

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RANDALL RICCI, Petitioner v. VILLAGE OF
ARLINGTON HEIGHTS

CASE NO: 97-501 c.l

PLACE: Washington, D.C.

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1 PROCEEDINGS

2 (10:15 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 97-501, Randall Ricci v. The Village of
5 Arlington Heights.

6 Mr. Flaxman.

7 ORAL ARGUMENT OF KENNETH N. FLAXMAN

8 ON BEHALF OF THE PETITIONER

9 MR. FLAXMAN: Mr. Chief Justice, and may it
10 please the Court:

11 The petitioner was arrested because he was
12 operating a business without having first obtained a
13 license from the respondent. Respondent's policy required
14 its police officers to make a full custodial arrest of
15 petitioner.

16 Although we challenge the mandatory nature of
17 respondent's policy, our primary contention is that the
18 Fourth Amendment does not permit a full custodial arrest
19 for a fine-only infraction on the same basis as in felony
20 cases. That is --

21 QUESTION: Mr. Flaxman, what do you mean by full
22 custodial arrest? This man was not handcuffed, he wasn't
23 fingerprinted, he wasn't put in a holding cell.

24 MR. FLAXMAN: What I mean is what is what the
25 Court said in Gustafson v. Florida, that a full custodial

1 arrest is when you're taken into custody, when you can be
2 subjected to an inventory search, when the area around you
3 can be searched, when you're subject to up to 48 hours of
4 post-arrest processing.

5 In this case the arrest was not as severe as it
6 could have been, but I don't think the Court has ever
7 engaged in balancing the severity of an arrest. An arrest
8 is an arrest is an arrest. The Court has never made
9 distinctions between them.

10 QUESTION: Well, if an arrest is an arrest is an
11 arrest, your proposition that the commonlaw traditionally
12 has not allowed arrests for misdemeanors is patently
13 false. We've had several cases up here involving the
14 arrest of motorists.

15 MR. FLAXMAN: In --

16 QUESTION: I mean, arrest means to stop the
17 person.

18 MR. FLAXMAN: Well, in the most recent case --

19 QUESTION: Isn't that a seizure, when they stop
20 a car?

21 MR. FLAXMAN: Well, that's temporary
22 questioning. In Whren the Court was very careful, I
23 think, not to say that Mr. Whren was being arrested. The
24 Court said Mr. Whren was being subject to a temporary stop
25 for questioning, and during that questioning evidence was

1 found.

2 QUESTION: Well, in your case do you think --

3 QUESTION: You appeal to the common law. Do you
4 think the common law makes that distinction between a
5 seizure that is an arrest in the technical sense that
6 you're telling us and the seizure that is not an arrest in
7 that technical sense?

8 MR. FLAXMAN: Yes. I think the nightwalker
9 statutes, allowing detention of suspicious people, is the
10 detention for investigation that is -- survives today in
11 Terry v. Ohio, but the common law I think was very, very
12 clear that an arrest as the way of initiating a
13 prosecution was reserved for felony cases or for nonfelony
14 cases where there was breach of the peace committed in the
15 officer's presence.

16 QUESTION: So you say the nightwalker statute
17 was not an exception, then, to the misdemeanor --

18 MR. FLAXMAN: It was not an arrest provision.
19 It was a detention provision, an investigative stop
20 provision.

21 QUESTION: Well, in your case, in the case we
22 have before us, suppose the police officer did what you
23 say he should do and told the man, now you're going to
24 have to come down and I'm going to give you a citation,
25 and the fellow said, I'm not interested, and started to

1 walk away. Could the officer hold him long enough to fill
2 out the citation?

3 MR. FLAXMAN: Oh, if -- yes. If --

4 QUESTION: Well, then an arrest is an arrest is
5 an arrest.

6 MR. FLAXMAN: Well, no. If a person refuses to
7 accept a field citation, or flouts the officer's
8 authority, or continues to jaywalk, or continues to
9 litter, or continues to deface public property --

10 QUESTION: No. The officer stays stop, I'm
11 going to write you out a citation, and then he fumbles
12 with his book and so forth. Isn't that an arrest?

13 MR. FLAXMAN: That's not an arrest. He has --
14 that's a detention for giving him the citation, and in the
15 situation where the person refuses to cooperate with the
16 officer who's writing the citation, then the person
17 traditionally has been subject to arrest for not
18 cooperating with the officer.

19 QUESTION: Of course, the Fourth Amendment
20 doesn't address arrest. It addresses seizures, and both
21 of them are seizures.

22 MR. FLAXMAN: Well, the Court has differentiated
23 between seizures which are arrests and seizures which are
24 temporary detentions for investigation like of luggage, or
25 of --

1 QUESTION: Like a what?

2 MR. FLAXMAN: Like of luggage, or a stop of a
3 person for questioning at the scene of a motor vehicle
4 incident.

5 Getting back to Whren, the Court was not there
6 talking about a full custodial arrest. The Court was
7 talking about a detention, a stop to investigate, which is
8 not --

9 QUESTION: Well, you -- but I thought you
10 replied to Justice Ginsburg's question a few minutes ago
11 that the Court has never distinguished between kinds of
12 arrests, and now you're distinguishing between them.

13 MR. FLAXMAN: Well, Whren was not an arrest, is
14 what our point is. Whren did not rise to that level.
15 Whren was a detention for --

16 QUESTION: Okay. Well, what is the significance
17 of the term arrest in Fourth Amendment connotation? As
18 Justice Scalia says, the Fourth Amendment doesn't talk
19 about arrest.

20 MR. FLAXMAN: It talks about unreasonable
21 seizures of people. When somebody is arrested they're
22 taken into custody. They're subject to all of the
23 post-arrest processing that the Court has approved.

24 QUESTION: Well, but how do you know that
25 they're subject to all the post-arrest processing. How do

1 you know they're not simply subject to what they were in
2 fact subjected to?

3 MR. FLAXMAN: Well, when somebody's taken to the
4 police station the Court has uniformly held that that's an
5 arrest situation.

6 In Berkemer, which was the motorist stop with
7 Miranda warnings, the Court said you're not entitled to
8 Miranda warnings when you've been stopped and we're
9 investigating, but once you're in custody, you are
10 entitled to Miranda warnings, which is what happened to
11 the petitioner in this case. He wasn't just brought to
12 city hall to buy a license. He was brought and locked in
13 a room, and --

14 QUESTION: Well, the distinction you're making
15 is the distinction between simply stopping and keeping
16 someone basically in the vicinity of the stop, and on the
17 other hand taking the person away, as to the police
18 station. Is that where you draw the line?

19 MR. FLAXMAN: That's correct, and we don't
20 have --

21 QUESTION: Taking them into custody, I suppose.

22 MR. FLAXMAN: Well, I --

23 QUESTION: I suppose that you'd say if the
24 officer told the person, you are under arrest, you'd say
25 that that was an arrest even if --

1 MR. FLAXMAN: That's true, but once you're under
2 arrest you don't stay at the scene. You're taken away to
3 someplace else for processing.

4 QUESTION: Suppose the door weren't locked.
5 Suppose the police said, we want a bond because the
6 liability here could run into several thousands,
7 considering how long you operated without a license, so
8 we're going to take you in because we have no facilities
9 to arrange for the bond in your workplace, and we'll put
10 you in a waiting room and we'll see where you are but we
11 won't lock the door.

12 MR. FLAXMAN: Well, if Mr. Ricci was free to
13 leave, then he would not have been under arrest.

14 But getting back to the bond question, the court
15 of appeals discovered that aspect of what they believed
16 the Village's policy was on their own. The Village had
17 never urged that Mr. Ricci was facing more than a
18 potential \$500 fine.

19 The officers who arrested Mr. Ricci knew that
20 what was going to happen was that he would get a business
21 license and, in fact, we know that the license was secured
22 while he was under arrest and in custody.

23 He wasn't facing this gigantic fine. He was
24 facing the annoyance and the humiliation of being
25 arrested, but he wasn't facing -- there wasn't the

1 realistic expectation that he was facing a fine.

2 In those situations where there is a realistic
3 expectation that someone is facing a huge fine and might
4 not come to court, the officer should get a warrant.

5 That's a tradition --

6 QUESTION: If in this case the officer had
7 gotten a warrant, then everything would have been fine.
8 Is that --

9 MR. FLAXMAN: We would not be challenging the
10 municipality's policy. There would be a question -- I
11 don't know how it could be raised, about whether a judge
12 has the authority to issue a warrant, but I think
13 traditionally and at common law judges could issue
14 warrants for minor offenses. We have that in the --

15 QUESTION: Is there a question about whether the
16 police officer in a case like this, an infraction of an
17 ordinance, could have gotten a warrant?

18 MR. FLAXMAN: There's no question there are
19 Illinois cases approving the obtaining of warrants to make
20 arrests for minor offenses, and --

21 QUESTION: So it's not the idea that this is
22 such a minor thing that somebody shouldn't be in custody.
23 You say he could be in custody as long as there's a
24 warrant.

25 MR. FLAXMAN: Well, but in order to get a

1 warrant in Illinois the officer, whoever applied for a
2 warrant has to make a showing not only that there's a
3 violation of the law but that the person will not obey a
4 summons, or will not obey a citation. There's some
5 likelihood that the person will flee unless they're
6 arrested.

7 And that's absolutely not present in this case,
8 where the officers knew for 2 days that Mr. Ricci was
9 operating his business and that he appeared not to have a
10 license.

11 QUESTION: Well, what if Illinois law were
12 otherwise and a warrant was obtainable on precisely the
13 showing that the police had here. Would -- do you think
14 that would violate the Fourth Amendment?

15 MR. FLAXMAN: No. I think that would be
16 consistent with the common law history of specific
17 warrants for specific offenses, even for minor offenses.

18 QUESTION: But it doesn't make sense to say -- I
19 thought your objection was that there was no good reason
20 for taking this person down to the station.

21 Now you're telling us it doesn't matter if
22 there's any good reason, so long as you get a warrant, and
23 a warrant doesn't -- you don't need a good reason to get a
24 warrant.

25 MR. FLAXMAN: Well --

1 QUESTION: I would have thought your position
2 would be, you need a good reason to get a warrant, too.

3 MR. FLAXMAN: Well, I think a judge looking at a
4 warrant application in this case would say, why do you
5 want to arrest this man, give him -- issue a summons.

6 QUESTION: He doesn't have to say that. You
7 just told the Chief Justice he doesn't have to say that.

8 MR. FLAXMAN: Oh, he doesn't have to say that,
9 but I think that --

10 QUESTION: So you're willing -- so long as a
11 warrant issues, it doesn't matter what the conditions for
12 the warrant are.

13 MR. FLAXMAN: Well, I think the Court has
14 traditionally respected the warrant as legitimizing a
15 seizure.

16 QUESTION: Oh, we've also traditionally required
17 a probable cause for a warrant to be a proper warrant.

18 MR. FLAXMAN: Well, there's no disagreement in
19 this case that there was probable cause to believe that
20 Mr. Ricci did not have a business license. The question
21 is whether the officers without a warrant --

22 QUESTION: Yes, but it was probable cause of an
23 arrestable offense, is the probable cause that we'd
24 normally have.

25 MR. FLAXMAN: That's exactly the position that

1 we're advocating here, but that is not what the court of
2 appeals said, and that's not what some of the State courts
3 have said, that if there's any kind of violation then
4 police officers without a warrant can go and arrest
5 someone for littering.

6 QUESTION: What about -- what's a misdemeanor?

7 MR. FLAXMAN: A misdemeanor is an offense
8 punishable by incarceration.

9 QUESTION: It's not in Massachusetts.
10 Massachusetts defines misdemeanor in terms -- and felony
11 in terms of where you can be incarcerated. If you're
12 incarcerated in State prison, then it's a felony. If it's
13 not incarcerated in a State prison, it's not a felony.

14 I've never been able to figure out -- you'd have
15 to go through the statute books, decide where you have to
16 go to Concord, where you'd have to go to Walpole, where
17 you could be imprisoned in a different place.

18 I mean, my point is every State has a different
19 definition.

20 MR. FLAXMAN: Every State has a different
21 definition of --

22 QUESTION: And Massachusetts is really
23 complicated, so I just realized you can't tell me what it
24 is in Massachusetts. You don't know.

25 MR. FLAXMAN: I think it's clear -- it's easy to

1 look at the statutes in any State and determine what's a
2 fine-only infraction.

3 QUESTION: Oh, it is? In Massachusetts -- I'll
4 read you the statute. It says -- I mean -- it says what I
5 said it says. It says a felony is -- a crime punishable
6 by imprisonment in the State prison is a felony. All
7 other crimes are misdemeanors.

8 MR. FLAXMAN: But then the question which has
9 been addressed in a number of courts is whether a fine-
10 only infraction is a crime or if it's a civil infraction.

11 QUESTION: Do you take the position that this is
12 a civil infraction?

13 MR. FLAXMAN: Absolutely. It --

14 QUESTION: What's a civil infraction?

15 MR. FLAXMAN: It's something that's punishable
16 by fine only, which is not even the level of --

17 QUESTION: All right. So in other words now --
18 because that's easier. In other words, what you're saying
19 is, since -- I mean, one of the terrible problems is you
20 have 50 States and each has a different definition of
21 misdemeanor and felony, so I didn't know where your rule
22 applies, where it doesn't apply.

23 Now, you say we look to the statute books and we
24 say, you see, if it's punishable by fine only you can't
25 arrest a person even if he's committing the crime, and if

1 it's not punishable by fine only you can.

2 MR. FLAXMAN: Unless the infraction is --
3 involves a breach of the peace, or there's some emergency.

4 QUESTION: Yes, okay. Then I guess a lot of
5 things -- you know, careless driving, reckless driving,
6 false information to a police officer, a fish and game
7 violation -- I bet we went through a lot of those, you
8 know, minor things, I bet we'd find in a lot of States
9 that it's not just fine only, or maybe you've done it, and
10 maybe you know.

11 MR. FLAXMAN: If it's not fine only then our
12 rule doesn't apply.

13 QUESTION: All right. Well then, are we really
14 going to separate the -- what you're trying to do is get
15 the really trivial things from the more important ones,
16 and will a fine-only rule do it?

17 MR. FLAXMAN: Oh, I think it will do it. I
18 think things that are fine only are really, really
19 trivial. I think if we look at -- the -- I mean, the
20 Court has done that with the right to trial by jury with
21 petty offenses.

22 QUESTION: Even fine-only offenses, you say, if
23 they involve a breach of the peace are arrestable.

24 MR. FLAXMAN: That's correct.

25 QUESTION: That comes from the -- the breach of

1 the peace term comes from the common law? And what did it
2 mean at common law?

3 MR. FLAXMAN: It meant a disturbance to public
4 order, that there was some -- some need to -- that the
5 arrest was necessary to preserve order.

6 QUESTION: Oh, I think it doesn't mean that. I
7 think it meant any violation of the law.

8 MR. FLAXMAN: In --

9 QUESTION: That was --

10 MR. FLAXMAN: It mean --

11 QUESTION: Any violation of the King's -- any
12 violation of the law was a violation of the King's peace.

13 MR. FLAXMAN: It meant that in a different
14 context. As it was consistently applied to arrest cases
15 in the common law cases, a breach of the peace meant an
16 affray, that that there was a disorder, an actual disorder
17 or a potential for a future disorder.

18 QUESTION: Well, does it add anything to your
19 position to say that one can arrest in a fine-only case if
20 there is also a breach of the peace, because if there's a
21 breach of the peace in the modern sense, that would be a
22 separate offense in virtually all States, I assume, and it
23 would be committed in the officer's presence and so this
24 issue wouldn't come up.

25 We wouldn't be dealing with a fine-only

1 situation. We would be dealing with somebody who was
2 committing a breach of the peace in the officer's
3 presence, isn't that right?

4 MR. FLAXMAN: That's correct.

5 QUESTION: So you don't need that qualification.
6 What you want to say is --

7 MR. FLAXMAN: It's --

8 QUESTION: -- if all you've got is a fine-only
9 situation, no arrest without a warrant.

10 MR. FLAXMAN: Well, I think it's hypothetically
11 possible to envision, and maybe my opponent can, a
12 fine-only ordinance which involves a breach of the peace
13 for which the officer should be able to arrest where there
14 is no misdemeanor or felony but it involves the same
15 conduct.

16 QUESTION: How about reckless driving?

17 MR. FLAXMAN: Reckless driving involves a breach
18 of the peace.

19 QUESTION: Why?

20 MR. FLAXMAN: Because it --

21 QUESTION: Is it an affray in that sense? An
22 affray always seemed to me to involve more than one
23 person.

24 MR. FLAXMAN: Well, reckless driving is the kind
25 of misconduct that can involve more than one person. I

1 think it depends on what kind of reckless driving we have.
2 We have people drag-racing. That's a different kind of
3 reckless driving, or somebody who's weaving over a yellow
4 line.

5 QUESTION: Well, it seems to me that your
6 criteria are very -- they waver quite a bit.

7 QUESTION: How about parking in a no parking
8 zone?

9 MR. FLAXMAN: That -- you should not be able to
10 be arrested for --

11 QUESTION: What if you think, though, it's an
12 out-of-State vehicle and the driver may not show up for
13 the hearing?

14 MR. FLAXMAN: I think it's still unreasonable to
15 make an arrest. I think we can't -- I don't think it
16 would be reasonable for the municipality to detain that
17 person for it because that person didn't pay the parking
18 ticket. I think that would just --

19 QUESTION: What if he happened to check in at
20 headquarters and found out he had 400 parking tickets that
21 he'd never paid?

22 MR. FLAXMAN: Well, parking -- then the car can
23 be seized and immobilized until he pays the parking
24 ticket, which is the traditional way for dealing with that
25 kind of infraction.

1 QUESTION: Mr. Flaxman, I guess it's clear that
2 the line-drawing is not going to be simple, assuming we
3 draw a line at all. Why do we -- why should we go through
4 this effort? What, as you understand it, is the value
5 that is going to be served by drawing this line and
6 requiring the warrant? What's important to you?

7 MR. FLAXMAN: If there is no line drawn and
8 police officers are free to make arrests for any violation
9 that they observe, then we have gone back, I believe, to
10 giving general warrants to police officers.

11 QUESTION: Why are we giving general warrants?
12 They've simply -- they've got to justify the arrest by
13 virtue of an offense and probable cause to believe the
14 offense was -- had been committed. That's the --

15 MR. FLAXMAN: The general warrant would
16 authorize the officer to make an arrest of anybody that he
17 believed had violated a law, which is --

18 QUESTION: Well, no, that's not so. I mean, if
19 you say -- depending on what you mean by believe, assuming
20 that the normal arrest standard requiring probable cause
21 to believe that an offense had been committed will be
22 applied whether we have a warrant or don't have a warrant.
23 The officer does not have a roving commission to go out
24 and act upon unsupported belief.

25 I don't see how that gets us into a general

1 warrant situation. It gets us into a no-warrant situation
2 where probable cause is nonetheless required.

3 MR. FLAXMAN: But I think the general warrant
4 also involved the officers having some belief that
5 somebody was involved with the wrongdoing, the subject of
6 the warrant.

7 QUESTION: Well, sometimes when they had a
8 general warrant, they could arrest without probable cause,
9 the general warrant was abused. But we're not talking
10 about that situation. We're talking about a situation in
11 which there's no warrant but there is a probable cause
12 requirement, and so on that assumption, what value is
13 going to be served to make it worth the effort to go
14 through this fairly -- seemingly fairly subtle line-
15 drawing exercise.

16 MR. FLAXMAN: Well, I disagree that a fine-only
17 offense is a subtle line-drawing, but I think that the
18 value of limiting the ability of the police to make
19 arrests for fine-only infractions that do not involve a
20 breach of the peace is that it promotes respect for the
21 law, and it avoids the situations where police are using
22 their powers in a unfair manner.

23 QUESTION: I agree that you shouldn't -- I mean,
24 what you've done is, you've picked examples where, I
25 totally agree with you, where it seems silly to have the

1 policeman arrest somebody, but the difficulty for me is,
2 you're asking the Court to draw a line that, while it
3 would win you your case and deal with what we might think
4 of as silly examples, might extend into a lot of other
5 things, and that's what I'm trying to find out.

6 MR. FLAXMAN: Well --

7 QUESTION: Is there anywhere in any of these
8 briefs that anyone has gone through and figured out really
9 what crimes would, in the different States, be encompassed
10 by your rule?

11 Let's take your second rule, which is the fine-
12 only rule. Do I -- how could I find that out? Is there
13 any way for me to find that out, other than, you know, set
14 my law clerk to work and look through 48 -- which you
15 could do as easily as I.

16 MR. FLAXMAN: Well, even if your law clerk went
17 to do that --

18 QUESTION: Yes.

19 MR. FLAXMAN: -- I think it would be almost
20 impossible to ascertain that, and that's not because your
21 clerk isn't --

22 QUESTION: All right, then if we can't ascertain
23 it, then I'd ask you a second question. Is it your rule
24 that if we get the fine-only set of circumstances, and if
25 we look at all those crimes, it's your rule, your idea

1 that the policeman cannot arrest the person without a
2 warrant, assuming no breach of the peace, even if the
3 policeman thinks he's going to run away, never show up.

4 MR. FLAXMAN: No. If -- that's a classic
5 exigent circumstance, but again, fitting into the
6 hypothetical --

7 QUESTION: All right. So then the total rule
8 you want is, you take the fine-only set of crimes, which
9 we're not certain what that includes, and we say the
10 policeman, even though he sees the crime, cannot arrest
11 the person unless, A, breach of the peace or B, run away.

12 Is there a C, or is that the whole thing?

13 MR. FLAXMAN: No, and I think that the criteria
14 for when the police officer should be allowed -- should be
15 able to exercise his or her discretion to make an arrest
16 has been identified by the ALI in the model code, so you
17 can set out --

18 QUESTION: So you really want us to say,
19 constitutionalize --

20 MR. FLAXMAN: Well -- no --

21 QUESTION: -- that six or eight part --

22 MR. FLAXMAN: What I really want the Court to
23 say is that the policy that we have in this case of
24 requiring arrests in all trivial cases is unreasonable,
25 and that unless there is a regulation or a statute or an

1 ordinance which limits the discretion and which says, this
2 is how you may use your discretion to make arrests, that
3 the police can't have the roving commission, the absolute
4 freedom to make arrests in trivial cases.

5 QUESTION: Well, supposing that the Village of
6 Arlington Heights had had a written policy and it
7 permitted an arrest in this case, would that make it any
8 different?

9 MR. FLAXMAN: Well, if they had --

10 QUESTION: Would it make it any different?

11 MR. FLAXMAN: It depends on what the policy was.
12 If they had Chicago's policy, then we would not be suing
13 the municipality for its policy. The question would be
14 whether the officer misused his authority for some -- to
15 deny equal protection for some --

16 QUESTION: Well, what case is authority for you
17 to sue a municipality because of its policy, independent
18 of what happened to your particular client?

19 MR. FLAXMAN: Well, we're not suing independent.
20 We're suing because of what happened. Mr. Ricci was
21 arrested because of a municipal policy.

22 QUESTION: But so you're saying that even though
23 he might have been arrested under a permissible policy, if
24 that policy wasn't in effect, his arrest is no good?

25 MR. FLAXMAN: No. I -- that's not what I'm

1 saying.

2 If Arlington Heights had the Chicago policy and
3 the officers, for whatever reason, decided to arrest
4 Mr. Ricci, we would not have a case against Arlington
5 Heights. We would not have a Fourth Amendment case
6 against the officers. We might have an equal protection
7 case against the officers if they arrested him for an
8 impermissible reason.

9 QUESTION: Mr. --

10 QUESTION: What is the policy that you say
11 Arlington Heights has that the officer must effect a
12 seizure for any offense?

13 MR. FLAXMAN: That's -- Arlington Heights tells
14 us that their policy is, these minor violations have to be
15 arrested. You can't give a field citation.

16 QUESTION: It takes the position, even in the
17 case of, for instance, not wearing a seat belt in a car --

18 MR. FLAXMAN: Well --

19 QUESTION: -- that no citation can be issued,
20 that the person must be seized? Is that your
21 understanding of the policy?

22 MR. FLAXMAN: The policy is, there's an
23 exception for parking violations, and I don't know if seat
24 belts are a municipal ordinance violation or whether it's
25 a State statute violation. I don't know if Arlington

1 Heights has tried to regulate seat belts, but Arlington
2 Heights says --

3 QUESTION: Is it the policy that any violation
4 of a -- an Arlington Heights ordinance requires a seizure?

5 MR. FLAXMAN: Other than parking tickets and
6 some other park violations Arlington Heights says,
7 officers must make arrests, and I think that's why the
8 officers did not treat Mr. Ricci to the full 48 hours of
9 detention that's authorized for an arrest, because they
10 realized that there was no need to do that, but they had
11 to make the arrest and bring him down and lock him up.

12 QUESTION: Mr. Flaxman --

13 QUESTION: Now, you said this is a civil fine,
14 so that if he went to trial he doesn't get the protection
15 of beyond a reasonable doubt --

16 MR. FLAXMAN: That's correct.

17 QUESTION: -- a unanimous jury and so --

18 MR. FLAXMAN: He gets a clear preponderance. He
19 has under the State constitution a right to trial by jury.
20 He can't get his costs if he wins on appeal. The State
21 can appeal. Excuse me, the Village can appeal if it loses
22 after trial. There's no double jeopardy. It's in the
23 nature of a fine.

24 QUESTION: Mr. Flaxman, when you responded to
25 Justice Souter, Justice Souter's question about, you know,

1 what's the harm, I thought you were going to say that the
2 harm of allowing arrests for misdemeanors is that for the
3 most minor of offenses somebody can be detained for
4 48 hours.

5 MR. FLAXMAN: That is --

6 QUESTION: That's what you might have answered,
7 anyway.

8 (Laughter.)

9 QUESTION: But what's wrong with that? Suppose
10 you have a real law-and-order State which simply adopts a
11 law that says, all misdemeanor -- we're serious about all
12 our offenses, and even for a misdemeanor you are subject
13 to incarceration for 48 hours.

14 MR. FLAXMAN: Well, I think the Framers rejected
15 that and intended to put barriers between the people and
16 the police.

17 QUESTION: Well, I mean, would it be
18 unconstitutional for a State to impose 48 hours of
19 detention for jaywalking?

20 MR. FLAXMAN: Well, if this Court upholds
21 respondent's policy, it would not be, and it would be
22 absolutely permissible.

23 QUESTION: Never mind what the Court does in
24 this case --

25 QUESTION: It would be permissible on probable

1 cause rather than on proof beyond a reasonable doubt.

2 MR. FLAXMAN: That's correct.

3 QUESTION: No, I don't mean whether it would be
4 permissible under the Fourth Amendment.

5 MR. FLAXMAN: No. If this Court --

6 QUESTION: The law says that the punishment for
7 jaywalking is 48 hours in -- of detention. Would that be
8 unconstitutional?

9 MR. FLAXMAN: That's an entirely different
10 question than what we're arguing here.

11 QUESTION: No. I know it's an entirely
12 different question. What's the answer to it?

13 MR. FLAXMAN: I'm not sure what the answer is,
14 and in an appropriate case --

15 QUESTION: Well, I'm saying if the answer is
16 that a State can do that if it wishes, then the asserted
17 harm that you're coming forward with, well, somebody could
18 be detained for as long as 48 hours, is a harm which in
19 another fashion, at least, is fully achievable by the
20 State.

21 MR. FLAXMAN: The distinction, though, is that
22 when the State, when the legislature has said we're going
23 to lock people up for 48 hours, then it's the elected
24 people, the elected representatives of the people who are
25 saying that.

1 In this case, it's the police department that's
2 saying that.

3 QUESTION: That's one distinction, and another
4 distinction, of course, is that it would only be the
5 guilty who would be detained for 48 hours.

6 QUESTION: Well, I thought it was the city
7 legislative body that said there would be a seizure,
8 not -- that's the group that said police officers will
9 affect a seizure --

10 MR. FLAXMAN: No, the -- this --

11 QUESTION: -- for a violation of our ordinances.

12 MR. FLAXMAN: This is a police department
13 unwritten practice, which is the custom of the whole
14 Village, but there's no ordinance saying to do this. This
15 is the police department.

16 QUESTION: This is a police department practice
17 only?

18 MR. FLAXMAN: That's correct.

19 QUESTION: Not authorized by city ordinance.

20 MR. FLAXMAN: That's correct.

21 QUESTION: I thought you were suing the city.
22 Weren't you suing the city?

23 MR. FLAXMAN: That's correct. In this --

24 QUESTION: Even though the city didn't order any
25 of it?

1 MR. FLAXMAN: Well, the city's policy --
2 QUESTION: That doesn't seem right.
3 MR. FLAXMAN: The city admitted that its policy
4 was as the police department --
5 QUESTION: So it was the city's policy, then.
6 MR. FLAXMAN: It was, but it was not adopted by
7 an ordinance by the --
8 QUESTION: All right, but it's the city's
9 policy.
10 MR. FLAXMAN: Oh, it absolutely is the city's
11 policy.
12 QUESTION: So --
13 QUESTION: Mr. Flaxman, there's one thing one of
14 your answers suggested that makes me more puzzled by the
15 case. Why don't you ask that the line be drawn between
16 criminal and noncriminal offenses?
17 MR. FLAXMAN: I think that's what finally is the
18 same thing --
19 QUESTION: Well, certainly there are criminal
20 fines.
21 MR. FLAXMAN: Excuse me?
22 QUESTION: There are certain -- certainly there
23 are criminal misdemeanor offenses under the law of most
24 States which are punishable only by fine, but they are
25 criminal.

1 I thought you -- this is a case, as I understood
2 what you said a moment ago, in which the State has defined
3 the offense as being a civil offense. It does not carry
4 criminal stigma, and you agreed that -- I think you agreed
5 that the criminal process would not be required
6 constitutionally.

7 MR. FLAXMAN: That --

8 QUESTION: All right. Then why don't you -- why
9 aren't you arguing that there should be no arrest without
10 a warrant for a noncriminal offense in the absence of a
11 failure to respond to process, or something of that sort?

12 MR. FLAXMAN: I thought that's what I was
13 arguing, and I had envisioned that dimension of the --

14 QUESTION: Well, no. You argued the breach of
15 the peace hypothetical, or the breach of the peace
16 distinction, the misdemeanor felony line, but if this is
17 just a civil offense it may be that arrest is simply not
18 permitted.

19 Do you have any authority which would help you
20 in -- if that were to be the line?

21 MR. FLAXMAN: Well --

22 QUESTION: Do we have authority which says that
23 you can arrest for a civil offense? I assume that's --

24 MR. FLAXMAN: Well, the common law rule --

25 QUESTION: -- a stable category. I'm not sure.

1 MR. FLAXMAN: The common law rule allowed
2 arrests to begin civil prosecutions of this nature, but
3 there was a warrant to do that. There wasn't --

4 QUESTION: Mr. Flaxman, I thought your question
5 presented asked whether the Reasonableness Clause of the
6 Fourth Amendment incorporated the common law rule
7 prohibiting warrantless arrests in misdemeanor cases not
8 involving breach of the peace.

9 I didn't read into that an allegation that a
10 civil offense which is not a misdemeanor, not a crime, can
11 justify a seizure.

12 MR. FLAXMAN: That ques --

13 QUESTION: You seem to be changing what's
14 presented.

15 MR. FLAXMAN: Well, the question was phrased in
16 an a fortiori situation. If the rule -- we know what the
17 rule was in misdemeanors. At common law there was no rule
18 at all allowing arrest in ordinance violation cases.
19 Ordinance violation cases --

20 QUESTION: Well, do we assume this is a
21 misdemeanor offense --

22 MR. FLAXMAN: Oh --

23 QUESTION: -- or not?

24 MR. FLAXMAN: No. It's a --

25 QUESTION: No, even though that's the question

1 you raised.

2 MR. FLAXMAN: Well, I raised that in an a
3 fortiori way of doing it, that if it's not true for
4 misdemeanor cases, certainly it shouldn't be true for
5 anything less than misdemeanor cases.

6 QUESTION: I'm still trying to figure out where
7 it's likely to have bite. I mean, would you say --
8 because you have an odd case, no doubt about that. The --
9 speeding. I suppose speeding offenses. Isn't that the
10 normal thing? Should a policeman, when he finds somebody
11 speeding, be able to arrest him?

12 MR. FLAXMAN: No.

13 QUESTION: You'd say no.

14 MR. FLAXMAN: No, you shouldn't.

15 QUESTION: All right. Now, why not? Suppose I
16 said, highways are dangerous places. People who go around
17 speeding kill a lot of people. If the policeman sees
18 somebody speeding and thinks he should arrest him, he
19 ought to be able to arrest him. At least the State should
20 have the power to make that determination. Why not?

21 MR. FLAXMAN: Because that's just a civil
22 infraction. That is not enough to justify an arrest.

23 QUESTION: That's not a crime, you say.

24 MR. FLAXMAN: That's not a crime.

25 QUESTION: And in most States, can they or can't

1 they?

2 MR. FLAXMAN: Most States that have actually
3 considered that --

4 QUESTION: Mm-hmm.

5 MR. FLAXMAN: -- and there's a recent decision
6 from Hawaii who said you can detain someone and search
7 them and talk to them, but you can't arrest them.

8 QUESTION: Thank you, Mr. Flaxman.

9 MR. FLAXMAN: Thank you.

10 QUESTION: Mr. Strauss, we'll hear from you.

11 ORAL ARGUMENT OF DAVID A. STRAUSS

12 ON BEHALF OF THE RESPONDENT

13 MR. STRAUSS: Thank you, Mr. Chief Justice, and
14 may it please the Court:

15 QUESTION: Would you please tell us what this
16 is? Is it a civil offense in the City of Arlington, or is
17 it a criminal offense? Is it a misdemeanor? What is it?

18 MR. STRAUSS: This is treated by Illinois law as
19 a civil offense. It's not subject to the panoply of
20 criminal protections.

21 That point, however, is something that
22 petitioner never raised throughout these proceedings until
23 the reply brief in this Court after an amicus raised it,
24 so that --

25 QUESTION: I think you're right about that, but

1 could you tell us, is there authority which allows an
2 arrest for a so-called civil offense, I suppose just to
3 start the proceeding?

4 MR. STRAUSS: In a sense, Justice Kennedy, the
5 text of the Constitution is that authority. The text of
6 the Constitution grants legislators an immunity from
7 arrest which is phrased in a way that leaves -- that
8 denies immunity in criminal cases, so the immunity, the
9 limit of legislative immunity in the Constitution applies
10 to arrest in civil cases, and this Court has so held on at
11 least two occasions, in Williamson and Brewster.

12 QUESTION: That was the old arrest for debt,
13 wasn't it, arrest on so-called mean process?

14 MR. STRAUSS: I think it was the capias, the
15 initiation of private civil proceedings by means of
16 seizing the -- seizing the defendant.

17 QUESTION: It was a general civil process.

18 MR. STRAUSS: Right. Right, but as far as --

19 QUESTION: But those arrests always required
20 warrants, didn't they?

21 MR. STRAUSS: Well --

22 QUESTION: In other words, I didn't think there
23 could ever be a warrantless arrest on a civil capias. I
24 mean, by definition capias is the written document, which
25 is an arrest warrant.

1 MR. STRAUSS: There was a writ, Justice Souter.
2 I'm not sure what showing was required.

3 But my real point is that a hard civil-criminal
4 line can't be imported into the Fourth Amendment, given
5 that the -- as far as when are arrests allowed, given that
6 the Constitution itself quite clearly envisions arrests in
7 civil cases.

8 QUESTION: Well, it may be that there can be no
9 line drawn between civil and criminal for purposes of
10 arrest, but there may very well be a line drawn between
11 civil and criminal for purposes of a warrant requirement,
12 and if the reference is, as you said, to the capias
13 process, that was by definition one in which there was a
14 written warrant. It was called a capias in civil cases,
15 but it was still an arrest warrant.

16 MR. STRAUSS: Well, Justice Souter, just, I want
17 to preserve the point that they waived -- that both courts
18 below found that they waived any right --

19 QUESTION: So what are we supposed to decide,
20 because let's assume that not having -- as once I did look
21 into that, I think that the point about arresting
22 legislatures is irrelevant, something totally different.
23 On that assumption, what are we supposed to do with this
24 case?

25 I thought the case was here to decide this

1 question of whether or not an undoubted crime, something
2 that everybody concedes is criminal, but it's called a
3 misdemeanor, or it's a crime punishable only by a fine,
4 whether or not you could arrest someone without a warrant.

5 Now, what we're saying is that isn't this case.
6 This case is perhaps not an undoubted crime. This case is
7 perhaps a civil offense or something that's not a crime,
8 so what in your view, are we supposed to do?

9 MR. STRAUSS: Justice Breyer, we've litigated
10 the case throughout on your assumption that this is a
11 crime, and that the civil nature of this offense has
12 simply not been a part of the proceedings.

13 QUESTION: Well, Mr. Strauss, where did you say
14 respondents first raised the contention that this was a
15 civil offense?

16 MR. STRAUSS: In their reply brief in this
17 Court, after an amicus raised it in the opening round of
18 briefing. So far as I am aware there's no reference to
19 the Illinois statutes --

20 QUESTION: But surely the Village knew that it
21 was dealing with. The Village and its police should have
22 known that they were dealing with a civil offense, and
23 wouldn't that be quite worrisome if the police think that
24 all these civil offenses are occasions to arrest someone
25 and lock them up?

1 MR. STRAUSS: Justice Ginsburg, absolutely. We
2 understand it's a civil offense.

3 Our position, Justice Ginsburg, is that if
4 officers have probable cause to believe that someone is
5 guilty of an offense, they may seize him, and as long as
6 the seizure is reasonable in manner and duration the
7 Fourth Amendment is satisfied.

8 Where they process the arrest, whether they
9 process it on the scene, process it in a patrol car,
10 process it in another office, or process it at the station
11 house is not a Fourth Amendment question.

12 QUESTION: And we're going to have all sorts of
13 different tests for duration, a 48-hour rule will not
14 apply in some cases?

15 MR. STRAUSS: Well, the --

16 QUESTION: This person could have been held for
17 48 hours?

18 MR. STRAUSS: The test in the County of
19 Riverside -- there's -- the County of Riverside
20 establishes a 48-hour -- as I read it, Justice Scalia,
21 establishes a 48-hour presumption, but it's quite clear
22 that that doesn't give the authorities a free 48 hours,
23 that it's still open to the arrestee to say, after an
24 hour, in this case, you've done everything you needed to
25 do, why didn't you release me, which is what would have

1 happened and what he could have said in this case had we
2 held him even for 2 hours. I think County of Riverside is
3 quite clear that it's a presumption only.

4 QUESTION: Mr. Strauss, could the police in this
5 case have handcuffed him, put him in a holding cell with a
6 lot of tough guys?

7 MR. STRAUSS: Justice Ginsburg, I think at some
8 point the conditions become so onerous as to be
9 unreasonable, and this Court in another case -- I think it
10 was Bell v. Wolfish -- used the example of putting someone
11 in shackles. At some point --

12 QUESTION: Because it's unreasonable based on
13 the type of offense?

14 MR. STRAUSS: The type of offense I think can
15 enter the calculus of what is a reasonable manner of
16 restraint.

17 QUESTION: What authority is there for that?

18 MR. STRAUSS: Well, I don't know that the Court
19 has ever -- has ever limited the manner of confinement
20 based on the nature of the offense.

21 QUESTION: Mr. Strauss, I have a different
22 concern that I'd like you to comment on, not going to the
23 burdensomeness of the arrest, but is it clear to you that
24 in a -- incident to this arrest the police could have
25 searched this man and his vehicle and his luggage and

1 everything else if they happened to stop him in a car for
2 this kind of offense? Would they have had all those
3 powers?

4 MR. STRAUSS: Justice Stevens, as -- well, as --
5 if they'd -- I should just say, as for a traffic offense
6 under Illinois law they would have had to accept his
7 license. They could not have arrested him for a traffic
8 offense under Illinois law.

9 QUESTION: Well, see, we don't have a traffic
10 offense.

11 MR. STRAUSS: But -- I understand.

12 QUESTION: If this -- take this sort of
13 financial crime.

14 MR. STRAUSS: I understand.

15 QUESTION: Yes.

16 MR. STRAUSS: Justice Stevens, as I read
17 Robinson and Gustafson they settled that question and the
18 answer is yes. Now, if that rule is too harsh, it's --

19 QUESTION: If this is a full arrest, then that's
20 one of the consequences that follow, is that the -- the
21 total search power. Search the car, search the luggage,
22 search the trunk and everything else.

23 MR. STRAUSS: That Robinson and Belton control
24 the scope of search --

25 QUESTION: So it seems to me that's really what

1 we ought to be concerned about, rather than whether he has
2 to spend 24 hours instead of 48 hours.

3 MR. STRAUSS: Well, this -- in this case there's
4 no evidence there was a search incident to the arrest,
5 even a pat-down.

6 QUESTION: No, I understand, but there could
7 have been. There could have been.

8 MR. STRAUSS: So far as I read it, that's
9 controlled by Robinson and Belton.

10 QUESTION: Yes.

11 QUESTION: Well, Robinson would control as to
12 the search of the --

13 MR. STRAUSS: Of the person.

14 QUESTION: -- who was arrested. I don't think
15 it would control at all as to a search of the car.

16 MR. STRAUSS: No. That would be Belton.

17 QUESTION: Or the luggage.

18 MR. STRAUSS: If -- and --

19 QUESTION: It would be Belton, yes.

20 MR. STRAUSS: And Chimel.

21 QUESTION: What is the policy with which we're
22 dealing in this case? Would you articulate it?

23 MR. STRAUSS: Yes, Justice --

24 QUESTION: It does not include minor traffic
25 offenses?

1 MR. STRAUSS: Justice O'Connor, yes. Our policy
2 applies -- first of all applies only to local ordinances.
3 Traffic offenses in Illinois are governed by State law.
4 This applies only to local ordinances. It does not apply
5 to parking violations, even when those are local
6 ordinances, so those are not in the picture.

7 The policy is not that the police must arrest
8 everyone who violates a local ordinance. They have the
9 ordinary discretion in giving someone a warning, or just
10 letting him go.

11 But if they initiate proceedings against the
12 person, they must bring the person to the station house,
13 where the sergeant on duty makes the decision whether this
14 person is to be bonded out or is to be released on his
15 recognizance.

16 What Arlington Heights tells its officers on the
17 beat is, when you make an arrest, you don't make the call
18 about whether this person just gets to sign a citation and
19 leave or must post bond. That's a call to be made at the
20 station house. You bring him in, where we will process
21 him. That's the nature of the policy, and that's why he
22 was brought in for this offense.

23 QUESTION: As I understand it -- this may not
24 count in the decision of the case, but I thought the
25 reason that Arlington Heights had for its policy was a --

1 to be candid, a rather superficial one. They said, well,
2 we just simply don't have a documentary process for field
3 summonses, and -- which doesn't really cut much if we get
4 to that issue.

5 You're now saying that they feel that the
6 discretion should be -- as to how far to go, to bond or
7 not to bond, should be made by a superior officer and
8 that's the reason that they do not have this field
9 processing scheme?

10 MR. STRAUSS: Yes, Justice Souter, and there's
11 testimony to that effect in the record. The point -- the
12 citations is the way we enforce the policy. The officers
13 are not given citation books where they can write a
14 citation in the field.

15 QUESTION: Okay.

16 MR. STRAUSS: That's how the policy's enforced,
17 but the reason for the policy is --

18 QUESTION: Mr. Strauss, isn't this unusual? I
19 think in many places a summons in lieu of an arrest is
20 common even for a misdemeanor that carries jail time, and
21 here you've told us that this is a civil category and that
22 the police have only two choices, either let him go with a
23 warning or, if they want to pursue this civil process,
24 they have to take him into full custody. That seems
25 rather extreme.

1 MR. STRAUSS: Justice Ginsburg, for purposes of
2 the Fourth Amendment I think the choice about whether to
3 proceed by citation, which I agree is often allowed by
4 municipalities, or whether to proceed in this way I think
5 has to be left to local circumstances.

6 We happen to be in a position where we can
7 process people quickly and where, for whatever reason, we
8 want these decisions not to be made by officers on the
9 beat, whether it's because we think they'll be vulnerable
10 to accusations of shakedowns and intimidation, or because
11 we want them back out on the street and not processing
12 applications, or for whatever reason, and we can process
13 them quickly.

14 In a large metropolitan area, where there are
15 many, many arrests, the policy is likely to be a different
16 one.

17 QUESTION: Mr. Strauss, let me get back again to
18 the point that you say was raised only for the first time
19 in the reply brief. In the -- the second question
20 presented in the petition for certiorari says, may a
21 municipality require its police officers to make full
22 custodial arrests for an alleged violation of a fine-only
23 license ordinance.

24 Now, it seems to me if -- the fine-only license
25 ordinance is fairly raised by that question presented.

1 MR. STRAUSS: Justice Rehnquist, when I said it
2 wasn't raised, what I meant is this. At no point until --
3 so far as I'm aware, until the reply brief, did petitioner
4 ever even mention the civil nature of the offense or cite
5 the Illinois statutes in cases that established that it's
6 civil.

7 QUESTION: So you say a fine-only license
8 ordinance doesn't suggest civil rather than criminal?

9 MR. STRAUSS: Violation of a fine-only license
10 ordinance, it seems to me the natural reading of that is
11 criminal, but my real point, Mr. Chief Justice, is not so
12 much about what the question can be read to include, as
13 the premise on which the case has been litigated
14 throughout, and that premise has undoubtedly, I'm certain
15 of this, been that this was --

16 QUESTION: A criminal --

17 QUESTION: Well, but do you take the position
18 that if we assume now that it is a civil offense, and not
19 a criminal misdemeanor offense, that the Fourth Amendment
20 does not prevent the city's policy of seizure and removal
21 to the station house?

22 MR. STRAUSS: Yes, I do take that position,
23 Justice O'Connor.

24 QUESTION: And what do you rely on in terms of
25 authority for that?

1 MR. STRAUSS: The -- my -- the basis for my
2 position is that the Fourth Amendment cannot be read to
3 draw a sharp line between criminal and civil arrests, and
4 the authority for that is the Court's statement, Justice
5 Brandeis' statement in Long v. Ansell that civil arrests
6 were common at the time of the framing, and the inclusion
7 in the Constitution of an immunity that applies only to
8 civil arrests, confirming that, in fact, civil arrests are
9 contemplated by the Constitution.

10 QUESTION: Yes, but if you're going to appeal
11 the history, I think you've got the problem that was
12 raised earlier. There is undoubted history that there
13 could be arrests for civil offenses, but I think there is
14 not undoubted history, and I think there is not any
15 history that there could be arrests for civil or -- for
16 civil offenses without some written arrest warrant,
17 whether you call it *capias* or some other term, and that's
18 the issue here, not whether you can arrest or not.

19 MR. STRAUSS: Well, Justice Souter, before I
20 assent to or disagree with that proposition I think
21 neither case that was litigated about civil rights --

22 QUESTION: Let's do it -- I just want to work
23 out the answer that you just gave to Justice O'Connor.

24 MR. STRAUSS: Mm-hmm.

25 QUESTION: And I take it that you do not have

1 any authority, know of any authority, traditionally, at
2 common law, for arrest for a purely civil offense without
3 some written process issued by a magistrate, i.e., like a
4 *capias*.

5 MR. STRAUSS: Well, Justice Souter, at common
6 law the line between criminal and civil, especially when
7 you're dealing with so-called public nuisances -- that is,
8 civil affronts to the Government as opposed to a private
9 party -- was a very indistinct line. It was --

10 QUESTION: Maybe it was, but leaving aside the
11 problem of indistinction, I take it you don't have any
12 authority with respect to cases that were on the civil
13 side of the line, in which the common law recognized a
14 valid arrest without some written process issued by a
15 third party like a magistrate.

16 MR. STRAUSS: I think our argument, Justice
17 Souter, would be that a civil offense against the
18 Government --

19 QUESTION: I don't want to cut off your
20 argument, but I don't want to lose my question.

21 MR. STRAUSS: Whether there's --

22 QUESTION: Do you have any authority for that,
23 or don't you have authority?

24 MR. STRAUSS: We would have authority for the
25 proposition that certain categories of offenses that we

1 believe are the ancestors of civil offenses against the
2 Government could be subject to -- at common law to -- on
3 occasion to warrantless arrests. I think we have
4 authority for that.

5 QUESTION: What are they?

6 MR. STRAUSS: Well, that's the night-walking
7 category of offenses, where there were minor nuisances
8 committed that by certain statutes under certain
9 circumstances could be proceeded against --

10 QUESTION: So like the Terry stop, in other
11 words.

12 MR. STRAUSS: Well, it was like a Terry stop
13 except it explicitly could last overnight, and in that
14 sense it really resembles more what goes on with the rest
15 of the minor offenses.

16 QUESTION: But in order to prevail here, you've
17 got to take the law beyond Terry.

18 MR. STRAUSS: This was an arrest. We don't
19 quarrel with that.

20 QUESTION: And you don't quarrel that there is a
21 distinction in the Fourth Amendment between a seizure that
22 is not an arrest and a seizure that is an arrest?

23 MR. STRAUSS: I think Terry establishes that,
24 Justice Scalia.

25 QUESTION: Is there -- can you give me an

1 example, so I know what I'm talking about here -- would
2 you just give me an example of a fine-only criminal
3 offense? Is there -- just give me one -- this one
4 apparently isn't clear, because we think maybe this isn't
5 criminal, so what's an example of something that is a
6 criminal offense that is punishable only by a fine, some
7 bad ones if you can think of some. Are there any?

8 MR. STRAUSS: In -- in Illinois, any
9 municipalities have the authority to make their fine-only
10 offenses civil. They could, in some jurisdictions --

11 QUESTION: What I want to know is if anybody
12 here has an example of what it is we're talking about? I
13 thought when we started this we were talking about
14 misdemeanors. Now we're not. We're talking about fine-
15 only offenses, and then I thought maybe there were some
16 fine-only offenses that are criminal, and so I'd have to
17 face that constitutional question.

18 Now I have one that may be criminal, may not be
19 criminal. It's an odd animal. Is there one, if we write
20 an opinion, that I'd at least know it affects that one,
21 and what is it? What's a fine-only criminal offense
22 that's undoubtedly criminal, that's -- you apparently
23 don't have an example --

24 MR. STRAUSS: I can't cite you to any in --

25 QUESTION: -- and I haven't found it in the

1 brief, so I'm not --

2 MR. STRAUSS: I can't cite you to any in
3 Illinois.

4 QUESTION: But it certainly isn't the one before
5 us, and I think you told us that most of the -- in
6 Arlington most of the offenses in this category are civil
7 offenses. These, not having a license to do something or
8 other.

9 MR. STRAUSS: Local ordinances that provide only
10 for fines are treated as civil.

11 I should say this isn't -- this is in large
12 measure a benefit to the accused as well, who now does not
13 have a criminal record by virtue -- would not have a
14 criminal record by virtue of being found to have committed
15 a civil infraction.

16 QUESTION: Does -- I wanted to ask you about the
17 booking and the record. Is it the same as in an arrest in
18 a criminal -- for a criminal prosecution, the way the
19 person is booked and the record, the police record that
20 that person -- the arrest record that the person will
21 have?

22 MR. STRAUSS: I think the answer is no, Justice
23 Ginsburg, to the extent that the record will reflect that
24 this is a civil offense, and if he is asked, have you ever
25 been convicted, he's not -- he was not convicted. The

1 charges were dismissed.

2 But had he been convicted, were he asked, have
3 you ever been convicted of a crime, he could say no.

4 QUESTION: Suppose he was asked, was he ever
5 arrested?

6 MR. STRAUSS: He would have to say yes. He was
7 arrested. He was arrested on probable cause. We had a
8 right to arrest him.

9 QUESTION: And that would be the same, so he
10 would have to answer that question the same, and it
11 wouldn't make any difference whether it was a misdemeanor
12 with jail time, he has an arrest record.

13 MR. STRAUSS: He has an arrest record.

14 QUESTION: Yes.

15 MR. STRAUSS: Now, he could go -- explain the
16 charges were dismissed. The charges were only civil.

17 QUESTION: Mr. Flaxman said that this business
18 about the bond requirement, on the face of it it looks
19 like there could be several thousand dollars involved, and
20 so it would be reasonable to require a bond before letting
21 this person go, but Mr. Flaxman said that that was an
22 afterthought.

23 MR. STRAUSS: Justice Ginsburg, the reason --
24 the subjective reason these officers arrested him was that
25 we tell our officers, you don't make the decision whether

1 to release the person on the basis of a citation or not,
2 you bring them down. That was all the officers were
3 thinking. They weren't thinking about the size of the
4 infraction.

5 QUESTION: Mr. --

6 MR. STRAUSS: Were I called upon to explain
7 objectively why this was reasonable, one of the factors I
8 would say if I needed to say it was the one you just
9 mentioned, that in fact he'd been, by his own admission,
10 operating for 6 months and did face a very substantial
11 fine. He had a person on his premises who was subject to
12 an arrest warrant, and various other circumstances.

13 QUESTION: Mr. Strauss, Terry aside, do you know
14 any basis in common law for the distinction between an
15 arrest that enables you to be taken down to the station
16 house and a traffic stop, or whatever you want to call it,
17 that does not allow you to be taken down to the station
18 house?

19 MR. STRAUSS: No. Justice Scalia, so far as I
20 know, if there is probable cause, then the person can be
21 seized, can be arrested, and whether he is -- where he is
22 taken for processing I think can't be regulated by a
23 constitutional rule. There are just too many variables,
24 too many factors that affect that.

25 They vary from jurisdiction to jurisdiction,

1 situation to situation, and even the ALI which disapproved
2 of -- which emphasized the need for citations, suggested a
3 code and then said, but the fact is we really can't
4 prescribe guidelines about when citations are needed
5 because the situations are just too variable.

6 QUESTION: No, but even if there's no common law
7 category such as Terry, we surely have recognized many,
8 many situations in which police are authorized to stop and
9 interrogate, even without probable cause, and those are
10 all seizures.

11 MR. STRAUSS: Yes.

12 QUESTION: You would agree with that.

13 MR. STRAUSS: If it's a stop, then it's a
14 seizure.

15 QUESTION: Yes.

16 MR. STRAUSS: But so far as I know, Terry --

17 QUESTION: And it doesn't require probable
18 cause.

19 MR. STRAUSS: It doesn't require probable cause,
20 but if it's -- if there's no probable cause the stop is
21 very limited in duration and purpose.

22 QUESTION: But we have here -- all we have here
23 is taking him to the police station to book him. There's
24 nothing more. Like, they didn't -- do we have to consider
25 whether 48 hours, and searches and that sort of thing?

1 MR. STRAUSS: No. He was released in an hour,
2 Justice Breyer, and there's no claim here that the
3 detention went beyond the amount of time needed to process
4 the necessary papers.

5 QUESTION: Thank you, Mr. Strauss.

6 MR. STRAUSS: Thank you, Mr. Chief Justice.

7 QUESTION: Ms. Millett.

8 ORAL ARGUMENT OF PATRICIA A. MILLETT

9 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING THE RESPONDENT

11 MS. MILLETT: Mr. Chief Justice, and may it
12 please the Court:

13 Justice Breyer, you asked for examples of
14 criminal fine-only offenses, and we list a number of these
15 on page 20 of our brief which are, of course, Federal
16 ones, and this is just the tip of the iceberg.

17 This is not an exhaustive list, but they include
18 such things as exclusion of jurors on account of race,
19 interference with aids to navigation, vandalism at
20 national monuments and military parks, and as I said, this
21 is the tip of the icebergs.

22 Our initial cut at how many Federal fine-only
23 criminal offenses there are was around -- I think I got
24 around 60 to 70, and I don't know if that's exhaustive.

25 QUESTION: What makes them criminal rather than

1 civil, just saying so?

2 MS. MILLETT: Well, certainly a legislative
3 decision, the community judgment to label behavior
4 criminal, is a big factor in whether it's a crime or not,
5 but certainly then whether traditional criminal processes
6 attend the prosecution of the case.

7 QUESTION: Well, that's a consequence of its
8 being criminal --

9 MS. MILLETT: Right.

10 QUESTION: -- not a cause of its being criminal.
11 I mean, so it's up to the State to say, we're going to
12 impose this fine and make it a civil fine, and therefore
13 you don't get beyond a reasonable doubt --

14 MS. MILLETT: Oh, I think this Court has long
15 recognized that it is primarily the job of States and
16 Congress within its authority to define what is criminal
17 or not, whether or not this Court or one particular
18 jurisdiction thinks that's a wise thing to make criminal
19 or not, and if --

20 QUESTION: Well, if this is not a criminal
21 offense, then what is the Government's position?

22 MS. MILLETT: I don't know if we have a position
23 on what happens to ordinance in particular. I think our
24 position is very clear that there is no --

25 QUESTION: Does the Federal Government have some

1 civil offenses that are not criminal?

2 MS. MILLETT: Plenty of civil offenses that are
3 not criminal, and --

4 QUESTION: What is your position with regard to
5 those --

6 MS. MILLETT: Our position --

7 QUESTION: -- as to the Fourth Amendment
8 requirements?

9 MS. MILLETT: Our position is the Fourth
10 Amendment does not draw a bright line banning seizures,
11 arrests, for civil offenses, such things as deportation,
12 extradition, civil commitment, if a police officer finds
13 someone who is a danger to himself.

14 There are categories of violations, offenses --
15 I'm not even sure what to call them -- civil violations
16 for which arrest has traditionally been recognized to be
17 appropriate. I mean --

18 QUESTION: The issue, if --

19 MS. MILLETT: -- conveyances and traffic may be
20 another one.

21 QUESTION: May I interrupt you? The issue is
22 not whether arrest may comport with the Fourth Amendment,
23 but arrest without any process issued by a magistrate or
24 some third party.

25 MS. MILLETT: Right, and I think the analysis --

1 the mode of analyzing whether proceeding without a warrant
2 or whatever process would be appropriate may be different
3 between criminal and civil cases under the Fourth
4 Amendment.

5 QUESTION: Well, didn't the Seventh Circuit rule
6 that the petitioner had waived his argument under the
7 Warrant Clause?

8 MS. MILLETT: Yes, they did, Justice --
9 Mr. Chief Justice.

10 But for purposes of what would be required in
11 the civil arena, our position is, if it's a crime,
12 probable cause justifies an arrest. You know, probable
13 cause plus.

14 If it's civil, I think this Court has recognized
15 that under the Fourth Amendment when you get into civil
16 seizures, which take a variety of forms, that a balancing
17 analysis is generally appropriate, and of course we want
18 to --

19 QUESTION: Every example that you gave involved
20 the risk of absconding or fleeing. You want to deport
21 someone, extradite someone, there's a high risk that
22 person won't be there if you let them out on the street.

23 MS. MILLETT: That's right, so that's why --

24 QUESTION: But here we're talking about, I
25 didn't get a license for my business, that my wife got

1 while I was in the police station. It was that easy.

2 So when you don't have a breach of the peace,
3 and when you don't have the risk that the person will
4 flee, then what is the justification? What is the reason
5 for permitting an arrest?

6 MS. MILLETT: I guess I'm -- if you're assuming
7 that this is a criminal offense, then -- I'm sorry, civil?

8 QUESTION: I thought we asked you -- you were
9 giving examples of civil proceedings --

10 MS. MILLETT: Okay.

11 QUESTION: -- where an arrest would be
12 recognized as reasonable, and they were all -- fall in the
13 "exigent circumstance" category.

14 MS. MILLETT: Right. I think a balancing would
15 be appropriate in a civil case, and certainly whether or
16 not someone is likely to abscond or -- I'm not sure
17 someone who's a danger to himself is the same as a
18 likelihood of absconding, but that could be another
19 factor.

20 QUESTION: Someone about to commit suicide, for
21 example.

22 MS. MILLETT: About to commit suicide or other
23 civil -- just to harm themselves, if not suicide, but
24 there's going to be a balance --

25 QUESTION: But this -- what's in front of us

1 doesn't seem to fit.

2 What would be -- now, we have -- the kind of
3 offense that's involved is failure to get a license to
4 operate some kind of business. What circumstances would
5 justify an arrest for such an infraction?

6 MS. MILLETT: I think it may be fair for a
7 legislature to -- for a legislature or a police department
8 to conclude that as a class there is a -- and the Fourth
9 Amendment analysis may permit this, that there is as a
10 class a risk of absconding or injury.

11 For example, when we think -- it's harder to
12 conceive of it in this particular case in the established
13 business, but you'd think of push-carts and vendors along
14 the street who are operating without licenses, and whether
15 in a particular case I know this person, I know where they
16 live, I don't know whether I would be able to find them
17 again, is not the appropriate analysis.

18 This Court has recognized that at some points
19 when you have an established level of suspicion you need
20 not have --

21 QUESTION: Yes, well --

22 QUESTION: We're talking about a civil case.

23 QUESTION: -- that's one of the virtues of the
24 Robinson opinion, I say perhaps because I wrote it --

25 (Laughter.)

1 QUESTION: -- that it lays down a flat rule.

2 Now, you say -- are you balancing in every
3 individual case --

4 MS. MILLETT: Well --

5 QUESTION: -- whether you can make an arrest?
6 That's hardly workable.

7 MS. MILLETT: No, certainly not for crimes. The
8 question is whether, once it's a civil violation, Robinson
9 wouldn't cover that by its own terms.

10 QUESTION: No.

11 MS. MILLETT: That dealt with a crime.

12 I mean, it does get complicated because you can
13 have traffic violations that are a crime in one case --
14 Maryland v. Wilson dealt with speeding, where it's a
15 crime. It is not a civil infraction. Whren v. United
16 States was speeding and it was a civil infraction.

17 So it -- jurisdiction by jurisdiction the same
18 conduct may, in fact, be either a crime or a civil
19 offense, and I think again when it's -- Robinson wouldn't
20 cover it if it's -- necessarily if it's civil, but there
21 may be either -- either through a balancing analysis or a
22 recognition of historical categories such as conveyances,
23 deportation, immigration control, that they may be the
24 types of civil seizures that are permitted on a -- you
25 know, without balancing in individual cases because of --

1 the interests are going to apply generally across the
2 board in making a seizure in those cases to enforce the
3 civil or criminal law, but --

4 QUESTION: Is it fair to say that you briefed
5 this case on the assumption that we were dealing with a
6 criminal offense?

7 MS. MILLETT: Yes, we did, and I apologize if we
8 don't have a completely thorough analysis of the issue.
9 We did not read the second question presented to render
10 the first question presented an advisory question, but we
11 certainly are emphatic that there is not a bright civil-
12 criminal line in the Fourth Amendment, that there are
13 classes of seizures, and whether -- that are permissible
14 in the civil arena, as I said, deportation, conveyances,
15 or the maritime, or traffic, and whether those --

16 QUESTION: That's all irrelevant for this case,
17 right? I mean --

18 MS. MILLETT: I guess it depends on whether this
19 Court reads the second question presented differently from
20 whether we did. I think it certainly has not been
21 briefed, briefed other than at a very late stage, and it
22 wasn't addressed by the courts below.

23 QUESTION: But now we know we are dealing with a
24 civil infraction, so how can we pretend that it's criminal
25 when it's -- we're told that it's civil?

1 MS. MILLETT: Well, if this Court concludes that
2 it is civil and it needs to address it, then we think it
3 would be better to --

4 QUESTION: We don't have to conclude that. We
5 were told that by Mr. Strauss, that this is in fact in the
6 City of Arlington a civil offense.

7 MS. MILLETT: We think that it may be preferable
8 for this Court to remand to allow a case to come up, or
9 else the courts below to address what either the common
10 law or the practices are for civil arrests on these types
11 of ordinances, which hasn't been briefed and addressed
12 below, and we certainly would be very concerned about
13 having a decision issued without the information provided
14 to this Court that is necessary about civil offenses.

15 QUESTION: We should forgive the waiver? I
16 mean, the point wasn't raised below. Should we instruct
17 the lower court to give the defendant another -- or the
18 plaintiff another swing?

19 MS. MILLETT: Well, the Court could certainly
20 dismiss cert as improvidently granted simply on the
21 question that either --

22 QUESTION: Well, I thought you were saying we
23 should read the second question, in light of the record,
24 as saying is this particular criminal offense one for
25 which you could arrest someone. Wasn't that your

1 position, or not?

2 MS. MILLETT: Our position is, we read the
3 second question presented in light of the first question
4 presented.

5 QUESTION: Which is criminal. In other words, I
6 take it --

7 MS. MILLETT: Right, absolutely. Absolutely.

8 QUESTION: So I take it you're not -- I
9 thought -- you think we should do the same, I take it, as
10 you did.

11 MS. MILLETT: We --

12 QUESTION: It would be a hypothetical question
13 when we know it is not criminal.

14 MS. MILLETT: If -- the Court --

15 QUESTION: How can we then say, well, we'll
16 assume that it's waived, that we'll treat something that
17 the city says is civil as criminal?

18 MS. MILLETT: That is the danger that you're
19 essentially issuing an advisory opinion in a case that
20 just does not present the question. That's again why cert
21 may have --

22 QUESTION: It's not an advisory opinion in this
23 case if that issue was not raised below. It's been tried
24 on the assumption that it's criminal. Why is it advisory
25 in this case?

1 I, for one, would certainly not send it back to
2 let this new point be dredged up when it was simply
3 foregone in the trial below, so I don't see why it's an
4 abstract case.

5 I mean, we have a real case before us that's
6 been tried on this assumption, and it seems to me we can
7 decide it on that assumption.

8 QUESTION: It just doesn't conform to the facts.

9 (Laughter.)

10 MS. MILLETT: I think you were not --

11 QUESTION: I thought I heard you say that we
12 should dismiss the writ as improvidently granted, because
13 we thought we were dealing with a criminal offense and it
14 turns out to be civil.

15 MS. MILLETT: Our only position -- may I answer,
16 Mr. --

17 QUESTION: Yes.

18 MS. MILLETT: Our only position is that if the
19 Court wishes to address, or -- wishes to address the issue
20 and wishes not to address the criminal issue, that it
21 may -- it's certainly within this Court's prerogative to
22 decide that the question it thought it was going to be
23 deciding is not, in fact, now presented to the case in
24 light of the respondent's admissions.

25 CHIEF JUSTICE REHNQUIST: Thank you,

1 Ms. Millett.

2 The case is submitted.

3 (Whereupon, at 11:15 a.m., the case in the
4 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

RANDALL RICCI, Petitioner v. VILLAGE OF ARLINGTON HEIGHTS
CASE NO: 97-501

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BY Donna M. Federico-----

(REPORTER)