

Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 11, 1966

RE: Nos. 759, 760, 761 and 584.

Dear Chief:

I am writing out my suggestions addressed to your Miranda opinion with the thought that we might discuss them at your convenience. I feel guilty about the extent of the suggestions but this will be one of the most important opinions of our time and I know that you will want the fullest expression of my views.

I have one major suggestion. It goes to the basic thrust of the approach to be taken. In your very first sentence you state that the root problem is "the role society must assume, consistent with the federal Constitution, in prosecuting individuals for crime." I would suggest that the root issue is "the restraints society must observe, consistent with the federal Constitution, in prosecuting individuals for crime."

OK

You may recall that at the initial conference to select the cases for argument, I offered the following: that the extension of the privilege against the states by Malloy v. Hogan inevitably required that we consider whether police interrogation should be hedged about with procedural safeguards effective to secure the privilege as we defined it in Malloy, namely, "The right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will." 378 U.S. at page 8. This is not the first time the Court has had to consider the imposition of a requirement that the states provide procedural safeguards effective to secure a specific of the Bill of Rights extended against the states. A familiar recent example is in the obscenity area. In Marcus, Quantity of Books and Freedman v. Maryland we held that the states were constitutionally required to provide procedures effective to safeguard non-obscene expression from suppression. In the Fourth Amendment area, our imposition of the exclusionary rule in Mapp v. Ohio is of the same order.

Before Malloy, when the problem was only that of federal interrogation, we fashioned the safeguards ourselves, through the criminal rules and the exercise of our supervisory power. We went

pretty far. McNabb and Mallory not only required warnings of the kind you discuss but required that they be given by a judicial officer. It is plain that these decisions, limited to the federal sphere, were responsive to the same considerations of Fifth Amendment policy that face us now as to the states. Here, however, our powers are more limited. We cannot prescribe rigid rules for the same reason that we did not do so in Freedman v. Maryland: we are justified in policing interrogation practices only to the extent required to prevent denial of the right against compelled self-incrimination as we defined that right in Malloy. I therefore do not think, as your draft seems to suggest, that there is only a single constitutionally required solution to the problems of testimonial compulsion inherent in custodial interrogation. I agree that, largely for the reasons you have stated, all four cases must be reversed for lack of any safeguards against denial of the right. I also agree that warnings and the help of counsel are appropriate. But should we not leave Congress and the States latitude to devise other means (if they can) which might also create an interrogation climate which has the similar effect of preventing the fettering of a person's own will? In other words, these convictions must be

reversed because no safeguards against the success of impermissible techniques of interrogation were present in these cases. It is right that we should say that as long as we adhere to the Malloy test, it is hypocrisy to tolerate procedures which bring about secretly and through the back door the very evils the privilege was intended to prevent.

I agree fully that the opinion must demonstrate, as your draft at pages 9 - 17 does, the dangers necessarily inherent in custodial questioning. But shouldn't that demonstration be made after the opinion first emphasizes that the right defined in Malloy is the right at issue here, and that that right requires a liberal and broadly based approach to its protection and enforcement? The dangers you mention might then be used to show the dangers which inhere in the procedures followed in the particular cases before us, and the difficulties of judicial avoidance of those dangers. We may thus establish that safeguards against those effects are constitutionally required to give substance to the right. The FBI warning in its present form can then be evaluated as providing an example of adequate procedures. But need we say that the States must follow these and no others? Is it not enough that we say that States which do model their procedures on the

FBI approach will stay out of trouble but that the essential constitutional requirement is only that they have some procedures which accomplish the same result. I confess that I can't think of other procedures that will serve the purpose. Yet I think that to allow some latitude accomplishes very desirable results: it will make it very difficult to criticize our action as outside the scope of judicial responsibility and authority, and like Brown v. Board of Education, it has an appeal to the conscience of our society, gaining on that account social acceptance of its necessity. I repeat that what we must get the public to understand is that the courts are duty bound to satisfy themselves that responses to custodial questioning are indeed the product of the person's "unfettered choice." Thus I would not think we should suggest, as especially at page 46 your opinion seems to suggest, that the Constitution requires a particular mode of assuring that result. All that the Constitution requires is that the procedures, federal or state, must embody safeguards which are effective. This, of course, is only what we did in Freedman v. Maryland in another context.

Incidentally, I think the approach I suggest may make your task on the retroactivity question considerably easier. We have already

established in Tehan that the Fifth Amendment coverage of State criminal actions goes back no further than Malloy v. Hogan. By resting these reversals squarely on the failure to meet the demands of that case, and avoiding mention of the "right to counsel" as such, non-retroactivity past the Malloy date would be assured, and could readily be demonstrated. This approach would also, I think, be more difficult for the dissenters to answer.

Having gone this far, I'll take the liberty of outlining what I conceive to be the structure of an opinion which would incorporate this approach.

1. Introduction. Much the same as your draft, altered however to present the problem in terms of the facts of the four cases we are considering; using those facts to show how the interrogation process may deny the person the right "to speak in the unfettered exercise of his own will"; how, therefore, these processes are inconsistent with the premises of our adversary system; and why in consequence it is necessary that the procedures embody safeguards to prevent that result. Much of what now constitutes pages 46 and thereafter of your draft could be used.

76

2. This would discuss the scope of the privilege emphasizing the Malloy definition, its derivation from Bram v. United States, 168 U.S. 532 (even a little bit of compulsion is too much) and the discussion from page 17 on of your draft (bringing forward, perhaps, the Brandeis quote from Olmsted now at page 36.) This would highlight the historical role of the privilege and the tradition of broad interpretation of the constitutional protection and its importance, in a democracy, of personal dignity and protection of the individual against the state.

3. This section would take up the discussion at pages 6 - 17 of your draft highlighting the threats presented by custodial interrogation to these traditions and rights. Reference might also be made here to the McNabb-Mallory line of cases to show both that this Court has continuously recognized both the dangers of interrogation and the appropriateness of prophylaxis in the face of such great threats, see 318 U.S. at 343-344; 354 U.S. at 455. 456.

4. This would be largely Part IV of your draft, discussing the supposed advantages or need of interrogation and demonstrating that they do not outweigh the risks to the privilege. If interrogation is to be employed at all it may only be under procedures which keep the

risks under control from the beginning of the interrogation process until the end. If substantial potential for compulsion remains, any resulting statement must be excluded.

5. Here the holding may be applied to the four cases perhaps as follows:

A. Westover: (1) ordinarily in federal prosecutions, McNabb-Mallory applies, and there may be no interrogation after arrest unless a judicial magistrate has warned the accused of his rights and has proffered counsel to him. But in circumstances where there is a form of "custody" not constituting "arrest" for the purposes of Rule 5(a), the privilege must be protected in other ways if interrogation is to occur. (2) Where, as here, protection is sought to be afforded through a warning, it is insufficient to offset the dangers of interrogation unless the warning includes a full statement of right to the assistance of counsel and scrupulous observance of the rights thus announced. pp. 27-30. (3) The adequacy of the warning in this case is in any event questionable, given the previous period of unwarned interrogation at the hands of state officers, which may well have yielded federally incriminating information. (4) Waiver cannot be found in these circumstances.

B. Stewart: California has, properly and courageously, anticipated the necessity for proper procedures in requiring affirmative safeguards against compulsion where the State seeks to interrogate. Its holding certainly does not exceed constitutionally required standards and therefore no substantial federal question is presented by the petition.

C. Miranda and Vignera: both records show that no adequate safeguards of any kind were included in the procedures employed and that waiver may not be found.

6. Summation. To secure the person the guarantee that anything he says shall be spoken "in the unfettered exercise of his own will", custodial interrogation must be conducted under safeguards appropriate to secure this result. The line between seeking information and compelling it must be scrupulously observed. Since police interrogation, as presently practiced, carries a substantial risk of testimonial compulsion and indeed is actually now structured to accomplish this overbearing effect, the Constitution requires that both federal and state governments must incorporate appropriate safeguarding procedures in their interrogation practices. And while no precise safeguards are required, none will be deemed sufficient if any less effective than those provided by full warning of rights to silence and counsel, scrupulously recorded and observed.

I turn now to some more specific suggestions addressed to your draft.

1. Must we not answer the argument, perhaps in a footnote, that the judgment in California v. Stewart is not a final judgment? Hugo has dealt with a similar contention in his just circulated Mills v. Alabama.

OK

2. Page 1. You here introduce the concept of "custodial police interrogation." This is frequently referred to throughout the opinion, and also appears in what seem to be alternate forms: "in custody" (33), "incommunicado" (6, 10), and "deprived of his freedom of action" (34, 35). Isn't it necessary to give a precise definition and show how it differs from the "focus" concept of Massiah and Escobedo, and from the "arrest" concept of Rule 5(a) and McNabb-Mallory? The latter distinction is particularly important, for it is only to the extent that such a distinction exists, that warning by the interrogator can ever suffice in a federal case such as Westover. McNabb-Mallory requires that the warning be judicially given.

Make
Citation

3. Page 2. In this discussion of Escobedo, should there not be mention of two factors stated to be important in the holding of that case: that inquiry had "focussed" on Escobedo (suggestion 2,

supra) and that the police nonetheless sought to elicit confessions? Moreover, should we say more at page 3 than that Escobedo was not an innovation? Is it not inconsistent to say also that it "^{announced} established principles?" At page 28, I think it questionable to state as fact that "the abdication of the constitutional privilege . . . was not made knowingly or competently" or that "the compelling atmosphere . . . caused the defendant to speak." I am not sure I would agree that we there "sought a protective device to dispel the compelling atmosphere of the interrogation." I think it was not that Escobedo's statements were the actual product of compulsion (page 29) so much as that they followed police ~~interference~~ with his attorney-client relationship which led us to act. I wonder if the reference to "fostering reliability", on the same page, is necessary or appropriate; I do not think it is relevant that the statement was true for we have long since abandoned trustworthiness as an element of the privilege.

4. Page 3. Is there an omission from the first sentence of n. 3, as condensed? While I agree that both sides of the debate should be recognized, as you do in this footnote and elsewhere, I wonder if more recognition could not be given those who have argued for the approach we take here. One important role this opinion must serve is to trace

the rights we discuss down to their roots in the American tradition and heritage - to show that whatever disturbance may result from these opinions is traceable to decisions made long before now about the nature of American government and its power. Whatever will serve to drive this point home - for example, Justice Brandeis' magnificent statement which you quote at page 36 - might profitably be aired at an early point.

5. Page 5. Since the question of exculpatory vs. inculpatory statements is not here, would it not be better to say only that "the prosecution may not use any statements stemming from custodial interrogation", and omit your later discussion of this point, at page 33? Also, I would add at lines 6 and 16 of this paragraph a statement of a further condition - that the opportunity for effective exercise of the rights of which he is warned must persist throughout the interrogation process; I am not sure the sentence beginning on line 17 drives that home. (In this respect, however, I would also remark that this rule, frequently stated throughout the opinion, must be squared at some point with the rule recognized in Rogers v. United States, 340 U. S. 367, that the privilege is irrevocably waived, in some circumstances, at least, once the person under questioning begins to incriminate himself. I have no doubt that a successful distinction is possible; indeed, the Court may now be willing to overrule that doctrine. But I think the case must be recognized.)

*Distinction
Rogers*

Another problem which appears for the first time in this summary paragraph is whether "right to silence" means merely a right not to answer questions, or, additionally, a right to control the course of questioning, to the extent of being able to enforce a wish that interrogation cease. You frequently state it is the latter right which is the actual right possessed (e.g., p. 31) - yet that the accused must be told only that he need not answer (e.g., pp. 26, 35). Should he not be told of his full power? More fundamentally, does "right to silence" include in all circumstances a right to call an immediate halt to a course of questioning? Where questioning has been continuing for a while, and an accused indicates he now wishes to stop, have the police no freedom to seek to persuade him, for however brief an interval, to continue? Particularly, if counsel is present, what dangers inhere in allowing the police the prerogative of further questioning and persuasion to test the sincerity of the accused's wish? Where the privilege is claimed at trial, counsel is allowed to "test" it by a course of questioning. Why not in interrogation, so long as counsel's presence assures that choice will not be fettered?

6. Pages 6 - 8. I have some difficulty with the paragraph that spans these pages. I wonder if it is appropriate in this context to

turn police brutality into a racial problem. If anything characterizes the group this opinion concerns it is poverty more than race. I'm also disturbed at the use of the Portelli case. At least as it is presented, won't readers wonder why we denied certiorari in that case (382 U.S. 1009) while these cases were on our calendar? Perhaps it would be enough to say that the case was one where "a potential witness [was] under interrogation for the purpose of securing a statement incriminating a third party, against whom the statement was ultimately used." And would not Williams v. United States, 341 U.S. 97, be a helpful addition to the footnote?

7. Pages 8 - 9. In discussing the need for an "assurance that practices of this nature will be eradicated" and "gap in our knowledge," you evoke the spirit of the McNabb-Mallory line of cases. I've already suggested that I think that these cases must be cited. They offer crucial support for the sort of approach the draft takes.

In general, I find the discussion of interrogation practices, beginning on page 9, compelling to the view we adopt of them. I question, however, whether we should characterize the discussion as a "fairly accurate composite" of actual procedures. What they depict is a disturbing series of professional recommendations on how

to make police questioning more compulsive. But do we really know that the average policeman starts out using any of these techniques? I know that Inbau's influence has been spreading but have the feeling that it is still limited. We might bring down a wave of protest if we attributed a general acceptance of his views to police everywhere.

To the extent these recommended practices are not universally used, one must ask whether custodial interrogation alone, without the use of particular tactics expressly designed to compel, is itself compulsive in the absence of warnings or some other amelioratory measure. It is important to deal with that question because we can deal with tactics intentionally employed for their compulsive effect on their own merits. Any use of such tactics, whether or not warnings are given, would fall within the purview of the Fifth Amendment of its own weight, and any resulting statement could be excluded at trial. The crucial issue is whether interrogation in custody is inherently compulsive even when these tactics, designed to compel, are not employed. That question, I suggest, is not presently answered by your recital, pages 10 - 16, of specially designed, compulsive tactics police may employ; similarly, isn't that basic issue obscured somewhat by your equation, at page 25, of "inherently compelling pressures" with "pressures designed to

undermine." It is only as to the former that the giving of warnings or presence of counsel has any necessary significance, for the latter seem bad in and of themselves.

8. Page 17. I wonder if the statement of history here - particularly the English history contemporary with the adoption of the Bill of Rights - isn't too brief to evoke the broad-base support for our result that you wish. Would the treatment of those events in Boyd v. Counselman v. Hitchcock, as frequently recognized polestars of civil liberties, be of assistance? And see Brown v. Walker, 161 U.S. at 596-597.

9. Page 19. I wonder whether the first word on page 19 ought not be "adversary" rather than "accusatory." I used "accusatory" in Malloy, I know, but I've come around to Abe Fortas' view that the root notion of our criminal procedure is that the state cannot compel the assistance of the accused, because it is his declared adversary; it is the hypocrisy of a system of secret interrogation in the context of a commitment to such an adversary system that we are decrying. Also, under my view of the draft, it is particularly important at this part of the text to make express reference to the sentence holding in Malloy, 378 U.S. at 8, that the right under the Fifth Amendment is a

right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."

10. Page 26. I wonder if we should not omit from footnote 33, the extraneous statement that silence in the face of questioning cannot be adduced in evidence. This has overtones for "silence in the face of accusation" or "silence despite possession of recently stolen goods" and we might want to examine that problem in cases actually involving the point.

You state at page 26 that "warning is an ascertainable fact." How? How may waiver be ascertained? Perhaps it would be best to leave these questions unspoken to. But what in addition to a signed statement that a warning was delivered and rights waived (which we decide to be insufficient in Miranda) is required? What is feasible? reliable?

In the paragraph beginning at the bottom of page 26, you again speak of a warning of a right "to remain silent"; however, the reference seems to be to a warning of a right to call off the interrogation (page 31). Compare point 5 supra. In this regard, incidentally, is it significant that a person says, simply, that he does not want to answer that question, rather than that he does not want to answer

any more questions? I assume in such a circumstance, questioning could continue. Have police a duty to determine which kind of request an accused is making where what he says is ambiguous?

Also, should not mention be made in this paragraph that a significant and commonly recognized function of the warning that "anything said may be used in court" is that it serves as a declaration of war, a reminder that the accused is dealing with an adversary, not a friend; perhaps it's also an indirect hint that he could use an ally or two in the fight; it puts him on guard.

11. Page 27. The first full paragraph on this page goes to my basic suggestion of approach. I question the reliance on the NDAA statement, particularly if the thrust of our analysis should be that our concern is to assure an "unfettered choice" at any given moment during the interrogation. That requires some continuous safeguard or reminder of right. Perhaps it need not be counsel - but there must be some effective reminder, and we do know that counsel will work. The question as I see it is not one of a "right to counsel", words which often appear in the next few pages and evoke the Sixth Amendment, but rather, what is sufficient to assure that a choice made is a free one, under the Fifth Amendment.

12. Page 28. Does this discussion mean, as the California Supreme Court held and the Arizona Supreme Court denied, that the police may not remain completely silent about counsel if an express request for counsel is not made? Or does it mean that even after a warning which includes adequate mention of counsel, the police may not rely on silence as a "waiver" of the right to have counsel's presence and assistance, but must seek an affirmative statement that the suspect does not wish counsel? The former position is clearly correct; the latter more doubtful.

13. Page 31. As already indicated, point 5 supra, I am not persuaded that a wish to remain silent necessarily requires the police to cease questioning. They are forbidden to attempt to overbear the wish, yes. And in some circumstances, distinguishing persuasion from compulsion in this regard may be so hard as to justify our forbidding all further pursuit of the issue. But in other circumstances, for example, if a lawyer is present, this is not at all a necessary consequence. If a lawyer were present, can we really say that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion" - wouldn't that assign to the word "compulsion" a meaning too broad to derive constitutional support?

14. Page 32. Couldn't this discussion be appropriately woven into the discussion of Stewart?

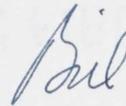
15. Page 35. The summary of holding here omits any mention of, and indeed appears to negate, the concept of a duty to extend Fifth Amendment rights continuously and effectively. Rather than "there must be an opportunity" and "after . . . such opportunity", shouldn't we say "Opportunity to exercise these rights must be continuously and effectively afforded to him. After such warnings have been given, the individual may . . ." Also, note that here, again, the draft speaks only of a right to remain silent, not to suspend interrogation. See point 5 supra.

16. Page 46. If I'm right about the basic premise, won't the full paragraph on this page have to be substantially revised? It seems to suggest that the rules set out in this opinion are constitutionally compelled, and the only constitutional solution. Under my approach Congress and the States would expressly be left free to devise alternative approaches, restrained only by the requirement, derived from Malloy, that any approach, to be sufficient, must effectively assure the unfettered exercise of will.

Similarly, I would not reverse the cases for failure to follow the rules we've just announced, but rather would reverse them for failure

to assure, in any permissible way, the full freedom of choice
Malloy requires.

Sincerely,

A handwritten signature in blue ink that appears to read "Paul". The signature is written in a cursive style with a prominent initial letter.

The Chief Justice.