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felonies and misdemeanors as a criterion in determining the officer's right to use force in making an arrest. A more realistic approach would restrict the use of deadly force to crimes which are of a violent nature.[24] Thus, an officer should be permitted to use his gun if necessary to arrest a murderer, an armed robber, or the perpretrator of any other such violent crime, but deadly force should be forbidden in the arrest of an embezzler, an ordinary thief, or any other person who has committed a non-dangerous type of felony or misdemeanor. The statute should enumerate the type of violent crime which the legislature would consider dangerous enough to warrant the use of deadly force if necessary to bring the criminal to justice. The statute should be broad enough to cover situations where the criminal is resisting arrest, or where he is fleeing from the officer's custody either before or after arrest.

In situations where the officer suspects that a person has committed a violent crime the nature of which the legislature has decided would make him a particularly dangerous enemy to society he should be permitted to use deadly force in an effort to make the arrest if he has met certain requirements. These should be strict enough to prevent the promiscuous use of deadly force by the officer in such a way as to harm innocent persons, yet at the same time be broad enough to permit the officer to cope with the motorized criminal suspect. A suggested list of such requirements might include: *first,* knowledge on the part of the arresting officer that a certain violent crime has been committed or attempted; *second,* that he have an adequate description of the criminal; *third,* that the person suspected fit such description; *fourth,* that every effort be made to communicate to the suspect the fact that he is being sought by an officer of the law; *fifth,* that deadly force be used only when other means fail.

While the enactment of a statute containing the provisions suggested would not serve to eliminate forever the use of deadly force by an officer in situations where it is not warranted, it would serve the purpose of acquainting the officer with the type of situation wherein he may use his revolver, and of protecting him from criminal and civil prosecution when he has used it in conformity with the statutory provisions. Indirectly it would serve to give greater protection to our citizenry from the unauthorized use of deadly force, for the state would be in a position where it could more conscientiously prosecute any officer who used his revolver in a manner contrary to law.

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Conspiracy Prosecutions in the Federal Courts

The United States Supreme Court addressed two different aspects of the crime of criminal conspiracy in the case of *Krulewitch v. United States,* one dealing with the admissibility of declarations of co-conspirators and the other concerned with the possibility of future action by the Court to limit the applications of the crime itself.[1] The petitioner was convicted[2] of violation of two sections of the Mann Act,[3] and of

24 See discussions in Proceedings of the American Law Institute, vol. 9, p. 179 (1931).

1 336 U.S. 440 (1949).

2 Conviction affirmed, 167 F (2nd) 943 (C.A. 2nd 1948). A prior conviction was reversed on the grounds that it was error not to allow defendant's counsel to inspect

conspiracy to violate a federal statute.[4] He appealed on the grounds that he had been prejudiced on trial by the admission into evidence of certain testimony of the complaining witness, who was allegedly induced by petitioner and his co-conspirator to travel interstate for the purpose of prostitution.

The questioned testimony concerned a conversation between the complaining witness and the petitioner's co-conspirator more than a month and a half after the illicit travel had occurred, and after the complaining witness had returned alone.[5] All three had been under arrest at the time the conversation was alleged to have occurred, charged with the offense of which the co-conspirators were later convicted.[6] From the facts, there was no doubt that the conspiracy to violate the Mann Act had ended and that the conversation was not in furtherance of that conspiracy. The government, acknowledging this, argued that the conversation was nevertheless admissible as in furtherance of a subsidiary object of the Mann Act conspiracy, an implied conspiracy to conceal the facts of the crime in order to prevent conviction.[7]

The Supreme Court denied the implied conspiracy theory and reversed the conviction.[8] The opinion of the Court[9] reiterated the strict observance by the federal courts of the rule that, in order to be admissible as an exception to the hearsay rule, unsworn, out-of-court declarations of co-conspirators must be made in furtherance of and during the charged conspiracy. What may be a satisfying trend toward the limitation of the use of conspiracy indictments is noticeable in the concurring opinion of which more will be said later.

The case of *Logan v. United States* established the declarations rule in the law of criminal conspiracy.[10] The basis for the rule is to be found however in an agency case where Mr. Justice Story commented upon the admissibility of declarations of a known agent which tended to prove the involvement of the principal in the offense charged, and ruled that

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a written statement made by complaining witness for the purpose of impeachment.

3 36 Stat. 825 (1910), 18 U.S.C.A. §§398, 399.

4 35 Stat. 1096 (1909), 18 U.S.C.A. §88.

5 In substance, the conversation was an admission of guilt by the co-conspirator which strongly implicated petitioner; the complaining witness was admonished by the co-conspirator not to "talk" until a lawyer was procured, and that it would be better for the two of them to take the blame rather than petitioner.

6 A Florida grand jury failed to indict, although petitioner and his alleged co-conspirator had been arrested there.

7 The circuit court in sustaining the conviction adopted the government's theory: "We think that implicit in a conspiracy to violate the law is an agreement among the conspirators to conceal the violation after as well as before the illegal plan is consummated. Thus, the conspiracy continues at least for purposes of concealment . . ." 167 F. (2nd) 943, 946. The government's implied conspiracy theory is not new. The same contention was made and refused in Logan v. United States, 144 U.S. 263 (1892) (petitioners were convicted of murder in course of a plan to secure the release of a criminal in the hands of federal authorities; evidence of a plan to conceal one of the petitioners after failure of the conspiracy was held inadmissible as not included among the original and charged conspiracy.) *Cf.* Murray v. United States, 10 F. (2nd) 409 (C.A. 7th 1926); McDonald v. United States, 89 F. (2nd) 128 (C.A. 8th 1937).

8 *Accord*: Pinkerton v. United States, 328 U.S. 640 (1946) (Rutledge, J., dissenting, indicates that conviction of petitioner of substantive crime when only evidence of guilt showed guilt of conspiracy to commit the substantive crime was equivalent to implying a crime, contrary to the Constitution.)

9 Mr. Justice Burton dissented on grounds that the admission of the conversation was harmless error.

10 144 U.S. 263 (1892).

the declarations were admissible if made during and in furtherance of the agency relationship.[11] In dictum, this rule was applied to the case of conspiracy.[12] This dictum was the authority for the holding in the *Logan* case.[13] It would seem then that the declarations rule is not so much an exception to the hearsay rule, but rather it is the result of a peculiar characteristic of the crime of conspiracy which holds all the conspirators as agents and principals of one another within the scope of the conspiratorial relationship.[14]

The declarations rule is composed of dual phases. Declarations are inadmissible if not made in furtherance of the conspiracy, even though made within its duration.[15] The converse is true that declarations made in furtherance yet not within the duration of the conspiracy are also inadmissible.[16] If the declarations are alleged inadmissible as not in furtherance of the conspiracy, the determining issue is the common purpose and aim of the conspiracy, on which the facts of each case are controlling. If inadmissibility is predicated upon the declarations not being made during the conspiracy, the issue is the length of existence of the conspiracy. The federal courts have generally adopted the rule that a conspiracy lasts until the common purpose or aim is attained or lost.[17] There are many cases in which both phases of the rule are applicable.[18] Illustrative of this group are cases where the declarations questioned were made to officers following arrest of the co-conspirator. Such declarations are generally held inadmissible both as not in furtherance and not during the conspiracy.[19] The instant case may be distinguished from these cases since, although made following arrest, the declarations were not made to public officials. Nevertheless, it would seem that dual grounds for exclusion exist since the declarations, clearly not in furtherance of the conspiracy charged, were made, or so the instant decision held, after the termination of that conspiracy.

An evaluation of the declarations rule is difficult. It has become so

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11 United States v. Gooding, 25 U.S. 460 (1827) (declarations of agent within the scope of authority held admissible against his principal on trial for violation of a federal statute.)

12 25 U.S. 460, 469.

13 144 U.S. 263, 309.

14 Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229 (1917); 4 Wigmore on Evidence (3rd ed. 1940) §1079. As Judge Hand said: "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another. What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all." Van Riper v. United States, 13 F. (2nd) 961, 967 (C.A. 2nd 1926).

15 Fiswick v. United States, 329 U.S. 211 (1946) (although the results of the conspiracy, concealment of membership in the Nazi Party, were continuing, the conspiracy itself was not, the last overt act marking its end.); Holt v. United States, 94 F. (2nd) 90 (C.A. 10th 1937); Mayola v. United States, 71 F. (2nd) 65 (C.A. 9th 1934).

16 Gambino v. United States, 108 F. (2nd) 140 (C.A. 3rd 1939); Link v. United States, 30 F. (2nd) 342 (C.A. 8th 1929); *cf.* Sparf & Hansen v. United States, 156 U.S. 51 (1885).

17 McDonald v. United States, 89 F. (2nd) 128 (C.A. 8th 1937).

18 *Eg.* Brown v. United States, 150 U.S. 93 (1893) (declaration in question was made after the conspiracy had been abandoned, and in furtherance of concealment of a fellow conspirator who had killed a government marshal, which murder was not the object of the original conspiracy.)

19 Graham v. United States, 15 F. (2nd) 740 (C.A. 8th 1926); Corso v. United States, 100 F. (2nd) 604 (C.A. 7th 1939); Lonardo v. United States, 67 F. (2nd) 883 (C.A. 2nd 1933). *But cf.* Ferris v. United States, 40 F. (2nd) 837 (C.A. 9th 1930).

ingrained in the federal court decisions that its efficacy is not questioned.[20] Under its operation, as in the instant case, a witness may testify to unsworn, out-of-court statements made by an alleged co-conspirator who is absent from the trial, hence incriminating the defendant with hearsay evidence. But more important than the apparent value of the rule as a means of increasing the permissible scope of the prosecutor's evidence, there would seem to be confusion in the federal courts as to the place of the declarations of co-conspirators in proving the conspiracy. This confusion stems from the present situation in the federal courts with regard to the establishment of the guilt of an alleged conspirator.

Proof of guilt of an alleged conspirator logically requires a showing of a conspiracy, and then the connection of the alleged conspirator therewith. There is no settled evidentiary criteria in the federal courts on which the conspirational relationship may be established.[21] Proof of the relationship under the conspiracy statute would seem to require the showing of an agreement, the criminal intent to violate a federal statute, and an overt act in furtherance of the agreement.[22] It is well settled that circumstantial evidence may properly establish the relationship,[23] but the different evidentiary criteria noticeable in the federal decisions cause the declarations of co-conspirators to assume varying degrees of importance in the proving of the conspiratorial relationship. In some cases for example, the declarations have no place in the establishment of the relationship.[24] In others, the declarations may be admissible to indicate the criminal intent with which the agreement was entered into,[25] and a few decisions find them used to establish the agreement as well as the intent.[26]

Guilt, however, requires the showing of the connection of the alleged conspirator with the relationship. It is generally accepted that the declarations of co-conspirators are not in themselves enough to implicate

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20 Mr. Justice Black, for the majority in the instant case, feels that there are "cogent" reasons that may be advanced against the rule, but feeling bound by precedent accepts it, giving no clue as to what the reasons are. 336 U.S. 440, 443.

21 *See* Cousens, Agreement as an Element in Conspiracy (1937) 23 Virginia L. Rev. 898.

22 2 Zolline, Federal Criminal Law and Procedure (1921) 286, 302; *and see* United States v. Cohen, 145 F. (2nd) 82 (C.A. 2nd 1944), Noted (1944) 58 Har. L. Rev. 279 (held: the overt act is an evidentiary condition of prosecution, and not an element of the crime); *accord:* Holmes, J., dissenting in Hyde v. United States, 225 U.S. 347 (1912) (venue of conspiracy may be placed where conspiracy is entered into, or may be at the place where overt act was performed.).

23 Williams v. United States, 3 F. (2nd) 933 (C.A. 6th 1925); Nat'l Ben Franklin Fire Ins. Co. v. Stuckey, 79 F. (2nd) 631 (C.A. 5th 1935); Galatas v. United States, 80 F. (2nd) 15 (C.A. 8th 1935); *see* Richie, The Crime of Conspiracy (1938) 16 Canadien B. Rev. 202.

24 Winchester & Partridge Mfg. Co. v. Cleary, 116 U.S. 161 (1885) (declaration as evidence of conspiracy to sell assets of insolvent debtors held inadmissible without prior establishment of the conspiratorial relationship by independent evidence); Davidson v. United States, 61 F. (2nd) 250 (C.A. 8th 1932); Nibbelnick v. United States, 66 F. (2nd) 178 (C.A. 6th 1933).

25 Wiborg v. United States, 163 U.S. 632, 658 (1896) (conspiracy to aid military expedition against the Spanish in Cuba); Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229 (1917); United States v. Vehicular Parking, 52 F. Supp. 751 (D.C. Dela. 1943); *cf.* Pinkerton v. United States, 328 U.S. 640, 647 (1946).

26 Smith v. United States, 284 Fed. 673 (C.A. 8th 1922); Connecticut Mutual Life Ins. Co. v. Hillmon, 188 U.S. 208 (1903); *cf.* Cummings v. United States, 15 F. (2nd) 168 (C.A. 9th 1926). *Contra:* Graham v. United States, 15 F. (2nd) 740 (C.A. 8th 1926).

an otherwise unconnected defendant.[27] Even here there is possibility of misuse of the declarations of co-conspirators in those cases where the practical effect of the admission of the declarations is the implication of the otherwise unimplicated defendant, since few juries can be expected to accept such testimony as applying only to those defendants already implicated by other evidence.[28] It has been held that "but slight evidence" will implicate a defendant in the conspiratorial relationship,[29] as will participation in the substantive offense or overt act, although not knowing of the conspiratorial relationship itself.[30] Hence, the value of this rule which permits the admission of the declarations of alleged co-conspirators would seem to decrease as more weight is given the declarations to establish the conspiratorial relationship, because of the likelihood of misapplication among defendants by the jury, and the existence of too slight requirements for establishment of the connection between the alleged conspirator and the relationship.

The present use of the declarations rule illustrates a common situation in the conspiracy field today, namely the subordination of the individual safeguards in our concept of criminal justice to that which the federal courts, in their interpretation of the conspiracy statute,[31] apparently believe to be a more desirable object, expedient and efficient protection of society from the danger of group planning in crime.[32] While protection of society from such a threat is proper and commendable, the possibility of undue prosecutor advantage ought not to be overlooked.[33]

The concurring opinion of Mr. Justice Jackson is concerned with the possibility of such an advantage.[34] Where the majority of the Court discusses the threatened expansion of the declarations rule by means of the government's implied conspiracy theory, Justice Jackson uses the instant case as an excuse to deliver a strong protest against loose practice in the employment of conspiracy indictments.[35] Many reasons are suggested why indiscriminate indictment for conspiracy "constitutes

27 Mayola v. United States, 71 F. (2nd) 65 (C.A. 9th 1934); Nibbelnick v. United States, 66 F. (2nd) 178 (C.A. 6th 1933); Hauger v. United States, 173 Fed. 54 (C.A. 4th 1909). *Contra:* Wiborg v. United States, 163 U.S. 632, 658 (1896).

28 *See* Blumenthal v. United States, 332 U.S. 539 (1947) for illustration of the possibility of incorrect application of evidence among co-defendants by the jury.

29 Galatas v. United States, 80 F. (2nd) 15 (C.A. 8th 1935), *cert. denied* 297 U.S. 711 (1935); Note (1936) 27 J. Crim. L. & Criminology 128; Roberts v. United States, 248 Fed. 873 (C.A. 9th 1918); Meyers v. United States, 94 F. (2nd) 433 (C.A. 6th 1938).

30 Wilkerson v. United States, 41 F. (2nd) 654 (C.A. 7th 1930); Stack v. United States, 27 F. (2nd) 16 (C.A. 9th 1928). *Contra:* Wiborg v. United States, 163 U.S. 632 (1896); Lee v. United States, 106 F. (2nd) 906 (C.A. 9th 1939); Davidson v. United States, 61 F. (2nd) 250 (C.A. 8th 1932); *cf.* McDonnell v. United States, 19 F. (2nd) 80 (C.A. 1st 1927).

31 62 Stat. 862, 18 U.S.C.A. §371 (1948).

32 *See* Note (1949) 62 Har. L. Rev. 276.

33 Possibilities of abuse in conspiracy field have been noted by the Supreme Court: Recommendations of the Senior Circuit Judges, Rep. Att'y. Gen. (1925) 5; Brown v. Elliot, 225 U.S. 392, 400 (1911); Kotteakos v. United States, 328 U.S. 750 (1946). *See* Von Moltkev v. Gillies, 332 U.S. 708, 727 (1947) (Frankfurter, J., concurring); Pinkerton v. United States, 328 U.S. 640 (1946) (Rutledge, J., dissenting).

34 With Justices Frankfurter and Murphy.

35 For the general rule of the requirements necessary to sustain a conspiracy indictment under the late federal conspiracy statute, cited *supra* note 4, *see* Rudner v. United States, 281 Fed. 516, 518 (C.A. 6th 1922) (indictment is sufficient if it "follows the language of the statute and contains a sufficient statement of an overt act to effect the object of the conspiracy."). *Accord:* Rose v. United States, 149 F. (2nd) 755 (C.A. 9th 1945).

a serious threat to fairness in our administration of justice.''[36] The vagueness and pliability of the conspiratorial concept has led to its expansion, not only in the lower federal courts, but in the Supreme Court as well.[37] The peculiar Anglo-American doctrine which attributes criminality to a combination which contemplates no act which would be criminal if carried out by any one of the combiners has also broadened the concept into a weapon to secure economic ends.[38] This broadening, coupled with the use of conspiracy in civil proceedings where more lax practices are sanctioned, has led to the importation into proceedings under the federal conspiracy statute of legal processes originally conceived for other purposes, which work to the disadvantage of the defendant in a conspiracy trial.[39] Furthermore, a conspiracy conviction may increase the degree of penalty over that levied for unconcerted offending.[40] And procedural advantages accruing to the prosecution from a conspiracy charge add to the danger of indiscriminate extension of the concept.[41]

Against this background, one sentence of the concurring opinion merits particular thought:[42]

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36 336 U.S. 440, 446.

37 *See* Pinkerton v. United States, 328 U.S. 640 (1946) (conviction on substantive charge where there was no proof of participation in or knowledge of the crime upon the theory that conspiracy is equivalent to aiding and abetting.). *Cf.* Nye & Nissen v. United States, 336 U.S. 613 (1949) (where the Court comments on the Pinkerton case, and apparently narrows its holding.).

38 *See* Cousens, *supra* note 21. He suggests that the federal courts have relied upon conspiracy under the desire to expand the criminal jurisdiction of the United States to meet modern necessities. Compare the application of conspiracy under the Sherman Anti-Trust Act.

39 *See* United States v. Cohen, 145 F. (2nd) 82 (C.A. 2nd 1944) (in discussing the difference in proof necessary in criminal conspiracy cases as distinguished from civil, the court concludes that there is none.).

40 Under the late conspiracy statute, cited *supra* note 4, a joint misdemeanor could be shifted into a felony by reliance on a conspiracy count; an incompleted plan carried a greater degree of penalty than the successful plan. *Eg.*, Weiss v. United States, 103 F. (2nd) 759 (C.A. 3rd 1939). The new conspiracy statute cited *supra* note 31, remedies this situation, but nevertheless, where the penalty for the substantive crime is less than five years maximum imprisonment, employment of a conspiracy charge, punishment for which is now a maximum of five years, may yet result in the infliction of greater punishment for unsuccessful planning.

41 Procedural advantages accruing from a conspiracy indictment are: (a) the declarations rule; (b) the difficulty of controlling the order of proof, which allows the prosecution much leeway (*e.g.* see extract from the trial of People v. Hines, reprinted in Michael & Wechsler, Criminal Law and its Administration (1940) 673); (c) possibility of guilt by association due to jury prejudice (*see* Blumenthal v. United States, 332 U.S. 539 (1947)); (d) the confused situation regarding the extent to which the elements of a conspiracy must be shown before guilt may be established (premature and unwarranted establishment of a conspiracy may well be a source of prejudice against a defendant in the jury's consideration of his substantive guilt); (e) possibility of mass trials. *See* Kotteakos v. United States, 328 U.S. 750, 756 (1946) (petitioner and 31 others were charged with one conspiracy, the proof actually showing eight separate conspiracies; Rutledge, J., addressed the source of burden to defendants of mass trials.). Bringing all the likely defendants together in one trial rather than separate trials allows the prosecution to put the maximum proof before the court, to circumvent the statute of limitations as to some of the overt acts, and to prove the conspiratorial relationship only once, Michael & Wechsler, Criminal Law and its Administration (1940) 657, citing 15 Scraps 22-23 (1939) (official publication of the Office of the U. S. Attorney, Southern District of New York.). *See* also, comments of Hand, J., in United States v. Falcone, 109 F. (2nd) 579, 581 (C.A. 2nd 1940).

42 336 U.S. 440, 457.

> "There should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

Such a use of the conspiratorial concept strikes Justice Jackson as unfair. He does not intend to question that the basic concept has a place in modern criminal law, since protection must be had against proposed group criminality due to the seriousness of group crimes. Nor does he think that the solution, as suggested by others, lies in the clarification of evidentiary criteria of the concept.[43] But rather there must be a discriminate and fair employment of the conspiracy indictment to insure justice for the individual, as well as to secure protection for society.

There are three different practices in the use of conspiracy indictments which have been cited as sources of possible abuse to the defendant: indictment only for conspiracy in lieu of a substantive crime,[44] indictment for conspiracy after conviction on the substantive charge,[45] and indictment for conspiracy in addition to indictment for the substantive charge itself.[46]

It would appear that the first two sources of abuse are not of the same nature as the third, to which Justice Jackson directs his criticism. In neither of the first two practices ought the conspiracy charge unduly burden an innocent defendant. Under the federal law, conspiracy is a separate and distinct offense from the substantive crime which is the object of the conspiracy.[47] In view of this, it is difficult to see how a legal argument can be advanced to disqualify such practices. The defendant is only subject to the rigors of the crime of conspiracy itself; in any case where the indictment is solely for conspiracy, the possible abuses inherent

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43 Harno, Intent in Criminal Conspiracy (1940) 89 U. Pa. L. Rev. 642; Cousens, cited *supra* note 21, where the author calls for the exercise of "certiorari power" of the Supreme Court to clarify the present confusion regarding the requirements as to the agreement element in the law of criminal conspiracy.

44 United States v. Kissel, 173 Fed. 823 (C.A. 2nd 1909) (Holt, J., indicates two reasons for employment of conspiracy indictments in lieu of a substantive charge: advantages to be gained in a long statute of limitations and in applicable rules of evidence.); Heike v. United States, 227 U.S. 131 (1913) (Holmes, J., comments on the possibility of abuse to defendants in such use of conspiracy indictments.). *See* Regina v. Boulton, 12 Cox Cr. Cas. 87 (1871) (criticism is directed at indictment for conspiracy alone when the only evidence to establish the conspiracy would be proof of the substantive crime itself.).

45 Westfall v. United States, 20 F. (2nd) 604 (C.A. 6th 1927) (here the court feels that, due to the separability of conspiracy and the substantive offense under the federal law, remedy for this abuse must be found in legislation precluding indictment for conspiracy to commit a crime for which the defendant has already been convicted.).

46 It is to this employment of conspiracy indictments that the criticism of the Senior Circuit Judges would also appear to be directed, cited *supra* note 33. In those cases where the gist of the substantive crime requires acts which would otherwise be equivalent to conspiracy, indictment for both the substantive offense and conspiracy to commit it has been questioned on double jeopardy grounds, Brady v. United States, 24 F. (2nd) 399 (C.A. 8th 1928); *contra:* Sealfon v. United States, 332 U.S. 575 (1948), noted (1948) 39 J. Crim. L. & Criminology 58 (double jeopardy not applicable where a prior acquittal on a conspiracy charge is raised in bar to further prosecution on a charge of aiding and abetting, due to statutory distinction between conspiracy and the substantive offense.); and on grounds of *res adjudicata, see* United States v. DeAngelo, 138 F. (2nd) 466 (C.A. 3rd 1943); *cf.* United States v. Morse, 24 F. (2nd) 1001 (S.D. N.Y. 1926).

47 Rabinowich v. United States, 238 U.S. 78 (1915); Heike v. United States, 227 U.S. 131 (1913).

in a conspiracy charge are at least kept within the scope of that charge alone. Justice Jackson's criticism would seem to be directed at the practice, the result of which is the possible overflow of those abuses into a trial on the substantive charge, easing the path to conviction, and, in any event, working in an unfair advantage on the defendant. In those cases where the conspiracy count is added solely to secure that advantage, he suggests that a reviewing court ought not "strain" to uphold conviction.

Whether or not Justice Jackson was thinking specifically of the application of the Supreme Court's supervisory power over the lower federal courts so as to insure that such conviction would not be sustained only speculation is possible. But it would seem that such an interpretation of the concurring opinion is not unreasonable. In the case of *McNabb v. United States*,[48] the Supreme Court endeavored through its supervisory power over the federal courts to remedy what it considered another unfair practice, the admission of confessions secured by enforcement officers during a period of wilful delay in arraignment before a judicial officer for the determination of the sufficiency of cause for detention. Convictions for murder of a federal officer were reversed on the ground that the confessions on which the convictions were dependent were attained after hours of continuous questioning without opportunity given the petitioners to inquire into their arrest. "Secret interrogation of persons accused of crimes" struck the Court as so unfair that it insisted that the procedural requirement of arraignment take on an importance amounting almost to a substantive "right" of arrested persons. Hence, evidence obtained at the expense of that "right" may not be admitted, and the prior criterion of the sufficiency of a confession, the voluntary-trustworthy test, was overlooked in favor of a more "civilized" standard.[49]

There are in the conspiracy indictment situation certain elements which indicate a possible parallel with the exercise of federal supervisory power in the *McNabb* case. There, the Court attempted to remedy a practice in law enforcement not prevented by the due process clause, but which nevertheless was unfair to arrested persons.[50] The main objection to the use of conspiracy indictments in addition to substantive charges where such indictments are added by the prosecution only to secure procedural advantages is not a due process argument either, but one going to the unfairness of the practice. In both cases, the unfairness comes about primarily as a result of acts by federal officers.[51] In addition

48 318 U.S. 332 (1943).

49 *See* Wilson v. United States, 162 U.S. 613 (1896) (application of the voluntary-trustworthy test).

50 "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards . . . which are summarized as 'due process of law'." Per Frankfurter, J., in McNabb v. United States, 318 U.S. 332 (1943).

51 It would seem that the federal district attorney exercises great control over the federal grand jury as regards what prosecutions are commenced. One reason is that the presentment, or notice of any offense given by the grand jury itself from its own knowledge without the aid of information or indictment, is not now used in the federal courts because of the availability of federal attorneys to assist the grand jury and because of the decline of prosecution by private individuals, Orfield, Criminal Procedure from Arrest to Appeal (1947) 158. Grand juries have been called the "rubber stamp" of prosecutors; *see* Morse, A Survey of the Grand Jury System (1931) 10 Oregon L. Rev. 295, 304; Miller, Information or Indictment in Felony Cases (1924) 8 Minn. L. Rev. 379, 397. *Cf.* Illinois Crime Survey