MR. TAYLOR: Mr. Chief Justice, Members of the Supreme Court:

The State of New York is appearing not only in the present case, the *Miranda* case, but in the ensuing four cases that have been scheduled for consecutive argument in which these problems of the right to the assistance of counsel are raised. I think the State has appeared here as *amicus* on numerous previous occasions when there has been a constitutional question in the general field of criminal procedure. The nature of our interest is stated in the opening pages of our brief, and I do not believe I need to elaborate on that orally.

I should add that I believe the brief has been circulated to the other states, and has been joined by something over half—I think about 27 of the states, as well as Puerto Rico and the Virgin Islands.

I will try to say what I have to say in less than the allotted time. My task of brevity is easier because some of the things I might otherwise say, I think, will be said much better by others, and I will also try to say a few things that I, as I read the briefs, thought no one else is going to say, or at least say in the same manner.

The factor common to all five of these cases is that a confession was received in evidence which was taken when counsel was not present and when there had been no waiver of counsel. And therefore a contention runs commonly through all five of them. That is the one that emerged, I think, most clearly from Mr. Justice Black's question as to whether this is a matter of constitutional dimension under the Fifth Amendment, or for that matter the Sixth, or the due process clause.

MR. JUSTICE BLACK: You said "one thing in common." Is there another thing in common as to where they were when the confessions were made?

MR. TAYLOR: Well, they were all in detention.

MR. JUSTICE BLACK: All what?

MR. TAYLOR: All in a state of detention, yes, sir. Other than that, there is quite a spectrum of circumstances that these cases reveal. The surrounding circumstances are not uniform.

Now, may I just state what the thrust of our position is, very briefly, before indicating likewise its limits and why we are taking this position? Our contention is that insofar as these cases present a constitutional claim that a valid confession cannot be taken unless counsel is present or has been waived, that that claim in constitutional terms in the constitutional dimension is not sound. In other words, Justice Black's question we would answer in the negative. The Fifth Amendment cannot, and should not, be read as requiring counsel to be present at the time the confession is taken. I will come to my reasons for that very presently.

Our secondary position is that if the Court should decide to enunciate a rule of that sort in constitutional terms, or other new rules pertaining to the validity of pre-arrangement confessions, those should not be applied retroactively but should be prospective only.

Now, before speaking in support of those two positions—and I intend to spend most of my time on the first one—may I make clear the limits of our position here and what we are not saying, because I think this is of almost equal importance. We are not taking any position for either affirmance or reversal of any of these five cases. That is because all five of them, as we see it, involve problems—or possible problems—that go beyond the limits of our contention here.

In the *Miranda* case that's just been argued, there is obviously division of opinion about the characteristics of the defendant about whether the warning which Mr. Justice Fortas' questions were directed to was given at a meaningful stage—what the significance of that warning is, in legal terms.

The other five cases involve questions of trial procedure in which we are not presently interested. They also, two of them, involve a long period of detention from which counsel are making arguments derived from the *McNabb-Mallory* principles. We are not taking a position on those matters and therefore we could not say that in any one of these five cases we are supporting an affirmance of reversal.

Secondly, may I make it quite clear that we are not saying that new rules about requiring counsel to be present when an investigation is taken—when an interrogation is made or a confession taken—we are not saying that such rules are necessarily unwise, without merit. We say that these are not matters of constitutional dimension. But we do not say that they might not be very wise rules to adopt. In fact, we are saying that this whole problem of the assistance of counsel at the pre-arraignment stage can, we think, be more appropriately and perhaps better dealt with in the legislative dimension and in the area of judicial policy, rather than on purely constitutional terms.

Now, of course, insofar as we say there is no constitutional basis here, our position outs against the defendant's. But, as I repeat, we are not making a position against such rules found in other ways, through legislative means, through judicial policy, or otherwise.

Now, may it please the Court, the inclusion of these five cases of one Federal case, the *Westover* case, No. 761, I think underlines this distinction that I have been endeavoring to state, and it also discloses the one respect in which I think our position departs from that taken by the Solicitor General. As a Federal case, this being a confession taken by Federal agents introduced in evidence in a Federal prosecution, I would suppose that the *Westover* case is susceptible of disposition in non-constitutional terms under this Court's Federal supervisory jurisdiction, as enunciated in the *McNabb-Mallory* cases, and that general line of authority.

As I read the Solicitor General's briefs, however, he is saying not only that the Constitution does not raise a requirement of the presence of counsel, but is also saying that such a rule should not be laid down by this Court as a matter of judicial power, the way it was done in *McNabb* and *Mallory.*

Our position does not extend to that second step. We do not take any position, one way or the other, on it. I think it entirely appropriate to say, though, that that would be a dimension in which we would consider this Court might very appropriately deal with the matter.

MR. JUSTICE FORTAS: Can we do that, with respect to the states?

MR. TAYLOR: No, Mr. Justice Fortas. I was pointing out that the *Westover* case brings that out. It's only in the *Westover* case that you can do that.

MR. JUSTICE FORTAS: I understand that. What you're saying is that we might lay down such a rule, some way, somehow, short of a constitutional basis for the Federal Courts, and leave the state courts alone; and that is what it comes down to.

MR. TAYLOR: That's correct. The states are, of course, affected only by the constitutional dimension. The Federal Courts are subject to a broader range of review. I might add that in

New York our own Court of Appeals has noted and acted upon this very distinction between decisions in the constitutional dimensions and decisions in the domain of judicial policy.

MR. JUSTICE FORTAS: What's the difference between this problem, in those terms, and the problem that this Court handled in *Gideon* the problem of the right to counsel?

MR. TAYLOR: Well, if Your Honor is asking what the reasons for drawing the distinction between the trial stage and the pre-trial stage may be—

MR. JUSTICE FORTAS: Yes, in the terms of what you are discussing. In other words, would New York State have taken the position that *Gideon* was wrongly decided?

MR. TAYLOR: Wrongly decided? No. Indeed, in New York State this would be treated, now, as a matter of constitutional requirement. There is no question about that in my mind.

MR. JUSTICE FORTAS: Well, in the Court's mind, General.

[Laughter.]

MR. TAYLOR: That is the pre-arraignment right to counsel. New York State held, prior to *Escobedo,* Mr. Justice Fortas, that where, as in *Escobedo,* there is an inference by the police authorities with the access of counsel to his client, that in the constitutional dimension this was a violation of the defendant's rights.

This case is cited with approval in the *Escobedo* decision. Just last year it went further than that in the Court of Appeals and held that if there is a telephone call from counsel to the police authorities asking that there be no more questioning of the client, that any questioning that takes place after that cannot result in admissible admissions or confessions. But when the further question was raised in a case where counsel arrived at the station while a confession was being taken, the State made the contention that that part of the confession that took place before counsel arrived could be admitted, and not the latter part.

MR. JUSTICE FORTAS: General, I don't want to take any more of your time. I just want to say that I think the problem is whether it's not too late in the day to make that kind of a distinction. I'm asking the question: That is to say, that once this Court has made the rulings that it has made in *Gideon* and *Escobedo,* I wonder if it's still of much avail to argue that we ought to draw the kind of line you are suggesting here?

MR. TAYLOR: Well, that brings me back to Mr. Justice Black's question and its relation to the ones you have been putting, Justice Fortas. And that is, whether there is anything in the Constitution, either in the Sixth Amendment assistance of counsel clause, or in the due process clause, or in the protection against self-incrimination, whether any of those clauses together or conjointly should be read as requiring counsel in the pre-arraignment stage.

Now it seems to me that if one is going to approach that question, one must enunciate a constitutional theory. Are we looking to history and original meaning of the Constitution, or are we looking to contemporary standards? Is the Constitution to be treated as fluid, with different and perhaps more rigorous meanings obtained by common consent at a later time, or are we to look to the original understandings, as it has been called? Now, I suggest, with all respect, Mr. Justice Fortas, that in those terms it's very difficult to support the contentions being made here, and the situation is quite different from *Gideon*—quite different.

I forget the exact number of states that already were furnishing counsel in all criminal trials at the time of *Gideon,* but my recollection is that there wasn't more than a handful that weren't already doing this, as a matter of state practice. Therefore, one had a very broad

practice and consensus in the states on this very point. The same thing, if I may say so, was true in the *Mapp* case, to a lesser extent. In *Mapp* you had about half the states that were applying the exclusionary rule, and the trend was solidly in that direction. California had changed its rule between *Wolf* and *Mapp,* so that in both of these situations you had a solid basis in practical experience in the states—and, really, your decision is not revolutionary, in these terms.

In the dimension that we are now talking about, I don't know of a single state that presently excludes confessions that are taken pre-arraignment in the absence of counsel. I don't think there is such a jurisdiction.

MR. CHIEF JUSTICE WARREN: Isn't it a fact that most of the states have a regulation that the prisoner shall be taken, forthwith, before a magistrate and there advised of his rights, and so forth? And doesn't practically every state in the Union have laws preventing people from being compelled to testify against themselves?

MR. TAYLOR: Indeed that is so, Mr. Chief Justice.

MR. CHIEF JUSTICE WARREN: So in that respect we are not much different from *Gideon,* are we? There are just an awful lot of states that weren't giving counsel up to the time of *Gideon.* They had the rule on it, maybe, but they weren't according counsel to them?

MR. TAYLOR: My understanding is that at the time of *Gideon* all but a very few states were, indeed, according full right of counsel at the trial stage, which is what*Gideon* related to, and what I am saying is that we have no such basis in precedent in the established practice when we are coming to the pre-arraignment stage.

MR. JUSTICE FORTAS: That is not constitutional doctrine. That is something that indicates wisdom. But that's not the same thing as saying that—that's not addressed to the question of the historical interpretation of the Constitution.

MR. TAYLOR: No, indeed. On the basis of historical interpretation, I think one would be hard-put to it to find any basis for finding the right to counsel at the pre-arraignment stage, and much less the right to be furnished counsel if you are indigent, and therefore it seems to me the stronger argument for the claim advanced here is not the historical basis, but the common consensus basis. And it is on that basis that I was suggesting, Mr. Justice Fortas, that we don't have the *Gideon* situation here at all. This Court is being asked to enunciate a rule for which there is no basis in the practice.

MR. JUSTICE FORTAS: I believe that in *Gideon* there was no claim made that the result arrived at in *Gideon* was based on an historical interpretation of the Constitution. It was based upon a reinterpretation of the general constitutional guarantees.

MR. TAYLOR: And for that reinterpretation there was abundant support in what one could see around one, and the commonly accepted view that this was a very desirable and accepted thing. We don't have that here.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE WARREN: General, you haven't gotten to your second point, and there are only two or three minutes until closing time. Would you mind addressing yourself to that on the question of retroactivity?

MR. TAYLOR: On retroactivity? Well actually, Mr. Chief Justice, that point flows, I would think as a matter of logic, from our first proposition—if that be accepted. If, as we see it, this

is not a constitutional claim based on an original understanding, if this is a matter that will be evolved from contemporary practice and changing standards, why then it seems to me that to apply such a rule retroactively presents considerable conceptual difficulties, and I find no conceptual difficulty in a prospective application. The Court has confronted this now twice, in *Linkletter* and *Tehan.* We have set out in our brief the reasons why it seems to us the considerations the Court went on there are applicable here.

I might say, also, that if we are to hope for legislative progress and action within the states by their own courts, why a principle of retroactivity may be a damper on change and improvement, rather than a stimulus to it. This would tend to freeze things and make people reluctant to develop new practices if everything else has to be unwound, going all the way back to the beginning, to make the new practice prevail.