IN THE SUPREME COURT OF THE UNITED STATES

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JOHNNIE CORLEY, :

Petitioner :

v. : No. 07-10441

UNITED STATES. :

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Washington, D.C.

Wednesday, January 21, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:14 a.m.

APPEARANCES:

DAVID L. McCOLGIN, ESQ., Assistant Federal Defender, Philadelphia, PA.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:14 a.m.)

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

Mr. McColgin.

ORAL ARGUMENT OF DAVID L. McCOLGIN

ON BEHALF OF THE PETITIONER

MR. McCOLGIN: Thank you, Mr. Chief Justice, and may it please the Court:

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

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

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

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

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

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

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

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but for several prudential reasons this Court should not, overturn McNabb and Mallory and should not find them to be no longer valid considerations.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

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

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

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

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

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

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

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

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

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

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

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

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

Court to reexamine the supervisory rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The government --

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

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

harbor.

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

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

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

MR. McCOLGIN: So the two terms --

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

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

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

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

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

JUSTICE SCALIA: Right.

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

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

MR. McCOLGIN: But that --

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

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

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

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

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

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

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

MR. McCOLGIN: Yes, it protects --

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

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

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

MR. McCOLGIN: It's protecting --

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

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

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

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

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

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

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

JUSTICE GINSBURG: Do you need fundamental

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

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

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

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

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

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

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

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

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

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

MR. McCOLGIN: Yes, Your Honor.

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

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

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

MR. McCOLGIN: The purpose of the right of prompt presentment is several-fold.

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

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

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

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

MR. McCOLGIN: We have to remember, Your Honor --

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

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

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

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

JUSTICE SCALIA: Right.

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

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

MR. McCOLGIN: Not at all, Your Honor,

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

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

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

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

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

JUSTICE SOUTER: I see.

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

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

of that time period, is there?

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. McCOLGIN: No further questions? Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DREEBEN: Well, certainly, Justice --

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

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

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

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

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

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

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

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

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

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

MR. DREEBEN: That's correct.

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

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

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

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

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

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

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

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

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

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

McNabb-Mallory after the six hours?

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

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

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

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

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

(Laughter)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DREEBEN: No, Justice Breyer.

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

MR. DREEBEN: If the --

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

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

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

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

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

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

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

JUSTICE BREYER: No, of course not.

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

JUSTICE BREYER: Did it say anything in the

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

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

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

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

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

MR. DREEBEN: No, Justice Alito.

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

MR. DREEBEN: Yes.

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

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

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

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

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

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

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

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

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

found by the trial judge to be reasonable.

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

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

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

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

MR. DREEBEN: Right.

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: That's Rule 5.

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

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

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

MR. DREEBEN: Justice Ginsburg --

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

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

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

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

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

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

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

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

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

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

MR. DREEBEN: No.

JUSTICE STEVENS: -- psychiatrists or something like that?

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dreeben.

MR. DREEBEN: Thank you.

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

REBUTTAL ARGUMENT OF DAVID L. McCOLGIN

ON BEHALF OF THE PETITIONER

MR. McCOLGIN: Thank you, Your Honor.

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

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

MR. McCOLGIN: Not at all, because it was statutorily based and it was viewed as being statutorily based, because it was it was based on the existing

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

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

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

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

We have in this case a flagrant and

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

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

MR. McCOLGIN: That's correct.

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

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

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

MR. McCOLGIN: There has to be line-drawing

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

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

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

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

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

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

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