

the courts' major means of insuring that the police will comply with the requirement for prompt arraignment.

Thank you kindly for this opportunity to comment upon this important subject after your committee has terminated its hearings.

Very truly yours,

PHILIP SCHWARTZ,

Member of Executive Board, Greater Washington Chapter, Americans for Democratic Action.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Washington, D.C., November 26, 1963.

Re H.R. 7525, H.R. 5726.

Hon. ALAN BIBLE,
Chairman, U.S. Senate Committee on the District of Columbia,
Washington, D.C.

DEAR SENATOR BIBLE: By letter of November 8, 1963, you have asked for my comments on H.R. 7525, the bill designed to undercut the *Mallory* rule, and, in particular, for my comments on the November 5, 1963, testimony of Deputy Attorney General Nicholas Katzenbach and U.S. Attorney David Acheson.

The most profitable starting point of any such discussion is the *Mallory* case itself and its background. The precise background of *Mallory* appears to stem from *McNabb v. United States*, 318 U.S. 332, in which the Supreme Court invalidated a confession made during a period of unlawful detention. Federal agents, prior to *McNabb* had virtually ignored the requirement of prompt arraignment which was, at that time, found in many places in the Federal criminal code. While the case went to the Supreme Court on the question of admissibility of the confession as tainted by coercion, the Court decided it on much narrower grounds, i.e., that the Government broke the law by failing to arraign promptly (in this case 18 U.S.C. 595), and "no Federal court can accept evidence obtained by a procedure expressly forbidden by Congress." Hogan and Snee, "The McNabb Mallory Rule: Its Rise, Rationale, and Rescue," 47 Geo. L. Rev. 1, 4 (1958). Although the Court, in *McNabb*, talked about "the circumstances in which the statements * * * were secured * * * a barren cell * * * for 14 hours * * * unremitting questioning by numerous officers," 318 U.S. at 344, it is clear that these facts did not lead to the result. As Professors Hogan and Snee put it:

"The outcome of the case, it seems would have been the same had the president of the University of Tennessee been arrested and confined for 2 days in the best suite in Chattanooga's finest hotel; had he been served a menu which would have sent a gourmet into ecstasy; and had he been questioned for short periods by polite mild-spoken Federal agents while soft music was played in the background." Hogan and Snee, *supra*.

The rule emanating from *McNabb*, therefore, is one of evidence and one deemed necessary by the Court "to enforce the congressional requirement of prompt arraignment." *Mallory v. United States*, 354 U.S. 449, 453, explaining the *McNabb* holding.

The next step, it seems to me, once having determined that the *Mallory* rule springs from the holding in *McNabb* and that the *McNabb* rule is one of evidence designed to enforce congressionally dictated Federal police practices, is to determine what the congressional mandate the Court is enforcing really is. It is at this point that the constitutional overtones of this issue come into play. The fourth amendment to the Constitution of the United States, in prohibiting "unreasonable * * * seizures," bans arrests made without probable cause. This is a fact which is quite often overlooked. Yet *Mallory v. United States*, 354 U.S. 449, 454, makes it quite clear:

"The police may not arrest upon mere suspicion but only on 'probable cause.'"

It was clear, however, long before *Mallory* that the fourth amendment prohibition against "unreasonable * * * seizures" and the provision that "no warrants shall issue, but upon probable cause * * * particularly describing the * * * persons * * * to be seized" applies to arrests and arrest warrants equally as to searches and search warrants. That was made clear in *Albrecht v. United States*, 273 U.S. 1, 5. It has since continually been reaffirmed, most recently in *Giordenello v. United States*, 357 U.S. 480, 485: