

the advice of counsel prior to the reaffirmation.

The literature on this subject is extensive. See, for example, Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Geo. L.J. 1 (1958). Our Junior Bar Section prepared an extensive analysis of the *McNabb* rule in 1957, while *Mallory* was pending in the Supreme Court. See "Report to the Council on Law Enforcement on the Meaning and Application of the McNabb Rule."

As I recall, former United States Attorney Oliver Gasch once reported that *Mallory* questions (confessions and admissions) are of controlling importance in probably less than five percent of criminal prosecutions in the District of Columbia. He also once dismissed the suggestion that the *McNabb-Mallory* rule affected the crime rate as "much too speculative." This suggests the need for a clear demonstration that drastic legislation is in order. The Killough Committee has not made such a demonstration.

There may be added problems raised by *Wong Sun v. United States*, U.S. (1963), U.S. LAW WEEK, p. 4079, Jan. 14, 1963. Even before *Wong Sun*, the illegality of an arrest excluded *tangible* evidence. There was, however, some controversy as to whether a confession or admission obtained as a result of an illegal arrest could be excluded as a violation of the Fourth Amendment. In *Wong Sun*, the Supreme Court found there had been an arrest without probable cause and extended the doctrine to confessions and admissions. The Court said:

"Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. See *Nueslein v. District of Columbia*, 115 F.2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence." Slip Opinion, p. 14

The *Wong Sun* case probably means that the legality of an arrest will be in issue in every confession case. It may even exclude some "threshold" confessions, which have been admissible in D. C. courts under *United States v. Mitchell*, 322 U.S. 65 (1944).