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TESTIMONY OF

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ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

A SUB-COMMITTEE OF THE COMMITTEE ON THE JUDICIARY
OF THE HOUSE OF REPRESENTATIVES

ON H.R. 3690

DECEMBER 3, 1943
10:00 A.M.

H. R. 3690, introduced by Congressman Hobbs 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."

The purpose of the bill is, of course, to overturn the rule of evidence laid down by the Supreme Court last March in the now famous decisions in McNabb v. United States, 318 U.S. 332, and Anderson v. United States, 318 U.S. 350. This is an exceedingly important matter in the administration of federal criminal justice. What is involved is that delicate balance between the rights of the individual and the claims of law enforcement which is so fundamental in our whole conception of a democratic government under law. I am, therefore, happy to have this opportunity to discuss the problems involved with Judge Hobbs and the members of the Committee.

1. It will be helpful to begin with the decisions in the McNabb and Anderson cases themselves. In the McNabb case the Supreme Court set aside convictions of second degree murder and in the Anderson case of conspiring to damage property of the Tennessee Valley Authority, on the ground that confessions were improperly admitted in evidence. In each of the cases so far as the Supreme Court record showed, the confessing defendants had been arrested and held for interrogation without arraignment before a committing magistrate within the time required by law. The length of the period of detention and interrogation prior to confession varied with the individual defendants from six days to five or six hours. In each case the district court, abidding by the traditional confessions rule, inquired only whether the confessions were voluntary and, concluding that they were, admitted them in evidence. In reversing the judgments, the Supreme Court, exercising

its acknowledged authority to develop the rules of evidence in federal criminal prosecutions, held that the voluntariness of the confession is no longer the sole determinant of its admissibility. While the precise measure of the new test is not set forth in detail, I read the opinions to state a general rule that confessions may no longer be received in evidence if they are made by persons under arrest when the arresting officers have not complied with the statutory duty with respect to arraignment before a United States Commissioner or other committing magistrate. When, in other words, a confession is obtained during a period of illegal detention, it is inadmissible under the new rule.

As you know, the duty of an arresting officer to bring the arrested person before a committing officer for arraignment is variously defined in the statutes. Under the general provision of section 595 of title 18, the duty of the marshal or other officer is to "take the arrested person before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial," a definition which does not express a temporal element but has been interpreted to require arraignment "without unnecessary delay." In the case of the Federal Bureau of Investigation, a special provision imposes the duty when an arrest is without a warrant to take the person arrested "immediately" before a committing officer (U.S.C., title 5, sec. 300(a)). Another special statute concerned with the arrest of persons found operating an illicit distillery requires arraignment "forthwith" before a committing officer in the county of arrest or the county nearest to the place of arrest. Section 4-140 of the District of Columbia Code requires a member of the police force to take a person arrested without a warrant "immediately

and without delay" before the proper court. Other special provisions of less significance use the word "forthwith" in defining the duty of an arresting officer (see e.g., U.S.C., title 16, secs. 10, 415, 706; U.S.C., title 33, secs. 413, 436, 446, 452, 499; U.S.C., title 46, sec. 708). The purpose of these statutes is, of course, to subject the legality of detention to judicial scrutiny at the earliest practicable moment, to afford the defendant an opportunity to obtain counsel and, if the offense is bailable, admission to bail. Indirectly, they are designed to safeguard against the "third degree" and similar police abuses from which, I know you will agree, federal justice has been happily and remarkably free.

Resting upon these arraignment statutes and the policy which they declare, the Supreme Court found it unnecessary to consider contentions pressed by the petitioners under the self-incrimination and due process clauses of the Fifth Amendment or arguments which might be derived from the Fourth Amendment by analogy to the prevailing law of search and seizure. The essence of the decisions is, in my view, that confessions obtained through wilful disregard of the procedure enjoined by Congress in these statutes cannot, in the language of the Court, "be allowed to stand without making the courts themselves accomplices in wilful disobedience of law." They rest upon the premise that "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" (McNabb v. United States, 318 U.S., 332, 345). The decisions do not, in my view, go beyond this. They do not exclude all confessions made prior to arraignment, nor do they prohibit all police interrogation.

It is interesting to add that in the McNabb case the Supreme Court decision actually rested on a misapprehension as to the facts. The McNabbs

were in fact arraigned in timely fashion, though the record did not show that the arraignment had occurred. There has since been a re-trial with the confessions admitted by the trial court under the McNabb rule and convictions of manslaughter duly returned.

2. Until recently decisions in the higher courts following the McNabb rule involved situations reasonably conceived to be within the intendment of the rule. Such was the case in the Chicago treason case (U. S. v. Haupt, 136 F. 2d, 661) in the Seventh Circuit, in which the Government filed no petition for certiorari and U. S. v. Gros, 130 F. 2d, 878, in the Ninth Circuit, in which no petition for certiorari was filed. Such also was the case in Runnels v. United States, a murder case in the Ninth Circuit, decided October 21, 1943 (No. 10,370), in which there was detention for seventeen days by state deputy sheriffs and in which, in effect, we confessed error. Recently, however, the Court of Appeals for the District of Columbia has rendered a decision, thus far unreported, which in my view goes beyond the requirements of the McNabb rule or the theory upon which that rule was evolved. The case is Mitchell v. United States, decided October 25, 1943. The facts, according to the testimony of the police, which the trial court accepted, are these:

On October 12, 1942, a police officer found in a jewelry store a pair of cuff links answering the description of links stolen some months before from a Washington home. The jeweler's records indicated that they had been purchased the day after the burglary in question from a person giving the name and address of the defendant. This clew led the officer to call at the defendant's home where they talked with him. The same evening, after the cuff links had been identified by their owner, two officers went to the defendant's home and asked him to go with them to the precinct station for

questioning. The defendant without being formally arrested accompanied the officers willingly, and upon arrival at the station they told the defendant "that they knew what he had done," * * * "that he did not have to say anything," but that "all they wanted to know was who had worked with him." Thereupon the defendant, according to the testimony of the police "freely admitted" that he had stolen the cuff links in question as well as other property. The entire confession was given within a few minutes after the defendant's arrival at the station house. At the same time the defendant gave the officers express permission to go to his home and obtain the other property that he confessed to having stolen, telling them where it was. Pursuant to this consent the officers went to his home and found the property in question. Thereafter the defendant was held for eight days without arraignment. This, I have no doubt, was a mistake. He should have been arraigned the next morning. It was, however, explained that the reason for the delay was that the officers had recovered from the defendant's home property that had been stolen in more than thirty Washington housebreakings and that the defendant was cooperating with the police and the victims in identifying this property, pursuant to his expressed desire to assist the police in investigating the various housebreakings in which he was involved. The defendant was not mistreated during his detention, but on the contrary was shown every possible courtesy and was on occasions visited by his mother and others. It is true that the defendant testified that he had been subjected to violence and denied making the statements to which I have referred, which were oral not written. But on these issues the court and the jury found the facts, as I have said, in accordance with the testimony of the police.

On these facts the district court held the confession made immediately upon arrival at the police station admissible. The Court of Appeals reversed, holding it to be immaterial under the McNabb rule that the confession was given at a time when the defendant was in lawful custody if he subsequently was held without arraignment for a longer period then the law allows. As I have indicated, I regard this decision as an unwarranted extension of the doctrine of the McNabb case, which, as I have said, I understand to be that confessions taken while the defendant is in unlawful custody are inadmissible in evidence against him. A petition for certiorari will presently be filed in this case, and I am hopeful that it will result in clarification of the McNabb rule along the lines that I have indicated.

3. A number of other decisions in trial courts also, in my view, go beyond the McNabb rule. Some of these decisions have recently attracted attention. Let me illustrate:

In United States v. Wilburn, Nos. 71877 and 72342, in the District Court for the District of Columbia, the testimony facts were as follows:

Wilburn, a 17-year-old Negro had attacked one girl at about 7:00 A.M. on March 17, 1943, and another girl at about 1:00 A.M. on March 18, 1943. He was arrested at about 2:00 A.M. on the same night of March 18 and made a verbal confession of the second attack at about 4:00 A.M. At about 5:00 A.M. in the presence of the complaining witness he reenacted the circumstances of the second attack. He signed a written confession of both crimes at about 11:30 A.M. on March 18 and was arraigned before the juvenile court at about 3:00 P.M. the same day. In the first case he was convicted of assault with intent to commit rape and was sentenced to imprisonment of from 6 to 9 years. However, Judge Letts on July 2, 1943, granted a new trial because of the

admission in evidence of the written confession. Thereafter, because of the difficulty of proving the case without use of the confession, Wilburn was allowed to plead guilty to simple assault and received a sentence of one year. In the second case Judge Pine, on November 15, 1943, directed a verdict of acquittal, ruling that the Government could not even introduce testimony to the fact of the oral confession at 4:00 A.M. or of the reenactment of the crime at about 5:00 A.M.

In United States v. Neely, No. 72187, United States District Court, District of Columbia, Neely had been arrested about 5:00 P.M. on Saturday, May 9, and was taken before a coroner's inquest at about 11:50 A.M. on Monday, May 11. He had made a statement at about 8:00 P.M. Saturday evening. Judge Pine on November 18, 1943, ruled that such statement was inadmissible even for the purpose of contradicting the defendant on his cross-examination.

In United States v. Johnston, No. 431303, Municipal Court, District of Columbia, the defendant was charged with assault in having stabbed his wife. She was taken to a hospital and at about 10:00 P.M. on Sunday, October 24, the police officers apprehended the defendant peering into the window of her room at the hospital. The officers recovered from him at the time the knife with which he had done the stabbing. The defendant was taken to the precinct station to which place his wife, who had sufficiently recovered, came some time Monday afternoon at which time he made a full confession. He was not arraigned until Tuesday afternoon. Here, the confession admittedly came after a delay in arraignment.

The facts of these cases as I have set them forth were procured from the district attorney's office. The files of the Department of Justice show the following further unreported cases:

In United States v. Basil Fedorka (S.D. N.Y.) Fedorka who had failed to report for induction as ordered by his draft board was apprehended by the Federal Bureau of Investigation at 7:00 A.M. on May 14, 1943, and was taken to the offices of the Bureau at the Court House at Foley Square, New York City. He was arraigned at 1:00 P.M. the same day before a United States commissioner whose office was in the same building. An attempt was made earlier to reach the United States commissioner who was absent, and his absence was the only reason for the delay in arraignment until 1:00 P.M. On July 19, 1943, Judge Caffey excluded both a written statement and also testimony to oral admissions which Fedorka had made between the time of arrest and the time of arraignment. The case being a simple one in which guilt was clear, and easily proved, Fedorka was convicted without the use of the confession and admissions.

In United States v. Stokeley Delmar Hart (N.D. Ill.), a sedition case, Hart was apprehended at 7:00 A.M. on Sunday, September 20, 1942, and gave a signed statement at 5:00 P.M. that day. He was arraigned the next morning. At the trial in May 1943, Judge Igoe in holding the statement inadmissible ruled that it made no difference that Hart in fact had been arraigned as soon as a United States commissioner was available at his office.

It should, of course, be noted that, as some of these cases show, exclusion of a confession does not necessarily mean that the defendants will not be convicted on other evidence. Nevertheless, I confess that I am unable to understand why the trial courts should exhibit the passion for excluding statements which some of these decisions reveal, knowing as they do that the precise confines of the McNabb decision remain to be charted by the Supreme Court; and that the Government, unlike the defendant, cannot correct on

appeal a ruling excluding a confession or, where the confession is essential, directing a verdict of acquittal, even though the ruling would be deemed to be erroneous by an appellate court. Where the issue is so close as to be doubtful I should have thought that the wiser course, especially if the confession is necessary for conviction, would be to admit the evidence subject to correction, if in error, on the defendant's appeal from conviction. Had that course been followed in some of the cases which very properly give rise to your concern, the rights of the Government would be preserved at the same time that the Supreme Court would be afforded further opportunity to develop the doctrines involved.

5. Should the Hobbs bill be enacted these problems would, of course, be set at rest by a reversion to the state of the law before the decision in the McNabb case came down. I should think, however, that you may be reluctant to follow this course when the Supreme Court has so recently adopted a contrary view, especially since, as I have said, a case will shortly come to the Court presenting an opportune occasion for clarifying its new doctrine. It has been the general policy of Congress to entrust the development of evidential doctrine in criminal cases to the Supreme Court, and this policy, so far as I know, has in general received the warm acceptance of the bench and bar. The entire field of procedure is now covered by Acts of Congress vesting rule-making power in the Supreme Court. You may question whether it is wise to embark on piece-meal qualifications of the policy which those acts lay down. You may be hesitant to qualify that policy in a matter which involves, as this does, the traditional requirement of our law that detention be judicially sanctioned, which, after all, is a fundamental element of our historic civil rights.

6. I do, however, point out that were the bill to be enacted it would leave unaltered the underlying law with respect to the duty to arraign and the illegality of detention when that duty has not been fulfilled. To put the matter another way you would remove the sanction which the Supreme Court has devised to implement the right of an arrested person to prompt or immediate arraignment, but the right itself would remain. Law enforcement officers would still labor under these exceedingly stringent arraignment rules, and Congress would presumably intend the rules to be respected even though the evidential sanction were removed. That is not from our point of view a satisfactory situation.

I, therefore, suggest to you an alternative approach to the problem. I suggest that instead of focussing your attention upon the sanction you focus it upon the rule itself. Is it the will of Congress that persons arrested be immediately taken before a committing officer to inquire into the legality of the arrest and to vindicate the right to bail? Is it the will of Congress that detention for an hour or three hours or even several days during which police interrogation may take place and the prisoner's story investigated--be declared illegal by positive law? If such is the will of Congress, does Congress wish to withdraw from the consequences of this mandate which have been prescribed by the Supreme Court, in cases where the rule is violated and illegal detention occurs? But if the will of Congress has changed with respect to detention before arraignment would it not be more satisfactory to modify the legal provisions defining the duty of arresting officers rather than to address yourselves to the evidential rule laid down by the Supreme Court? The McNabb rule is not brought into play unless the detention is illegal. Would you be prepared to liberalize somewhat the rules by which legality is determined?

There are paradoxes in the present statutes which seem to me entirely without justification. If the duty of a deputy marshal is to take an arrested person before a committing officer "without unnecessary delay" why should it be the duty of agents of the Federal Bureau of Investigation or of members of the police force of the District of Columbia to do so "immediately?" At the very least, it seems to me that you should lay down an uniform rule in place of the four different rules that I have mentioned above. This, indeed, is the recommendation of the Advisory Committee on Rules of Criminal Procedure appointed by the Supreme Court pursuant to the Act of June 29, 1940.

If you were to lay down a uniform rule, the question arises as to what the rule should be. The Supreme Court Advisory Committee has proposed that the standard be "without unnecessary delay." In view of the stringency of the recent decisions, I suggest a little more flexibility, such, for example, as a standard requiring arraignment "within a reasonable time." Such a standard would, I think, assist materially in the typical situation where arraignment seems to me to be justifiably delayed, namely, in cases where arraignment of one of a number of suspected persons will operate to forewarn those of the accomplices who have not yet been arrested. Such was the case, for example, with the eight saboteurs, and exactly that situation was presented, I am advised, in a number of the important kidnapping cases which the Federal Bureau of Investigation has succeeded in breaking in recent years. A reasonable time standard would seem to me to justify delay for such purposes and to achieve such ends.

This approach would not abandon the traditional view that persons should not be arrested without probable cause sufficient for binding over upon

arraignment before a commissioner. It would, however, permit, as the present law does not, some accommodation of the governing principle to the realistic needs of federal law enforcement.

I have prepared a draft of a bill to accomplish this objective, should the Committee view this alternative approach with favor. I may add that under the standard I propose I believe that the cases that have attracted attention, where the delay in arraignment was brief and reasonably explained, would have been decided the other way.