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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 the Respondent.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We'll 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. It's 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 6-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

1 Court's convenience, on page 7 of the yellow brief, the  
2 operative language of the -- of the text of the statute is  
3 set out.

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

7 MR. MCCOLGIN: That's correct, Your Honor.

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

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 First of all -- or no longer valid  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

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

20 Second of all, the parties haven't briefed that  
21 issue. It's been briefed instead as a statutory  
22 interpretation issue.

23 Thirdly, Congress through 3501(c) structured  
24 the statute on the existing precedent of McNabb and  
25 Mallory, and at this point, for the Court to pull McNabb

1 and Mallory out from underneath that structure, it would  
2 cause that structure to basically collapse. It depends.  
3 The 6-hour time limitation depends on the existence of  
4 McNabb-Mallory outside that 6-hour time period.

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

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

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

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

25 MR. McCOLGIN: Your Honor, it does the latter.

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

9 JUSTICE KENNEDY: Well, it would be consistent  
10 with the second purpose that you gave to say that there's a  
11 6-hour safe harbor or whatever term you want to call it,  
12 and beyond 6 hours, the Court is free to reexamine its  
13 supervisory rule in light of what Congress has provided in  
14 (a) and (b) of the statute.

15 MR. McCOLGIN: Well, but again, the language of  
16 the statute is "time limitation." That's strong language  
17 for Congress to use, and it indicates that Congress  
18 intended to limit the taking of confessions to those first  
19 6 hours. There is no limitation without McNabb-Mallory in  
20 effect.

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

25 MR. McCOLGIN: I'm not actually saying that

1 Congress has taken away the authority of the Court. I'm  
2 saying as a prudential matter, since Congress can address  
3 this on its own and since it structured the statute on the  
4 foundation of McNabb-Mallory, it would be best for this  
5 Court to leave up to Congress that policy choice.

6 Congress chose in 1968 to leave the McNabb-  
7 Mallory protection against presentment delay in place after  
8 6 hours. It was a compromise, and it was an appropriate  
9 compromise, because what it did was it cut out the first 6  
10 hours during which there had been the most problems with  
11 the application of McNabb-Mallory. The 6-hour time  
12 limitation effectively lowers the social costs of this --  
13 of this rule of inadmissibility while maintaining the  
14 deterrent effect of McNabb-Mallory outside the 6 hours.

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

17 MR. McCOLGIN: Yes, Your Honor. On page 7,  
18 I've set out the operative language of the statute. And  
19 what the statute actually provides is that a confession  
20 shall not be inadmissible solely because of delay if such  
21 confession is found by the trial judge to have been made  
22 voluntarily and made within 6 hours of arrest.

23 Now, the phrase "inadmissible solely because of  
24 delay" is clearly a reference to the McNabb-Mallory rule  
25 because that's exactly what McNabb-Mallory does. It

1 renders the confession inadmissible solely because of delay  
2 if the delay in presentment was unreasonable.

3 So what the statute is providing on its face is  
4 that a confession shall not be subject to the McNabb-  
5 Mallory rule if it's voluntarily given and made within 6  
6 hours. The 6-hour provision means that McNabb-Mallory is,  
7 in effect, outside of the 6 hours.

8 CHIEF JUSTICE ROBERTS: Or it may just mean  
9 that the confessions beyond 6 hours may be excluded solely  
10 because of delay. In other words, if a judge says, look, I  
11 don't want to hear about all this other stuff, it's just  
12 too long, he can -- he can't do that beyond the 6 hours,  
13 but he can within the 6 hours.

14 MR. MCCOLGIN: Within the 6 hours, he cannot  
15 exclude solely because of delay, even a voluntary  
16 statement. That is the McNabb-Mallory principle,  
17 inadmissible solely because of delay. So what it's saying  
18 is that McNabb-Mallory does not apply within the 6 hours.

19 Now, the government's interpretation is that  
20 this is simply a voluntariness safe harbor, and what they  
21 do is they read the word "inadmissible" as being synonymous  
22 with the word "involuntary." But the text of the statute  
23 shows that those two terms are not synonymous, because the  
24 text of the statute says that in order for a confession to  
25 be admissible it must be voluntary and made within 6 hours.

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

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

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

22 MR. McCOLGIN: No. It simply establishes a --  
23 an exception in the area of delay. And this is the way  
24 statutes work. When there is a conflict between a general  
25 provision and a specific one, the specific must control

1 over the general. If it worked the other way around, it  
2 would render the specific superfluous. So this has  
3 happened in -- in statutes in numerous cases. In 1983  
4 versus 2254, it was held that 2254 as a specific provision  
5 controls over 1983. So this is a -- an accepted principle  
6 of statutory interpretation.

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

13 MR. MCCOLGIN: With respect, no, Your Honor.  
14 We're not making the negative inference argument that the  
15 government suggests we're making in the first part of their  
16 brief. Instead, we're making the argument that subsection  
17 (c) was constructed on the existing precedent of McNabb and  
18 Mallory, which already established a rule of  
19 inadmissibility. Subsection (c) then just carves out the  
20 first 6 hours from that. So it's not creating a rule of  
21 inadmissibility by negative influence -- inference.  
22 Rather, it's just recognizing that a rule of  
23 inadmissibility already exists in the -- in the case law,  
24 and the purpose of this statute was to simply carve out  
25 from the first 6 hours the McNabb-Mallory rule.

1           The government --

2           JUSTICE SCALIA:  Why -- why can't you argue  
3 that what happens when you're not within the safe harbor is  
4 simply that the time period cannot alone govern?  All  
5 right?  But it can still be part of the list of things that  
6 can be taken into account in determining voluntariness  
7 under (b).  Why doesn't that reconcile the two provisions?

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

18           JUSTICE SCALIA:  But -- but "admissibility" is  
19 defined in 3501 itself:  (a) says that it shall -- shall be  
20 admissible in evidence if it's voluntarily given; and (b)  
21 says what factors will be taken into account in determining  
22 whether it's voluntarily given.

23           MR. McCOLGIN:  Yes, Your Honor.  And (c) makes  
24 clear that, at least for purposes of subsection (c),  
25 voluntariness is not enough for admissibility, because it

1 says on its face that in order --

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

4 MR. McCOLGIN: So the two terms --

5 JUSTICE SCALIA: And so if you're outside of  
6 that safe harbor, you cannot rely upon the time alone. But  
7 why can't you rely on the time plus the other factors?

8 MR. McCOLGIN: Your Honor, because the effect  
9 is, again, to allow for a confession to be inadmissible  
10 solely based on delay if it's outside of the 6 hours.

11 JUSTICE SCALIA: No, no. It's not being  
12 admissible solely on the basis of -- I'm sorry. Delay is  
13 not the only factor being -- being considered in the -- in  
14 making the inadmissibility call. Delay is one of the  
15 things; whereas, within the safe harbor, delay can't be  
16 taken into account at all.

17 MR. McCOLGIN: Well, what the -- what the  
18 Congress said was that delay alone cannot be a basis for  
19 inadmissibility within 6 hours.

20 JUSTICE SCALIA: Right.

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

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

1 admissible if it's voluntary --

2 MR. McCOLGIN: But that --

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

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

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

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

15 JUSTICE SCALIA: (a) says that if it's -- it's  
16 admissible if it's voluntary.

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

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

1 MR. McCOLGIN: Yes. It protects --

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

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

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

9 MR. McCOLGIN: It's protecting --

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

12 MR. McCOLGIN: It's protecting the right of  
13 prompt presentment. McNabb-Mallory was meant to prevent  
14 the exploitation of delay in presentment as a means of  
15 obtaining a confession.

16 JUSTICE KENNEDY: But why do we want to avoid  
17 delay in presentment? What reasons do we give -- and I  
18 assume they're reasons to contact family and so forth --  
19 other than voluntariness?

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

24 JUSTICE KENNEDY: What do those rights have to  
25 do with a confession that's conceded, for our analytic

1 purposes, to be voluntary?

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

11 JUSTICE GINSBURG: Do you need fundamental  
12 principles when you've got rule -- rule 5 of the Rules of  
13 Criminal Procedure? Don't they say that an arrestee shall  
14 be taken before a magistrate without unreasonable delay?

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

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

23 MR. McCOLGIN: Well, the purpose of McNabb-  
24 Mallory was actually to cut the line a bit short of having  
25 to actually make a voluntariness determination. It's a

1 recognition that even if the statement is voluntary, that  
2 still there are inherent coercive pressures that develop  
3 during a period of presentment -- of presentment delay, and  
4 that that period of time should be as short as possible so  
5 that that coercive nature, the coercive nature of the  
6 interrogation, doesn't cause the person to waive rights.

7 JUSTICE KENNEDY: So you say a confession can  
8 be coercive and still voluntary.

9 MR. McCOLGIN: It's -- yes, Your Honor. Not in  
10 the sense that it's a coerced confession. I'm not arguing  
11 that this was involuntary. Instead, I'm arguing that  
12 McNabb-Mallory intends to avoid the voluntariness  
13 requirement by establishing a prophylactic rule, so that a  
14 presentment needs to be made as soon as reasonably possible  
15 after the arrest so that that delay cannot be exploited as  
16 a means of obtaining a confession. It both protects the  
17 right to prompt presentment and it also --

18 JUSTICE STEVENS: May I ask you this? What  
19 other remedy, other than suppression of the confession made  
20 after the 6 hours, is there available to the defendants to  
21 enforce the interest in prompt presentment?

22 MR. McCOLGIN: There is no other remedy  
23 available. In fact, the message that an affirmance in this  
24 case would send to law enforcement is that delay for the  
25 purpose of interrogation is permissible and that the right

1 of prompt presentment is unenforceable. Without McNabb-  
2 Mallory, this becomes an empty right. There is no other  
3 remedy. And that's why, particularly where the delay is  
4 purposeful, as we have in this case --

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

8 MR. McCOLGIN: Yes, Your Honor.

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

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

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

25 MR. McCOLGIN: The purpose of the right of

1 prompt presentment is several-fold.

2           First of all, it's because there are inherent  
3 coercive characteristics that develop during a period of  
4 custody, and a person, once arrested, should be presented  
5 to a neutral magistrate so that a neutral magistrate can  
6 both assign counsel, give an opportunity for consultation  
7 with counsel, and can also inform the person of his rights,  
8 address bail, and issues such as that. So the right of  
9 prompt presentment is considered fundamental. It's  
10 considered a basic right, a basic statutory right, in our  
11 system.

12           JUSTICE SCALIA: Mr. McColgin, what do you do  
13 with the problem that the proviso only makes a delay longer  
14 than -- than 6 hours nondestructive of the admissibility of  
15 the confession if this -- the delay beyond 6 hours is found  
16 by the trial judge to be reasonable considering the means  
17 of transportation and the distance to be traveled to the  
18 nearest available magistrate judge or other officer?

19           I can think of a lot of reasons why you can't  
20 do it within 6 hours other than the means of transportation  
21 and the distance to be traveled.

22           MR. MCCOLGIN: We have to remember, Your Honor,  
23 that --

24           JUSTICE SCALIA: You see, if you take the  
25 government's position that it really doesn't matter, it

1 gets thrown back into (b), and you can take all those  
2 factors into account, and the ultimate question is whether  
3 the confession was reasonable.

4 But if you take your position, the defendant  
5 automatically walks, or at least his confession is  
6 automatically thrown out, and the only exception made is if  
7 the means of transportation and the distance to be traveled  
8 made -- made 6 hours impracticable.

9 MR. McCOLGIN: No, Your Honor, that's not our  
10 position. Our position is that the first question is, did  
11 the confession fall within that 6-hour time period?

12 JUSTICE SCALIA: Right.

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

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

3 MR. McCOLGIN: Not at all, Your Honor, because  
4 once we look at the structure of the statute, what it's  
5 doing is carving out the first 6 hours from McNabb-Mallory.  
6 So the determination of whether we're in that carve-out  
7 period is limited to transportation and distance, but once  
8 we're outside of it, we just apply McNabb-Mallory, and  
9 that's McNabb-Mallory as it's developed in the case law,  
10 which includes all of these other considerations.

11 JUSTICE SOUTER: But why was -- why was it  
12 appropriate to have a special rule for transportation? In  
13 other words, everything that's covered by the  
14 transportation proviso would, on your theory, have been  
15 subject to consideration under McNabb-Mallory anyway. So  
16 why didn't they simply have a 6-hour rule and leave any  
17 exceptions, transportation, unavailability of magistrate,  
18 medical emergency, whatever, to -- to the leeway that  
19 McNabb-Mallory allows?

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

1 distance.

2 JUSTICE SOUTER: So basically -- I don't mean  
3 this disparagingly. Basically the answer is politics.

4 MR. McCOLGIN: Correct, Your Honor.

5 JUSTICE SOUTER: Somebody from a State thought  
6 of it and nobody else said, well, gee, let's pile on some  
7 other express provisos. It's as simple as that in your  
8 view.

9 MR. McCOLGIN: Exactly, Your Honor. There's  
10 very little comment on it. It's added at the -- at the  
11 last minute. The Scott Amendment had just included the 6-  
12 hour provision, but then the proviso was added on the floor  
13 at the very last minute.

14 JUSTICE SOUTER: I see.

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

24 JUSTICE GINSBURG: There is one time limit that  
25 has been complied with -- that's the Fourth Amendment, how

1 long you can keep somebody seized without taking them  
2 before a magistrate. There's no violation of that time  
3 period, is there?

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

10 I would suggest that Congress struck an  
11 appropriate balance at that time, keeping McNabb-Mallory in  
12 place for the more extreme types of delay, but eliminating  
13 it from the shorter periods of delay. In doing so,  
14 Congress struck an appropriate balance, and I would suggest  
15 that this Court should respect the balance that Congress  
16 has struck.

17 Unless there's any further questions, I would  
18 ask the --

19 JUSTICE STEVENS: I just had -- had one  
20 question. Did you think the -- the D.C. Circuit -- the  
21 statute pertaining to the District of Columbia is relevant?

22 MR. McCOLGIN: As legislative history, yes,  
23 Your Honor, because the 3501(c) was modeled on the D.C.  
24 legislation, which established clearly a 3-hour time  
25 period. And the legislative history for that is very clear

1 that it intended to leave McNabb-Mallory in effect outside  
2 that time period.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. MCCOLGIN: No further questions? Thank  
5 you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE RESPONDENT

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

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

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

1 intended but of its own force as a way to backstop the rule  
2 5 requirement.

3 In the government's view, two acts that came  
4 subsequently to McNabb and Mallory, section 3501 and rule  
5 402 of the Federal Rules of --

6 JUSTICE STEVENS: May I just ask before you get  
7 to those, Mr. Dreeben? Other than the McNabb-Mallory rule,  
8 what was available as a sanction for violations of the rule  
9 of prompt presentment?

10 MR. DREEBEN: Justice Stevens, I'm not sure  
11 that there is any evidentiary sanction that could be  
12 imposed.

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

15 MR. DREEBEN: None has arisen in the case law  
16 that I could point Your Honor to. I think the primary  
17 safeguard of the enforcement of rule 5 is the obligation  
18 that's placed on the government and on government agents to  
19 comply with rules of criminal procedure that are valid.

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

25 MR. DREEBEN: No, I don't think that they are,

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

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

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

14 JUSTICE STEVENS: To the extent that -- I'm  
15 suggesting to the extent that that was a motivating factor  
16 in McNabb, it seems to me that it would be precisely the  
17 same motivating factor today.

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

20 JUSTICE STEVENS: Not the sole, but -- but to  
21 the extent it was a motivating factor, that seems -- it  
22 would have equal strength today as then.

23 MR. DREEBEN: No, I do not agree that it would  
24 have equal strength, Justice --

25 JUSTICE SCALIA: Mr. Dreeben, wouldn't --

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

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

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

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

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

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

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

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

8 JUSTICE GINSBURG: Rule 5 says without  
9 unnecessary delay. And here we have a case, if I remember  
10 the facts right, where the officer said, yes, the reason we  
11 didn't bring him before a magistrate sooner is we wanted to  
12 get a confession from him.

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

21 JUSTICE SCALIA: I -- I must be losing the  
22 thread of the argument. It seems to me that McNabb and  
23 Mallory only provide punishment for excessive delay where  
24 there has been a confession. Isn't that right?

25 MR. DREEBEN: That is correct.

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

10 MR. DREEBEN: It is certainly challengeable on  
11 voluntariness grounds.

12 Now, the Court's motive in --

13 JUSTICE STEVENS: It's still true they have  
14 everything to gain and nothing to lose by continuing to  
15 interrogate him.

16 MR. DREEBEN: Well, they do have something to  
17 lose --

18 JUSTICE STEVENS: If they -- if they don't get  
19 the confession within 6 hours, they haven't got it. So if  
20 they continue on, their only purpose is to try and get a  
21 voluntary confession.

22 MR. DREEBEN: Well, Justice Stevens, to the  
23 extent that it is correct that a waiver of Miranda rights  
24 waives the prompt-presentment right and prevents an  
25 objection based on whatever survives of McNabb-Mallory, the

1 officers are doing nothing wrong if they obtain a valid  
2 Miranda waiver. And this was just not a factor that the  
3 Court had on the horizon when it decided McNabb and  
4 Mallory.

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

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

18 Given what I think is the -- kind of the real-  
19 world effect of Miranda -- say the magic words, get the  
20 defendant to say, I'll talk, that's it -- doesn't it make  
21 sense to have a further safeguard in something like the  
22 6-hour rule understood as preserving McNabb-Mallory after  
23 the 6 hours?

24 MR. DREEBEN: Well, Justice Souter, I think  
25 that's purely a question of policy of whether there should

1 be such a strong exclusionary rule that mandates the  
2 barring from admission into evidence of a purely voluntary  
3 confession where there's no dispute about its voluntariness  
4 because the officers delayed beyond 6 hours.

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

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

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

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

21 (Laughter.)

22 MR. DREEBEN: Section 3501 on its face says  
23 nothing about excluding any evidence. What it says is that  
24 in section (a), voluntary confessions are admissible. In  
25 section (b), it says that in determining voluntariness, a

1 court will consider a variety of factors under the totality  
2 of the circumstances, including pre-arraignment delay.  
3 Then in subsection (c), it -- it attacks more directly the  
4 McNabb-Mallory rule. And as originally formulated it would  
5 have wiped out McNabb-Mallory altogether. There's no  
6 dispute about that. After the bill was introduced, there  
7 was a modification of it on the floor of the Senate in  
8 which a 6-hour limitation was put in.

9           Now, the effect of that 6 hours is to say that  
10 within 6 hours after the arrest, delay by itself can never  
11 be an exclusive grounds for suppression. It just can't.  
12 And to that extent, it overrules McNabb-Mallory, to the  
13 extent that McNabb-Mallory would have allowed less than 6  
14 hours of delay to serve as a basis for suppressing  
15 evidence. Outside of 6 hours, it does not say that  
16 evidence is suppressed. It simply leaves that  
17 determination to other sources of law.

18           In the government's view, the primary source of  
19 law that controls the answer to that question is subsection  
20 (a), which says that voluntary confessions are admissible,  
21 and I believe that, as Justice --

22           JUSTICE SOUTER: If that's the answer, why do  
23 we need (c)? I mean, why did Congress need (c) at all?

24           MR. DREEBEN: Congress never needed (c); (c) in  
25 the government's view was always superfluous, even at the

1 time when it directly said delays shall never be the ground  
2 for suppressing a confession. There was already a  
3 provision in (a) that said voluntary confessions are  
4 admissible, and it was well understood that McNabb-Mallory  
5 -- and this Court was very explicit on the point --  
6 excluded totally voluntary confessions.

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

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

15 MR. DREEBEN: That's the limitation on a -- the  
16 period during which a court cannot rely exclusively on  
17 delay within the meaning of the statute. It -- it carves  
18 out 6 hours from McNabb-Mallory plus reasonable  
19 transportation delays, and it leaves the 6-hour -- after  
20 the 6-hour period to other sources of law.

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

1 this Court --

2 JUSTICE GINSBURG: So you weren't really asking  
3 the Court to overrule McNabb-Mallory because you say  
4 Congress provided 6 hours, no McNabb-Mallory, but after 6  
5 hours the test is voluntariness -- only voluntariness. So  
6 there's nothing left under the government's view of McNabb-  
7 Mallory.

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

14 Petitioner does not contend that McNabb-Mallory  
15 was an interpretation of rule 5 of the Federal Rules of  
16 Criminal Procedure, and I don't think that he could do  
17 that. This Court was explicit that the predecessor  
18 statutes that existed before rule 5 and provided the  
19 prompt-presentment requirement did not address the issue of  
20 remedy.

21 And it's notable, I think, that in the  
22 preliminary draft of the Rules of Criminal Procedure, a  
23 rule of exclusion was explicitly provided. The rule would  
24 have said, no statement made by a defendant in response to  
25 interrogation by an officer or agent of the government

1 shall be admissible in evidence against him if the  
2 interrogation occurs while the defendant was held in  
3 custody in violation of this rule.

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

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

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

15 So in your opinion, does section (a) mean to  
16 set aside all the reasons? In other words, if for some  
17 other reason this particular piece of self-incriminating  
18 evidence, adverse evidence obtained after 30 hours,  
19 violated the admission, violated some totally different  
20 rule of evidence, is your opinion does (a) mean, judge, it  
21 doesn't matter if it's triple hearsay or it doesn't matter  
22 if it violates some authentication requirement, it doesn't  
23 matter if it violates -- you know, it has to be relevant,  
24 pertinent, not a waste of time. It doesn't matter; admit  
25 it.

1 MR. DREEBEN: No, Justice Breyer.

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

4 MR. DREEBEN: If there's --

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

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

15 JUSTICE BREYER: Well, there are -- there are,  
16 in other words, as you've heard, a number of things that  
17 can happen when you hold a person, let's say, for 40 hours  
18 or 29. I mean, one thing that happens is he doesn't learn  
19 how he gets out on bail. Another thing that happens is he  
20 doesn't learn exactly what the charge is against him.  
21 Another thing -- you know, they're all listed in -- in rule  
22 5.

23 And -- and when you have an exclusionary rule,  
24 you enforce not only what you're talking about, which I  
25 understand, which is the voluntariness part, but you also

1 enforce all these other things that happen when you bring a  
2 person before a magistrate and don't keep him for 70 hours  
3 or something.

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

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

9           JUSTICE BREYER: No, of course not.

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

15           JUSTICE BREYER: Does it say anything in the  
16 legislative history, which interests me, that the purpose  
17 of (a) is to overturn Mallory and McNabb? But --

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

22           JUSTICE ALITO: Mr. Dreeben, Justice Breyer  
23 suggested that there are rules of evidence other than those  
24 based on the Constitution or McNabb-Mallory that might  
25 result in the exclusion of a confession. Maybe there are

1 such rules, but I'm trying to think of them. I can't think  
2 of what they might be. Certainly it's not hearsay. It's  
3 -- is it ever going to be ruled to be irrelevant? Is it  
4 common for a confession to be excluded under rule 403? Are  
5 there rules that would --

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

12 JUSTICE ALITO: Have you -- are you familiar  
13 with cases in which a defendant's confession has been  
14 excluded under -- under 403?

15 MR. DREEBEN: No, Justice Alito.

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

23 MR. DREEBEN: Yes.

24 JUSTICE BREYER: And I think you're right. I  
25 think we agree on that.

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

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

12           JUSTICE BREYER: The reason I brought that up  
13 is not to be technical. The reason I brought it up is to  
14 point out that there are many, many words that a person  
15 could utter in confinement under 30 hours, which in a  
16 variety of ways could stab him in the back without it  
17 having anything to do with Miranda, without it having  
18 anything to do with coerced confessions.

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

24           MR. DREEBEN: I think it would be quite  
25 extraordinary for the Court to decide to revive its

1 supervisory powers decisions in McNabb and Mallory. They  
2 clearly were aimed at the problem of incommunicado  
3 detention with a suspect who did not know his rights.

4 JUSTICE SCALIA: Mr. Dreeben, I tend to think  
5 that what we should be focusing on is the language of -- of  
6 3501. Can I bring you back to that?

7 What I do not understand about your argument is  
8 the following: The 6 -- the 6-hour safe harbor applies  
9 only when the confession is made voluntarily. Right?

10 I would think that the proviso likewise assumes  
11 voluntariness. That is, the time limitation contained in  
12 this subsection -- it's a time limitation applicable to  
13 voluntary confessions. And it says that time limitation  
14 shall not apply in any case in which the delay in bringing  
15 the person is -- beyond 6 hours is found by the trial judge  
16 to be -- to be reasonable.

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

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

1 otherwise voluntary. And in that sense section 3501(c)  
2 does contain --

3 JUSTICE SCALIA: Well, I'm reading it that way,  
4 too. Otherwise voluntary is in the -- in the safe harbor.

5 MR. DREEBEN: Right.

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

10 MR. DREEBEN: It's a -- it's a limitation on  
11 the time during which a judge may not rely on delay alone  
12 to find a confession inadmissible. That's all subsection  
13 (c) does. It says, judge, you may not find a confession to  
14 be inadmissible solely because of delay if it's within 6  
15 hours, plus reasonable transportation delays.

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

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

25 MR. DREEBEN: It is, and I think the reason

1 that it was written that way, Justice Souter, is it was a  
2 direct attempt to make clear that McNabb-Mallory shall not  
3 operate in the 6-hour period after arrests and before  
4 presentment.

5           It was an attempt to displace McNabb-Mallory  
6 explicitly. Originally it was to displace it altogether.  
7 As it ended up being written, it displaced it for 6 hours.  
8 And our submission is that you read the rest of the statute  
9 to determine what happens to confessions that are taken  
10 outside of 6 hours. And I would recognize that this makes  
11 subsection (c) in certain respects unnecessary to achieve  
12 the result that voluntariness controls.

13           But the most that Petitioner argues -- and he  
14 made it very clear today. The most that he argues is that  
15 section 3501(c) leaves McNabb-Mallory to live another day  
16 for confessions outside of 6 hours. And if that is true,  
17 then the government's position is that Congress, in 1975 in  
18 rule 402 of the Federal Rules of Evidence, provided the  
19 bases on which relevant evidence can be excluded. And it  
20 listed four sources, and they are the Constitution, an act  
21 of Congress, a rule of evidence, or -- and this is the  
22 relevant one -- other rules prescribed by the Supreme Court  
23 pursuant to statutory authority. And what Congress meant  
24 by that were rules that this Court promulgates pursuant to  
25 Rules Enabling Act authority. It did not --

1 JUSTICE GINSBURG: That's -- that's rule 5.

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

6 JUSTICE GINSBURG: But you have said without  
7 the exclusionary rule, rule 5(a) has no teeth at all. And  
8 I agree with that. It says -- it's a straight-out command:  
9 no unnecessary delay. And isn't the reason for 5(a)  
10 exactly what happened here? This was a case where the --  
11 where the police officers were frank to admit that the sole  
12 reason that they didn't bring Corley before a magistrate  
13 promptly was to extract confessions.

14 MR. DREEBEN: Justice Ginsburg --

15 JUSTICE GINSBURG: Exactly what McNabb and  
16 Mallory were trying to get --

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

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

8           JUSTICE STEVENS: Mr. Dreeben, do you think the  
9 rule 402 argument is strong enough to prevail even if the  
10 section -- the statute had never been enacted?

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

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

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

19          JUSTICE STEVENS: But it was a superfluous and  
20 unnecessary answer if your interpretation of the rule is  
21 correct?

22          MR. DREEBEN: It came many years before,  
23 Justice Stevens. In 1968, when Congress reacted to this  
24 Court's Miranda decision and to McNabb-Mallory, it passed  
25 section 3501. Rule 402 is a very general rule that says

1 the policy of the Federal courts is that we're not going to  
2 have evidence rules made any more by a case-by-case decision  
3 by the Supreme Court. We're going to have them promulgated  
4 in a -- in a code, a set of rules, and if -- and the Court  
5 wants to change them, it can do that through the revisory  
6 committee process. And it would be open to Congress at any  
7 point, which has superior ability to gather facts and to  
8 survey the impact of whether there is a pattern of  
9 violations of rule 5 that warrants the very strong --

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

12 MR. DREEBEN: No.

13 JUSTICE STEVENS: -- from psychiatrists or  
14 something like that.

15 MR. DREEBEN: No, I -- I think that the Court  
16 did that and quite properly did it, Justice Stevens, because  
17 rule 502 of the Federal Rules of Evidence -- it's 501 or  
18 502 -- says that principles of privilege shall be developed  
19 in light of reason and experience, and so it was a specific  
20 grant to this Court of the authority to do that.

21 But beyond that, Congress did not intend that  
22 the Court use supervisory powers to exclude relevant  
23 evidence. There's a rulemaking process. If the bench and  
24 the bar want to get together and conclude as they did not  
25 conclude in 1943 -- this is a point I was trying to make to

1 Justice Breyer. In 1943, after this Court's decision in  
2 McNabb, there was explicit consideration of an exclusionary  
3 rule provision in rule 5. It engendered enormous  
4 controversy. It was rejected. It was taken out of the  
5 rule, and it was never promulgated.

6 So McNabb-Mallory exists not by virtue of the  
7 rulemaking process but by virtue of a supervisory decision  
8 of this Court more than half a century ago in an entirely  
9 different legal climate, in a climate where the costs of  
10 excluding a reliable, probative confession were not  
11 balanced against the benefits, if any, to be achieved by  
12 enforcing of the prompt-present requirement through  
13 exclusion.

14 Since that time, this Court's Miranda  
15 jurisprudence has made it far more inappropriate for the  
16 Court to conclude that the enforcement of a rule-based  
17 mechanism which serves as a prophylaxis to protect  
18 voluntariness should now result in the exclusion of a  
19 confession when section 3501 says voluntary confessions  
20 come in and section -- and rule 402 says that relevant  
21 evidence comes in unless excluded by four sources --

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

25 MR. DREEBEN: No. I -- Justice Ginsburg, the

1 rules advisory committee notes, I think, reflect an  
2 expectation that McNabb-Mallory was the law. Our  
3 submission is that the text of 402 is simply inconsistent  
4 with that, because it's quite explicit in limiting the  
5 sources of rules that can bar the admission of relevant  
6 evidence. And the phrase that's -- that's in rule 402,  
7 which is on page 29 of our brief, is "rules prescribed by  
8 the Supreme Court pursuant to statutory authority."

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

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Dreeben.

15 MR. DREEBEN: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. McColgin, you have  
17 4 minutes.

18 REBUTTAL ARGUMENT OF DAVID L. MCCOLGIN

19 ON BEHALF OF THE PETITIONER

20 MR. MCCOLGIN: Thank you, Your Honor.

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

1 was --

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

5 MR. McCOLGIN: Not at all, because it was  
6 statutorily based and it was viewed as being statutorily  
7 based because it was it was based on the existing statutes  
8 at the time of McNabb which were seen as precluding  
9 presentment delay. And then after the enactment of -- of  
10 rule 5(a), it was seen as based on that as well.

11 After -- in 1968, Mallory was also seen as  
12 being incorporated into 3501(c), which is clear from the  
13 citation in the advisory note to both Mallory and 3501(c).  
14 So it was viewed, when it was enacted, as leaving in place  
15 McNabb-Mallory, because McNabb-Mallory was viewed as being  
16 pursuant to statutory authority -- pursuant to statutory  
17 authority because it was enforcing statutory rights. So  
18 rule 402 clearly does not in any way overturn McNabb-  
19 Mallory.

20 I'd like to address very quickly the Miranda  
21 issue and note that, you know, certainly, although Miranda  
22 came into effect after McNabb-Mallory, Miranda itself in  
23 rule 32 notes that the existence of the Miranda warnings  
24 should not be seen as a basis for disregarding the rights  
25 under McNabb and Mallory and the importance of that

1 exclusionary rule. So Miranda itself recognized that it  
2 was still important to have a protection against  
3 presentment delay.

4           And I think the facts of this case illustrate  
5 that very well. We have in this case a flagrant and  
6 deliberate violation of the right of prompt presentment,  
7 where the agents admitted freely that they delayed the  
8 presentment in order to obtain the confessions. If --  
9 again, if the Third Circuit were to be affirmed in this  
10 case, it would be telling law enforcement around the  
11 country that that sort of flagrant conduct is permissible.

12           CHIEF JUSTICE ROBERTS: Well, but that -- that  
13 sort of flagrant conduct would not be an issue if this had  
14 been done within 6 hours, right, assuming that it was a  
15 voluntary confession?

16           MR. McCOLGIN: That's correct.

17           CHIEF JUSTICE ROBERTS: The purpose of the law  
18 enforcement officers, if it's voluntary, is irrelevant  
19 under 6 hours.

20           MR. McCOLGIN: As long as it is under 6 hours,  
21 that's correct. There's no problem, and that's because if  
22 it's within 6 hours, there's no delay. The Congress has  
23 determined that anything less than 6 hours is not within --

24           CHIEF JUSTICE ROBERTS: Well, doesn't it seem  
25 odd to focus on flagrant conduct at 6:01 as being as

1 important as you're emphasizing, but not -- but totally  
2 irrelevant at 5:59?

3 MR. McCOLGIN: There has to be line-drawing in  
4 this sort of case. So when you get close to the line, you  
5 may have results that are dramatically different. In this  
6 case, we're far outside the line. The second confession  
7 was 26 and a half hours after the arrest. And as I have  
8 noted and as -- as this Court has noted, it was a  
9 deliberate delay for the purpose of obtaining the  
10 confessions. Where we have such purposeful delay, Congress  
11 left McNabb-Mallory in place to address precisely such  
12 flagrant conduct.

13 JUSTICE ALITO: Can a defendant waive the  
14 right, the 5(a) right?

15 MR. McCOLGIN: Yes, Your Honor, as long as it  
16 is waived within the 6-hour time period, and as long as  
17 it's an express waiver of the right to a prompt  
18 presentment, it can be waived. In this case, of course,  
19 there was no waiver. There wasn't even a Miranda waiver  
20 until well -- well after the 6 hours.

21 If there's no further questions, thank you,  
22 Your Honor.

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

25 (Whereupon, at 11:14 a.m., the case in the

1 above-entitled matter was submitted.)

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