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1 P R O C E E D I N G S

2 (10:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first today in Case 07-10441, Corley v. United  
5 States.

6 Mr. McColgin.

7 ORAL ARGUMENT OF DAVID L. MCCOLGIN

8 ON BEHALF OF THE PETITIONER

9 MR. MCCOLGIN: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 FBI agents delayed presenting Mr. Corley to  
12 a Federal magistrate judge in order to obtain his two  
13 confessions. The admissibility of these two confessions  
14 depends on an issue of statutory interpretation: The  
15 interpretation of 3501(c), together with the  
16 McNabb-Mallory rule and the right of prompt presentment.

17 Now, there's two critical issues I would  
18 like to address. The first is that 3501(c) as it's  
19 written by Congress leaves the McNabb-Mallory rule in  
20 place outside the six-hour time limitation. And the  
21 second is that the Government's interpretation, under  
22 which 3501(c) is merely a voluntariness safe harbor, is  
23 unfaithful to the text and the structure of the statute.

24 Turning to the first point, subsection (c)  
25 modifies McNabb-Mallory, but does not eliminate it. The

1 exact text of the statute here is crucial. And for the  
2 Court's convenience, on page 7 of the yellow brief the  
3 operative language of the text of the statute is set  
4 out.

5 JUSTICE GINSBURG: Before we -- before we  
6 get to the statute, McNabb-Mallory are exercises of this  
7 Court's supervisory authority over the lower courts?

8 MR. McCOLGIN: That's correct, Your Honor.

9 JUSTICE GINSBURG: And they were both  
10 pre-Miranda decisions, when now the defendant is told of  
11 his right to remain silent. Whatever Congress put in  
12 1301 -- 3501, this Court could say, well, McNabb-Mallory  
13 are no longer viable cases in light of Miranda.

14 MR. McCOLGIN: This Court could, but for  
15 several prudential reasons this Court should not,  
16 overturn McNabb and Mallory and should not find them to  
17 be no longer valid considerations. First of all -- or  
18 no longer valid precedents.

19 First of all, the Solicitor General's Office  
20 has not asked that McNabb and Mallory be overturned.

21 Second of all, the parties have not briefed  
22 that issue. It has been briefed instead as a statutory  
23 interpretation issue.

24 Thirdly, Congress through 3501(c) structured  
25 the statute on the existing precedent of McNabb and

1 Mallory, and at this point for the Court to pull McNabb  
2 and Mallory out from underneath that structure would  
3 cause that structure to basically collapse. It depends,  
4 the six-hour time limitation, depends on the existence  
5 of McNabb-Mallory outside that six-hour time period.

6 Congress can revisit this issue at any time.  
7 Their hands are not tied. Congress could choose to  
8 change 3501(c) so that it no longer provides for McNabb-  
9 Mallory outside the six-hour time period. But that's a  
10 decision for Congress and this Court, I would suggest  
11 respectfully, should respect the prerogatives and the  
12 policy choice that Congress has already made.

13 JUSTICE ALITO: Are you arguing that the  
14 language in subsection (c) codifies the McNabb-Mallory  
15 rule?

16 MR. MCCOLGIN: I am arguing that the exact  
17 language, whether it is "codification" or "leaves  
18 intact," doesn't matter. What it does is --

19 JUSTICE ALITO: There is a very big  
20 difference, isn't there, between saying we are codifying  
21 this rule, we're making it a statutory requirement, and  
22 saying, assuming that this supervisory rule that was  
23 adopted by the Supreme Court remains in place, we are  
24 creating an exception to it? Which of those two things  
25 does subsection (c) do?

1                   MR. MCCOLGIN: Your Honor, it does the  
2 latter. It leaves McNabb-Mallory in place. However,  
3 the language of the statute uses the phrase "time  
4 limitation" in the proviso. "Time limitation" implies  
5 more than we're just not just touching McNabb-Mallory  
6 for the time being. It depends -- the statute depends  
7 on McNabb-Mallory to create the time limitation, because  
8 without McNabb-Mallory there is no limitation. After  
9 the six hours nothing else happens unless McNabb-Mallory  
10 --

11                   JUSTICE KENNEDY: Well, it would be  
12 consistent with the second purpose that you gave to say  
13 that there's a six-hour safe harbor, whatever term you  
14 want to call it, and beyond six hours the Court is free  
15 to reexamine its supervisory rule in light of what  
16 Congress has provided in (a) and (b) of the statute.

17                   MR. MCCOLGIN: Well, but again, the language  
18 of the statute is "time limitation." That's strong  
19 language for Congress to use and it indicates that  
20 Congress intended to limit the taking of confessions to  
21 those first six hours. There is no limitation without  
22 McNabb-Mallory in effect.

23                   JUSTICE KENNEDY: It is a little bit odd to  
24 say that Congress has built a statute around a  
25 supervisory rule, but taken away the authority of this

1 Court to reexamine the supervisory rule.

2 MR. MCCOLGIN: I am not actually saying that  
3 Congress has taken away the authority of the Court. I  
4 am saying as a prudential manner, since Congress can  
5 address this on its own and since it structured the  
6 statute on the foundation of McNabb-Mallory, it would be  
7 best for this Court to leave up to Congress that policy  
8 choice.

9 Congress chose in 1968 to leave of  
10 McNabb-Mallory protection against presentment delay in  
11 place after six hours. It was a compromise, and it was  
12 the appropriate compromise, because what it did was it  
13 cut out the first six hours during which there had been  
14 the most problems with the application of  
15 McNabb-Mallory. The six-hour time limitation  
16 effectively lowers the social cost of this rule of this  
17 rule of inadmissibility while maintaining the deterrent  
18 effect of McNabb-Mallory outside the six hours.

19 JUSTICE KENNEDY: Well, you were trying to  
20 get to page 7 of your yellow brief?

21 MR. MCCOLGIN: Yes, Your Honor. On page 7 I  
22 set out the operative language of the statute. And what  
23 the statute actually provides is that a confession shall  
24 not be inadmissible solely because of delay if such  
25 confession is found by the trial judge to have been made

1 voluntarily and made within six hours of arrest. Now,  
2 the phrase "inadmissible solely because of delay" is  
3 clearly a reference to the McNabb-Mallory rule because  
4 that is exactly what McNabb-Mallory does. It renders  
5 the confession inadmissible solely because of delay if  
6 the delay in presentment was unreasonable.

7               So what the statute is providing on its face  
8 is that a confession shall not be subject to the  
9 McNabb-Mallory rule if it is voluntarily given and made  
10 within six hours. The six-hour provision means that  
11 McNabb-Mallory is in effect outside of the six hours.

12              CHIEF JUSTICE ROBERTS: Or it may just mean  
13 that the confessions beyond six hours may be excluded  
14 solely because of delay. In other words, if the judge  
15 says, look, I don't want to hear about all this other  
16 stuff, it's just too long, he can't do that beyond the  
17 six hours, but he can within the six hours.

18              MR. MCCOLGIN: Within the six hours he  
19 cannot exclude solely because of delay, even a voluntary  
20 statement. That is the McNabb-Mallory principle,  
21 inadmissible solely because of delay. So what it's  
22 saying is that McNabb-Mallory does not apply within the  
23 six hours.

24              Now the government's interpretation is that  
25 this is simply a voluntariness safe harbor, and what



1 they do is they read the word "inadmissible" as being  
2 synonymous with the word "involuntary." But the text of  
3 the statute shows that those two terms are not  
4 synonymous, because the text of the statute says that in  
5 order for a confession to be admissible it must be  
6 voluntary and made within six hours.

7 JUSTICE ALITO: Well, they have that textual  
8 problem, but you have at least an equally big textual  
9 problem, because you want to read the first sentence of  
10 subsection (a) completely out of the statute based on  
11 some supposition about what Congress was intending to  
12 do. So really, if you live by the text you die by the  
13 text. I don't see how you are going to succeed with a  
14 subsection (c) textual analysis if you're going to  
15 disregard the text of subsection (a).

16 MR. MCCOLGIN: Your Honor, we don't  
17 disregard the text of subsection (a). Instead, we just  
18 apply the principle that a general provision, if it  
19 conflicts with a specific provision, the specific  
20 controls over the general. What we have in subsection  
21 (a) is a general statement that voluntary statements are  
22 admissible. But if we read that the way the government  
23 does, as making admissible every voluntary statement,  
24 then that would make subsection (c) completely  
25 superfluous.

1 JUSTICE ALITO: And if you read subsection  
2 (c) the way you do, it makes subsection (a) mean  
3 something quite different from what it says literally.

4 MR. MCCOLGIN: No, it simply establishes an  
5 exception in the area of delay. This is the way  
6 statutes work. When there is a conflict between a  
7 general provision and a specific one, the specific must  
8 control over the general. If it worked the other way  
9 around, it would render the specific superfluous. So  
10 this has happened in statutes in numerous case. In 1983  
11 versus 2254, it was held that 2254 as a specific  
12 provision controls over 1983. So this is an accepted  
13 principle of statutory interpretation.

14 JUSTICE ALITO: What you're -- you are not  
15 arguing that there is a specific provision that controls  
16 a general provision. You are arguing that an arguable  
17 negative inference from an arguably more specific  
18 provision reads new language into the text of a specific  
19 provision. That's what you are arguing, isn't it?

20 MR. MCCOLGIN: With respect, no, Your Honor.  
21 We are not making the negative inference argument that  
22 the government suggests we are making in the first part  
23 of their brief. Instead, we are making the argument  
24 that subsection (c) was constructed on the existing  
25 precedent of McNabb and Mallory, which already

1 established a rule of inadmissibility. Subsection (c)  
2 then just carves out the first six hours from that. So  
3 it's not creating a rule of inadmissibility by negative  
4 inference. Rather it's just recognizing that a rule of  
5 inadmissibility already exists in the case law and the  
6 purpose of this statute was to simply carve out from the  
7 first six hours the McNabb-Mallory rule.

8 The government --

9 JUSTICE SCALIA: Why can't you argue that  
10 what happens when you are not within the safe harbor is  
11 simply that the time period cannot alone govern, all  
12 right, but it can still be part of the list of things  
13 that can be taken into account in determining  
14 voluntariness under (b). Why doesn't that reconcile the  
15 two provisions?

16 MR. MCCOLGIN: That, again, is the  
17 government's interpretation. But it requires a  
18 rewriting. It requires reading "inadmissible" as  
19 "involuntary" to interpret all of subsection(c) as a  
20 voluntariness safe harbor. But Congress used the word  
21 inadmissible deliberately. That's a reference to the  
22 McNabb-Mallory rule. McNabb-Mallory did not render  
23 confessions voluntary or involuntary based on delay. It  
24 rendered them inadmissible. So that language is  
25 crucial. This cannot be read as a voluntariness safe

1 harbor.

2 JUSTICE SCALIA: But admissibility is  
3 defined in 3501 itself. (A) says that it shall be  
4 admissible in evidence if it is voluntarily given; and  
5 (b) says what factors will be taken into account in  
6 determining whether it's voluntarily given.

7 MR. MCCOLGIN: Yes, Your Honor. And (c)  
8 makes clear that, at least for purposes of subsection  
9 (c), voluntariness is not enough for admissibility,  
10 because it says on its face that in order --

11 JUSTICE SCALIA: I agree with that. It is  
12 not alone enough.

13 MR. MCCOLGIN: So the two terms --

14 JUSTICE SCALIA: So if you are outside of  
15 that safe harbor you cannot rely upon the time alone.  
16 But why can't you rely on the time plus the other  
17 factors?

18 MR. MCCOLGIN: Your Honor, because the  
19 effect is again to allow for a confession to be  
20 inadmissible solely based on delay if it's outside of  
21 the six hours.

22 JUSTICE SCALIA: It's not being admissible  
23 solely on the basis -- I'm sorry. Delay is not the only  
24 factor being considered in making the inadmissibility  
25 call. Delay is one of the things; whereas, within the

1 safe harbor delay can't be taken into account at all.

2 MR. McCOLGIN: Well, what the Congress said  
3 was that delay alone cannot be a basis for  
4 inadmissibility within six hours.

5 JUSTICE SCALIA: Right.

6 MR. McCOLGIN: That leaves in place  
7 McNabb-Mallory, under which delay alone is a basis for  
8 inadmissibility.

9 JUSTICE SCALIA: No. It -- it leaves it in  
10 effect only if you ignore (a) and (b). (A) says that  
11 it's admissible if it's voluntary --

12 MR. McCOLGIN: But that --

13 JUSTICE SCALIA: -- and (b) says it's  
14 voluntary if you take into account the five factors, one  
15 of which is the period of time before arraignment.

16 MR. McCOLGIN: Your Honor, that depends.  
17 The premise of that depends on the argument that  
18 "inadmissibility" is synonymous with "involuntariness"  
19 for purposes of subsection (c), and "admissibility" is  
20 synonymous with "voluntariness," but they are not  
21 synonymous as used in subsection (c).

22 JUSTICE SCALIA: But they are synonymous as  
23 used in (a).

24 MR. McCOLGIN: Well, subsection -- as used  
25 in subsection --

1 JUSTICE SCALIA: (A) says that if it's --  
2 it's admissible if it's voluntary.

3 MR. McCOLGIN: Yes, Your Honor. However, as  
4 used in subsection (c), that should control, because the  
5 word "inadmissibility" is being used in that very same  
6 sentence. Since the very same sentence makes clear that  
7 voluntariness is not enough for admissibility, it's  
8 clear that those two terms are not synonymous.

9 JUSTICE KENNEDY: Well, is it your position  
10 that the McNabb-Mallory rule serves purposes other than  
11 to ensure the voluntariness of the statement?

12 MR. McCOLGIN: Yes, it protects --

13 JUSTICE KENNEDY: And that's what you're  
14 trying to reach here?

15 MR. McCOLGIN: Yes, Your Honor. It protects  
16 --

17 JUSTICE KENNEDY: But if that's true, then  
18 why is it that we would suppress the confession if it's  
19 completely voluntary? I mean, what's the link between  
20 some other end that's being served by McNabb-Mallory --

21 MR. McCOLGIN: It's protecting --

22 JUSTICE KENNEDY: -- something other than  
23 voluntariness and suppressing the confession?

24 MR. McCOLGIN: It's protecting the right of  
25 prompt presentment. McNabb-Mallory was meant to prevent

1 the exploitation of delay in presentment as a means of  
2 obtaining a confession.

3 JUSTICE KENNEDY: But why do we want to  
4 avoid delay in presentment? What reason do we give?  
5 And I assume there are reasons that -- to contact family  
6 and so forth -- other than voluntariness.

7 MR. MCCOLGIN: Well, voluntariness is  
8 certainly a part of it. But it's in addition, because  
9 there's rights that attach at presentment that allow a  
10 defendant to make a much more informed decision as to  
11 whether --

12 JUSTICE KENNEDY: What do those rights have  
13 to do with a confession that is conceded, for our  
14 analytic purposes, to be voluntary?

15 MR. MCCOLGIN: Because the confession itself  
16 was obtained through exploitation of the delay. During  
17 a period of custody -- before presentment the defendant  
18 was just in the hands of the zealous police officers who  
19 have actually arrested him. It's a fundamental  
20 principle of our justice system that that period should  
21 be as short as reasonably possible because during that  
22 period, as time goes on, the effect of the delay is to  
23 increase the inherently coercive power of that uncertain  
24 --

25 JUSTICE GINSBURG: Do you need fundamental

1 principles when you have got Rule 5 of the Rules of  
2 Criminal Procedure? Don't they say that an arrestee  
3 shall be taken before a magistrate without unreasonable  
4 delay?

5 MR. MCCOLGIN: Exactly, Your Honor. It's  
6 the right under 5(a) to prompt presentment that is being  
7 protected.

8 JUSTICE KENNEDY: But all you are doing is  
9 trying to have an enforcement mechanism for this by the  
10 wholly unrelated remedy of suppressing the confession if  
11 it's voluntary. If it's not voluntary, of course, it's  
12 related.

13 MR. MCCOLGIN: Well, the purpose of  
14 McNabb-Mallory was actually to cut the line a bit short  
15 of having to actually make a voluntariness  
16 determination. It's a recognition that, even if the  
17 statement is voluntary, that still there are inherent  
18 coercive pressures that develop during a period of  
19 presentment -- of presentment delay, and that that  
20 period of time should be as short as possible so that  
21 that coercive nature, the coercive nature of the  
22 interrogation, doesn't cause the person to --

23 JUSTICE KENNEDY: So you are saying a  
24 confession can be coercive and still voluntary?

25 MR. MCCOLGIN: It's -- yes, Your Honor. Not



1 in the sense that it's a coerced confession. I'm not  
2 arguing that this was involuntary. Instead, I'm arguing  
3 that McNabb-Mallory intends to avoid the voluntariness  
4 requirement by establishing a prophylactic rule, so that  
5 a presentment needs to be made as soon as reasonably  
6 possible after the arrest so that that delay cannot be  
7 exploited as a means of obtaining a confession. It both  
8 protects the right to prompt presentment and it also --

9 JUSTICE STEVENS: May I ask you this: What  
10 other remedy, other than suppression of the confession  
11 made after six hours, is there available to the  
12 defendants to enforce the interest in prompt  
13 presentment?

14 MR. McCOLGIN: There is no other remedy  
15 available. In fact, the message that an affirmance in  
16 this case would send to law enforcement is that delay  
17 for the purpose of interrogation is permissible and that  
18 the right of prompt presentment is unenforceable.  
19 Without McNabb-Mallory, this becomes an empty right.  
20 There is no other remedy. And that's why particularly  
21 where the delay is purposeful, as we have in this case  
22 --

23 JUSTICE ALITO: Why would that be the case?  
24 The confession could still be suppressed on grounds of  
25 involuntariness?

1 MR. MCCOLGIN: Yes, Your Honor.

2 JUSTICE ALITO: Your argument is you don't  
3 trust district judges to make accurate determinations as  
4 to whether the confession is voluntary or not. You need  
5 -- you need a rule that takes that out of their hands.

6 MR. MCCOLGIN: It's not that we don't trust  
7 them. It's that delay for the purpose of interrogation  
8 should not be pushed to that limit; that delay for the  
9 purpose of interrogation should not be permitted. The  
10 delay, particularly where it's for that express purpose,  
11 even if the defendant cannot show that it rose to the  
12 level of involuntariness, still it's exploitation of  
13 delay. It's a violation of the right to prompt  
14 presentment, and that violation of the right to prompt  
15 presentment under McNabb-Mallory renders that confession  
16 --

17 JUSTICE ALITO: What's the purpose of the  
18 requirement of prompt presentment?

19 MR. MCCOLGIN: The purpose of the right of  
20 prompt presentment is several-fold.

21 First of all, it's because there are  
22 inherent coercive characteristics that develop during a  
23 period of custody, and a person, once arrested, should  
24 be presented to a neutral magistrate so that the neutral  
25 magistrate can both assign counsel, give an opportunity

1 for consultation with counsel, and can also inform the  
2 person of his rights, address bail, and issues such as  
3 that. So the right of prompt presentment is considered  
4 fundamental. It's considered a basic right, a basic  
5 statutory right in our system.

6 JUSTICE SCALIA: Mr. McColgin, what do you  
7 do with the problem that the proviso only makes a delay  
8 longer than six hours nondestructive of the  
9 admissibility of the confession if the delay beyond six  
10 hours "is found by the trial judge to be reasonable  
11 considering the means of transportation and the distance  
12 to be traveled to the nearest available magistrate judge  
13 or other officer."

14 I can think of a lot of reasons why you  
15 can't do it within six hours other than the means of  
16 transportation and the distance to be traveled.

17 MR. MCCOLGIN: We have to remember, Your  
18 Honor --

19 JUSTICE SCALIA: You see, if you take the  
20 government's position that it really doesn't matter, it  
21 gets thrown back into (b), and you can take all those  
22 factors into account, and the ultimate question is  
23 whether the confession was reasonable.

24 But if you take your position, the defendant  
25 automatically walks, or at least his confession is

1 automatically thrown out, and the only exception made is  
2 if the means of transportation and the distance to be  
3 traveled made six hours impracticable.

4 MR. MCCOLGIN: No, Your Honor, that's not  
5 our position. Our position is that the first question  
6 is did the confession fall within that six-hour time  
7 period?

8 JUSTICE SCALIA: Right.

9 MR. MCCOLGIN: Or longer, depending on  
10 transportation, means of transportation. For that  
11 determination of whether it falls within the exclusion  
12 period, only means of transportation or distance is  
13 considered, but once the confession is outside that  
14 period, then McNabb-Mallory applies and the confession  
15 may still be admissible if the delay was necessary. And  
16 for those purposes, once we are determining whether  
17 McNabb-Mallory requires inadmissibility, the court can  
18 consider, for example, emergency hospital treatment or  
19 unavailability of the magistrate. So all of those  
20 factors can and do get considered once we get into the  
21 determination of whether McNabb-Mallory requires  
22 exclusion.

23 JUSTICE SCALIA: Well, that certainly is a  
24 very back-door way of doing it, isn't it?

25 MR. MCCOLGIN: Not at all, Your Honor,

1 because once we look at the structure of the statute  
2 what it's doing is carving out the first six hours from  
3 McNabb-Mallory. So the determination of whether we are  
4 in that carve-out period is limited to transportation  
5 and distance, but once we are outside of it, we just  
6 apply McNabb-Mallory, and that's McNabb-Mallory as it  
7 has developed in the case law, which includes all of  
8 these other considerations.

9 JUSTICE SOUTER: But why -- why was it  
10 appropriate to have a special rule for transportation?  
11 In other words, everything that is covered by the  
12 transportation proviso would, on your theory would on  
13 your theory have been subject to consideration under  
14 McNabb-Mallory anyway. So why did they simply have a  
15 six-hour rule and leave any exceptions, transportation,  
16 unavailability of magistrate, medical emergency,  
17 whatever, to -- to the leeway that McNabb-Mallory  
18 allows?

19 MR. MCCOLGIN: Because the first question,  
20 again, is just whether to exclude the confession  
21 altogether from the McNabb-Mallory determination. And  
22 for those purposes, they -- some Senators from larger  
23 States where there's greater distances to travel wanted  
24 to make sure that there was an exception for  
25 transportation and distance.

1 JUSTICE SOUTER: So basically -- I don't  
2 mean this disparagingly, but basically the answer is  
3 politics. Somebody from a State thought of it and  
4 nobody else said, well, gee, let's pile on some other  
5 provisos. It's as simple as that in your view?

6 MR. MCCOLGIN: Exactly, Your Honor. There  
7 was very little comment on it added at the -- at the  
8 last minute. The Scott Amendment had just included the  
9 six-hour provision, but then the proviso was added on  
10 the floor at the very last minute.

11 JUSTICE SOUTER: I see.

12 MR. MCCOLGIN: Your Honor, the government  
13 also relies on 402 as a basis for arguing that  
14 McNabb-Mallory has been basically overturned by  
15 Congress. Rule 402, however, clearly does not apply  
16 here. The advisory notes -- the advisory committee  
17 notes make clear that Rule 402 was never intended to  
18 overturn McNabb-Mallory. In fact, the advisory  
19 committee identified McNabb-Mallory as a rule of  
20 inadmissibility that was meant to stay in place even  
21 after the implementation of Rule 402.

22 JUSTICE GINSBURG: At least one time limit  
23 that has been complied with -- and that's the Fourth  
24 Amendment, how long you can keep somebody seized without  
25 taking them before a magistrate -- there is no violation

1 of that time period, is there?

2 MR. MCCOLGIN: That's correct, Your Honor,  
3 the McLaughlin principle that less than 48 hours is  
4 presumptively reasonable. However, Congress in -- in  
5 3501(c) chose to set a six-hour time period for the  
6 taking of confessions and to leave McNabb-Mallory in  
7 place outside that time period.

8 I would suggest that Congress struck an  
9 appropriate balance at that time, keeping McNabb-Mallory  
10 in place for the more extreme types of delay, but  
11 eliminating it from the shorter periods of delay. And,  
12 in doing so, Congress struck an appropriate balance, and  
13 I would suggest that this Court should respect the  
14 balance that Congress has struck. Unless there is any  
15 further questions, I would ask that --

16 JUSTICE STEVENS: I just have one question.  
17 Do you think the -- that the D.C. Circuit -- the statute  
18 pertaining to the District of Columbia is relevant?

19 MR. MCCOLGIN: As legislative history, yes,  
20 Your Honor, because the 3501(c) was modeled on the D.C.  
21 legislation, which established clearly a three-hour time  
22 period. And the legislative history for that was very  
23 clear that they intended to leave McNabb-Mallory in  
24 effect outside that time period.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1                   MR. MCCOLGIN: No further questions? Thank  
2 you, Your Honor.

3                   CHIEF JUSTICE ROBERTS: Mr. Dreeben.

4                   ORAL ARGUMENT OF MICHAEL R. DREEBEN

5                   ON BEHALF OF THE RESPONDENT

6                   MR. DREEBEN: Mr. Chief Justice, and may it  
7 please the Court:

8                   It's important in this case to go back and  
9 look at the original Rule of Exclusion that this Court  
10 developed in the McNabb case in 1943 and then reiterated  
11 in the Mallory case in 1957. Both of those cases  
12 considered a pre-Miranda regime in which there was no  
13 constitutional law that required that a suspect be  
14 advised of his rights.

15                  Under Rule 5 of the Federal Rules of  
16 Criminal Procedure and under statutes that preceded it  
17 that were in effect at the time of McNabb, the only way  
18 to ensure that a suspect was informed of his rights to  
19 silence and counsel was to bring him before a  
20 magistrate, and the magistrate would advise him of those  
21 rights. This Court in McNabb and Mallory thus fashioned  
22 a judicial rule of evidence, an exclusionary rule under  
23 the Court's supervisory power not as an effectuation of  
24 something that Congress specifically intended but of its  
25 own force as a way to backstop the Rule 5 requirement.



1                   In the government's view, two acts that came  
2   subsequently to McNabb and Mallory, section 3501 and  
3   Rule 402 of the Federal Rules --

4                   JUSTICE STEVENS: Let me just ask before you  
5   get to those, Mr. Dreeben: Other than the McNabb-  
6   Mallory Rule, what was available as a sanction for  
7   violations of the rule of prompt presentment?

8                   MR. DREEBEN: Justice Stevens, I am not sure  
9   that there is any evidentiary sanction.

10                  JUSTICE STEVENS: No, not -- apart from an  
11   evidentiary sanction.

12                  MR. DREEBEN: None has risen in the case law  
13   that I can point Your Honor to. I think the primary  
14   safeguard of the enforcement of Rule 5 is the obligation  
15   that is placed on the government and on government  
16   agents to comply with rules of criminal procedure that  
17   are valid.

18                  JUSTICE STEVENS: So at the time that  
19   Mallory and McNabb were decided the Court thought that  
20   an extra rule was necessary to give the government an  
21   incentive to comply with prompt-presentment  
22   requirements. The very same factors are still at work  
23   today, aren't they?

24                  MR. DREEBEN: No, I don't think that they  
25   are, Justice Stevens, because the -- the critical thing

1     that the Court was doing in Mallory and McNabb was  
2     trying to come up with a way to ensure that suspects  
3     were advised of their rights to protect against abuses  
4     in the interrogation process. And the Court's ultimate  
5     constitutional solution to that lay years in the future.  
6     It came in the form of Miranda.

7                 JUSTICE STEVENS: No, but I am not -- we are  
8     not talking about a constitutional problem but a rule  
9     problem encouraging compliance with the -- the -- with  
10    the rule that requires prompt presentment.

11                MR. DREEBEN: I think that what the Court  
12    was after--

13                JUSTICE STEVENS: I say that to the extent  
14    -- to the extent that was a motivating factor in McNabb,  
15    it seems to me that it would be precisely the same  
16    motivating factor in McNabb.

17                MR. DREEBEN: Well, I think that it was not  
18    the sole motivating factor in McNabb.

19                JUSTICE STEVENS: Not the sole, but it was a  
20    motivating factor. And it would have equal strength  
21    today as then.

22                MR. DREEBEN: No, I would not agree that it  
23    would have equal strength.

24                JUSTICE SCALIA: Mr. Dreeben, wouldn't --  
25    wouldn't you still have this disincentive which --

1 wouldn't you still have this disincentive, which is  
2 considerable? If you -- if you exceed the time limit,  
3 it may be taken into account in determining that the  
4 confession was involuntary.

5 MR. DREEBEN: Well, certainly, Justice --

6 JUSTICE SCALIA: Isn't that enough of a  
7 disincentive? If you delay too long, that delay is one  
8 of the factors to be taken into account in deciding  
9 whether the confession was voluntary.

10 MR. DREEBEN: Yes, excessive delay can be a  
11 -- it is by statute a factor that will be taken into  
12 account in determining --

13 JUSTICE GINSBURG: Well, what about Rule 5?  
14 And Rule 5 doesn't say a word about voluntary. It says  
15 unnecessary delay -- shall be brought before a  
16 magistrate without unnecessary delay. So whatever the  
17 balancing there may be in 3501, I think what you're  
18 saying is that Rule 5(a), which just says bring  
19 theoretically before a magistrate without unreasonable  
20 delay, that that has no teeth; that that is effectively  
21 unenforceable.

22 MR. DREEBEN: I think it is unenforceable by  
23 the exclusion of a confession that results from what a  
24 court concludes is unnecessary delay. And I think that  
25 that is true for two reasons, by virtue of congressional

1 action and rulemaking action. And I think that as an  
2 additional actor this Court, which struck that  
3 supervisory powered balance in a pre-Miranda era, would  
4 do well to consider whether the factors that motivated  
5 it to suppress confessions in McNabb and Mallory should  
6 still be evaluated the same way today.

7 JUSTICE SCALIA: But isn't your -- I'm  
8 sorry.

9 JUSTICE GINSBURG: Rule 5 is about  
10 unnecessary delay, and here we have a case, if I  
11 remember the facts right, where the officer said, yes,  
12 the reason we didn't bring him before a magistrate  
13 sooner is because we wanted to get a confession from  
14 him.

15 MR. DREEBEN: Justice Ginsburg, what  
16 happened in this case is that the suspect was given his  
17 Miranda rights and waived them and agreed to give a  
18 confession. There are three circuits and the D.C. local  
19 court which all have concluded that a waiver of Miranda  
20 rights waives the right to prompt presentment. So the  
21 question of whether there was in fact unnecessary delay  
22 that would constitute a violation of Rule 5 has not been  
23 litigated in this case.

24 JUSTICE SCALIA: I must be losing the thread  
25 of the argument. It seems to me that McNabb and Mallory

1     only provide punishment for excessive delay where there  
2     has been a confession. Isn't that right?

3                 MR. DREEBEN: That's correct.

4                 JUSTICE SCALIA: And so long as the length  
5     of the -- the delay can still be considered as one of  
6     the elements in determining that the confession -- that  
7     the confession is involuntary, there is still a degree  
8     of incentive based upon only the confession. Now, it --  
9     it may not be as high a degree -- that it is  
10    automatically excluded -- but the police are going to  
11    have to consider that any confession they may get within  
12    that period of excessive delay may be challengeable.

13                MR. DREEBEN: It is certainly challengeable  
14    on voluntariness grounds. Now, the Court's motive-

15                JUSTICE STEVENS: It is still true they have  
16    everything to gain and nothing to lose by continuing to  
17    interrogate.

18                MR. DREEBEN: Well, they do have something  
19    --

20                JUSTICE STEVENS: If they don't get the  
21    confession within six hours, they haven't got it. So if  
22    they continue on, their only purpose is to try to get a  
23    voluntary confession.

24                MR. DREEBEN: Well, Justice Stevens, to the  
25    extent that it is correct that a waiver of Miranda

1 rights waives the prompt presentment right and prevents  
2 an objection based on whatever survives of  
3 McNabb-Mallory, the officers are doing nothing wrong if  
4 they obtain a valid Miranda waiver; and this was just  
5 not a factor that the Court had on the horizon when it  
6 decided McNabb and Mallory.

7 JUSTICE SOUTER: But isn't there a -- a new  
8 factor now that the Court has decided Miranda? And  
9 you've argued that we should regard this in the  
10 post-Miranda light, but I think there is at least one  
11 way of doing that that cuts against the government's  
12 argument and I would like your response to that.

13 That is that in the post-Miranda world in  
14 practical terms, if a -- if a court in considering a  
15 suppression motion finds that the Miranda warnings were  
16 given and that after they were given this individual  
17 said, okay, I'll talk, that is in practical terms the  
18 end of the issue. The notion that there is a -- an  
19 independent voluntariness concern is pretty much theory,  
20 not practice.

21 Given what I think is the, kind of the  
22 real-world effect of Miranda -- say the magic words, get  
23 the defendant to say, I'll talk, that's it -- doesn't it  
24 make sense to have a further safeguard in something like  
25 the six-hour rule understood as preserving

1 McNabb-Mallory after the six hours?

2 MR. DREEBEN: Well, Justice Souter, I think  
3 that is purely a question of policy of whether there  
4 should be such a strong exclusionary rule that mandates  
5 the barring from admission into evidence of a purely  
6 voluntary confession where there's no dispute about its  
7 voluntariness because the officers delayed beyond six  
8 hours.

9 JUSTICE SOUTER: Well, I agree with you; it  
10 is an issue of policy. But I thought your whole  
11 argument for considering this as a post-Miranda case was  
12 in effect a -- a policy context in which you wanted us  
13 to decide this.

14 MR. DREEBEN: It's a policy context that I  
15 think Congress has decided in two different enactments,  
16 and I think that if this Court were to reach it as a  
17 matter of policy, it should revisit the balance that it  
18 reached in McNabb-Mallory because of the changed legal  
19 context. But this is a case about section 3501 and  
20 about Federal Rule of Evidence 402.

21 JUSTICE SCALIA: I knew you were going to  
22 get to 3501 eventually.

23 MR. DREEBEN: I am glad that I have finally  
24 reached it.

25 (Laughter)

1                   MR. DREEBEN: Section 3501 on its face says  
2 nothing about excluding any evidence. What it says is  
3 that in section (a) voluntary confessions are  
4 admissible. In section (b) it says that in determining  
5 voluntariness, a court will consider a variety of  
6 factors under the totality of the circumstances,  
7 including prearrest delay. Then in subsection (c),  
8 it attacks more directly the McNabb-Mallory rule. And  
9 as originally formulated it would have wiped out  
10 McNabb-Mallory altogether; there is no dispute about  
11 that. After the bill was introduced there was a  
12 modification of it on the floor of the Senate in which a  
13 six-hour limitation was put in.

14                   Now, the effect of that six hours is to say  
15 that within six hours after the arrest delay by itself  
16 can never be an exclusive grounds for suppression; it  
17 just can't. And to that extent it overrules  
18 McNabb-Mallory to the extent that McNabb-Mallory would  
19 have allowed less than six hours of delay to serve as a  
20 basis for suppressing evidence. Outside of six hours,  
21 it does not say that evidence is suppressed. It simply  
22 leaves that determination to other sources of law.

23                   In the government's view, the primary source  
24 of law that controls the answer to that question is  
25 subsection (a), which says that voluntary confessions



1 are admissible, and I believe that, as Justice --

2 JUSTICE SOUTER: If that is the answer, why  
3 do we need (c) -- I mean, why did Congress need (c) at  
4 all?

5 MR. DREEBEN: Congress never needed (c); (c)  
6 in the government's view was always superfluous, even at  
7 the time when it directly said delays shall never be the  
8 grounds for suppressing a confession. There was already  
9 a provision in (a) that said voluntary confessions are  
10 admissible and it was well understood that  
11 McNabb-Mallory -- and this Court was very explicit on  
12 the point -- excluded totally voluntary confessions.

13 So if this Court has nothing before it but  
14 the text of the statute, subsection (a) makes voluntary  
15 confessions admissible, and the only way that Petitioner  
16 can get around that is to say that section 3501(c)  
17 carved something out of subsection (a).

18 JUSTICE STEVENS: But if it doesn't, Mr.  
19 Dreeben, what do the words "time limitation" mean in the  
20 proviso?

21 MR. DREEBEN: That's the limitation on a --  
22 the period during which a court cannot rely exclusively  
23 on delay within the meaning of the statute. It simply  
24 -- it carves out six hours from McNabb-Mallory plus  
25 reasonable transportation delays, and it leaves the

1 six-hour -- after the six-hour period to other sources  
2 of law.

3 Now, one source of law -- and this is where  
4 Petitioner looks -- would be McNabb-Mallory. But  
5 McNabb-Mallory is not a constitutional rule of decision.  
6 This Court has been clear, most recently in the  
7 Sanchez-Llamas decision, that it is a rule of  
8 supervisory power created by this Court.

9 JUSTICE GINSBURG: You are really asking the  
10 Court to overrule McNabb-Mallory, because you say  
11 Congress provided six hours, no McNabb-Mallory, but  
12 after six hours the test is voluntariness -- only  
13 voluntariness. So there's nothing left under the  
14 government's view of McNabb-Mallory.

15 MR. DREEBEN: That's correct, but the  
16 modification, Justice Ginsburg, is that I think Congress  
17 has displaced McNabb-Mallory. It obviously cannot  
18 overrule a decision of this Court, but it can prescribe  
19 a rule of law that takes precedence over a decision of  
20 this Court that rests on its supervisory power.

21 Petitioner does not contend that  
22 McNabb-Mallory was an interpretation of Rule 5 of the  
23 Federal Rules of Criminal Procedure, and I don't think  
24 that he could do that. This Court was explicit that the  
25 predecessor statute that existed before Rule 5 and

1 provided the prompt presentment requirement did not  
2 address the issue of remedy.

3 And it's notable I think that in the  
4 preliminary draft of the Rules of Criminal Procedure a  
5 rule of exclusion was explicitly provided. The rule  
6 would have said: "No statement made by a defendant in  
7 response to interrogation by an officer or agent of the  
8 government shall be admissible in evidence against him  
9 if the interrogation occurs while the defendant was held  
10 in custody in violation of this rule."

11 JUSTICE BREYER: What is the -- what if the  
12 other reasons apply? I take it the words  
13 "self-incriminating statement" in (e) means any adverse  
14 evidence?

15 MR. DREEBEN: I think that's right,  
16 Justice Breyer.

17 JUSTICE BREYER: Okay. Now, there are a lot  
18 of reasons we exclude evidence. You know, I mean -- it  
19 might, for example, might not in the circumstance be  
20 worth the confusion. It might not in the circumstance  
21 be worth the time. It might violate -- I don't know,  
22 there is like a whole -- there are many reasons.

23 So in your opinion, does section (a) mean to  
24 set aside all the reasons? In other words, if for some  
25 other reason this particular piece of self-incriminating

1 evidence, adverse evidence obtained after 30 hours,  
2 violated the admission, violated some totally different  
3 rule of evidence, as your opinion does (a) mean, judge,  
4 it doesn't matter if it's triple hearsay or it doesn't  
5 matter if it violates some authentication requirement,  
6 it doesn't matter if it violates, you know, it has to be  
7 relevant, pertinent, not a waste of time -- it doesn't  
8 matter; admit it?

9 MR. DREEBEN: No, Justice Breyer.

10 JUSTICE BREYER: No, of course it doesn't  
11 mean that.

12 MR. DREEBEN: If the --

13 JUSTICE BREYER: So if it doesn't mean that,  
14 then why does it mean that we should ignore this other  
15 rule of evidence contained in Rule 5 of the Federal  
16 Rules of Civil Procedure?

17 MR. DREEBEN: Well, that's precisely my  
18 point, Justice Breyer. The other rules that might  
19 permit exclusion of a voluntary confession in the Rules  
20 of Evidence are explicit, or they are there because the  
21 courts interpreted that rule to require it. That's not  
22 what happened in McNabb-Mallory, and I don't think  
23 that --

24 JUSTICE BREYER: Well, there are -- there  
25 are, in other words, as you have heard, a number of

1 things that can happen when you hold a person, let's say  
2 for 40 hours for 29. I mean, one thing that happens is  
3 he doesn't learn how he gets out on bail. Another thing  
4 he happens, he doesn't learn exactly what the charge is  
5 against him. Another thing -- they are all listed in,  
6 in Rule 5.

7 And -- and when you have an exclusionary  
8 rule, you enforce not only what you are talking about,  
9 which I understand, which is the voluntariness part, but  
10 you also enforce all these other things that happen when  
11 you bring a person before a magistrate and don't keep  
12 him for 70 hours or something.

13 So why should we interpret (a) as setting  
14 those other things aside and requiring us to overturn  
15 McNabb and Mallory?

16 MR. DREEBEN: Well, McNabb and Mallory are  
17 not constitutional decisions of this Court.

18 JUSTICE BREYER: No, of course not.

19 MR. DREEBEN: They were attempts to  
20 effectuate a particular policy choice. That policy  
21 choice was one that Congress was free to revisit, and I  
22 submit it did revisit in two different provisions, one  
23 in 3501(a) and the other in Federal Rule of Evidence  
24 402.

25 JUSTICE BREYER: Did it say anything in the

1 legislative history, which interests me, that the  
2 purpose of (a) is to overturn Mallory and McNabb?

3 MR. DREEBEN: No, Justice Breyer, and I will  
4 concede to you the legislative history on the point that  
5 section (a) was considered to overrule Miranda and  
6 subsection (c) was addressed to McNabb-Mallory.

7 JUSTICE ALITO: Mr. Dreeben, Justice Breyer  
8 suggested that there are rules of evidence other than  
9 those based on the Constitution or McNabb-Mallory that  
10 might result in the exclusion of a confession. Maybe  
11 there are such rules, but I'm trying to think of them.  
12 I can't think of what they might be. Certainly it's not  
13 hearsay. Is it ever going to be ruled to be irrelevant?  
14 Is it common for a confession to be excluded under Rule  
15 403? Are there rules that would --

16 MR. DREEBEN: I think in theory Rule 403 is  
17 such a rule. Rule 16, which requires discovery  
18 obligations, contains its own authorization for an  
19 exclusionary rule. And my answer to Justice Breyer on  
20 those rules is that they are explicitly provided by  
21 Congress. The difference in a Rule 5 --

22 JUSTICE ALITO: Are you familiar with cases  
23 in which a defendant's confession has been excluded  
24 under -- under 403?

25 MR. DREEBEN: No, Justice Alito.

1 JUSTICE BREYER: I wasn't focusing on the  
2 word "confession." I was focusing on the words in (e),  
3 which were "any self-incriminating statement." And  
4 that's why I asked you if you interpreted that to  
5 include anything that the individual said after, say,  
6 29 hours that might turn out to be adverse to that  
7 defendant's interests. And your answer to that was yes.

8 MR. DREEBEN: Yes.

9 JUSTICE BREYER: And I think you are right.  
10 I think we agree on that.

11 So, if the defendant said, if you look under  
12 the rock you will find the writing such-and-such, it  
13 might not be authenticated for that particular writing.  
14 There are many reasons. It might be triple hearsay,  
15 what he says. I mean, you know, there are a variety of  
16 things, aren't there? Maybe I am wrong.

17 MR. DREEBEN: I think the general principle  
18 is what the Court ought to be focused on here. And the  
19 general principle is, yes, if there is some specific  
20 provision that should be together with subsection (a) --

21 JUSTICE BREYER: The reason I brought that  
22 up is not to be technical. The reason I brought it up  
23 is to point out that there are many, many words that a  
24 person could utter in confinement under 30 hours, which  
25 in a variety of ways could stab him in the back without

1 it having anything to do with Miranda, without it having  
2 anything to do with coerced confession.

3 And similarly, there are many reasons for  
4 bringing him forward that have nothing to do with  
5 either. And therefore, I wonder if all those reasons  
6 could support retaining McNabb-Mallory, a matter about  
7 which Congress said nothing.

8 MR. DREEBEN: I think it would be quite  
9 extraordinary for the Court to decide to revive its  
10 supervisory power decisions in McNabb and Mallory. They  
11 clearly were aimed at the problem of incommunicado  
12 detention with a suspect who did not know his Miranda  
13 rights.

14 JUSTICE SCALIA: Mr. Dreeben, I tend to  
15 think that what we should be focusing on is the language  
16 of 3501. Can I bring you back to that? What I do not  
17 understand about your argument is the following: The  
18 six -- the six-hour safe harbor applies only when the  
19 confession is made voluntarily, right?

20 I would think that the proviso likewise  
21 assumes voluntariness. That is, the time limitation  
22 contained in this subsection, it's a time limitation  
23 applicable to voluntary confessions. And it says that  
24 time limitation shall not apply in any case in which the  
25 delay in bringing the person is beyond six hours is



1 found by the trial judge to be reasonable.

2 I think you have already voluntariness  
3 assumed in the proviso, but you want us to go back and  
4 re -- reconsider voluntariness under (a). I just don't  
5 think that's -- that's a fair way to read it.

6 MR. DREEBEN: I think the statute, as we  
7 read it, contains some overlap in voluntariness  
8 requirement, and we interpret the voluntariness  
9 reference in subsection (c) to really mean otherwise  
10 voluntary; in other words, not to be deemed involuntary  
11 solely on the basis of delay, but otherwise voluntary.

12 And in that sense section 3501(c) does  
13 contain --

14 JUSTICE SCALIA: Well, I am reading it that  
15 way, too. Otherwise voluntary is in the safe harbor.

16 MR. DREEBEN: Right.

17 JUSTICE SCALIA: Then when you have a  
18 proviso, which refers to the time limitation contained  
19 in this subsection, it's a time limitation upon  
20 voluntary confessions.

21 MR. DREEBEN: It's a -- it's a limitation on  
22 the time during which a judge may not rely on delay  
23 alone to find a confession inadmissible. That's all  
24 subsection (c) does. It says, judge, you may not find  
25 the confession to be inadmissible solely because of

1 delay if it's within six hours plus reasonable  
2 transportation delays.

3 And our interpretation of that language is  
4 that the inadmissibility as you mentioned,  
5 Justice Scalia, refers back to subsection (a), which  
6 speaks about confessions that are admissible if they are  
7 voluntarily given.

8 JUSTICE SOUTER: Then why didn't the statute  
9 say, instead of saying inadmissible, shall not be found  
10 involuntary solely by reasons of delay. Because it  
11 seems to me that your argument twain the two.

12 MR. DREEBEN: It is, and I think the reason  
13 that it was written that way, Justice Souter, is it was  
14 a direct attempt to make clear that McNabb-Mallory shall  
15 not operate in the six-hour period after arrests and  
16 before presentment.

17 It was an attempt to displace McNabb-Mallory  
18 explicitly. Originally it was to displace it  
19 altogether. As it ended up being written, it displaced  
20 it for six hours. And our submission is that you read  
21 the rest of the statute to determine what happens to  
22 confessions that are taken outside of six hours. And I  
23 would recognize that this makes subsection (c) in  
24 certain respects unnecessary to achieve the result that  
25 voluntariness controls.

1           But the most that Petitioner argues and he  
2   made it very clear today, the most that he argues is  
3   that section 3501(c) leaves McNabb-Mallory to live  
4   another day for confessions outside of six hours. And  
5   if that is true, then the government's position is that  
6   Congress, in 1975 in Rule 402 of the Federal Rules of  
7   Evidence provided the bases on which relevant evidence  
8   can be excluded. And it listed four sources and they  
9   are the Constitution, an act of Congress, a rule of  
10   evidence, or -- and this is the relevant one -- other  
11   rules prescribed by the Supreme Court pursuant to  
12   statutory authority.

13           And what Congress meant by that were rules  
14   that this Court promulgates pursuant to Rules Enabling  
15   Act authority. It did not --

16           JUSTICE GINSBURG: That's Rule 5.

17           MR. DREEBEN: No. Rule 5 it certainly  
18   prescribed pursuant to Rules Enabling Act authority,  
19   although it was originally enacted by Congress. But  
20   Rule 5 contains no exclusionary rule.

21           JUSTICE GINSBURG: And as you have said  
22   without the exclusionary rule, Rule 5(a) has no teeth at  
23   all. And I agree with that. It says -- it's a straight  
24   out command, no unnecessary delay. And isn't the reason  
25   for 5(a) exactly what happened here? This was a case

1 where the police officers were trying to admit that the  
2 sole reason that they didn't bring Corley before a  
3 magistrate properly was to extract a confession.

4 MR. DREEBEN: Justice Ginsburg --

5 JUSTICE GINSBURG: That's exactly what  
6 McNabb-Mallory was trying to --

7 MR. DREEBEN: There is a crucial difference  
8 between this Court deciding that there is a command in  
9 the Rules of Criminal Procedure and we as a court are  
10 going to back it up by an enforcement mechanism, which  
11 is the supervisory power route, and Congress saying what  
12 we intend is that a violation of this rule produced  
13 inadmissibility of a confession. Congress has never  
14 said the latter. This Court, in promulgating rules of  
15 evidence, have never said the latter.

16 And what that leaves the Court with is the  
17 option of persisting in McNabb-Mallory as a supervisory  
18 powers decision or following the text of Rule 402 of the  
19 Federal Rules of Evidence, which says that there isn't  
20 any authority to say that relevant evidence is out of  
21 the case simply because of the Court's views on  
22 supervisory powers --

23 JUSTICE STEVENS: Mr. Dreeben, do you think  
24 the Rule 402 argument is strong enough to prevail even  
25 section -- the statute that has never been enacted?

1 MR. DREEBEN: Yes, I do, Justice Stevens.

2 JUSTICE STEVENS: The statute was really  
3 unnecessary to overrule McNabb-Mallory, in your view?

4 MR. DREEBEN: Well, Congress focused on the  
5 problem of confessions in section 3501 and it dealt with  
6 McNabb-Mallory in section 3501(c). We submit that the  
7 text of the statute provides an answer to McNabb-Mallory  
8 in section 3501(a).

9 JUSTICE STEVENS: But it is superfluous and  
10 unnecessary answer if your interpretation of the rules  
11 is correct?

12 MR. DREEBEN: It came many years before,  
13 Justice Stevens. In 1968 when Congress reacted to this  
14 Court's Miranda decision and to McNabb-Mallory, it  
15 passed section 3501. Rule 402 is a very general rule  
16 that says the policy of the federal courts is that we  
17 are not going to have evidence rules made any more by  
18 case-by-case decision by the Supreme Court. We are  
19 going to have them promulgated in a code of Federal  
20 rules, and if the Court wants to change them, it can do  
21 that through the revisory committee process, and it  
22 would be open to Congress at any point, which has  
23 superior ability to gather facts and to survey the  
24 impact of whether there is a pattern of violations of  
25 rule 5 that warrants the very strong --

1 JUSTICE STEVENS: We could never acknowledge  
2 or recognize a new privilege, then, for example --

3 MR. DREEBEN: No.

4 JUSTICE STEVENS: -- psychiatrists or  
5 something like that?

6 MR. DREEBEN: No, I think the Court did that  
7 and quite properly did it, Justice Stevens, because rule  
8 502 of the Federal Rules of Evidence -- 501 or 502 says  
9 that principles of privilege shall be developed in light  
10 of reason and experience, and so it was a specific grant  
11 to this Court of the authority to do that.

12 But beyond that Congress did not intend that  
13 the Court use supervisory powers to exclude relevant  
14 evidence. There is a rulemaking process; if the bench  
15 and bar want to get together and conclude as they did  
16 not conclude in 1943 -- this is the point I was trying  
17 to make to Justice Breyer -- in 1943 after this Court's  
18 decision in McNabb, there was explicit consideration of  
19 an exclusionary rule provision in rule 5; it engendered  
20 enormous controversy; it was rejected; it was taken out  
21 of the rule and it was never promulgated.

22 So McNabb-Mallory exists not by virtue of  
23 the rulemaking process but by virtue of a supervisory  
24 decision of this Court more than half a century ago in  
25 an entirely different legal climate, in a climate where

1 the costs of excluding a reliable, probative confession  
2 were not balanced against the benefits, if any, to be  
3 achieved by enforcing of a prompt present requirement  
4 through exclusion.

5               Since that time this Court's Miranda  
6 jurisprudence has made it far more inappropriate for the  
7 Court to conclude that the enforcement of a rule-based  
8 mechanism which serves as a prophylactic to protect  
9 voluntariness should now result in exclusion of a  
10 confession when rule 501 says voluntary confessions come  
11 in and section -- and rule 402 says that relevant  
12 evidence comes in unless excluded by four sources --  
13 not-

14               JUSTICE GINSBURG: Is there any indication  
15 of the rules advisory committee, any of their notes,  
16 that 402 was meant to overturn McNabb-Mallory?

17               MR. DREEBEN: No, I -- Justice Ginsburg, the  
18 rules advisory committee notes I think reflect an  
19 expectation that McNabb-Mallory was the law. Our  
20 submission is that the text of 402 is simply  
21 inconsistent with that, because it is quite explicit in  
22 limiting the sources of rules that can bar the admission  
23 of admissible evidence; and the phrase that is in 402,  
24 which is on page 29 of our brief, is "rules prescribed  
25 by the Supreme Court pursuant to statutory authority."

1           Now the advisory committee drafters may have  
2    thought that that subsumed rule 5, but I think that is a  
3    legal question for this Court, and the correct answer to  
4    that is McNabb-Mallory is a rule of supervisory power,  
5    not a rule promulgated by this Court.

6           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
7    Dreeben.

8           MR. DREEBEN: Thank you.

9           CHIEF JUSTICE ROBERTS: Mr. McColgin, you  
10   have four minutes.

11           REBUTTAL ARGUMENT OF DAVID L. MCCOLGIN

12           ON BEHALF OF THE PETITIONER

13           MR. MCCOLGIN: Thank you, Your Honor.

14           Rule 402 as it was enacted clearly was not  
15   intended to overturn existing rules of inadmissibility  
16   such as McNabb-Mallory. We know that because the  
17   advisory committee notes specifically identify it as a  
18   rule of inadmissibility that would survive after rule  
19   402. It was --

20           CHIEF JUSTICE ROBERTS: Well, it may not  
21   have been intended to do that but doesn't its language  
22   on its face cover that?

23           MR. MCCOLGIN: Not at all, because it was  
24   statutorily based and it was viewed as being statutorily  
25   based, because it was it was based on the existing



1 statutes at the time of McNabb which were seen as  
2 precluding presentment delay. And then after the  
3 enactment of -- of rule 5, it was seen as based on that  
4 as well.

5 After -- in 1968 Mallory was also seen as  
6 being incorporated into 3501(c) which is clear from the  
7 citation in the advisory note to both Mallory and  
8 3501(c). So it was viewed when it was enacted as  
9 leaving in place McNabb-Mallory, because McNabb-Mallory  
10 was viewed as being pursuant to statutory authority --  
11 pursuant to statutory authority because it was enforcing  
12 statutory rights.

13 So rule 402 clearly does not in any way  
14 overturn McNabb-Mallory.

15 I would like to address very quickly the  
16 Miranda issue and note that you know, certainly,  
17 although Miranda came into effect after McNabb-Mallory,  
18 Miranda itself in rule 32 notes that the existence of  
19 the Miranda warnings should not be seen as a basis for  
20 disregarding the rights under McNabb and Mallory and the  
21 importance of that exclusionary rule. So Miranda itself  
22 recognized that it was still important to have a  
23 protection against presentment delay, and I think the  
24 facts of this case illustrate that very well.

25 We have in this case a flagrant and

1 deliberate violation of the right of prompt presentment,  
2 where the agents admitted freely that they delayed the  
3 presentment in order to obtain the confession. If --  
4 again, if the Third Circuit were to be affirmed in this  
5 case, it would be telling law enforcement around the  
6 country that that sort of flagrant conduct is  
7 permissible.

8 CHIEF JUSTICE ROBERTS: Well, but that --  
9 that sort of flagrant conduct would not be an issue if  
10 it had been done within six hours, right? Assuming it  
11 was a voluntary confession?

12 MR. MCCOLGIN: That's correct.

13 CHIEF JUSTICE ROBERTS: The purpose of the  
14 law enforcement officers, if it's voluntary, is  
15 irrelevant under six hours.

16 MR. MCCOLGIN: As long as it is under six  
17 hours, that's correct, there is no problem; and that's  
18 because within six hours there is no delay. Congress  
19 has determined that anything less than six hours is not  
20 within --

21 CHIEF JUSTICE ROBERTS: Well, doesn't it  
22 seem odd that the focus on flagrant conduct at 6:01 as  
23 being as important as you are emphasizing, but not --  
24 but totally irrelevant at 5:59?

25 MR. MCCOLGIN: There has to be line-drawing

1 in this sort of case, so when you get close to the line,  
2 you may have results that are dramatically different.  
3 In this case we are far outside the line. The second  
4 confession was 26 and a half hours after the arrest; and  
5 as I have noted and as this Court has noted, it was a  
6 deliberate delay for the purpose of obtaining the  
7 confessions.

8 Where we have such purposeful delay,  
9 Congress left McNabb-Mallory in place to address  
10 precisely such flagrant conduct.

11 JUSTICE ALITO: Can you waive the right, the  
12 5(a) right?

13 MR. MCCOLGIN: Yes, Your Honor, as long as  
14 it is waived within the six-hour time period, and as  
15 long as it is an expressed waiver of a right to prompt  
16 presentment, it can be waived. In this case, of course,  
17 there was no waiver; there wasn't even a Miranda waiver  
18 until well -- well after the six hours.

19 If there is no further questions, thank you,  
20 Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22 The case is submitted.

23 (Whereupon, at 11:14 a.m., the case in the  
24 above-entitled matter was submitted.)

25

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