

the suspension of bail pending a brief period of judicially authorized interrogation." (Note, 68 *Yale L.J.* 1003, 1025-26 (1959)). "In fact, prior to the *McNabb* decision, the U.S. marshals in the District of Columbia—under whose custody the great majority of federally accused persons are placed pending trial—regularly returned them to police for interrogation," the same at 1026.

The Supreme Court has sustained a confession obtained from a defendant after he had been duly committed to jail, *United States v. Carignan*, 342 U.S. 36 (1951). Moreover, in *Goldsmith v. United States*, 277 F. 2d 335, 339 (D.C. Cir. 1958), a municipal judge, at the request of the police, signed an order permitting police interrogation after the defendants had been ordered held for the grand jury; the practice was not challenged and the resulting reenactment of the crime was sustained.

True, the *Carignan* case is a long time ago, considering the tremendous strides taken by the Supreme Court in recent years. It is conceivable that postcommitment interrogation (a) without counsel's permission of one who has already retained counsel, or (b) of one who has not had the opportunity to consult counsel at any point, may be deemed constitutionally impermissible by the present Court. My own view is that it would not; that prior to the filing of an information or indictment, the absence of counsel, without more, is not likely to be considered a fatal defect in the near future.

What if I am wrong? Then the measure proposed by the Department of Justice would also be struck down on constitutional grounds.

Although, as I have previously indicated, I think the Department of Justice proposal resolves, in the main, the "involuntary confession" problems which have long plagued the courts, I am troubled by a "right to counsel—equality of justice" aspect of the proposal.

In the testimony pertaining to the proposal there are frequent statements about permitting the arrested person to consult with "counsel of his own choosing." But as Mr. Acheson observed (p. 706), "usually * * * these people don't know a lawyer." Usually, one might add, these people lack the financial resources to hire a lawyer, even if they did know one. But, as Mr. Acheson has also pointed out (p. 707), neither the Legal Aid Society nor any other legal agency is presently authorized to accept the call of the police to represent defendants in the custody of the police.

What follows from this? A forceful argument may be made that to condition the availability of counsel at the crucial period shortly after arrest on the financial ability of the arrested person constitutes an "invidious discrimination" violative of 14th amendment equal protection and (in the case of Federal law enforcement) 5th amendment due process.

To paraphrase Mr. Justice Douglas, speaking for a 6 to 3 majority in the recent landmark case of *Douglas v. California*, 372 U.S. 353, 355, 357-58 (1963):

There can be no equal justice where the time an accused first enjoys the benefit of counsel depends on the amount of money he has. There is lacking that equality demanded by the 5th and 14th amendments where the rich man is fortified by the advice of counsel before he is interrogated but the indigent is forced to shift for himself.

In your letter of November 8, you call my attention to the November 5 testimony of Maj. Robert V. Murray, Chief of the District of Columbia Police Department. You have been good enough to let me take issue with Major Murray at great length, but I cannot resist the temptation to comment briefly about some of the statements the Chief made on November 5.

1. Major Murray testified that "over the years if a man was arrested and said 'I want a lawyer' he was given an opportunity to call a lawyer" (Daily Report of Proceedings, Nov. 5, 1963, p. 740); that this was the practice "when I worked in homicide 20 years ago that we had a person in there and he said, 'I want a lawyer,' why there is no use wasting time with him. Just get him a lawyer" (p. 758). But at that same point, he states: "But I have never run into an attorney yet that would not advise his client not to talk to the police. We know when an attorney comes in that his client is not going to talk to the police about the case" (p. 749).

It may be my shortcoming, but so far as I can make out, isn't Major Murray saying, in effect, that those persons who are wary enough and sophisticated enough—the experienced and professional criminals, if you will—to request an attorney as soon as they are taken into custody can commit crime with virtual impunity?