appended to FF! Knapp mem

May 8, 1961

MEMORANDUM FOR THE CONFERENCE

Re: No. 236 - Mapp v. Ohio

1. Herewith is a copy of my memorandum in Knapp v. Schweitzer, 357 U. S. 371, which was offered as precedent for what is proposed to be done in Mapp v. Ohio. Res ipsa loquitur.

2. As for reliance on Rogers v. Richmond -- I give up! The decision in that case turned on the crucial question argued at the bar, to wit: the admissibility of an alleged coerced confession, and on the conclusion reached, after full discussion at Conference, that the basis on which the confession was legally admitted on Connecticut criteria offended the controlling constitutional requirements as laid down by this Court. The division in this Court related to the remedy to observe this Court's standards regarding coerced confessions, namely, whether a new trial in Connecticut was required or a hearing before the United States District Court.

F.F.

The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker
Mr. Justice Stewart

June 25, 1958

Dear Brethren Burton, Clark, Harlan, Brennan and Whittaker:

The five of you whom I am addressing had joined my opinion in No. 189, Knapp v. Schweitzer. At last Friday's Conference, Brother Black stated that he did not yet know what he would do about dissenting in the case, whether he was going to write a short or a long dissent, and indicated that if he decided to write a full-dress dissent, he might simply dissent and reserve the right to file an opinion later. Thereupon, Brother Brennan stated that if the filing of a dissenting opinion were to be reserved, he would withdraw his agreement with the opinion. Promptly after the Conference, Brother Black circulated his memorandum saying that he had "concluded not to file a dissent until after Court adjourns." I assume, therefore, that Brother Brennan has withdrawn his agreement to Knapp v. Schweitzer. That leaves five of us -- a Court, if the other four of you stand by the opinion. If there is a Court, the decision should be handed down next Monday, unless any one of us thinks that the case should not go down, which, in effect, would mean that such a Brother would withdraw his assent to the opinion and there would be no Court.

I should like to state why, with every desire to be observant of appropriate judicial amenities, I myself do not feel that there is any reason in the circumstances of this case why the case should not go down:

1. The problem with which the case deals is an old one. Nothing new is decided in the Knapp case. It is in fact a reaffirmation of a long established doctrine, growing out of our federalism, regarding the relationship between the States and the Federal Government within their autonomous jurisdictions.

2. The various arguments, historical, political, civil-libertarian, against this settled doctrine were powerfully put to this Court by one of the greatest lawyers in the history of our profession, James C. Carter. It is fair to say that the various questions were again canvassed when Ullman v. United States, 350 U. S. 422, was decided. I do not mean to say that what was written in the opinion disclosed the extent of the inquiry into the general problem of the bearing of the immunity statutes by the United States and the States respectively to one another. I do say that the literature of the field was canvassed.

3. Certainly the problem is not a new one for Brother Black, nor is my opinion a last-minute circulation. It's been out about three weeks. The problem that he now raises -- which is indeed not before us, namely, whether in the circumstances of this particular case Knapp's testimony could ever be used against him in a federal proceeding -- was dealt with by him with characteristic vigor in his dissent in Feldman. While he might garnish a new opinion with more historical learning, in essence he could not be saying more than he did in his Feldman dissent. The essential argument could not be different. (To leave no doubt that the problem that Brother Black now raises is not in Knapp, a reference to

the Feldman case was, at Brother Whittaker's suggestion, deleted from my opinion.) We are invited, in effect, not to hand down a decision which merely declares old, well-settled law, because more intensive digging into some historical materials would be invoked to unsettle a deeply settled doctrine of American constitutional law, in much the same way as we were asked early this Term in the contempt case, Green v. United States, 356 U.S. 165, to unsettle well-settled American constitutional doctrine because of some new historical materials.

Dr. Grant's articles, to which Brother Black makes reference, are valuable compilations of materials, but in all good conscience, Grant does not add to the sum of the ideas with which one dealing with this problem has long been familiar. Dr. Grant is a political scientist and not a lawyer, and like almost all political scientists who write on constitutional problems, even some of the best of them, like Dr. Corwin, they cavalierly disregard what to us lawyers is essential. The notion that Grant's articles should make us reverse the whole current of our constitutional law strikes me a bit odd.

4. The suggestion that we return the case to the Court of Appeals for consideration by it of its own Constitution is, I am tempted to say, a bit thick, and not the less so because of the suggestion that the New York Court of Appeals (which, incidentally, affirmed without opinion) may have submissively felt constrained by the Feldman case to construe the State Constitution as it did. The fact of the matter is that the Appellate Division recognized what Feldman recognized, that if a federal functionary is

himself the means by which testimony is compelled in State proceedings, then of course the Fifth Amendment would apply if use were sought to be made of such testimony in a federal prosecution. How such a broad-minded construction of the Fifth Amendment when invoked in a federal court could have improperly affected the New York courts in sanctioning their immunity statute is beyond my comprehension.

5. There are situations when the feeling of a Brother that he needs the summer, as it were, to work on setting forth his views in a case should delay handing down a decision. Such a situation was presented by the _Expatriation Cases_ at the end of last Term. How different that case from this! The problems there were new, difficult and of far-reaching import in our national life. More than that, not only was the Court closely divided, but within the narrow majority there were those who had doubts and uncertainties. Nothing could have been more appropriate to the circumstances of that situation than to set the cases down for reargument. That situation and the one in _Knapp_ v. _Schweitzer_ are profoundly different.

6. There is involved more than the disposition of a particular case. To yield to the suggestion that whenever any member of the Court seeks to reserve the writing of an opinion the case is not to go down, is to enable any single member of the Court to exercise a veto power on our disposition of adjudications. To say this is not to search the mind of any Brother or to question his right to take all the time he wants to do justice to his views in a case when everybody else is ready. But the Court is, after all, an institution with the needs of an institution, duly reserving

to any member the opportunity to express his individual views. In complete good conscience I could have reserved the right to file an opinion in the _Ivanhoe_ case after the Court adjourned. But thereby to hold up handing down _Ivanhoe_ this Term would have been, I submit, indefensible on my part, however conscientious the motives which would have impelled it.

In any event, I thought it desirable to set forth in all candor what I think about this situation, leaving myself, as the politicians say, in the hands of my friends.

Very sincerely yours,

P.S. Need I add that it has long been the practice here for Justices to reserve their right to file opinions without holding up the rendering of decisions.

F.F.

Mr. Justice Burton
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker