and lower federal courts the *McNabb* rule has been approved and the courts have ruled that confessions made during an unreasonable period of delay between arrest and arraignment were inadmissible.[9] Without careful analysis it would seem that delay in arraignment was only one of many circumstances considered in *McNabb* as rendering the confession inadmissible. This idea received some support in *United States v. Mitchell*[10] where the Court stated that the features of the *McNabb* rule were, "inexcusable detention for the purpose of illegally extracting evidence from an accused, and the success-

[7] Authority cited note 3, supra, at 342: "[It] shall be the duty of the marshall, . . . who may arrest a person . . . to take the defendant before the nearest United States commissioner . . . Aug. 18, 1894, ch. 301, sec. 1, 28 Stat. 416. . . . [The] Act of June 18, 1934, c. 595, 48 Stat. 1008, authorizing Federal Bureau of Investigation Officers to make arrests, requires that, 'the person arrested *shall be immediately* taken before a committing officer.' Compare also the Act of March 1, 1879, c. 125, 20 Stat. 327, 341 . . . when arrests are made of persons in the act of operating an illicit distillery, the arrested persons shall be taken *forthwith* before some judicial officer. . . ." (Emphasis added.)

[8] Wolfe v. United States, 291 U.S. 7 (1934); Funk v. United States, 290 U.S. 371 (1933).

[9] United States v. Bayer, 331 U.S. 532 (1947); Upshaw v. United States, 335 U.S. 410 (1948) (thirty hour delay); United States v. Haupt, 136 F.2d 661 (C.A. 7th, 1943) (several days delay); United States v. Hoffman, 137 F.2d 416 (C.A.2d, 1943) (several days delay); Runnels v. United States, 138 F.2d 346 (C.A. 9th, 1943) (seventeen day delay); Akowskey v. United States, 81 App. D.C. 353, 158 F.2d 649 (1946) (seven hour delay); Hayes v. District of Columbia, 34 A.2d 709 (Mun. Ct. App. Dist. Col., 1943) (three day delay); Burns v. District of Columbia, 34 A.2d 714 (Mun. Ct. App. Dist. Col., 1943) (two day delay).

[10] 322 U.S. 65 (1944).

ful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure."[11]

However, in 1948, the Supreme Court denied the apparent holding of the *Mitchell* case that aggravating circumstances were necessary to the application of the *McNabb* doctrine. In *Upshaw v. United States*,[12] the Court clarified its reason for pointing out the aggravating circumstances in the *McNabb* case and said: "This was done to show that the record left no doubt that the McNabbs were not promptly taken before a judicial officer as the law required. . . ."[13]

In excluding Upshaw's confession and reversing the conviction, the Court made this statement concerning the *McNabb* rule:

> A confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the confession is the result of torture, physical or psychological. . . .[14]

In *Carignan v. United States*,[15] after defendant was arrested and *duly committed* on the charge of assault with intent to commit rape, he confessed to a murder. The Court declined to extend the *McNabb* doctrine to statements to police or wardens while prisoners are legally detained on other charges.[16]

In *Brown v. Allen*[17] the *McNabb* case was cited as adopting for federal courts a rule "that denies admission to confessions obtained before prompt arraignment *notwithstanding their voluntary character*."[18] This analysis of the rule is particularly interesting when it is observed that the opinion of the Court was written by Justice Reed who had dissented in *McNabb*.

The case of *Mallory v. United States*[19] treated the *McNabb* rule as one of delay—not of coercion and thus the Court has fully clarified the rule and fully construed the statute.[20] In *Mallory* the Court held that arraignment was not made "without unnecessary delay" as required by rule 5(a), and that a confession given during the period of delay was inadmissible. Mallory, 19 years old and of limited intelligence, was arrested on suspicion of rape and was questioned by police for approximately a half hour. He was submitted to lie detector tests, one of them lasting for an hour and a half; he was not told of his right to counsel nor of any other of his basic

[11] Ibid., at 67.

[12] 335 U.S. 410 (1948).

[13] Ibid., at 413.

[14] Ibid.

[15] 342 U.S. 36 (1951).

[16] Ibid., at 45.

[17] 344 U.S. 443 (1953).

[18] Ibid., at 476 (emphasis supplied).

[19] 354 U.S. 449 (1957).

[20] 5(a) Federal Rules of Criminal Procedure provides: "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner. . . ."

constitutional rights and was not arraigned until he confessed, although the arraignment could easily have been made. *Mallory* is very similar to *McNabb* in that there were many other factors bearing on the voluntariness of the confession besides the delay. The Court, however, in a unanimous opinion treated these factors only in consideration of whether the arraignment was "without unnecessary delay."

The case of *Trilling v. United States*,[21] a very recent decision in the Court of Appeals for the District of Columbia, has been, along with *Mallory* and *McNabb*, the subject of heated congressional discussion.[22]

Trilling had been arrested on probable cause at 5:30 A.M. for breaking into a warehouse with intent to steal. At approximately 8:30 A.M., he confessed to the crime for which he was arrested but was questioned about two other robberies to which he confessed before his arraignment at about 3:00 P.M. the same day. The court of appeals affirmed the action of the trial court in allowing the first confession into evidence, but reversed the court's decision in allowing the other two confessions as a violation of the rules in *McNabb* and *Mallory*.

The obvious distinction between *Carignan* and *Trilling* is that in the former the accused was *legally* detained when he confessed to the murder, and in the latter the accused was held an *unreasonable* time before arraignment when he confessed to the second and third robberies.

Thus, after fourteen years of analysis and consideration, the *McNabb* rule is fairly well defined.

SUPREME COURT REVIEW OF STATE COURT DECISIONS

The state courts have refused to apply the strict rule established by the *McNabb* case. The state courts have continued to hold admissible confessions made by an accused whose arraignment was made in violation of a statute, since the *McNabb* rule is a rule of Federal procedure and, therefore, not binding on the state courts.[23]

Thus, in *Gallegos v. Nebraska*[24] a Mexican farmhand, who could neither speak nor write English, while being held by the police in Texas at the request of the United States Immigration Service, without charge, confessed a Nebraska murder. A few days after arrival in Nebraska, he again confessed. Fifteen days after his confession, he was arraigned before a magistrate. The Court held the confession admissible on the grounds that the *McNabb* rule does not apply to state courts, even though they have a

[21] 260 F.2d 677 (App. D.C., 1958).

[22] 104 Cong. Rec. 17036, Aug. 19, 1958.

[23] State v. Browning, 206 Ark. 791, 178 S.W. 2d 77 (1944) (two day delay); State v. Smith, 158 Kan. 645, 149 P.2d 600 (1944) (three day delay); State v. Goyet, 119 Vt. 167, 132 A.2d 623 (1957).

[24] 342 U.S. 55 (1951).

statute similar to Rule 5(a) of the Federal Rules of Criminal Procedure and in the absence of coercion due process is not violated.

Also, in *Stein v. New York*[25] the state, at a trial for murder, used confessions made only after prolonged police relay interrogations. Twelve hours of questioning were stretched over a thirty-two hour period. The Court held these confessions to be properly admitted.

A confession obtained after an unreasonable delay in taking the accused before a magistrate is not inadmissible as a violation of due process.[26] But the Supreme Court may exclude a confession made during a delay if other circumstances show a violation of due process.[27]

Thus, in *Watts v. Indiana*[28] where Watts was without sleep and decent food while being kept in "the hole" for two days. He was then questioned in relays during five night sessions. On three occasions he was driven around town with the purpose of eliciting identifications, and was not brought before a magistrate as required by *state law*. He was also deprived of his right to counsel during this whole period. The Supreme Court ruled his subsequent confession inadmissible as a violation of due process.

In *Haley v. Ohio*[29] a conviction of murder was reversed when the conviction was obtained upon evidence which included a confession made by the defendant, a 15 year old Negro, after five hours of questioning by the police following his arrest at night. He was deprived of his right to counsel and was held incommunicado for over three days before being taken before a magistrate and formally charged with a crime.

RULE IN STATE COURTS SINCE MC NABB

The state courts have avoided the rule in *McNabb* by saying that it is merely a rule of federal procedure, not a constitutional issue and, therefore, not binding on them. In stating this position, the courts are overlooking a very basic fact. The vast majority of states have rules very similar, if not exact copies of Rule 5(a) of the Federal Rules.[30]

[25] 346 U.S. 156 (1953).

[26] Stroble v. California, 343 U.S. 181 (1952); Brown v. Allen, 344 U.S. 443 (1953); Stein v. New York, 346 U.S. 156 (1953).

[27] Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Lyons v. Oklahoma, 322 U.S. 596 (1944); Ward v. Texas, 316 U.S. 547 (1942).

[28] 338 U.S. 49 (1949). [29] 332 U.S. 596 (1948).

[30] California Penal Statute (1949) § 825: "The defendant must in all cases be taken before a magistrate *without unnecessary delay*. . . ." Ill. Rev. Stat. (1957) c. 38, § 660: "[Without] a warrant . . . the person arrested shall, *without unnecessary delay*, be taken before the nearest magistrate. . . ." § 665: "[Warrant]—[The] officer is directed *forthwith* to take the person and bring him before . . . (a) judge or justice [who issued the warrant]." (Emphasis supplied.)

There have been many state court decisions since *McNabb* that make no mention of the rule.[31] In *People v. Miller*[32] the Illinois Supreme Court stated that a confession was not rendered inadmissible because it was made while the accused was illegally arrested or detained without process if the confession was otherwise voluntary.

The fact that a defendant was not granted a preliminary hearing as required by statute, was held by the Mississippi Supreme Court not to affect the admissibility of a confession made during detention before trial.[33]

The New Jersey Supreme Court in *State v. Pierce*[34] declared that a confession was admissible although there was a delay in bringing the accused before a magistrate, as required by statute. The court reasoned that the delay was only to be taken into consideration when considering the voluntariness of the confession.

There are countless cases in other jurisdictions which have followed this reasoning. Although the vast majority of jurisdictions have statutes similar to Rule 5(a) of the Federal Rules of Criminal Procedure, from a study of the cases reported there seems to be no enforcement nor reason for the statutes. The only test is voluntariness and this is determined from all the facts and circumstances. It might be called the *complete picture doctrine*. The states seem to forget that psychological pressure is very easily applied during a delay between arrest and arraignment.

RECENT ATTEMPTS AT LEGISLATION

The *McNabb* rule has been the subject of much congressional debate and criticism.[35] However, the debate that ensued after that decision was very tame compared to the discussion that has followed *Mallory* and *Trilling*.[36]

Congressional action has taken the form of various bills introduced on the floor. All of the bills introduced have been defeated, but it would not be amiss to consider some of them here.[37]

[31] Hightower v. State, 62 Ariz. 351, 158 P.2d 156 (1945); People v. Bashor, 48 Cal.2d 763, 312 P.2d 255 (1957); People v. Miller, 13 Ill.2d 84, 148 N.E.2d 455 (1958); Napue v. People, 13 Ill.2d 566, 150 N.E.2d 613 (1958); State v. Triplett, 248 Iowa 339, 79 N.W.2d 391 (1956); State v. Harriot, 248 Iowa 225, 79 N.W.2d 332 (1956); People v. Trinchillo, 2 App.Div.2d 146, 153 N.Y.S.2d 685 (1956); Mitchell v. State, 312 S.W.2d 245 (Tex. Cr., 1958).

[32] 13 Ill.2d 84, 148 N.E.2d 455 (1958).

[33] Winston v. State, 209 Miss. 799, 48 So.2d 513 (1950).

[34] 4 N.J. 252, 72 A.2d 305 (1950).

[35] E.g., 93 Cong. Rec. 1392; H.R. 29, 80th Cong. 1st Session (1948).

[36] E.g., 104 Cong. Rec. 17036–17059, 17075–17084, 17085–17100, 17112–17125, Aug. 19, 1958.

[37] For a more complete discussion of congressional action, see Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L.J. 1, 33–46 (1958).

Senator Butler proposed a definite time limit approach to the problem[38] by adding a new section to Rule 2 of the Federal Rules, which in essence would provide a twelve hour time limit in presenting an accused before a magistrate.

Senator Morse introduced an idea similar to the Judges' rules in England.[39] In essence, the bill provided that before a person could be interrogated: (1) he must be informed of the nature of the offense; (2) he must be informed of his rights relating to self-incrimination; (3) he must be informed of his right to counsel; and (4) he must be told that any statement he might make could be used against him. The bill further provided that the burden was on the prosecution to prove that the provisions of the bill had been complied with and that in the absence of such proof any confession obtained would be inadmissible.[40] It is submitted that the *Morse* bill would not have altered the *McNabb* rule in the least, but would have provided additional safeguards for the accused. The bill itself has no reference to the length of time between arrest and arraignment.

Other proposals introduced have been direct attempts to abolish the *McNabb* rule. The *Willis-Keating* bill[41] provided:

> Evidence including statements and confessions, otherwise admissible, shall not be inadmissible solely because of delay in taking an arrested person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States.

This bill also required that the accused be told that (1) he is not required to make a statement and (2) that any statement made by him may be used against him. The bill was passed in the House but when it reached the Senate it was changed to read, "solely because of *reasonable* delay." The addition of this one word certainly changed the effect of the bill. In fact, the addition of the one word, "reasonable" made the bill a collection of words having no effect on the *McNabb* rule. In congressional debate the point was well taken that the difference between "without unnecessary delay" and "reasonable delay" was purely one of semantics and judges would still construe the phrase in the same manner.[42] An unnecessary delay is still illegal under Rule 5(a), and therefore such a delay could certainly not be deemed a reasonable one.

The amendment was passed by a 41–39 margin[43] and the bill as amended passed 65–12[44] but was referred to conference. The conference added the

[38] S. 3355, 85th Cong., 2d Sess. (1958).

[39] E.g., R. v. Straffen, [1952] 2 Q.B. 911, [1952] 2 All E. R. 657.

[40] S. 3325, 85th Cong., 2d Sess. (1958).

[41] H. R. 11477, 85th Cong., 2d Sess. (1958).

[42] 104 Cong. Rec. 17046–47 (Aug. 19, 1958).

[43] Ibid., at 17116.

[44] Ibid., at 17125.

words: "Provided, that such a delay is to be considered as an element in determining the voluntary or involuntary nature of such statements or confessions."[45] This amendment was defeated by a point of order that the amendment was matter never considered on the floor.[46] Thus the bill died and the *McNabb* rule stands supreme.[47]

CONCLUSION

The *McNabb* rule, as harsh as it may seem, without delving into its real purpose, stands today as a basic safeguard of the rights of the accused in facing a federal court. Is the rule, as some claim it is,[48] a punishment for the police rather than a protection for the accused? That the rule is a punishment for the police seems to be a very falacious argument when it is considered that detention can be used as a very definite factor in coercion. The argument may be raised: "What harm can there be in holding a man a few hours or days, in the absence of physical coercion?" True, there may be no *physical* coercion, but a factor to be considered is *psychological* coercion. It is true that the Supreme Court has stated that it will exclude a confession made after an unnecessary delay, even though there is no evidence of coercion, physical or psychological;[49] but could the reason for this statement be that psychological coercion is a very difficult fact to prove?

Certainly, there are many quesions raised as to the real reason for the *McNabb* rule but there can be no questions raised as to its propriety.

[45] House-Senate Conference amendment to H. R. 11477, 85th Cong., 2d Sess., Aug. 23, 1958.

[46] 104 Cong. Rec. 18093–18101, Aug. 25, 1958.

[47] Hogan and Snee, op. cit. supra, note 37 at 46.

[48] Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442 (1948).

[49] Authority cited note 14, supra.