OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CHARLES THOMAS DICKERSON, Petitioner, vs.

UNITED STATES

CASE NO: 99-5525 e.2

PLACE: Washington, D.C.

DATE: Wednesday, April 19, 2000

PAGES: 1-53

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES THOMAS DICKERSON, :

Petitioner :

v. : No. 99-5525

UNITED STATES :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, April 19, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JAMES W. HUNDLEY, ESQ., Fairfax, Virginia; on behalf of the Petitioner.

SETH P. WAXMAN, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

PAUL G. CASSELL, ESQ., Salt Lake City, Utah; as amicus curiae, supporting the judgment below.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-5525, Charles Thomas Dickerson v. The United States.

Mr. Hundley.

ORAL ARGUMENT OF JAMES W. HUNDLEY

ON BEHALF OF THE PETITIONER

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

Thirty-four years ago, in Miranda v. Arizona, this Court held that the Fifth Amendment privilege against self-incrimination required that police interrogators fully inform a suspect of their rights under the privilege and provide them a full opportunity to exercise those rights. The question before the Court today asks whether Congress has the authority to legislatively overrule and reverse this Court's decision in Miranda.

The key to this question turns on whether the requirements of Miranda are constitutionally based and therefore immune from legislative modification, or are something else: as the Foruth Circuit ruled, a mere exercise of the Court's power to prescribe rules and procedures for courts.

QUESTION: Mr. Hundley, are those requirements

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substantive requirements? Is it a violation of the Fifth Amendment not to observe them?

MR. HUNDLEY: Yes, Justice Scalia. While the specific warnings articulated in Miranda themselves are not constitutionally mandated, the constitutional threshhold represented by those warnings is constitutionally required.

QUESTION: I presume that if a policeman should beat someone with a rubber hose and extract a confession, and then introduce that confession in a criminal prosecution, that the policeman would be subject to a civil action not only for assault, but also for a violation of the constitutional right, or Fifth Amendment right.

MR. HUNDLEY: Yes.

QUESTION: Now, do you think that a policeman who fails to Mirandize the suspect, obtains a confession without having Mirandized them and then introduces that confession in court, is subject to suit? Do you know of any suit that has ever been brought?

MR. HUNDLEY: I am unaware of any -- well, Justice Scalia, let me take that back. I believe the Ninth Circuit is currently wrestling with the issue of whether or not the intentional disregard of an individual's exercise of his rights under Miranda could

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constitute a civil action.

QUESTION: I'd be very surprised if that is prosecutable civilly, which makes me think that the right we're talking about here is a procedural, is a procedural guarantee that the court instituted, rather than a substantive one.

MR. HUNDLEY: Yes. The requirements of Miranda are constitutional protections that the court --

QUESTION: In the criminal process, an exclusionary rule, in effect, that we won't let in these confessions.

MR. HUNDLEY: Well --

QUESTION: Regardless of whether they've been technically extracted in violation of the Constitution, as a matter of criminal procedure, we won't admit them, nor will the States.

MR. HUNDLEY: I would respond, Your Honor, that they cannot be submitted because they were obtained without the requisite protections that the Constitution demands to ensure their voluntariness, to dispel the inherent compulsion --

QUESTION: So then your answer is, is that the warnings specified in Miranda are constitutional requirements, and I thought you'd said --

MR. HUNDLEY: The --

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QUESTION: -- something somewhat different at the very outset.

MR. HUNDLEY: I did, and it's a subtle distinction, Justice Kennedy, and it's a distinction I think which has perhaps led to some confusion in the literature. The constitutional requirement of Miranda is that there be protective procedures in place to fully inform a suspect of his rights, so that he knows his rights, so that he knows he can exercise those rights, he knows that his interrogators will honor those rights, and so that the court will know that any waiver of those rights was made knowingly and intentionally, not just voluntarily.

QUESTION: Well, how is 3501 deficient under that analysis?

MR. HUNDLEY: Because 3501, rather than requiring affirmative objective procedures which provide notice to the defendant and provide protections for the suspect, simply reverts the analysis back to the totality-of-circumstances test, which courts in this country wrestled with for many decades until Miranda explicitly rejected it as unworkable and inconsistent.

QUESTION: Mr. Hundley, as I understand it, Miranda made a switch from the totality-of-the-circumstances that related to due process, don't give

people the third degree, to something quite different, and I'm not sure you're explicit about it. That is, Miranda for the first time put this right under the First -- under the Fifth Amendment, and it became a right to notice and opportunity to exercise your rights.

MR. HUNDLEY: Yes.

QUESTION: Not a right to be free from third degree procedures, but a right to notice, and opportunity to exercise your right to silence, and that that was an interpretation of what the self-incrimination privilege required, is that correct?

MR. HUNDLEY: Yes, Justice Ginsburg. The Miranda court specifically shifted the focus of the analysis from the traditional due process, totality-of-the-circumstances case to a more objective, concrete, clear-cut procedure whereby procedures had to be in place to ensure that the individual knew his rights, knew his interrogators would honor those rights, and to provide a knowing and intelligent waiver of those rights.

QUESTION: Well, Mr. Hundley, you say shifted. You don't mean superseded, I take it, because I think the voluntariness rule of previous cases still is a constitutional requirement.

MR. HUNDLEY: Yes.

QUESTION: That a confession that is not

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voluntarily extracted is nonetheless a -- is a violation of the Constitution.

MR. HUNDLEY: Yes, Mr. Chief Justice, that is correct. In a rare case, a confession that were obtained following Miranda warnings could still be deemed involuntary if physical coercion were present, or other forms of coercion that overbore the will of the individual, but the benefit of the Miranda rule is that it in most instances provides clear-cut evidence for the Court.

QUESTION: Well, you say it provides clear-cut evidence. I looked into the number of cases that we have had construing Miranda, and there are about 50 of them, so that to say that it's easily applied is just a myth.

MR. HUNDLEY: I would respectfully disagree, Mr. Chief Justice. I believe that in fact perhaps my understanding of the case law as it's developed has demonstrated that while initially when the Miranda requirements were new, cases were coming before the Court more steadily. They have since slowed down, and certainly comparing that to, under the old totality-of-the-circumstances analysis, the Court was consistently wrestling with the issue on almost every term.

QUESTION: Mr. Hundley, when you say it replaced the totality-of-the-circumstances analysis, it replaced

that, the totality-of-the-circumstances analysis was not a criterion of police conduct. It was a criterion by which this Court evaluated the voluntariness of the confession, so you are suggesting that what Miranda is is not a substantive rule governing police conduct, but simply a rule that the Court has adopted for all Federal courts as to how Federal courts will procedurally determine, for purposes of admitting evidence, whether the confession was voluntary. Isn't that right?

MR. HUNDLEY: Yes. It is a --

QUESTION: Well, is that right? Didn't we apply it to State courts? It wasn't just a rule for Federal courts, was it?

MR. HUNDLEY: Oh, no. It has consistently, since its inception, been applied to State courts. I --

QUESTION: Miranda itself was from a State court.

MR. HUNDLEY: Yes, it was, as were numerous other decisions of this Court interpreting and tailoring the decision, and the fact --

QUESTION: Are you suggesting that we can't apply any procedural requirements upon State courts? We cannot compel the observance of certain procedural requirements by State courts in the adjudication of Federal constitutional rights?

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MR. HUNDLEY: Only those procedures which themselves are demanded by the Constitution.

QUESTION: Why is that? Why don't we have -- I mean, we can certainly do it for statutory causes of action. I mean, if title VII cases can be brought in State court, we can require State courts as a matter of Federal law to use the, you know, prima facie burden-shifting procedures that we've applied in Federal court for title VII. Why can't we do the same thing with the Constitution?

MR. HUNDLEY: Well, Justice Scalia, in that example, that would be an exercise of the Court's Federal statutory jurisdiction, but in cases such as Miranda, unless the Court is interpreting and applying the Constitution, its procedures would not be applicable to the States unless the Court were to embrace the theory put forth by a court-appointed amicus that there is some form of constitutional common law, which this Court to my knowledge has never recognized, and --

QUESTION: It seems to me you're swallowing the camel and straining out the gnat. You're willing to allow -- you're willing to acknowledge this power of the Court to establish substantive procedures for the States, but you're not willing to ackowledge the much lesser power of this Court to say how constitutional questions in State

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courts will be adjudicated. It seems to me it's a much lesser power.

MR. HUNDLEY: Justice Scalia, I would disagree. To interpret the Constitution and to determine the protections which are to be required under the Constitution is perhaps the greatest power of this Court. It is the power that this Court recognized in Marbury v. Madison. It is a power which underlies one of the most basic tenets of federalism of the Court.

QUESTION: Mr. Hundley, I think you are getting away now from what I thought you had established clearly before, that what we're talking about now is something that's discrete from and in addition to voluntariness, that is, notice and opportunity to exercise your right of silence, and I don't think those two should blended together, because what made Miranda different was not that it did away with the voluntariness law, but that it recognized a discrete right, a procedural right, if you will, but a constitutional right to notice and opportunity of your right to silence.

MR. HUNDLEY: Yes, I agree, Justice --

QUESTION: If that's the basis for Miranda, why don't we have the same rule for consent? The Government doesn't -- for consent to search? The Government's never argued that there should be that rule for consent to

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search. Why do they argue the --

MR. HUNDLEY: No, Justice --

QUESTION: -- requisite for Miranda?

MR. HUNDLEY: Excuse me, Justice Kennedy. In Schneckloth the Court provided an excellent analysis of the difference between the two rights. It ultimately comes down to this Court's determination of which rights are fundamental to the individual, particularly in the context of a proceeding with a fair criminal trial, which the Court has recognized --

QUESTION: The right to privacy and personal protection against seizure is not fundamental?

MR. HUNDLEY: Not in the context of maintaining a fair criminal trial, because the evidence found in a Fourth Amendment violation, while there may be a violation of constitutional rights, is probative to guilt or innocence. It's been -- the Fourth Amendment rights have been described by this Court not as individual rights so much as societal rights to protect them from -- to protect individuals' privacy, whereas the individual -- the Fifth Amendment privileges are specific, fundamental individual rights, which in the inherently compulsive context of custodial interrogation need additional protection.

If I may, Your Honors, I would like to reserve a couple of minutes for rebuttal.

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QUESTION: Very well, Mr. Hundley. General Waxman, we'll hear from you.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE UNITED STATES

GENERAL WAXMAN: Mr. Chief Justice and may it please the Court:

The position of the United States is based on three propositions, and I'd like simply to state them. First, as this Court's repeated application of Miranda to the States reveals, its rule is a constitutional one. Second --

QUESTION: Well, in our past Miranda cases I think the Government has taken the position that Miranda warnings are not constitutionally required.

GENERAL WAXMAN: That is correct, Justice O'Connor, and in that regard, and I must -- I will say at the outset with regard to all of the, whether it's 30 or 50 Miranda decisions this case has decided, the Court is leading, and we are respectfully following, but the Court explained in Miranda that the warnings themselves were not constitutionally required, and it repeatedly invited legislatures, including the national legislature, to enact constitutionally adequate safeguards.

Our proposition here is that the rule that the

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Court announced in Miranda, that is, in the absence of systemically adequate safeguards the Government can't use as evidence of guilt at a criminal trial an unwarned statement, must be a constitutional rule because the Court has in dozens of cases applied it to the State courts, at the same time repeating that it has --

QUESTION: What's the source of that authority for the Court --

GENERAL WAXMAN: The --

QUESTION: -- and how do you equate it with other exercises of such a right?

GENERAL WAXMAN: The --

QUESTION: If it isn't a Fifth Amendment right itself, what is it, and how do we have the power to --

GENERAL WAXMAN: Justice O'Connor, the Court itself has repeatedly said that Miranda's requirements are based on its power to interpret and apply the Constitution, and that the doctrine, the Court has said, is necessary. The Court said in Garner it was impelled to adopt the doctrine in order to protect, in the distinctive context of custodial interrogation, the privilege against self-incrimination.

Now, it is, as the Court said, therefore, in the nature of a prophylactic rule, that is, a rule that when it is violated -- when the warnings themselves aren't

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given, it is not true that the statement is thereby as a matter of fact inevitably coerced.

QUESTION: I really want you to get to your other two points, but what you're talking about just now is something I don't understand.

You say the warnings are not constitutionally required, but the Miranda rule is constitutional.

GENERAL WAXMAN: Yes. I --

QUESTION: My --

GENERAL WAXMAN: This --

QUESTION: Okay. I don't understand that.

GENERAL WAXMAN: This Court held in Miranda, and every post-Miranda case that has tailored and explicated the doctrine is consistent with this principle, held that, absent a narrow exigency exception, a public safety exception, the Government may not use as evidence of guilt at trial a statement made in response to custodial interrogation, absent either warnings and a waiver or some other systemically adequate safeguard.

QUESTION: General --

GENERAL WAXMAN: That is the doctrine of Miranda, and I --

QUESTION: General Waxman, all it takes to explain the application of Miranda to the States, it seems to me, is the proposition that the Constitution is what

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gives the Court the power to impose the rule. It doesn't necessarily follow that if the Court has the power to impose the rule by reason of the Constitution, Congress cannot change that rule.

In Chapman v. California, which was decided the term after Miranda and which also involved a procedural rule, we said, we have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth Amendment right -- the issue was harmless error when there was comment upon their remaining silent.

The right of these petitioners, expressly created by the Federal Constitution itself, is a Federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.

GENERAL WAXMAN: Justice Scalia, I --

QUESTION: The Court has the power to fashion procedural rules, but that doesn't mean that once it fashions them Congress cannot say, well, you know, we think this goes too far.

GENERAL WAXMAN: Justice Scalia, I could not agree with you more, with an important caveat, and that is, in Miranda itself the Court deliberately, repeatedly, and self-consciously said, this isn't the only rule.

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Congress or the State legislatures may impose another rule, provided it has adequate safeguards.

In other words -- please let me finish.

QUESTION: I'm letting you finish.

GENERAL WAXMAN: In other words, what the Court said in Miranda in 1966 is what -- is precisely what this Court said this term in Smith v. Robbins, which is, when the Court acts in order to protect a constitutional privilege by creating of the rule in the absence of a legislative safeguard, the legislature can come in with alternatives, but --

QUESTION: I'm glad you said -- I'm glad you said, what the Court said, because all of that is dictum. In order to explain the holding of Miranda and the holding of all subsequent cases, no more is necessary than what I described --

GENERAL WAXMAN: The --

QUESTION: -- that we have the power to do this, but that doesn't necessarily mean that Congress doesn't have the power to change it.

GENERAL WAXMAN: When the Court is applying a rule pursuant to its authority to interpret and apply the Constitution, Congress can come up with alternative ways to do it, but it is this Court, under Marbury v. Madison and City of Boerne, that will ultimately decide whether

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the Constitution is satisfied.

When this -- when the legislature -- when this Court comes up with a rule in the exercise of its supervisory authority, as, for example, the rule for -- that the Court -- that 3501 otherwise does away with with respect to the consequences of pre-indictment delay, that is self-consciously a rule imposed on Federal courts only in the exercise of its supervisory authority, Congress gets the last word.

And if the Congress of the United States were to take up the Court's suggestion, or any State were to take up the Court's suggestion in Miranda that it has repeated since and come up with alternatives, and we've suggested some of them at page 20 of our reply brief, I would be standing before this Court asking the Court to consider whether or not the alternative safeguards sufficiently protected the Fifth Amendment privilege in this distinctive context.

QUESTION: So in your view this case boils down to whether section 3501 is sufficient --

GENERAL WAXMAN: Yes, and that actually is my -- the second point that I --

(Laughter.)

GENERAL WAXMAN: The second premise I was going to address, which is that --

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QUESTION: Before you get into detail on that, tell us the third one and then argue the second.

(Laughter.)

GENERAL WAXMAN: Okay. The third one is that we don't believe that the showing required to overrule Miranda has been made.

The second one, which really does precede the third one, is that section 3501 in our view cannot be reconciled with Miranda and therefore could be upheld by this Court only if the Court were to be prepared to overrule Miranda.

Now, why do I say that in our view, because it is certainly -- it may be very unusual, but it would not be improper for the Solicitor General of the United States to ask this Court to reconsider and overrule one of its precedents, although in this case we're talking about 34 years and, as the Chief Justice has mentioend, 50 precedents, but let me just list the four reasons why, in our view, the Court -- the case has not been made to overrule Miranda v. Arizona.

First, we think that stability in the law is important, and it is nowhere more important than in this case, given the Court's extremely unhappy experience with the law of confessions under the totality-of-the-circumstances, and the certainty that this Court has

repeatedly recognized that Miranda provides.

Second, in our view, Miranda, as it has been developed and tailored and refined by this Court, has proven workable, and its benefits to the administration of justice have been repeatedly emphasized by this Court and documented by the Court.

Third, in its -- all of its post-Miranda cases, this Court has reaffirmed Miranda's underlying premise, that is that custodial interrogation creates inherently compelling pressures that require some safeguards.

And finally, any reevaluation of Miranda must take account of the profoundly unhappy experience of this Court that impelled its adoption. Applying the totality-of-the-circumstances test in 36 cases over 30 years before 1966, the Court was simply unable to articulate manageable rules for the lower courts to apply.

QUESTION: But General Waxman, that may have just been a misexercise of the certiorari jurisdiction. Perhaps the Court shouldn't have granted all those cases, realizing that it was a rather vague concept.

GENERAL WAXMAN: I -- Mr. Chief Justice, I think actually if the Court were applying its current certiorari standards a number of those csaes would not have been accepted for review, because the articulation of the legal test was set.

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The difficulty that this Court found was its inability to expound the law, that is, to give to the lower Federal courts a set of articulable, manageable rules that would predictably govern the introduction of confessions in the case in chief.

Let me just say this in that regard. The constitutional test, I think under either the Fifth Amendment or the Fourteenth Amendment, is voluntariness. It's, was this -- did the person speak in these circumstances as an exercise of free will, or was his will overborne?

Now, the totality-of-the-circumstances test was a legal construct, as the Chief Justice mentioned earlier. It was an -- I think it was the Chief Justice. It was an effort to impose legal rules on police conduct, and it, itself, included prophylactic rules that the Court developed over time. It -- you know, if the suspect is held more than 36 hours, we don't want to hear anything else. If violence was used or threatened --

QUESTION: Well, 36 hours was a Federal rule. It was not imposed on the States. You're talking about McNabb?

GENERAL WAXMAN: No. I think it was Ashcraft v. Tennessee, if I have the case right, or Haynes v. Washington, but I thought it was Justice Jackson in

dissent who said, some people can't -- some people's free will can't withstand 36 hours, but I think this man's can.

And my only point is that the Court's experience under the totality test was that seemingly the more cases it decided, the less actual guidance was provided to lower courts, and thereby to prosecutors and police, for what the rules were. What is the bright-line legal standard that will allow us to determine something, something is admissible or not admissible, given the inherent difficulty of determining what actually occurred and what actually happened in the mind of a suspect in this very distinctive context?

And we think -- respectfully submit to the Court that in determining whether to overrule Miranda wholesale, which is what we think is required in order to uphold the statute, the Court has to take account, as we have taken account, the status quo ante and whether circumstances have changed so as to return it.

QUESTION: Of course, that complex situation you're describing was a situation based upon the standard we had set forth in Bram, which is what Miranda relied on, which was not the -- which has since been rejected. I mean, Miranda said that we need this because it's too complex otherwise to apply the Bram standard, which was that a statement was compelled if it was induced by any

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threat or promise, or by the exertion of any improper influence, however slight.

GENERAL WAXMAN: Justice Scalia, I agree that the Court in Miranda relied on Bram, but not for that test, which had not been applied by this Court under the totality-of-the-circumstances.

The Court in Miranda relied on Bram for the same proposition that the United States relied on it in Miranda itself, which is that the Fifth Amendment applies in the context of custodial interrogation. That particular articulation of the standard was not one that was repeated by the Court in Miranda or applied by the Supreme Court under the totality-of-the-circumstances test.

The Court had long since made clear that what it was looking at under the totality-of-the-circumstances test was consistent with society's mores about appropriate police conduct and, balancing the need for the ability of police and prosecutors to obtain and use confessions against contemporary standards, did the police conduct in a particular case go too far?

And the problem with the standard was that, under the totality-of-the-circumstances, everything is relevant and nothing is determinative. There --

QUESTION: And that standard wasn't necessarily detrimental to the defense, was it, because there were

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many approaches that the defense could use to attack the confession.

GENERAL WAXMAN: That is absolutely correct, and that's -- as I said -- I don't -- I doubt I'll have time to explicate this, but one of the benefits that this Court has explained as recently as in Minnick and in Moran of -- for law enforcement and for the administration of justice generally is the provision of rules that are easily applied and understood.

And Mr. Chief Justice, you -- whether the number is 50 or 35, I may not have uncovered them all, but it is true that as always happens when the Court essentially -- thank you.

QUESTION: Thank you, General Waxman.

Mr. Cassell, we'll hear from you.

ORAL ARGUMENT OF PAUL G. CASSELL

AS AMICUS CURIAE SUPPORTING THE JUDGMENT BELOW

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

I'd like to turn immediately to the question that Justice Kennedy posed a moment ago, because I think it goes to the heart of this case. You have asked both of our colleagues on the other side of the room whether the Miranda rights or the Miranda procedures are constitutional requirements, and I think the answer they

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gave was yes, which is what they have to say to win this case.

The difficulty with that answer is, it would require this Court to overrule more than a quarter of a century of jurisprudence. To turn, for example, to this Court's holding in Oregon v. Elstad, this Court refused to apply the fruit-of-the-poisonous-tree doctrine, and the reason it gave was that a simple failure to administer Miranda warnings is not, in itself, a violation of the Fifth Amendment.

Justice O'Connor's opinion for the Court went on to say that the Miranda rule may be triggered even in the absence of a Fifth Amendment violation, and it's important to understand what the holding in that case was. The holding there was that there was no reason to suppress the fruit of a non-Mirandized statement that is derivative evidence, and the reason this Court gave was, and again I am quoting, there was no actual infringement of the suspect's constitutional rights.

QUESTION: Well, Mr. Cassell, I think you can point to other cases, too, including one which I authored, Michigan v. Tucker, that refers to it as a prophylactic rule, but here we're kind of faced with a conundrum. If the rule can be applied to State courts, as it was in Miranda, how can it be that it doesn't originate in the

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Constitution?

MR. CASSELL: Well, we think it certainly relates to the Constitution.

QUESTION: But I mean, what does relates -- does that mean something different than arises out of, or stems from?

MR. CASSELL: Well, it stems from -- the point -- the way that we would describe the Miranda procedures is this. They represented this Court's provisional, interim judgment about how to go about enforcing Fifth Amendment rights. Now --

QUESTION: Well, is it like the Anders requirements, for example, where we imposed on States and others certain requirements on appellate review?

MR. CASSELL: Yes. We think it's very similar to the Anders requirement, which just 3 months ago this Court concluded could be superseded, and I think the term overruled has been used today. That was not a situation where California --

QUESTION: By an adequate alternative procedure.

MR. CASSELL: That's right.

QUESTION: So in your view does this case boil down, as I take it the Solicitor General also expresses, the notion that we have to determine whether section 3501 is an adequate alternative?

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MR. CASSELL: Well, like the Solicitor General, we have three arguments as well.

(Laughter.)

MR. CASSELL: That is our second argument. Our first -- there are so many good arguments for section 3501. I hope I can get them all in here. Their first argument is simply that it is this provisional interim judgment that the Court made that must then recede when the Nation's elected representatives, Congress, have acted.

QUESTION: Mr. Cassell, before you proceed with that, may I ask what you do -- we are dealing with -- Miranda is the bedrock decision, and the Court repeatedly said, unless we are shown other procedures which are at least as effective, effective to do what? Effective to apprise accused persons of their right of silence in assuring, and in assuring a continuous opportunity to exercise it.

I think the Miranda decision said that three times, that what was being protected by these preventative rules was the right of the accused person to know that he could remain silent and would have an opportunity to exercise that right.

MR. CASSELL: You've certainly accurately quoted the opinion, Justice Ginsburg. However, that sentence,

those sentences that you refer to were not at all necessary to the holding in this Court's decision in Miranda, and just --

QUESTION: I thought Miranda said the police station, station house, is a Fifth Amendment venue in the same way a court is, in the same way a legislative committee that's inquiring into something that may lead to a criminal indictment, and in those settings -- take the court, whether it's the first appearance before a magistrate, whether it's a guilty plea, that's written right into the rules of what the court must advise the defendant, the right to remain silent, that statements can be used against him, the right to counsel.

Whenever a defendant is before a judge or a magistrate the defendant will be of course given that information, and I thought that Miranda said, well, the police station is also a Fifth Amendment venue in that way.

MR. CASSELL: When we talk about court procedures, we're talking about a different stage in the criminal justice process. The Government has shifted from investigating a crime to now adjudicating it in court, and so that's why the Sixth Amendment procedures --

QUESTION: I don't -- the initial presentation before a magistrate, there's no trial yet. That's much

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further down the line. But isn't that what the magistrate has to say to any defendant brought before the magistrate?

MR. CASSELL: There are certainly varying procedures around the country, and that is one of the approaches that's taken, but again, that is the point at which the Sixth Amendment rights attach. That is when the Government has formally initiated charges against a suspect.

So to go back to the Fifth Amendment setting --

QUESTION: But I thought what Miranda's whole point was, that we're going to treat the station house as that kind of forum, or perhaps you can tell me, because I really don't know, what is done by a legislative investigating committtee when they are investigating something that could lead to the criminal prosecution of certain witnesses. Do legislative committees inform witnesses before them of their rights?

MR. CASSELL: I've testified before Congress and I -- on Miranda, and I actually did not get my rights to remain silent --

(Laughter.)

MR. CASSELL: -- when I testified.

QUESTION: I don't think --

MR. CASSELL: So my personal experience is no.

QUESTION: I doubt that you were in any jeopardy

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at all of a criminal prosecution.

MR. CASSELL: Actually, there was a death penalty hearing where I was sworn to tell the truth, but there were no warnings given to me at that time.

I think the relevant precedent here, Justice Ginsburg, is Minnesota v. Murphy, involving a parole officer who met with a suspect, and this Court concluded that the general Fifth Amendment rule is that no warnings or waivers need to be administered, that the Fifth Amendment is a right someone can assert by refusing to make --

QUESTION: Because there, wasn't it the parole officer had a relationship, kind of a caring, fatherly relationship with the -- as distinguished from the police encounter?

MR. CASSELL: I don't think -- the parole officer in that case was asking Mr. Murphy whether he had committed a homicide, so I don't think it was a caring sort of relationship there and, indeed, those statements were used against Mr. Murphy later in a prosecution -- for --

QUESTION: Well, I think you -- the parole officer is supposed to be there to help rehabilitate the person. The police are trying to find out if a crime was committed, and who committed it. The settings are not the

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same, are they?

MR. CASSELL: We're not saying that they're exactly the same, but we are saying that this Court said, and I believe this is a paraphrase of the Court's holding in Murphy, that the general Fifth Amendment rule is that warnings and waivers are not required.

QUESTION: Mr. Cassell, could I go back to what I think was the kernel of Justice Ginsburg's original question, and that was, she stated an understanding of Miranda which is my understanding, too, and that was that the experience with a system based purely on inquiries into voluntariness had been sufficiently unsatisfactory that the Court said in Miranda, we are going to go to a somewhat different system which we think will produce better results.

The justification for going to that system is that we understand that the Fifth Amendment has an application in the station house as well as in the courtroom. Because it does, we are going to go from a system that inquires solely into voluntariness as a matter of fact, but to a system which inquires in the first instance about knowing waiver of Fifth Amendment rights and we accept, the Court said, the proposition that there may be other ways to do this. We would accept the possibility of equivalents.

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But I think -- and this is where I go back to Justice Ginsburg's question. I understood, when the Court talked about equivalents, that it was talking about equivalents to this knowing waiver kind of system, and the problem that we have with the statute here is that it seems to go from the necessity of a knowing wiaver system, when the statement is to be used in a case in chief, back to a voluntariness system, and that does not seem to be an equivalent, either in fact or in law, as Miranda was using it. That's the problem I have with the case.

MR. CASSELL: Well, I think the point that we would emphasize, Justice Souter, is this. There's no question today of going back to the voluntariness test. We're already there, and the record in this case demonstrates that.

As soon as the district court judge concluded that Miranda warnings had not been given to Mr. Dickerson, the next order of business became the voluntariness inquiry.

QUESTION: Voluntariness system alone.

MR. CASSELL: That's right.

QUESTION: That's right, and the statute goes back to, I guess, a voluntariness system alone.

MR. CASSELL: That's not the way -- that's our second argument. Now, maybe I should turn to that.

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QUESTION: I've given you a golden opportunity.

QUESTION: I thought your first point was, even if it did, it contradicts nothing but dicta in Miranda and not the holding of Miranda.

MR. CASSELL: Absolutely correct.

QUESTION: But that's exactly the point which I think Justice Ginsburg and Justice Souter were getting at.

Justice Ginsburg quoted one sentence of Miranda. It has to be at least as effective as what? It has to be at least as effective as probably words that I think probably 2 billion people throghout the world know.

He must be warned, prior to any questioning, that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him. All right?

Now, that's a hallmark of American justice in the last -- 30 years?

MR. CASSELL: Thirty-four years.

QUESTION: And at the end of that, and this is what I want you to focus on, the Court is asked, why don't you let the States or rule-making -- other rule-making bodies figure out how to enforce the Fifth Amendment, and these are the words ending the opinion, not some obscure

phrase buried in dicta:

Where rights secured by the Constitution are involved, there can be no rule-making or legislation that would abrogate them, end of the body of the opinion.

Now, given that phrase, and those rights set forth with clarity, what is your response to Justice Ginsburg's question, namely, that Miranda itself says that the phrase that I read, or the equivalent, is demanded by the Constitution?

MR. CASSELL: Well, there are a number of responses, Justice Breyer. First of all, you quoted words that have become very well-known around the world. Many of those same words appear in the statute that is before the Court today, and you could have similarly read sections 3501(b)(3) and (4) and (5), that talk very specifically about whether a suspect was advised of certain rights, or had counsel present.

QUESTION: But they do not require it. They consider it simply as a factor, and whatever else may be clear, it is clear that that is not the equivalent to which Miranda referred, as Justice Breyer just quoted it.

QUESTION: Is that your argument, though? I mean, one argument would be, those words are the equivalent.

QUESTION: One at a time.

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MR. CASSELL: If I could answer Justice Souter's questions -- question first, and then, Justice Breyer, I would be glad to answer your question as well.

Justice Souter, our position is this, that the section -- section 3501 enumerated factors give very clear incentives to law enforcement agents to deliver warnings. In fact, the Government's brief has --

QUESTION: Incentive is not required.

MR. CASSELL: There is certainly a difference.

QUESTION: You bet.

MR. CASSELL: But the fact of the matter is that General Waxman has represented to this Court that Federal agencies will continue to deliver Miranda warnings should --

QUESTION: No, but could I ask just one question. I hate to complicate it, but I think I can perhaps simplify it. The key question that I don't think you've -- I want to be sure I understand your position really. Do you contend that the statute complies with the requirement of Miranda, that it could be a substitute adequate procedure, or do you think the statute overrules Miranda?

MR. CASSELL: We think that it provides a substitute adequate --

QUESTION: That is equally adequate to the

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Miranda warnings?

MR. CASSELL: That is adequate. Now, I haven't had an opportunity to lay out in full vision here our position on this, and it is laid out at some length in our brief.

QUESTION: Well, let me ask you, Mr. Cassell, with respect to the quotation Justice Breyer read you, were there any rule-making proceedings before the Court in Miranda?

MR. CASSELL: Absolutely.

QUESTION: So that's dicta, too.

MR. CASSELL: Yes, Mr. Chief Justice, and in fact one of the sentences that has been quoted here begins in a -- or is in the paragraph that begins with the statement, it is impossible for us to foresee the potential alternatives that might be devised by Congress and the States, so --

QUESTION: Could you then -- one quick -- would you state the holding in Miranda, in your own view?

MR. CASSELL: Yes. In the absence of appropriate congressional or legislative action, the following procedures are prerequisites to the admissibility of confessions. Ah, but of course we now have appropriate congressional action.

Justice Souter, to get back to your question

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about equally effective, we know from the experience in the Fourth Circuit in the last year that Federal agents will continue to deliver warnings. The Government has committed that they will continue to deliver warnings.

QUESTION: Oh, I will assume that that is going to be so in most cases. I mean, there are good reasons to continue to deliver the warnings. I think we probably all agree with that.

But I guess I want to come back to the point that we're all addressing in one way or another, and that is, one may say, well, the statement that an equivalent and only an equivalent will do is -- was dictum in Miranda, but I'm not sure that that really gets to the heart of it, because I undertand Miranda to have held and to have explained that the delivery of these warnings and the securing of a knowing waiver is constitutionally necessary to serve the substantive constitutional standards.

If that is so, and if we continue to accept that proposition as so, then it necessarily follows that anything that might substitute for Miranda, assuming that -- the Miranda warnings, assuming that possibility, have got to be an equivalent. So you can say, well, it was dictum for them to say that, because no one was proposing an equivalent, but it seems to me that that

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necessarily follows from the Miranda holding, and it has therefore the same precedential dignity that the basic holding had. Is -- am I wrong in that?

MR. CASSELL: I believe you are, with all respect, Justice Souter.

The language is tied to the part of the Miranda opinion that seems to view custodial questioning as inherently compelling, that is, automatically a violation of the Fifth Amendment, without warnings. There are some passages that can be read that way. There are now 25 years of --

QUESTION: Well, not -- I don't know that it goes so far as to say that it is automatically coercive in the sense that you would automatically draw the conclusion that coercion was involved, but that there was invariably a coercive effect. I think that's what the Court was getting at, don't you?

MR. CASSELL: And in cases such as Elstad, New York v. Quarles, the Chief Justice has mentioned his opinion in Michigan v. Tucker, the Court has clarified whatever ambiguity may reside in some of the passions -- passages of Miranda, that there is no constitutional violation. The phrase --

QUESTION: There is no constitutional violation in the sense that there is no passage in the Constitution

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that says, you have to give these warnings, but those cases, it seems to me, have not overruled or jettisoned the proposition that, in order to get to a constitutionally mandated result with sufficient assurance that the Constitution is being served, we are going to require, as a matter of practical necessity, the giving of these warnings.

MR. CASSELL: Well --

QUESTION: And just number two, we are there -- for that reason we are going to go to a waiver-based, knowing waiver-based system, and I don't think those cases have jettisoned those propositions.

MR. CASSELL: Well, I would urge the Court to read carefully, then, the opinion in New York v. Quarles, which we think takes a different view.

Again, just to quote one passage from the opinion, the Court held there is, quote, no constitutional imperative requiring the exclusion in that case of a statement that was taken in custodial questioning that was not in any way preceded by a Miranda warning or a Miranda waiver.

QUESTION: Mr. Cassell, do you see the Miranda holding, or ruling, or whatever you want to call it, as differently based than the exclusionary rule under Mapp v. Ohio?

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MR. CASSELL: Yes, Mr. Chief Justice.

QUESTION: What is that difference?

MR. CASSELL: The exclusionary rule applies when there has been an actual constitutional violation of the defendant's rights. Section 3501 applies an exclusionary rule whenever there has been an actual constitutional violation of the defendant's rights. If Mr. Dickerson could establish that he had been compelled, if his statement was involuntary, the evidence would be automatically excluded, but this case comes before this Court with a district court finding that his statement was voluntary.

That was not disturbed on appeal, is not challenged here and, under New York v. Quarles, Oregon v. Elstad, Harris v. New York, and a number of other cases, there is then no abridgement of a defendant's constitutional rights.

QUESTION: Mr. Cassell --

QUESTION: Mr. Cassell, the point was made earlier that under 3501 you suggested there would be an incentive for the police to continue to give the Miranda warnings, and the point was made that, however, they would not be required. Well, they really aren't required under Miranda. I mean, what happens if you don't give them under Miranda?

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MR. CASSELL: The --

QUESTION: The confession will be excluded, so it's really just the same thing. You have an incentive to give them.

MR. CASSELL: The --

QUESTION: Unless you think that you can have a cause of action against the policeman who fails to give -- what is your view of that?

MR. CASSELL: I believe nine courts of appeals around the country have ruled on that question and there's an ambiguous opinion from the Ninth Circuit, but every other court of appeals that has addressed precisely the hypothetical you have given has concluded that there is no Bivens action, for example, or 1983 action in a State seting because to violate the Miranda procedures is in no way a violation of the Constitution.

QUESTION: But you accept the proposition that they are required if you want to get the statement in in the case in chief?

MR. CASSELL: Not as a matter of constitutional law, and that is the --

QUESTION: They are required under Miranda if you want to get the statement in as part of your case in chief?

MR. CASSELL: That is part of the Miranda

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procedures that this Court announced --

QUESTION: Well, that's the holding of Miranda, isn't it?

MR. CASSELL: That's the, as we view it, the provisional, interim judgment that this Court announced, and then invited Congress and the States to consider other approaches. In section 3501, Congress has taken a careful look at the issue --

QUESTION: Yes, but absent the conclusion from this Court that another approach provides the equivalence, the Miranda warning and the knowing waiver is a necessity if the statement is to be admitted as part of the State's case in chief to prove guilt. You accept that proposition, I take it?

MR. CASSELL: We accept the proposition that the alternative has to be adequate to safeguard constitutional rights. It doesn't have to match up --

QUESTION: But that's not my question. My question --

MR. CASSELL: I'm sorry.

QUESTION: -- assumed that, in the absence of something that was found to be equivalent, the warnings and the knowing waiver are necessities for admissibility if the statement is to be used in the case in chief to prove guilt, and you -- I -- you do accept that

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proposition, don't you?

MR. CASSELL: Well, I think I would phrase it slightly differently, Justice Souter. We agree that this Court must announce its decision on whether there is an adequate protection for constitutional rights. Smith v. Robbins we think is directly on point here.

Just a few months ago this Court said, we address not what is prudent or appropriate, but what is constitutionally compelled, and so you must look at section 3501 and see if it secures a defendant's Fifth Amendment rights, not whether it matches --

QUESTION: Well --

MR. CASSELL: -- up to every feature of Miranda.

QUESTION: -- I understand your point. I think you don't want to answer the question, and I will take that as the --

MR. CASSELL: No, I'm sorry, Justice Souter, I very much want to answer the question.

QUESTION: My question is just simply an understanding of what Miranda held --

MR. CASSELL: Our --

QUESTION: -- and it goes to the question of what is the necessity, and my point is that Miranda held, as I understand it, that in the absence of a conclusion that there was an -- a constitutionally equivalent

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procedure, the warnings and finding of knowing waiver are in fact necessities for the admission of the statement to prove guilt. You --

MR. CASSELL: We would --

QUESTION: You do accept that, that that's what Miranda held, don't you?

MR. CASSELL: I would phrase it slightly differently. Again, to repeat my answer to Justice Stevens, which I hope very much it answers your question -- I very much want to answer it, but I don't believe I can accept your formulation of the holding of Miranda, which is why --

QUESTION: What is your formulation?

MR. CASSELL: My formulation is this. In the absence of congressional or legislative action, the following require -- the following measures are prerequisites to the admissibilitiy of confessions.

QUESTION: May I just interrupt you, because I do want to clarify just exactly what your position is. Would it not be more accurate to say, in the absence of congressional or a legislative holding that satisfies the requirement that these warnings satisfy it, isn't that what they said?

MR. CASSELL: Again, I would phrase it slightly differently, Justice Stevens. They have to satisfy the

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Fifth Amendment.

QUESTION: Correct.

MR. CASSELL: They don't have to match up to every single jot and jiggle in the Miranda warning.

QUESTION: Absolutely right.

QUESTION: Well, Miranda said they did. You have to acknowledge that Miranda said they did.

MR. CASSELL: There is a sentence in Miranda which we believe has been clarified in cases like New York v. Quarles to make it clear that there is no constitutional imperative requiring the exclusion of unwarned statements.

QUESTION: Let me just finish up, because I'm really -- I'm trying to understand your position as accurately as I can. Is it your view that 3501 was an effort to comply with the Miranda suggestion that equivalent standards can be enacted by law, or is it your view that 3501 was intended to overrule Miranda?

MR. CASSELL: It was not intended to overrule Miranda to get to your second question directly. It was --

QUESTION: You don't think so, that Senator McClellan and Senator Ervin at that time had that in mind at all?

MR. CASSELL: Well, I certainly -- I don't know

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if this Court has ever seen posturing taking place in the course of a criminal justice legislation. I think there was certainly some firey statements made on the floor of the Congress, but the question is not what Congress --

QUESTION: I don't think there's anything in that legislative history that suggests they thought they were providing a substitute for the guarantees that Miranda provided, that rather, they -- it seems to me they said they wanted to go back to the old voluntariness test.

MR. CASSELL: No, Justice Stevens. We believe that there actually is direct language. To the extent one wants to look at legislative history, we would direct the Court to the Senate report number 1097. Congress concluded, or the Judiciary Committee concluded:

The committee is of the view that the legislation proposed would be an effective way of protecting the rights of the individual. The committee also feels the constitutional rights of defendants in criminal cases would be fully protected and respected by the safeguards in this proposed legislation, and we haven't had a chance to --

QUESTION: But that certainly doesn't say this is an effort to do what Miranda suggested we do.

MR. CASSELL: Well --

QUESTION: That's a statement that can be read

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as saying, we think Miranda went farther than necessary.

MR. CASSELL: Well, Justice Stevens, the passages that I just quoted follow immediately on the heels of a quotation that I believe was the quotation that Justice Ginsburg read, so the Court looked at that quotation, it then looked at the legislation in front of it, and reached this conclusion.

QUESTION: May I ask you -- you heard one quote from Justice Breyer. I gave you another one. You have restated what you thought was the Miranda holding. Another statement in Miranda: procedural safeguards must be employed to protect the privilege unless other fully effective means are adopted.

Adopted to do what? To notify the person of his right to silence, and to assure that the exercise of the right will be scrupulously honored, the following measures are required, and the Court said, we're not saying that it must be these particular warnings. It said, there might be others, but they had to be adequate substitues, and it seems to me that the one thing that Miranda would not permit, if you are following that decision honestly, is to go back to a totalitarian --

(Laughter.)

QUESTION: -- a totality-of-the-circumstances. We just mix everything up and come out however the

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particular decisionmaker wants to come out.

MR. CASSELL: Justice Ginsburg, we would respectfully suggest that that passage has to be viewed through the lens of 25 years of precedents from this Court, and what that lens reveals is that that statement is not articulating constitutional requirements. It is instead articulating a provisional judgment by this Court as to how Fifth Amendment rights can be enforced.

Congress has now stepped in and provided its judgment as to how to deal with these issues, and we haven't had a chance today to talk about how section 3501 actually goes beyond some of the Miranda features. For example, in 3501(b)(2), it guarantees that a Court will consider whether a suspect knew the nature of the charges against him.

In Colorado v. Spring, this Court said that was not one of the things to be examined under the Miranda doctrine. Under 3501 it now will become one of the factors, and so one of the results of this Court upholding the statute may be that Federal agents will add an additional feature to the Miranda warnings. It may actually inrease the warnings that they deliver.

In addition, there are tort remedies that have expanded over the last 20 or 30 years. The Government reveals in its brief that police training and disciplinary

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procedures are far different today than they were --

QUESTION: You make a wonderful argument on a lot of points, but I think it's going to be tough to convince me that 3501 was intended to expand the protection granted by Miranda --

(Laughter.)

QUESTION: -- which you seem to be arguing.

MR. CASSELL: Well, it's interesting, here we should not be looking at what Congress said. We have to look at what they did, and this is a case where they actually did something that I believe is quite thoughtful. It articulates all of the factors.

What it changes is this, Justice Stevens. The automatic, rigid exclusionary rule of Miranda. Today, if there is some defect in the way the Miranda warnings are delivered, or some failure in this case -- for example, we had a prosecutor who failed to introduce the actual, signed statement of Mr. Dickerson that he had been read his rights. In those sort of technical situations, the Miranda procedures automatically require that voluntary statements be thrown out.

And Congress has directed a more nuanced approach. Congress has directed the Courts to take a look at all of the factors, and it may well be that the failure to warn a suspect means that the statement is involuntary.

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But it may also be, as it was in this case, that the failure to warn did not mean that an involuntary statement was obtained from a suspect.

QUESTION: May I ask you to clarify one answer you gave to the Chief Justice about the distinction between the Fourth Amendment and the self-incrimination Miranda rule? I thought you were taking the position that rights are for this Court to declare, but that remedies are for Congress to determine, and if that's the dichotomy, rights, but how you implement them is ultimately a legislative judgment, then why wouldn't it follow -- why wouldn't your agument apply just as well to the exclusionary rule?

MR. CASSELL: Well, the dichotomy we're trying to draw is between actual violations of the constitutional right. Every time the Fourth Amendment exclusionary rule operates, there has been a judicial finding that the defendant's Fourth Amendment rights have been violated?

QUESTION: But why couldn't the legislature say, fine, but the remedy is, you have a great tort action against the officers who engaged in unlawful search and seizure?

MR. CASSELL: That's a conceivable approach. If the Congress provided a million dollar fine every time a Federal agent --

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QUESTION: You're picking a million dollar because you think that's adequate?

MR. CASSELL: That's clearly adequate. I would think it would be in many ways, certainly for innocent persons whose rights are violated. They get --

QUESTION: So then you're not making the --

QUESTION: Thank you, Mr. Cassell.

MR. CASSELL: Thank you.

QUESTION: Mr. Hundley, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JAMES W. HUNDLEY

ON BEHALF OF THE PETITIONER

MR. HUNDLEY: Thank you, Mr. Chief Justice. Let me, just in response to Mr. Cassell's argument that this was a mere technical violaton by the police officers conducting this investigation, respond that we firmly believe the district court was correct in its factual finding that the police failed to appropriately apprise Mr. Dickerson of its rights that it wasn't simply a mistake by the prosecutor to introduce evidence. There was no evidence.

I'd also like to point out that it is this Court that sets the limits of the Bill of Rights including the Fifth Amendment, not Congress.

In Miranda, this Court set a constitutional

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minimum. Congress didn't attempt to meet that minimum. Rather, they attempted to roll the clock back and reverse it, and reimpose totality-of-the-circumstances. This is the reason section 3501 fails.

I would agree with Justice O'Connor's question that this case boils down to the sufficiency of 3501 -- Does it meet the standards set forth in Miranda? -- and it does not.

QUESTION: In fact, it doesn't --

MR. HUNDLEY: It clearly does not.

QUESTION: It doesn't call for the inadmissibility of an involuntary confession. It just prescribes that it must be admitted if it's voluntary. It doesn't even purport to be exclusionary at all.

MR. HUNDLEY: That's correct. That's correct, and --

QUESTION: I assume the Constitution -- you don't need a statute to exclude an involuntary confession, do you? Doesn't the Fifth Amendment do that on its own?

MR. HUNDLEY: But this Court in Miranda clearly defined that the Fifth Amendment needed additional protections to be fully effective, to be more than a formal --

QUESTION: Not in order to exclude from court a confession that is known to be involuntary. That happens

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automatically with the Fifth Amendment, doesn't it?

MR. HUNDLEY: That's correct. If a warned statement is found to be involuntary, it is excluded, but that is really -- the strength and clarity of the Miranda rule is that it provides guidance for the police, it provides guidance for the courts, and it protects the individual's rights.

That's all I have, Your Honors. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hundley.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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