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THE CLINTON JUSTICE DEPARTMENT'S REFUSAL TO ENFORCE THE LAW ON VOLUNTARY CONFESSIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

EXAMINING THE DEPARTMENT OF JUSTICE'S DECISION REGARDING THE ENFORCEMENT OF FEDERAL STATUTE 18 U.S.C. 3501, WHICH GOVERNS THE ADMISSIBILITY OF VOLUNTARY CONFESSIONS IN FEDERAL COURT, AND THE IMPACT ON THE MIRANDA RIGHTS

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THE CLINTON JUSTICE DEPARTMENT'S REFUSAL TO ENFORCE THE LAW ON VOLUNTARY CONFESSIONS

THURSDAY, MAY 13, 1999

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:02 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the subcommittee) presiding.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Also present: Senators Sessions, and Kyl [ex officio.]

Senator THURMOND. The subcommittee will come to order. I am pleased to hold this oversight hearing today on the Department of Justice. We will review a Federal statute, 18 U.S.C. 3501, that the Congress passed to govern the admissibility of voluntary confessions in Federal court. Unfortunately, the Clinton administration has refused to use this tool to help Federal prosecutors in their work to fight crime.

In 1966, the Supreme Court established in *Miranda* v. *Arizona* a codelike set of rules requiring that a defendant must be read certain warnings before his confession of a crime can be used against him in court. The strict rules it established were not mandated by the Constitution, as even the Court itself acknowledged, and we will never know how many crimes have gone unsolved or unpunished because of it.

In response, the Judiciary Committee held an extensive series of hearings on this issue as part of broader criminal law reform. A bipartisan Congress, with my participation and that of many others, passed a statute in 1968 that provides, "In any criminal prosecution brought by the United States * * *, a confession * * * shall be admissible in evidence if it is voluntarily given." One factor to consider in whether a confession is voluntary is whether the defendant received the *Miranda* warnings.

The *Miranda* Court expressly invited the Congress and the States to develop a legislative solution in this area. I have with me today the hundreds of pages of hearings and committee reports that detail this committee's extensive consideration of this issue in response to that invitation.

During the Clinton administration, this committee has repeatedly encouraged the Justice Department to enforce the statute. During an oversight hearing in 1997, Attorney General Reno indicated to the committee that the Department would enforce it in an appropriate case, as did Deputy Attorney General Holder during his nomination hearing the same year.

However, when such a case clearly arose in *United States* v. *Dickerson,* the administration refused to enforce it. In that case, Charles Dickerson was suspected of committing a series of armed bank robberies in Virginia and Maryland. During questioning, he voluntarily confessed his crimes to the authorities and implicated another armed bank robber, but the *Miranda* warnings were not read to him beforehand. The U.S. attorney's office in Alexandria urged the trial court to admit the confession under section 3501, but the Justice Department refused to permit the U.S. attorney to raise it on appeal.

Thus, Paul Cassell, who we are pleased to have with us today, made the argument instead, and the fourth circuit ruled solidly in favor of section 3501. It is due to the efforts of third parties outside the Justice Department that a key confession will be used, and may be the reason that a serial bank robber is brought to justice.

The media reaction to the *Dickerson* case has been negative, indicating that defendants will no longer receive *Miranda* warnings if the decision stands. This is simply not true. As the fourth circuit noted, section 3501 encourages the police to give *Miranda* warnings because the warnings help establish that a confession is voluntary. Section 3501 will not stop *Miranda* warnings from being given. What it will do is stop criminals from being released on legal technicalities.

The fourth circuit strongly criticized the Justice Department for refusing to argue the statute, saying that it has impeded the law's enforcement and has overruled the efforts of career Federal prosecutors to use it. Indeed, without the involvement of third parties in cases like *Dickerson,* the Department's position would have prevented the issue from ever being considered by the courts.

The executive branch has a duty under article II, section 3, of the Constitution to "take care that the laws be faithfully executed." Section 3501 is a law like any other. In *Davis* v. *United States,* Justice Scalia questioned whether the refusal to invoke the statute abrogated this duty. As he also stated, the United States' repeated refusal to invoke 3501 "may have produced—during an era of intense national concern about the problem of runaway crime—the acquittal and nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this."

I am equally troubled. I cannot understand why the Clinton administration refuses to use this law against criminals and even prohibits its career Federal prosecutors from doing so. America does not need its Justice Department making arguments on behalf of criminals.

The statute has been upheld by all courts that have directly considered it. Even the Supreme Court has long characterized the *Miranda* warnings as "prophylactic," as opposed to constitutional re-

quirements. It has referred to section 3501 as, "the statute governing the admissibility of confessions in Federal prosecutions."

The Justice Department will not say what position it will take if the *Dickerson* case is considered by the Supreme Court. This is one of the questions I was eager to ask the Justice Department today. Unfortunately, they refused my invitation to testify. Not only will the Justice Department not defend the law in court, it will not even discuss the matter before this subcommittee.

I recognize the Department's reluctance to discuss specifics about pending cases, but this is no excuse for its failure to discuss its general treatment of the law governing voluntary confessions. Even the dissent in *Dickerson* stated that the Congress could invoke its oversight authority and investigate why the law is being ignored.

It is my sincere hope, as the *Dickerson* court stated, that "no longer will criminals who have voluntarily confessed their crimes be released on mere technicalities." By supporting section 3501, the Justice Department can go a long way toward making this promise a reality.

I look forward to the testimony of our witnesses as we review the Clinton Justice Department's refusal to enforce the law on voluntary confessions.

You want to introduce a witness now, don't you?

Senator KYL. Yes, please.

Senator THURMOND. Go right ahead.

Senator KYL. Thank you very much, Mr. Chairman. Thank you for holding this hearing. Though not a member of this subcommittee, I am delighted to be here, even if for a few minutes to express my support for the inquiry which you are making today.

I would like to acknowledge two members of this distinguished panel with whom I have worked extensively. You mentioned one, Dr. Paul Cassell, from the University of Utah, who has not only been active in this and a variety of other similar matters in court, but has also been enormously supportive of our efforts to write, defend, and promote a constitutional amendment to provide rights to victims of crime.

I am happy to say, Mr. Chairman, that the Majority Leader has indicated his support for providing time on the floor for consideration of our constitutional amendment this summer, as soon as we can get it through the full Judiciary Committee, and I appreciate very much Dr. Cassell's help in this regard.

But today it is my pleasure to especially introduce my county attorney, Rick Romley, who is currently serving in his third term as Maricopa County Attorney. Our county, by the way, Mr. Chairman, is the sixth largest in the country, and it is also the fastest growing county in the United States. So he has got a real challenge ahead of him.

He has been a prosecutor for almost 20 years, and he currently oversees one of the largest prosecuting agencies in the country. His staff is about 800 people, including 300 attorneys, over 50 investigators, and incidentally nearly 50 victim witness advocates. He has earned a reputation as a leader in criminal justice issues, and he has championed many prosecution and reform policies.

For example, he played a leading role in rewriting Arizona's criminal code, which resulted in truth in sentencing statutes that

require convicted criminals to serve their full time. While serving on the Arizona Victims Constitutional Rights Steering Committee, he worked to make Arizona one of the first States in the Nation to pass a constitutional amendment that guarantees that victims are afforded certain rights during the criminal justice process. He was also a prominent figure in Arizona's juvenile justice reform.

In fiscal year 1997–1998, the Maricopa County Attorney's Office handled over 45,000 felony matters. County Attorney Rick Romley has testified before this committee on numerous occasions, Mr. Chairman, but I think you will agree that he is very well-qualified to testify on the topic of voluntary confessions. So I join you in welcoming him, as well as the other members of your panel to this discussion today.

Thank you, Mr. Chairman, for affording me the opportunity to introduce my county attorney.

Senator THURMOND. I will now introduce our panel. The first witness is Stephen Markman, who served in the Bush administration as U.S. attorney in Michigan, and in the Reagan administration as Assistant Attorney General in charge of the Office of Legal Policy. In the latter position, he wrote a definitive report on the law of pretrial interrogation for the Justice Department. Prior to that, he served on the staff of the Senate Judiciary Committee. Currently, he is a judge on the court of appeals in Michigan. We welcome you here.

Our second witness is Richard Romley, who is currently serving his third term as the Maricopa County Attorney in Phoenix, AZ. Mr. Romley holds both a bachelor's and law degree from Arizona State University, and he served in the U.S. Marine Corps. We welcome you.

Our third witness is Gilbert Gallegos, national president of the Fraternal Order of Police, the largest law enforcement organization in the United States. Mr. Gallegos has a degree in criminology from the University of Albuquerque and is a graduate of the FBI National Academy. Prior to becoming FOP national president, Mr. Gallegos served for 25 years in the Albuquerque Police Department, retiring with the rank of Deputy Chief of Police. We are glad to have you.

The fourth witness is Prof. Daniel Richman, of the Fordham University School of Law. A graduate of Harvard University and Yale Law School, Professor Richman clerked for Justice Thurgood Marshall on the Supreme Court. He also spent 7 years as an assistant U.S. attorney and special assistant U.S. attorney for the Southern District of New York, including service as chief appellate attorney. We are glad to have you.

Our fifth witness is Prof. George Thomas, of Rutgers University School of Law. A graduate of the University of Iowa College of Law, Professor Thomas practiced law in Tennessee and taught criminal justice at the University of Tennessee before assuming his current position. We are glad to have you.

Our sixth and final witness is Prof. Paul Cassell, of the University of Utah School of Law. He served as a Federal prosecutor and as an Associate Deputy Attorney General during the Reagan administration. He clerked for then Judge Antonin Scalia on the District of Columbia Circuit Court of Appeals and for Chief Justice

Warren Burger on the Supreme Court. Professor Cassell argued the *Dickerson* case before the fourth circuit.

I ask that each of you please limit your opening statements to 5 minutes. All of your written testimony will be placed in the record, without objection. We will start with Judge Markman and proceed down the line.

PANEL CONSISTING OF STEPHEN J. MARKMAN, FORMER U.S. ATTORNEY FOR THE EASTERN DISTRICT OF MICHIGAN, AND FORMER ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL POLICY, LANSING, MI; RICHARD M. ROMLEY, MARICOPA COUNTY ATTORNEY, PHOENIX, AZ; GILBERT G. GALLEGOS, PRESIDENT, GRAND LODGE, FRATERNAL ORDER OF POLICE, WASHINGTON, DC; DANIEL C. RICHMAN, PROFESSOR OF LAW, FORDHAM UNIVERSITY SCHOOL OF LAW, AND FORMER CHIEF APPELLATE ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, NEW YORK, NY; GEORGE THOMAS, PROFESSOR OF LAW, RUTGERS UNIVERSITY SCHOOL OF LAW, NEWARK, NJ; AND PAUL G. CASSELL, PROFESSOR OF LAW, UNIVERSITY OF UTAH COLLEGE OF LAW, AND FORMER ASSOCIATE DEPUTY ATTORNEY GENERAL, SALT LAKE CITY, UT

STATEMENT OF STEPHEN J. MARKMAN

Judge MARKMAN. Chairman Thurmond, Senator Kyl, thank you very much for the invitation to testify on the subject of section 3501 and *Miranda*. As a staff member of this committee for 7 years, it is a particular honor for me to be back here this afternoon.

As former Assistant Attorney General of the United States from 1985 to 1989, I have been asked specifically to set forth the perspectives of the Reagan administration Department of Justice toward section 3501. It is not my attention here to compare or contrast these perspectives with those of any other administration.

Section 3501, of course, was enacted as part of the Omnibus Crime Control Act of 1968 and represents the congressional response to the Supreme Court's decision in *Miranda* v. *Arizona*. Essentially, 3501 would restore the pre-*Miranda* voluntariness standard to confessions and other statements elicited from suspects during custodial interrogation.

As Assistant Attorney General, I was requested by Attorney General Edwin Meese in 1985 to analyze the *Miranda* decision and the law of pretrial interrogation as part of a larger analysis of the changes in criminal procedure that had resulted from a series of U.S. Supreme Court decisions over the previous 2 decades. His request set in motion a series of actions on the part of the Justice Department that I would like to summarize.

In February 1986, the Office of Legal Policy issued a report to the Attorney General on the law of pretrial interrogation. The report is contained as Attachment B of my testimony. The report was a comprehensive review of the development of the law on pretrial interrogation from its medieval origins to the Supreme Court's decision in *Miranda*. After considerable analysis, the report concluded that the *Miranda* decision had, "had a major adverse effect on the willingness of suspects to provide information to the police."

Various studies were cited which concluded that *Miranda* had substantially reduced the availability of confession evidence to the criminal justice system, reducing in half, for example, confessions arising out of custodial interrogations in Pittsburgh, according to one study. In our judgment, these studies amply bore out the concern expressed by Justice White in his dissent in *Miranda* that, "In some unknown number of cases, the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss in human dignity."

In addition, our report concluded that the continued application of *Miranda* violated the constitutional separation of powers by promulgating a code of procedure for interrogations that was more properly the responsibility of the executive and the legislative branches, that it violates the constitutional principle of federalism by enforcing a nonconstitutional rule of procedure against State courts, that it impaired the effectiveness of the criminal justice system by requiring the expenditure of limited resources in developing cases that could easily have been made prior to *Miranda* and in forcing questionable plea bargains upon the prosecutor, and that it undermined public confidence in the law by freeing known criminals on the basis of what were perceived by many as technicalities and prolonging the anguish of criminal victims through years of additional criminal litigation.

Our report further concluded that section 3501 represented a constitutional response by the Congress to the *Miranda* decision, in light both of the Court's own assertions that its warnings were not mandated by the fifth amendment and by its express invitation to the legislative branches of the Federal and State governments to develop effective alternatives. As part of an overall reform strategy, the report recommended that 3501 be affirmatively invoked in an effort to overrule or abrogate *Miranda*.

Following issuance of the report, the Department convened a special task force in an effort to implement the report's recommendations. Professor Cassell, as well as myself, were among the members of that task force. In its report in May 1987, the task force reaffirmed the strategy of invoking 3501 in an effort to overrule *Miranda*, while at the same time issuing draft guidelines establishing new custodial interrogation procedures in place of those required by *Miranda*. Although the task force viewed section 3501 as a constitutional enactment with or without the guidelines, such guidelines were designed to demonstrate the efficacy of alternative custodial interrogation procedures.

Members of the committee, there is no more significant criminal justice issue that this committee could address than the legacy of *Miranda* v. *Arizona*. While the impact of *Miranda* is a largely hidden one, there is no criminal procedural innovation in modern times that has been more costly. No legacy of the criminal procedure revolution of the 1960's and 1970's has been more devastating to the first civil right of all individuals—the right to be protected from domestic predators.

I would respectfully urge this subcommittee to reaffirm the earlier words of the Judiciary Committee more than 3 decades ago

when it enacted section 3501, "The traditional right of the people to have their prosecutors place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored."

Thank you very much for the opportunity to be here this afternoon.

Senator THURMOND. Thank you, Judge Markman.

[The prepared statement of Judge Markman follows:]

PREPARED STATEMENT OF STEPHEN J. MARKMAN

Members of the Senate Judiciary Committee, thank you very much for the invitation to testify on the subject of § 3501 of Title 18 of the United States Code. As former Assistant Attorney General of the United States from 1985–89, I have been asked to set forth the perspectives of the Reagan Administration Justice Department toward 18 USC § 3501. It is not my intention here to compare or contrast these perspectives with those of any other Administration.

§ 3501 represents the Congressional response to the Supreme Court's decision in *Miranda* v *Arizona,* 384 US 436 (1966). [Attachment A.] In *Miranda,* the Court invited such a legislative response when it stated,

> It is impossible for us to foresee the potential alternatives for protecting the privilege for protecting the privilege which might be devised by the Congress or the States in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed. [466 US at 467]

§ 3501 was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968. The first sentence of § 3501(a) overrules *Miranda* and restores the voluntariness standard for the admission of confessions in federal prosecutions. The remainder of this subsection provides for an initial determination concerning the voluntariness of a confession by the judge outside the presence of the jury. § 3501(b) lists various factors, including the proffering of warnings, which are to be considered by the trial court in applying the voluntariness standard. The status of these factors under this subsection is the same as their status under pre-*Miranda* voluntariness law. As the last sentence of this subsection indicates, these are not preconditions to the admission of a confession, but simply evidence relevant to the determination of a confession's voluntariness. § 3501(d) provides that the statute does not bar the admission of any voluntarily given confession that is outside the custodial interrogation process, while § 3501(e) defines "confession" to include any self-incriminating statement.[1]

As Assistant Attorney General for Legal Policy, I was requested by Attorney General Edwin Meese in 1985 to analyze the *Miranda* decision and the law of pretrial interrogation as part of a larger series of analyses of changes in criminal procedure that had been effected by the U.S. Supreme Court in decisions over the previous two decades.[2] As a former legal academician and prosecutor, Attorney General Meese had long expressed concerns about the impact of the *Miranda* decision. His request set in motion a series of subsequent actions on the part of the Justice Department during his tenure as Attorney General that I have been asked to summarize for this panel.

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[1] § 3501(c) is not directly related to the *Miranda* decision but responds to the Supreme Court's decisions in *McNabb* v *United States,* 318 US 332 (1943) and *Mallory* v *United States,* 354 US 449 (1957), providing that delays of up to six hours in the production of an arrested person before a magistrate do not, by themselves, require the exclusion of a confession obtained in that period.

[2] These analyses were widely disseminated by the Department of Justice at the time of their publication and are reprinted in their entirety in the University of Michigan Journal of Law Reform in the Spring and Summer 1989 volume.

In February of 1986, the Office of Legal Policy (now known as the Office of Policy Development) of the Justice Department issued its Report to the Attorney General on The Law of Pre-Trial Interrogation. [Attachment B.] According to the Attorney General,

> [The Report] comprehensively reviews the development of the law of pretrial interrogation from its medieval origins to the Supreme Court's 1966 decision in *Miranda* v *Arizona*. It places the "*Miranda* rules" in historical and constitutional perspective; rigorously analyzes the *Miranda* decision itself; describes the practical effects of *Miranda* and subsequent legal developments; and compares current American law in this area to the rules and practices of several foreign jurisdictions. It also analyzes the policy considerations relevant to the formulation of rules and procedures for pretrial questioning and examines the prospects for reform.

After considerable analysis, the Report concluded that the *Miranda* decision "had a major adverse effect on the willingness of suspects to provide information to the police." Studies conducted in various communities indicated that *Miranda* had substantially reduced the availability of confession evidence to the criminal justice system. One study in Pittsburgh, for example, determined that *Miranda* had roughly cut in half the number of suspected violent criminals who confessed or who otherwise provided useful information to the police—a reduction from about 60 percent before *Miranda* to about 30 percent afterward. In our judgment, these studies amply bore out the concern initially expressed by Justice Byron White in his dissent in *Miranda*:

> In some unknown number of cases, the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection * * * There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

In addition, the Report concluded that the continued application of *Miranda* (a) violated the constitutional principle of separation of powers by promulgating a code of procedure for interrogations that exceeded the requirements of the Fifth Amendment and that more properly was the responsibility of the executive and legislative branches; (b) violated the constitutional principle of federalism by enforcing admittedly non-constitutional rules against state courts; (c) impaired the effectiveness of the criminal justice system by requiring the expenditure of limited law enforcement resources in developing cases that might easily have been made with the suspect's cooperation prior to *Miranda*, and in requiring the prosecutor to accept pleas that were not commensurate with the seriousness of the actual offense; and (d) undermined public confidence in the law by freeing known criminals on the basis of what were perceived by many as "technicalities" and prolonging the anguish of criminal victims through years of additional criminal litigation.

The Report further concluded that § 3501 represented a valid, constitutional response by the Congress to the *Miranda* decision in light both of the Court's assertions that its required warnings were not mandated by the Fifth Amendment and its express invitation to the legislative branches of the federal and state governments to develop effective alternatives. As the Report asserted:

> *Miranda* should no longer be regarded as controlling because a statute was enacted in 1968, 18 USC § 3501, which overrules *Miranda* and restores the pre-*Miranda* voluntariness standard for the admission of confessions. Since the Supreme Court now holds that *Miranda's* rules are merely prophylactic, and that the Fifth Amendment is not violated by the admission of a defendant's voluntary statements despite non-compliance with *Miranda*, a decision by the Court invalidating this statute would require some extraordinarily imaginative theorizing of an unpredictable nature.[3]

[3] Additionally, the Report concluded that, even if § 3501 was not directly effective in overruling *Miranda*, "it is a relevant factor in deciding whether to overrule that decision. In the past the Supreme Court has been willing to reconsider and overturn constitutional decisions in light of later Congressional enactments which expressed disagreement with them. The Congressional findings embodied in 18 USC § 3501 should also be accorded weight in deciding whether the time has come to overrule *Miranda*."

Concerning the best strategy for pursuing reform of *Miranda,* the Report recommended, first, that the Justice Department seek to persuade the Supreme Court to abrogate or overrule the *Miranda* decision by expressly relying upon § 3501, as well as upon subsequent decisions of the Supreme Court which had held that noncompliance with *Miranda* did not entail any violation of the Constitution.[4] The Report reasoned that § 3501 related directly to federal proceedings, and could be rejected by the Court only by finding an Act of Congress to be unconstitutional. Further, if the Court upheld § 3501, this would effectively dispose of *Miranda* at the state level as well since the States could then enact counterpart statutes to § 3501. The validation of § 3501 would have made it clear that any possible constitutional mandate for continuing to apply *Miranda* in contravention of such statutes had been rejected by the Supreme Court.

Second, the Report recommended that the Justice Department formulate an administrative policy, establishing standards for the conduct of custodial interrogations by federal law enforcement agencies. Such standards would be implemented concurrent with litigative efforts to seek reversal of *Miranda.* "Promulgating such a policy would increase the likelihood of judicial acceptance of the abrogation of *Miranda,* ensure that the enlarged freedom of action resulting from *Miranda's* demise will be exercised responsibly, and demonstrate that implementing alternative procedures would promote fair treatment of suspects as well as furthering law enforcement." Issues to be considered in the development of an interrogation policy by the Department would include the desirability of requiring that interrogations, where feasible, be videotaped or recorded; the desirability of rules providing additional guidance concerning the permissible duration and frequency of interrogations; and the desirability of rules restricting or prohibiting specific deceptive or manipulative practices that were characterized as abusive in the *Miranda* decision and elsewhere.

A number of considerations were cited in support of such new interrogation guidelines. First, the Office of Legal Policy considered such standards to be desirable as a matter of institutional responsibility. Currently, as well as at the time of the Report, the basic rules of custodial interrogations were determined by the *Miranda* decision, and enforced by courts through the exclusion of evidence. If this form of oversight was to be eliminated, as the Report urged, we believed that alternative measures were desirable which ensured that interrogations were carried out in a manner that was fair to suspects, and that did not jeopardize the admissibility or credibility of confessions in subsequent judicial proceedings.

Second, the existence of an administrative policy of this sort would be of substantial value in persuading the courts to abandon *Miranda.* The courts were, by then, two decades after *Miranda,* well-accustomed to setting the rules for custodial interrogations, and to enforcing the rules that they had created in particular cases. As a practical matter, it would be easier for them to relinquish this role if they knew that in doing so they were acceding to a responsible alternative system, rather than writing a blank check for individual officers or agencies.

Third, the adoption of such rules represented an additional response (going beyond § 3501) to *Miranda's* assertion that its rules were not the only acceptable means of ensuring compliance with the Fifth Amendment, and the Court's invitation to develop effective alternatives. A reasonably designed administrative policy would provide an argument for dispensing with *Miranda's* system even under the terms of the decision that created it. A related argument was based on the Court's later decision in *INS* v. *Lopez-Mendoza,* 468 US 1032 (1984), which held that the Fourth Amendment's exclusionary rule did not apply to deportation proceedings. In reaching this conclusion, the Court regarded it as significant that the INS had in place an administrative system for preventing and punishing Fourth Amendment violations. The Department could argue similarly that its internal system of administrative rules and sanctions provided adequate safeguards against Fifth Amendment violations, and justified dispensing with *Miranda's* prophylactic system.

A final point in support of an administrative policy was that it would enable us to demonstrate that replacing the *Miranda* system with superior alternative rules offered major advantages in relation to the legitimate interests of suspects and defendants—especially a proposed requirement that custodial interrogation sessions be videotaped—as well as major gains in promoting effective law enforcement. Adopting publicly articulated standards which avoided the *Miranda* rules' shortcomings as a means of ensuring fair treatment of suspects would be the most effective way of making this point.

In explaining this rationale for new custodial interrogation guidelines, let me emphasize, however, that the Report was not of the view that the constitutionality of

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[4] See, in particular, *Michigan* v *Tucker,* 417 US 433 (1974); *New York* v *Quarles,* 467 US 649 (1984); and *Oregon* v *Elslad,* 470 US 298 (1985).

§ 3501 was contingent upon the implementation of such guidelines. Rather, it made clear that § 3501 was constitutionally defensible—independent of any executive branch guidelines—under the express terms of *Miranda* and its recent progeny. As an enactment of the Congress, § 3501 standing by itself was entitled to considerable deference on the part of the judiciary. While alternative interrogation guidelines, in our judgment, would enhance the overall interests of the criminal justice system, including its protection of defendants' rights, such guidelines were justified on their own terms, as well as in order to allay the concerns of those who disagreed with § 3501 as a matter of policy, rather than as a necessary predicate to the constitutionality of § 3501.

CUSTODIAL QUESTIONING POLICY

Following issuance of the Report, the Attorney General convened several meetings of senior Justice Department officials to discuss its recommendations. Considerable discussion and debate ensued at these meetings, after which the Attorney General established a Task Force to develop specific departmental guidelines governing custodial interrogation by federal law enforcement agencies. In May 1987, after review from both the law enforcement and the litigation components of the Justice Department, draft guidelines were formulated by the Task Force and in October 1987, they were formally presented to the Attorney General.

One part of the draft guidelines set forth general standards concerning the custodial interrogation process relating to such matters as the legal prohibition of coercion, the prompt production of a suspect before a magistrate, the training of officers in the legal and administrative rules governing custodial questioning, the investigation of possible violations, and the establishment of penalties for such violations. A second part of the guidelines set forth detailed procedures to be utilized by the Department's investigating agencies in place of the *Miranda* procedures. Such procedures were discretionary and to be employed only when determined to be useful by the interrogating agents. The alternative procedure required the interrogators to deliver revised warnings to suspects, informing them:

> (1) You do not have to say anything; (2) anything you do say may be used as evidence; (3) we are required by law to bring you before a judge without unnecessary delay; (4) you have a right to be represented by a lawyer once that occurs; (5) if you cannot afford a lawyer, the judge will appoint one for you without charge.

After delivering these warnings, the interrogators would ask the suspect whether he understood these warnings and answer any questions pertaining to them. Most significantly, the custodial interrogation was required to be videotaped, although support also existed on the Task Force for only audiotaping such interrogations.

The draft policy attempted to provide a workable alternative to the *Miranda* warnings, going beyond § 3501, that more effectively promoted the twin objectives of protecting the rights of the individual and promoting efficient enforcement of the criminal laws. Concerning the first objective, the policy provided additional safeguards to suspects not available under *Miranda.* The videotaping requirement provided an objective audio and visual record of an interview that could be reproduced in subsequent judicial proceedings, while the requirement that a suspect be advised of his right to prompt production before a magistrate and to the assistance of counsel once that occurs. In addition, the guidelines required that a suspect be advised of his right to prompt production before a magistrate and to the assistance of counsel once that occurred and also required the training of officers in Fifth Amendment law and related administrative standards. There are no comparable requirements under the *Miranda* rules.

The record established by the videotaping requirement would be in contrast with custodial interrogations under the current *Miranda* requirements which are normally secret proceedings and which generate no objective record concerning (a) compliance with the specified procedural rules; (b) statements and representations made by the interviewer to the suspect; (c) statements and admissions made by the suspect; and (d) other occurrences at the interview. When disputes concerning these matters arise in later proceedings, they are typically resolved at present on the basis of "swearing matches" between the suspect and the interviewing officers. The videotaping requirement accordingly would provide a type and degree of objective protection for the suspect that does not exist under *Miranda.* See generally, American Law Institute, Model Code of Pre-Arraignment Procedure, § 130.4 Commentary at 341–42 ("the concern about the danger of police abuse which cannot subsequently

be established in court * * * has in no way been lessened by the *Miranda* decision.").[5]

At the same time, the alternative procedure dispensed with the specific features of *Miranda* that have done the greatest damage to legitimate law enforcement: (a) the 'prophylactic' *Miranda* right to counsel in connection with custodial questioning;[6] and (b) the requirement that an affirmative waiver of the rights set out in the *Miranda* warnings must be obtained from a suspect prior to questioning.[7] Taken together, these aspects of the *Miranda* decision have effectively established a constitutional right going far beyond the Fifth Amendment's fights not to be compelled to incriminate oneself—the right not to be questioned at all. Studies set forth in the Report have demonstrated that these specific requirements have led to a substantial reduction in the number of statements by suspects to investigators, even in jurisdictions where suspects were already receiving warnings concerning the right to remain silent. [Attachment C.] These features of *Miranda* are, at best, only remotely related to enforcement of the Fifth Amendment which does not address the right to counsel and which does not require prior consent to questioning, but only bars eliciting responses through coercion. Far more effective protection against actual coercion is provided by the videotaping requirement and the other safeguards contained in the draft guidelines.

§ 3501 LITIGATION

Following presentation of the draft guidelines to the Attorney General, and further discussions within the Department, efforts were undertaken to attempt to identify a case in which the Department could directly raise the constitutionality of § 3501. Such efforts involved identifying a case in which the voluntariness of a confession was not essentially in dispute, and therefore in which there was no actual coercion in violation of the Fifth Amendment, but nevertheless a case in which an element of the *Miranda* warnings had not been properly given. Although I recall that discussion within the Department focused upon a number of cases in various postures within the federal system, in particular, I recall that considerable attention was accorded to *United States* v *Goudreau, an Eighth Circuit case, in which a number of components of the Department, including the Office of Legal Policy, specifically recommended the invocation of* § 3501. Although § 3501 had not been raised in this case before the trial court, the Department had contended that defendant's statements were voluntary and should be admitted despite the absence of warnings. My further recollection is that § 3501 was eventually raised in this case but that it did not prove to be a dispositive issue.

Additionally, informal guidelines on constitutional litigation were issued by the Department to the United States Attorneys offices in February of 1988 which included guidelines relating to the *Miranda* procedures. These guidelines concluded that, "[f]ederal prosecutors, in appropriate cases, should urge the courts to apply broadly the principles underlying the various limitations to *Miranda*." As the result, however, of an inability on the part of the Department to identify a further case in which to invoke the constitutionality of § 3501, and the arising of issues of greater immediate priority, the Department never proceeded further to raise the constitutionality of § 3501 during the Reagan Administration.

CONCLUSION

Members of the Judiciary Committee, there is no more significant criminal justice issue that this Committee could address than the legacy of *Miranda* v *Arizona*. While the impact of *Miranda* is a largely hidden one, there is no criminal procedural innovation in modem times that has been more costly. No legacy of the revolution

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[5] In connection with the videotaping recommendation, substantial analysis was also done of the experiences of Orange County (Cal.) and the State of Alaska, two jurisdictions which had experimented with the videotaping of custodial interrogations. The most consistently identified benefit of recording was its value in rebutting coercion and *Miranda* claims, as well as in foreclosing subsequent denials of admissions by suspects.

[6] The Supreme Court has held that the Sixth Amendment constitutional right to counsel does not attach until a suspect is formally accused and that the *Miranda* right to counsel at the earlier stage of custodial questioning is only a suggested safeguard against coercion that the Constitution does not require. See, e.g., *Moran* v *Burbine,* 475 US 412 (1986).

[7] An affirmative waiver is not in itself a prerequisite to a valid waiver. Answering questions when not compelled to do so has been held to be a sufficient waiver at least in a non-custodial setting. See, e.g. *Minnesota* v *Murphy,* 465 US 420, 427–29 (1984). Since the *Miranda* warnings themselves are not constitutionally required, but are simply 'measures to insure' that a suspect's right against self-incrimination is protected in a custodial setting, no single, inflexible formulation is required to insure this protection.

in criminal procedure of the 1960's and 1970's has been more devastating to the first civil right of individuals, the right to be protected from domestic predators. While it may be easier to deal with criminal justice problems whose costs are more visible, if effective reform of the criminal justice system is to be undertaken, unsettling such "settled" areas of the law as *Miranda* is required. Until that time, society can do little more than continue to count Justice White's "unknown number" of killers, rapists, and other criminals who go free because of the devastating impact of Miranda upon confession evidence available to the system. I would respectfully urge you to reaffirm the earlier words of this Committee when it enacted § 3501 thirty years ago, "the traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored." Thank you very much for the invitation to appear here this afternoon.

[EDITOR'S NOTE: The attachments A–E referred to in the prepared statement of Stephen J. Markman are retained in the subcommittee files.]

ATTACHMENT F

TRUE CONFESSIONS

Miranda's Hidden Costs

The Warren Court's creation of a constitutional right not to be questioned has impeded law-enforcement efforts in ways that even the professionals scarcely comprehend.

PAUL CASSELL AND STEPHEN J. MARKMAN

CURIOUSLY absent from the debate within Congress about how to combat historically unprecedented levels of violent crime in the United States has been any serious discussion of the single most damaging legacy of the Supreme Court's criminal-justice revolution of the 1960s: the *Miranda* rule. While intensive debate has focused upon other aspects of the Court's revolution—for example, the exclusionary rule and novel forms of habeas-corpus review—*Miranda* today seems little more than an anachronistic remnant of the era of "Impeach Earl Warren" billboards.

One possible explanation for this development is that the impact of *Miranda*, while extraordinarily detrimental to the criminal-justice system, is largely a hidden one, while the costs of such innovations as the exclusionary rule and habeas corpus are highly visible, in the form of kilos of cocaine being removed from the courtroom and repetitive criminal appeals inundating the justice system. Indeed, the costs of *Miranda* are so obscured that even many law-enforcement officers are only vaguely aware of them. Estimating the costs of *Miranda* requires that we engage in the difficult exercise of comparing the present reality with the reality which might exist "but for" the rule.

For tens of millions of Americans, the *Miranda* warnings have been learned from countless televised police dramas in which arrested suspects have been apprised by conscientious police officers that "You have the right to remain silent; what you say may be used against you; you have a right to an attorney; and you have a right to a free attorney if you cannot afford one." Few of those who have long since memorized these innocuous words have paused to consider how they have eroded the ability of the criminal-justice system to carry out its responsibilities.

In its 1966 decision in *Miranda* v. *Arizona*, the Supreme Court by a 5 to 4 vote determined that the Fifth Amendment's prohibition against a person's being "compelled in any criminal case to be a witness against himself" required what have become known as the *Miranda* warnings whenever a witness in custody is subject to questioning by the police. The decision also required that police obtain a "waiver of rights" from a suspect—that is, an affirmative agreement from the suspect that he would like to talk to police. Also, if at any time the suspect indicated a wish to stop talking or to see a lawyer, police had to stop questioning immediately. Failure to deliver the warnings, obtain the waiver, or cut off questioning when requested automatically bars the use at trial of statements obtained from the suspect.

Underlying *Miranda* was a deep suspicion on the part of the Court majority about any custodial interrogation of criminal suspects. For the 175 years preceding *Miranda*, it had never been thought that the police were violating a suspect's constitutional rights merely by questioning him in the absence of an attorney. No, we are not referring to a police officer's beating the hapless suspect with a rubber hose or policemen working in shifts to keep the suspect from sleep until he finally confesses to a crime. Such tactics were condemned uniformly well before *Miranda*. To satisfy the requirements of the Fifth Amendment, a confession needed to be voluntary, and circumstances which called that voluntariness into doubt served to undermine the admissibility of a confession. Confessions occur for any number of reasons, including the simple desire to cleanse one's soul and the more com-

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 ILLUSTRATION BY DENNIS DITTRICH

plicated desire to explain extenuating circumstances. Under the voluntariness standard, police were not precluded from asking the suspect what knowledge he possessed about the dead body they had discovered buried in his backyard.

This old understanding of the Fifth Amendment's prohibition against coerced self-incrimination was sharply transformed by *Miranda*. The Court acknowledged that "it might not find the defendant's statements to have been involuntary in traditional terms." In other words, the *Miranda* decision was amending the Constitution. In place of the previous understanding, the Court effectively provided a criminal suspect with a right not to be questioned. If he was questioned prior to the warnings, any statements would be suppressed; if he was questioned after the warnings and after he had requested an attorney, any statements that were made prior to the attorney's arrival again would be suppressed. After the attorney's arrival, it was certain that there would be no statements at all.

If the criminal suspect incriminates himself through police methods that do not involve compulsion, that is a good thing.

In dissent, Justice Byron White observed, "In some unknown number of cases the Court's rule will return a killer, a rapist, or other criminal to the streets and to the environment which produced him to repeat his crime whenever it pleases him. As a consequence there will not be a gain, but a loss, in human dignity." Justice White was prescient, although it can hardly be imagined that the majority of Justices in *Miranda* disagreed with his assessment. Such a result was logically certain under *Miranda*.

The insidiousness of *Miranda* is that, by and large, the violent predators placed back on the streets are *not* suspects to whom police have failed to give proper warnings. After nearly three decades, the police not surprisingly have learned *Miranda* by rote and only rarely fail to administer its warnings or follow its waiver and questioning-cutoff rules. Relatively few criminal cases involve the suppression of evidence obtained by police after a failure to comply with *Miranda*. This is what many observers, including some law-enforcement officers themselves, mean when they contend that the system has "learned to live" with *Miranda*.

No, the enormous cost of *Miranda* is entailed not in the lapses of the system but in its successes. It is when the warnings are properly administered and waiver rules are followed that it wreaks its greatest harm. For what it has done is to substantially dry up access to a hugely important category of criminal evidence—confession evidence. It is almost as if the Supreme Court had told law-enforcement officials that, henceforth, they were no longer going to be able to use fingerprint evidence. No one would doubt that in "some unknown number of cases" individuals who would otherwise have been correctly identified as criminals would avoid prosecution.

Principally, *Miranda* has eroded the supply of information available to law enforcement by introducing the criminal's defense attorney to the process at the earliest possible stage. This is done, in a sense, by the suspect asserting his *Miranda* right to have an attorney present at questioning even before formal charges have been filed. The effect of this is to preclude entirely the questioning of many suspects because police recognize that such questioning would be pointless. By effectively insulating the suspect who invokes his rights or asks for a lawyer from any questioning, no matter how restrained or reasonable, *Miranda* has assured that far fewer confessions will be induced by questioning. For the *Miranda* majority, this was cause for celebration, not concern. But this is an odd—not to say dangerous—view of the world. As an earlier Supreme Court said, "the Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will." The principal legacy of *Miranda* is the creation of an environment in which everything possible has been done to avoid such self-inflicted injuries. Given the relatively modest intellectual faculties of many violent criminals, the incidence of such injuries had always been significant.

If the criminal suspect incriminates himself through police methods that do not involve compulsion, that is a good thing. It is a good thing because it results in accurate fact-finding by the criminal-justice system; it avoids the possibility that an innocent person might be charged with a crime he did not commit; and it promotes public confidence that the police have caught the right person. In other words, it is a good thing because it promotes justice through procedures which most Americans would view as fair.

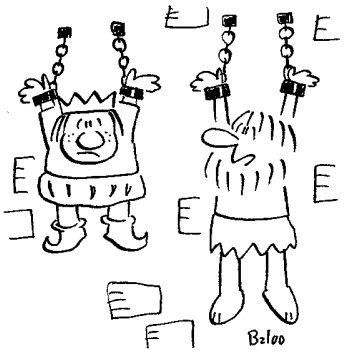
The most compelling evidence of the desirability of confessions, and of the extent to which Justice White's warnings have been borne out, comes from the before-and-after studies done in the immediate wake of the decision in 1966. One leading study, done in Philadelphia, reported that, before *Miranda*, an estimated 45 per cent of all criminal suspects made confessions to police officers; following *Miranda*, that figure dropped to approximately 20 per cent. Another study, done in New York City, found that confession rates fell from 49 per cent to 15 per cent. In Pittsburgh, the confession rate among suspected robbers and murderers fell from 60 per cent to 30 per cent. Adverse effects on confessions were also reported in Chicago, Kansas City, Brooklyn, and New Orleans. The best-estimate consensus among all the studies done on the impact of *Miranda* is that a lost confession occurs in approximately one of every six, or 16 per cent, of all criminal cases in the United States.

THE other leading methodology for such calculations, albeit less exact, is to compare the American confession rate after *Miranda* with confession rates in countries that follow different approaches to regulating police interrogations. Such comparisons fully confirm the conclusions of the before-and-after studies. Since *Miranda*, American police appear to obtain confessions in perhaps 40 per cent of all cases. In other countries, police

are far more successful. In Great Britain in the 1970s and early 1980s, police, following the "Judges' Rules," gave only a very limited advice of rights. Confession rates were estimated to be 61 to 85 per cent, well above reported American rates. In Canada, confession rates also appear to be substantially higher than in the post-*Miranda* United States.

Such declines in confession rates as have occurred in the United States since *Miranda* are extraordinarily harmful to the interests of effective law enforcement. Confession evidence, because it comes from the perpetrator himself, is compelling; but it doesn't stand alone—it is virtually always subject to corroboration by physical or other evidence. According to the available studies, in about one-quarter (24 per cent) of all criminal cases, confessions or other self-incriminating statements by a suspect are indispensable to a criminal conviction; in many more cases, perhaps an equal number, it can be surmised that they make some difference in terms of the severity of the offense for which a defendant is convicted.

A rough calculation, then, can be made as to the real-world cost of the *Miranda* rules. Multiplying the estimated 16-point reduction in the confession rate after *Miranda* by the estimated 24 per cent of cases in which a confession was necessary for conviction produces a figure of 4 per cent of all criminal cases that will be "lost" or never successfully prosecuted because of the rules. That figure may not sound very high, but the cost in absolute numbers of criminal cases is staggering. For FBI-index crimes, each year *Miranda* results in approximately 28,000 "lost" cases for violent crimes (murder, rape, aggravated assault, and robbery) and 79,000 "lost" cases for serious property crimes (burglary, larceny, and car theft). The bare numbers do not begin to convey the human costs in murders that go unpunished, rapists who remain at large, and treasured heirlooms that are never recovered.



"Sibling rivalry, you say?"

Additionally, the leverage of prosecutors would be reduced in a roughly equal number of cases, resulting in plea bargains more favorable to the defendant and less favorable to the public. Compare these figures with the likely gains expected from other crime-control measures, such as midnight basketball leagues or even long-overdue habeas corpus reform. It seems improbable that any other single needed change in the criminal-justice system would yield anywhere near the number of successful prosecutions that would result from repealing *Miranda*.

Further, all these figures must be weighed in the light of other figures from the Bureau of Justice Statistics indicating that roughly two-thirds of all violent crime in the United States is committed by repeat offenders. *Miranda* does not merely defeat justice in the immediate case, but prematurely returns to the streets individuals in this high-risk category.

IF SUCH a cost in "lost" prosecutions were compelled by the clear language of the Constitution or by the dictates of sound public policy, then society might intelligently choose to suffer the tragic consequences. However, the strictures of *Miranda* are not required by the Constitution—as the Supreme Court recognized in *Miranda* itself—nor are they improvements over alternative methods of achieving fairness and due process in the context of custodial questioning. *Miranda* instead is a "prophylactic" rule (by its own terms) designed to establish protections against violations of the Fifth Amendment. As Chief Justice Warren remarked in his opinion for the court, "[T]he Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective [as the *Miranda* rules]." In a later decision, the Court reiterated that the *Miranda* rights "were not themselves rights protected by the Constitution but were instead measures to ensure that the right against compulsory self-incrimination was protected."

Responding to this invitation, Congress in 1968 enacted new legislation concerning police interrogation, adopting the view that such legislation would be "fully as effective" in maintaining the guarantees of the Fifth Amendment. The new law restored the traditional "voluntariness" test and identified the *Miranda* warnings as mere factors to be considered by the courts in deciding whether or not a confession was genuinely voluntary.

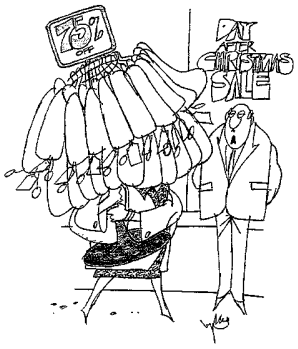
Because of the hostility of the incumbent attorney general, Ramsey Clark, who believed that it was unconstitutional, the new congressional enactment quickly fell into desuetude. United States Attorneys were ordered not to defend confessions unless they satisfied the *Miranda* standards. Although later attorneys general, including John Mitchell and Ed Meese, were cognizant of the statute and sensitive to the costs of *Miranda*, no serious efforts were undertaken to reverse the Johnson Administration policy or to secure any determination of the constitutionality of the law. A recommendation by the

Justice Department's Office of Legal Policy in 1987 that an aggressive effort be made to test the law was never adopted as the result of opposition by other agencies within the Department.

THE time has never been better for a test case raising the 1968 law and challenging *Miranda*. Just last year, Justice Scalia wrote a scathing concurrence chastising the Justice Department for its failure to enforce the law. He observed that that failure "may have produced—during an era of intense national concern about the problem of run-away crime—the acquittal and non-prosecution of many dangerous felons, enabling them to continue their depredations upon our citizens." He promised to rule on the statute at the next available opportunity. Congress should make certain that the Justice Department gives him the opportunity by directing it to begin enforcing the statute and reminding the Executive Branch of its constitutional duty to "take care that the laws be faithfully executed." Congress need not enact a new law; it need only ensure that a law already on the books is presented to the Court.

A favorable Court ruling seems quite a realistic prospect. It has long been understood that the Congress has the final say on rules of evidence for federal cases. If the statute admitting voluntary confessions does not confront any constitutional barrier (as the Court has now plainly held), on what possible grounds could the enactment of the people's representatives be struck down? As the Office of Legal Policy observed in recommending that the legitimacy of the *Miranda*-repeal statute be asserted, "There is every reason to believe that an effort to correct this situation would be successful. . . . It is difficult to see how we could fail to make our case."

While the statute highlights the problems of *Miranda*'s continuing vitality in federal cases, equally perplexing is its applicability to the far greater number of state criminal prosecutions. The Supreme Court's acknowledgment that the *Miranda* rules are not derived from the Fifth Amendment leads one to ask how the federal judiciary possesses the authority to impose *Miranda* upon the states. It is an extraordinarily novel proposition of constitutional law that the states are limited in their criminal procedures not merely by the dictates of the Constitution but also by superintending or "prophylactic" rules invented by the federal judiciary. That such a proposition has not yet been challenged can be explained only by the states' tendency to rely upon the Justice Department for leadership on constitutional matters of this sort, as well, perhaps, as by an understandable failure even by the law-enforcement community to recognize the full extent of *Miranda*'s hidden costs.



"One to a customer, madam."

Ironically, there are better means of enforcing the very protections toward which *Miranda* is directed. However, as is the case generally with the exercise of uniform national policies, *Miranda* petrified efforts by the states, which were widespread in the 1960s, to experiment with their custodial interrogation procedures and search for alternatives that might better protect not only society's interest in apprehending criminals but also suspects' interests in preventing coercive questioning.

Perhaps the most effective replacement for *Miranda* would simply be to videotape or record police interrogations. About one-sixth of all police departments in the country already videotape at least some confessions, and a recent study by the National Institute of Justice concluded that, in addition to providing safeguards for the suspect, videotaping also resulted in the improvement of police interrogation practices, rendered confessions more convincing to judges and juries, and assisted prosecutors in negotiating more favorable plea bargains and guilty pleas. Videotaping would also provide more protection for innocent suspects caught up in the criminal-justice system.

For *Miranda* is not particularly well tailored to protecting a suspect's rights to be free from coercion. Justice Harlan's point in his *Miranda* dissent has never been effectively answered: "The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers." It is not clear why police using rubber hoses before *Miranda* would have thought it necessary to shelve them afterward. Furthermore, once a valid *Miranda* waiver is obtained, police are relatively free to proceed as they like.

No legacy of the Warren Court has been more devastating to the first civil right of individuals, the right to be protected from attack. Congressional conservatives may choose to place serious procedural reform off-limits. They may do this, in part, because of the burdens of leadership required in order to explain the relationship of procedure to the substantive ability of the justice system to protect society. They may do this because it is easier to deal with public-policy problems whose costs are more visible. However, if effective reform is to be undertaken, unsettling such settled areas of the law as *Miranda* will be required. Until that time, society can do little more than continue to count Justice White's "unknown number" of killers, rapists, and other criminals who go free because of the criminal-justice innovations of the Warren Court. □

Senator THURMOND. Mr. Romley.

STATEMENT OF RICHARD M. ROMLEY

Mr. ROMLEY. Mr. Chairman and members of this subcommittee, let me first thank you very much for giving me this opportunity to be here before you today.

The matter we are to do discuss, in my opinion, has an unfortunate consequence of undermining public confidence in our criminal justice system. As has been pointed out, I am the Maricopa County District Attorney and the chief prosecutor for the sixth largest county in America. Ironically, as the Maricopa County Attorney, I am the successor to the previous county attorney in which Ernesto Miranda, the *Miranda* v. *Arizona* decision, came out of.

Currently, there is a request before the U.S. Supreme Court to hear an appeal from the U.S. Court of Appeals for the fourth circuit involving the *Miranda* decision. As has been pointed out, the issue revolves around a ruling by the court of appeals to admit into evidence the voluntary confession of a serial bank robber by the name of Charles Dickerson even though he had not received his *Miranda* warnings. Unfortunately, in my opinion, the Justice Department has expressed the view that such a confession is inadmissible and has issued a directive to that effect. That decision, in my opinion, should be changed.

When the Supreme Court in the *Miranda* decision instructed law enforcement officials to provide certain warnings to a criminal suspect held in custody before questioning, the Court invited Congress and the States to experiment with other methods of ensuring a suspect's fifth amendment right rather than strictly following the procedural guidelines issued in *Miranda*.

However, in doing so, they were clear to point out that they must provide adequate protection to the privilege against self-incrimination. In 1968, as the previous speaker has indicated, the omnibus crime control bill was passed and was codified in 18 U.S.C. 3501, which does not require the automatic preclusion of *Miranda*.

In the *Dickerson* case, when the fourth circuit decided that matter, it referred to that particular statute and said that excluding evidence of an otherwise voluntary confession because a defendant had not received his *Miranda* warnings is not constitutionally mandated. The court went on to say,

> * * * in enacting Section 3501, Congress recognized the need to offset the harmful effects created by *Miranda*'s unrebuttable presumption * * * no longer will criminals who have voluntarily confessed their crimes be released on more technicalities.

The court of appeals reached this conclusion in spite of what the court perceived to be a political decision by the Justice Department to not argue section 3501. The court said,

> Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it.

As a prosecutor of 20 years of experience, I have seen firsthand the tragic effects on victims of crime that occurs when a voluntary confession of the, in my opinion, obviously guilty are suppressed. As a result, I have witnessed a serious erosion in the public's confidence in our criminal justice system.

No one disagrees that a confession that is coerced—if a defendant is psychologically or physically abused, then his or her confession should not be admissible in a criminal courtroom. However, this administration's position that there is an automatic exclusion in a criminal trial of a defendant's otherwise voluntary confession does not serve justice. The strict application of the exclusionary rule creates social costs unacceptable to law-abiding citizens. Such a position, in my opinion, is absurd on its face and favors form or substance, formalities over justice.

To graphically illustrate the injustice when an otherwise voluntary is excluded solely because *Miranda* was not technically adhered to, I would cite an Arizona case. Toribio Rodriguez was accused of brutally stabbing, sexually assaulting and killing a person by the name of Dawn Dearing. While being lawfully detained pursuant to a court order so that police could obtain blood and hair samples, Rodriguez was questioned by the police and he gave a statement. After trial, he was convicted and sentenced to death.

This conviction was reversed and his incriminating statements were suppressed merely because *Miranda* warnings were not given, even though there was not one bit of evidence to indicate coercion or involuntariness. Mr. Rodriguez is presently awaiting retrial. This injustice cannot be the result intended when we were all afforded the protection of the fifth amendment.

I would strongly urge the Justice Department to support the fourth circuit's ruling recognizing the constitutionality of section 3501. It is time to balance the scales of justice.

Thank you.

Senator SESSIONS [presiding]. Thank you.

[The prepared statement of Mr. Romley follows:]

PREPARED STATEMENT OF RICHARD M. ROMLEY

Mr. Chairman and members of this subcommittee:

Thank you very much for giving me this opportunity to appear before you today and to discuss with you a matter that has the unfortunate consequence of undermining public confidence in our criminal justice system.

As the Maricopa County district attorney, I am the chief prosecutor for the sixth largest county in America. Maricopa County encompasses Phoenix, Arizona, along with 23 other cities. I am here to discuss with you a matter that involves the *Miranda* decision. Ironically, I am a successor to the prosecutor who initiated the original case against Ernesto Miranda. *Miranda* v. *Arizona,* 384 U.S. 36 (1966).

Currently, there is a request before the U.S. Supreme Court to hear an appeal from the U.S. Court of Appeals for the Fourth Circuit involving the *Miranda* decision. The issue revolves around a ruling by the court of appeals to admit into evidence the "voluntary confession" of a serial bank robber by the name of Charles Dickerson even though he had not received his *Miranda* warning. Unfortunately, the Justice Department has expressed the view that such a confession is inadmissible and has issued a directive to that effect. that decision should be changed.

When the Supreme Court in the *Miranda* decision instructed law enforcement officials to provide certain warnings to a criminal suspect held in custody before questioning, the court invited Congress and the States to experiment with other methods of insuring a suspect's Fifth Amendment right rather than strictly follow the procedural guidelines issued in *Miranda.* However, in doing so they must provide adequate protection to the privilege against self-incrimination. In 1968, Congress

passed and President Johnson signed into law the Omnibus Crime Control and Safe Streets Act. It contained a provision codified at 18 U.S.C. § 3501 providing that a violation of "Miranda" does not result in the automatic exclusion of a confession, but is only one factor to be considered in determining voluntariness and admissibility.

When the Fourth Circuit decided the Dickerson case, it referred to § 3501 and said that excluding evidence of an otherwise voluntary confession because a defendant had not received his *Miranda* warnings is not constitutionally mandated. the court went on to say:

> * * * in enacting § δ3501, Congress recognized the need to offset the harmful effects created by *Miranda's* unrebuttable presumption * * * no longer will criminals who have voluntarily confessed their crimes be released on mere technicalities.

The court of appeals reached this conclusion in spite of what the court perceived to be a political decision by the Justice Department to not argue § 3501. The court said:

> Fortunately we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it.

As a prosecutor with more than 20 years experience, I have seen firsthand the tragic effect on victims of crime that occurs when voluntary confessions of the obviously guilty are suppressed. As a result, I have witnessed a serious erosion in the public's confidence in our criminal justice system. No one disagrees that if a confession is coerced, if a defendant is psychologically or physically abused, then his/her confession should not be admissible in a criminal courtroom. However, this administration's position that there is an "automatic exclusion" in a criminal trial of a defendant's otherwise "voluntary" confession does not serve justice. The strict application of the exclusionary rule creates social costs unacceptable to law-abiding citizens. Such a position is absurd on its face and favors "form over substance" * * * "formalities over justice."

To graphically illustrate the injustice when an otherwise voluntary confession is excluded solely because "Miranda" was not technically adhered to, I would cite the 1996 case of *Aarizona* v. *Rodriguez*. 186 Ariz. 240, 921 P.2D 643 (1996).

Toribio Rodriguez was accused of brutally stabbing, sexually assaulting and killing Dawn Dearing. While being lawfully detained pursuant to a court order so that police could obtain blood and hair samples, Rodriguez was questioned by the police and he gave a statement. After trial, he was convicted and sentenced to death. This conviction was reversed and his incriminating statement was suppressed merely because *Miranda* warnings were not given, even though there was not one bit of evidence to indicate coercion or involuntariness. Mr. Rodriguez is presently awaiting retrial.

This injustice cannot be the result intended when we were all afforded the protection of the Fifth Amendment.

I strongly urge the justice department to support the fourth circuit's ruling recognizing the constitutionality of § 3501. It is time to balance the scales of justice.

Thank you.

Senator SESSIONS. Mr. Gallegos.

STATEMENT OF GILBERT G. GALLEGOS

Mr. GALLEGOS. Good afternoon, Mr. Chairman and other members of the Subcommittee on Criminal Justice Oversight. My name is Gilbert Gallegos. I am the National President of the Fraternal Order of Police, which is the largest law enforcement organization in the country, 277,000 members. I am pleased to have this afternoon to speak in support of the recent decision, *United States* v. *Dickerson*.

I have got to add a footnote to my remarks in that I have lived as a police officer—and I guess I am telling my age—before *Miranda*. I was a rookie officer in 1966 when *Miranda* was decided, so I have had the opportunity to deal with both sides of the *Miranda* issue. I think it has helped the law enforcement profession become more professional in how it deals with it, but I think that

we have some definite problems that we have to address and I think that *Dickerson* addresses that.

Let me give you one example of how it has impacted law enforcement. On July 24, 1985, the bodies of Paul Conrad and Sandra Wicker were discovered in Lancaster, PA. Through informants, the detectives of the Lancaster Police Department were able to come up with a suspect by the name of Zook, and they directed where this Zook would be located and sure enough they were able to find him and took him into custody.

He was brought in to police department and shortly thereafter read his *Miranda* rights. Incidentally, he also had some weapons in his possession, along with some property that eventually turned out to be from one of the victims. So they felt they had a pretty good suspect, so they started talking to the suspect and he denied that he was involved and couldn't give any real corroboration as to where he was involved at and that he didn't know the victims.

But, in fact, Sandra Wicker, who was one of the victims—her name was located in his address book. When they confronted him with that, he became very angry. So he said he wanted to call his mother to see if she could find him an attorney. So he went to call his mom and came back, and the officers again asked him, do you want to continue with it. He chose to continue and gave a confession.

Ultimately, the Supreme Court of Pennsylvania ruled that it was inadmissible, the confession, because of the fact that he went and called his mother. But the fact is that he voluntarily gave a confession and it was not coerced. That is the kind of technicality I think *Dickerson* addresses and that we in law enforcement have to deal with all the time.

I think 3501—Congress has taken a positive step, as they did in 1968, to address this issue, and I think that it only makes good sense that the 1968 decision by Congress should be upheld by all courts.

Now, the thing to look at as far as *Miranda* is the way it impacts police officers. We have to often make the decision as to when is the right time to give the *Miranda* warnings. So often, police officers are second-guessed, and it takes judges, such as Judge Markman, many years to determine, in fact, whether a decision was made appropriately by the police officer and whether that confession should be brought into the record.

But a police officer often has to make that under stressful situations, in the street, or whenever the situation arises that they have to make the *Miranda* warning available to the suspect. So even though it isn't always required, the practice has been around the country that police officers pretty much, as a matter of fact, give the *Miranda* warnings and, in fact, obtain confessions even after giving the warnings and they are not coerced. So I think that the court decision rises to the real needs of the rank-and-file police officers out in the street who are trying to deal with the public safety issues that confront this country.

The thing that some of the critics have talked about as far as *Miranda* and reducing the threshold level of *Miranda* is that confessions will be coerced. I think that is a standard that has evolved over the years since 1966 and before that, for that matter, that in-

voluntary confessions or coerced confessions have never really been upheld by the court anyway even before *Miranda*.

So I think that the fact that *Dickerson* has been passed on by the Fourth Circuit Court of Appeals—the naysayers will say that it is going to reduce that threshold. I don't think it does that. Police officers are going to continue to give the *Miranda* warnings, are going to continue to extract confessions that are reasonable, not coerced, not under threat, from suspects. That will happen, and I think that needs to happen across this country.

So I think the logic of public safety, I think the logic of rational approach to taking confessions, I think the logic of saying we make mistakes on occasion, but they don't have to be such mistakes that they override the public safety—and I think that really is what the issue is here.

Thank you, Mr. Chairman.

Senator SESSIONS. Thank you.

[The prepared statement of Mr. Gallegos follows:]

PREPARED STATEMENT GILBERT G. GALLEGOS

Good morning, Mr. Chairman and distinguished members of the Senate Subcommittee on Criminal Justice Oversight. My name is Gilbert G. Gallegos, National President of the Grand Lodge, Fraternal Order of Police. The F.0.P. is the nation's largest organization of law enforcement professionals, representing more than 277,000 rank-and-file law enforcement officers in every region of the country.

I am pleased to have the opportunity this morning to speak in support of a recent court decision, *United Slates* v. *Dickerson*, which upholds; a Congressional attempt to address legislatively the issues of pretrial interrogations and self-incrimination which are currently governed by the Supreme Court's decision in *Miranda* v. *Arizona* (1966).

Law enforcement officers have a demanding and difficult job, and much is expected of us—whether it's rescuing a cat, directing traffic, delivering a baby, or busting a drug dealer. As a police officer, I am very proud to say that the brave men and women who I am privileged to represent here today work very hard to meet, and hopefully exceed, those expectations every day.

A career in law enforcement, like any other, is not without its frustrations. But for a police officer, these frustrations have less to do with the workplace and more to do with our criminal justice system which all too often allows criminals to avoid justice because of "technicalities."

What precisely are these technicalities? Perhaps the American public does not know how many criminals are walking the streets today or how many will be released from prisons today because of these "technicalities." I would wager, however, that most law enforcement officers would be able to tell you how many crooks they arrested have walked on a "technical."

Let me give you just one example of how this can happen On July 24, 1985, the bodies of Paul Conrad and Sandra Wiker were discovered in Lancaster, Pennsylvania. It was a brutal murder—the victims had been stabbed, strangled, bound and gagged.

Two days later, several detectives of the Lancaster Police Department, along with the District Attorney, interviewed two people who provided information linking a man named Zook to the killings and naming a hotel where they thought Zook could be found. The police decided to stake out the motel. A few hours later, Zook left his hotel room, and pursuant to their instructions, the police officers placed him under arrest. At that time, Zook had in his possession a knife and a revolver along with two rings later identified as belonging to Paul Conrad.

Zook was brought to police headquarters and, shortly thereafter, read his *Miranda* rights. He was questioned about the murders and the weapons in his possession. It is worth noting that Zook was not at all unfamiliar with police procedure or the criminal justice system, having been previously convicted of attempted murder, robbery, burglary and criminal conspiracy. According to Lancaster Police Lieutenant Michael Landis, one of the interrogating officers, Zook offered an explanation of his whereabouts on various key dates, but could not provide the names of witnesses to corroborate his story. He could offer no cogent explanation as to why he

checked into the motel under an alias. He claimed he got the gun and the ring in exchanges for drugs but would not, or could not, name the other party to the transaction. When asked whether he knew Sandra Wiker, he denied knowing her. When confronted with the fact that her name was listed in his own address book, he could not explain the discrepancy and became angry.

At the pre-trial hearing to determine whether or not Zook's statements should have been suppressed, Lieutenant Landis stated that about two-thirds of the way into the interview, after being asked if he knew Conrad or Wiker, Zook asked if he could use the phone to call his mother to see if she could get him an attorney. At this point, the officer asked if this meant Zook wanted him to stop the questioning until Zook had an attorney present. Zook told Lieutenant Landis, no and allowed the interview to continue.

By a 4 to 3 vote, the Pennsylvania Supreme Court threw out Zook's conviction for the murders. The Court ruled that under *Miranda* Lt. Landis should have stopped questioning when he asked to use the phone even though Zook agreed to continue and there was no evidence of coercion. Since, the Court said, it could not be established exactly when Zook asked to make the phone call, all of his statements had to be thrown out.

I should point out that there is no question Zook made his statements voluntarily, not as a result of any improper police coercion. I should also point out that of the eight judges who examined the question as to whether the Lancaster Police Department had to stop questioning when Zook made his request, four found that they should have and four found that they had no reason to do so. Yet the jury's conviction of Zook for these two brutal murders was thrown out.

This is a technicality.

The issue before the Fourth Circuit in *Dickerson* was precisely the question of whether to let a confessed, dangerous criminal go free on a "technicality." Fortunately, the Fourth Circuit refused to allow this to happen, and instead applied a law Congress had passed in 1968—Section 3501 of Title 18, U.S. Code. "No longer will criminals who have voluntarily confessed their crimes be released on mere technicalities," the court wrote in upholding this law. To this holding, law enforcement officers all across the country say, "It's about time,"

With all the legal gymnastics available to defense lawyers, the caprice of judges and overburdened prosecutors, it is certain that many persons who ought to be locked up are walking the streets today. Many blame law enforcement officers, expecting us to be legal experts on exclusionary rule law and be able to quote verbatim all case law on the Fourth, Fifth, and Fourteenth amendments. Police officers make life and death decisions every day; they are trained to prevent crime and catch criminals. They know the law and apply it every day as they walk their beats and patrols. They are also called upon to exercise their judgment and common sense in uncommon situations. Unfortunately, we too often find that common sense is not always admissible in court.

A big step toward common sense was taken when Congress passed section 3501. That statute encouraged police agencies to give the now standard "*Miranda*" warnings. But at the same time, it said that a confession could be used in court so long as it was "voluntary." This approach properly recognizes the vital importance of confessions to law enforcement. No one suggests that police officers should be able to coerce or threaten a suspect to obtain a confession. But that is not what the *Miranda* decision is about. Even, before *Miranda,* any confession obtained by threats—an "involuntary" confession—was excluded. *Miranda* did not add anything to those situations, and Section 3501 preserves in full force the rule that involuntary confessions cannot be admitted. Instead, *Miranda* created a whole host of new procedural requirements that applied, not to situations of threats, but to ordinary, everyday police questioning all over the country.

Here it is important to understand what rules the decision actually imposed on police. The general public may think that it knows all about *Miranda* from watching television programs and seeing the four warnings read from a card. But for police officers on the streets, much more is involved.

To begin with police officers have to decide when it is time to apply the *Miranda* procedures. The courts have told officers that warnings are required only when a suspect is in "custody." Making this determination is very complicated, as shown by the fact that respected judges with ample time to consider the issues frequently cannot agree among themselves over whether or not a suspect was in custody. If a suspect is in "custody," *Miranda* warnings must be given whenever "interrogation" of a suspect begins, Here again, respected judges have often disagreed on what constitutes interrogation, but police officers are expected to know on the spot, often in tense and dangerous situations.

If a suspect in "custody" is "interrogated," police officers must not only read *Miranda* warnings but then obtain a "waiver" of rights from the suspect. Pages of judicial ink have been spilled on what constitutes a valid waiver of rights, but police officers must decide almost instantaneously whether they have a valid waiver from a suspect. Then, once officers get a waiver, they must be constantly ready to know if a suspect has changed his mind and decided to assert his right to see a lawyer or to remain silent. If this change of mind has taken place, a police officer must still know if and when he can reapproach a suspect to see if the suspect has changed his mind yet again.

Finally, on top of all this, police are expected to know that *Miranda* warnings are not always required, as the Supreme Court has specifically created exceptions for situations involving public safety" or "routine booking," and other courts have recognized exceptions for routine border questioning, general on-the-scene questioning, and official questioning at a meeting requested by a suspect. And police, too, must know about whether a suspect has been questioned by officers from another agency and about another crime and another time, if so, whether a suspect invoked his rights during that other questioning.

Police officers all around the country spend a great deal of time attempting to learn all these rules and follow them faithfully. But since judges disagree with exactly how to apply all these rules, it is not surprising to find that police officers too will occasionally make mistakes and deviate from some of the *Miranda* requirements.

There will also be situations when police officers and criminal suspects disagree about whether all the rules were followed. *Dickerson* provides a very good illustration of this. Charles Dickerson, the confessed bank robber, said that he received his warnings only *after* he had given his confession.

The officer involved testified to the contrary that they followed their normal procedures and read the warnings before questioning. Dickerson apparently had prior experience as a suspect in the criminal justice system and had probably even heard the *Miranda* rights before. In situations like this, it makes no sense to throw out a purely voluntary confession on technical arguments about exactly when the Miranda warnings were read, for all the reasons that the Fourth Circuit gives in its opinion.

Of course, our Constitution, and the Bill of Rights in particular, were enacted and ratified with the aim of protecting the individual from an abuse of power by government. In an arrest and interrogation situation, the law enforcement officers represent the government and no one ought to be deprived of their constitutional rights during that questioning. But the Fifth Amendment's prohibition of anyone being "compelled" to be a witness was designed to protect against coercion by government agents, not technical mistakes that might occur in administering complicated court rules. This was exactly what the Fourth Circuit recognized in its *Dickerson* opinion in refusing to allow, what the court describes as, "mere technicalities" to prevent a completely voluntary confession from being introduced before the jury.

The Fourth Circuit also properly explained why legally this makes good sense. In *Miranda* v. *Arizona,* the Supreme court established various procedures to safeguard the Fifth Amendment rights of persons in custodial interrogations. The Court thought that, without certain safeguards, no statement obtained by law enforcement authorities could be considered "voluntary" and thus admissible in court. Ever since, the words, "You have the right to remain silent * * *" have been part of every law enforcement officers' lexicon.

However, the Supreme Court has made it clear over the past 25 years that procedural safeguards imposed by the *Miranda* decision were not rights protected by the Constitution, but rather measures designed to help ensure that the right against self-incrimination was protected. As the Court explained a few years later in *Michigan* v. *Tucker* (1974), the safeguards were not intended to be a "constitutional straightjacket" but rather to provide "practical reinforcement" for the exercise of Fifth Amendment rights.

In *Tucker,* a rape suspect gave exculpatory responses without being fully Mirandized. (He was questioned before the Court had decided *Miranda.*)

The suspect's statements led them to a witness who provided damaging testimony, testimony which the defense sought to have excluded because the witness was located through an interrogation in which the suspect had not been fully advised of his rights. The Court, however, allowed the evidence to be used, explaining that "[c]ertainly no one could contend that the interrogation faced by [the suspect] bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed."

Similar to the decision in *Tucker,* the Supreme Court ruled in *New York* v. *Quarles* (1985) that there is a "'public safety' exception to the requirement that Mi-

randa warnings be given." Police officers approached by a victim raped at gunpoint were advised that her attacker had just entered a supermarket. After arresting the suspect and discovering an empty holster on his person, the officer asked, "Where is the gun?" The suspect revealed where he had hidden the weapon, an important piece of evidence, which the suspect's lawyers successfully excluded in State court because the suspect was not Mirandized between his arrest and the "interrogation."

The Supreme Court, however, overruled the lower court's decision stating that police officers ought not to be "in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that and neutralize the volatile situation confronting them." The Court recognized the "kaleidoscopic situation * * * confronting the officers," not that spontaneity rather than adherence to a police manual is necessarily the order of the day," and worried that "had *Miranda* warnings deterred [the suspect] from responding to [the officer's] questions, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. [The officer] needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area." Accordingly, the Court allowed the statement made by Quarles to be used against him.

The logic of the Supreme Court's "public safety" decision in *Quarles* is exactly the logic of Section 3501. This statute was drafted in 1968, after the Senate Judiciary Committee held extensive hearings on the effects of the Supreme Court's rulings in *Miranda* and some other cases. The Committee was deeply concerned about *Miranda's* effects on public safety, concluding that "[t]he rigid, mechanical exclusion of an otherwise voluntary and competent confession is a very high price to pay for a 'constable's blunder.' "

To reduce that high price, Congress enacted 19 U.S.C. 3501, which instructs Federal judges to admit confessions "voluntarily made." The statute also spelled out the factors a court must "take into consideration" in order to determine the "voluntariness" of a confession. The Senate report which accompanied the "Omnibus Crime Control and Safe Street Act of 1968," explained the rationale for Section 3501 quite bluntly: "[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities * * * The Committee is convinced that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic and extremely harmful to law enforcement."

Unfortunately, for various legal reasons that will doubtlessly be discussed by others in this hearing, the benefits of this statute were not generally obtained until the Fourth Circuit's recent decision in *Dickerson*. The F.O.P. agrees with the Fourth Circuit—as well as with the United States Congress—that this statute is constitutional and that it is a prudent and necessary approach to considering defendants' motions to suppress voluntary confessions.

It has taken too long for the statute to be applied by the courts, but we now hope that the decision will be quickly upheld in the Supreme Court, so that the benefits of the statute will be available in all cases presented in Federal court. F.O.P. members often work cases prosecuted in Federal court and, indeed, the *Dickerson* case itself involved a coordinated effort by both Federal and local police officers to apprehend Dickerson and bring him to justice.

We also hope that the benefits of the statute will end up being extended to State courts as well. Arizona has a statute almost identical to Section 3501, and we expect that a favorable ruling on the Federal statute would help that state and other states draft similar legislation. Moreover, even without any State statutes, a favorable court ruling on Section 3501 might well set the stage for avoiding the suppression of voluntary confessions because of technical *Miranda* issues in state courts.

In considering the statute, it is important to understand that police officers will continue to give *Miranda* warnings if the principles of Section 3501 are applied around the country. The statute itself provided that the giving of *Miranda* warnings is a factor to be considered in determining whether a confession is voluntary. The Fourth Circuit specifically pointed to this fact in upholding the statute. It said, "Lest there be any confusion on the matter, nothing in today's opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings. * * * [T]hose warnings are among the factors a district court should consider when determining whether a confession was voluntarily given." Police agencies will continue to do their best to follow *Miranda* when the statute is applied just as we do now, The only change will be that dangerous confessed criminals, like Mr.

Dickerson, will not escape justice and be set free to commit their crimes again. The F.O.P. strongly endorses this return to common sense in our nation's courtrooms, and hopes that the Congress and the Department of Justice will do whatever they can to insure that this is the ruling of the United States Supreme Court.

On behalf of its members, the F.0.P. is also keenly interested in having the Supreme Court affirm the *Dickerson* opinion because of its implication for civil damage suits that are filed against police agencies. As the Committee is well aware, police agencies and law enforcement officers today are frequently sued in a variety of circumstances. Responding to such suits requires significant time and energy that could otherwise be devoted to apprehending criminals. That time and energy should be devoted to litigation only when crucial issues are at stake.

Courts around the country have routinely held that a mere allegation that a police officer failed to properly deliver all of the *Miranda* warnings is not the sort of allegation that warrants a Federal civil rights lawsuit under Section 1983. Because *Miranda* rights are not constitutionally required, the courts have repeatedly explained, alleged *Miranda* violations are not actionable under Section 1983. Many courts have reached this conclusion, which demonstrates not only that this position is a strong one, but also that police officers frequently face lawsuits from disgruntled criminal suspects that they have interviewed who are motivated solely by a desire to disrupt law enforcement activities.

So long as the *Dickerson* opinion is upheld by the Supreme Court, this line of cases will remain in place. *Dickerson* explained that "it is certainly well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation," Yet those who challenge *Dickerson* jeopardize not only that court's specific decision but the rationale that has shielded police officers from having to respond to a civil rights suit whenever they have arguably deviated from *Miranda.* The F.O.P. therefore strongly supports *Dickerson* not simply because it helps insure the conviction of dangerous criminals, but also because it helps to permit police officers to concentrate on their difficult task of catching and convicting criminal defendants rather than spending time themselves as defendants in unwarranted civil lawsuits.

In closing, let me say that I agree with those who have expressed concerns about *Miranda's* harmful effects on law enforcement. Sometimes we hear the claim that police have "learned to live with *Miranda*" as an argument against any change in the rules used in our courts. If what is meant by this is that police will do their very best to follow whatever rules the Supreme Court establishes, it is true police have "teamed to live with *Miranda.*" Indeed, since 1966, police professionalism in this country has expanded tremendously in many ways.

But if what is meant by this is that police "live with" and do not care about the harmful effects of these Court rules, nothing could be further from the truth. I can tell you from my experience as a law enforcement officer that too often these rules interfere with the ability of police officers to solve violent crimes and take dangerous criminals off the streets. The main culprit is not the *Miranda* warnings, which suspects have often heard time and again. The barrier to effective police questioning comes from all of the other technical requirements, which in far too many cases make it impossible for police, officers to ask questions of suspects, and to rigid exclusionary rules that prevents the use of any information obtained if there is the slightest hint of noncompliance.

Many crimes can only be solved and prosecuted if law enforcement officers have a chance to interview criminals and have their confessions introduced in court. Unfortunately, the *Miranda* procedures and its accompanying exclusionary rule in many cases prevent the police from ever having this opportunity.

It is no coincidence that immediately after the imposition of all these technical requirements by the Supreme Court's decision in *Miranda,* the criminal case "clearance rate" of the nation's police fell sharply. At the time, police officers around the country pointed to the *Miranda* decision as one of the major factors in this drop, and time has proven them right.

Time has also proven the wisdom of the action that Congress took back then. Responding to the urgent requests of law enforcement, Congress decided to restore common sense to our criminal justice system by enacting Section 3501. This is a law that needs to be enforced so that entire "voluntary" confessions obtained by hard-working police officers are not suppressed from the jury.

As a country, we should never "learn to live with" the devastating effects of crime, To the contrary, we should never stop striving to improve our efforts to apprehend and convict dangerous criminals through fair and appropriate means. The F.O.P. and its members are constantly working to find better ways to help provide safe streets and safe communities to all our nation's citizens. The F.O.P. strongly supports Section 3501 as a vital step in this direction.

Mr. Chairman, I would like to thank you and all the distinguished members of this Subcommittee for your efforts to advance Section 3501. I would be pleased to answer any questions you may have.

Senator SESSIONS. Professor Richman.

STATEMENT OF DANIEL C. RICHMAN

Mr. RICHMAN. Thank you, Mr. Chairman. I thank the committee for inviting me to be here. I testify as a former Federal prosecutor in the Southern District of New York and as a current criminal procedure professor at Fordham Law School, in New York.

My focus will be, first, on whether the Justice Department could properly decide to forgo using 3501 to defend confessions in Federal court, and, second, on whether the Department's decision not to use 3501 is an appropriate exercise of its enforcement discretion.

That Federal enforcers, prosecutors and law enforcement have and should exercise broad discretion over what criminal cases they should bring should not be open to question. Criminal statutes are drafted broadly, and prosecutors are supposed to mediate between the broad language and both the equities of a case and the needs of the communities they serve.

The next question is whether, in cases that the executive decides to bring or is thinking about bringing, are enforcers bound to use every tactic authorized by the Constitution and/or by statute. The answer here must be no, and I suspect Congress would not want it otherwise. We don't want to live in a world where Federal agents use every tactic at their disposal in every case. Reasonable minds may differ on what restraint is appropriate, but in the end policy decisions that are not compelled by law must be made. There thus can be no question that the Department of Justice could choose to require *Miranda*-type warnings be given in Federal cases, as indeed was the policy of the FBI before *Miranda* was ever decided.

The same point about executive discretion can also be made with respect to arguments in adjudicative proceedings. To take a trivial example, the mere fact that a rule of evidence appears to bar or authorize the introduction of a bit of testimony does not legally obligate a prosecutor to object to it or to introduce it. There are many reasons why he may not do so in a particular case. The Department of Justice may also implement the policy of restraint more systemically as well, as it has in the successive prosecution area.

Against this backdrop, the Department's policy with respect to 3501 seems well within its powers. Having committed itself to the use of *Miranda*-type warnings, the Department evidently reasoned that its commitment would be for naught if it turned around and defended confessions on grounds other than *Miranda* and its progeny. To make arguments based on 3501 would send the wrong message to Federal agents, suggesting that *Miranda* violations were excusable. And the message would be even worse for State law enforcement officers who, while not being subject to departmental discipline, generate a great many of the Federal cases involving confessions.

If the decision to eschew 3501 was within the Department's discretion, the issue becomes whether that exercise of discretion was appropriate. I believe it was. My position does not rest on the empirical debate on the effects of *Miranda* on clearance rates. My own

experience with *Miranda* warnings lead me to believe that they don't deter confessions, in part because television has inured people to their meaning, but I won't press this point.

The fact that, according to one view of the sketchy evidence, future suspects may have confessed once *Miranda* warnings were required, does not necessarily mean that the decrease was caused simply by the fact that suspects now knew their rights.

The most important point about *Miranda* was not the legal information that it required suspects to be given, but who was required to give that information. Police officers now explicitly had to acknowledge constitutional limits on their conduct in a suspect's presence. To the suspect terrified of being held in communicado or of being beaten, even if such fears were groundless, this was a powerful message. It might well have decreased confessions, but these were confessions that no decent society had a right to expect.

The reasonableness of the Justice Department's commitment to *Miranda* does not rest only in arguments of simple decency. There are also excellent law enforcement arguments. As a line prosecutor, and even as an appellate attorney concerned with a broad range of cases, I rarely had to brief *Miranda* issues. Under *Miranda*, agents and police officers know what is required, and when proper warnings have been given, defense challenges to confessions rarely go anywhere, if they are made at all.

In contrast, were enforcers to rely on 3501, that provision's broad totality of the circumstances inquiry would, at the very least, make for far more complicated suppression hearings. In addition to reducing litigation costs and uncertainty, the predictability allowed by *Miranda* also aids law enforcement by giving the properly Mirandized suspect who has confessed a clear incentive to cooperate against other targets without waiting for the resolution of his fifth amendment claim. Quick cooperation, of course, will be far more valuable to investigators.

To be sure, the Department could require the giving of *Miranda* warnings, but still invoke 3501 to defend confessions alleged to have violated *Miranda*. As I have already suggested, however, such a course would give uncertain guidance to agents and police officers, and reduce the power of the Department's directive.

Federal prosecutors occupy a unique place in the Federal law enforcement system. For the most part, they do not have hierarchical control over Federal agents, some of whom are not even part of the Justice Department, and they certainly have no control over the State and local officers who increasingly are investigating cases that end up in Federal court.

Nonetheless, we want Federal prosecutors to stand as a buffer between law enforcement officers and citizens. One way prosecutors can do their duty in this regard is to exercise their monopoly over the bringing of criminal charges. Another way is to have and to exercise similar discretion as to the legal arguments used to support those charges. I believe the Department has done just that in the case of 3501, and has done so appropriately.

I would also like to add that in light of the testimony we have heard today, particularly from Mr. Gallegos and Mr. Romley, there may well be arguments in State jurisdictions with respect to the problems caused by *Miranda* in the enforcement context. What is

interesting, though, is that we do not see the kind of move of 3501-type legislation in the States. We only see it in the Federal system, where generally we do not have a system of custodial interrogations.

I would like to thank the committee for inviting me to be here.

Senator SESSIONS. Thank you, Professor Richman.

[The prepared statement of Mr. Richman follows:]

PREPARED STATEMENT OF DANIEL C. RICHMAN, ASSOCIATE PROFESSOR OF LAW, FORDHAM LAW SCHOOL, NEW YORK, NEW YORK

I thank the members and staff of the Committee for the opportunity to participate in this hearing. I have long been a student of federal criminal law, first as a law clerk for Chief Judge Wilfred Feinberg, of the Second Circuit Court of Appeals, and for Justice Thurgood Marshall, of the Supreme Court, and then as an Assistant United States Attorney in the Southern District of New York. During my five and half years, at the U.S. attorney's office, I prosecuted numerous narcotics cases, worked in the Organized Crime and Appellate units, and ultimately served as Chief Appellate Attorney. For the last seven years, I have been a full-time law professor, and am currently an associate professor at Fordham Law School, where I teach courses in Criminal Procedure, Federal Criminal Law, and Evidence.

My focus here will be on two aspects of the debate involving 18 U.S.C. § 3501: first, whether the Justice Department could properly decided to forgo using § 3501 to defend confessions in federal court, and, second,'whether the Department's decision not to use § 3501 was an appropriate exercise of its enforcement discretion.

That federal enforcers—prosecutors and law enforcement agents—have and should exercise broad discretion over what criminal cases they bring should not be open to question. Criminal statutes are drafted broadly, and prosecutors are supposed to mediate between the broad language and both the equities of a case and the needs of the communities they serve. The fact that conduct *can* be reached by a criminal statute is not the end of a conversation about prosecutorial power; it is the beginning.

The next question is whether the scope of this enforcement discretion extends only to decisions about whether to prosecute, and not to questions about enforcement tactics. Put differently: In cases that the executive decides to bring, are enforcers bound to use every tactic authorized by the Constitution and/or by statute? The answer here must be "no," and I suspect that Congress would not want it otherwise. We don't want to live in a world where federal agents use every tactic at their disposal in every case—a world with, say, no institutional restraints on undercover investigations, or on grand jury subpoenas to lawyers or media representatives. Reasonable minds may differ on what restraint is appropriate (as was recently shown when certain members of Congress took the I.R.S. to task for its enforcement tactics). In the end, though, policy decisions that are not compelled by law must be made. Such decisions go to the essence of executive power, as much as decisions about *whom* to charge. There thus can be no question that the Justice Department could choose to require that *Miranda*-type warnings be given in federal cases, as indeed was the policy of the Federal Bureau of Investigation before *Miranda* was ever decided.

The same point about executive discretion can be made with respect to arguments in adjudicative proceedings. To take a trivial example: The mere fact that a rule of evidence appears to bar or authorize the introduction of a bit of testimony does not legally oblige a prosecutor to object to it or introduce it. And there are many reasons why he may not do so in a particular case. The Justice Department may implement a policy of restraint more systematically as well, as it has in the successive prosecution area. Back in 1960, the Department filed a motion to vacate the conviction of a defendant who had already been prosecuted for other offenses arising out the same transaction; the Supreme Court acceded. Although no statute or constitutional rule required this result, the Department cited its policy against pursuing such cases, a policy that continues to this day.

Against this backdrop, the Department's policy with respect to § 3501 seems well within its powers. Having committed itself to the use of *Miranda*-type warnings, the Department evidently reasoned that its commitment would be for naught if it turned around and defended confessions on grounds other than *Miranda* and its progeny. To make arguments based on § 3501 would send the wrong message to federal agents, suggesting that *Miranda* violations were excusable. And the message would be even worse for state law enforcement officers, who, while not being subject

to departmental discipline, generate a great many of the federal cases involving confessions. (Confession issues generally don't come up in white collar cases, in large part because white-collar defense lawyers are in the picture at an early stage. This tendency will become even more pronounced now that the Ethical Standards for Federal Prosecutors Act will substantially limit the ability of prosecutors and their agents to speak with represented parties.)

If the decision to eschew § 3501 was within the Justice Department's discretion, the issue becomes whether that exercise of discretion was appropriate. I believe it was. My position does not rest on the fascinating debate between Paul Cassell, on one side, and George Thomas and John Donohue (all of whom know and respect) and others on the effects of *Miranda* on clearance rates. My own experiences with *Miranda* warnings lead me to believe that they don't deter confessions, in part because television has inured people to their meaning. But I won't press this point. The "fact" that (according to one view of the sketchy evidence) fewer suspects may have confessed once *Miranda* warnings were required does not necessarily mean that the decrease was caused simply by the fact that suspects now knew their rights. The most important point about *Miranda* was not the legal information it required suspects to be given, but who was required to give that information. Police officers now explicitly had to acknowledge constitutional limits on their conduct, in a suspect's presence. To the suspect terrified of being held *incommunicado*, or of being beaten (even if such fears were groundless), this was a powerful message. It might well have decreased confessions, but these were confessions that no decent society had a right to expect.

The reasonableness of the Justice Department's commitment to *Miranda* does not rest only on arguments of simple decency. There are also excellent law enforcement arguments. As a line prosecutor, and even as an appellate attorney concerned with a broad range of cases, I rarely had to brief *Miranda* issues. Under *Miranda*, agents and police officers know what is required, and, where proper warnings have been given, defense challenges to confessions rarely go anywhere (if they are made at all). In contrast, were enforcers to rely on § 3501, that provision's broad totality of the circumstances inquiry would, at the very least, make for far more complicated suppression hearings. In addition to reducing litigation costs and uncertainty, the predictability allowed by *Miranda* also aids law enforcement by giving the properly *Mirandized* suspect who has confessed a clear incentive to cooperate against other targets without waiting for the resolution of his Fifth Amendment claim; quick cooperation will, of course, be far more valuable to investigators.

To be sure, the Justice Department *could* require the giving of *Miranda* warnings but still invoke § 3501 to defend confessions alleged to have violated *Miranda*. As I have already suggested, however, such a course would give uncertain guidance to agents and police officers, and reduce the power of the Department's directive.

Federal prosecutors occupy a unique place in the federal law enforcement system. For the most part, they do not have hierarchical control over federal agents, some of whom are not even part of the Justice Department. And they certainly have no control over the state and local officers who increasingly are investigating cases that end up in federal court. But nonetheless, we want federal prosecutors to stand as a buffer between law enforcement officers and citizens. One way prosecutors can do their duty in this regard is to exercise their monopoly over the bringing of criminal charges. Another way is to have and to exercise similar discretion as to the legal arguments used to support those charges. I believe the Department has done just that in the case of § 3501 and has done so appropriately.

Again, I thank the Committee for inviting me to be here.

Professor Thomas.

STATEMENT OF GEORGE THOMAS

Mr. THOMAS. Mr. Chairman, I thank the members and staff of the committee for inviting me to participate.

In my written remarks, I discuss whether *Miranda* has harmed law enforcement, but in my oral remarks I address only the issue of whether 18 U.S.C. 3501 is constitutional in light of *Miranda*'s core holding.

The key to the Supreme Court's *Miranda* opinion was a finding of law and fact that custodial police interrogation constitutes inherent compulsion in every case. To counteract that inherent compulsion, the Court required warnings that advised the suspect of his

right to remain silent and his right to counsel during interrogation. *Miranda* held that unless these warnings are given and the underlying rights waived, every statement is compelled within the meaning of the fifth amendment.

To be sure, the *Miranda* Court encouraged Congress and the States to seek other ways of, "protecting the rights of the individual while promoting efficient enforcement of ourcriminal laws." But the key to evaluating these alternatives lies in the very next sentence in the *Miranda* opinion, "However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence, and in assuring a continuous opportunity to exercise it, the following safeguards must be observed."

The "following safeguards," of course, are the famous *Miranda* requirement of warnings and waiver. Any statutory alternative must, therefore, satisfy the minimum *Miranda* requirement that it be, "equally effective in apprising accused persons of their right of silence."

On the face of 3501, it cannot be equally effective in advising suspects of their right of silence because it does not require warnings. A rule that does not require warnings cannot advise suspects of their rights, as well as the *Miranda* rule that does require warnings. Thus, on the face of it, 3501 is squarely in conflict with the *Miranda* opinion.

Some post-*Miranda* cases suggest—and my friend will talk about those—that *Miranda* is not a constitutional rule, but merely a prophylactic device that serves the fifth amendment by presuming that any statement is compelled if given without the benefit of warnings. On this presumptive reading of *Miranda*, it would be broader than the fifth amendment evil that Congress sought to address.

Some have argued that these cases sever the link between *Miranda* and the fifth amendment, thus permitting Congress to tinker with or even replace the *Miranda* rule. But there is no reason why the Supreme Court cannot find a presumption to be part of a constitutional right and then use that presumption as a mechanism to protect the underlying right. Indeed, *Miranda* must be based on the fifth amendment. Otherwise, the Court lacks authority to apply *Miranda* to the States, as it has done in many cases.

Moreover, the Supreme Court has repeatedly asserted, even in recent cases, that statements taken in violation of *Miranda* must be suppressed without inquiry into whether there was actual compulsion. As Justice Kennedy wrote for seven members of the Court in 1990, the *Miranda* rule,

> ensures that any statement made in subsequent interrogation is not the result of coercive pressure. [This] conserves judicial resources which would otherwise be expended in making the difficult determination of voluntariness * * *

Section 3501 returns to a test that *Miranda* explicitly rejected as a proper measure of fifth amendment compulsion—the voluntariness test. It would be paradoxical to permit a statutory version of

voluntariness to replace the *Miranda* presumption that the Court used to replace the voluntariness test.

Whether or not *Miranda* correctly decided how best to understand fifth amendment compulsion, the core holding remains undisturbed. A statement taken without warnings is presumed to be compelled. 18 U.S.C. 3501 is inconsistent with this core holding, and is therefore, in my opinion, unconstitutional.

On the question of *Miranda*'s effect on law enforcement, I refer the committee to my written statement where the argument is set out in some detail, with citations to various studies and papers.

I thank you very much for your attention.

Senator THURMOND [presiding]. Thank you very much.

[The prepared statement of Mr. Thomas follows:]

PREPARED STATEMENT OF GEORGE THOMAS, DISTINGUISHED PROFESSOR OF LAW, RUTGERS UNIVERSITY, NEWARK

ORAL REMARKS

Mr. Chairman, I thank the members and staff of the Committee for inviting me to participate. In my written remarks, I discuss whether *Miranda* has harmed law enforcement. But in my brief oral remarks, I address only the issue of whether 18 U.S.C. § 3501 is constitutional in light of *Miranda's* core holding.

The key to the Supreme Court's *Miranda* opinion was a finding of law and fact that custodial police interrogation constitutes inherent compulsion in every case. To counteract that inherent compulsion, the Court required warnings that advise the suspect of his right to remain silent and his right to counsel during interrogation. *Miranda* held that, unless these warnings are given and the underlying rights waived, *every* statement is compelled within the meaning of the Fifth Amendment.

To be sure, the *Miranda* Court encouraged Congress and the states to seek other ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."[1] But the key to evaluating these alternatives lies in the very next sentence in the *Miranda* opinion: "However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed."[2] The "following safeguards," of course, are the famous *Miranda* requirement of warnings and waiver.

Any statutory alternative must, therefore, satisfy the minimum *Miranda* requirement that it be "equally effective in apprising accused persons of their right of silence." On the face of § 3501, it cannot be equally effective in advising suspects of their right of silence because it does not require warnings. A rule that does not require warnings cannot advise suspects of their rights as well as the *Miranda* rule that does require warnings. Thus, § 3501 is squarely in conflict with the *Miranda* opinion.

Some post-*Miranda* cases suggest that *Miranda* is not a constitutional rule but merely a prophylactic device that serves the Fifth Amendment by presuming that any statement is compelled if given without the benefit of warnings.[3] On this reading of *Miranda,* it would be broader than the Fifth Amendment evil the Court sought to address. Some have argued that these cases sever the link between *Miranda* and the Fifth Amendment, thus permitting Congress to tinker with or replace the *Miranda* rule. But there is no reason why the Supreme Court cannot find a presumption to be part of a constitutional right and use that presumption as a mechanism to protect the underlying right. Indeed, *Miranda* must be based on the Fifth Amendment. Otherwise, the Court lacks authority to apply *Miranda* requirements on the states, as it has often done.[4]

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[1] 384 U.S. at 467.

[2] Id.

[3] See, e.g., *Oregon* v. *Elstad,* 470 U.S. 298, 306–07 (1985).

[4] Three of the four cases that the Court decided in *Miranda* were state cases. Other state cases in which the Court reversed convictions for failure to comply with *Miranda* include *Withrow* v. *Williams,* 507 U.S. 680 (1993); *Minnick* v. *Mississippi,* 498 U.S. 146, 151 (1990); *Edwards* v. *Arizona,* 451 U.S. 477 (1980). *Withrow* is particularly noteworthy because it held that a *Miranda* claim can be used in federal habeas to overturn a state conviction that had already survived direct appeal in state and federal court.

Moreover, the Supreme Court has repeatedly asserted, even in recent cases, that statements taken in violation of *Miranda* must be suppressed without inquiry into whether there was "actual" compulsion. As Justice Kennedy wrote for seven members of the Court in 1990, the *Miranda* rule "ensures that any statement made in subsequent interrogation is not the result of coercive pressures. [This] conserves judicial resources which would otherwise be expended in making the difficult determinations of voluntariness. * * *"[5]

Section 3501 returns to a test that *Miranda* explicitly rejected as a proper measure of Fifth Amendment compulsion—the so-called "voluntariness" test. It would be paradoxical to permit a statutory version of voluntariness to replace the *Miranda* presumption that the Court used to replace the voluntariness test.

Whether or not the *Miranda* Court correctly decided how best to understand Fifth Amendment compulsion, the core holding remains: A statement taken without warnings is presumed to be compelled. 18 U.S.C. § 3501 is inconsistent with that core holding and is, therefore, unconstitutional.

On the question of *Miranda's* effect on law enforcement, I refer the Committee to my written statement, where the argument is set out in some detail with citations to various studies and papers.

Thank you for your attention.

WRITTEN REMARKS

To summarize my argument about *Miranda's* effect on police interrogation: I believe that the evidence, while far from conclusive, is most consistent with what I have called a "steady-state" theory of confessions.[6] Central to my "steady-state" theory are two premises: first, that *Miranda* has had roughly offsetting effects; second, that when police need confessions, they manage to finesse the *Miranda* warnings even when suspects are initially reluctant to talk.

On Miranda's *offsetting effects:* It is likely true that some suspects decide not to answer questions because they know they have a right to refuse to talk to police. But other suspects will decide to answer questions because the Miranda warnings can be perceived as an opening gambit to a conversation; if the gambit is refused, the police will only become more suspicious. Thus, the suspect might think that his only chance to be released from custody is to provide an exculpatory version of what really happened. But the exculpatory version will usually be shot through with lies, evasions, and inconsistent statements, which turn out to be incriminating. *Miranda* thus might have the perverse effect of making some suspects incriminate themselves.

On the police need for confessions: The second premise underlying my "steady-state" theory of confessions is that when police need (or perceive a need for) a confession, they can maneuver their way through the *Miranda* minefield and, in many cases, persuade the suspect to waive his *Miranda* rights and answer questions. Once the suspect has waived *Miranda*, the rules for evaluating any subsequent confession are the old voluntariness rules that permit a good deal of leeway for police to trick, cajole, and manipulate suspects.

The empirical findings are consistent with this "steady-state" hypothesis, though the evidence is flawed and difficult to interpret. I begin with what is universally accepted in the academy: there is no way to know for certain what the confession rate was prior to *Miranda* because the few studies seeking to measure that rate are methodologically flawed. Given the lack of a baseline rate for confessions prior to *Miranda*, we will likely never know with anything approaching scholarly certainty what effect *Miranda* has had.

More fundamentally, as Professor Stephen Schulhofer of the University of Chicago has pointed out with particular clarity, real life is too messy and complex for us to make a confident assessment of what might have caused a decline (or increase) in the confession rate.[7] The year 1966 brought us more than *Miranda*. It brought deepening involvement in the Viet Nam War; it brought increased drug use among the youth, along with a counterculture that rejected authority; it brought increasing awareness of the instances of mistreatment of black citizens by police. Two years later, the war would be raging, Martin Luther King and Bobby Kennedy would be assassinated, and the national mood would be at a fever pitch. Even if we knew for certain that the rate of confessions declined in the years following *Miranda*, why

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[5] *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990).

[6] George C. Thomas III, "Plain Talk About the *Miranda* Empirical Debate: A 'Steady-State' Theory of Confessions," 43 UCLA L. Rev. 933, 935–36 (1996).

[7] Stephen J. Schulhofer, "*Miranda's* Practical Effect: Substantial Benefits and Vanishingly Small Social Costs," 90 Nw. U.L. Rev. 500, 510–15 (1996).

would we think that *Miranda*, rather than the counterculture movement and antiwar sentiment, caused the decline?

That said, however, one can construct an average from the best of the pre-*Miranda* studies and obtain a rough approximation of what the pre-*Miranda* rate might have been. From there one can at least argue that some or most of the change is attributable to *Miranda*. I have estimated a pre-*Miranda* rate, as has Professor Cassell. Our approximations differ. He reads the pre-*Miranda* confessions rate as 55–60 percent.[8] I read it as 45–53 percent. Though I think my reading is better than Professor Cassell's, I concede that both are plausible readings of the data. If we split the difference at 53 percent, and compare that to the post-*Miranda* studies, Professor Cassell and I still disagree because we disagree about the best way to read the new studies. He counts incriminating statements more narrowly than I do, for example. The researchers who conducted three recent studies characterized the confessions rate that they found as 64 percent, 62 percent, and 42 percent, for an average rate of 56 percent,[9] which is at the low end of Professor Cassell's estimate of the pre-*Miranda* rate and above my estimate. (Professor Cassell's reading of the empirical data is not as widely held in the academy as mine. Professor Stephen Schulhofer, University of Chicago, and Dr. Richard Leo, University of California, Irvine, essentially agree with my reading of the empirical evidence,[10] while no researcher, to my knowledge, has published a paper indicating agreement with Professor Cassell's reading of the data.)

So where's the beef about *Miranda* causing a decline in confessions? I think the problem is that most people, certainly all nine members of the *Miranda* Court, accepted as intuitively obvious that if a guilty suspect is told he need not answer police questions, he will act from rational self interest and refuse to answer, and that the police will be without psychological weapons to overcome a reluctance to testify. That surely happens in some cases but a contrary, perverse effect may be occurring in other cases. This is based on a calculation of suspect behavior that I have proposed.[11]

On my account, the *Miranda* warnings tell a suspect something about his situation that he sometimes does not know—he is the number one suspect and is under arrest. Moreover, telling him that he need not answer, paradoxically, puts pressure on him to answer. I imagine that some suspects think roughly as follows:

> I will remain in police custody unless I come up with a plausible explanation of whatever facts the police possess. Moreover, the police have told me that I need not answer but only a guilty person would refuse to answer. If I don't answer, it will only make them more suspicious. If I answer, on the other hand, I will look innocent and might be able to outsmart the police who, after all, don't have all the facts.

These reactions to the *Miranda* warnings are not what any member of the *Miranda* Court likely expected. This kind of thinking could often lead the suspect to provide inconsistent explanations that worsen his situation. I thus believe that the *Miranda* warnings cause some suspects to answer who would otherwise have remained silent, and cause others to offer an exculpatory version of their guilty acts when otherwise they would have provided less illuminating answers.

Moreover, the *Miranda* Court underestimated the ability of police to create incentives for suspects to waive *Miranda*. Perhaps the best account of this is in David Simon's book, *Homicide*, which is drawn from his experiences watching the Baltimore Homicide Unit for an entire year. In the chapter on interrogation, the police manage to persuade a guilty suspect that they are in a way on his side, that they are his last chance to present an exculpatory version of the killing before he is charged. As Simon puts it:

> The effect of the illusion is profound, distorting as it does the natural hostility between hunter and hunted, transforming it until it resembles a relationship more symbiotic than adversarial. That is the lie, and when the

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[8] Paul Cassell and Bret S. Hayman, "Police Interrogation in the 1990's: An Empirical Study on the Effect of *Miranda*," 43 UCLA L. Rev. 821, 917 (1996).

[9] These studies, two of which were conducted by the National Institute of Justice and one by Dr. Richard Leo, are discussed in George C. Thomas III, "Plain Talk About the *Miranda* Empirical Debate: A 'Steady-State' Theory of Confessions," 43 UCLA L. Rev. 933, 953–56 (1996).

[10] See Richard A. Leo, "The Impact of *Miranda* Revisited," 86 J. Crim. L. & Criminology 621 (1996); Stephen J. Schulhofer, "*Miranda's* Practical Effect: Substantial Benefits and Vanishingly Small Social Costs," 90 Nw. U. L. Rev. 500 (1996).

[11] See George C. Thomas III, "Plain Talk About the *Miranda* Empirical Debate: A 'Steady-State' Theory of Confessions," 43 UCLA L. Rev. 933, 935–36 (1996); George C. Thomas III, "A Philosophical Account of Coerced Self-Incrimination," 5 Yale J. L. & Humanities 79 (1993).

> roles are perfectly performed, deceit surpasses itself, becoming manipulation on a grand scale and ultimately an act of betrayal. Because what occurs in an interrogation room is indeed little more than a carefully staged drama, a choreographed performance that allows a detective and his suspect to find common ground where none exists. There, in a carefully controlled purgatory, the guilty proclaim their malefactions, though rarely in any form that allows for contrition or resembles an unequivocal admission.[12]

In sum, I believe that *Miranda* causes some suspects not to confess and a roughly similar number to confess. If something like my "steady-state" theory of confessions is correct, then *Miranda* has not on balance harmed law enforcement at all.

Do I have conclusive evidence of this hypothesis? No. But no one has conclusive evidence rebutting it either. I am in the process of seeking funding for a research project designed to test my hypothesis, and I hope to have results in two years.

Professor Cassell has sought to isolate another pernicious effect of *Miranda*—that it has lowered the "clearance" rate (the rate at which police solve crimes). The theory here is that if *Miranda* persuades more suspects to remain silent than to talk, the police will solve fewer crimes. Cassell and his co-author Richard Fowles conducted a multiple regression analysis and published a paper concluding that the fall in crime clearance rates following *Miranda* was at least partially attributable to the *Miranda* restrictions on police interrogation.[13]

But the same objection can be lodged here as against the effort to "blame" *Miranda* for any change in the confession rate. If police solved fewer crimes in 1968, for example, the most likely culprit might be the social upheaval caused by the assassination of Dr. King in the spring of that year. Or drug use and the counterculture generally. Or the national self-hatred about the war in Viet Nam. Professor John Donohue makes this same point in response to the Cassell-Fowles paper and also observes that while youth rebellion receded in later years, "drugs, gangs, and crime are clearly more pernicious in the period after the mid-1960's than they were in the preceding fifteen years. Neither Cassell nor Fowles, nor any other researchers, have found a way to control for these influences in regression models, so the Cassell-Fowles article implicitly attributes all of these effects to *Miranda*."[14] But this attribution is, to put it mildly, controversial.

In sum, Paul Cassell has made claims about *Miranda's* effects on law enforcement, claims that can be supported only by weak empirical data or controversial assumptions about attribution of post-*Miranda* developments to *Miranda* rather than the vast changes taking place in our society. And the weak empirical data is at least as consistent with a "steady-state" theory of confessions in which suspects are encouraged to talk to police at roughly the same rate as before *Miranda* was decided.

Until there is better empirical evidence, the claim that *Miranda* has harmed law enforcement should be taken with quite a large grain of salt.

Senator THURMOND. How far are you?

Senator SESSIONS. We are down to Professor Cassell.

Senator THURMOND. Professor Cassell.

STATEMENT OF PAUL G. CASSELL

Mr. CASSELL. Thank you, Mr. Chairman. Our Constitution places on the President the duty to take care that the laws be faithfully executed. The President is not given the power to pick and choose which laws he will execute. In our system of separated powers, the lawmaking power is entrusted to the people's representatives here in Congress.

The current Justice Department has said that it agrees with this view, and has solemnly assured Congress that it will defend the constitutionality of statutes in all cases where reasonable arguments can be made on their behalf. In this respect, the Department

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[12] David Simon, "Homicide, A Year on the Killing Streets," (1991).

[13] Paul G. Cassell and Richard Fowles, "Handcuffing the Cops? A Thirty-Year Perspective on *Miranda's* Harmful Effects on Law Enforcement," 50 Stan. L. Rev. 1055 (1998).

[14] John J. Donohue III, "Did *Miranda* Diminish Police Effectiveness?," 50 Stan. L. Rev. 1147, 1159 (1998).

has not taken the position that we heard articulated by Professor Richman this afternoon.

Indeed, when asked specifically about section 3501, the current Department has until quite recently claimed that it had no policy against defending the law and, to the contrary, that it would defend the statute in appropriate cases. In spite of these solemn pledges, the Justice Department has been unable to find a single case where it could vigorously defend the statute. Indeed, for the past 6 years the Department appears to have undertaken to prevent any enforcement of section 3501.

At first, these efforts were covert as the Department's political appointees maneuvered behind the scenes to block efforts by career prosecutors to use the law to secure convictions of dangerous criminals. More recently, when forced to show their hand by court order, the Department has even overly joined in an unholy alliance with criminal defendants to argue that there is no reasonable position supporting the law.

On February 8, 1999, these efforts to block the enforcement of the law came to a crashing halt. On that day, the U.S. Court of Appeals for the Fourth Circuit announced its decision in *United States* v. *Dickerson,* applying the statute to prevent the escape of a dangerous bank robber on technical *Miranda* grounds.

In emphatically rejecting the arguments of the Justice Department, the court explained that it had little difficulty in concluding that section 3501, enacted at the invitation of the Supreme Court and pursuant to Congress' unquestioned power to establish rules of evidence in Federal Court, is constitutional. The court also spoke a few pointed words about the Department's maneuvering in that case. It said that the Department's efforts to bar career prosecutors from defending section 3501 was an action, "elevating politics over law."

Unfortunately, it is hard to disagree with the fourth circuit's harsh assessment. Plainly, there are reasonable arguments that can be made on behalf of the statute. These arguments are found in the exhaustive opinion, for example, in *Dickerson* written by Judge Karen Williams, a respected jurist from South Carolina, and sustained by an 8–5 vote of the full fourth circuit.

These arguments are in no way novel, as they closely follow earlier decisions by the 10th circuit and the District Court for the District of Utah. Beyond that, the Justice Department itself has historically taken the view that the statute is constitutional. From 1969 to at least 1993, this was the stated policy of the Department. It was also the view of career prosecutors all over this country who advanced arguments on behalf of the statute in a number of different cases.

And last but by no means least, Congress has expressed its considered view that the statute is constitutional. Section 3501 was approved in 1968 by overwhelming bipartisan majorities. It may be of more than historical interest to note, for example, that the chair of this subcommittee, Senator Thurmond, was an original cosponsor. More recently, the chairman of the Judiciary Committee, Senator Hatch, and eight of his colleagues wrote a detailed letter to the Department expressing their considered opinion that the statute is constitutional.

In short, to believe that there are no reasonable arguments on behalf of section 3501, one has to accept that the fourth circuit, the 10th circuit, Justice Department officials from 1969 to 1993, career prosecutors all over the country, and largemajorities in both political parties are not simply wrong, but are unreasonably wrong. This is implausible, to put it charitably.

If the Department's decision not to defend the statute were simply a violation of our system of separated powers, that would be bad enough, but what is at stake with the statute is more than that. The statute's nonenforcement jeopardizes the safety of law-abiding citizens, citizens who count on the Department to keep dangerous criminals from shattering innocent lives with acts of terrible criminal violence.

Congress spoke for the innocent in passing section 3501. Yet, the current Department, in actually joining with criminal defendants to defeat the law, has put the interests of those who commit violent crimes ahead of those who suffer from them. "There is no excuse for this," as Justice Scalia succinctly put it. I strongly urge the subcommittee to do whatever it can to bring these excuses to an end and to begin the effort to extend the benefits of the law throughout the country. Thank you for inviting me to testify, Mr. Chairman.

[The prepared statement of Mr. Cassell follows:]

PREPARED STATEMENT OF PAUL G. CASSELL

Mr. Chairman and Distinguished Members of the Committee, I am pleased to be here today to urge the Department of Justice to enforce 18 U.S.C. § 3501, the statute passed by Congress in 1968 to ensure the admission of voluntary confessions from dangerous criminals in federal courts.

On January 31, 1998, I stood before the U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia, to defend this Act of Congress on behalf of the Washington Legal Foundation. Unfortunately, I also stood alone. Although seated in that courtroom were several quite capable, experienced career federal prosecutors, they had been ordered by political appointees in Washington, D.C., not to defend this statute on behalf of the United States. Indeed, these prosecutors had apparently even been ordered to tell the Fourth Circuit that this Act of Congress was somehow unconstitutional, joining the position of the serial bank robber whose case was before the Court.

That these career prosecutors were ordered to take such a position was stunning. The longstanding policy of the Department of Justice is to defend a law duly enacted by Congress when any "reasonable" argument can be made in defense of its constitutionality. The Department has even described this policy to defend Acts of Congress where reasonable arguments can be made as rising to the level of a "duty":

> The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent *overwhelmingly* indicates that the statute is invalid. * * * [T]he Department has the *duty* to defend an act of Congress whenever a *reasonable* argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts.[1]

The current political appointees in the Department claim to follow this established principle. For example, Solicitor General Seth Waxman was asked by Senator Hatch during confirmation hearings whether he would adhere to the view that the Department "is bound to defend the constitutionality of all acts of Congress unless no reasonable arguments can be made in support." Mr. Waxman solemnly replied: "I absolutely will."[2]

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[1] *5 Opinions of the Office of Legal Counsel* 25, 25–26 (Apr. 6, 1981) (emphases added).

[2] *Hearing on the Nomination of Seth Waxman to be Solicitor General of the United States: Senate Comm. on the Judiciary,* 105th Cong., 1st Sess. 8 (Nov. 5, 1997); *see also id.* at 6–7 (Solicitor General should defend a law "except in the rarest instances").

The Department's obligation to defend Acts of Congress where "reasonable" arguments can be made is critical to our constitutional system of separated powers, as it is unclear whether the Executive has the power to do anything other than enforce the law passed by Congress. The President, of course, is required "to take care that the Laws be faithfully executed."[3] Long ago the Supreme Court concluded that, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."[4] Examining this case and others like it, a number of respected constitutional scholars have concluded that the President must enforce all Acts of Congress, even where he has questions about their constitutionality. Professor Edward Corwin has written, "Once a statute has been duly enacted, whether over his protest or with his approval, [the President] must promote its enforcement."[5] Professor Raoul Berger has similarly concluded that "It is a startling notion * * * [that a President] may refuse to execute a law on the ground that it is unconstitutional. To wring from a duty faithfully to execute the laws a power to defy them would appear to be a feat of splendid illogic."[6] Professor Westel W. Willoughby has warned that: "If, upon his own judgment, [the President] refuses to execute a law and thus nullifies it, he is arrogating to himself controlling legislative foundations, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President."[7] And Professor Eugene Gressman has concluded: "In our constitutional system of govern, such a refusal by the Executive to 'take care that the Laws be faithfully executed' cannot and must not be tolerated."[8] One need not go as far as these respected scholars have to conclude that, at the very least, the Executive should defend Acts of Congress where reasonable arguments can be made on their behalf.[9] This is particularly the case where, if the Executive does not present an argument, the effect will be to deny the courts the opportunity to review the issue.[10]

Because the well-known policy of the Justice Department is to present such "reasonable" arguments, the Department's failure to join me in supporting the law before the Fourth Circuit was a statement that my arguments were not simply wrong, but did not even rise to the level of a "reasonable" legal argument. I nonetheless laid before the court a defense of the statute that is, in my judgment, not simply reasonable but compelling. On February 8, 1999, the U.S. Court of Appeals for the Fourth Circuit entirely agreed, holding that the statute was constitutional. In its opinion in *United States* v. *Dickerson*,[11] the court concluded that it had "little difficulty" in concluding that "section 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in federal courts, is constitutional."[12] The court also spoke a few pointed words about the Department's maneuvering in this case. It said that the action of political appointees "prohibit[ing] the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501" was "elevating politics over law. * * *"[13]

The Fourth Circuit's conclusions were entirely accurate. The Department's proffered reasons for failing to find a reasonable argument to defend the statute are implausible. Unfortunately, it is hard to escape the conclusion that the Department's current view is not a serious legal position. It is, instead, as the Fourth Circuit suggested, a politically inspired concoction. It appears to be motivated not by fear that, if the statute came before the Supreme Court, the Department would "lose" because the Court would strike it down. Rather, it is motivated by the Department's fear

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[3] U.S. Const. art. II, § 3.

[4] *See Kendall* v. *United States, 37 U.S. 524, 612–613 (1838).*

[5] E. Corwin, The President: Office and Powers 79 (3d ed. 1948).

[6] Raoul Berger, Executive Privilege: A Constitutional Myth 306 (1974).

[7] 3 Westel W. Willoughby, The Constitutional Law of the United States 1503 (2d ed. 1929).

[8] *Constitutionality of GAO's Bid Protest Function: Hearings before a Subcomm. of the House Comm. on Gov't Operations,* 99th Cong., 1st Sess. 46 (1985).

[9] As illustrations of this principle, the Administration (quite properly) recently defended the Communications Decency Act despite the fact that there was quite a strong argument that it was difficult to square with controlling Supreme Court First Amendment cases. And it also (quite properly) had no problem defending the Religious Freedom Restoration Act, which was in many ways a direct challenge to a recent Supreme Court constitutional holding concerning the scope of the Free Exercise Clause in *Employment Div.* v. *Smith,* 494 US 872 (1990).

[10] *See* Memorandum for the Counsel to the President Abner Mikva from Asst. Attorney General Walter Dellinger, Nov. 2, 1994 ("the President may base his decision to comply * * * [with a questioned statute] in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch).

[11] 166 F.3d 667 (4th Cir. 1999).

[12] *Id.* at 672.

[13] *Id.*

that the Supreme Court might, like the Fourth Circuit and other courts, uphold the statute and the Department would "win." This kind of political decision is, of course, precisely that which our constitutional scheme of separated powers prohibits to the Department. In my testimony today I want to support this position by rebutting in some detail each of the three reasons that the Department has, at various times, proffered for failing to defend § 3501.

First, the Department has claimed that it is simply following the policies of its predecessors. When asked about the Department's failure to enforce the statute at a press conference a few days after *Dickerson* was handed down, the Attorney General asserted that: "In this administration and in other administrations preceding it, both parties have reached the same conclusion [that the statute could not be defended.]"[14] This is simply untrue. In fact, the long-standing Department of Justice policy was to defend the statute, a policy that had even produced a favorable appellate decision in the Tenth Circuit. In adopting its position, the current Administration is not only overriding the view of its career prosecutors but also those of a number of predecessors in the Department. Part I of my testimony recounts the Department's long-standing position that the statute was constitutional, a position that the political appointees in the Clinton Administration reversed apparently over the objections of career prosecutors.

Second, the Department has stated directly in its briefs to the Fourth Circuit and other lower federal courts that the statute is unconstitutional because of the constitutional "foundations" of *Miranda*.[15] The Fourth Circuit has flatly disagreed with this position, as has the Tenth Circuit, the District Court of Utah, and a number of respected legal observers. Part II explains why the Fourth Circuit and the other courts that have closely examined the issue are correct in concluding that § 3501 is constitutional. Two arguments strongly support this result. First, as explained in Part II.A,the Supreme Court has repeatedly held that the *Miranda* rights are not constitutional rights. Accordingly, Congress has the power to modify their application in federal courts. Second, as explained in Part II.B., the Supreme Court in the *Miranda* decision itself invited "*Congress* and the States to continue their laudable search for increasingly effective ways, of protecting the rights of the individual while promoting efficient enforcement of our criminal laws"[16] by drafting alternatives to *Miranda*. Section 3501, considered not by itself but as part of a full package of measures covering questioning by federal police officers, is such a reasonable alternative.

Third, at various times, the Department of Justice has suggested that § 3501 makes no difference to public safety because federal prosecutors can prevail even laboring under the *Miranda* exclusionary rule.[17] This argument is wrong, as even in the cases I have been personally involved with, dangerous criminals have either gone free because of the failure to apply § 3501 or, as in *Dickerson*, have probably been kept from going free by my defense of the statute. More generally, the *Miranda* procedural requirements seriously harm public safety, as extensive empirical evidence demonstrates. Part III reviews this evidence, explains why the *Miranda* exclusionary rule exacts a heavy toll on the ability of this country to prosecute dangerous crimes, a toll that would be reduced if § 3501 were enforced by the Department.

Before turning to each of these issues, a bit of my background in this area may be in order. I am currently a Professor of Law at the University of Utah College of Law, where I teach criminal procedure among other subjects. From 1988 to 1991, I served as an Assistant United States Attorney in the Eastern District of Virginia, where I was responsible for prosecuting federal criminal cases. From 1986 to 1988,

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[14] Press Conference of Attorney General Janet Reno, Feb. 11, 1999, the press conference transcript is available in www.usdoj.gov/ag/speeches/1999/feb1199.htm.

The Department of Justice has reportedly declined an opportunity to appear at today's hearing, apparently on grounds that § 3501 is currently involved in litigation. It is curious that the Department will not appear before this subcommittee duly charged with oversight of the Department's operations, particularly where the Department could confine its remarks to historical issues and indeed has, as the Attorney General's remarks indicate, discussed this very same subject with representatives of the mass media.

[15] *See, e.g.,* Br. for the United States in Support of Partial Rehearing En Banc at, *United States* v. *Dickerson,* No. 97–4750 (4th Cir. Mar. 8, 1999) ("on the current state of the Supreme Court's *Miranda* jurisprudence, taken as a whole, this Court may not conclude that the *Miranda* rules lack a constitutional foundation").

[16] 384 U.S. at 467 (emphasis added).

[17] *Confirmation of Deputy Attorney General Nominee Eric Holder: Hearings before the Sen. Comm. on the Judiciary,* 105th Cong., 1st Sess. 124 (June 13, 1997) (written response of Deputy Attorney General Designate Holder to question from Senator Thurmond) ("My experience has been that we have not had significant difficulty in getting the federal district court to admit voluntary confessions under *Miranda* and its progeny").

I served as an Associate Deputy Attorney General at the United States Department of Justice, handling various matters relating to criminal justice, including matters relating to *Miranda*. I have also served as a law clerk to then-Judge Antonin Scalia and Chief Justice Warren E. Burger, writing memoranda on numerous criminal cases. For the last seven years, I have been involved in litigation on behalf of § 3501 in various courts around the country. I have published articles regarding the *Miranda* decision in a number of law journals, including the *Stanford Law Review*, the *UCLA Law Review*, and the *Journal of Criminal Law and Criminology*. I have also delivered presentations on *Miranda* issues at a number of different fora, including the American Bar Association's Annual Convention and a conference held on *Miranda*'s thirtieth anniversary at Northwestern Law School. I have represented various clients, including the Washington Legal Foundation and several United States Senators, who have asked for my assistance to have § 3501 defended in the courts.

I. Department of Justice Policy Has Long Been To Enforce § 3501

Attorney General Reno has recently claimed that long-standing Department of Justice policy has been against enforcing 3501 because doubts about the constitutionality of the statute. The Attorney General stated at a press conference a few days after *Dickerson* was handed down that, "In this administration and in other administrations preceding it, both parties have reached the same conclusion."[18] With all due respect to the Attorney General, this claim is demonstrably false. This is not just my view, but the view of others who have carefully studied the issue. For example, respected veteran Supreme Court reporter Lyle Denniston recently wrote a lengthy article that reached the conclusion that "Reno's perception * * * that this has always been the federal government's view is mistaken."[19]

The view that the Department has consistently declined to defend the statute is so plainly false that from 1993 to 1997 the even political appointees of the current Administration specifically recognized the defense of the statute. When asked questions about this statute in various hearings, far from saying that they would continue the (nonexistent) policy of past Administrations forbidding the use of the statute because of their conviction that it was unconstitutional or could not be argued in the lower courts, Attorney General Reno, Solicitor General Drew Days, and Deputy Attorney General-designate Holder all said that the Department had no policy against its use and that they were prepared to use it "in an appropriate case."[20]

The fact of the matter is that with only one brief exception, *no* Administration other than the current one has ever expressed the view that the statute is unconstitutional or issued a directive to U.S. Attorneys Offices or anyone else telling them not to use the statute. To the contrary, with the exception of the last few months of the Johnson Administration, past Administrations either tried to encourage use of the statute or, at the very least, had no policy of discouraging its use. A brief history of the statute and its enforcement will demonstrate that the posture of the current Justice Department is at odds with that of its predecessors.[21]

A. MIRANDA AND THE ADOPTION OF § 3501

In 1963, Ernesto Miranda, 23, who had dropped out of school in the ninth grade and had a prior arrest record, was picked up by Phoenix police as a suspect in the kidnapping and rape of an 18-year-old girl. After two hours of questioning, Miranda confessed orally to the crime. He then wrote out and signed a brief statement admitting and describing the rape. It contained a typed paragraph stating that his confession was made voluntarily without threats or promises of immunity and that he had full knowledge of his rights and understood that the statement could be used against him. At Miranda's trial, the confession was admitted despite his lawyer's objections, and Miranda was convicted and sentenced to 20 years in prison.[22]

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[18] Press Conference of Attorney General Janet Reno, Feb. 11, 1999, available in www.usdoj.gov/ag/speeches/1999/feb1199.htm.

[19] Lyle Denniston, *The Right to Remain Silent? Law Professor, Justice of Supreme Court Aim to Replace Miranda*, Baltimore Sun, Feb. 28, 1999, at C1, C5.

[20] *See infra* note 97 and accompanying text.

[21] For a good history of the statute through 1986, see U.S. Dep't of Justice, Office of Legal Policy, Report to the Attorney General: The Law of Pre-Trial Interrogation 64–74 (1986) (hereinafter OLP Report), *reprinted* in 22 Mich. J.L. Ref. 512–21 (1989).

[22] For an excellent overview of the case, see George C. Thomas III, *Miranda:* The Crime, the Man, and the Law of Confessions, The Miranda Debate: Law, Justice and Policing (Richard Leo and George C. Thomas III eds. 1998).

Miranda's appeal eventually reached the U.S. Supreme Court. *Miranda* v. *Arizona*,[23] the resulting landmark 5 to 4 decision handed down June 13, 1966, established procedural requirements governing the questioning by law enforcement officials of suspects in custody. The Court then overturned Miranda's conviction because police had not followed the new rules. The Court specified four warnings that police must deliver to criminal suspects about to be questioned. Unless the warnings were read, nothing an arrested suspect might say afterwards during questioning, even in the anguish of conscience, could be used against him in court.

The changes wrought by *Miranda* can be best understood by comparing the new rules to those in place before the decision. Before June 13, 1966, police questioning of suspects in custody was covered by the "voluntariness" doctrine.[24] Under the Fifth and Fourteenth Amendments to the Constitution, courts admitted a defendant's confession into evidence if it was voluntary, but they excluded any involuntary confession. In making the voluntariness determination, courts considered a host of factors. For example, if police officers or prosecution investigators used physical force or the threat of force, courts deemed the resulting confession involuntary. Courts also considered such factors as length of interrogation and types of questions asked in making the voluntariness determination.

Miranda radically changed these rules, adding a stringent warning-and-waiver requirement. Under this approach, a confession police obtained from a suspect in custody would not be admissible in court unless that suspect had been read his or her rights. The rights specified are familiar to anyone who has ever watched a police show on television:

> You have the right to remain silent.
> Anything you say can be used against you in a court of law.
> You have the right to talk to a lawyer and have him present with you while you are being questioned.
> If you cannot afford to hire a lawyer, one will be appointed to represent you before you answer any questions.

While the *Miranda* "warnings" are the most famous part of the decision, perhaps even more important are additional requirements that the Court imposed. After reading a suspect his rights, an officer must ask whether the suspect agrees to "waive" those rights. If the suspect refuses to waive—that is, declines to give his permission to be questioned—the police must stop questioning. At any time during an interrogation, a suspect can halt the process by retracting his waiver or asking for a lawyer. From that point on, the police cannot even suggest that the suspect reconsider. All of these new rights were enforced by an exclusionary rule: the suppression of the suspect's confession if police deviated from the requirements.[25] The Court, however, made clear that its approach was not the only approach to the issue. "* * * [T]he Constitution does not require any specific code of procedure for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free," the majority held, "to develop their own safeguards for the privilege, so long as they are fully as effective as those described above. * * *"[26]

The Court's ruling, its most famous ever in the criminal law area,[27] ignited a firestorm of controversy. Justice Harlan warned in his dissenting opinion that "[v]iewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances."[28] Justice White concluded that "the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent. * * *"[29] He also likewise predicted that "[i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."[30] Critics outside the Court also immediately predicted that the

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[23] *Miranda* v. *Arizona*, 384 U.S. 435 (1966).
[24] *See generally* Joseph D. Grano, Confessions, Truth and the Law 59–86 (1993).
[25] *See Miranda*, 384 U.S. at 478–79.
[26] *Id.* at 490.
[27] A 1974 ABA survey of lawyers, judges, and law professors found that *Miranda* was the third most notable decision of all time, trailing only *Marbury* v. *Madison* and *United States* v. *Nixon* and leading *Brown* v. *Board of Education*. *See* Jethro K. Lieberman, Milestones! 200 Years of American Law: Milestones in Our Legal History at vii (1976).
[28] *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting).
[29] *Id.* at 531 (White, J., dissenting).
[30] *Id.* at 542 (White, J., dissenting).

requirements would put "handcuffs on the police"[31] and prevent the prosecution of countless dangerous criminals.[32]

The Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures held hearings on these alarming concerns in 1967.[33] During the hearings, a number of the Senators and testifying witnesses denounced the *Miranda* exclusionary rule. For example, Senator Thurmond explained, "I am convinced that voluntary confessions must be admitted * * * so long as the confessions are voluntary, so long as they constitute the truth. I have frequently heard it said that more men are convicted out of their own mouths than are convicted out of the mouths of other people, and that have been my experience in practicing law."[34] A number of law enforcement witnesses talked about the difficulties that the *Miranda* rules were causing in their efforts to apprehend criminals.[35] Ultimately the Committee drafted the legislation which became § 3501. The rationale for the reform was stated by the Senate Judiciary Committee in its report:

> [C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities. The traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored. * * * The committee is convinced * * * that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement. * * * [*Miranda*] was an abrupt departure from precedent extending back at least to the earliest days of the Republic. Up to the time of the rendition of this 5-to-4 opinion, the "totality of circumstances" had been the test in our State and Federal courts in determining the admissibility of incriminating statements. * * * The committee is of the view that the proposed legislation * * * would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws.[36]

The anti-*Miranda* legislation was included as Part of Title II of the Omnibus Crime Control and Safe Streets Act, a broad criminal justice reform bill that also included not only a provision on *Miranda* but also legislation divesting the federal courts of jurisdiction to review state court decisions admitting confessions. This last part of the package was eliminated, but other legislation was left in to replace *Miranda* as well as to overrule the *McNabb–Mallory* line of cases excluding confessions taken more than six hours after a suspect was taken into custody[37] and *United States* v. *Wade* case creating a right to counsel during police line-ups.[38] After debates in the House and the Senate, the legislation was passed by a strong bipartisan majority. (The measure was, for example, co-sponsored by Senators Strom Thurmond, Robert Byrd, and many other members of both parties.)[39]

The statute passed by Congress—known as § 3501—provides in pertinent part:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
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> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including

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[31] *See More Criminals to Go Free? Effect of High Court's Ruling,* U.S. News & World Rep., June 27, 1966, at 32, 33 (quoting Los Angeles Mayor Samuel W. Yorty).

[32] *See id.* (including a statement by Fred E. Inbau, Professor of Criminal Law at Northwestern University, that law enforcement officials would choose not to prosecute a number of cases because of *Miranda*).

[33] *See Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcom. On Criminal Laws and procedures of the Sen. Comm. on the Judiciary,* 90th Cong., 1st Sess. (1967) (hereinafter *Controlling Crime Hearings*).

[34] *Id.* at 13.

[35] *See, e.g., id.* at 326 (statement of Quinn Tamm, Int'l Assoc. of Chiefs of Police).

[36] S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News. 2112, 2123–38.

[37] *See* 18 U.S.C. § 3501(c).

[38] *See* 18 U.S.C. § 3502.

[39] *See* OLP Report, *supra* note 21, at 67.

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether, or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession. * * *
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

The obvious import of the provision was to restore, at least in some fashion,[40] a voluntariness determination as the basis for admitting confessions in federal courts.

B. THE IMPLEMENTATION OF § 3501 IN THE EARLY YEARS: THE ROAD TO SUCCESS IN CROCKER

When the Omnibus Crime Control and Safe Streets Act of 1968 reached President Johnson's desk, he signed the law[41] but put a gloss on the provisions of § 3501 to essentially incorporate *Miranda.* His signing statement said:

> The provisions of [§ 3501], vague and ambiguous as they are, can, I am advised by the Attorney General [Ramsey Clark], be interpreted in harmony with the Constitution and Federal practices in this field will continue to conform to the Constitution. * * * I have asked the Attorney General and the Director of the Federal Bureau of Investigation to assure that these policies [*i.e.,* giving *Miranda* warnings] will continue.[42]

The Department of Justice would later characterize this action as "disingenuous[]."[43] and it is hard to disagree. The proposed legislation was not in any way ambiguous, as everyone involved in its drafting was well aware of both its intent and its basic effect.[44] In any event, the result of the President's statements was that law was ignored in the first few months after it was signed into the law. Attorney General Clark seems to have instructed U.S. Attorneys around the country to not rely on the statute in their arguments before courts around the country.[45]

This position proved to be very short-lived. During the 1968 Presidential campaign, then-candidate Richard Nixon attacked the Warren Court's criminal procedure jurisprudence in general and *Miranda* in particular. Nixon explained that *Miranda* "had the effect of seriously ham stringing [sic] the peace forces in our society and strengthening the criminal forces."[46]

After President Richard Nixon was elected, his new Attorney General John Mitchell quickly issued new guidance to federal prosecutors and agents around the country. They were directed to continue to follow the rules prescribed by *Miranda,* but to use § 3501 to help obtain the admission of confessions. A memorandum circulated by the Will Wilson, Assistant Attorney General of the Criminal, set forth the Department's position that § 3501 could be applied:

> Congress has reasonably directed that an inflexible exclusionary rule be applied only where the constitutional privilege itself has been violated, not where a protective safeguard system suggested by the Court has been violated in particular case without affecting the privilege itself. The determination of Congress that

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[40] *See infra* note 238 (explaining how § 3501 extends beyond the pre-*Miranda* voluntariness test).

[41] Pub. L. No. 90–351, 82 Stat. 197 (codified in various sections of titles 5, 18, 28, 42 and 47 U.S.C.).

[42] 4 Weekly Compilation of Presidential Documents 983 (June 24, 1968).

[43] OLP Report, *supra* note 21, at 72.

[44] *See Controlling Crime Hearings, supra* note 33, at 72 (letter of Attorney General Ramsey Clark noting conflict between legislation and *Miranda*; bill would be constitutional if *Miranda's* requirements were "read into" it or added as a "constitutional gloss," but if this were done it would be superfluous).

[45] *See* N.Y. Times, July 28, 1969, at 22.

[46] 114 Cong. Rec. 12,936, 12,937 (1968) (Mr. Mundt reading into the record Richard M. Nixon, Toward Freedom from Fear (1968)); *see also* Liva Baker, *Miranda*: Crime, Law and Politics 248 (1983) (citing Nixon campaign speeches attacking *Miranda*).

> an inflexible exclusionary rule is unnecessary is within its constitutional power.[47]

In explaining this policy, Attorney General Mitchell testified before the House Select Committee on Crime that "It is our feeling * * * that the Congress has provided this legislation [§ 3501], and, until such time as we are advised by the courts that it does not meet constitutional standards, we should use it."[48]

Following this approach, federal prosecutors raised § 3501 in federal courts around the country in an effort to secure a favorable ruling on it. This litigation effort produced a number of decisions in which courts referenced the statute, but found it unnecessary to reach the question of whether it actually replaced the *Miranda* procedures, usually because the federal agents had followed *Miranda.* Typically of these decisions is *United States* v. *Vigo,* in which the Second Circuit concluded: "Inasmuch as we hold defendant Vigo's statements voluntary and admissible under the requirements of *Miranda* v. *Arizona,* * * * *[i]t is therefore unnecessary to reach the question of the application and constitutionality of* § 3501."[49] Other similar decisions can be found in other courts.[50]

The Justice Department's litigation efforts did, however, successfully produce at least one decision from a federal court of appeals upholding § 3501. In *United States* v. *Crocker,*[51] the Tenth Circuit affirmed a district court's decision to apply the provisions of § 3501 rather than *Miranda.* The Tenth Circuit concluded that the Supreme Court's decision in *Michigan* v. *Tucker*[52] "although not involving the provisions of section 3501, did, in effect, adopt and uphold the constitutionality of the provisions thereof."[53] The Tenth Circuit explained that *Tucker* authorized the use of a statement taken outside of *Miranda* to impeach a defendant's testimony, relying on language in *Miranda* that the "suggested" safeguards were not intended to "create a constitutional straitjacket."[54] The Tenth Circuit concluded by specifically stating its holding: "We thus hold that the trial court did not err in applying the guidelines of section 3501 in determining the issue of the voluntariness of Crocker's confession."[55]

C. THE IMPLEMENTATION OF § 3501 FROM 1975 TO 1992: THE SEARCH FOR THE "TEST CASE"

After the favorable decision in Crocker, the Department of Justice appears to have shifted, almost by accident, into a posture of litigating § 3501 only in selected "test cases" where the argument could be most successfully advanced. Immediately following the Tenth Circuit's favorable decision in Crocker in 1975, § 3501 appears to have slipped the collective consciousness of federal prosecutors. The argument that the statute supercedes *Miranda* does not appear to have been pressed in the courts from about 1975 to 1985. This was not the result of any new policy from the Department of Justice. To the contrary, it appears that the directive issued in 1969 remained in effect through the Ford, Carter, Reagan, and Bush Administrations. The directive was clearly in effect as of 1974[56] and, writing later in 1986, an exhaustive Department of Justice report could not find any change.[57]

The 1986 Report was prepared by the Department's Office of Legal Policy, then headed by Assistant Attorney General Stephen Markman. In an extended and scholarly analysis, the Report concluded that the statute was constitutional and that the Supreme Court would so find:

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[47] Memorandum from Will Wilson, Asst. A.G., Criminal Division, to United States Attorneys (June 11, 1969), *reprinted in* 115 Cong. Rec. 23236 (Aug. 11, 1969).

[48] *The Improvement and Reform of Law Enforcement and Criminal Justice in the United States: Hearings Before the House Select Comm. on Crime,* 91st Cong., 1st Sess. 250 (1969) (statement of Attorney General John N. Mitchell).

[49] 487 F.2d 295, 299 (2d Cir. 1973).

[50] *See, e.g., United States* v. *Marrero,* 450 F.2d 373, 379 (2d Cir. 1971) (Friendly, J., concurring); *Ailsworth* v. *United States,* 448 F.2d 439, 441 (9th Cir. 1971); *United States* v. *Lamia,* 429 F.3d 373, 377 (2d Cir. 1970). *See generally* OLP Report, *supra* note 21, at 73; Daniel Gandara, *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts,* 63 Geo. L.J. 305 (1974).

[51] 510 F.2d 1129 (10th Cir. 1975).

[52] 417 U.S. 433 (1974).

[53] 510 F.2d at 1137.

[54] 510 F.2d at 1137 (*quoting Tucker,* 417 U.S. at 449).

[55] 510 F.2d at 1138. The Court also held, in a single sentence, that Crocker's confession had been obtained in compliance with *Miranda.*

[56] *See* Gandara, *supra* note 50, at 312 (letter from Dept. of Justice dated May 15, 1974, stating the policies set forth in the 1969 memorandum "are still considered current and applicable").

[57] *See* OLP Report, *supra* note 21, at 73–74.

> *Miranda* should no longer be regarded as controlling [in federal cases] because a statute was enacted in 1968, 18 U.S.C. § 3501. * * * Since. the Supreme Court now holds that *Miranda's* rules are merely prophylactic, and that the fifth amendment is not violated by the admission of a defendant's voluntary statements despite non-compliance with *Miranda,* a decision by the Court invalidating this statute would require some extraordinarily imaginative legal theorizing of an unpredictable legal nature.[58]

Following on the heels of this comprehensive study, the Attorney General approved this view of the constitutionality of the statute and instructed the litigating divisions to seek out the best case in which to argue that the statute replaced *Miranda.* From 1986 to 1988, I served as an Associate Deputy Attorney General in the Department of Justice. One of my specifically assigned responsibilities was to locate a good "test case" for the argument. The theory was that, rather than test § 3501 in a case chosen at random, it made sense to identify a case or cases in which the facts made a favorable ruling for the statute more likely. Department lawyers did identify several cases in which it appeared that a good § 3501 argument could be made. This resulted in the filing of at least one brief seeking to invoke the statute. In *United States* v. *Goudreau,*[59] the Civil Rights Division argued (in police brutality prosecution) that "under the terms of 18 U.S.C. 3501, the defendant's statement is admissible evidence regardless of whether *Miranda* warnings were required, because the statement was voluntarily made (*citing United States* v. *Crocker*)."[60] This argument was specifically approved both by the Office of the Solicitor General and the Assistant Attorney General for the Civil Rights Division. In that case, the Eighth Circuit ultimately issued an opinion that did not cite § 3501 and that found that federal agents had complied with the requirements of *Miranda.*[61]

Again during the Bush Administration, the "test case" approach of litigating § 3501 appears to have been followed whenever prosecutors considers § 3501. Some federal prosecutors presented the § 3501 argument in cases in which the facts appeared to suggest a favorable ruling.[62] No federal courts appear to have ruled on the merits of the claim during this time.

D. UNDERMINING THE STATUTE: THE CLINTON DEPARTMENT OF JUSTICE FROM 1993 TO DATE

From the beginning of the Nixon Administration in 1969 through the end of the Bush Administration in 1993, the consistent view of the Department of Justice, when asked, was that § 3501 was constitutional. The Department's policy, however, began to change in subtle and mysterious ways with the election of President Clinton and the appointment of his political appointees to policy making decisions in the Department.

1. United States v. *Cheely* and *Davis* v. *United States*

The first evidence of that the Department might have a new posture on the statute surfaced in the dubious handling of the defense of the § 3501 before the Ninth Circuit in *Cheely* v. *United States.*[63] The case involved a brutal crime designed to terrorize prosecution witnesses. Defendant Cheely and others were convicted of murder. They then arranged for a mail bomb to be sent to the post office box of George Kerr, a key witness against them in the earlier trial. Kerr's parents, who were collecting his mail, opened the box containing the mail bomb. David Kerr, George's father, was killed. Michelle Kerr, George's mother, was seriously injured when hundreds of pellets, glass, and other projectiles entered her body. She miraculously survived after spending five weeks in a coma. She will never fully recover.

The investigation of this case by the postal inspectors obtained incriminating statements from Cheely. The inspectors approached Cheely to ask him about the crime. Cheely briefly indicated that he did not want to sign a waiver of rights form, but said that he appreciated the postal inspectors talking to him. A far ranging and indisputably voluntary conversation ensued, as the district court found, the result of which was incriminating statements from Cheely. The district court, however, failed to apply § 3501 and instead suppressed the statements under *Miranda.*

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[58] *Id.* at 103.
[59] No. 87–5403ND (8th Cir. 1987).
[60] Brief for the United States, *United States* v. *Goudreau,* No. 87–5403ND (8th Cir. 1987).
[61] 854 F.2d 1097 (8th Cir. 1987).
[62] *See Department of Justice Enforcement of Section 3501: Hearings before the Sen. Subcomm. on Criminal Justice Oversight of the Sen. Judiciary Comm.,* 106th Cong., 1st Sess. (May 13, 1999) (testimony of Judge Stephen Markman).
[63] 21 F.3d 914 (9th Cir. 1994), amended —— F.3d —— (1994).

Because of the importance of the confession to the circumstantial case against Cheely, the government consider appealing the district court's ruling. The case would also, for obvious reasons, be a good "test case" for § 3501. A memo from an Assistant to the Solicitor General, written on March 12, 1993 early in the Clinton Administration before there were any confirmed political appointees in the Department of Justice, recommended authorizing an appeal raising § 3501 as one of four grounds, a recommendation that was apparently accepted without any issue on the question. The memo states: "As I understand it, we have made arguments based on Section 3501 to courts of appeals in the past. We generally have argued that Section 3501, by incorporating the *Miranda* factors into the voluntariness analysis, rendered some inculpatory statements admissible even where there was a 'less than perfect warning or a less than conclusive waiver,' as long as the suspect voluntarily waived his constitutional rights. * * * A Section 3501 argument may be useful in this case, because the district court appears to have concluded that the defendant's statements were voluntary."[64]

Apparently the career attorneys in the Department of Justice authorized the appeal on this basis, but before the brief could be finalized political appointees arrived in town. By the time the Department's brief was actually filed in the Ninth Circuit, it did not vigorously defend the propriety of obtaining those statements under § 3501. Instead, the Department's brief in the case contains what might be called charitably an uninspired argument in support of the statute. The Department's argument on § 3501, barely two double-spaced pages long (in a brief that appears to have been well below applicable page limits), off-handedly mentions the statute and cites no authority more recent than 1975.[65]

The § 3501 portion of the Department's brief appears to be so far below the normal standards of appellate advocacy that one wonders whether it was written by unsympathetic political officials rather than the Department's experienced career attorneys or aggressive field prosecutors. With this question in mind, it is informative to learn that the brief was, in contrast to earlier and later pleadings, not signed by the Department's accomplished career attorney on the matter.

The Department's less-than-aggressive prosecution of this case continued following a predictable (given the briefing) adverse ruling on § 3501 from the Ninth Circuit. The Ninth Circuit, citing *Edwards* v. *Arizona*[66] (a leading 1981 Supreme Court decision that the Department's brief had not attempted to distinguish), concluded that § 3501 could not "trump" *Edwards*.[67]

After the ruling, the Department did not petition for rehearing. In an extraordinary move, however, the Ninth Circuit *sua sponte* then entered an order directing the parties to address the question whether the case merited rehearing *en banc*.[68] Such a court-initiated request is quite rare in appellate litigation and presented a great opportunity for the United States to reverse an adverse decision against it. However, the Department of Justice did not take the clue and surprisingly filed a memorandum *opposing* further review.[69]

The memorandum in opposition to rehearing is unusual because of its effort to conceal the importance of the § 3501 issue. The document stated:

> We are also of the view that the panel's holding that Cheely's statements to postal inspectors were properly suppressed by the district court under *Edwards* v. *Arizona*, 451 U.S. 477 (1981) does not merit rehearing en banc under the criteria set out in Fed. R. App. 35. That factbound decision is neither contrary to the holdings of any other panel of this Court nor of sufficient systemic importance to merit plenary review.[70]

This statement is deceptive in several respects. To begin with, it is hard to understand how a decision regarding a federal statute overruling the *Miranda* decision in all federal cases could lack systemic importance."[71] Moreover, it is quite curious

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[64] Solicitor General Memorandum, March 12, 1993 (*citing* other Dep't of Justice document).

[65] Brief of the United States at 20–22, *U.S.* v. *Cheely*, No. 92–30504 (9th Cir.) (brief filed Mar. 30, 1993).

[66] 451 U.S. 477 (1981).

[67] 21 F.3d at 923. The brevity of the Ninth Circuit's ruling leaves it unclear precisely what the Ninth Circuit meant. Was the Circuit concluding that the statute was unconstitutional or that as a matter of statutory construction it did not cover the *Edwards* situation at hand?

[68] Order, *U.S.* v. *Cheely*, No. 92–30257 (9th Cir. May 25, 1994).

[69] Memorandum of the United States Relating to the Question Whether to Entertain Rehearing *En Banc*, *U.S.* v. *Cheely*, No. 92–30257 (1994).

[70] *Id.* at 9.

[71] Indeed, just one week after the Department filed its rehearing memorandum, the United States Supreme Court in *Davis* would note the importance of the § 3501 issue, with the majority

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that the Department did not apprise the Ninth Circuit of the potential conflicts the *Cheely* decision created, both within and without the circuit. Within the Ninth Circuit, several earlier decisions contain language that conflicts with the *Cheely* approach. In *United States* v. *Cluchette,*[72] the court appeared to view § 3501 as establishing the controlling factors for admissibility of confessions.[73] In *Cooper* v. *Dupnik,*[74] the dissenting judges, without direct response from the majority, pointed out that § 3501 establishes the standards for admissibility of confessions in federal cases. Finally, in an early decision, *Reinke* v. *United States,*[75] the court discussed § 3501 before concluding that it was technically inapplicable to the case before it.

Cheely also appeared to create a clear "circuit split." *Cheely* is at odds with the Tenth Circuit's decision in *United States* v. *Crocker,*[76] which (as noted earlier) held that § 3501 constitutionally required the admission of all voluntary statements regardless of compliance with *Miranda* rules. Other decisions also seem to suggest that § 3501 may be important in federal cases.[77] It is hard to imagine that the Department of Justice was unaware of such decisions. Yet it failed to disclose them to the Ninth Circuit.

Finally, the memorandum contains inadequate discussion of a plain legal error in the *Cheely* opinion. The *Cheely* opinion cited only a single case in support of its conclusion that § 3501 did not "trump" the *Miranda* rules: *Desire* v. *Attorney General of California.*[78] *Desire* does not cite § 3501; nor could it have any possible bearing on § 3501, because it arises from a *state* prosecution to which § 3501 has absolutely no application. The memorandum does not make this obvious point. In view of these plainly deficient legal arguments, it is unsurprising that the signature of the Department's career prosecutor does not appear on this memorandum as well.

This was not the end of the Department's efforts to dodge the question of § 3501. Shortly after the Department filed its memorandum on rehearing, the United States Supreme Court handed down its decision in *Davis* v. *United States.* It is here necessary, to keep matters in chronological order, to shift from the Ninth Circuit to the United States Supreme Court. There, too, the Clinton Justice Department appeared to be undermining the statute.

In March 1994, a Justice Department attorney appeared before the United States Supreme Court in *Davis* v. *United States,*[79] a federal court martial case involving Davis' attempt to suppress an incriminating statement made after an ambiguous request for counsel. There was no claim that Davis' statement was involuntary, only that the "prophylactic" rules of *Miranda* somehow required the statement implicating Davis in a murder be suppressed.

The Washington Legal Foundation, represented by Paul Kamenar and me, filed an *amicus* brief in support of the United States, arguing that § 3501 required the admission of Davis' voluntarily-made incriminating statements.[80] We were surprised to discover a few days later that the brief of the Solicitor General affirmatively and gratuitously undermined our attempt to support the United States. The Solicitor General's brief argued that military courts-martial are not "criminal prosecutions" covered by the statute[81] and thus that Congress had not intended to reach cases like *Davis.*

The implications of this position are remarkable. If the Solicitor General's position is correct, it would mean that suspects could more easily exclude their incriminating statements if prosecuted in a military court martial than if prosecuted in federal court. In many cases, a consequence would be that crime victims who served in the armed forces (as *Davis* itself serves to illustrate[82]) would be less likely to see justice than victims in other federal prosecutions. It is also strange to attribute such an

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opinion calling it a question of "first impression" and Justice Scalia's concurring opinion calling the Departments failure to raise the statute "inexcusable." *See infra* note 89 and accompanying text.

[72] 465 F.2d 749 (9th Cir. 1972).

[73] *See id.* at 754 ("there is no claim that the judge did not fully employ the criteria required by 18 U.S.C. § 3501 (a) and (b). * * *").

[74] 963 F.2d 1220, 1256–57 (9th Cir. 1992) (*en banc*) (Leavy, J., dissenting).

[75] 405 F.2d 228, 230 (9th Cir. 1968).

[76] 510 F.2d 1129 (10th Cir. 1975).

[77] *See, e.g., United States* v. *Gay,* 522 F.2d 429, 431–32 (6th Cir. 1975); *United States* v. *Carney,* 328 F. Supp. 948, 953 n.3 (D. Del. 1971), *aff'd,* 455 F.2d 925 (3d Cir. 1972).

[78] 969 F.2d 802, 805 (9th Cir. 1992).

[79] 512 U.S. 452 (1994).

[80] Brief *Amicus Curiae* of the Washington Legal Foundation, *Davis* v. *U.S.,* No. 92–1949 (1994).

[81] Brief of the United States at 18 n.13, *Davis* v. *U.S.,* No. 92–1949 (1994).

[82] Davis was convicted of murdering Seaman Keith Shackleton.

intention to Congress, particularly since the whole point of § 3501 was to limit "the harmful effects" of *Miranda*.[83]

Even before the case was argued, this peculiar interpretation of the statute raised a suspicion (at least in my mind) that the Solicitor General's Office was looking for a way to duck the issue without forthrightly explaining that it disliked the statute for ideological reasons. In oral argument before the Court, the suspicions were publicly confirmed. The Court repeatedly asked Assistant to the Solicitor General Richard H. Seaman about the effect of § 3501. He gave generally unresponsive answers and finally, after being pressured by several questions, stated, "We don't take a position on that issue."[84] Later he made the same statement.[85]

It is possible that the representative from the Solicitor General's Office may have been given explicit instructions not to say anything about the statute. At one point, Justice Scalia said, "[I]t seems to me the Government ought to have a position on this." Mr. Seamon could only respond, "You may well be right, Justice Scalia."[86]

This refusal to address the implications of the statute in response to specific questions from the Court did not go unnoticed. Justice O'Connor's majority opinion indicated an inability to discuss the issue because of the Department's failure, dropping a hint that the Department should consider raising it: "We also note that the Government has not sought to rely in this case on 18 U.S.C. 3501, 'the statute governing the admissibility of confessions in federal prosecutions,'[87] and we therefore decline the invitation of some amici to consider it [citing Brief of WLF]. Although we will consider arguments raised only in an amicus brief, * * * we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position."[88] Justice Scalia, in a concurring opinion in the case, was even more specific, noting the bizarre quality of the Department's behavior:

> The United States' repeated refusal to invoke § 3501, combined with the courts' traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of "*Miranda*" issues that might be entirely irrelevant under federal law. * * * Worse still, it may have produced—during an era of intense national concern about the problem of run-away crime—the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. *There is no excuse for this.*[89]

Justice Scalia went on to note that he could "not immediately see why * * * the Justice Department has good basis for believing that allowing prosecutions to be defeated on grounds that could be avoided by invocation of § 3501 is consistent with the Executive's obligation to 'take Care that the Laws be faithfully executed.'"[90]

The story of § 3501 can now return to the Ninth Circuit, where the Department's career prosecutor handling the *Cheely* case read Justice Scalia's favorable remarks about § 3501. He then promptly sent a letter to the Ninth Circuit appraising them of this decision and explaining briefly how the *Davis* decision applied to the issues at hand.[91] Later that same day, political figures in the Department of Justice learned of this letter. This prompted a telephone call, apparently from Solicitor Gen-

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[83] S. Rep. No. 1097, 90th Cong., 2nd Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2127.

[84] Official Transcript of Oral Argument at 44, *Davis* v. *U.S.*, No. 92–1949 (1994).

[85] *Id.* at 47 ("Again, we don't take a position in this case [on § 3501]").

[86] *Id.* at 45.

[87] Justice O'Connor's opinion here was quoting from *United States* v. *Alvarez–Sanchez*, 511 U.S. 350, 351 (1994), a case decided that same term about the six-hour "safe harbor" provision for police interrogation contained in 18 U.S.C. § 3501(c). It is interesting that the Department of Justice vigorously defended this provision, urging the admission of a confession under § 3501(c) and explaining in its brief to the Court that § 3501(a) "requires the admission" of voluntary statements. Br. for the U.S. at *passim*, *United States* v. *Alvarez–Sanchez*, No. 92–1812, 511 U.S. 350 (1994). At no point to the Department of Justice tell the Supreme Court that § 3501(a) was unconstitutional; nor did the Department address any of the complex severability issues that would arise if part of the statute were unconstitutional. The Department had also urged the Court to admit a statement pursuant to § 3501 in another case, albeit not over a constitutional objection from a defendant. *See* Br. for the United States, *United States* v. *Jacobs*, No. 76–1193, *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978).

[88] *See Davis* v. *U.S.*, 512 U.S. 452, 457 n.* (1994) (citing *United States* v. *Alvarez–Sanchez*, 511 U.S. 350, 351, (1994)). The Court had also briefly raised § 3501 in oral argument in a case argued the previous term, *United States* v. *Green*, 592 A.2d 985 (D.C. App. 1991), *cert. granted*, 504 U.S. 908 (1992). The Court, however, never published an opinion in the case, because Green died in prison. *See* 507 U.S. 545 (1993) (vacating order granting cert).

[89] 512 U.S. at 465 (Scalia, J., concurring) (emphasis added).

[90] *Id.* (quoting U.S. Const., art. II, § 3).

[91] Letter from Mark H. Bonner to Cathy Catterson, Clerk, United States Court of Appeals for the Ninth Circuit (June 29, 1994).

eral Drew Days himself, to the clerk of the court for the Ninth Circuit. General Days then sent a letter from the Solicitor General withdrawing the earlier letter from the career prosecutor[92] replacing it with a new letter that blandly mentioned that *Davis* might have some relevance to the Department's pending memorandum.[93]

Apparently not enlightened by this letter, the Ninth Circuit then ordered briefing by the parties on whether *Davis* affected its earlier ruling.[94] This led the United States to file a "Supplemental Memorandum" concerning *Davis*.[95] Curiously, the memorandum's argument section fails to even argue the applicability of § 3501, despite the obvious implications of the discussions of the statute in *Davis*.

Unsurprisingly, the Ninth Circuit ultimately decided not to rehear the case and the Department sought no further review in the United States Supreme Court. Cheely went to trial and, despite the government's inability to use his incriminating statements, was fortunately convicted. But the Department's handling of the case effectively undercut § 3501 throughout the Ninth Circuit.

2. The department's commitment to raise § 3501 in an "appropriate" case

After the Department's curious machinations in *Cheely* and *Davis*, there were those of us who strongly suspected that the Justice Department's political appointees had decided to reverse its long-standing policy supporting § 3501. Late in 1995, I raised these concerns in testimony before the Senate Judiciary Committee.[96] At that same hearing, several members of the Judiciary Committee pressed this point with then-Solicitor General Drew Days. In response to questions from Senator (and former prosecutor Fred Thompson) about why the Department had not defended § 3501 in these cases, Solicitor General Days denied there was some decision not to defend the statute:

> Well, we simply said [in *Davis*] that it was not properly raised and there was a problem with courts martial. Let me make clear, Senator, that there is no policy in the Department, and the Attorney General has already advised the committee of this fact, against raising 3501 in an appropriate case. Indeed, we have used some provisions of 3501 * * * So I think it is really a question of our making the decision as prosecutors when we are going to raise these issues. * * *
>
> The Department has to make a strategic decision in cases as to how it is going to use Federal statutes, and in *Cheely* and in *Davis* the decision was made not to press that particular argument. It doesn't mean to say that we won't under other circumstances.[97]

Later, under questioning from Senator Biden Solicitor General Days again denied any decision was in place not to enforce the law: "with respect to 3501, as I indicated earlier, there is no Department policy against using 3501 in an appropriate case."[98]

The position taken by the Solicitor General was the same as that taken by other Clinton Administration political appointees at this time. For example, in response to a written question from Senator Hatch in an oversight hearing in 1995, Attorney General Reno stated: "The Department of Justice does not have a policy that would preclude it from defending the constitutional validity of Section 3501 in an appropriate case."[99] Indeed, the Attorney General even pointed to the Department's recent efforts on behalf of § 3501 in *Cheely*, noting that "the most recent case in which we raised Section 3501 held that the statute did not 'trump' Supreme Court precedent."[100] In a 1997 oversight hearing, Senator Jeff Sessions asked Attorney General Reno about the statute.

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[92] Letter from Drew S. Days, III, Solicitor General to Cathy Catterson, Clerk, United States Court of Appeals for the Ninth Circuit (June 29, 1994) (referring to "our telephone conversation today").

[93] Letter from Drew S. Days, III, Solicitor General to Cathy Catterson, Clerk, United States Court of Appeals for the Ninth Circuit (June 29, 1994) (citing *Davis* and noting "[t]he decision in *Davis* related to Point 3" of the government's brief). I am indebted to Solicitor General Days for providing me copies of this letter and the letter referred to in the preceding footnote.

[94] Order, *U.S.* v. *Cheely*, No. 92–30257 (9th Cir. Aug. 9, 1994) (directing parties to file briefs "on the issue of suppression in light of the Supreme Court's decision in *Davis* v. *U.S.*").

[95] Supplemental Memorandum of the United States Relating to the Question Whether Appellee Cheely Waived His Right to Counsel, *U.S.* v. *Cheely*, No. 92–30257 (9th Cir. 1994).

[96] *See Solicitor General Oversight: Hearing Before the Sen. Comm. on the Judiciary*, 104th Cong., 1st Sess. 72–80 (1995).

[97] *Id.* at 31, 33.

[98] *Id.* at 42.

[99] The Administration of Justice and the Enforcement of Laws, Hearings Before the Sen. Judiciary Committee, 104th Cong., 1st Sess. 91 (June 27, 1995) (written answer of Attorney General Reno to question of Senator Hatch).

[100] *Id.* (*citing United States* v. *Cheely*, 21 F.3d 914, 923 (9th Cir. 1994)).

> Sessions: A number of years ago, I think you were asked about it, and you indicated you would consider using it, some two years ago, in an appropriate case. Two years have passed, and that still has not happened * * * [D]o you know—has the Department of Justice under your tenure ever asserted section 3501?
>
> Reno: I understand that it was raised in *United States* v. *Cheely* * * * and we did not prevail.
>
> Sessions: In what circuit. * * *
>
> Reno: Ninth Circuit.
>
> Sessions: Well, that would be your least best chance of prevailing with 3501 [laughter]. * * *
>
> Reno: * * * what I try to do, based on the evidence in the law, is not create hypotheticals, but to say when the appropriate circumstances arise, we'll do what's right. And we'll review this, and determine when it's right, if it's right, and do it.
>
> Sessions: Well, I just would ask you—I assume, then, that you are not committing to follow that law, and I think that would—from your previous testimony, I had understood that you would in an appropriate case.
>
> Reno: I just told you, I'd do it if it's right in an appropriate case.
>
> Sessions: Well, I'll take that as you express it. I assume that you will in the right case, and I think it's time to assert that.[101]

United States Attorney Eric Holder, when his nomination to be Deputy Attorney in the Department was under consideration by the Judiciary Committee, also promised to support the statute in appropriate situations:

> Question: Do you believe that the United States Attorneys should invoke this statute in an appropriate case?
>
> Answer: My experience has been that we have not had significant difficulty in getting the federal district court to admit voluntary confessions under *Miranda* and its progeny. However, I would support the use of Section 3501 in an appropriate circumstance.[102]

3. Fourth circuit litigation over § 3501 in Sullivan and Leong

The "appropriate" circumstance for raising § 3501 would turn out to be hard for the current Administration to find. Indeed, in the next case presenting the issue—*United States* v. *Sullivan*[103]—political appointees in the Department even tried to "unfile" a brief filed by a career prosecutor defending § 3501.

Robert Sullivan was stopped by U.S. Park Police for a missing license plate. After reviewing his registration, the officer did not cite him, but told him to correct the problem. Sullivan was free to go; but the officer asked the unusually nervous Sullivan if he had anything illegal in his car. After repeating the question a few times, Sullivan owned up that he had a fully loaded revolver right under the front seat. Sullivan had a prior armed robbery conviction and was charged with being a felon illegally in possession of a gun.

In the subsequent prosecution, Sullivan's lawyer moved to suppress the gun and Sullivan's statement that he had it, on the ground that the officer did not read Sullivan his *Miranda* rights. The judge agreed, and suppressed the gun and the statement. The judge raised no suggestion that the statement was involuntary, and—since it was made after Sullivan was "questioned" for at most one minute, in broad daylight, sitting by the roadside in his own car—the voluntariness argument seems obvious. The judge suppressed the evidence solely because no *Miranda* warnings were given. In its opinion suppressing the statement, however, the district court specifically asked the higher courts to reassess whether mechanical application of the exclusionary rule should continue to be the law.[104]

Career prosecutors in the United States Attorney's Office for the Eastern District of Virginia appealed, arguing that no *Miranda* warnings were needed because Sullivan was not in the officer's custody. But the Office also argued, picking up on the suggestion from the district court, that even if Sullivan had been in custody, the statement should be admitted because under § 3501. The brief explained that "Congress acted within its powers in modifying *Miranda*'s prophylactic rules" and "sec-

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[101] *Department of Justice Oversight: Hearings Before the Sen. Comm, on the Judiciary,* 105th Cong., 1st Sess. 89–90 (April 30, 1997).

[102] *Confirmation of Deputy Attorney General Nominee Eric Holder: Hearings before the Sen. Comm. on the Judiciary,* 105th Cong., 1st Sess. 124 (June 13, 1997) (written response of Deputy Attorney General Designate Holder to question from Senator Thurmond).

[103] 138 F.3d 126 (4th Cir. 1998).

[104] *See United States* v. *Sullivan,* 948 F. Supp. 549, 558 (E.D. Va. 1996).

tion 3501 complies with the Constitution."[105] On March 5, 1997, the brief for the office was filed with the Fourth Circuit.

On March 26, 1997, the Acting Solicitor General, Walter Dellinger, submitted a letter to the Clerk of the Fourth Circuit Court, accompanied by a "Motion to Substitute Redacted Brief for the United States." The letter said: "I am writing to withdraw the government's brief * * * and to request leave to file as a substitute the enclosed brief."[106] The letter claimed (without presenting supporting citations or documentation) that the brief presented issues "that were not presented to me for consideration at the time I authorized the government to appeal." The accompanying motion noted that a new attorney in Washington, D.C., was to be substituted as counsel on the case in place of the career prosecutors handling the appeal from the Eastern District of Virginia.[107] Attached to the motion was a new brief that simply omitted the part arguing § 3501.

Apparently anticipating the court granting the government's, motion, on March 31, 1997, Sullivan's counsel filed a brief that did not discuss the admissibility of the statement under 18 U.S.C. § 3501.[108] On April 3, 1997, the Fourth Circuit granted the government's motion to file the new, redacted brief.

The Washington Legal Foundation, represented by Paul Kamenar and me, learned of the decision and thought that, rather than leave the Court of Appeals for the Fourth Circuit in the dark on this key issue, WLF should attempt to have the matter brought to the court's attention. On June 26, 1997, WLF filed a motion to submit an amicus brief in the *Sullivan* case on behalf of WLF and four members of the Senate Judiciary Committee—Senators Jeff Sessions, Jon Kyl, John Ashcroft, and Strom Thurmond. There was nothing complex about the motion. WLF simply asked the court to accept for filing the arguments that the career prosecutors had previously submitted on behalf of the statute.

In support of its motion, WLF explained why the Court should reach the issue of the applicability of § 3501. The Supreme Court has described § 3501 as "'the statute governing the admissibility of confessions in federal prosecutions.'"[109] Moreover, WLF observed that a few months earlier the Fourth Circuit had found it necessary to unanimously reject an "inexplicabl[e]" concession of error by the Clinton Justice Department that evidence obtained during the course of a traffic stop should have been suppressed.[110] WLF further argued at length that the government's attempted withdrawal of the argument based on § 3501 did not license a court to ignore a controlling Act of Congress. WLF noted that the Supreme Court has instructed that the parties cannot prevent a court from deciding a case under the governing law simply by refusing to argue it. In *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*,[111] the Court concluded that it was free to reach the issue whether Congress had repealed the statute the Comptroller of the Currency had used to rule against the respondent even though the respondent had specifically refused to make an argument to that effect both before the court of appeals and before the Supreme Court. The Court held that it would be absurd to allow the parties' decisions about what arguments to press to force the Court to decide the meaning of a statute that had been repealed. "The contrary conclusion," the Court explained, "would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory."[112] WLF finally noted that the parties before the court had apparently literally colluded to remove this argument from the case. The Department of Justice decided to abandon the U.S. Attorney's office's § 3501 argument as a result of a call from defense counsel to the Solicitor General's Office in Washington, D.C.[113] This

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[105] Brief for the United States at 18, *United States* v. *Sullivan*, No. 97–4017 (4th Cir. Mar. 5, 1997).

[106] Letter from Walter Dellinger, Acting Solicitor General to Patricia S. Connor, Clerk, U.S. Court of Appeals for the Fourth Circuit, Mar. 26, 1997.

[107] Motion to Substitute Redacted Brief for the United States, *United States* v. *Sullivan*, No. 97–4017 (4th Cir. Mar. 26, 1997).

[108] Br. for Appellee, *United States* v. *Sullivan*, No. 97–4017 (4th Cir. Mar. 31, 1997).

[109] *Davis* v. *United States*, 512 U.S. 452, 457 (1994) (*quoting United States* v. *Alvarez–Sanchez*, 114 S. Ct. 1599, 1600 (1994)).

[110] *United States* v. *Stanfield*, 109 F.3d 969, 984 n.5 (4th Cir. 1997).

[111] 508 U.S. 439, 445–48 (1992).

[112] *Id.* at 447, *cited in Davis* v. *United States, 512 U.S. at 464 (Scalia, J., concurring).*

[113] *Dept. of Justice Oversight: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (Apr. 30, 1997) (remarks of Sen. Thompson) ("My understanding is that the defendant's attorney called the Justice Department, and the Justice Department caused this career prosecutor's brief [asserting 3501] to be withdrawn. * * *").

was done in the teeth of a statute that governs not the conduct of private parties outside the courtroom, but rather the conduct of the courts themselves.[114]

The Department's decision to file a new brief not discussing § 3501 also raised serious issues of professional responsibility. Many codes of professional responsibility, including the Virginia Code of Professional Responsibility, indicate that courts expect "pertinent law [will be] presented by the lawyers in the cause."[115] As a result, "Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so."[116] A duty of candor should have compelled the Department of Justice to make the Court aware of this controlling "legal authority."[117]

The Fourth Circuit granted the motion of WLF and Senators Sessions, Kyl, Ashcroft, and Thurmond to file the brief.[118] But ultimately the Court's ruling gave it no occasion to reach the § 3501 issue. The Court reversed the district court's decision that Sullivan had been in custody; the police officer, accordingly, was not required to give *Miranda* warnings. The Court then dropped a footnote on the § 3501 issue: "Amici curiae urge that we reverse the district court on the basis of 18 U.S.C. § 3501 (providing for the admissibility of confessions voluntarily given). Because our decision moots this issue and because the parties neither presented it to the district court nor briefed it on appeal, we decline to address it."[119]

While the *Sullivan* case shed little light on § 3501, *United States* v. *Leong*[120] was more illuminating. While our motion to raise § 3501 was pending before the Court in *Sullivan,* Paul Kamenar and I learned of another Fourth Circuit case in which a dangerous criminal had obtained a Fourth Circuit ruling suppressing his confession, with the apparent result that he was about to be released. In *Leong,* a police officer had made a valid stop of a vehicle for speeding. He had also validly obtain a consent to search the vehicle. During the ensuing search, the officer discovered a handgun on the floor behind the driver's seat. The officer retrieved the firearm, walked to the rear of the vehicle, and ordered all four individuals to squat and put their hands above their heads. The officer then asked Leong and his companions who owned the firearm, but no one answered. After a few moments, the driver became somewhat distraught and also asked the others who owned the firearm. When no one responded, the officer advised Leong and the others that they were "all going to be placed under arrest" until he could determine who owned the firearm. At that point, Leong confessed it was his gun.

Leong was a felon, and was charged with being a felon in possession of a firearm. The district court, however, concluded that Leong was in "custody" when he confessed. Because he had not been his *Miranda* warnings at that time, it suppressed any evidence of the gun, making any prosecution of Leong impossible. The government appealed, arguing the Leong was not in fact in custody at this time. The Fourth Circuit, however, reluctantly affirmed the district court's suppression order "under the narrow facts presented by this case." An unpublished opinion to that effect was released on June 26, 1997.

The Washington Legal Foundation, represented by Paul Kamenar and me, then filed a motion suggesting the appropriateness of *sua sponte* rehearing and rehearing en banc to examine the applicability of § 3501.[121] In its motion, WLF explained that the parties had failed to appraise the Court of potentially relevant legal authority, specifically 18 U.S.C. § 3501. In its accompanying brief, WLF argued that the issue was one of exceptional importance that should be considered by the full Fourth Circuit. In particular, WLF noted that the effect of the Court's ruling was to permit

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[114] *See* 18 U.S.C. § 3501 (providing that "in any [federal] criminal prosecution" a confession "*shall* be admissible in evidence") (emphasis added); *see also Davis* v. *United States,* 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (§ 3501 "is a provision of law directed *to the courts*") (emphasis in original).

[115] Va. Code Prof. Resp., Ethical Consideration 7–20.

[116] *Id.*

[117] Sadly, the Fourth Circuit had previous experience with the current Department of Justice misrepresenting legal issues to the court. In one case, nine judges of the Fourth Circuit roundly criticized the Department for, "on virtually every occasion when it recite[d the relevant statute's] requirements," "intentional[ly] omi[tting] * * * three manifestly relevant words" the statute contained which the Department apparently did not care for. *Virginia* v. *Riley,* 106 F.3d 559, 565 (4th Cir. 1997). In failing to cite § 3501, the Department seems to have gone even further—deliberately omitting not merely three words but any reference whatever to the governing statute.

[118] Order, *United States* v. *Sullivan,* No. 97–4017 (Sept. 10, 1997).

[119] *United States* v. *Sullivan,* 138 F.3d 126, 134 n.* (4th Cir. 1998).

[120] 116 F.3d 1474, 1997 WL 3512414 (4th Cir. 1997 unpublished).

[121] Motion of the Washington Legal Foundation and Safe Streets Coalition to File as Amici Curiae A Suggestion of Appropriateness of *Sua Sponte* Rehearing and Rehearing En Banc, *United States* v. *Leong,* 96–4876 (July 9, 1997).

the escape from justice an armed and presumptively dangerous felon. To allow this in the face of a federal statute to the contrary was, WLF explained, "to bestow a windfall benefit that seriously affects the fairness, integrity and public reputation of judicial proceedings."[122]

An astonishing development then occurred. Five days after WLF filed its brief—before the Fourth's Circuit had an opportunity to rule on WLF's motion and even before the Fourth Circuit's mandate had issued returning the case to the district court—the Department of Justice moved in the district court to dismiss the indictment against Leong, and a dismissal order was entered on July 16,1997.[123] This appeared to be a brazen maneuver by the Department to simply avoid the § 3501 issue by rending the case moot, in spite of the jeopardy to public safety consequences involved in simply dismissing the indictment against a dangerous criminal. The Department's ploy in the district court, however, turned out to be without legal effect on the Fourth Circuit, as the Court of Appeals still retained jurisdiction over the case.[124]

On July 16, 1997, the Fourth Circuit issued an order directing the Department of Justice and counsel for Leong "to submit supplemental briefs addressing the effect of 18 U.S.C.A. § 3501 on the admissibility of Leong's confession, including the effect of the statute on *Miranda* v. *Arizona*. * * * and any constitutional issues arising therefrom."[125] This order seemed to present a "appropriate" case for the Department of Justice to defend the statute, particularly since the Fourth Circuit had asked specifically for the Department's views. The Chairman and five members of the Senate Judiciary Committee certainly expected the Department to do this. On August 28, 1997, the six distinguished Senators wrote a careful letter to Attorney General Reno carefully analyzing the legal issues and strongly urging her to defend the law:

> We believe that Section 3501 is constitutional. While the Supreme Court has not passed on this question directly, we believe that the Court would uphold the statute. * * * On numerous occasions, the Supreme Court has described *Miranda's* rules as prophylactic measures that are designed to assist in effectuating the Fifth Amendment's prohibition against compelled self-incrimination, but that are not required by the Fifth Amendment itself. [collecting cases]
>
> There is direct authority for the proposition that Section 3501 * * * is constitutional. The Tenth Circuit is the only federal circuit court that, at the behest of the Department of Justice, has specifically addressed the constitutionality of Section 3501 [citing *Crocker*]. In that case, the district court applied Section 3501, rather than *Miranda,* and admitted a defendant's statements, on the ground that they were voluntary. The principal holding of the court of appeals was that the district court acted properly and that the statute is constitutional. * * *[126]

The Senators concluded, "The undersigned members do not want to see a guilty offender go free due to a technical error if the Justice Department easily can prevent such a miscarriage of justice by invoking the current written law."[127]

The Senators had every reason to expect that the Department would defend the law, as it had in earlier cases. The Senators noted the repeated assurances they had received from the Department that it would defend the statute in an "appropriate case." The Senators recounted, for example, Solicitor General Days testimony about the decision of the Department not to pursue § 3501 further in the *Cheely* case,[128] noting that "Mr. Days attributed the Department's refusal * * * to pursue the issue any further in the Ninth Circuit case of *United States* v. *Cheely* not to doubts about its constitutionality—indeed, he never suggested in the course of the hearing that the Department had any such doubts—but instead to various litigation strategy considerations. He specifically stated that the decision not to press the argument in those cases 'doesn't mean that we won't under other circumstances.'"[129] Moreover, the Department had itself raised § 3501 before, as noted in a motion for an exten-

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[122] Br. of Amici Curiae WLF and Safe Streets Coalition Suggesting the Appropriateness of a Sua Sponte Rehearing and Rehearing En Banc at 8, *United States* v. *Leong,* 96–4876 (4th Cir. July 9, 1997) (*quoting United States* v. *Perkins,* 108 F.3d 512, 517 (4th Cir. 1997).

[123] *See* Supp. Br. of the United States at 5, *infra* note 131.

[124] *See United States* v. *Rodgers,* 101 F.3d 247, 251 (2d Cir. 1996).

[125] Order, *United States* v. *Leong,* No. 96–272 (4th Cir. July 16, 1997).

[126] Letter from Senators Orrin Hatch, Strom Thurmond, Fred Thompson, Jon Kyl, John Ashcroft, and Jeff Sessions to Attorney General Janet Reno at 3–4 (Aug. 28, 1997).

[127] *Id.* at 5.

[128] *See supra* note 97 and accompanying text.

[129] Letter from Senators Orrin Hatch *et al., supra* note 126, at 4–5 (quoting testimony of Solicitor General Drew Days).

sion of time filed when the Fourth Circuit ordered briefing in *Leong* on § 3501. In response to the Fourth Circuit's order, the Chief of the Appellate Section of the Criminal Division request for additional time stated matter-of-factly not that there was some Department of Justice policy against making such an argument in the courts of appeals, but rather to the contrary that "[t]he Department's last attempt to invoke Section 3501(a) was not successful." [130]

In spite of all this, the Clinton Justice Department, apparently acting at the behest of political appointees at the highest levels, filed a brief in *Leong* actually joining the defendant in arguing that the statute was unconstitutional. The Department's brief advanced two claims. First, the Department asserted that the "lower courts" could not reach the question of the effect of the 1968 statute because Supreme Court's 1966 decision in *Miranda* had decided the issue: "*Miranda* has never expressly been overruled, and it is the Supreme Court's sole province to pass on the continuing validity of its decisions."[131] Second, the Department argued that on the merits, the statute was unconstitutional, at least in the lower courts. The Department argued "we do not believe that the Supreme Court's jurisprudence permits this or any lower court to draw that the conclusion that *Miranda* [has been superseded by § 3501]." [132] In the Supreme Court, however, things might be different: "Should the issue of § 3501's validity * * * be presented to the Supreme Court * * * the same considerations would not control, since the Supreme Court (unlike the lower courts) is free to reconsider its prior decisions, and the Department of Justice is free to urge it to do so." [133] The Department's brief also contained a footnote declaring that the position in this brief "constitutes the position of the executive branch of the United States in the lower courts." [134] Shortly thereafter, the Attorney General sent a notice to Congress that she would not defend § 3501 in the lower courts.[135]

The Department's argument was joined, in a curious (and, some might say, unholy) alliance, by defendant and convicted felon Tony Leong and the National Association of Criminal Defense Lawyers. WLF then filed a reply to all of this, explaining why § 3501 was a valid exercise of Congressional power to modify prophylactic, evidentiary rules created by the Supreme Court.[136] The WLF brief explained that the *Miranda* rules were not constitutionally required and were, therefore, subject to congressional modification.

On September 19, 1997, the Fourth Circuit issued its order declining to rehear the case. The Circuit first recounted the Department's argument that lower courts could not reach the question of § 3501, concluding succinctly: "We disagree." [137] The Court recounted a number of other situations where lower courts had considered similar issues and then concluded, "The Government is mistaken, therefore, in asserting that it may not urge the applicability of § 3501 before a lower court." [138] The Court, however, went on to conclude that, because § 3501 had been raised by WLF belatedly only on a petition for rehearing, the Court could consider only whether it was "plain error" to suppress a confession in spite of the statute. Because the question of § 3501 had not been plainly settled, the Court declined to consider the statute for the first time on an appellate petition for rehearing.[139]

The *Leong* decision seemed to set the stage for a successful defense of § 3501, if only a case could be found in the Fourth Circuit in which the statute had been raised not on appeal but in the trial court. The Department, however, took pains to make sure that this would not happen. On November 6, 1997, John C. Keeney, Acting Assistant Attorney General for the Criminal Division, sent a memorandum to all United States noting the Department's position against § 3501 in *Leong* and requiring the prosecutors to "consult[]" with the criminal division in all cases con-

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[130] Joint Motion for a Thirty-Day Extension of Time Within Which to File Supplemental Briefs in the Above Case at 3, *United States* v. *Leong,* No. 96–4876 (4th Cir.) (filed July 22, 1997) (citing *United States* v. *Cheely,* 36 F.3d 1439, 1448 (9th Cir. 1994).

[131] Supp. Br. for the United States at 23, *United States* v. *Leong,* No. 96–4876 (4th Cir. Aug. 29, 1997).

[132] *Id.* at 18.

[133] *Id.* at 7.

[134] *Id.* at 24 n. 10.

[135] *See, e.g.,* Letter from Attorney General Janet Reno to Hon. Albert Gore, Jr., President of the Senate (Sept. 10, 1997).

[136] Brief of Amici Curiae WLF and Safe Streets Coalition in Response to Supplemental Briefs of the Parties and Amicus National Ass'n of Criminal Defense Lawyers, *United States* v. *Leong,* No. 96–4876 (4th Cir. Sept. 12, 1997).

[137] Order at 3, *United States* v. *Leong,* No. 96–4876 (4th Cir. Sept. 19, 1997).

[138] *Id.* at 4.

[139] *Id.* at 4–6.

cerning the voluntariness provisions of the statute.[140] Fortunately for the statute, however, the Department's efforts to consign § 3501 to oblivion in the trials court came too late, as will be recounted presently in connection with the *Dickerson* decision.

4. Section 3501 in the District of Utah and the Tenth Circuit

Before turning to this final act in the Fourth Circuit, it is necessary to complete the chronology of § 3501 litigation by returning briefly to the Tenth Circuit. After the Tenth Circuit's 1975 ruling in *Crocker* upholding § 3501, one would have thought that other cases involving the statute would have been plentiful. Yet, while later cases from the Circuit had cited both *Crocker* and § 3501 favorably,[141] by and large the courts and prosecutors within the Tenth Circuit appeared to be unaware of the decision. A few experienced, career prosecutors in that Circuit, however, realized the value of § 3501 and attempted to use it in appropriate cases.[142] One such case was *United States* v. *Nafkha.* The defendant there, Mounir Nafkha, was involved in a series of armed "takeover" bank robberies and was a dangerous, career criminal. While he had confessed to his participation in the robberies, the remaining evidence against him was circumstantial. Whether he would be taken off the streets—or set free to continue his life of crime—depended on the admissibility of his confession in court.

Under *Miranda,* the admissibility of the confession appeared to be a close question. When taken into custody by federal agents, Nafkhahad made a reference to a lawyer that might, under the *Miranda* rules be possible viewed as requiring police to stop all questioning. The case was brought to my attention by a person who was concerned that Nafkha might escape justice because of the *Miranda* exclusionary rule. Ultimately, both the United States and WLF as amicus (represented by me) filed briefs arguing for the admission of Nafkha's confession under § 3501.[143] The magistrate ruled that while the § 3501 argument was "logical and intriguing, this issue need not be reached" because police had complied with *Miranda.*[144] Nafkha's confession was presented to the jury, and he was convicted.

On Nafkha's appeal to the Tenth Circuit, the career prosecutor filed a brief on behalf of the United States defending the admission of the confession under both *Miranda* doctrine and § 3501.[145] WLF, too, filed a brief defending § 3501, joined by the International Association of Chiefs of Police, the Law Enforcement Alliance of America, and other groups.[146] While the case was awaiting argument, the Department filed its brief in LEONG attacking § 3501. The Department then sent a letter to the clerk of the Tenth Circuit, withdrawing the portion of the *Nafkha* brief by the career prosecutor defending § 3501, and substituting as the government's position copies of the politically-approved brief from *Leong.*[147] Curiously, in executing this xerox-and-file maneuver to briefing, the Department never explained why § 3501 did not apply in the Tenth Circuit. The Circuit, after all, had previously and specifically *upheld* the statute (at the behest of the Department) more than twenty

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[140] Memorandum for all United States Attorneys and all Criminal Division Section Chiefs from John C. Keeney, Acting Asst. Atty. Gen., Crim. Div. at 2 (Nov. 6, 1997).

[141] *See United States* v. *Brown,* 540 F.2d 1048, 1053 (10th Cir. 1976), *cert. denied,* 429 U.S. 1100 (1977); *United States* v. *Shoemaker,* 542 F.2d 561, 563 (10th Cir.), *cert. denied,* 429 U.S. 1004 (1976); *United States* v. *Fritz,* 580 F.2d 370, 378 (10th Cir.) (*en banc*), *cert. denied,* 439 U.S. 947 (1978); *United States* v. *Hart,* 729 F.2d 662, 666–67 (10th Cir. 1984), *United States* v. *Benally,* 756 F.2d 773, 775–76 (10th Cir. 1985); *United States* v. *Fountain,* 776 F.2d 878, 886 (10th Cir. 1985); *United States* v. *Short,* 947 F.2d 1445, 1450 (10th Cir. 1991); *United States* v. *Caro,* 965 F.2d 1548, 1552 (10th Cir. 1992); *United States* v. *Miller,* 987 F.2d 1462, 1464 (10th Cir. 1993); *United States* v. *March,* 999 F.2d 456, 462 (10th Cir. 1993); *United States* v. *Glover,* 104 F.3d 1570, 1583 (10th Cir. 1997); *see also United States* v. *DiGiacomo,* 579 F.2d 1211, 1217–18 (10th Cir. 1978) (Barrett, J., dissenting).

[142] *See, e.g.,* Govt's Resp. to Motion to Suppress at 12, *United States* v. *Cale,* No. 1:97–CR–9B (D. Utah 1997) (citing § 3501 and noting that *Crocker* "is the law in this circuit").

[143] *See* Memorandum of *Amicus Curiae* Washington Legal Foundation in Support of the United States on Issues Raised by the Defendants' Motions to Suppress Statements, *United States* v. *Nafkha,* No. 95–CR–220C (D. Utah Feb. 7, 1996); Government's Response to Motion to Suppress Statement-Nafkha, *United States* v. *Nafkha,* No. 95–CR–220C (D. Utah Feb. 7, 1996).

[144] Report and Recommendation at 22, *United States* v. Nafkha, *No. 95–CR–220C (Apr. 5, 1996).*

[145] *See* Brief of Appellee United States at 17, *United States* v. *Nafkha,* No. 96–4130 (10th Cir. Apr. 23, 1997).

[146] *See* Brief of Amici Curiae WLF *et al., United States* v. *Nafkha,* No. 96–4130 (10th Cir. Apr. 28, 1997).

[147] Letter from Lisa Simotas, U.S. Dep't of Justice, to Patrick Fisher, Clerk, U.S. Court of Appeals for the Tenth Cir. (Sept. 2, 1997).

years earlier in *Crocker*[148] and later Circuit precedent favorably cited both *Crocker* and § 3501.[149] The *Leong* brief from the Fourth Circuit did not argue that *Crocker* had been overruled and did not discuss later Tenth Circuit precedent. All the *Leong* brief said was that "the Tenth Circuit has not had occasion to reexamine *Crocker* in light of subsequent developments in the Supreme Court's *Miranda* jurisprudence. * * *"[150] Of course, this was no reason to ignore a binding Tenth Circuit precedent in the Tenth Circuit. The Tenth Circuit ultimately ruled that the confession had been obtained in compliance with *Miranda*.[151] As result, the Court stated, "The disposition of this appeal does not require us to consider whether 18 U.S.C. § 3501 overrules *Miranda*.[152]

At around this time, the Clinton Justice Department's determined and ingenuous efforts to keep courts from reaching the merits of the effects of § 3501 soon began to unravel. The Department's position was first rebuffed by a federal district court in Utah. There, the Safe Streets Coalition, represented by me, filed an amicus brief raising § 3501 and pointing out that, in the District of Utah, the Tenth Circuit's decision in *Crocker* was binding on the issue.[153] The Department of Justice, apparently at the behest of political appointees in Washington,[154] responded by simply attaching to a cursory pleading its brief in the *Leong* case.[155] Safe Streets replied by criticizing this "one size fits all" approach to briefing, explaining that the Department's brief from *Leong* in the Fourth Circuit contained no analysis of why district courts within the Tenth Circuit should ignore *Crocker*.[156] The district court fully agreed, and issued a published opinion upholding § 3501. The court first noted the Department's "curious position" agreeing with the defendant "that § 3501 does not apply and is unconstitutional."[157] The court rejected the Department's strange position, finding that the Supreme Court had repeatedly described the *Miranda* rules as not constitutionally mandated. Moreover, the Tenth Circuit had "squarely upheld the constitutionality of" § 3501 in *Crocker*.[158] The court concluded:

> The government implies that the *Miranda* jurisprudence since the *Crocker* case would undoubtedly persuade this circuit to alter its course if given the chance, but apparently the government does not want to give the Tenth Circuit that chance. Given the above review of the cases and post-*Miranda* decisions, this court declines to so speculate, and will and must follow the precedent set in this circuit.[159]

Rivas–Lopez appeared to present an opportunity to obtain a clear-cut appellate ruling on the merits of § 3501, as the decision surmounted the current Justice Department's determined efforts to avoid any ruling on the issue. The case, however, ultimately petered out. Mr. Rivas–Lopez decided to skip bail rather than find out how he would fare at a jury trial for drug dealing with his confession introduced in evidence.[160]

But the § 3501 issue was destined to reach an appellate court.

5. The end of the road? United States v. Dickerson

The long effort to obtain an appellate court ruling on § 3501 came to a successful conclusion just a few months ago in the Fourth Circuit. There, the Circuit's September, 1997 ruling in *Leong* meant that only § 3501 issues raised in the trial court could be considered on appeal. The Department's November 1997 directive against

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[148] *See supra* note 51 and accompanying text.

[149] *See supra* note 141.

[150] Supp. Br. of the United States, *supra* note 131, at 17 n.6.

[151] *United States* v. *Nafkha,* 139 F.3d 913, 1998 WL 45492 (unpublished 10th Cir. Feb. 5, 1998).

[152] *Id.,* 1998 WL 45492 at *1 n.1.

[153] Memorandum of Amici Curiae Safe Streets Coalition et al. on the Applicability of 18 U.S.C. § 3501 to Defendant's Motion to Suppress Statements, *United States* v. *Rivas–Lopez,* No. 97–CR–104G (July 25, 1997).

[154] At this time, the United States Attorney for the District of Utah, my good friend Scott Matheson, asked that all contacts with his office on § 3501 pass through him so that he could obtain approval from the Criminal Division in Washington for any filings.

[155] Govt's Supp. Response to Defendant's Motion to Suppress, *United States* v. *Rivas–Lopez,* No. 97–CR–104G (Sept. 5, 1997).

[156] Reply Mem. of Amici Curiae Safe Streets Coalition et al. Replying to the Position of the Dep't of Justice and the Defendant on the Applicability of § 3501, *United States* v. *Rivas–Lopez,* No. 97–CR–104G (Sept. 12, 1997).

[157] *United States* v. *Rivas–Lopez,* 988 F. Supp. 1424, 1430 (D. Utah 1997).

[158] *Id.* at 1435.

[159] *Id.*

[160] Recently the District of Utah reaffirmed that § 3501 superceded *Miranda. See United States* v. *Tapia–Mendoza,* 1999 WL 137658 (D. Utah Mar. 10, 1999).

raising § 3501 in the trial court[161] headed off any new cases in which the career prosecutors might raise the statute. But the Department's efforts to hermetically seal off all such cases from the circuit was thwarted by one pending case involving the statute. *United States* v. *Dickerson* arose before the Department's directive against § 3501 was promulgated. The case involved a serial bank robber, who had been taken into custody and interviewed by FBI agents. At the suppression hearing, the lead agent testified that he gave Dickerson his *Miranda* warnings, obtained a waiver, after which Dickerson made incriminating statements. Dickerson, on the other hand, testified that he gave statements in an interview, and only then was given his *Miranda* warnings. Such one-on-one "swearing contests" are routinely decided in favor of law enforcement officers, but in this case the district court sided with the accused bank robber.[162] The United States Attorney's Office then mobilized a strong response to the district court opinion, filing a motion for reconsideration which contained affidavits from several other officers fully corroborating that Dickerson had been given his *Miranda* warnings first, consistent with standard FBI practice. The motion for reconsideration also specifically raised § 3501 as a basis for admitting the statements. The district court, however, refused to reconsider its decision because none of these arguments were unavailable to the prosecutors at the time of the first hearing.[163]

Career prosecutors then filed an appeal to the Fourth Circuit, arguing that the district court should have reconsidered its first ruling in light of the subsequently-provided affidavits. In the meantime, the Department's new position on § 3501 had been announced. Consistent with that policy, the brief contained a footnote, nothing that the government was prohibited from raising § 3501 on appeal, consistent with the Department's announced position in *Leong.* The Washington Legal Foundation, represented by Paul Kamenar and me, filed an *amicus* brief arguing that § 3501 was binding on the court, noting that, in contrast to *Leong,* § 3501 had been presented to the trial court, albeit in a motion for reconsideration.[164] The Fourth Circuit granted WLF's motion to participate in oral argument, and in January 1998 I traveled to Richmond and defended the statute.

A little more than a year later, on February 8, 1999, the Fourth Circuit announced its landmark opinion in the case, upholding § 3501 against constitutional attack and applying its to admit Dickerson's incriminating statements.[165] In a lengthy opinion, the court held that "[w]e have little difficulty concluding * * * that § 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in federal courts, is constitutional."[166] The court noted the absence of a defense of the statute from the Department of Justice, observing that the career prosecutor on the case "had been prohibited by his superiors at the Department of Justice from discussing § 3501."[167] This was, the Fourth Circuit said, a decision "elevating politics over law. * * * Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it."[168] The Court also noted that for the parties to fail to discuss § 3501 was for them to "abdicate their responsibility to call relevant authority to his Court's attention," citing the Virginia Code of Professional Responsibility.[169] Judge Michael dissented, arguing that the court should not have reached the issue of the statute's application where it was not presented by the Department of Justice. For purposes of this hearing, it may also be important to note that Judge Michael

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[161] *See supra* note 140.

[162] *See* Memorandum Opinion, *United States* v. *Dickerson, No. 97–159–A (E.D. Va. July 1, 1997).*

[163] *United States* v. *Dickerson,* 971 F. Supp. 1023 (E.D. Va. 1997), *rev'd,* 166 F.3d 667 (4th Cir. 1999).

[164] Brief of WLF in Support of Appellant United States, *United States* v. *Dickerson, No. 97–4750 (4th Cir. Nov. 5,1997).*

[165] *United States* v. *Dickerson,* 166 F.3d 667 (4th Cir. 1999).

[166] *Id.* at 672.

[167] *Id.* at 681 n.14.

[168] *Id.* at 672 (citing *United States Nat'l Bank of Or.* v. *Independent Ins. Agents of America, Inc.,* 508 U.S. 439, 445–48 (1993)).

[169] 166 F.3d at 682 (*citing* Va. Code Prof. Resp. 7–20).

Perhaps in response to this point, the Department of Justice sent out a memorandum to all United States Attorneys in the Fourth Circuit shortly after *Dickerson,* explaining that, in response to motions to suppress statements, "prosecutors in the Fourth Circuit discharge their professional and ethical obligations if they call the district court's attention to the existence of Section 3501 and the *Dickerson* decision." Memorandum for all U.S. Attorneys in the Fourth Circuit from James K. Robinson, Asst. Attorney General (Mar. 8, 1999).

expressly stated "Congress therefore may legitimately investigate why the executive has ignored § 3501 and what the consequences are."[170]

After the decision was handed down, Dickerson filed a petition for rehearing en banc,[171] supported by the American Civil Liberties Union and the National Association of Criminal Defense Lawyers.[172] The question then arose as to what the Department of Justice should say, since it had "won" the case, with a little help from its amicus friends at WLF. At this stage, too, the Department now indisputably had a "reasonable" argument on behalf of the statute—specifically the argument advanced by a respected Fourth Circuit Judge, Karen Williams, in her opinion for the Fourth Circuit. This point was made forcefully in a letter to the Attorney General by Chairman Orrin Hatch, Chair of the Senate Judiciary Committee and eight of his colleagues—Senators John Kyl, John Ashcroft, Bob Smith, Chuck Grassley, Mike DeWine, Strom Thurmond, Spence Abraham, and Jeff Sessions. The Senators found the Fourth Circuit's criticism of the Department for "raising politics over law" to be "deeply troubling."[173] The Senators went on to observe that the Department had pledged to defend Acts of Congress where reasonable arguments could be made: "The *Dickerson* opinion demonstrates beyond doubt that there are 'reasonable arguments' to defend 18 U.S.C. § 3501. In fact, these arguments are so reasonable that they have prevailed in every court that has directly addressed their merits."[174] Despite this letter, the Department actually filed a brief supporting the defendant, the ACLU, and the National Association of Criminal Defense Lawyers in seeking rehearing.[175] The Department argued the Court's decision to apply § 3501 "is error, and that its holding deserves reconsideration by the full court of appeals."[176] Of the four career prosecutors who had been handling the case up to that point, not one signed the Department's brief attacking § 3501.

WLF filed a reply to all this, explaining that not only was the panel decision correct on the merits but that it made little sense to review the matter en banc. Because the Clinton Justice Departnent had always said that it might take a different position on § 3 501 in the Supreme Court, it made sense to leave the case where it was: "Where a question seems important enough to warrant Supreme Court review in any event, and where one of the parties to a case has announced that it is planning on presenting a position to this Court that may change once the case is before the Supreme Court, it is almost impossible to see why the en banc court should spend its resources on the case."[177] On April 1, 1999, the full Fourth Circuit voted 8–5 to deny rehearing en banc.

As of this writing, Dickerson will apparently file a petition for certiorari to the United States Supreme Court over the summer. A Supreme Court decision on whether to review the case will be made around October 1, with many observers predicting the Court will take the case.

If the Court grants certiorari, the current Administration may finally have the long-awaiting "appropriate" case for defending § 3501, returning to the position that the Department took from at least from 1969 through 1993. The recent pleadings of the Department have always hedged refusals to defend that statute in the lower court with the suggestion that things would be different in the Supreme Court. The Department's brief in *Leong*, for example, stated: "Should the issue of § 3501's validity * * * be presented to the Supreme Court * * * the same considerations would not control, since the Supreme Court (unlike the lower courts) is free to reconsider its prior decisions, and the Department of Justice is free to urge it to do so."[178] This statement gives every reason for believing that, in the Supreme Court, the Department will craft some sort of defense of the statute involving reconsideration of prior court decisions. There is no need for such complicated argumentation. Section 3501

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[170] *Id.* at 695–98 (Michael, J., dissenting).

[171] Petition for Rehearing and Petition for Rehearing *En Banc, United States* v. *Dickerson,* No. 97–4750 (4th Cir. Feb. 22, 1999).

[172] Brief of the Am. Civil Liberties Union in Support of Rehearing, *United States* v. *Dickerson,* No. 97–4750 (Feb. 20, 1999); Brief Amicus Curiae of the Nat'l Assoc. of Criminal Defense Lawyers in Support of Defendant-Appellee's Petition for Rehearing, *United States* v. *Dickerson,* No. 97–4750 (Feb. 22, 1999).

[173] Letter from Senator Orrin Hatch and eight members of the Senate Judiciary Comm. to Attorney General Reno at 2 (Mar. 4, 1999).

[174] *Id.*

[175] Br. for the United States in Support of Partial Rehearing En Banc, *United States* v. *Dickerson,* No. 97–4750 (Mar. 8, 1999).

[176] *Id.* at 6.

[177] Brief of the WLF as Amicus Curiae in Opposition to Petition for Rehearing at 3–4, *United States* v. *Dickerson,* No. 97–4750 (Mar. 19, 1999).

[178] *Id.* at 7.

is fully constitutional under the Supreme Court's current jurisprudence, as the following section explains.

II. Section 3501 Complies with the Constitution

Section 3501 is a constitutional exercise of Congressional power, under at least two different theories. First, as the *Dickerson* opinion explains, the *Miranda* rules are not constitutionally required and thus can be overridden by Congress. A second, independent argument, not needed and therefore not discussed in the *Dickerson* opinion, is that § 3501 is a reasonable "alternative" to *Miranda,* an alternative that accepts the invitation from the Court itself for Congress to draft alternative measures governing confessions. Both of these arguments are explained below.

Before turning to the specific legal arguments, however, it is important to recognize that Congress has itself made a determination that the Act is constitutional. While the final say on this issue is in the hands of the Supreme Court, that congressional determination is itself important evidence of the constitutionality of the statute. It is for this reason that, when a party calls into question the constitutionality of an Act of Congress, a federal court assumes "the gravest and most delicate duty [an appellate court] is called on to perform."[179] The views of the people, through their elected representatives, deserve important consideration.

A. SECTION 3501 IS CONSTITUTIONALLY VALID AS AN EXERCISE OF CONGRESSIONAL POWER TO ESTABLISH RULES OF EVIDENCE FOR FEDERAL COURT

1. Congress has the power to establish rules of evidence for federal court

The Supreme Court has described § 3501 as "the statute governing the admissibility of confessions in federal prosecutions."[180] The rules the statues establishes, of course, differ from those set by *Miranda.* But it is generally accepted that unless the rules are unconstitutional, Congress has the final say regarding the rules of evidence and procedure in federal courts. For example, the Supreme Court upheld congressional modification of a Court-promulgated rule concerning production of impeaching materials on government witnesses, explaining that "[t]he statute as interpreted does not reach any constitutional barrier."[181] The Court specifically went out of its way to explain that Congress may trump even a conflicting Supreme Court procedural or evidentiary rule, so long as the Court-imposed rule was not required by the Constitution, noting that "[t]he power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress."[182]

The validity of § 3501, therefore, boils down to whether the *Miranda* exclusionary rule is required by the Constitution. "If it is," the *Dickerson* opinion observed, "Congress lacked the authority to enact § 3501, and *Miranda* continues to control the admissibility of confessions in fedeal court. If it is not required by the Constitution, then Congress possesses the authority to supersede *Miranda* legislatively, and § 3501 controls the admissibility of confessions in federal court."[183]

2. The Miranda *rights are not constitutional rights*

There can be little doubt that *Miranda* rights are not constitutional rights. The Supreme Court has emphasized that the *Miranda* procedures are not themselves constitutional rights or requirements. Rather, they are only "recommended procedural safeguards"[184] whose purpose is to reduce the risk that the Fifth Amendment's prohibition of compelled self-incrimination will be violated in custodial questioning. Quite simply, to violate any aspect of *Miranda* is not necessarily—or even usually—to violate the Constitution.

There can be no doubt that the Supreme Court, in a series of cases starting in the early 1970's, has repeatedly described the *Miranda* warnings as mere prophylactic rights that are "not themselves rights protected by the Constitution"[185] and has relied on that characterization in refusing to exclude unwarned or imperfectly warned custodial confessions and their fruits in a variety of contexts. Because this has been by far the dominant Supreme Court characterization of *Miranda's* holding, and because that characterization has been necessary to, and the principal basis for,

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[179] *Fullilove* v. *Klutzaick,* 448 U.S. 448, 472 (1980).
[180] *United States* v. *Alvarez–Sanchez,* 511 U.S. 350, 351 (1994).
[181] *Palermo* v. *United States,* 360 U.S. 343, 353 n.11 (1959).
[182] *Id. see generally* Grano, *supra* note 24, at 173–222.
[183] *Dickerson,* 166 F.3d at 688.
[184] *Davis* v. *United States,* 512 U.S. 452, 457–58 (1994) (internal quotation omitted).
[185] *Michigan* v. *Tucker,* 417 U.S. 433, 444 (1974).

these cases' holdings, no more is needed to demonstrate that *Miranda's* exclusionary rule is not constitutionally mandated. If that is so, *Miranda* provides no basis for doubting § 3501's constitutionality, which requires only the admission of "voluntary" confessions, that is, confessions obtained without violating the Fifth Amendment's prohibition against compelled self-incriminating testimony.[186]

It is important to emphasize that the view that *Miranda* rights are not constitutionally required is not some "gloss" or "spin" on the Supreme Court's opinions, but rather the way that the Supreme Court itself has described *Miranda* rights. The Court has regularly said in cases since *Miranda* that the procedures it laid down there were not required by the Constitution, but rather were prophylactic rules designed to add extra layers of protection beyond those required by the Constitution. In *Davis* v. *United States,* for example, the Court referred to *Miranda* warnings as "a series of recommended procedural safeguards."[187] In *Withrow* v. *Williams,* the Court acknowledged that "*Miranda's* safeguards are not constitutional in character."[188] In *Duckworth* v. *Eagan,* the Court said "[t]he prophylactic *Miranda* warnings are not themselves rights protected by the Constitution but are instead measure to insure that that the right against compulsory self-incrimination is protected."[189] In *Oregon* v. *Elstad,* the Court explained that the *Miranda* exclusionary rule "may be triggered even in the absence of a Fifth Amendment violation."[190]

Such statements are not idle dicta, but rather a critical part of the Court's holdings. A prime illustration is *New York* v. *Quarles,*[191] where the Court ruled that a confession obtained as a result of a police question "Where's the gun?," asked of a person with an empty gun holster suspected of having just committed a rape, was admissible despite the failure to give *Miranda* warnings. Similarly, in *Harris* v. *New York,*[192] and *Oregon* v. *Hass,*[193] the Court held that an un-Mirandized confession, obtained where police questioning continued after a suspect said he would like to call a lawyer, could be used to impeach the testimony of a defendant who took the stand at his own trial. The basis the Court gave for these rulings is that *Miranda's* exclusionary rule is not constitutionally required, and hence un-Mirandized confessions may constitutionally be admitted provided they are voluntary. All of these cases, among others, would have to be overruled if *Miranda's* procedures were now held to be constitutionally required rather than prophylactic. If a defendant's failure to be given *Miranda* warnings meant that the defendant had thereby automatically been "compelled" to confess, *any* use of his confession at trial, including the ones allowed by the Court in *Quarles, Harris,* and *Hass,* would be forbidden by the 5th Amendment of the Constitution, since it bars *any* use at trial of compelled self-incrimination of any kind. The Fifth Amendment provides: "No person * * * shall be compelled in any criminal case to be a witness against himself." And indeed, the Supreme Court has concluded that the Fifth and Fourteenth Amendment forbid the use of involuntary confessions even for impeachment purposes, distinguishing *Harris* and *Hass* as involving confessions obtained after mere *Miranda* violations rather than confessions obtained in violation of the Constitution.[194] Accordingly, the Supreme Court's admission of un-Mirandized statements in *Quarles, Harris,* and *Hass*

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[186] Many commentators have concluded that § 3501 is constitutional on similar reasoning. Joseph Grano, Confessions, Truth, and the Law 203 (1993); Joshua Dressler, Understanding Criminal Procedure 295 (1991); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment,* 90 NW. U. L. Rev. 387, 471–72 (1996); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda",* 54 U. Chi. L. Rev. 938, 948 (1987); Phillip Johnson, *A Statutory Replacement for the Miranda Doctrine,* 24 Am. Crim. L. Rev. 303, 307 n.8 (1987); Bruce Fein, *Congressional and Executive Challenge of Miranda* v. *Arizona, in* Crime and Punishment in Modern America 171, 180 (P. McGuigan & J. Pascale eds. 1986); Gerald Caplan, *Questioning Miranda,* 38 Vand. L. Rev. 1417, 1475 & n.271 (1985).

[187] 512 U.S. 452, 457–58 (1994).

[188] 507 U.S. 680, 690–91 (1993).

[189] 492 U.S. 195, 203 (1989) (internal quotation omitted).

[190] 470 U.S. 298, 306 (1985); *accord Connecticut* v. *Barrett,* 479 U.S. 523, 528 (1987) (noting that "the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights "); *Moran* v. *Burbine,* 475 U.S. 412, 422 (1986) ("As is now well established, the * * * *Miranda* warnings are not themselves rights protected by the Constitution but [are] instead measure to insure that the [suspect's] right against compulsory self-incrimination [is] protected." (internal quotation omitted); *Michigan* v. *Tucker,* 417 U.S. 433, 444 (1974) (*Miranda* warnings are "not themselves rights protected by the Constitution"); *see also Edwards* v. *Arizona,* 451 U.S. 477, 492 (1981) (Powell, J., concurring) (noting that the Court in *Miranda* "imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution").

[191] 467 U.S. 649, 654 (1984).

[192] 401 U.S. 222, 224 (1971).

[193] 420 U.S. 714, 722 (1975).

[194] *See New Jersey* v. *Portash,* 440 U.S. 450, 458–59 (1979); *Mincey* v. Arizona, *437 U.S. 385, 397 (1978).*

proves beyond argument that *Miranda* warnings are *not* required by the Constitution, as every federal court of appeals in the country has concluded.[195] And the proposition that the procedures set out in *Miranda* are not required by the Constitution is the view that every Administration including this one has consistently taken in litigation throughout the federal court system since *Miranda* was decided.[196]

All of this demonstrates quite clearly that a violation of the Fifth Amendment is not conclusively presumed to be present when *Miranda* is violated. Instead, actual compulsion in violation of the Fifth Amendment exists only where law enforcement has transgressed the standards established by the traditional voluntariness test.[197] In the absence of such compulsion, there is no constitutional impediment to admitting a suspect's statements despite non-compliance with *Miranda*.[198]

3. Arguments against the constitutionality of § 3501 are misplaced

The opponents of § 3501 typically acknowledge that there is considerable force to this argument. Nevertheless, they claim, Congress may not overrule *Miranda* by statute because to do so would be to violate the Constitution. The problem with this position is that it only works if *Miranda* is indeed a constitutional decision in the strongest sense of the word. If *Miranda* is anything else—if it is, for example, a decision rooted in the Court's quasi-supervisory powers or the Court's ability to craft constitutional common law (in which the Court devised one form of remedy to guard against Fifth Amendment violations but acknowledged that that remedy could be replaced with an alternative)—Congress has significant authority to modify *Miranda's* holding by legislation.

To be sure, if the Supreme Court had really foreclosed any reading of *Miranda* other than that its holding is constitutionally required, there would be no basis for considering possible application of § 3501. However, one need not guess about whether the Supreme Court views that question as open or closed. The Supreme Court has said it is open. As noted earlier,[199] in *United States* v. *Davis*[200] WLF filed an amicus brief in the Supreme Court, urging the Court to apply § 3501 instead of *Miranda*. Far from suggesting that precedent controlled the issue, the Court explained "the issue is one of *first impression*."[201] The Court ultimately concluded that

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[195] *Mahan* v. *Plymounth County House of Corrections,* 64 F.3d 14, 17 (1st Cir. 1995); *DeShawn* v. Safir, *156 F.3d 340, 346 (2d Cir. 1998); Giuffre* v. *Bissell,* 31 F.3d 1241, 1256 (3d Cir. 1994); *United States* v. *Elie,* 111 F.3d 1135, 1142 (4th Cir. 1997); *United States* v. *Abrago,* 141 F.3d 142, 168–70 (5th Cir), cert. denied, 119 S.Ct. 182 (1998); *United States* v. *Davis,* 919 F.2d 1181, 1186 (6th Cir. 1990), reh'g en ban denied, 1991 U.S. App. Lexis 3934; *Clay* v. *Brown,* 1998 U.S. App. Lexis 17115, reported in table format, 151 F.3d 1032 (7th Cir.); *Winsett* v. *Washington,* 130 F.3d 269, 274 (7th Cir. 1997); *Warren* v. *City of Lincoln,* 864 F.2d 1436, 1441–42 (8th Cir. en banc), cert. denied, 490 U.S. 1091 (1989); *United States* v. *Lemon,* 550 F.2d 467, 472–73 (9th Cir. 1977); *Lucero* v. *Gunter,* 17 F.3d 1347, 135–51 (10th Cir. 1994); *Bennett* v. *Passic,* 545 F.2d 1260, 1263 (10th Cir. 1976).

[196] *See City of Boerne* v. *Flores,* No. 95–2074, Brief for the United States (*Miranda* cited as an example of judicially created prophylactic rules that "enforce" constitutional guarantees but "are not constitutionally compelled"); Transcript of Oral Argument *Davis* v. *United States,* (Question from one of the Justices: "Is *Miranda* required by the Fifth Amendment? I thought it wasn't required. Have we said it's required by the Fifth Amendment?" Response of Assistant to the Solicitor General Seamon, speaking on behalf of the Clinton Department of Justice: "No, this Court has repeatedly made clear that the *Miranda* rules are prophylactic"); *Withrow* v. *Williams* No. 91–1030, Brief for the United States as Amicus Curiae Supporting Petitioner (statements admitted despite *Miranda* violations should not serve as a basis for grants of habeas, in part because admission of such statements did not violate the Constitution); *see also United States* v. *Green,* No. 91–1521, Brief for the United States; *Minnick* v. *Mississippi,* No. 89–6332, Brief for the United States as Amicus Curiae Supporting Petitioner; *Michigan* v. *Harvey,* No. 88–512, Brief for the United States as Amicus Curiae Supporting Petitioner; *Arizona* v. *Roberson,* No. 87–354, Brief for the United States as Amicus Curiae Supporting Petitioner; *New York* v. *Quarles,* No. 82–1213, Brief for the United States as Amicus Curiae Supporting Petitioner; Hearing on the Confirmation of Seth Waxman as Solicitor General, Committee on the Judiciary, United States Senate, November 5, 1997 at 101 ("It is my understanding of *Miranda,* and of the Supreme Court's further jurisprudence in this field, that the *Miranda* warnings themselves were not ever regarded as direct requirements compelled by the Constitution." Conversely, I am aware of no case argued in the past nineteen Supreme Court term (which is as far back as the Lexis data base containing Supreme Court briefs goes) where the Department has taken the position in the Supreme Court that the *Miranda* procedures are constitutionally required.

[197] *See New York* v. *Quarles,* 467 U.S. at 654–55 & n.5, 658 n.7; *Oregon* v. *Elstad,* 470 U.S. at 306–09; *Michigan* v. *Tucker,* 417 U.S. at 444–45

[198] *See Davis* v. *United States,* 512 U.S. at 458; *New York* v. *Quarles,* 467 U.S. at 654–55 & n.5, 658 n.7.

[199] *See supra* note 79 and accompanying text.

[200] 512 U.S. 452 (1994).

[201] *Id.* at 457 n.* (emphasis added).

it would not decide the matter because it was "reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position."[202] This led to a concurring opinion from Justice Scalia, who consistently with the majority said he was "entirely open" to various arguments on § 3501.[203] Also worthy of note is *United States* v. *Alvarez–Sanchez*.[204] In that case, which, to be sure, did not involve a custodial confession, the Court identified § 3501 without qualification as "the statute governing the admissibility of confessions in federal prosecutions."[205] Nor are *Alvarez–Sanchez* and *Davis* the only cases by the Supreme Court citing § 3501. Although *Miranda*-related cases decided by the Court in recent years have generally involved state proceedings to which § 3501 does not apply, the Court has cited § 3501 in several of them without any indication of constitutional infirmity.[206]

All of this suggests that the arguments of the opponents of § 3501 are not well taken. The following subsections deal with some of their arguments in particular.

a. Viewing Miranda *rights as not constitutionally required is consistent with the* Miranda *opinion itself*

The Supreme Court's post-*Miranda* decisions repeatedly not only state but hold that that case's procedural prerequisites for admitting a custodial confession in the government's case in chief are "prophylactic"—meaning that a police violation of *Miranda* is not necessarily a violation of the Fifth Amendment and thus that *Miranda's* rule barring admission of such confessions is not constitutionally required. In arguing against § 3501, the Department of Justice concedes as much but contends that these cases should be ignored because they have "retreated" from the reasoning in *Miranda*.[207] In fact, the *Miranda* opinion itself easily lent itself to this prophylactic reading. As *Dickerson* explains,

> Although the Court failed to specifically state the basis for its holding in *Miranda*, it did specifically state what the basis was not. At no point does the Court refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, disclaimed any intent to create a "constitutional straitjacket," repeatedly referred to the warnings as "procedural safeguards," and invited Congress and the states "to develop their own safeguards for [protecting] the privilege."[208]

To be sure, the *Miranda* opinion contains some language that can be read as suggesting that a *Miranda* violation is a constitutional violation because custodial interrogation is inherently compulsive.[209] But notwithstanding this inherent compulsion rationale—which would make every statement taken without *Miranda* warnings compelled and every case admitting a custodial confession as voluntary both before and after *Miranda* wrongly decided—much of the opinion is written in the language of prophylaxis. At various points, the Court spoke of the "potentiality" of compulsion and the need for "appropriate safeguards" "to insure" that statements were the product of free choice, as well as the possibility of Fifth Amendment rights being "jeopardized" (not actually violated) by custodial interrogation.[210] Potential compulsion is of course different than inherent compulsion; jeopardizing Fifth Amendment rights is different from actually violating them; and assuring that Fifth Amendment rights are protected is different from concluding that Fifth Amendment rights actually have been infringed. This rationale is, therefore, prophylactic precisely in the sense the more recent cases have used that term.

The Court also said that "[u]nless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature [practices gleaned from police interrogation manuals, not from the records in the four cases before the Court] will be eradicated in the foreseeable future."[211] A prophylactic rule, of course, seeks to prevent constitutional viola-

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[202] *Id.* at 457–58 n.*.
[203] *Id.* at 464 (Scalia, J., concurring).
[204] 511 U.S. 350 (1994).
[205] 511 U.S. at 351.
[206] *See, e.g., Crane* v. *Kentucky,* 476 U.S. 683, 689 (1986); *United States* v. *Raddatz,* 447 U.S. 667, 678 (1980); *Brown* v. *Illinois,* 422 U.S. 590, 604 (1975); *Keeble* v. *United States,* 412 U.S. 205, 208 n.3 (1973). Indeed, in one case, the Court's opinion seems to have gone out of its way to cite § 3501. *See Lego* v. *Twomey,* 404 U.S. 477, 486 n.14 (1972) (*quoting* § 3501 in full).
[207] Supp. Brief for the U.S. at, *United States* v. *Leong,* No. 97–4876 (4th Cir. 1997).
[208] *Dickerson,* 166 F.3d at 688–89 (*quoting Miranda*).
[209] *See Miranda,* 364 U.S. at 458, 467.
[210] 384 U.S. at 457, 479.
[211] *Id.* at 447.

tions in future cases rather than to discover whether a constitutional violation actually occurred in the case at hand.

The *Miranda* Court's treatment of the four cases before it is also illuminating. First, the Court did not turn to the facts of the cases until it had devoted more than fifty pages to a summary of its holding, a history of the Fifth Amendment, a survey of police manuals, an elaboration of its holding, and "a miscellany of minor directives,"[212] not actually involved in the cases. This total neglect of the facts is itself an indication that the Court was not interested in the actual constitutionality of what had occurred. When it finally turned to the facts, the Court spent only eight pages in concluding that all the confessions had been obtained in violation of its new rules. In three of the cases, including *Miranda's,* the Court gave no indication that the defendant's statements had been compelled. Rather, it rejected the confessions because no "steps" had been taken to protect Fifth Amendment rights.[213] Only in defendant Stewart's case did the Court suggest the existence of actual compulsion.[214]

To reject a prophylactic reading would defy not only common sense, but also empirical recent observation that "very few incriminating statements, custodial or otherwise, are held to be involuntary."[215] To violate *Miranda* is not necessarily to violate the Constitution—and, although ambiguous in spots, *Miranda* recognized this from the beginning.[216] And the Department of Justice, at least until quite recently, seemed to recognize this as well.[217]

b. The Supreme Court's application of Miranda *to the states does not demonstrate that* Miranda *rights are constitutional rights*

The Justice Department's current refusal to defend § 3501 rests primarily on *Miranda* application to the states. The Department has said that "[t]he most important indication that the Court does not regard *Miranda* as resting simply on its supervisory powers is the fact that the Court has continued to apply the *Miranda* rules to cases arising in state courts."[218] The basis for *Miranda's* applicability to the states is interesting and (as the Department itself has explained) perplexing.[219] Nevertheless, there is no need to come to a definitive conclusion when considering § 3501, provided that there are explanations available other than that *Miranda's* exclusionary rule is constitutionally required.

Several others come readily to mind. First, and most plausibly, like *Mapp* v. *Ohio,*[220] and *Bivens* v. *Six Unknown Named Agents,*[221] *Miranda* may be a constitutional common law decision. In such cases, the Court is presented with an issue implicating a constitutional right for whose violation there is no legislatively specified remedy. It is conceivable that generally in such circumstances the judicial power may include the crafting of a remedy, and that the remedy may extend beyond simply redressing the constitutional violation. It is clear, however, that exercising its powers, Congress may step in and substitute an alternative remedy that sweeps more or less broadly, provided the substitute remedy is adequate to correct the violation.[222] It is also entirely possible that the States may do so as well. This theory (unlike the position of the Department) is consistent with the suggestion made by the *Miranda* Court itself that the national and State legislatures may substitute alternative remedial schemes for the one set out in *Miranda.* Unlike this case, none of the State cases decided since *Miranda* have involved an effort by Congress or the States to modify through legislation the scope of the remedy created by *Miranda.* Thus the continued application of *Miranda* to the States in the absence of such a legislative effort may represent no more than the application of the Court's judi-

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[212] *Id.* at 505 (Harlan, J., dissenting)

[213] *Id.* at 492, 494.

[214] *Id.* at 499.

[215] *United States* v. *Elie,* 111 F.3d 1135, 1144 (4th Cir. 1997) (internal quotation omitted).

[216] *See generally* Grano, *supra* note 24, at 173–182.

[217] *See, e.g.,* Br. for the United States as Amicus Curiae, *Withrow* v. *Williams,* No. 91–1030 (1992) (arguing against habeas review of *Miranda* claims and explaining that "the most important factor" is "that 'the *Miranda* rule is not, *nor did it ever claim to be,* a dictate of the Fifth Amendment itself'" (emphasis added) (*quoting Duckworth* v. *Eagan,* 492 U.S. 195, 209 (1989) (O'Connor, J., concurring)).

[218] Supp. Br. for the U.S. at 18, *United States* v. *Leong,* No. Xxxx (4th Cir. 1997).

[219] *See* U.S. Dept's of Justice, Office of Legal Policy, Report to the Attorney General on the Law of Pre-Trial Interrogation (1986), *reprinted in* 22 U. Mich. J.L. Ref. 437, 550; *see also Oregon* v. *Elstad,* 470 U.S. 298, 370 & 371 n.15 (1985) (Stevens, J., dissenting); J. Grano, Confessions, Truth, and the Law 183–198 (1993); *United States* v. *Dickerson,* 166 F.3d 667, 691 n.21 (4th Cir. 1999) (how *Miranda* applies to the states is "an interesting academic question).

[220] 367 U.S. 643 (1961).

[221] 403 U.S. 388 (1971).

[222] *See Bush* v. *Lucas,* 462 U.S. 367, 377 (1983).

cially-created, but not constitutionally mandated, remedial scheme in the absence of a legislatively devised alternative.

Second, the *Miranda* court may not have focused on the question whether the federal courts have supervisory power over the States. It was, after all, resolving a slew of other important issues. Since *Miranda* came down, no case has arisen where a party has seriously presented to the Court the question whether *Miranda's* prophylactic approach can be reconciled with the Court's cases holding that the federal courts lack supervisory power over the States.

Let there be no mistake about it, however. Both in state and federal cases, the Court has described *Miranda* as prophylactic. In *Oregon* v. *Elstad,* for example, the Court, in response to Justice Stevens, said most directly that "a failure to administer *Miranda* warnings is not itself a violation of the Fifth Amendment."[223] To uphold § 3501 in a federal case, therefore, the Supreme Court need go no further than recognize congressional power to supercede rules that are not constitutionally required.

c. Miranda's *applicability in federal habeas corpus does not mean it is a constitutional right*

The Justice Department has additionally claimed that *Miranda's* constitutional status is supported by the fact that *Miranda* claims were held to be cognizable in federal habeas corpus proceedings in *Withrow* v. *Williams,*[224] This argument, too, misses the mark.

Habeas corpus extends to persons who are in custody "in violation of the Constitution or the laws or treaties of the United States"[225] The Department reasons (without further explanation) that "[b]ecause *Miranda* is not a 'law' or a treaty, the Court's holding in *Withrow* depends * * * on the conclusion that" *Miranda* is a constitutional right.[226] The Department must be aware, however, that what is a "law" for purposes of federal habeas review is not exclusively limited to federal statutory claims.[227] This has led a leading commentator to conclude that *Miranda* claims raise issues about a "law" of the United States.[228]

Of course, we do not know precisely what jurisdictional basis *Withrow* relied upon, because that issue was not before the Court and the majority specifically wrote to chide the dissent for addressing a point which "goes beyond the question on which we granted certiorari."[229] In any event, the question surrounding § 3501 is whether *Miranda* is ordinary constitutional law or something akin to common law, which can be overruled by Congress. Either way, *Miranda* is cognizable in federal habeas corpus and *Withrow* is unilluminating.

Withrow also did not change the Court's view of *Miranda* as prophylactic. The Court in fact accepted the petitioner's premise (supported by the Department as amicus curiae) that the *Miranda* safeguards are "not constitutional in character, but merely 'prophylactic,'" but it rejected her conclusion that for that reason *Miranda* issues should not be cognizable in habeas corpus.[230] The Court conceded that *Miranda* might require suppression of a confession that was not involuntary,[231] the reason the decision has been called prophylactic. The *Withrow* Court nonetheless allowed *Miranda* claims to be cognizable in habeas corpus for largely prudential reasons.[232] In short, *Withrow* in no way detracts from *Miranda's* stature as merely prophylactic and not constitutionally required. Whatever small doubt there may have been on this point was erased the following year, when the Court repeated (in its

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[223] 470 U.S. 298, 306 n.1 (1985). Accord, *e.g., New York* v. *Quarles,* 467 U.S. 649, 655 n.5 (1984).

[224] 507 U.S. 680 (1993). *See* Supp. Br. for the U.S. at 19, *United States* v. *Leong,* No–97–4876 (4th Cir. 1997).

[225] 28 U.S.C. § 2254(a).

[226] Supp. Br. for the U.S. at 19, *United States* v. *Leong,* No.97–4876 (4th Cir. 1997).

[227] *See, e.g., Bush* v. *Muncy,* 659 F.2d 402 (4th Cir. 1981) (finding interstate compact on detainer procedures to be "a law of the United States within the meaning of section 2254"). *See generally Davis* v. *United States,* 417 U.S. 333, 346 (1974) (recognizing that a "fundamental defect" can be reviewed on habeas); *see also Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938) (phrase "laws of the several States" in Rules of Decision Act includes the States' judicial decisional law).

[228] *See* Larry W. Yackle, Post Conviction Remedies § 97, at 371 (1981 & 1996 Sapp.) ("If court-fashioned rules for the enforcement of constitutional rights are not themselves part and parcel of these rights, they would seem to be federal 'laws' which, under the statute, may form the basis for habeas relief").

[229] 507 U.S. at 685 n.2.

[230] 507 U.S. at 690.

[231] *Id.*

[232] *Id.* at 691–94.

most recent discussion of the status of the *Miranda* rules) that they are "not themselves rights protected by the Constitution."[233]

B. SECTION 3501, READ IN COMBINATION WITH OTHER BODIES OF LAW, IS A CONSTITUTIONALLY ADEQUATE ALTERNATIVE TO THE INFLEXIBLE MIRANDA EXCLUSIONARY RULE

The foregoing argument establishes that § 3501 is a valid exercise of Congress undoubted power to override non-constitutional procedures and establish the rules for federal courts. But an alternative, independent analysis leads to exactly the same conclusion: section 3501—read in combination with other bodies of law providing criminal, civil, and administrative remedies for coercion during interrogation along with the Fifth Amendment's exclusionary rule for coerced confessions—leaves in place a constitutionally adequate alternative to the inflexible *Miranda* exclusionary rule.

In *Miranda* itself, the Supreme Court specifically wrote to "encourage *Congress* and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."[234] The Court explained:

> i[t] is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by *Congress* and the States in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have that effect.[235]

The Court concluded that, if it were "shown other procedures which are at least as effective in appraising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," the *Miranda* safeguards could simply be dispensed with.[236]

The Justice Department has attempted to make short work of the possibility that § 3501 could be upheld on this basis, concluding briefly in some of its court pleadings that "Congress cannot be deemed to have taken advantage of" this invitation to develop alternatives because "Congress simply relegated warnings back to their pre-*Miranda* status"[237] This argument is misleading in at least two ways.

First, in some respects the statute extends beyond the pre-*Miranda* voluntariness law that existed before 1966 and beyond current Supreme Court *Miranda* doctrine today.[238] For example, section b(2) of the statute requires the suppression judge to consider whether the "defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of the confession."[239] This requirement actually extends beyond current case law, as the Supreme Court has held that a suspect can waive his *Miranda* rights even if he does not know the offense about which he is being questioned. In *Colorado* v. *Spring,* the court concluded that the failure of police to inform a suspect "of the subject matter of the interrogation could not affect [his] decision to waive his Fifth Amendment privilege in a constitutionally significant manner."[240] Extending beyond the *Spring* decision, section (b)(2) makes the subject matter of the interrogation a relevant factor in determining whether to admit the statement.

Section 3501(b)(3) also requires consideration of "whether or not such defendant was advised or knew that he was not required to make any statement and that any statement could be used against him."[241] This section is broader than pre-*Miranda* law in implicitly recognizing that a suspect does not have to make any statements during police questioning, a position that critics of pre-*Miranda* case law had long

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[233] *Davis* v. *United States,* 512 U.S. at 457 (internal citation omitted).

[234] 384 U.S. at 467 (emphasis added).

[235] *Miranda,* 384 U.S. at 467 (emphasis added).

[236] *Id.; see also United States* v. Elie, *111 F.3d at 1142 (Miranda* "disclaim[ed] any intent to create a 'constitutional straitjacket'") (*quoting* 384 U.S. at 467). This fact by itself provides a striking reason to view *Miranda* as a non-constitutional decision. *Cf.* City of *Boerne* v. *Hores, 521 U.S. 507,—(1997) ("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch").*

[237] Supp. Br. for the U.S. at 13, *United States* v. *Leong,* No. 96–4876 (4th Cir. 1997).

[238] I am indebted to my friend, Professor George C. Thomas III, for several of these arguments, which appear in his interesting article *2001: The End of the Road for Miranda* v. *Arizona?* (manuscript current circulating for publication).

[239] 18 U.S.C. § 3501(b)(2).

[240] 479 U.S. 564, 577 (1987).

[241] 18 U.S.C. § 3501(b)(3).

espoused. Section (b)(3) extends well beyond pre-*Miranda* case law with its apparent statutory recognition of a right to counsel during interrogation. Section 3501(b)(4) requires consideration of "whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel."[242] And (b)(4) further requires consideration of "whether or not such defendant was without the assistance of counsel when questioning and when giving such confession." Before *Miranda*, no right to assistance of counsel existed during police questioning. These parts of § 3501, accordingly, provide to defendants more consideration than they had under the pre-*Miranda* voluntariness test.[243]

Second, not only does § 3501 by itself go beyond the pre-*Miranda* rules, but the statute must be examined against the backdrop of all federal law that bears on the subject.[244] The Supreme Court will not decide whether § 3501, standing in splendid isolation, would be an acceptable "alternative" to *Miranda*. The interrogation practices of federal officers are addressed not solely in § 3501 but also by other federal statutes and related bodies of law that provide the possibility of criminal, civil, and administrative penalties against federal law enforcement officers who coerce suspects. Taken together, these remedies along with § 3501 form a constitutional alternative to the *Miranda* exclusionary rule.

Congress has established criminal penalties for federal law enforcement officers who willfully violate the constitutional rights of others. A federal civil rights statute provides that whoever "under color of any law * * * willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," shall be subject to criminal liability.[245] Similarly, 18 U.S.C. § 241 prohibits conspiracies to violate constitutional rights. These statutes apply to federal law enforcement officers[246] who obtain coerced confessions.[247] While Congress adopted these statutes during the Reconstruction Era, they have undergone significant judicial interpretation since *Miranda*. Indeed, the Supreme Court recently explicated the proper standard for coverage of the statute.[248] Also, the Department's Civil Rights Division and the FBI now fully support enforcement of these statutes against federal officials.[249]

Civil penalties against federal officers who violate constitutional rights are also now available. When *Miranda* was decided, as a practical matter it was not possible to seek damages from federal law enforcement officers who violated Fifth Amendment rights.[250] That changed in 1971, when the Supreme Court decided *Bivens* v. *Six Unknown Named Agents*.[251] The Court held that a complaint alleging that the Fourth Amendment had been violated by federal agents acting under color of their authority gives rise to a federal cause of action for damages. Since then, courts have held that *Bivens* actions apply to abusive police interrogations, either as violations of the Fifth 252 Amendment Self-Incrimination Clause or violations of the Due Process Clause.[252]

When *Miranda* was decided, the federal government was also effectively immune from civil suits arising out of Fifth Amendment violations. At the time, sovereign

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[242] 18 U.S.C. § 3501(b)(4).

[243] This is the conclusion of Professor George Thomas in a draft article he has kindly shared with me, although he also goes on to conclude that the statute will not necessarily attract the support of a majority of the current Court. Professor Thomas does not, however consider (at least in the current draft) the arguments advanced in the remainder of this section of my testimony, which provide a stronger argument for the constitutionality of the statute than the more limited one he discusses. *Cf.* Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 Wash. & Lee L. Rev. 1149, 1206 (considering all these arguments and concluding "[b]ecause the Court in *Miranda* overenforced the Fifth Amendment, lower courts can—consistent with *Miranda*—rule that the famous warnings are no longer required").

[244] *See, e.g., Gracey* v. *International Brotherhood of Electrical Workers*, 868 F.2d 671, 675 (4th Cir. 1989).

[245] 18 U.S.C. § 242.

[246] *United States* v. *Otherson*, 637 F.2d 1276, 1278–79 (9th Cir. 1980).

[247] *See United States* v. *Lanier*, 520 U.S. 259, 271 (1997) (noting that "beating to obtain a confession plainly violates § 242") (internal citation omitted).

[248] *Lanier*, 520 U.S. at 270–72.

[249] *See* 28 C.F.R. § 0.50 (establishing Justice Department's Civil Rights Division).

[250] *See Bell* v. *Hood*, 327 U.S. 678 (1946).

[251] 403 U.S. 388 (1971).

[252] *See, e.g., Wilkins* v. *May*, 872 F.2d 190, 194 (7th Cir. 1989) (finding a *Bivens* claim under the Due Process Clause for police misconduct during custodial interrogation); *Bradt* v. *Smith*, 634 F.2d 796, 800 (5th Cir.1981) (suggesting § 1983 recognizes Fifth Amendment claims); *see also Riley* v. *Dorton*, 115 F.3d 1159, 1164–66 (4th Cir. 1997) (discussing but finding factually unsupported a § 1983 claim for Fifth Amendment violations; Fifth Amendment claims arise only when coerced confession used at trial; considering Due Process challenge to police conduct during questioning).

immunity barred recovery for many intentional torts which might normally form the basis for such suits, including false arrest, false imprisonment, abuse of process, assault, battery, and malicious prosecution.[253] After *Miranda,* Congress acted to provide that the federal government is civilly liable for damages for conduct that could implicate Fifth Amendment concerns. In 1974, Congress amended the Federal Tort Claims Act to make it applicable "to acts or omissions of investigative or law enforcement officers of the United States Government" on any subsequent claim arising "out of assault, battery, false imprisonment, false arrest, abuse of processes, or malicious prosecution."[254]

In addition to these civil remedies, there is also now in place a well-developed system providing internal disciplinary actions against federal officers who violate the regulations of their agencies. As the Department of Justice explained in connection with the Fourth Amendment exclusionary rule, device for preventing constitutional violations include:

> (1) comprehensive legal training * * * (2) specific rules and regulations governing the conduct of employees, and the use of investigative techniques such as searches and seizures; (3) institutional arrangements for conducting internal investigations of alleged violations of the rules and regulations; and (4) disciplinary measures that may be imposed for unlawful or improper conduct.[255]

The Department's observations likely apply not merely to search and seizure violations, but also to use of coercion during custodial interrogations.[256]

Finally, it is crucial to remember that the Fifth Amendment itself provides its own exclusionary remedy. Actual violations of the Fifth Amendment, as opposed to "mere" *Miranda* violations, will always lead to the exclusion of evidence—regardless of whether § 3501 is upheld.

The *Miranda* decision, of course, is not binding on the question of alternatives, as the Court in 1966 had no opportunity to consider such subsequent developments as the *Bivens* decision in 1971 and the amendment of the Federal Tort Claims Act in 1974. As the Department of Justice has explained in connection with the Fourth Amendment exclusionary rule, "[t]he remedial landscape has changed considerably" since the early 1960s.[257] Taken together, the combination of criminal, civil, and administrative remedies now available for coerced confessions—along with the Fifth Amendment's exclusion of involuntary statements—renders *Miranda* prophylactic remedy unnecessary and therefore subject to modification in § 3501. Unlike the *Miranda* exclusionary rule, which "sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation,"[258] the criminal and civil sanctions adopted by Congress focus more narrowly on conduct that directly implicates the Fifth Amendment proscription against "compelled" self-incrimination. At the same time, they provide stronger remedies against federal agents who coerce confessions than does the *Miranda* exclusionary rule. It is well known that the exclusion of evidence "does not apply any direct sanction to the individual official whose illegal conduct" is at issue.[259] Thus, the *Miranda* exclusionary rule would not be expected to have much effect on police intent on coercing confessions or otherwise violating Fifth Amendment standards. It should therefore come as no surprise that "there has been broad agreement among writers on the subject that *Miranda* is an inept means of protecting the rights of suspects, and a failure in relation to its own premises and objectives."[260]

In contrast, civil remedies directly affect the offending officer. As the Department itself has explained, "[e]ven if successful *Bivens* suits are relatively rare, the mere prospect of such being brought is a powerful disincentive to unlawful conduct. It defies common sense to suppose that fear of a suit against [a federal] officer in his individual capacity, in which he is faced with the possibility of personal liability, has no influence on his conduct."[261] Similarly, civil actions against the United States provide a tangible financial incentive to insure that federal practices comport with constitutional requirements. Likewise, internal disciplinary actions against federal

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[253] *See* Senate Rep. No. 93–588, 1974 U.S.C.C.A.N. 2789, 2791.

[254] 28 U.S.C. § 2680(h).

[255] U.S. Dep't of Justice, Office of Legal Policy, Report of the Attorney General on the Search and Seizure Exclusionary Rule (1986), *reprinted in* 22 U. Mich. J.L. Ref. 573, 622 (1989).

[256] This Subcommittee might request the Department of Justice to provide detailed information on this issue.

[257] U.S. Dep't of Justice, The Search and Seizure Exclusionary Rule, *supra,* 22 U. Mich. J.L. Ref. at 645.

[258] *Oregon* v. *Elstad,* 470 U.S. 298, 306–10 (1985).

[259] *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

[260] U.S. Dep't of Justice, Report on Pre-Trial Interrogation, *supra,* 22 U. Mich. J.L. Ref. at 545 (collecting citations).

[261] Br. for the United States at 34, *INS* v. *Lopez–Mendoza,* No. 83–491 (U.S. 1984).

agents must be considered an important part of the calculus. In refusing to extend the Fourth Amendment exclusionary rule into civil deportation proceedings, the Supreme Court has explained that "[b]y all appearances the INS has already taken sensible and reasonable steps to deter Fourth Amendment violations by its officers, and this makes the likely additional deterrent value of the exclusionary rule small.[262]

Bearing firmly in mind that the Fifth Amendment will itself continue to provide an exclusionary rule for involuntary confessions, Congress acted within its powers in accepting *Miranda's* invitation to craft an alternative regime to insure that the Fifth Amendment is respected by federal agents. That regime subjects officers who forcibly extract confessions to criminal sanctions,[263] civil actions (*Bivens*), and administrative remedies (internal disciplinary rules of various agencies), and their employing federal agencies to civil actions under the Federal Tort Claims Act.[264] At the same time, that regime allows voluntary confessions to be used in evidence.[265] This is an entirely reasonable, and in many ways more effective, approach to securing respect for the values of the Fifth Amendment than the *Miranda* exclusionary rule and, therefore, is fully compatible with both the Constitution and *Miranda's* call for Congress to develop alternative approaches.[266]

C. SECTION 3501 DOES NOT "UNLEASH" FEDERAL AGENTS TO TRAMPLE RIGHTS

Because the effects of § 3501 are sometimes mischaracterized and exaggerated, it is important to note that a decision admitting the statements under § 3501, on whatever theory, will not somehow "unleash" federal enforcement agents to trample on the rights of suspects. Section 3501 permits the introduction only of "voluntary" statements. Under the statute, the judge—not the police—determine whether the statement was voluntarily given. And beyond that, § 3501 requires the jury, too, have the opportunity to assess voluntariness and, of course, the ultimate truthfulness of any confession. The statute even facilitates this review by requiring the judge to instruct the jury to give the statement only such weight as the jury feels it deserves "under all the circumstances."[267]

On top of all this, many federal (and state) law enforcement agencies have their own policies requiring their agents to provide warnings before questioning, as just explained. Section 3501 itself continues to provide that warnings to suspects are relevant considerations in the voluntariness determination,[268] thereby continuing to provide incentives for law enforcement officers to warn suspects of their rights. The *Dickerson* opinion was quite clear on this point, stating: "[L]est there be any confusion on the matter, nothing in today's opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings. * * * those warnings are among the factors a district court should consider when determining whether a confession was voluntarily given."[269]

Finally, of course, the Fifth Amendment itself flatly forbids coercive interrogation tactics. Therefore, applying the statute will simply avoid protracted litigation over whether confessions should be suppressed because of close questions of technical compliance with *Miranda*. In light of all this, there can be little doubt that the statute survives constitutional challenge.

III. Miranda Harms Law Enforcement

A final claim against § 3501 is also worth considering. The Department of Justice has occasionally suggested that § 3501 makes no different to public safety because

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[262] *INS* v. *Lopez–Mendoza*, 468 U.S. 1032, 1049 (1984).
[263] 18 U.S.C. §§ 242, 241.
[264] 28 U.S.C. § 2680(h).
[265] 18 U.S.C. § 3501.
[266] An entirely separate argument for the constitutionality of § 3501 is based on the fact that Congress has now rejected the factual findings underpinning *Miranda's* conclusion that custodial interrogation has an "inherently compelling" character. Compare *Miranda*, 384 U.S. at 457–58 with S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 2112, 2134. *Dickerson* alluded to this argument, explaining that "Congress, utilizing its superior fact-finding ability, concluded that custodial interrogations were not inherently coercive." 166 F.3d at 692 n.22. *See generally* Burt, *Miranda* and Title 11: A Morganatic Marriage, 1969 Sup. Ct. Rev. 81, 118–34; Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 42 n.217 (1975). Because the § 3501 is constitutional on the arguments developed in sections A and B, *supra*, there is no need to discuss this alternative ground for upholding the statute.
[267] 18 U.S.C. § 3501(b).
[268] *See* 18 U.S.C. § 3501(b)(3) & (4).
[269] *Dickerson*, 166 F.3d at 692.

federal prosecutors can prevail even under the *Miranda* exclusionary rule.[270] This claim is easy to disprove. For example, in the *Dickerson* case itself, the Fourth Circuit warned that "[w]ithout [Dickerson's] confession it is possible, if not probable, that he will be acquitted."[271] It is also worth noting that Mr. Dickerson's confession was critical to the arrest of Jimmy Rochester, another bank robber who had been involved in robbing a total of 17 banks in three different states, as well as an armored car. Similarly, in a *United States* v. *Rivas–Lopez*, it will be quite difficult to obtain the conviction of a confessed methamphetamine dealer without the law.[272] While *Dickerson* and *Rivas–Lopez* have not reached a final conclusion, there is no doubt about the result of the failure to apply § 3501 in *United States* v. *Leong.* There, defendant Tony Leong was set back on the streets, in spite of the fact that he had confessed to being a convicted felon in possession of a firearm.

No one has compiled a list of cases actually brought where the convictions of dangerous criminals were imperiled by this rigid exclusionary rule. The cases cited here involve simply my own, limited litigation experience over the last year or so, and a complete list of cases undermined by *Miranda* would clearly involve many other cases.[273] Even if there were such a list, of course, it would only be the tip of the iceberg, since there are undoubtedly many other prosecutions that are not pursued at all because of *Miranda* problems with an otherwise voluntary confession.

At the time *Miranda* was handed down, dissenting Justice John M. Harlan clearly warned that the decision would "entail harmful consequences for the country at large. How serious those consequences may prove to be only time can tell." This question of *Miranda's* practical effect bears not only on the importance of § 3501, but also the whole question of the Supreme Court's *Miranda* jurisprudence. Since 1966, the Supreme Court has repeatedly held that *Miranda* is a realistic preventive measure—"a carefully crafted balance designed to fully protect both the defendants' and society's interests."[274] If the costs of *Miranda* are greater than is generally acknowledged, the Court might decide to rethink the current doctrine. What, then, are *Miranda's* Costs?[275]

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[270] *Confirmation of Deputy Attorney General Nominee Eric Holder: Hearings before the Sen. Comm. on the Judiciary,* 105th Cong., 1st Sess. 124 (June 13, 1997) (written response of Deputy Attorney General Designate Holder to question from Senator Thurmond) ("My experience has been that we have not had significant difficulty in getting the federal district court to admit voluntary confessions under *Miranda* and its progeny").

[271] *United States* v. *Dickerson,* 166 F.3d 667, 672 (4th Cir. 1999).

[272] *See* 988 F. Supp. at 1426–27 (describing facts; Rivas–Lopez voluntarily consented to search of the car, whereupon drugs were discovered inside a hidden panel; little evidence to connect Rivas–Lopez to the drugs, apart from his confession obtained "outside *Miranda*").

[273] *See, e.g.,* OLP Report, *supra* note 21, at 568 (collecting "miscarriages of justice resulting from *Miranda* and related decisions); *United States* v. *Tyler,* 164 F.3d 150 (3rd Cir. 1998), cert. denied,—U.S.—(1999) (remanding for further consideration of *Miranda* issues in witness tampering case involving the killing of a government witness); *United States* v. *Rodriguez–Cabrera,* 35 F.Supp.2d 181 (D.P.R. 1999) (suppressing incriminating admission on grounds suspect in custody and should have received *Miranda* warnings); *United States* v. *Guzman,* 11 F.Supp.2d 292 (S.D.N.Y. 1998) (suppressing statement suggesting involvement in an attempted murder on grounds defendant was in custody and should have been *Mirandized*; also finding that statement was not coerced), aff'd, 152 F.3d 921 (2d Cir. 1998); *United States* v. *Garibay,* 143 F.3d 534 (9th Cir. 1998) (reversing conviction for distribution of 138 pounds of marijuana on grounds defendant did not understand *Miranda* waiver); *United States* v. *Foreman,* 993 F.Supp. 186 (S.D.N.Y. 1998) (Baer, J.) (suppressing some statements under *Miranda* on grounds discussion during drive to booking after defendant asked what was going on constituted "interrogation"); *United States* v. *Griffin,* 7 F.3d 1512 (10th Cir. 1993 (reversing conviction and sentence of life imprisonment for distributing crack cocaine on grounds defendant was in custody and should have received *Miranda* warnings; conviction apparently obtained on retrial); *United States* v. *Ramsey,* 992 F.3d 301 (11th Cir. 1993) (reversing conviction for distribution of crack on grounds that turning and looking away from officer was invocation of *Miranda* right to remain silent); *United States* v. *Henly,* 984 F.2d 1040 (9th Cir. 1993) (reversing conviction for armed robbery; defendant in custody and should have been *Mirandized* when sitting in back of police car); *State* v. *Oldham,* 618 S.W.2d 647 (Mo. 1981) (defendant's conviction for horribly abusing his two-year-old step daughter reversed because confession admitted; second police officer who obtained *Mirandized* confession not aware of that defendant declined to make statement to first officer); *Commonwealth* v. *Zook,* 553 A.3d 920 (Pa. 1989) (death sentence reversed on *Miranda* grounds); *Commonwealth* v. *Bennett,* 264 A.2d 706 (Pa. 1970) (defendant's first degree murder conviction overturned because non-*Mirandized* confession admitted; defendant acquitted on retrial); *Commonwealth* v. *Singleton,* 266 A.3d 753 (Pa. 1970) (police warning any statement could be used "*for or* against" defendant deviated from *Miranda*; defendant's conviction for beating deaths reversed; defendant acquitted on retrial).

[274] *Moran* v. *Burbine,* 475 U.S. 412, 433 n.4 (1986).

[275] Some of the material used in the following sections draws on my "Handcuffing the Cops: *Miranda's* Harmful Effects on Law Enforcement," Report No. 218 for the National Center for Policy Analysis.

A. DECLINING CONFESSION RATES IMMEDIATELY AFTER MIRANDA

Immediately after *Miranda,* a handful of researchers attempted to measure the effects of the decision. The studies generally suggested significant reductions in the number of suspects giving confessions under the new rules. For a recent article in the *Northwestern Law Review,* I exhaustively canvassed the empirical evidence on *Miranda's* social costs in terms of lost criminal cases.[276] The direct information—before-and-after studies of confession rates in the wake of the decision—indicates that *Miranda* significantly depressed the confession rate.[277] For example, in 1967, research revealed that confession rates in Pittsburgh fell from 48 percent of suspects questioned by detectives before the decision to 29 percent after.[278] Similarly, New York County District Attorney Frank Hogan testified before the Senate Judiciary Committee that confessions fell even more sharply in his jurisdiction, from 49 percent before *Miranda* to 14 percent after.[279]

Virtually all of the studies just after *Miranda* found that confession rates had declined, as shown in Figure 1. The sole exception was a study in Los Angeles, which has been revealed to be 280 badly flawed.[280]

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[276] Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment,* 90 Nw. U. L. Rev. 387 (1996).

[277] The term "confession" rate as used here includes not only full confessions to a crime but also "incriminating statements" useful to the prosecution.

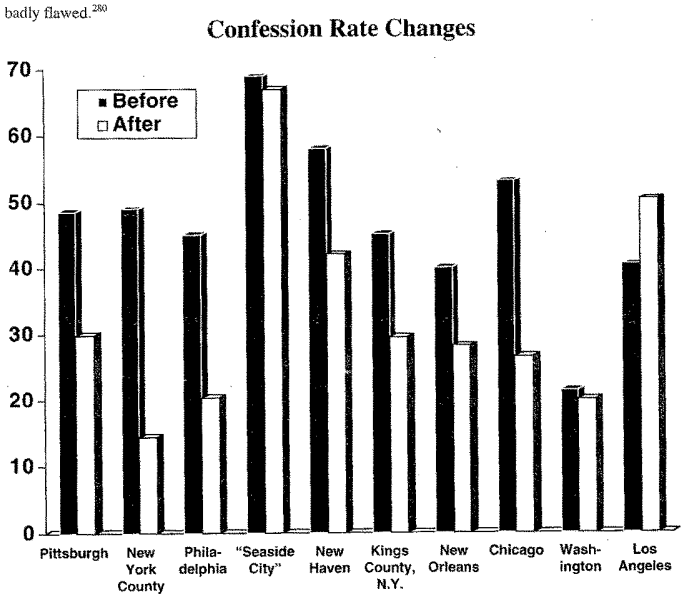
[278] Richard H. Seeburger and R. Stanton Wettick Jr., *Miranda In Pittsburgh—A Statistical Study,* 29 U. Pitt. L. Rev. 1, 12–13 (1967).

[279] *See* Controlling Crime through More Effective Law Enforcement: Hearings before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 1120 (1967) [hereinafter Controlling Crime Hearings].

[280] The study gathered evidence on "confessions" before *Miranda* and "confessions and other statements" after *Miranda.* Because this latter category is broader than the first, it is impossible to meaningfully compare the two statistics. The law clerk who actually collected the data agrees that the figures from Los Angeles "prove nothing." *See* Paul G. Cassell, *Miranda's "Negligible" Effect On Law Enforcement: Some Skeptical Observations,* 20 Harv. J.L. & Pub. Pol'y 327, 332 (1997) (quoting now-U.S. Court of Appeals Judge Stephen S. Trott, who collected the data).

badly flawed.[280]

FIGURE I



Source: Paul G. Cassell, "*Miranda's* Social Costs: An Empirical Reassessment," *Northwestern Law Review* 90, 1996, p. 387. For further details about these statistics, see pp. 395-418.

The reliable data from the before-and-after studies[281] show that confession rates fell by about 16 percentage points after *Miranda*. In other words, if the confession rate was 60 percent before *Miranda*,, it was 44 percent after—meaning that in about one of every six criminal cases *Miranda* resulted in a lost confession. The reliable studies also indicate that confessions are needed in about 24 percent of all cases to obtain a conviction. Combining these two figures produces the result that about 3.8 percent (16 percent × 24 percent) of all criminal cases in this country are lost because of the restrictions imposed by *Miranda*..[282] Extrapolating across the country, each year there are 28,000 fewer convictions for violent crimes, 79,000 fewer for property crimes, and 500,000 fewer for crimes outside the FBI crime index.

B. RECENT DATA ON LOWERED CONFESSION RATES

These estimates of *Miranda's* harmful effects come solely from before-and-after studies that rely on data from the months immediately preceding and following *Miranda*. The studies accordingly fail to capture *Miranda's* long-term effects, effects that would reflect criminal suspects' full understanding of the protection *Miranda* offers them. To gain a better view of *Miranda's* historic effects, we need some solid statistical indicator that extends beyond 1967 and, indeed, into the 1990's.

In theory, the ideal study would review confession rates since 1967 to see whether, despite initial declines after the decision, the rates have since "rebounded"—in other words, a before-and-after study of confession rates over several decades rather than several months. Unfortunately, no such statistics exist. The only figures that do exist were gathered by individual researchers for particular cities on a one-time basis. Although broad generalizations are hazardous, confession rates before *Miranda* were probably 55 percent to 60 percent.[283] After *Miranda*, the few studies available reveal lower confession rates. The most recent empirical study, in 1994 in Salt Lake County, Utah, found an overall confession rate of only 33 percent, as shown in Figure II.[284]

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[281] Data from L.A. are excluded for the reasons given in the preceding note; from the District of Columbia because police did not generally follow the *Miranda* requirements, and from Chicago because the data are limited to homicides. *See* Cassell, *supra* note 276, at 418.

[282] *See* Cassell, *supra* note 276, at 438–39. For further discussion of this estimate, compare Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs,* Nw. U. L. Rev. 500 (1997) with Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders, Nw. U. L. Rev. 1084 (1996).*

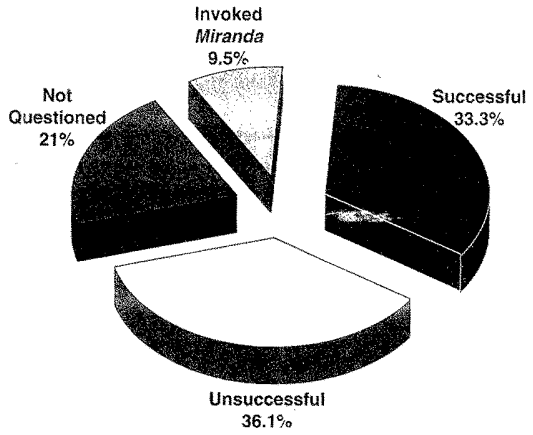
[283] *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation: An Empirical Study of the Effects of* Miranda, 43 UCLA L. Rev. 839, 871 (1996); *see also* Christopher Slobogin, Criminal Procedure: Regulation of Police Investigation: Legal, Historical, Empirical and Comparative Materials 6 (1995 Supp.) (concluding that a 64 percent confession rate is "comparable to pre-*Miranda* confession rates"). *Cf.* George S. Thomas III, "*Plain Talk About the* Miranda *Empirical Debate: A 'Steady-State' Theory of Confessions,*" 43 UCLA L. Rev. 933, 935–36 (1996) (deriving lower estimate with which to compare studies).

[284] *See* Cassell & Hayman, *supra* note 283, at 869. For an interesting though ultimately unpersuasive argument that the Salt Lake County confession rate is actually higher, *see* Thomas, *supra* note 283, at 944–53.

FIGURE II

Salt Lake County Confession Rates

(1994)



Source: Paul G. Cassell and Bret S. Hayman, "P ice Interrogation: An Empi l Study of the Effects of *Miranda*," *UCLA Law Review* 43, 1996, p. 839.

This Salt Lake city data is generally consistent with such other data as is available. Richard Leo's 1993 study from Berkeley, California, found an in-custody questioning success rate by detectives of 64 percent. If we adjust this figure for comparability with earlier studies, it translates into an overall confession rate of about 39 percent.[285] A 1979 National Institute of Justice study of Jacksonville, Fla., and San Diego, Calif., reported confession rates of 33 percent and 20 percent, respectively. When statements admitting presence at a crime scene are added, the overall rates for incriminating statements rise to 51 percent and 37 percent, respectively.[286] A 1977 study of six cities reported a confession rate of 40 percent.[287]

Taken together, these studies suggest that confession rates have been lower since *Miranda*. But this conclusion, too, could be attacked on the grounds that studies from individual cities may not be applicable across the country. Because no national data exist, we must search for an alternative measure.

C. DECLINING CRIME CLEARANCE RATES AFTER MIRANDA

The most meaningful alternative measure of the frequency of confessions is the clearance rate—the rate at which police officers "clear," or solve, crimes. Since at least 1950, the Federal Bureau of Investigation has collected clearance rate figures from around the country and reported this information annually in the *Uniform Crime Reports*.[288] The clearance rate appears to be a reasonable (if understated) alternative measure for the confession rate. If *Miranda* prevents a confession, a crime may go unsolved. As one leading police interrogation manual explains, "Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects."[289]

Clearance rates have been widely viewed—especially by *defenders* of the *Miranda* decision—as a statistic that would reveal its effects. For example, a widely cited passage in Professor Stephen Schulhofer's 1987 article praising *Miranda* reported the prevailing academic view that, while some studies suggested declining confession rates after the decision, within a "year or two" clearance "rates were thought to be returning to pre-*Miranda* levels.[290] While an apparent consensus exists that clearance rates at least partially gauge *Miranda's* impact, one note of caution should be sounded. Police can record a crime as "cleared" when they have identified the perpetrator and placed him under arrest, even where the evidence is insufficient to indict or convict.[291] As a result, clearance rates fail to capture any of *Miranda's* harmful effects if these show up only after a crime has been cleared. This means that clearance rates understate *Miranda's* effects.

Surprisingly, no one has made a close examination of the national data from the FBI's *Uniform Crime Reports*. In a recently published article, Professor Richard Fowles and I showed that crime clearance rates fell sharply all over the country immediately after *Miranda* and remained at these lower levels over the next three decades.[292] For example, in both 1966 and 1967 the FBI reported that a drop in clearance rates was "universally reported by all population groups and all geographic divisions."[293] A long-term perspective on crime clearance rates comes from plotting the FBI's annual figures. Figure III illustrates the national crime clearance rate from 1950 to 1995 for violent crimes (nonnegligent homicide, forcible rape, aggravated assault and robbery).

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[285] *See* Cassell & Hayman, *supra* note 283, at 926–30 (discussing Richard A. Leo, *Inside The Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1996)).

[286] Floyd Feeney et al., Arrests Without Conviction: How Often They Occur and Why 142 (1983).

[287] *See* Gary D. Lafree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 Criminology 289, 302 (1985).

[288] *See* Federal Bureau of Investigation, *Uniform Crime Reports, Crime in the United States 1995* (1996) [hereinafter cited as *UCR*–year].

[289] Fred E. Inbau et al., Criminal Interrogation and Confessions at xiv (2d ed. 1986).

[290] Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. Chi. L. Rev. 435, 436 (1987).

[291] Federal Bureau of Investigation, Uniform Crime Reporting Handbook 41–42 (1984).

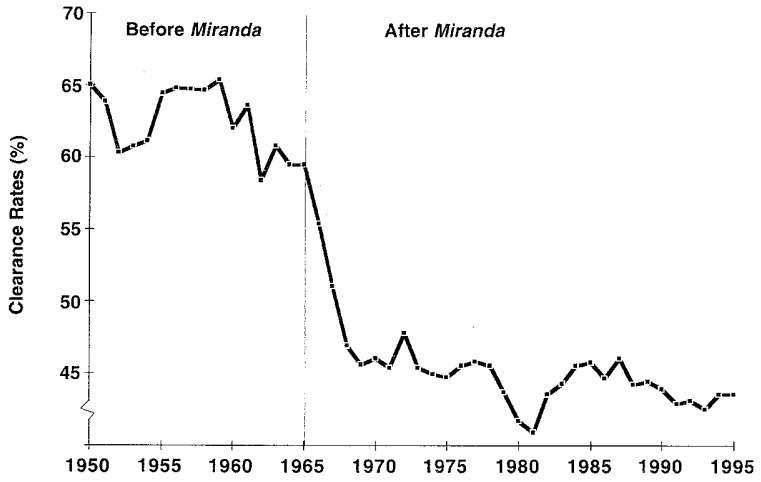
[292] Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. (1998). For more details about our analysis of clearance rates, including methodological issues, *see ibid.* For further discussion of this analysis, compare John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?, 50 Stan. L. Rev. 1147 (1998) (confirming some aspects of the analysis and raising questions about others) with Paul G. Cassell and Richard Fowles, Falling Clearance Rates After* Miranda: *Coincidence Or Consequence, 50 Stan. L. Rev. 1181 (1998) (responding to Donohue).*

[293] *UCR*–1966, *supra* note 288, at 27; *UCR*–1967, *supra* note 288, at 30.

FIGURE III

Violent Crime Clearance Rate

1950-95



Source: FBI Uniform Crime Reports.

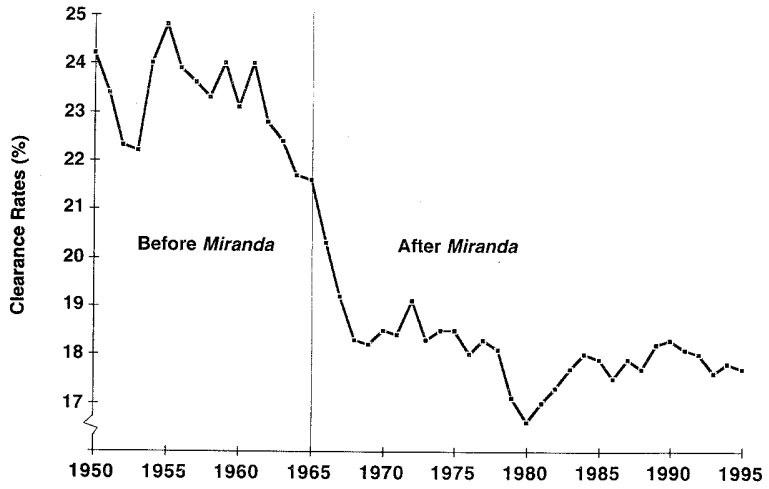
As the numbers show, violent crime clearance rates were fairly stable from 1950 to 1965, generally hovering at or above 60 percent. They even increased slightly from 1962 to 1965. Then, in the three years following *Miranda*, the rates fell dramatically—to 55 percent in 1966, 51 percent in 1967 and 47 percent in 1968. Violent crime clearance rates have hovered around 45 percent ever since—about 15 percentage points, or 25 percent, below the pre-*Miranda* rate. Because *Miranda* probably took effect over several years—while both police practices and suspect talkativeness adjusted to the new rules—simple visual observation of the long-term trends suggests that *Miranda* substantially harmed police efforts to solve violent crimes.

The annual crime clearance rate during the same period for the property crimes of burglary, vehicle theft and larceny present the same pattern, as shown in Figure IV. The rate at which police cleared property crimes fluctuated somewhat from 1950 to 1960, declined from 1961 to 1965, then fell at an accelerating rate from 1966 to 1968 and generally stabilized thereafter. Here again, during the critical post-*Miranda* period, clearance rates dropped, although somewhat less dramatically than clearance rates for violent crime.

FIGURE IV

Property Crime Clearance Rates

1950-95



Source: FBI Uniform Crime Reports.

The graphs of crime clearance rates, particularly violent crime clearance rates, nicely fit the handcuffing-the-cops theory advanced by *Miranda's* critics and disprove the suggestion that there was any sort of "rebound" of clearance rates after the decision. Defenders of *Miranda* nonetheless might argue that this does not prove any causal link between the drop in clearance rates and the Supreme Court's new rules.[294] The link, however, is strongly suggested by the striking timing of the sharp drop, originating in 1966 (and not earlier) and concluding in the year or two after. Moreover, it is important to recall that it was *Miranda's* defenders who first suggested exploring clearance rates as evidence of *Miranda's* effects.

The connection between the decline in clearance rates and *Miranda* was contemporaneously recognized. During the critical 1966–68 period, the *Uniform Crime Report* listed as explanatory causes for falling clearance rates "court decisions which have resulted in restrictions on police investigative and enforcement practices" along with "the sharp increase of police workloads in criminal and noncriminal matters; the almost static ratio of police strength to population, which is not commensurate with the sharp increase in crime; and the increasing mobility of those who commit crimes."[295]

Assessments from law enforcement officers who questioned suspects both while free from and subject to *Miranda's* constraints confirm the importance of *Miranda* in the drop in clearance rates. Perhaps the best interviews of officers on the streets were conducted by Otis Stephens and his colleagues in Knoxville, Tenn., and Macon, Ga., in 1969 and 1970. Virtually all the officers surveyed believed that Supreme Court decisions had adversely affected their work, and most blamed *Miranda*.[296] Similarly, in New Haven, Conn., Yale students who observed interrogations during the summer of 1996 interviewed most of the detectives involved plus 25 more. They reported that "[t]he detectives unanimously believe [*Miranda*] will unjustifiably [help the suspect]."[297] They also reported that "[t]he detectives continually told us that the decision would hurt their clearance rate and that they would therefore look inefficient." Law student Gary L. Wolfstone sent letters in 1970 to police chiefs and prosecutors in each state and the District of Columbia. Most agreed that *Miranda* raised obstacles to law enforcement.[298] In "Seaside City," James Witt interviewed forty-three police detectives some time before 1973. Witt reported that the detectives "were in almost complete agreement over the effect that the *Miranda* warnings were having on the outputs of formal interrogation. Most believed that they were getting many fewer confessions, admissions and statements * * * [and] were quick to refer to a decline in their clearance rate when discussing problems emanating from the *Miranda* decision."[299]

While other social changes in the 1960's might have affected police performance, these changes are unlikely to account for the sharp 1966–68 drop in clearance rates. For example, although illegal drug use certainly increased during the 1960's, the increase continued into the 1970's and 1980's. Other social changes may have had some indirect effect on police effectiveness, but again such long-term changes are not strong candidates for an unexplained portion of the 1966–68 drop in clearance rates. Finally, the conclusion that *Miranda* caused a significant part of the 1966–68 decline in clearance rates is supported by a wide range of information, and also by common sense. The conclusion suggested here is simply that when the Supreme Court imposed unprecedented restrictions on an important police investigative technique, the police became less effective. This is not a counterintuitive assertion, but instead a logical one.

As theory and contemporaneous police reports suggest that the *Miranda* decision was a primary cause of the 1966 to 1968 drop in clearance rates, so do standard statistical techniques. The generally accepted device for sorting through competing possibilities is multiple regression analysis.

The first step in developing a regression model is to identify relevant variables for the equations. For our dependent variable, Professor Fowles and I used clear-

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[294] *See* Stephen J. Schulhofer, Miranda *and Clearance Rates,* 91 Nw. U. L. Rev. 278 (1996).

[295] *UCR*–1967, *supra* note 288, at 30.

[296] *See* Otis H. Stephens et al., *Law Enforcement and the Supreme Court: Police Perceptions of the* Miranda *Requirements,*" 39 Tenn. L. Rev. 407 (1972); *see also* Otis H. Stephens Jr., The Supreme Court and Confessions of Guilt (1973).

[297] *See* Project, *Interrogations in New Haven: The Impact of* Miranda, 76 Yale L.J. 1519, 1611–12 (1967).

[298] *See* Gary L. Wolfstone, Miranda—*A Survey of Its Impact,* 7 Prosecutor 26, 27 (1971).

[299] James W. Witt, *Noncoercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality,* 64 J. Crim. L. & Criminology 320, 325, 330 (1973).

ance rates at a national level based on FBI data.[300] For control variables, the factor most commonly cited as affecting the clearance rate is the crime rate. The standard argument is that as police officers have more crimes to solve, they will be able to solve a smaller percentage of them. Apart from the clime rate, the most often cited factors influencing clearance rates are law enforcement officers and expenditures on law enforcement. To control for such influences, we added variables for the number of law enforcement personnel per capita and the dollars spent on police protection per capita by state and local governments, adjusted for inflation by the consumer price index. We also controlled for the interactions between these variables and the overall number of crimes—what has been called the "capacity" of the system.[301] Other variables have been identified in the criminal justice literature as having some bearing on clearance rates or, more generally, crime rates. We controlled for the percentage of juveniles in the population, the unemployment rate, disposable per capita real income, labor force participation, live births to unmarried mothers, levels of urbanization and the distribution of crimes committed in large and small cities. Finally, to capture the effects of the *Miranda* decision, we included a "dummy" variable in the equations. This was assigned the value of 0 before *Miranda*, ½ in the year of *Miranda* (1966) and 1 thereafter.

The findings, which have been detailed elsewhere,[302] are that *Miranda* had a statistically significant effect on clearance rates for both violent and property crimes. The coefficient associated with the *Miranda* variable implies that violent crime clearance rates would be 6.7 percentage points higher without *Miranda*. The coefficient associated with the Miranda variable indicates that property crime clearance rates would be 2.2 percentage points higher. In 1995 the violent crime clearance rate was 45.4 percent and the property crime clearance rate 17.7 percent:[303] The regression equations thus suggest that without *Miranda* the violent crime clearance rate would have been 50.2 percent (43.5 percent + 6.7 περψεντ) ανδ τηε προπερτυ ψριμε ψλεαρανψε ρατε ςοθλδ ηαωε βεεν 19.9 περψεντ (17.7 περψεντ + 2.2 περψεντ).

These findings are for the total categories of "violent" and "property" crime. There is a danger, of course, that such aggregations may obscure what is happening in individual crime categories. For this reason, we ran separate regressions on the individual violent and property crimes. Except for robbery, all exhibit a long-term downward trend, but not a sharp downward break in the 1966 to 1968 period. The sharp reduction in robbery clearances suggests that robbery clearances are the most likely to be affected by *Miranda*. The results of the regression analysis confirm that *Miranda* had a significant effect on robbery clearances but not on other violent crimes.[304]

Clearances of property crimes (burglary, larceny and vehicle theft) all exhibit a long-term downward trend. Larceny and vehicle theft clearances show particularly sharp drops in the 1966 to 1968 period, while the sharp drop in burglary clearances extends from 1961 to 1968. These visual observations track the regression results. The *Miranda* variable has a statistically significant downward effect on clearance rates for larceny and vehicle theft. For burglary, the *Miranda* variable is not statistically significant at the conventional 95 percent confidence level (but is significant at a 90 percent confidence level).[305]

The regression equation controls for two of the factors cited in the *Uniform Crime Report* as possible reasons for the clearance rate decline: the increase in police workloads and the static ratio of police strength. Increased mobility of those committing crimes is possible, but seems an unlikely explanation for a sudden, three-year shift in crime clearance rates. Increasing mobility could affect clearances only over the long haul. That leaves the first factor—"court decisions which have resulted in re-

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[300] FBI clearance rates have been criticized as subject to interdepartmental variations in what constitutes solving or "clearing" a crime, but the figures used here come from the aggregate national clearance rate, comprised of reports filed by thousands of law enforcement agencies. As a result, they should be reliable for present purposes. *See* James Alan Fox, Forecasting Crime Data: An Econometric Analysis 7 (1978) (concluding that the problem of data manipulation is "not overly troublesome" for time series analysis that "does not involve cross-sectional data, but rather a time series from the *same* population"); Charles R. Tittle and Alan R. Rowe, *Certainty of Arrest and Crime Rates: A Further Test of the Deterrence Hypothesis*, 52 Social Forces 455, 456 (1974) (although manipulation is possible, "such biases would seem to be distributed throughout the various police departments so that the validity of a study which examines internal variations in the entire body of data * * * would be unaffected").

[301] *See* Schulhofer, *supra* note 294, at 291.

[302] *See* Cassell & Fowles, *supra* note 292, at 1086, 1088.

[303] *UCR*–1994, *supra* note 288, at 208 Table 25.

[304] *See* Cassell & Fowles, *supra* note 292, at 1085–86.

[305] *See id.* at 1087–88.

strictions on police investigative and enforcement practices"—as the logical candidate for explaining the sudden drop in clearance rates.

Sometimes it is argued that clearance rates declined after *Miranda* for a good reason: the police were forced to abandon unconstitutionally coercive questioning techniques. On this view, declining clearance rates measure not the social cost of criminals unfairly escaping, but rather the social benefit of police abandoning impermissible questioning techniques. This explanation is far-fetched for two reasons. First, genuinely coerced confessions were, statistically speaking, rare at the time of *Miranda.* It appears to be common ground in the literature that, as the result of increasing judicial oversight and police professionalism, coercive questioning methods began to decline in the 1930's and 1940's.[306] By the 1950's, coercive questioning had, according to a leading scholar in the area, "diminished considerably."[307] When the Supreme Court began issuing more detailed rules for police interrogation in the 1960's, it was dealing with a problem "that was already fading into the past."[308] Chief Justice Warren's majority opinion in *Miranda,* while citing the Wickersham Report and other accounts of police abuses, acknowledged that such abuses were "undoubtedly the exception now" and that "the modern practice of in-custody interrogation is psychologically rather than physically oriented."[309] At about the same time, the President's Commission on Law Enforcement and the Administration of Justice reported that "today the third degree is almost nonexistent" and referred to "its virtual abandonment by the police."[310] The empirical surveys provide good support for Professor Gerald Rosenberg's assessment: "Evidence is hard to come by, but what evidence there is suggests that any reductions that have been achieved in police brutality are independent of the Court and started before *Miranda.*"[311] Second, beyond the relative infrequency of unconstitutional interrogation techniques, the *Miranda* rules themselves were not well tailored to prevent coerced confessions. Justice Harlan's point in his *Miranda* dissent has never been effectively answered. He wrote: "The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers."[312] It is not clear why police using rubber hoses before *Miranda* would have shelved them afterwards—at least in the generally short time period following the decision during which the confession rate changes were observed.

Having considered various models for the *Miranda* effect, it may be thought useful to have a short summary of the findings and the range of the possible effect of the decision on clearance rates. Table I displays the pertinent information.

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[306] *See* Cassell, *supra* note 276, at 473–74, collecting references.

[307] Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America,*" 18 Crime, Law & Social Change 35, 51 (1992).

[308] Fred P. Graham, The Self-Inflicted Wound 22 (1969).

[309] *Miranda,* 384 U.S. at 448–49.

[310] President's Commission on Law Enforcement and Administration of Justice, the Challenge of Crime in a Free Society 93 (1967).

[311] Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 326 (1991).

[312] *Miranda,* 384 U.S. at 505 (Harlan, J., dissenting).

TABLE I

Summary of the Range and Size of the Effect of the *Miranda* Variable

Crime	1995 Clearance Rates	Range of *Miranda* Effect	Percentage Increase Without *Miranda*	1995 Additional Cleared Crimes Without *Miranda*
Violent	43.5%	3.7%-8.9%	8.5%-20.4%	56,000-136,000
Murder	63.2%	0%*	0%	0
Rape	50.8%	0%*	0%	0
Robbery	24.2%	1.6%-7.2%	6.6%-29.7%	8,000-36,000
Assault	54.4%	0%*	0%	0
Property	17.7%	0.7%-2.9%	3.9%-16.3%	72,000-299,000
Burglary	12.8%	0.8%-3.7%	6.2%-28.9%	17,000-82,000
Larceny	20.1%	0.1%-2.4%	0.4%-11.9%	6,000-163,000
Vehicle	13.2%	1.7%-6.0%	12.8%-45.4%	23,000-78,000

* = no robust, statistically significant *Miranda* effect found.

Source: Paul G. Cassell and Richard Fowles, "Handcuffing the Cops? A 30-Year Perspective on *Miranda's* Harmful Effects on Law Enforcement," 50 Stanford Law Review 1055, 1998.

The first column sets out the clearance rate for the various crime categories for 1995—for example, a 24.2 percent clearance rate for robbery. The second column shows the range of the *Miranda* effect found in considering all possible combinations of the variables in our equations.[313] For example, depending on the model specification, robbery clearances were somewhere between 1.6 and 7.2 percentage points lower, depending on what variables one includes or excludes. To provide some context for these figures, the third column sets out the rate at which clearances would have increased without the *Miranda* effect. For example, given that only 24.2 percent of robberies were cleared in 1994, increasing the clearance rate by 1.6 to 7.2 percentage points would have meant the clearance of 6.6 percent to 29.7 percent more robberies. Because of interest in the absolute number of crimes affected, we estimate in the last column how many more crimes would have been cleared in 1995 in the absence of the *Miranda* effect. Our equations suggest, for instance, that without *Miranda*between 8,000 and 36,000 more robberies would have been solved in 1995. It should be emphasized again that these estimates are quite conservative. They capture only *Miranda's* impact on crime clearances, ignoring some of the effects on prosecutions and convictions at later points in the criminal justice system.

Our equations suggest a *Miranda* effect on clearance rates for robbery, larceny and vehicle theft (and possibly burglary), but not homicide, rape and assault. What could explain this pattern? No doubt the reasons are complex, but reasonable possibilities suggest themselves.

What might be loosely called crimes of passion or emotion—murder, rape and assault—were apparently unaffected by *Miranda,* while crimes of deliberation—robbery, larceny, vehicle theft and possibly burglary—were affected. These categories are oversimplifications; obviously there are coolly calculated murders and impulsive car thefts. But if the generalizations are more often correct than incorrect, they correspond with the larger body of evidence suggesting that *Miranda* more substantially affects police success in dealing with repeat offenders and professional criminals.[314]

Still another explanation is that police may more often clear some kinds of crimes through confessions. A study of the New York City Police Department around the time of *Miranda* reported widely varying ratios of clearances to arrests across crime categories.[315] The ratio of clearances to arrests is well in excess of 1 for some crimes—specifically burglary, grand larceny, grand larceny vehicle and robbery. Police might arrest, for example, a professional burglar who would confess not only to the burglary for which he was apprehended, but to several he had previously committed. For other crimes-specifically homicide, rape and assault—the ratio was quite close to 1. This suggests that confessions may play a more important role in clearances of such crimes as burglary, vehicle theft, larceny and robbery, and thus clearance rates for these crimes are more susceptible to changes in confession procedures.

Another possibility is resource shifts by police to maintain high clearance rates for the most serious and less numerous crimes such as murder or rape. After *Miranda,* police may have responded to the difficulties created by the Supreme Court by reassigning some officers to the homicide division. Police agencies are frequently judged by their effectiveness in solving the most notorious crimes, especially murders. This transfer of resources would produce lower clearance rates for less visible and more numerous crimes like larceny or vehicle theft.

D. THE COSTS OF MIRANDA IN PERSPECTIVE

The evidence collected here suggests that *Miranda's* restrictions on police have significant social costs. To put *Miranda's* costs into some perspective, one might compare them to the costs of the Fourth Amendment exclusionary rule, long considered a major—if not *the* major—judicial impediment to effective law enforcement. In creating a "good faith" exception to the exclusionary rule, the Supreme Court cited statistics tending to show that the rule resulted in the release of between 0.6 percent and 2.35 percent of individuals arrested for felonies.[316] The Court concluded that these "small percentages * * * mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches

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[313] This is known as "extreme bounds analysis." For further explication, *see* Cassell and Fowles, *supra* note 292, at 1103–06.

[314] *See* Cassell, *supra* note 276, at 464–66, on collecting the available evidence.

[315] Peter W. Greenwood, An Analysis of the Apprehension Activities of the New York City Police Department 18–19 (1970).

[316] *See United States* v. *Leon,* 468 U.S. 897, 908 n.6 (1984) (*citing* Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) about the 'Costs' of the Exclusionary Rule: The NIJ Study and Other Studies of 'Lost' Arrests,* 1983 Am. B. Found. Res. J. 611, 621, 667).

or seizures." The data presented here suggest that *Miranda's* costs are higher than those of the exclusionary rule. It is also virtually certain that these costs fall most heavily on those in the worst position to bear them, including racial minorities and the poor.[317]

A final way of showing *Miranda's* harm is through the truism that an unnecessary cost is a cost that should not be tolerated. If *Miranda's* costs can be reduced or eliminated without sacrificing other values, they should be—and as quickly as possible. What converts *Miranda's* harm into tragedy is that these uncleared crimes are, in many cases, unnecessary. If § 3501 were enforced, those costs would clearly diminish. Today, with the benefit of 30 years of interpretations, we know the *Miranda* mandate is not a constitutional requirement. As explained earlier, *Miranda* itself invited Congress to craft alternatives to the court-promulgated rules and since the decision the Court has repeatedly held that the rights are not themselves rights protected by the Constitution. When called upon to justify these rules, the Court has based these safeguards on a purely pragmatic, cost-benefit assessment. The Court has specifically stated that the *Miranda* rules rest not on constitutional requirement but rather are a "carefully crafted balance designed to fully protect *both* the defendant's and society's interests."[318] While the Court has never said precisely what costs it is willing to tolerate in this cost-benefit calculation, it has likely understated their magnitude, as the new evidence presented here suggests. The Court's calculation of *Miranda's* costs and benefits becomes even more problematic when the possibility of reasonable, less harmful approaches to regulating police questioning is factored in. When the Court announced *Miranda* in 1966, significant efforts to reform the rules regarding interrogations were under way.[319] The decision itself seemed to invite continued exploration of such alternatives, promising that "[o]ur decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform."[320]

To date, the Court's promise has proven to be an empty one. In the three decades since *Miranda*, reform efforts have been virtually nonexistent. The reasons are not hard to imagine. No state is willing to risk possible invalidation of criminal convictions by using an alternative to *Miranda* until the Supreme Court clearly explains what alternatives will pass its scrutiny.

The failure to explore other approaches cannot be attributed to lack of viable options. For example, the police might be permitted to videotape interrogations as a substitute for the *Miranda* procedures. I have explained such a proposal in detail,[321] and the concept has been endorsed by respected commentators.[322] Videotaping might be the best solution to the problem of regulating police interrogations envisioned in *Miranda's* encouragement to "Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."[323] Videotaping would better protect against police brutality, end the "swearing contest" about what happens in secret custodial interrogations and allow suspects who are manipulated into falsely confessing to prove their innocence.[324] At the same time, even when coupled with limited warnings of rights, videotaping does not appear to significantly depress confession rates.[325] Another replacement for *Miranda* would be to allow the states to bring an arrested suspect before a magistrate for questioning.[326] Questioning under the supervision of a magistrate would offer more judicial oversight than *Miranda*, but might be structured so as to result in more evidence leading to conviction. But, as with videotaping, because of the Court's failure to indicate whether this

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[317] *Compare* Charles Murray, Losing Ground: American Social Policy, 1950–1980, at 117 (1984) (reviewing crime statistics and concluding: "Put simply, it was much more dangerous to be black in 1972 than it was in 1965, whereas it was not much more dangerous to be white.").

[318] *Moran* v. *Burbine*, 475 U.S. 412, 433 n.4 (1986).

[319] *See* Office of Legal Policy, U.S. Department of Justice Report to the Attorney General on the Law of Pre-Trial Interrogation 40–41, 58–61 (1986).

[320] *Miranda*, 384 U.S. at 467.

[321] *See* Cassell, *supra* note 276, at 486–92.

[322] *See, e.g.*, Judge Harold J. Rothwax, Guilty: The Collapse of Criminal Justice 237 (1996) (urging replacement of *Miranda* with a system of videotaping interrogations).

[323] *Miranda*, 384 U.S. at 467.

[324] *See* Harold J. Rothwax, Guilty: The Collapse of Criminal Justice 237 (1996); Cassell, *supra* note 276, at 486–92; Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. Crim. L. & Criminology 497 (1998).

[325] *See* Cassell, *supra* note 276, at 489–92.

[326] William Schaefer, The Suspect and Society (1967); Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 721–25 (1968); Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 76–77 (1997).

might be a permissible alternative to *Miranda,* this approach has remained nothing more than hypothetical for criminal procedure professors.

This rigidity in the law of pre-trial interrogation may well be the greatest cost of *Miranda.* In its 1986 Report, the Department of Justice put the point nicely:

> The *Miranda* decision has petrified the law of pre-trial interrogation for the past twenty years, foreclosing the possibility of developing and implementing alternatives that would be of greater effectiveness both in protecting the public from crime and in ensuring fair treatment of persons suspected of crime. * * * Nothing is likely to change in the future as long as *Miranda* remains in effect and perpetuates a perceived risk of invalidation for any alternative system that departs from it.[327]

With the "petrification" of the law in mind, the importance of § 3501 becomes clear. Section 3501 offers a very real chance to reform our rules governing pre-trial questioning and begin to consider how best to structure the process to protect the legitimate interests of both suspects *and* society. If the *Dickerson* opinion is upheld, for example, one would expect federal agencies to begin more serious consideration of various alternative approaches. It is encouraging, for example, to see that the FBI has recently announced it will consider, at the option of local offices, the use of videotaping during interrogations. Alternatives like this—at both the state and federal levels—will prosper if the Supreme Court upholds § 3501 and signals that it will not automatically exclude voluntary confessions whenever there has been any kind of deviation from the *Miranda* requirements.

It is against this backdrop that the Department's refusal to defend § 3501 in the lower courts must ultimately be assessed. As was shown in Part I, this new position is at odds with the consistent views of the Department of Justice for nearly a quarter of a century before the current Administration took power. As was shown in Part II, there plainly are "reasonable" arguments to defend the statute, as the Fourth Circuit's recent exhaustive opinion (among others) demonstrates. But the true tragedy of the Department's position is shown by the costs of *Miranda* in suppressing reliable evidence, as shown here in Part III.

Justice White's dissent in *Miranda* warned that "[i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets * * * to repeat his crime whenever it pleases him." He continued, "There is, of course, a saving factor: the next victims are uncertain unnamed and unrepresented in this case."[328] The Congress of the United States, in passing § 3501 was gravely concerned about these costs, and attempted to restructure the rules governing confessions to protect suspects while at the time lowering the costs that law abiding citizens must pay. Justice Scalia aptly observed a few years ago that § 3501 "reflect[s] the people's assessment of the proper balance to be struck between concern for persons interrogated in custody and the needs of effective law enforcement."[329] Yet in spite of this the Department has refused to defend the judgment of the people before the court's of this country. As Justice Scalia bluntly concluded, this failure to defend the law "may have produced—during an era of intense national concern about the problem of runaway crime—the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this."[330]

It is time for the excuses to end. Hopefully the United States Supreme Court will grant review of the *Dickerson* case. Then, perhaps at long last, the Department of Justice will finally have an "appropriate" case for defending § 3501, as it has repeatedly promised Congress. There is every indication that the Supreme Court will then uphold that Act of Congress, stopping the tragic and unnecessary release of dangerous criminals who have voluntarily confessed to their crimes. If so, the countless citizens who will benefit will have every reason to thank the Congress, and this subcommittee, for their efforts to focus attention not just on the interests of suspected criminals, but also on those of their innocent victims.

Senator THURMOND. Senator Sessions, I understand you may have to leave before the hearing is over, and so you may go ahead and ask questions now.

Senator SESSIONS. Thank you, sir. I first want to say that I am disappointed that the Department of Justice has found it not worth

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[327] OLP Report, *supra* note 21, at 96.
[328] *Miranda,* 384 U.S. at 542–43 (White, J., dissenting).
[329] *Davis* v. *United States,* 512 U.S. 452, 465 (1994) (Scalia, J., concurring).
[330] *Id.*

their time, apparently, to appear to meet with another branch of Government to discuss a statute that they have chosen steadfastly not to enforce. I think that really is offensive.

We have discussed it previously, I believe, before *Dickerson* came down, and I personally questioned the Attorney General herself. I believe we have discussed it also with the Criminal Division chief, and Deputy Attorney General Holder has been questioned on this very subject by one of a number of this committee.

It is a well-known fact that Congress believes that laws passed by it ought to be enforced by the executive branch and used to ensure that those who are guilty of crimes are punished. To me, it is really disappointing that no one here is even willing to discuss it.

In fact, what has frustrated me most about the Department's position, as I understand it, is its lack of a position. Well, Senator, when we have the right case, we will probably take it up and argue it. But here we go for decades now without a right case, and the fact becomes clear they had no intention of taking it up.

Professor Cassell, I tend to agree that there is a burden, a duty on the law enforcement branch to use the legitimate tools given them to vindicate those who have been victimized by crime. Is that one of the points you were making?

Mr. CASSELL. Absolutely, Senator, and I believe the Department has promised—for example, Solicitor General nominee Seth Waxman promised this committee—"absolutely" was the phrase he used—that he would defend acts of Congress when reasonable arguments can be made on their behalf. I must say I find it astonishing that the Department, I guess, is implicitly saying that arguments that have been made for the statute are not only wrong, but are unreasonably wrong.

Senator SESSIONS. I agree, and I believe I may well have questioned Mr. Waxman about that when he came up because, as I said, this is not some surprise. It has been out there for a long time and it is time to confront it.

Judge Markman, I appreciate your statement and comments, and have great respect for your insight into legal issues.

Judge MARKMAN. Thank you, Senator.

Senator SESSIONS. I believe you indicated there was a substantial decline in the clearance of cases. Mr. Romley alluded to that. I will just sort of ask the two of you; you were a former prosecutor and Mr. Romley is now. It goes more to just that one case that gets reversed because of a technical violation, doesn't it, Mr. Romley? There are cases that you know you can't go forward with where that policemen never even refer to you or where confessions were never obtained which are relevant here. Do either one of you want to comment on that?

Judge MARKMAN. Well, I think your insight is right on target, Senator Sessions. Professor Richman mentioned the fact that we don't see very many instances in which evidence is suppressed because of failures on the part of the police to provide the *Miranda* warnings properly, and that is correct. But the great cost of *Miranda* is not when the police err in delivering the *Miranda* warnings. The great cost, to the contrary, is when they do deliver the *Miranda* warnings and they deter confession evidence that was for-

merly available to the system but is available no longer. That is the cost of *Miranda*.

Mr. ROMLEY. Mr. Chairman and Senator Sessions, from the prosecutor's perspective from a jurisdiction that receives over 65,000 felonies every single year, we have seen the impact of the *Miranda*, and let me talk in a different context.

The issue on *Dickerson* is the automatic exclusion of a statement. Where we see problems, other than what the judge has alluded to, is cases in which we do not even charge a particular individual because there has been a failure. So I am not even sure the statistics even accurately reflect that particular problem.

Interestingly enough, I was invited late last week to come and testify before this subcommittee, and although we don't keep exact tracking devices through an automated computer program, we did pull up—and we saw that a large number of cases were not even filed upon. And interestingly enough, it wasn't just on the big-type cases; it was really on things such as burglary where the new patrol officer—we added 900 new officers in the last 4 years to Phoenix and the surrounding cities.

Those new officers, although they have been trained, as Mr. Gallegos has indicated, it is the heat of the moment. A tiny mistake has been made. We are contiguous to Mexico. A major child molestation case recently had a statement suppressed because the officer did not clearly state the *Miranda* warnings in Spanish, and it was a voluntary statement.

What we are here for today, in my opinion, is that I think the Justice Department's position is incredulous. The fifth amendment goes directly toward coercion tactics, physical or psychological abuse. The mere technicality of not saying it exactly right should only be a factor in deciding whether or not it is a voluntary statement, and we really do see the impact and there is a definite impact.

Senator SESSIONS. Well, I tend to agree with that very much. Sometimes, wouldn't you agree, Mr. Romley, that you have a case and a confession but there is some weakness in the confession, so it is suppressed you had the confession, the defendant would have pled guilty, but knowing that you only had circumstantial evidence only without a confession, you have to go to trial.

Aren't you as a prosecutor, as well as the police department, challenged every day with trying to maximize your resources? And aren't these things also impacting on your ability to do your job?

Mr. ROMLEY. Senator Sessions, absolutely. I am not talking from a philosophical point of view. This is the practical world, where the rubber meets the road.

Senator SESSIONS. The real world. That is what we are talking about.

Mr. ROMLEY. Really, there, and there is no question. And nothing is worse than to sit there and have some corroborating evidence and the confession makes the case and it is thrown out, and we have to go back to the victims. And you show no involuntariness, no abuse, nothing. The community does not understand that. It has driven the criminal justice system to where there is a lack of faith that it is really providing them with protection. We need to rebal-

ance it. We need to rethink *Miranda* and bring it back, in my opinion, to some degree.

Senator SESSIONS. Frankly, you talk about a young officer. Let's take an example of something that would clearly fail to meet *Miranda*. There is a burglar alarm off. A young policeman grabs one person running one way and the other one going the other way, and he says, who was with you? And the buglar says, Billy made me do it. Is that admissible or not?

Mr. ROMLEY. Well, today that is, and that goes toward the constitutionality argument. It is the *Quarles* decision, and this kind of argues against the position that it is a constitutional requirement. The *Quarles* decision out of New York—I believe it was New York—basically gave an exemption to the *Miranda* ruling that in a public safety context that may be admissible. So, that is why we need to get this clarified to such a degree, and it goes against the Department of Justice argument.

Senator SESSIONS. Fundamentally, if he is being held, he is in custody. When people confess, don't they spill the beans and whole gangs of criminals get convicted instead of just the one? Is that a realistic downside to reducing the number of confessions we get?

Judge MARKMAN. Again, I think you are right, Senator Sessions. I mean, there is no evidence that is more critical to the effective operation of the criminal justice system than confession evidence, since it comes from the very individual who is in a position to know more about what took place than any other person in the world.

The impact of *Miranda*, regrettably, is that when *Miranda* works, it discourages people from providing that information to the system. I mean, it is effective. It is effective in the sense that if you are going to marshall police resources to the end of encouraging suspects not to say anything, eventually you are going to succeed, and *Miranda* has, in fact, succeeded. And as you suggest, Senator, the cost has been enormous.

Senator SESSIONS. I don't think people fully understand the cost of it. Sometimes, the person you catch is the little fish who slips up before he knows it and he has confessed on the big criminal. That is lost forever.

Do you remember, any of you, when *Miranda* was being argued and the defenders of it would say, well, nothing done here that a little shoe leather on the part of the police won't solve? Now, Mr. Romley, isn't it true that in some cases if a person doesn't give you the information, you will never prove who committed a crime?

Mr. ROMLEY. Senator Sessions, no question about it.

Senator SESSIONS. That is the reality, isn't it?

Mr. ROMLEY. It is the reality of the system.

Senator SESSIONS. And this idea that police officers can go out and investigate a burglary and always find out every member that was involved in it is dream land, in my view.

Mr. ROMLEY. That is correct.

Mr. CASSELL. Senator, I actually collected some data in Salt Lake City on that. We went into the district attorney's office there and had them look at a sample of cases, and they found that in 61 percent of the cases that they were filing the confession was necessary to that prosecution. So we are talking about a huge number of

cases that can only be filed because of some information obtained from the defendant.

Senator SESSIONS. It is remarkable to me—and I think it is a tribute to the police—that they can deliver *Miranda* and still be able to maintain contact, with the defendant and often get them to go on and confess. I used to make the joke, I wonder why they don't require you to say, if you are a plain idiot, you will confess; if not, you will keep your mouth shut and call your lawyer. Why don't you make that part of the *Miranda* statement?

Do you have any comment on that?

Mr. GALLEGOS. Yes, Mr. Chairman and Senator Sessions. As I testified, I have been in law enforcement since 1964, and in my experience I have never seen a person convicted of any crime without other evidence other than a confession. And usually a confession is simply a tool for the investigation, for the police officers to use.

And I would echo that the prosecutors here, and Judge Markman would agree, that they are not going to convict someone solely on the confession.

The experience that police officers have all the time is *Miranda* sets a threshold of such requirement of investigation in the gathering of evidence and in the presenting of the evidence that all-inclusive is what really adds to convictions. But is time-consuming and officers do have to go out and investigate and develop the case, and they solely don't do it on the confession. So I think it adds to a case, but it doesn't necessarily jeopardize the case.

Senator SESSIONS. And one of the things it does is once you have got that corroboration and a confession, you probably have a 95-percent chance they will plead guilty.

Mr. GALLEGOS. Absolutely, sir.

Senator SESSIONS. If you don't have that confession, you have got the corroborative circumstantial evidence. You may have to spend 3 days in trial with uncertain verdict, whereas the person is plainly guilty if his statement was admissible.

Mr. RICHMAN. Senator Sessions——

Senator SESSIONS. Let me ask the two of you one thing and then I will let you comment. I have been in this body for a little over 2 years, and I was a Federal prosecutor for 15 and an attorney general for 2. So prosecuting is my business, and I have been there and I have interviewed police officers and victims by the hundreds.

Do you have any numbers, or are you aware of any statistics that would indicate that a confession without a *Miranda* is any more unreliable than a confession after *Miranda* has been given?

Mr. THOMAS. No, Senator Sessions, I don't have any data along those lines. In fact, because most suspects waive the *Miranda* rights—as you said a minute ago, and it is a very insightful comment, the police are very effective in persuading suspects to waive their *Miranda* rights. They do so in most cases, and because suspects do waive in most cases, then the rules that are left to govern the interrogation are the old voluntariness rules.

So, in fact, in many cases we wind up with the old voluntariness rules being what courts use to decide whether the waiver and the later confession are valid. So, therefore, it seems to me *Miranda* probably does not add very much, if anything, to the protection of

the Due Process Clause in terms of preventing unreliable confessions.

Senator SESSIONS. Professor Richman, on this or any other subject would you like to cover?

Mr. RICHMAN. Just to clarify one point, Senator, you were speaking about the confession of the small fish being used down the road against the big fish. Regardless of what happens with *Miranda* or 3501, that really can't happen unless the sixth amendment jurisprudence of the Supreme Court is radically changed. The confessions of an out-of-court conspirator, unless he actually takes the stand and testifies, which in many cases obviously won't happen, cannot be used, although there will be a case in front of the Supreme Court this term or next that may clarify this somewhat.

Senator SESSIONS. What I would say about that is when you confess, you plead guilty. I mean, people who confess, have given up. They have said, you have got me, I am not going to go down there and lie, now just be as light and kind to me as you possibly can. And they say, well, who else was involved? Well, Billy and John and George.

So that is how it happens, in reality, would you not agree, Mr. Romley?

Mr. ROMLEY. Senator Sessions, absolutely. From a theoretical standpoint, Professor Richman raises a constitutional issue. But the real way that it works—say you have a small fish that may talk about individuals higher up in the hierarchy that are involved in criminal activity. What happens is that you offer that person some type of a plea bargain that may be a little bit more favorable for his testimony. He then takes the stand. The right of confrontation is overcome, and that is how you get to the higher criminals within an organization. It is a common tactic and it is not like you can't do it. It does occur on a day-to-day basis.

Senator SESSIONS. Well, we interrupted you. I apologize, Professor Richman.

Mr. RICHMAN. I just wanted to clarify that what I think you are quite right pointing out is what you would like is as soon as possible to get this small fry turned around and ready to go cooperating. One thing *Miranda* does do, and the jurisprudence of *Miranda* does do is, since he has a lawyer, he is quite sure that his confession is coming in. When warnings are given appropriately, litigation is generally trivial. It really comes up, and he probably will be cooperating quicker.

I just want to make one broader point, which is there is some reference by Professor Cassell to the politics of all of this. And I really can't speak to the politics; as just an exline prosecutor and as a professor, it is beyond me. But I am mystified by the fact that given that most of the custodial confessions in the United States happen in the State, not just because more criminal prosecutions occur in the State, but because that really is the meat and potatoes of State law enforcement, I think it is rather odd that in State jurisdictions, which I don't think in most States are particularly nice to criminals, and the alliance with criminals that Professor Cassell spoke about, we do not have this kind of move to 3501 legislation.

On the other hand, in the Federal system where for the most part, at least in the office I came from—our focus was on white col-

lar cases—there really will be very few custodial interrogations now, because now under the recent legislation that the Congress just passed, once the defendant has a lawyer, the prosecutors or their agents really can have no contact whatsoever with those suspects, shutting down the business completely.

So I really am a bit mystified as to why, in Congress, you are focusing on matters that the States normally are concerned with, while on the same hand when it comes to a strong Federal enforcement position Congress has decided for restraint lately.

Senator SESSIONS. You are referring to the Hyde legislation that just passed?

Mr. RICHMAN. I am referring to Ethical Standards for Federal Prosecutors Act.

Senator SESSIONS. You are right. It slipped in on a conference bill that had so much in it that the train couldn't be stopped.

Do you have any comment about that, Judge Markman? Are you familiar with the Hyde——

Judge MARKMAN. I am familiar generally, but not sufficiently to comment on the details.

Senator SESSIONS. I don't want to take the chairman's time. I have enjoyed this conversation. We do have a juvenile crime bill on the floor and I am managing it.

Mr. Romley, do you have a comment?

Mr. ROMLEY. Senator Sessions, Mr. Chairman, if I could just respond briefly to Professor Richman's one comment that States have not moved forward with statutes such as that, I think that from a general perspective most States haven't, but Arizona did. In 1969, Arizona passed a statute that pretty much emulated 18 U.S.C. 3501.

In 1983, our Arizona Supreme Court ruled that—it pretty much abrogated it, and I think that that is the real reason why we must get this up to the U.S. Supreme Court to decide the constitutionality. So States have attempted to be moving in that direction to some degree, at least, and we need to get this resolved at the U.S. Supreme Court. I think that the arguments are fair, they are reasonable, and I would hope the Department of Justice would change their position.

Senator SESSIONS. Professor Cassell, you can say what you would like, but would you not agree that the present state of Federal law makes it difficult for States to get a fair hearing on these cases? If the Federal law was changed, the States may well realize that the States could also change their laws.

Mr. CASSELL. Exactly, that is the experience we have had in Utah. I am involved with a number of crime victims organizations in Utah and we are certainly watching this case, and if the opening is there—if a favorable decision comes from the Supreme Court, then we will certainly seriously consider legislation.

Also, back in the 1980's Utah passed some legislation on the exclusionary rule. It ended up being invalidated on a Federal constitutional argument. So I think, as Mr. Romley was suggesting, if this matter can be straightened up at the Federal law, it will certainly open the door to States like Utah, Arizona. Indiana, I believe, had a similar statute at one point, and I would anticipate many others would move forward in that direction as well.

Senator SESSIONS. Well, I respect those of you who are nervous about this, the thought that the police are doing these bad things. But I really don't find it so in my experience. I believe that police officers daily do their best, and if we got a 15- or 20-percent increase in the number of cases that confess, you would also pick up a lot of co-defendants, career criminals. Cases wouldn't have to go to trial. People wouldn't be released to commit another year's worth of crimes before they get caught again.

It is the kind of thing that is the reality out there, and my own view is the costs of *Miranda* far exceed the benefits. Judge Markman, your analysis of it—I remember reading that at the time—was just brilliant and superb. I remember the work that you did on that and I thank you for it, and the work for the Department of Justice.

Judge MARKMAN. Thank you, Senator.

Senator SESSIONS. And I would say about Chairman Thurmond, I am not sure a lot of people, Mr. Chairman, realize—I was a State attorney general and Federal U.S. Attorney—how much benefit the Federal system has achieved from the changes and leadership you gave to it, particularly as chairman of this committee.

We have the Speedy Trial Act, where cases are literally tried within 70 days. There is honesty in sentencing and guidelines that mandate consistency of sentencing. Frequently, bail is denied for repeat, dangerous offenders, and they are given a prompt trial. One reason States are giving people bail when they shouldn't is because they have to wait 1 year or 2 to get tried. And you can't keep them in jail that long; it is just wrong. So if you are going to deny bail, you need a speedy trial. And there is no parole; parole has been eliminated.

Mr. Chairman, thank you for your leadership on all of that—and I am pleased to see you were an original sponsor of 3501, and I am amazed and pleased to join you on this committee to continue to fight for those issues.

Thank you.

Senator THURMOND. Senator, it is a pleasure to have you here, and I appreciate your comments. I was equally disappointed that the Justice Department refused to appear at this hearing. They should tell us in person why they are ignoring a law passed by the Congress. Thank you very much.

I have a few questions here I would like to propound.

Judge Markman, some officials in the Justice Department have indicated that the policy of prior administrations was that they would not invoke section 3501 in instances in which *Miranda* was applicable. Based on your personal experience in the Reagan and Bush administrations, did they have a policy prohibiting U.S. attorneys from raising section 3501?

Judge MARKMAN. During the Reagan administration, when I served as Assistant Attorney General, of course, there was no such policy. And as I have indicated, we made a number of efforts to attempt to promote reform of *Miranda*. During the Bush administration, where I served as U.S. attorney, there was also no prohibition. In fact, there are a number of instances in which 3501 was affirmatively invoked by individual U.S. attorneys.

Senator THURMOND. Judge Markman, while you were U.S. attorney in the Bush administration, did you ever attempt to invoke section 3501?

Judge MARKMAN. Yes, sir, I did. One case, in particular, I recall I personally handled. It was *People* v. *Kirkland* and I did personally raise the issue of a voluntary confession under 3501, and my recollection is that it was accepted by the trial judge. There were no further appeals in that case, however.

Senator THURMOND. Mr. Romley, I understand that Arizona has a statute very similar to section 3501. If the Supreme Court considers section 3501 and concludes that *Miranda* is not constitutionally required, would that decision help you enforce your voluntary confession law in Arizona, and would it encourage other States to pass a similar law?

Mr. ROMLEY. Mr. Chairman, yes, Arizona does have a law that is similar to 3501. It was passed in 1969. Our Arizona Supreme Court did rule that a voluntary confession, in the absence of *Miranda*, would be suppressed and therefore it is not applicable at this time. There is no question in my mind, Mr. Chairman, that if 3501 was held to be constitutional and the Supreme Court took that and ruled in that way, it would help Arizona to be able to allow voluntary confessions to come in.

Senator THURMOND. Mr. Romley, some say that enforcing section 3501 will complicate the consideration of whether a confession is voluntary and requires more suppression hearings in court. It seems to me that the only time more suppression hearings will be needed is if *Miranda* is not strictly complied with.

Do you think that using section 3501 would make it harder for the courts and the prosecutors, or would it simplify the process by eliminating the strict *Miranda* exclusionary rule?

Mr. ROMLEY. Mr. Chairman, if 3501 were in effect, from a practical standpoint in literally all cases any defense attorney will ask for a voluntariness hearing in any case. So there will always generally be a suppression hearing there. I don't think it will increase the workload itself. It will definitely help, though, the prosecutor in a voluntary statement to be able to hold those that I believe are guilty of a crime accountable for their actions.

Senator THURMOND. Mr. Gallegos, as you know, section 3501 encourages police to give the *Miranda* warnings because the warnings are a factor in determining whether a confession is voluntary. The question is do you think that if section 3501 is upheld, police will continue to give *Miranda* warnings?

Mr. GALLEGOS. Absolutely, Mr. Chairman. Police have been trained since 1966 to give the *Miranda* warnings, and really it has become commonplace in police practice. What we are looking for is a commonsense approach to those times that there are mistakes in the application of *Miranda*. And police do want to use tactics that are noncoercive and use of force and other kinds of means to get confessions that can't be upheld in court. So *Miranda* will still be used. It is just a different twist to it.

Senator THURMOND. Professor Thomas, the question of whether *Miranda* is required by the Constitution is open to different interpretations. However, until and unless the Supreme Court considers

this issue, do you believe that the Justice Department should attempt to enforce section 3501 in the lower Federal courts?

Mr. THOMAS. Senator, I certainly agree that ultimately this is a question for the Supreme Court. With respect to whether the Department of Justice ought to be using the statute, my honest opinion is, yes, they should. I sort of disagree with my friend, Professor Richman, on that.

It seems to me that the statute is clear enough and it gives the prosecutor an opportunity to use a different theory to get a confession admitted, and that if a prosecutor is trying to admit a confession, he or she ought to use all the avenues available. So, actually, I do agree that the Department of Justice should be using 3501, although I still believe it is probably unconstitutional.

Senator THURMOND. Professor Richman, as you know, the 10th circuit in *Crocker* and the fourth circuit in *Dickerson* have both upheld section 3501. I know you do not agree with these decisions. However, given that the two circuits have found section 3501 constitutional, do you think that a reasonable argument can be made that section 3501 is constitutional, and if so, doesn't the Justice Department have a duty to defend the statute before the Supreme Court?

Mr. RICHMAN. I certainly agree that certainly an argument can be made, a good argument can be made as to constitutionality. One of the problems has been you have Supreme Court language going all over the board since *Miranda* with respect to the necessity for these precise warnings to be given.

As to what the Justice Department's position should be with respect to the constitutionality of the statute, I am not speaking as a member of the Department, and from I gather today there have been certain commitments made in the past by Justice Department officials about what their positions would be. I don't know what those commitments were.

If I were writing on an empty slate, and were I to be involved in making the call on this, I would say that the Justice Department is not obliged to defend the constitutionality of a statute that, in its opinion, very much undermines a policy decision to have *Miranda* warnings given across the board. As I said, this is not considering past statements by the Justice Department which I am unaware of.

Senator THURMOND. Professor Cassell, I wish to commend you for your determination to get section 3501 enforced and your willingness to stand alone before the fourth circuit to defend it. Of course, that should not have been necessary. I believe the administration has a constitutional duty to enforce laws passed by the Congress if a reasonable argument can be made to uphold the law.

Please explain the executive branch's constitutional duty to enforce the laws, and has the Clinton administration defended laws before in which reasonable arguments could be made against its constitutionality?

Mr. CASSELL. Yes, Senator. The Department has repeatedly said that they have a duty to defend acts of Congress where reasonable arguments can be made on behalf of a law. So I don't think that there is any dispute about that. Clearly, that would be at least the

view of Congress and that is what the executive branch has promised Congress it will do.

Then the question becomes: If there is a reasonable argument to defend section 3501? And I think it is interesting when you look at the six of us that are here today, four of us have testified very directly in support of the law, that it seems to be constitutional, in our view. The other two witnesses, Professor Richman and Professor Thomas have both suggested the same thing.

Professor Richman just said a good argument can be made for the constitutionality of the statute, and Professor Thomas indicated that the Department ought to be using this. So I think all six witnesses here today would take what I think is the commonsense position here that there is a reasonable argument to be made on behalf of 3501.

And I should say you mentioned that I had to stand alone in the fourth circuit. I stood alone, but I felt that behind me were many career prosecutors all over the country that supported my position. Unfortunately, as we have seen in a number of cases, there are political appointees within the Department of Justice that don't want the voices of those career prosecutors to be heard, and I was very glad to have the opportunity to express their views as well.

Senator THURMOND. Professor Cassell, some feel that the *Miranda* ruling created two hurdles to admit a confession. The first is whether the precise *Miranda* were given. The second is whether the confession was otherwise voluntary. Under section 3501, there is only one hurdle. Is having one hurdle rather than two going to complicate matters or simplify them?

Mr. CASSELL. I think it is certainly going to simplify matters, Senator. Obviously, today, there is extensive litigation in a number of cases over *Miranda* technical details. The *Dickerson* case is a good illustration of that. There was an extensive hearing over the issue of exactly what time of the day were the *Miranda* warnings administered. All of that would become irrelevant under section 3501.

And I think we also are in a position to see how it is simplifying things. I understand that within district courts within the fourth circuit, it has actually simplified a number of hearings now. What were going to be complicated *Miranda* issues have simply disappeared. So, certainly, it is going to make life easier for Federal prosecutors and for Federal courts.

Senator THURMOND. Professor Cassell, my understanding of the position of the Department of Justice is that *Miranda* is constitutionally required, so they will not enforce section 3501 in the lower Federal courts. But they have not decided what they will do if the issue reaches the Supreme Court.

Were it not for people like you, would the courts have gotten the opportunity to consider whether the statute was constitutional?

Mr. CASSELL. Unfortunately, Senator, I think the only way the issue could be presented was by some of the organizations that I represented, the Washington Legal Foundation and a number of other organizations that are very concerned about the rights of law-abiding citizens and victims of crime.

As the fourth circuit opinion in *Dickerson* itself mentioned, it was our efforts as a friend of the court that brought this statute to the

attention of the court. And the fourth circuit mentioned there are some very serious ethical issues that are raised when parties do not call to the court's attention relevant legal authority.

I would think that a statute governing confessions, which is the way the Supreme Court has described 3501, would be the type of thing that the Department of Justice would always bring to the court's attention. Yet, in *Dickerson* they were failing to do this.

Senator THURMOND. Professor Cassell, the court in *Dickerson* said that the Government was elevating law over politics. What do you think they meant by that statement?

Mr. CASSELL. Well, I think for reasons that the Department has never articulated—and we could speculate about it, but for some reason the Department of Justice has decided that they want to do whatever they can to support the efforts of, for example, the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, and defense attorneys such as the attorney that represents Mr. Dickerson.

I think I called that an unholy alliance, and I think it is very odd when our Department of Justice which, of course, is charged with prosecuting the laws turns around and allies themselves with those who are typically on the other side of the courtroom, shall we say.

Senator THURMOND. Professor Thomas, some have argued that Section 3501 will roll back the clock to the confession standard that existed pre-*Miranda*. Do you believe that Section 3501 is an improvement on the law in this area from how it existed at the time of *Miranda*?

Mr. THOMAS. Yes, I do, Senator. I think 3501 is a very well-drafted piece of legislation. I think it is an improvement over the common law view of voluntariness, and I would much prefer that to the common law view.

That said, however, there is still the constitutional question. And if I might disagree slightly with my friend Paul Cassell, in response to your question about whether 3501 would simplify matters, he said it would. And I think it would, but only if most police continue to give *Miranda* warnings in most cases because *Miranda* is a nice safe harbor. *Miranda* makes it easy to get confessions admitted as long as it is complied with.

So as long as there are just a few cases where the *Miranda* warnings were not given and we have to deal with the voluntariness issue, 3501 presents a nice vehicle to do that. And I think I probably agree with Mr. Gallegos, too, that the police will continue. But if for some reason they did not continue to give *Miranda* warnings, then I think 3501 hearings would become rather complicated because of the fact that it is such a good statute, Senator.

It sets out six factors, I believe, or five factors that have to do with voluntariness. So I think that this could become a rather complicated procedure if it had to be done in most cases. But to the extent that the police continue to give *Miranda* warnings, then I think it is pretty good, actually.

Senator THURMOND. I think we have about completed this hearing. Before adjourning the hearing, I wish to note that I am pleased to have received a letter from the National Association of

Police Organizations supporting the enforcement of section 3501, and wish to place a copy of it in the record.

[The letter referred to follows:]

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.,
Washington, DC, May 11, 1999.

Hon. STROM THURMOND, *Chairman,*
Hon. CHARLES E. SCHUMER, Ranking Democrat,
Subcommittee on Criminal Justice Oversight,
Senate Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN THURMOND AND SENATOR SCHUMER: The National Association of Police Organizations (NAPO), representing more than 220,000 sworn law enforcement officers through 4,000 unions and associations nationwide, appreciates the opportunity to provide this brief statement, in connection with the Subcommittee's Thursday, May 13, 1999, hearing, "The Clinton Justice Department's Refusal to Enforce the Law on Voluntary Confessions".

We have had an opportunity to review the case of *United States* v. *Dickerson,* 166 F.3d 667 (4th Circuit 1999), which upheld and applied 18 U.S.C. § 3501, allowing for voluntary confessions to be admitted into evidence, notwithstanding the refusal of the Justice Department to enforce this provision in federal criminal cases and its recent assertion in the *Dickerson* case that the provision was unconstitutional.

NAPO firmly believes that the Administration, specifically the Justice Department, has an obligation to defend this law, especially in the context of a voluntary and uncoerced incriminating statement by Charles Dickerson, who was subsequently charged with bank robbery and related felonies. The Justice Department's refusal to defend this law could have resulted in the dismissal of these charges against Mr. Dickerson and may have contributed to the non-prosecution of dangerous felons, as noted by Justice Scalia in the case of *Davis* v. *United States,* 512 U.S. 452 (1994).

It is clear from the cases cited in *Dickerson* that the U.S. Supreme Court has never held that the *Miranda* warnings are constitutionally compelled. In fact, there is contrary language, including Chief Justice Warren's own analysis in *Miranda.* The Department's apparent position that the warnings are constitutionally compelled and that evidence obtained without the warnings must automatically be excluded, is troubling. We share the concern expressed in the Fourth Circuit's well-reasoned opinion in *Dickerson,* as articulated by Paul G. Cassell, Professor, University of Utah, College of Law, about the Department's "elevation of politics over law".

There has been much public misconception about the *Dickerson* case, § 3501, and the impact on *Miranda.* Those opposed to this statutory provision and this decision characterize it as a rollback, where warnings will no longer be given to suspects and coerced confessions allowed into evidence. That is not the situation. The consequences will be much more limited. If ultimately upheld by the Supreme Court, § 3501 would no longer prevent an incriminating statement by a suspect from automatically being excluded from admission into evidence, even if the *Miranda* warnings were not given because the police did not consider the suspect in custody, for example.

We believe that it is extremely doubtful that the vast majority law enforcement officers would stop giving *Miranda* warnings and that their departments would support that position. These warnings help assure uncoerced and voluntary statements. But, as the Congress recognized in enacting § 3501, the presence of the warnings is indicative of a lack of coercion but is not necessarily determinative on that issue. Indeed, under § 3501, the giving of the four *Miranda* warnings to a suspect in custody, prior to questioning, must be taken into consideration by the judge in determining the voluntariness of the confession or incriminating statement, and the failure of officers to give the warning will only increase the burden on the prosecution to show that a confession or statement was voluntary and not coerced. However, rather than focus on whether the *Miranda* warnings were required and given, a court would have to focus on whether the suspect's statement was uncoerced and voluntarily given.

The court's ruling in *Dickerson* will especially address the "grey" areas, where there is a genuine dispute as to whether the warnings were required. What this means is that if the police do not provide the warnings, because they do not believe that they have not placed a suspect in custody—he or she is free to leave—or that they have not begun to interrogate a suspect who is in custody, but a court later disagrees, they will still be able to use any incriminating statement, provided, once again, that the court finds that it was freely and voluntarily given and not in violation of the suspect's privilege against self-incrimination.

Section 3501 applies only to Federal prosecutions and not to prosecutions by state and local authorities. Hence, it is not directly applicable to state and local law enforcement officers, the officers whom NAPO mainly represents. However, NAPO strongly believes that the *Dickerson* case and the outcome of the Supreme Court's expected review of that case will eventually significantly impact local law enforcement. State courts can be expected to follow the *Dickerson* ruling, reconsider the issue, and fashion court-made law on whether the failure to give *Miranda* warnings requires the exclusion of evidence under both the federal and state constitutions. Likewise, depending on the eventual outcome of this controversy, state legislatures can be expected to consider legislation, similar to § 3501, at the state level.

We commend you for holding this hearing, to shed light on the Justice Department's past refusal to defend this law and on the Department's future plans, if the U.S. Supreme Court accepts review. It would also be helpful to know the Department's current directives to its prosecutors in the states covered by the Fourth Circuit concerning implementation of the law.

Thank you for the opportunity to comment on this important issue. Please let us know if we can be of further assistance.

Sincerely,

(Signed) Robert T. Scully

(Typed) ROBERT T. SCULLY,
Executive Director.

Senator THURMOND. I also would like to place in the record a letter from former Attorney General Ed Meese, Dick Thornburgh, and William Barr explaining the Reagan and Bush administrations' policy in support of section 301.

[The letters referred to follow:]

EDWIN MEESE III,
Washington, DC, May 12, 1999.

Hon. STROM THURMOND, *Chairman,*
Subcommittee on Criminal Justice Oversight,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter responds to your questions concerning various aspects of the Department of Justice's views and positions on 18 U.S.C. § 3501 during the Administration of President Ronald Reagan. Let me provide you with a brief description of the various decisions that we made in the Department of Justice concerning the statute and then I will answer your specific questions.

After an exhaustive review of the question during my tenure as Attorney General, the Department of Justice's Office of Legal Policy concluded that the rigid exclusionary rule of *Miranda* v. *Arizona* was not constitutionally mandated, and that if the question were presented to it, the Supreme Court would likely agree with this conclusion. We published this study under the Department's auspices, as the conclusion of the Department of Justice on the question.

In this same study, we concluded that 18 U.S.C. § 3501 was constitutional, and that admission of voluntary confessions pursuant to its provisions was accordingly a legitimate objective for the Department to seek.

I also asked Associate Deputy Attorney General Paul Cassell to direct a search for the right case to use as a vehicle for testing the statute's constitutionality in the Supreme Court. Consequently, Department attorneys proposed a Fifth Circuit case for consideration that the Solicitor General argued was not a good one to use as a test. I decided against seeking to invoke the statute in that case, because we would have been raising the argument for the first time in a petition for rehearing en banc of a panel decision by the court. That is my recollection of the decision I made at the meeting during the spring of 1987 referred to in Charles Fried's book, "Order & Law," at pp. 45–47.

We continued to monitor cases, and the Department did in fact argue for admission of statements pursuant to the statute in at least one later case of which I am aware, *United States* v. *Goudreau*. This was in a brief filed in the Eighth Circuit on October 20, 1987, several months after the meeting Professor Fried described. In that case a police officer with the Bureau of Indian Affairs was investigated and subsequently indicted for using excessive force during an arrest. He gave his version of events during an interview at the Law Enforcement Services Building on the reservation, which he attended at his supervisor's instructions. The district court suppressed his statements, finding that he should have received *Miranda* warnings before the interview. The government took an interlocutory appeal. The Department's principal argument to the Eighth Circuit was that the officer was not in custody

at the time he made the statements, and therefore *Miranda* warnings were unnecessary. But we also made the alternative argument that the statements were admissible under § 3501 regardless of whether the officer should have been given the warnings, because the officer had made the statements voluntarily. The Eighth Circuit did not reach our second argument, because it decided the statements were admissible as a result of the first argument.

I should add that during my tenure as Attorney General, so far as I am aware, neither I nor anyone else at the Department of Justice ever directed anyone in a United States Attorney's Office not to make an argument based on § 3501. Nor did we ever pull back a brief in which such an argument had been made.[1]

Thus, our position on *Miranda* was: (1) that none of *Miranda's* procedural requirements, including its exclusionary rule, is constitutionally required (and, I should add, I believe this was the position of every other prior Administration other than that of Presidents Lyndon Johnson); (2) that 18 U.S.C. § 3501 was constitutional; (3) that the Department could appropriately invoke § 3501 in the lower federal courts to seek the admission of voluntary but unMirandized statements, and in fact we did so in at least one case of which I am aware; and (4) that not only were there reasonable arguments the Department could make in defense of § 3501 (the standard the Department has historically applied in considering whether to defend a federal statute), but that those arguments were correct, and that the Department should defend § 3501 against constitutional challenge throughout the federal court system. To the extent Department officials have said anything to the contrary, I would respectfully suggest that they are mistaken.

Because I share your concern about the current Administration's refusal to defend the constitutionality of section 3501, I commend you for holding an oversight hearing to explore this important issue. Thank you for this opportunity to share my views.

Sincerely,

(Signed) Ed
(Typed) EDWIN MEESE III.

October 7, 1999.

Hon. STROM THURMOND,
Chairman, Subcommittee on Criminal Justice Oversight, Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: This letter responds to your questions concerning the positions the Department of Justice took during my tenure as Attorney General on the constitutional status of various aspects of *Miranda* and 18 U.S.C. § 3501.

As to *Miranda,* by the time I became Attorney General, I believe the Department viewed it as clear from the Supreme Court's cases that the warnings set out in that case were not themselves constitutional rights, but were rather, as the Court had by that time said repeatedly, prophylactic devices intended to add an extra layer of protection to the rights set out in the Fifth Amendment. We routinely described the warnings that way in our Supreme Court briefs, *see, e.g., Minnick* v. *Mississippi,* No. 89–6332, Brief for the United States as Amicus Curiae Supporting Petitioner; *Michigan* v. *Harvey,* No. 88–512, Brief for the United States as Amicus Curiae Supporting Petitioner, and I assume we did so in our briefs in the lower federal courts.

Likewise, we regularly argued that *Miranda's* exclusionary rule was not constitutionally required, distinguishing it from the rule requiring exclusion of coerced confessions, which came directly from the Fifth Amendment. Therefore, for example, we argued that since a per se exclusionary rule will inevitable result in the exclusion of some voluntary confessions, Miranda's exclusionary rule should not be applied in cases where the risk of coercion against which Miranda sought to protect was slight, *see, e.g., Minnick* v. *Mississippi, supra.* Likewise, we argued against application of *Miranda's* exclusionary rule when the additional deterrence that would stem from it was limited, and the harm to the search for truth that a criminal trial is supposed to serve would be great. *See, e.g., Michigan* v. *Harve, supra.* We noted that such considerations were legitimate in deciding the scope of *Miranda's* exclusionary rule precisely because it "sweeps more broadly than the Fifth Amendment itself," *Oregon*

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[1] The only decision that I made against the use of § 3501 was in the Fifth Circuit case mentioned above, where the decision was consistent with a United States Attorney's office's own reservations about invoking the section given the posture of the case. In that case, my decision was not the result of doubts about the statute's constitutionality, but the fact that the consensus in the Department was that several features made that case a poor vehicle for testing the statute's constitutionality.

v. *Elstad,* 470 U.S. 298, 306–07 (1985), whereas they had no role in deciding the scope of the Fifth Amendment's exclusionary rule, which bars admission of compelled self-incrimination without regard to policy considerations of this type, Brief in *Minnick, supra;* brief in *Harvey, supra.*

With regard to § 3501, I do not remember any cases or discussions within the Department that I was aware of that related to the invocation of that statute during my tenure as Attorney General. At the same time, I certainly know of no policy that would have prevented individual U.S. Attorneys from making arguments based on this provision. In fact, while I was not aware of it at the time, I have recently learned that while I was Attorney General, at least one U.S. Attorney did invoke the provision in at least one district court case.

Finally, I do not believe the question of whether to defend the constitutionality of § 3501 came up during my tenure. What I can say, however, is that when an Act of Congress is challenged as unconstitutional, the Department of Justice's longstanding practice, which we followed, is to defend the statute against that challenge unless there is no reasonable argument that could be made in its defense. *See, e.g.,* The Attorney General's Duty to Defend the Constitutionality of Statutes, 43 Op. Atty. Gen. 325 (1981) (Opinion of Attorney General Smith); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Atty. Gen. 275 (1980) (Opinion of Attorney General Civiletti).[1]

Under that standard, looking at the question now, it seems to me that § 3501 is easily defensible. The Fifth Amendment's text prohibits only compelled testimony. Thus, it is hard to see how it could possible require the exclusion of voluntary custodial confessions, which are the only kind that § 3501 makes admissible. While the Supreme Court did hold in *Miranda* that a confession obtained from a suspect in police custody without certain procedural safeguards could not be admitted whether or not it was voluntary, the Congress is free to modify that rule by 2 statute unless the rule is constitutionally required.[2] On the basis of the cases cited in the briefs I referred to above, it seems fairly clear that the Court does not view *Miranda's exclusionary rule as a constitutional requirement. To be sure, the Supreme Court has never ruled directly on the statute's constitutionality, but the provision seems perfectly consistent with doctrinal developments since Miranda,* and those developments seem difficult if not impossible to square with any theory under which the provision could found unconstitutional. Finally, two courts of appeals have upheld § 3501's constitutionality and none has struck it down. In fact, my personal view is that since *Miranda's* exclusionary rule was not a constitutional directive, it is not only reasonable but legally correct to say, as the Court of Appeals ruled in *Dickerson,* that § 3501 is a legitimate exercise of the legislative authority to deal with questions of admissibility of evidence. I should add that although I have given this question fairly careful thought, I may be wrong and the Supreme Court may disagree. I do, however, find it hard to believe that a position that two courts of appeals have backed and that I believe is correct, could not only be wrong, but could be so unreasonable that the Department of Justice would not have an obligation to advance it in defense of an enactment of Congress.

Sincerely,

DICK THORNBURGH.

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[1] The Department has generally recognized one limited exception to this rule, pursuant to which it also generally will not defend statutes that it believes unconstitutionally trench on the executive branch's power, even if there is a reasonable argument that could be made in favor of the statute. *See* Civiletti opinion cited above. That exception plainly has no application in the case of § 3501, which attempts to restore, rather than contract, executive power.

[2] *See,* for example, Act of September 2, 1957, 71 Stat. 595 (codified at 18 U.S.C. § 3500) ("Jencks" Act) (making non-discoverable certain material that would have been discoverable by the defense under the rule set out in *Jencks* v. *United States,* 353 U.S. 657 (1957) (upheld as a proper exercise of Congressional power in *Palermo* v. *United States,* 360 U.S. 343 (1959)).

It is perhaps worth noting that the Palermo court described the Jencks Act as "governing the production of statements to government agents by government witnesses," 360 U.S. at 345, and as "the rule of law governing the production of the statement at issue in this case," 360 U.S. at 351. This language is strikingly similar to that used in Justice O'Connor's majority opinion in *Davis* v. *United States,* 512 U.S. 451 (1994), where she noted the government's failure in arguing for the admission of incriminating statements made by a defendant in police custody "to rely * * * on 18 U.S.C. § 3501, the statute governing the admissibility of confessions in federal prosecutions,' *United States* v. *Alvarez-Sanchez* 511 U.S. 350, 351, 128 L.Ed. 2d 319, 114 S. Ct. 1599 (1994)." *Davis,* 512 U.S. at 457 n*.

July 22, 1999.

The Hon. STROM THURMOND,
Chairman, Subcommittee on Criminal Justice Oversight,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter responds to your questions regarding the Department of Justice's views and positions on 18 U.S.C. § 3501 during my tenure as Attorney General in the Administration of President George W. Bush. This letter is based on my own recollection as well as consultation with people who served in the Department of Justice during the Bush Administration.

It was the position of the Department of Justice during my tenure as Attorney General that *Miranda* v. *Arizona's* procedural requirements and its per se exclusionary rule were not constitutionally mandated. We made arguments to this effect in the United States Supreme Court, *see, e.g.;* Brief for the United States as Amicus Curiae in *Withrow* v. *Williams,* No. 91–1030; Brief for the United States as Amicus Curiae in *Parke* v. *Raley,* No. 91–719. In some cases, the Department of Justice also participated as amicus curiae in support of the State in the lower federal courts. Our legal position in this regard was based in large part upon the report issued by the Office of Legal policy in the previous Administration and upon subsequent Supreme Court decisions which made it clear that the *Miranda* regime was not required by the Fifth Amendment.

We also took the position that 18 U.S.C. § 3501 was constitutional as an exercise of Congress' authority to control the admission of evidence before federal courts. As the senior officer of the prosecuting arm of the Executive Branch, I believed that the Department of Justice should be prepared to use all of the legal tools at its disposal, within constitutional bounds, to seek the conviction of the guilty and exoneration of the innocent. This certainly included making a criminal defendant's voluntary statements regarding the crime available to the finder of fact. Accordingly, during my tenure, the United States Attorneys' Offices were authorized and encouraged to raise 18 U.S.C. § 3501 as an argument for the admission of reliable evidence of guilt that would otherwise be kept from juries by the *Miranda* doctrine. As far as I am aware, no case during my tenure as Attorney General was a United States Attorneys' Office prohibited from relying upon section 3501 in any forum. .

In 1991, I instructed a Special Assistant to the Attorney General to undertake the task of locating a test case for the constitutionality of 18 U.S.C. § 3501. Contacts were made with United States Attorneys' Offices to find an appropriate case where the issue could be raised and preserved for appellate review. Although no proper vehicle for pursuing the issue was generated prior to the end of the Administration, the effort demonstrates the Bush Administrations commitment to use and defend section 3501 and seek a definitive adjudication as to its constitutionality.

To summarize, during my tenure as Attorney General of the United States:

(1) We adhered to the position of prior Administrations that *Miranda's* procedural requirements and exclusionary rule were not constitutionally mandated;

(2) We took the position that section 3501 was a constitutional exercise of Congress' authority over the admissibility of evidence in federal court;

(3) We authorized the United States Attorneys' Offices to use section 3501 to promote the admissibility of reliable evidence of guilt in federal criminal prosecutions; and

(4) We stood ready to defend the constitutionality of the statute in the Courts of Appeals and the United States Supreme Court.

I hope this letter is of assistance to you and that it helps to clarify the historical record as to the position of the Department of Justice regarding the constitutionality of 18 U.S.C. § 3501.

Sincerely,

WILLIAM P. BARR.

Senator THURMOND. Further, I wish to place in the record a copy of the following letters: a September 10, 1997, letter from Attorney General Reno reporting to the Senate that the Department of Justice will not defend the constitutionality of section 3501 in the lower Federal courts; a November 6, 1997, memorandum from Acting Assistant Attorney General John Keeney to all U.S. attorneys prohibiting them from invoking section 3501 without permission; a March 4, 1999, letter that I sent, along with Senator Hatch and others to Attorney General Reno on this issue, the April 15, 1999,

response to that request, and also a letter to James Robinson, Assistant Attorney General of the Criminal Division dated May 6, 1999 inviting him to this hearing.

[Senator Thurmond submitted the following materials:]

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, September 10, 1997.

The Hon. ALBERT GORE, JR.,
President of the Senate, Washington, DC.

DEAR MR. PRESIDENT: I am writing to notify you that the Department of Justice has taken the position that the federal courts of appeals and district courts may not apply 18 U.S.C. § 3501 to admit a voluntary confession in a case in which *Miranda* v. *Arizona,* 384 U.S. 436 (1966), would require its exclusion, and that the Department of Justice cannot argue that they do so.

In *United States* v. *Tony Leong,* No. 96–4876, the government appealed the suppression of an unwarned statement elicited by the police during a traffic stop. The government argued that the defendant was not in custody when he made the statement, and therefore he was not entitled to *Miranda* warnings. The Fourth Circuit affirmed the suppression order, finding, contrary to the government's argument, that the defendant was in custody when he made the incriminating statement and therefore that suppression of his unwarned statement was required by the Supreme Court's decision in *Miranda.* Shortly thereafter, the court directed the parties to address the applicability of Section 3501 to the government's appeal. In response to that order, the Department filed a brief advising the Fourth Circuit that it could not apply Section, 3501 to admit a confession taken in violation of the Supreme Court's decision in *Miranda* unless and until the Supreme Court overrules or modifies that decision. A copy of the Department's brief in *Leong* is attached.

Because the Department has not determined that it will decline to defend the constitutionality of Section 3501 in the Supreme Court, should the issue arise there, it is unclear whether the reporting requirements of Pub. L. No. 96–132, 21(a)(2), 93 Stat. 1049–50 (1979), are triggered by our filing in *Leong.* Nevertheless, should the Department's determination that it will "refrain from defending" Section 3501 in the lower courts trigger the statute's reporting requirements, this letter will serve as that report.

Sincerely,

JANET RENO.

Enclosure.

[EDITOR'S NOTE: The above mentioned enclosure is located in the subcommittee's file.]

U.S. DEPARTMENT OF JUSTICE,
CRIMINAL DIVISION,
Washington, DC, November 6, 1999.

FROM: John C. Keeney, *Acting Assistant Attorney General.*

SUBJECT: 18 U.S.C. § 3501.

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS AND ALL CRIMINAL DIVISION SECTION CHIEFS

Section 3501 of Title 18, United States Code, provides that "in any criminal prosecution brought by the United States," a confession "shall be admissible in evidence if it is voluntarily given." The statute requires trial judges to make a threshold determination of voluntariness outside the presence of the jury, and provides that voluntariness shall be assessed based on the totality of the circumstances—including whether or not the "defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him," and whether the defendant had been advised of his right to counsel. Section 3501(b) states, however, that the "presence or absence" of any particular factor—including whether the defendant received the warnings required by *Miranda* v. *Arizona,* 304 U.S. 436 (1966)—"need not be conclusive on the issue of voluntariness of the confession."

Section 3501 was intended by Congress to secure the admissibility, in federal courts, of voluntary statements that would otherwise be suppressed under *Miranda.*

Since its enactment in 1968, the statute has rarely been invoked by federal prosecutors, however, in part due to questions as to its constitutionality that were recognized even by Congress when it passed the law. *See, e.g.,* S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2137–2138. ("No one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted * * *. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability * * * is that this legislation would be upheld.")

Recently, in *United States* v. *Leong,* No. 96-4876, the Fourth Circuit directed the parties to address the applicability of Section 3501 in a case in which a defendant's admission was suppressed for failure to give *Miranda* warnings. The Department thoroughly reviewed the legal issues and came to the conclusion that unless the Supreme Court were to modify or overrule the *Miranda* and the cases that have continued to apply it, the lower courts are not free to rely on Section 3501 to admit statements that would be excluded by *Miranda,* and the *United States is not free to urge lower courts to do so. The Fourth Circuit ultimately* declined to address the applicability of Section 3501 because the issue was not raised in the district court.

The Department has not yet decided whether it would ask the Supreme Court in an appropriate case to overrule or modify *Miranda. While the Department considers this issue, federal prosecutors should not rely on the voluntariness provision of Section 3501 to urge the admission of a statement taken in violation of* Miranda *without first consulting with the Criminal Division.*

Copies of the brief in the *Leong* case are available from the Appellate Section of the Criminal Division. If you have any questions about this issue, please contact Patty Merkamp Stemmler, Chief of the Appellate Section.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, March 4, 1999.

Hon. JANET RENO,
Attorney General,
Department of Justice, Washington, DC.

DEAR MADAM ATTORNEY GENERAL: As members of the Senate Judiciary Committee, we bring to your attention the case of *United States* v. *Dickerson,* No. 97–4750, (4th Cir. 1999). In *Dickerson,* the court thoroughly addressed and upheld the constitutionality of 18 U.S.C. § 3501. As you know, this statute provides that in a federal prosecution, "a confession * * * shall be admissible in evidence if it is voluntarily given." In a September 10, 1997, letter, you notified Congress that the Department of Justice would neither urge the application nor defend the constitutionality of 18 U.S.C. § 3501 in the lower federal courts. Given that *United States* v. *Dickerson* rejects your legal position and upholds the constitutionality of the statute, we would like a commitment from you faithfully to execute this federal law.

The facts in *Dickerson* are disturbing: On January 27, 1997, Charles Dickerson confessed to robbing a series of banks in Maryland and Virginia. After being indicted for armed robbery, Dickerson moved to suppress his confession. The U.S. District Court specifically found that Dickerson's confession was voluntary under the Fifth Amendment, but it nevertheless suppressed the confession because of a technical violation of the *Miranda* warnings. In ruling on the admissibility of Dickerson's confession, however, the district court failed to consider 18 U.S.C. § 3501.

Despite the fact that Dickerson voluntarily confessed to a series of armed bank robberies, the Department of Justice prohibited the U.S. Attorney's office from arguing 18 U.S.C. § 3501 in its appeal of the suppression order. Unfortunately, the Department's refusal to apply this law is not an isolated event. As the court in *Dickerson* noted, "over the last several years, the Department of Justice has not only failed to invoke 3501, it has affirmatively impeded its enforcement." In numerous cases, the Clinton Administration has adamantly refused to utilize this statute to admit voluntary confessions into evidence. *See Davis* v. *United States,* 512 U.S. 452 (1994); *Cheely* v. *United States,* 21 F.3d 914 (9th Cir. 1994); *United States* v. *Sullivan,* 138 F.3d 126d (4th Cir. 1998); *United States* v. *Leong,* No. 96–4876 (4th Cir. 1997); *United States* v. *Rivas-Lopez,* 988 F. Supp. 1424, 1430–36 (D. Utah 1997).

As the *Dickerson* court noted, "[w]ithout his confession it is possible, if not probable, that [Dickerson] will be acquitted. Despite that fact, the Department of Justice, elevating politics over law, prohibited the U.S. Attorney's office from arguing that Dickerson's confession is admissible under the mandate of 3501." Needless to

say, we find this criticism of the Department of Justice from a federal court of appeals deeply troubling.

Many in Congress have long believed that the current Justice Department's position on the constitutionality of 18 U.S.C. § 3501 is suspect and would be so proven in court. The *Dickerson* court, after an exhaustive examination, rejected the Department's position and ruled that 18 U.S.C. § 3501 is "clearly" constitutional. The court stated: "We have little difficulty concluding, therefore, that 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts, is constitutional." The other courts that have directly addressed § 3501 have also rejected your conclusion and upheld the constitutionality of the statute. *See United States* v. *Crocker,* 510 F.2d 1129, 1137 (10th Cir. 1975); *United States* v. *Rivas-Lopez,* 988 F. Supp. 1424, 1430–36 (D. Utah 1997). In addition, every court to which you have presented the other portion of your argument—that there is a bar on the lower federal courts applying this Act of Congress in cases before them—has also rejected that view. *See United States* v. *Dickerson,* No. 97–4750 (4th Cir. 1999); *United States* v. *Leong,* No. 96–4876 (4th Cir. 1997); *United States* v. *Rivas-Lopez,* 988 F. Supp. 1424 (D. Utah 1997).

We want to emphasize that 18 U.S.C. § 3501 does not replace or abolish the *Miranda* warnings. On the contrary, the statute explicitly lists *Miranda* warnings as factors a district court should consider when determining whether a confession was voluntarily given. As the *Dickerson* court recognized, providing the *Miranda* warnings remains the surest way to ensure that a statement is voluntary. As such, we expect federal law enforcement officials to continue to give *Miranda* warnings. In our view, the promise of 18 U.S.C. § 3501 is that it retains every incentive to give *Miranda* warnings but does not require the rigid and unnecessary exclusion of a *voluntary* statement.

In his 1997 confirmation hearing, Solicitor General Seth Waxman pledged "to defend the constitutionality of Acts of Congress whenever reasonable arguments are available for that purpose * * *" The *Dickerson* decision demonstrates beyond doubt that there are "reasonable arguments" to defend 18 U.S.C. § 3501. In fact, these arguments are so reasonable that they have prevailed in every court that has directly addressed their merits.

Given that *United States* v. *Dickerson* upholds the constitutionality of this statute, we believe that the time has come for the Department of Justice faithfully to execute this federal law. This commitment entails seeking the admission in federal court of any voluntary statement that is admissible under § 3501 even if it is in technical violation of *Miranda.* In addition, we also seek and expect a commitment from you to defend the constitutionality of this Act of Congress before both the lower federal courts and the Supreme Court.

Accordingly, we look forward to hearing from you by March 15 concerning 1) what position the Department of Justice will take in *Dickerson* should the Fourth Circuit call for a reply to the defendant's petition for rehearing; 2) what position the Department of Justice will take in *Dickerson* should the Fourth Circuit grant rehearing; 3) what position the Department of Justice will take in *Dickerson* should the defendant seek certiorari; 4) whether the Department of Justice will now take the necessary steps to ensure that its attorneys invoke § 3501 in cases where it is needed to ensure the admissibility of voluntary statements that may otherwise be found inadmissible.

Sincerely,

(Signed) Orrin Hatch,
(Signed) Strom Thurmond,
(Signed) Spencer Abraham.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, April 15, 1999.

Hon. STROM THURMOND, *Chairman,*
Subcommittee on Criminal Justice Oversight,
Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am responding to your March 4, 1999, letter also signed by several other Members of the Judiciary Committee regarding the case of *United States* v. *Dickerson,* No. 97–4750 (4th Cir. 1999). As noted in your letter, in *Dickerson,* the panel majority held that a federal district court may admit into evidence, pursuant to 18 U.S.C. § 3501(a), a voluntary confession taken in violation of

the Supreme Court's decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). In light of the *Dickerson* decision, you have asked what position the Department of Justice will take in that case should the Fourth Circuit call for a reply to the defendant's petition for rehearing. You also ask what position the Department will take should the Fourth Circuit grant rehearing. An identical response is being sent to the other signatories of your letter.

The Fourth Circuit requested our views on whether it should rehear *Dickerson.* Pursuant to that request, on March 8, 1999, the Department filed a brief in support of partial rehearing en banc. In that brief, a copy of which is enclosed, we noted that the constitutionality of Section 3501(a) is a question of exceptional importance deserving the attention of the en banc court. We reiterated our position, set forth 2 years ago in our brief in *United States* v. *Leong,* No. 96–4876, that the *Miranda* decision and its progeny represent an exercise of the Supreme Court's authority to implement and effectuate constitutional rights, and therefore those decisions are binding on Congress. Critical to our conclusion that Congress was without authority to overrule *Miranda* through the enactment of Section 3501(a) is the fact that the Supreme Court has consistently applied *Miranda* to the States and on federal habeas review of state convictions, which it could not do unless *Miranda* had constitutional underpinnings. Moreover, we explained in our submission to the Fourth Circuit in *Dickerson* that, as the Supreme Court recently reiterated in *Agostini* v. *Felton,* 117 S. Ct. 1997 (1997), the lower federal courts are bound by Supreme Court holdings unless and until the Supreme Court itself overrules them. For that reason, we took the position that the panel's determination to give effect to Section 3501 rather than the Supreme Court's decision in *Miranda* was error. On March 30, 1999, the Fourth Circuit denied Dickerson's petition for rehearing en banc by a vote of 8 to 5.

You also ask what position the Department will take in *Dickerson* should the defendant seek certiorari. We cannot answer that question at this time, as our response to the petition will depend in part on the issues raised in the petition. Further, we have not yet determined what our position will be if the Supreme Court grants certiorari in *Dickerson* or in any other case to determine the continued vitality of *Miranda* and hence the constitutionality of Section 3501.

Finally, you ask whether the Department will now take steps necessary to ensure that its attorneys invoke Section 3501 in cases where it is needed to ensure the admissibility of voluntary statements that may otherwise be found inadmissible. For the reasons stated in our brief in *Dickerson,* we do not believe that prosecutors are free to urge the lower courts to apply Section 3501. We acknowledge, however, that in the Fourth Circuit, where the panel decision in *Dickerson* is controlling authority, the district courts are free to apply the statute. Accordingly, we have instructed federal prosecutors in that circuit to bring Section 3501 and the *Dickerson* decision to the district court's attention in any case in which a defendant is seeking suppression of a confession.

Sincerely,

(Signed) Dennis Burke

(Typed) DENNIS K. BURKE,
Acting Assistant Attorney General.

Enclosure.

[EDITOR'S NOTE: The enclosure mentioned in this letter has been retained in Subcommittee files.]

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, May 6, 1999.

The Hon. JAMES K. ROBINSON,
Assistant Attorney General, Criminal Division, Washington, DC.

DEAR MR. ROBINSON: On Thursday, May 13, 1999, the Subcommittee on Criminal Justice Oversight of the Senate Judiciary Committee will hold a hearing concerning the enforcement of 18 U.S.C. 3501, which is the statute the Congress passed to govern the admissibility of confessions in Federal court in response to the Supreme Court's decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). This letter is to request that you testify before this subcommittee on behalf of the Department of Justice. The hearing will be held at 2:00 p.m. in Room 226 of the Senate Dirksen Office Building.

We would like for you as Chief of the Criminal Division to discuss the Criminal Division's approach toward the statute generally, including both currently and his-

torically, in the context of *Miranda*. For example, we would like to know whether and how the Department plans to approach 18 U.S.C. 3501 in the Fourth Circuit, given that the Fourth Circuit ruled the statute constitutional in *United States* v. *Dickerson*, 166 F.3d 667 (4th Cir. 1999).

In discussions with my staff, the Department has expressed reservations about testifying because the Supreme Court may consider the *Dickerson* case, which would necessitate the Solicitor General deciding whether and how to defend the Constitutionality of this law. It is true that we are interested in knowing as soon as possible whether the Department will defend the Constitutionality of the statute because I believe the Senate Legal Counsel should attempt to defend the statute if the Department chooses not to. However, the subcommittee is not attempting to interfere in the Department's handling of any particular pending case, and you are free to decline to answer any questions that you do not feel are appropriate. The hearing will consider all aspects of the statute and not solely one case in which the statute has been addressed. I believe that our evaluation of this issue would be more useful and complete with your participation.

This is one of the first issues related to the Criminal Division on which our subcommittee is conducting its oversight authority, and we would appreciate your cooperation. If you cannot attend personally, please send someone in your place who could discuss this issue. If you have any questions, please contact me or Garry Malphrus of my subcommittee staff at 224–4135.

Thank you for your consideration.

Sincerely,

STROM THURMOND,
Chairman, Subcommittee on Criminal Justice Oversight.

Senator THURMOND. Finally, I would like to submit a copy of 18 U.S.C. 3501 and a copy of the chart I have behind me listing cases that have criticized the Department of Justice for its refusal to enforce the law on voluntary confessions.

[18 U.S.C. 3501 and the chart referred to follow:]

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

(Added Pub.L. 90-351, Title II, § 701(a), June 19, 1968, 82 Stat. 210, and amended Pub.L. 90-578, Title III, § 301(a)(3), Oct. 17, 1968, 82 Stat. 1115.)

Historical Note

1968 Amendment. Subsec. (c). Pub.L. 90-578 substituted "magistrate" for "commissioner" in three instances.

Legislative History. For legislative history and purpose of Pub.L. 90-351, see 1968 U.S. Code Cong. and Adm.News, p. 2112. See, also, Pub.L. 90-578, 1968 U.S.Code Cong. and Adm.News, p. 4252.

Federal Practice and Procedure

Admissibility of voluntary confessions, see Wright: Criminal 2d § 72 et seq.
Admissible or inadmissible evidence, see Wright & Graham: Evidence § 5191 et seq.
Confessions, see Wright: Criminal 2d § 414.
Determination of preliminary questions, see Wright & Graham: Evidence § 5051 et seq.
History of Federal Rules of Evidence, see Wright & Graham: Evidence § 5001 et seq.
Instructions on confessions, see Wright: Criminal 2d § 494.
Privileges, see Wright: Criminal 2d § 406 et seq.

Federal Jury Practice and Instructions

Confession or admission—when involuntary, see § 15.07.
Extrajudicial statements or conduct, see § 15.06.

Library References

Criminal Law ⟹517(1), 517.1(1), 519(1).
C.J.S. Criminal Law §§ 817 et seq., 817(1), 817(2) et seq.

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What The Courts Have Said About the Voluntary Confessions Law 18 U.S.C. § 3501

"The United States' repeated refusal to invoke § 3501 . . . may have produced — during an era of intense national concern about the problem of run-away crime — the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this."

Davis v. United States, 512 U.S. 452, 465 (1994) (Scalia, J., concurring).

"The government implies that the Miranda jurisprudence since the Crocker case would undoubtedly persuade this circuit to alter its course if given the chance, but apparently the government does not want to give the Tenth Circuit that chance."

United States v. Rivas-Lopez, 988 F.Supp. 1424, 1435 (D. Utah 1997).

"[T]he Department of Justice, elevating politics over law, prohibited the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501. Fortunately, we are a court of law and not politics. . . . No longer will criminals who have voluntarily confessed their crimes be released on mere technicalities."

United States v. Dickerson, 166 F.3d 667, 672, 692 (4th Cir. 1999).

"After all, Congress . . . uses the public hearings process to examine the policies and conduct of the executive. . . . Congress therefore may legitimately investigate why the executive has ignored § 3501 and what the consequences are."

United States v. Dickerson, 166 F.3d 667, 697 (4th Cir. 1999) (Michael, J., dissenting).

Senator THURMOND. We will leave the hearing record open for 1 week for additional materials and for follow-up questions.

I want to thank all of you gentlemen for attending this hearing, and thank you for your testimony and your devotion to your country by coming here and serving.

I think we are now finished with the hearing unless somebody wants to raise some point. We are now adjourned.

[Whereupon, at 3:30 p.m., the subcommittee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSE OF STEPHEN J. MARKMAN TO QUESTION FROM SENATOR THURMOND

Question 1. Judge Markman, do you have any doubt that, while you were involved in the Reagan and Bush Administrations, if a case similar to Dickerson had arisen out of a circuit court, the Department would have defended the statute before the Supreme Court?

Answer 1. Concerning the Reagan Administration's Department of Justice, I have no such doubt, not only because of the general institutional commitment to defend the constitutionality of congressional enactments, but also because of the internal decision made by 1987 to affirmatively identify a federal criminal case in which the constitutionality of section 3501 could be asserted. Concerning the Bush Administration's Department of Justice, I also have no such doubt both for the former reason and because no objections were made to the efforts of individual U.S. Attorney's offices to assert this argument.

RESPONSES OF RICHARD M. ROMLEY TO QUESTIONS FROM SENATOR THURMOND

Question 1. In your opinion, does the example you talked about in the *Rodriguez* case reflect a lack of empirical support for the *Miranda* court's assumption that confessions derived from custodial interrogation are inherently coercive and involuntary?

Question 2. Do you believe the *Rodriguez* case is an isolated incident, or are there numerous cases where a criminal goes free because of a minor, technical failure to follow *Miranda* safeguards?

OFFICE OF THE MARICOPA COUNTY ATTORNEY,
RICHARD M. ROMLEY, COUNTY ATTORNEY,
Phoenix, AZ, September 10, 1999.

Senator STROM THURMOND,
Subcommittee on Criminal Justice Oversight,
U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: I am pleased to provide the following responses to the follow-up questions recently presented to me. I was honored to have had an opportunity to appear before the Subcommittee on Criminal Justice Oversight on May 13, 1999, and to discuss the refusal of the Justice Department to enforce the law on voluntary confessions.

With regard to your question concerning the "lack of empirical support for the *Miranda* court's assumption that confessions derived from custodial interrogation are inherently coercive and involuntary," I am not able to venture an opinion absent a statistical analysis. However, I am of the opinion that while in-custodial interrogations may be at least to some degree inherently coercive, the mere fact that a confession was obtained during an in-custodial interrogation should not alone determine of the issue of voluntariness. An in-custodial interrogation should be but one factor in determining voluntariness and the subsequent admissibility of a confession. The decision in the *Rodriguez* case illustrates that many factors should be considered when determining the voluntariness and admissibility of a confession. Obviously, among the factors entering into a decision by a person in-custody to confess

include feelings of guilt, the desire to explain one's conduct, and other self-generated motivations. The in-custodial nature of the interrogation itself is not and should not be depositive of this issue.

As to your second question; the *Rodriguez* case is obviously not an isolated instance where a confession has been ruled inadmissible merely because of the lack of Miranda warnings. In Arizona, we have a recent example in the case of *State of Arizona* v. *Elizabeth Shannon/Whittle,* CR 1998–013880. In this particular case, Mrs. Whittle, who was in the hospital at the time of her interrogation was not given Miranda warnings. In this instance, the police did not consider her as being in-custody, however the court disagreeded. Her statement was ruled inadmissible when the court held that she had undergone an in-custodial interrogation without the benefit of having received Miranda warnings. The court indicated in its original decision that in all other respects Ms. Whittle's confession was voluntary and, but for the fact that she had not been afforded Miranda warnings her statement would have been admissible. There was no evidence of coercion by the police to induce Ms. Whittle to confess. This is, but another example of a situation where technicalities outweighed reason.

I trust that the above responses to your questions will be helpful to the Senate's determination of these issues. If I can be of further assistance, please do not hesitate to call upon me.

Sincerely,

RICHARD M. ROMLEY,
Maricopa County Attorney.

RESPONSES OF GILBERT G. GALLEGOS TO QUESTIONS FROM SENATOR THURMOND

Question 1. Mr. Gallegos, in the *Dickerson* case, an alleged serial bank robber confessed his crimes to the authorities without coercion or improper influence. The only problem was that the *Miranda* warnings were not read to him before hand. Common sense dictates that this man's confession should be used, and he should not go free. Please discuss the frustrations police officers on the street face with technicalities like in *Dickerson.*

Answer 1. With all the legal gymnastics available to defense lawyers, the caprice of judges and overburdened prosecutors, it is certain that many persons who ought to be locked up are walking the streets today, released on "technicalities." This is frustrating to police officers and the public alike. Perhaps one of the most egregiously frustrating scenarios is a criminal who freely confesses his or her crime to police officers, which is later thrown out by a judge, allowing a confessed criminal to go free.

Many blame law enforcement officers, not prosecutors or judges, when criminals go free on technicalities, suggesting that if we followed the rules and conducted proper investigations, only the innocent would go free and the guilty would always wind up in jail. If this were the case. It is important to realize that our legal system goes to great lengths to protect the rights of both the innocent and the guilty. Any investigation must proceed without violating these rights and every interrogation must be lawful and voluntary. Coerced confessions have never been admissible in court. Police officers must protect the rights of those they investigate, but when the rules are unclear or inconsistently applied, the guilty benefit and public safety suffers.

Police officers are expected to be legal experts on exclusionary rule law and be able to quote verbatim all case law on the Fourth, Fifth, and Fourteenth Amendments. Police officers make life and death decisions every day; they are trained to prevent crime and catch criminals. They know the law and apply it every day as they walk their beats and patrols. They are also called upon to exercise their judgment and common sense in uncommon situations. Unfortunately, we too often find that common sense is not always admissible in court.

A big step toward common sense was taken when Congress enacted Section 3501, Title 18, U.S.C. That statute encourages police agencies to give the now standard "*Miranda*" warnings. But at the same time, it said that a confession could be used in court so long as it was "voluntary." This approach properly recognizes the vital importance of confessions to law enforcement. No one suggests that police officers should be able to coerce or threaten a suspect to obtain a confession. That is not what the *Miranda* decision is about. Even before *Miranda,* any confession obtained by threats—an "involuntary" confession—was excluded. *Miranda* did not add anything to those situations, and Section 3501 preserves in full force the rule that involuntary confessions cannot be admitted. What *Miranda* created was a whole host of

new procedural requirements that applied, not to situations of threats, but to ordinary, everyday police questioning all over the country.

Here it is important to understand what rules the decision actually imposed on police. The general public may think that it knows all about *Miranda* from watching television programs and seeing the four warnings read from a card, but for police officers on the streets, much more is involved.

To begin with, police officers have to decide when it is time to apply the *Miranda* procedures. The courts have told officers that warnings are required only when a suspect is in "custody." Making this determination is very complicated, as shown by the fact that respected judges, with ample time to consider the issues, frequently cannot agree among themselves when "interrogation" of a suspect begins. Here again, respected judges have often disagreed on what constitutes interrogation, but police officers are expected to know on the spot, often in tense and dangerous situations.

If a suspect in "custody" is "interrogated," police officers must not only read *Miranda* warnings but then obtain a "waiver" from the suspect of his rights. Even with all the resources of time and research their court allows, no two judges will completely agree on what constitutes a valid waiver of rights, and yet, police officers must decide almost instantaneously whether they have a valid waiver from a suspect. Then, once officers get a waiver, they must be constantly ready to know if a suspect has changed his mind and decided to assert his right to see a lawyer or to remain silent. If this change of mind has taken place, a police officer must still know if and when he can reapproach a suspect to see if the suspect has changed his mind yet again.

Finally, on top of all this, police are expected to know that *Miranda* warnings are not always required, as the Supreme Court has specifically created exceptions for situations involving "public safety" or "routine booking." Other courts have recognized exceptions for routine border questioning, general on-the-scene questioning, and official questioning at a meeting requested by a suspect. Police, too, must know about whether or not a suspect has been questioned by officers from another agency about another crime and another time, and if so, whether or not a suspect invoked his rights during that other questioning.

Police officers all around the country spend a great deal of time attempting to learn all these rules and follow them faithfully. However, since judges disagree with exactly how to apply all these rules, it is not surprising to find that police officers, too, will occasionally make mistakes and deviate from some of the *Miranda* requirements.

There will also be situations when police officers and criminal suspects disagree about whether all the rules were followed or not. *Dickerson* provides a very good illustration of this. Charles Dickerson, the confessed bank robber, said that he received his warnings only after he had given his confession.

The officer involved testified to the contrary that they followed their normal procedures and read the warnings before questioning. Dickerson apparently had prior experience as a suspect in the criminal justice system and had probably even heard the *Miranda* rights before. In situations like this, it makes no sense to throw out a purely voluntary confession on technical arguments about exactly when the *Miranda* warnings were read, for all the reasons that the Fourth Circuit gave in its opinion.

The issue before the Fourth Circuit in *Dickerson* was precisely the question of whether or not to let a confessed, dangerous criminal go free on a "technicality." Fortunately, the Fourth Circuit refused to allow this to happen and instead applied a law Congress had passed in 1968—Section 3501 of Title 18, U.S. Code. "No longer will criminals who have voluntarily confessed their crimes be released on mere technicalities," the court wrote in upholding this law. To this holding, law enforcement officers all across the country say, "It's about time."

Question 2. Mr. Gallegos, do you think that if Section 3501 is upheld, it will encourage police officers to ignore defendant's legal rights generally?

Answer 2. Absolutely not. Our Constitution, and the Bill of Rights in particular, were enacted and ratified with the aim of protecting the individual from an abuse of power by government. In an arrest and interrogation situation, the law enforcement officers represent the government and no one ought to be deprived of their constitutional rights during that questioning. However, it is important to understand that the Fifth Amendment's prohibition of any person being "compelled" to be a witness against himself was designed to protect against *coercion by government* agents, not technical mistakes that might occur in administering complicated court rules. This was exactly what the Fourth Circuit recognized in its *Dickerson* opinion in refusing to allow, as the court put it, "mere technicalities" to prevent a completely voluntary confession from being introduced before the jury. Voluntary confessions

made without police coercion should be evaluated by juries, not concealed by cleaver defense attorneys.

Miranda v. *Arizona* established various procedures to safeguard the Fifth Amendment rights of persons in custodial interrogations-procedures which are unaffected by Section 3501, which actually *encourages* the proper use of the *Miranda* warnings. In its ruling, the Court thought that, without 3 certain safeguards, no statement obtained by law enforcement authorities could be considered "voluntary" and thus would not be admissible in court. Ever since, the words, "You have the right to remain silent * * * " have been part of every law enforcement officer's lexicon.

However, the Supreme Court has made it clear over the past 25 years that procedural safeguards imposed by the *Miranda* decision were not rights protected by the Constitution, but rather measures designed to help ensure that the right against self-incrimination was protected, that confessions or other information were lawfully and voluntarily obtained and therefore admissible in a court of law. As the Court explained a few years later in *Michigan* v. *Tucker* (1974), the safeguards were not intended to be a "constitutional straightjacket" but rather to provide "practical reinforcement" for the exercise of Fifth Amendment rights.

In *Tucker*, a rape suspect gave exculpatory responses without being fully Mirandized. (He was questioned before the Court had decided *Miranda*.)

The suspect's statements led them to a witness who provided damaging testimony, testimony which the defense sought to have excluded because the witness was located through an interrogation in which the suspect had not been fully advised of his rights. The Court, however, allowed the evidence to be used, explaining that "Certainly no one could contend that the interrogation faced by [the suspect] bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed."

Similar to the decision in *Tucker*, the Supreme Court ruled in *New York* v. *Quarles* (1985) that there is a "public safety" exception to the requirement that *Miranda* warnings be given." Police officers approached by a victim raped at gunpoint were advised that her attacker had just entered a supermarket. After arresting the suspect and discovering an empty holster on his person, the officer asked, "Where is the gun?" The suspect revealed where he had hidden the weapon, an important piece of evidence, which the suspect's lawyers successfully excluded in State Court because the suspect was not Mirandized between his arrest and the "interrogation."

The Supreme Court, however, overruled the lower court's decision stating that police officers ought not be "in the untenable position of having to consider, often in a matter of seconds, whether or not it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possible damage or destroy their ability to obtain that and neutralize the volatile situation confronting them." The Court recognized the "kaleidoscopic situation * * * confronting the officers," not the "spontaneity rather than adherence to a police manual is necessarily the order of the day," and worried that "had *Miranda* warnings deterred [the suspect] from responding to [the officer's] questions, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles, but to insure that further danger to the public did not result from the concealment of the gun in a public area." Accordingly, the Court allowed the statement made by Quarles to be used against him.

The logic of the Supreme Court's "public safety" decision in *Quarles* is exactly the logic of Section 3501. This statute was drafted in 1968 after the Senate Judiciary Committee held extensive hearings on the effects of the Supreme Court's rulings in *Miranda* and some other cases. The committee was deeply concerned about *Miranda's* effects on public safety, concluding that "[tlhe rigid, mechanical exclusion of an otherwise voluntary and competent confession is a very high price to pay for a 'constable's blunder'."

To reduce that high price, Congress enacted 18 U.S.C. 3501, which instructs federal judges to admit confessions "voluntarily made." The statute also spelled out the factors a court must "take into consideration" in order to determine the "voluntariness" of a confession. The Senate report which accompanied the "Omnibus Crime Control and Safe Street Act of 1968," explained the rationale for Section 3501 quite bluntly: "[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities * * * The Committee is convinced that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic and extremely harmful to law enforcement."

In considering the statute, it is important to understand that police officers will continue to give *Miranda* warnings if the principles of Section 3501 are applied around the country. The statute itself provided that the giving of *Miranda* warnings is a factor to be considered in determining whether a confession is voluntary. The Fourth Circuit specifically pointed to this fact in upholding the statute. It said, "Lest there be any confusion on the matter, nothing in today's opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings * * * [T]hose warnings are among the factors a district court should consider when determining whether a confession was voluntarily given." Police agencies will continue to do their best to follow *Miranda* when the statute is applied just as they do now. The only change will be that dangerous confessed criminals, like Mr. Dickerson, will not escape justice and be set free to commit their crimes again. The Fraternal Order of Police strongly endorses this return to common sense in our nation's courtrooms and hopes that the Congress and the Department of Justice will do whatever they can to insure that this is the ruling of the United States Supreme Court.

I agree with those who have expressed concerns about *Miranda's* harmful effects on law enforcement. Sometimes we hear the claim that police have "learned to live with *Miranda*" as an argument against any change in the rules used in our courts. If what is meant by this is that police will do their very best to follow whatever rules the Supreme Court establishes, it is true police have "learned to five with *Miranda*." Indeed, since 1966, police professionalism in this country has expanded tremendously in many ways.

But if what is meant by this is that police "live with and do not care about the harmful effects of these Court rules, nothing could be father from the truth. I can tell you from my experience as a law enforcement officer that too often these rules interfere with the ability of police officers to solve violent crimes and take dangerous criminals off the streets. The main culprit is not the *Miranda* warnings, which suspects have often heard time and again. The barrier to effective police questioning comes from all of the other technical requirements which in far too many cases make it impossible for police officers to ask questions of suspects and too rigid exclusionary rules that prevent the use of any information obtained if there is the slightest hint of noncompliance.

Many crimes can only be solved and prosecuted if law enforcement officers have a chance to interview criminals and have their confessions introduced in court. Unfortunately, the *Miranda* procedures and its accompanying exclusionary rule in many cases prevent the police from ever having this opportunity.

It is no coincidence that immediately after the imposition of all these technical requirements by the Supreme Court's decision in *Miranda*, the criminal case "clearance rate" of the nation's police fell sharply to lower levels. At the time, police officers around the country pointed to the *Miranda* decision as one of the major factors in this drop, and time has proven them right.

Time has also proven the wisdom of the action that Congress took in 1968. Responding to the urgent request of law enforcement, Congress decided to restore common sense to our criminal justice system by passing Section 3501. This is a law that needs to be enforced so that entire "voluntary" confessions obtained by hardworking police officers are not suppressed from the jury.

As a country, we should never have to "learn to live with" the devastating effects of crime. To the contrary, we should never stop striving to improve our efforts to apprehend and convict dangerous criminals through fair and constitutional means.

RESPONSE OF DANIEL C. RICHMAN TO A QUESTION FROM SENATOR THURMOND

Question 1. Professor Richman, it appears to me that the premise of *Miranda* is that a confession cannot be voluntary if the warnings are not strictly given. Of course, whether a confession is voluntary is actually a factual question based on all of the circumstances. In determining whether a confession is voluntary, why is it not better for a judge to make that decision on a case-by-case basis as Section 3501 provides?

DEAR SENATOR THURMOND: I appreciate the opportunity your inquiry gives me to expand on my remarks at the May 13, 1999 hearing.

Answer 1. As I understand it, your question suggests that, rather than have the inquiry into Voluntariness framed by *Miranda* and its progeny, it would be "better" simply to require the case-by-case totality of the circumstances inquiry established by § 3501. Were one to judge "better-ness" in the abstract, without any consideration of systemic concerns, I would have to agree with your suggestion. In some far-away

world of unlimited resources and unerring judges, every case would stand on its particular facts, and court proceedings would intensively inquire into whether each suspect "voluntarily" chose to incriminate himself. The resulting body of law would be richly textured, as judges explored the mysteries of the human will and the diverse ways in which individuals interact with police officers.

In our own world, however, the regime established by *Miranda* and its progeny has significant advantages for the Government and the criminal justice system as a whole. By focusing attention on the extent to which the Government has complied with that regime, these cases have made what otherwise would be a difficult fact-sensitive determination quite manageable. When the Government can show that *Miranda* warnings were properly given, it not only satisfies an initial legal requirement. It also provides judges with evidence of good faith and adherence to the rule of law. The result in such cases is that what otherwise could be a open-ended inquiry into "voluntariness" becomes quite truncated, with the Government generally winning.

Does logic of *Miranda* compel this litigation pattern Not really. Theoretically (as I think your question suggests), an 'inquiry into whether warnings were given would merely be the first step into a more general examination of the "voluntariness" with which a suspect allegedly waived his rights. As a practical matter, however, this generally does not happen. As the Supreme Court noted in *Berkemer* v. *McCarty,* 468 U.S. 433 n.20 (1984), "cages in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." And my own experiences as a federal prosecutor which, particularly when I had a supervisory role in the Appellate Unit, gave me some familiarity with hundreds of cases—lead me to make the same observation.

The result of this judicial focus on the giving of *Miranda* warnings has not simply been to save judicial resources by truncating the inquiry at pre-trial hearings. It has also led to creation of narrowly confined body of caselaw that provides agents and police officers with a road map for ensuring that a confession with be admissible, and provides prosecutors with a reasonably reliable way of predicting the outcome of suppression hearings. Such predictability, of course, I facilitates early plea negotiations.

One response to my argument here might be: "Perhaps you have explained how the Government and judicial system are benefitted by *Miranda's* prophylactic regime. But why not have § 3501 as a back-up, for the relatively small number of cases in which there has merely been a 'technical' violation of *Miranda,* but where the totality of the circumstances indicates that a confession was voluntary?" There is something to this argument. Indeed, as someone quite interested in sending guilty people to prison, I would agree with it, if I could only find a way for criminal justice system to speak out of two different sides of its mouth. If law enforcement agents and police officers could remain blissfully unaware of the arguments that prosecutors later used in court to justify the admission of confessions and of the judicial outcomes, we would have the best of both worlds: the virtues of a prophylactic regime and the ability to sift through the facts of the remaining cases for voluntary confessions.

But this is another world that bears no resemblance to reality. Rules of admission inevitably affect police behavior, particularly when the message is as clear as "*Miranda* warnings are merely optional." And the effect of implementing § 3501 (were it constitutional) would thus be to dramatically expand the number of cases in which either no *Miranda* warnings or defective warnings were given, with all the systemic costs such cases entail. In theory, agencies and police departments could step into the breach by requiring *Miranda* warnings as a matter of internal regulation (as the FBI did before *Miranda*). But such internal disciplinary schemes have traditionally been of mixed effectiveness, and would be extremely hard for federal officials to implement in the local police departments, which have been producing an increasing number of federal cases.

It is for these reasons (and for the others that I noted in my May 13 testimony), that the Department of Justice's historical reluctance to invoke § 3501 makes sense as a matter of law enforcement policy, not just as a matter of constitutional interpretation (as others have argued). The policy advantages of *Miranda's* regime may also explain why the States, which, according to Professor Cassell's analysis, would seem to be most hurt by *Miranda,* have not seemed particularly interested in passing legislation like § 3501.

Again, I thank you for your consideration.

Respectfully,

DANIEL C. RICHMAN.

RESPONSES OF GEORGE THOMAS TO QUESTIONS FROM SENATOR THURMOND

Question 1. In your oral testimony, you mentioned that you thought the Department should raise and defend section 3501. Please elaborate on the reasons for your position.

Answer 1. Senator Thurmond, whether 18 U.S.C. § 3501 is constitutional or not, its function is to tell federal judges that they must admit voluntary confessions. Section (a) provides that "a confession * * * shall be admissible in evidence if it is voluntarily given." Like a rule of evidence, this provision makes admissible a category of evidence. In every other context of which I am aware, if a federal prosecutor seeks to admit evidence, the prosecutor has a duty to argue for its admissibility using every plausible argument. Given the mandatory language of § 3501 ("shall be admissible"), it is a powerful argument on behalf of a prosecutor trying to admit a confession. To be sure, the prosecutor has discretion about *whether* to seek the admission of a confession, but once the decision is made to seek admission, I believe the prosecutor has a duty to argue for admission on the ground of compliance with § 3501. Similarly, the Department of Justice has a duty to use every plausible argument to defend a lower court decision to admit a confession. Section § 3501 is, after all, a mandate from Congress, a co-equal branch of our federal government, to judges to admit voluntary confessions. This mandate creates a duty in the prosecutors and the Department of Justice to raise and defend the constitutionality of § 3501.

Question 2. Are there ways in which section 3501 extends beyond the pre-*Miranda* voluntariness standards governing the admissibility of confessions? Please explain any differences that you see.

Answer 2. Senator, 18 U.S.C. § 3501 expands the pre-*Miranda* voluntariness standards by creating or recognizing a right to counsel during pre-indictment interrogation. The Sixth Amendment applies to interrogation only after indictment. *See, e.g., Crooker* v. *California,* 357 U.S. 433 (1958); cf. *Brewer* v. *Williams,* 430 U.S. 387 (1977). The Due Process Clause has never been held to create a right to counsel in every case of pre-indictment interrogation. *See, e.g. Cicenia* v. *La Gay,* 357 U.S. 504 (1958). But 18 U.S. C. § 3501(b) (4) and (5) instruct the trial judge, when considering the voluntariness of a confession, to take into consideration "whether or not such defendant had been advised prior to questioning of *his right to the assistance of counsel,* and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession." (Emphasis added.) This seems to me to create a statutory right to counsel in every pre-indictment interrogation, a salutary recognition by Congress of the importance of having the assistance of counsel during interrogation. Alternatively, these provisions may simply be a congressional interpretation of the Due Process Clause as creating a right to counsel during every pre-trial interrogation, an interpretation broader than the Supreme Court has yet recognized. As a co-equal branch of government, however, Congress is authorized (indeed, has a duty) to interpret the Constitution, which interpretation shall stand unless overruled by the Supreme Court. In either case, § 3501 supplies defendants with a broader right to counsel during interrogation than was available prior to *Miranda.*

It also seems to me that subsection (b)(2) of 18 U.S.C. § 3501 broadens not only the pre-*Miranda* right against an involuntary confession but also the rights of a defendant under *Miranda* itself. This subsection requires the judge to consider "whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession." Under pre-*Miranda* law, the Supreme Court had never held that notice of the subject of the interrogation was a part of the voluntariness calculus. And in interpreting *Miranda,* the Court has explicitly held that a waiver of rights is valid even though the suspect did not know what offense was to be the subject of the interrogation. *Colorado* v. *Spring,* 479 U.S. 564 (1987).

Question 3. Professor Thomas, your view appears to be that the Supreme Court in *Miranda* established an irrebuttable presumption that all custodial confessions obtained without *Miranda* warnings were "compelled" and therefore not admissible. However, the Supreme Court has created exceptions to *Miranda* in *Harris* v. *New York,* 401 U.S. 222 (1971) (impeachment), *Michigan* v. *Tucker,* 417 U.S. 433 (1974) (fruit of the poisonous tree doctrine inapplicable), *Oregon* v. *Haas,* 420 U.S. 714 (1975) (impeachment), *New York* v. *Quarles,* 467 U.S. 649 (1984) (public safety), and *Oregon* v. *Elstad,* 470 U.S. 298 (1985) (waiver possible after initial response to unwarned yet uncoerced questioning). How do you reconcile your reading of *Miranda* with cases such as these?

Answer 3. Yes, Senator, I believe that *Miranda* created an irrebuttable presumption that all confessions obtained without the warnings and waiver required by the Court are compelled within the meaning of the Fifth Amendment to the United

States Constitution and cannot be used in court as evidence of the confessor's guilt. Only one of the cases you cite, however, involved the use of a confession in the prosecution's case as a way of showing guilt. The others permitted use of a confession taken without *Miranda* warnings for a collateral purpose—to impeach the defendant's credibility (*Harris* v. *New York,* 401 U.S. 222 (1971); *Oregon* v. *Haas,* 420 U.S. 714 (1975)), or as a means of finding other evidence (*Michigan* v. *Tucker,* 417 U.S. 433 (1974)). One of the cases did not even involve use of a confession taken in violation of *Miranda* (*Oregon* v. *Elstad,* 470 U.S. 714 (1975)), although there was an earlier statement in *Elstad* that did violate *Miranda.*

In *Michigan* v. *Tucker,* 417 U.S. 433 (1974), the Court held that a witness who was found by use of a compelled confession could testify against the defendant. This does not seem to me in any way inconsistent with the principle that the compelled confession cannot be used as evidence of guilt. Similarly, *Harris* v. *New York,* 401 U.S. 222 (1971), and *Oregon* v. *Haas,* 420 U.S. 714 (1975), held that a confession compelled within the meaning of *Miranda* could be used to impeach the defendant if he testified. The confession remains inadmissible in the State's case in chief. Because the *Miranda* presumption is of Fifth Amendment compulsion, rather than Due Process coercion, it seems appropriate to me to hold that the confession cannot be introduced as evidence of guilt but can be introduced to impeach a defendant who testifies falsely. (A defendant can always seek to have the confession excluded even for impeachment purposes by arguing that the police used coercion).

In *Oregon* v. *Elstad,* 470 U.S. 298 (1985), the Court held that a statement made after *Miranda* warnings and a voluntary waiver is admissible even though the police had elicited an incriminating statement before they gave the warnings. *Elstad* makes good sense to me. If the *Miranda* warnings are adequate to dispel the inherent compulsion of police interrogation, they should also dispel any compulsion resulting from the suspect's knowledge that he has already "let the cat out of the bag." And *Elstad* makes clear that the first statement, the one made without warnings, is inadmissible. So, again, the Court is following the basic holding in *Miranda* that no confession can be admitted in the prosecution's case unless the police give the warnings and secure a waiver.

To be candid, Senator, my theory of *Miranda* cannot explain *New York* v. *Quarles,* 467 U.S. 649 (1984). In *Quarles,* the Court created an exception to *Miranda* for cases in which "public safety" is threatened, holding that a confession which is presumed compelled under *Miranda* can nonetheless be admitted if the questioning was "reasonably prompted by a concern for the public safety." It was a 5–4 decision which, in my view, partially overrules *Miranda.* I agree with Justice O'Connor's dissent in *Quarles.* She wrote, "Were the Court writing from a clean slate, I could agree with its holding. But *Miranda* is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures."

But, Senator, just because the Court has partly overruled *Miranda* in cases of threats to public safety does not mean that 18 U. S.C. § 3501 is constitutional. The statute applies not just to public safety cases but to all interrogations and to all confessions.

My view remains, Senator, that 18 U.S.C. § 3501 is unconstitutional to the extent that it authorizes confessions to be admitted without *Miranda* warnings in any situation not covered by the *Quarles* public safety exception. Whether *Miranda* was properly decided is a difficult question, I think. But as Justice O'Connor said, it "is now the law." Unless the Supreme Court sees fit to modify *Miranda* further, I believe the Court will strike down (or limit) 18 U.S.C. § 3501.

RESPONSES OF PAUL G. CASSELL TO QUESTIONS FROM SENATOR THURMOND

Question 1. Professor Cassell, it appears to me that a major flaw with *Miranda* was that it only focused on the interests of the accused. The Congress responded by taking into account the interests of society and victims in making sure criminals are brought to justice. Do you think the law should strike a balance between the rights of defendants and the interests of society, and do you think Section 3501 does that better than *Miranda?*

Answer 1. I believe that § 3501 strikes a better balance between the interests of society and the defendant than does *Miranda,* particularly when § 3501 is considered in a larger context. Section 3501 should not be examined by itself, as its critics are wont to do, but rather against the backdrop of other developments. For example, since the passage of § 3501, the Department of Justice has instituted more rigorous training and oversight for federal law enforcement agents. Moreover, the Congress has allowed actions, under the Federal Tort Claims Act, for willful misconduct by

federal agents. These reforms are likely to do far more to protect against those rare cases of police abuse than do the *Miranda* rules. At the same time, § 3 501 reduces the number of situations in which a guilty criminal who has voluntarily confessed to his crime will be able to escape justice. Section 3501 recognizes the tremendous importance of bringing such criminals to book, and thus strikes a better balance among competing concerns. But, in addition to all these reasons for supporting § 3501, a critical point remains that the *Miranda* rules have "locked in" a single approach to evaluating the competing concerns in police interrogation. Upholding and applying § 3501 will lead to serious consideration of a wide range of reforms in the interrogation area, such as videotaping of questioning and perhaps judicial questioning by magistrates. This experimentation will quite likely lead to even better ways of balancing the competing interests.

Question 2. Professor Cassell, my understanding of the position of the Department of Justice is that *Miranda* is constitutionally required so they will not enforce Section 3501 in the lower Federal courts, but they have not decided what they will do if the issue reaches the Supreme Court. Were it not for people like you, would the courts have gotten the opportunity to consider whether the statute was constitutional?

Answer 2. Unfortunately the current position of the Department of Justice makes it quite difficult for courts to consider the implications of § 3501. Typically courts only review issues pressed by the parties. Defendants, of course, have no interest in using § 3501. And when the Department of Justice does not present the statute, courts require considerably prompting to reach the question. It is noteworthy on this point that until the Washington Legal Foundation, among other groups, began raising § 3501 in recent years, courts seemed to have forgotten about the statute. However, when WLF et al. pressed the issue in the Fourth Circuit and elsewhere, courts began to consider the issue, Thus, the tragic result of the Department's failure to press the statute is that in what must be countless numbers of cases, criminals who have voluntarily confessed to their crimes have suppressed their confessions and potentially escaped conviction. These criminals have gone free, it should be emphasized, simply because the Department of Justice, for reasons that remain mysterious, has refused to defend a presumptively valid Act of Congress.

Question 3. Professor Cassell, assume that the Supreme Court upholds Section 3501, and assume further that the police continue to give the *Miranda* warnings as the statute encourages. Do you think a court would be any less likely to admit a confession using Section 3501 than they are today?

Answer 3. If § 3501 is upheld, there is no reason to expect any dramatic change in the way that courts consider voluntariness issues. Courts have considerable experience in apply the voluntariness principle. Indeed, everyday across the country, courts make voluntariness determinations in determining whether non-Mirandized confessions can be used for impeachment or other purposes. Given this experience, § 3501 will not present any novel questions for the courts and should not lead to any unanticipated consequences.

RESPONSES OF JAMES K. ROBINSON TO QUESTIONS FROM SENATOR THURMOND

Question 1. In your prepared statement, you imply that *Miranda's* constitutional status depends more on the Supreme Court's application of the decision to the States than on "[w]hatever ambiguity exists in what the Supreme Court has variously said in the post-*Miranda* cases." However, the Court has been anything but ambiguous in its post-*Miranda* decisions, which have consistently held that *Miranda's* procedural safeguards are not constitutionally mandated. *See Harris* v. *New York* 401 U.S. 222 (1971); *Michigan* v. *Tucke* 417 U.S. 433 (1974); *Oregon* v. *Haas*, 420 U.S. 714 (1975); *New York* v. *Quarles*, 467 U.S. 649 (1984); *Oregon* v. *Elstad* 470 U.S. 298 (1985); v. *United States*, 512 U.S. 452 (1994). Are not the Supreme Court's holdings, based on what the Court's various post-*Miranda* opinions say, the touchstone for constitutionality? How are the holdings of these cases consistent with the Justice Department's theory that the *Miranda* procedural safeguards are constitutionally required?

Answer 1. We agree that all of the Supreme Court's decisions must be considered in determining the constitutional status of *Miranda*. For the reasons given in my prepared statement, and explained at greater length in the Brief for the United States in *Dickerson* v. *United States*, No. 99–5525 (S. Ct.), the Department of Justice has concluded that "[a] well-established line of [the Supreme Court's] cases * * * requires the conclusion that *Miranda*, as applied by [the] Court, does indeed rest on a constitutional basis." *Id.* at 14. To be clear, however, the Department has never taken the position that the specific procedural safeguards identified in *Miranda* are

constitutionally required. The Supreme Court expressly noted in *Miranda* that the Constitution requires no "particular solution for the inherent compulsion of the interrogation process," and it expressly left open the possibility that Congress and the States might "develop their own safeguards for the privilege, so long as they are fully as effective * * * in apprising accused persons of their right of silence and in affording the continuous opportunity to exercise it." 384 U.S. at 490.

Question 2. As you confirm, the Justice Department's brief in the *Leong* case argued that the lower Federal courts were not free to apply § 3501 and that the Department was not free to urge that they do so. In view of the Supreme Court's prudential policy of not considering questions not raised in the lower Federal courts, how did the Administration expect the Supreme Court to ever consider the issue of § 3501's constitutionality?

Answer 2. As is illustrated by the fact that the issue is now before the Supreme Court in *Dickerson,* the Department's position in the lower courts did not deprive the Supreme Court of the opportunity to pass on Section 3501's constitutionality. Although the Department was not pressing the issue in the lower federal courts, the issue was being actively pursued by amicus curiae. Moreover, any State could ask the Supreme Court to reconsider *Miranda's* exclusionary rule; such an argument, if successful, could have established Section 3501's validity in federal cases.

Question 3. The *Leong* court expressly rejected your argument that you were not free to raise § 3501 in the lower Federal courts. Why did you continue to make the same argument in the *Dickerson* case?

Answer 3. To the extent that the panel in *Leong* held that it was free to determine the constitutionality of Section 3501, the Department agrees, and did not argue to the contrary in *Leong.* The Department's argument in *Leong* was that, in determining the statute's constitutionality, the Fourth Circuit was required to follow controlling Supreme Court precedent even if that precedent had arguably been undermined by subsequent Supreme Court cases. The Department repeated that argument in *Dickerson* because the Department believes the argument to be correct. *See Agostini* v. *Felton,* 521 U.S. 202, 237 (1997).

Question 4. In your prepared statement, you said that the Justice Department has "instructed federal prosecutors to bring the *Dickerson* decision and Section 3501 to the attention of the district courts whenever a *Miranda* violation is alleged." Will the prosecutors urge the court to apply § 3501 in the Fourth Circuit?

Answer 4. In a memorandum from the Criminal Division sent to all United States Attorneys in the Fourth Circuit and to all Criminal Division Section Chiefs, the Department stated its view that "when a defendant seeks the suppression of a statement allegedly obtained in violation of *Miranda,* prosecutors in the Fourth Circuit discharge their professional and ethical obligations if they call the district court's attention to the existence of Section 3501 and the *Dickerson* decision. The prosecutor should acknowledge that *Dickerson* is controlling authority insofar as it holds that '§ 3501, rather than *Miranda,* governs the admissibility of confessions in federal court.' The prosecutor should also advise the court, however, that the Department disagrees with *Dickerson's* holding, and that the decision remains subject to possible further review in the * * * Supreme Court. Moreover, prosecutors should urge district courts to rule on the defendant's claim under traditional *Miranda* analysis as well."

Question 5. As you know, the Tenth Circuit has also upheld the constitutionality of § 3501. *See United States* v. *Crocker,* 510 F.2D 1129 (10th Cir. 1975); *United States* v. *Rivas-Lopez,* 988 F. Supp. 1424 (D. Utah 1997). In view of your instructions to Federal prosecutors in the Fourth Circuit, is the Department giving similar instructions in the Tenth Circuit and/or the District of Utah?

Answer 5. No. The court in *Crocker* held that there was no *Miranda* violation in the case before it, see 510 F.2d at 1136–1138, and the subsequent decisions of Tenth Circuit have analyzed the admissibility of confessions under *Miranda* rather than Section 3501. *See, e.g., United States* v. *Parra,* 2 F.3d 1058, 1067–1068, cert. denied, 510 U.S. 1026 (1993). (*Rivas-Lopez* is a district court decision.) Under those circumstances, the Department has not viewed it as advisable to instruct prosecutors in the Tenth Circuit to invoke Section 3501.

Question 6. During a press conference on February 11, 1999, the Attorney General stated that "in this administration and in other administrations preceding it, both parties have reached the same conclusion," *i.e.,* that § 3501 was unconstitutional. The Subcommittee has received a letter from former Attorney General Meese contradicting this assertion and detailed testimony from former Assistant Attorney General Stephen Markman on the same point. In addition, the Subcommittee was made aware of 1969 testimony by former Attorney General John Mitchell to a House Select Committee on Crime supporting the constitutionality of § 3501 and a 1975

opinion obtained by the 10th Circuit upholding section 3501 pursuant to the litigating posture announced by former Attorney General Mitchell. It appears that the Attorney General was misinformed about prior Administrations. Has his information been brought to the Attorney General's attention?

Answer 6. Yes, the testimony and letter to which you refer have been brought to the attention of the Attorney General. At her weekly press availability on February 11, 1999, the Attorney General stated that "the Supreme Court has concluded that [the *Miranda* decision] is constitutionally based, since [the Supreme Court] has applied it to the States, as well. In this administration and other administrations preceding it, both parties have reached the same conclusion." It should be noted that during the tenures of former Attorneys General Mitchell and Meese, the Department rarely invoked Section 3501.

Question 7. On June 11, 1969, Assistant Attorney General Will Wilson circulated a memorandum to United States Attorneys encouraging them to use 18 U.S.C. § 3501 (reprinted in 115 Cong. Rec. 23,236–23,238 (1969)). As of 1974, that policy was still in effect. See Gandara, Admissibility of Confessions in Federal Prosecution, 63 Geo L.J. 305, 312 (1974) (citing letter from Department dated May 15, 1974, stating policies set forth in the memorandum are "still considered current and applicable"). On November 6, 1997, Assistant Attorney General John Keeney circulated a memorandum to United States Attorneys ordering United States Attorneys not to rely on § 3501 without consulting with the Criminal Division. Did the policy announcement in the 1969 memorandum formally change before the 1997 memorandum? Please provide the Subcommittee with all formal policy guidance that has been given to federal prosecutors since 1969 regarding the use of § 3501, with the exception of the November 6, 1997 memorandum.

Answer 7. Apart from the November 6, 1997 memorandum, the Department issued two memoranda following the Fourth Circuit's decision in *Dickerson:* a memo to all federal prosecutors, dated February 12, 1999, and a memorandum to prosecutors in the Fourth Circuit, dated March 4, 1999. Copies of both memoranda are attached. We are not aware of any other formal guidance to federal prosecutors since 1969.

Question 8. Justice Department representatives have previously said they will defend the constitutionality of section 3501 in an "appropriate" case. What cases are "appropriate" for such a defense?

Answer 8. After undertaking a thorough examination of Section 3501's constitutionality, the Department came to the conclusion that the lower courts cannot rely on Section 3501 to admit a confession that *Miranda* would exclude unless and until the Supreme Court overrules or modifies *Miranda.* In the Brief for the United States in *Dickerson,* the Department of Justice has concluded that the Court should grant certiorari to consider the constitutionality of Section 3501, but that the Court should not overrule *Miranda.*

Question 9. In your prepared statement, you state that "additional considerations" are implicated whenever the question of defending a congressional enactment that is inconsistent with a decision of the United States Supreme is presented to the Department. No such "additional considerations" were referred to by, for example, Solicitor General Waxman during his Senate confirmation hearings when asked about this subject. Are these "additional considerations" meant to be "additional" prerequisites to defending Acts of Congress where reasonable arguments can be made on their behalf.

Answer 9. As I explained in my statement, and as the Attorney General explained in her November 1, 1999, letters to Congress respecting the *Dickerson* case, in determining whether to defend the Act of Congress the Executive Branch must take into account the respect that is due Supreme Court decisions under the doctrine of stare decisis. This is consistent with General Waxman's testimony. *See Nomination of Seth Waxman to be Solicitor General: Hearing Before the Senate Comm. on the Judiciary,* 105th Cong. 6–7 (1997) (Solicitor General should defend a law against constitutional challenge "whenever reasonable arguments can be made in support of its constitutionality, except in the rarest instances such as where a statute directly conflicts with a Supreme Court ruling of constitutional dimension"); *id.* at 100–101 ("When there is a Supreme Court holding that interprets or implements the Constitution, however, the question of defending an Act of Congress that is inconsistent with that decision implicates additional considerations. The duty of the Solicitor General includes upholding the Constitution itself. In such a case, the Solicitor General must carefully weigh the duty to defend statutes against the obligation to respect the rulings of the Court. * * * In making [the] decision [whether to ask the Court to reconsider *Miranda*], the Department would consider the interests of law enforcement, as well as the important doctrine of stare decisis, the traditional re-

straint of the United States in asking for the overruling or modification of Supreme Court decisions, and the need to examine what indications exist that the Supreme Court may be receptive to a change in its decisions.").

Question 10. Your prepared statement mentioned that "it is an infrequent occurrence that a case is lost on *Miranda* Lgrounds." We are interested in assessing the frequency of such occurrences. Please provide the Subcommittee a list of felony cases from January 20, 1993, to the present date in which the Department has lost a case on grounds related to *Miranda* and, in addition, cases in which the Department has had a confession suppressed on *Miranda* grounds and then later plea bargained the case for something less than what was originally charged.

Answer 10. On November 5, 1997, in an addendum to a letter to Senator Fred Thompson, a copy of which is attached, we listed all adverse *Miranda* rulings reviewed by the Solicitor General between January 1, 1989 and November 1, 1997. We note, however, that the government did not necessarily lose each of these cases simply because statements were suppressed. The government is frequently able to proceed with the prosecution without the suppressed statements. Upon searching our adverse decision files from November 1, 1997, to November 10, 1999, we have found 19 additional cases in which statements were suppressed on *Miranda*-related grounds. Five cases (## 1, 4, 11, 17, and 18) are pending on the government's appeal, and thus there has not yet been a final disposition of the charges. Three cases are awaiting retrial or further proceedings in the district court (## 2, 8, and 15). In two cases, the government convicted the defendant at trial without the suppressed statements (## 7 and 12). In one case (# 19), the defendant pleaded guilty to the charge in the indictment. In four cases, the government resolved the charges through a plea agreement (## 5, 6, 9, and 13). And finally, in three cases, the government dismissed the charges (## 3, 10, and 14). The cases are listed below.

1. *United States* v. *Peter Paul Hudson & Tammy Riness,* Cr. No. 99–163–LH (D.N.M. May 17, 1999) (district court suppressed statements elicited during a routine inspection at a fixed border checkpoint), appeal pending.

2. *United States* v. *Anibal Ortiz,* 177 F.3d 108 (1st Cir. (D.Mass.) June 2, 1999) (court of appeals found an *Edwards* violation; officers initiated conversations after defendant asserted his *Miranda* rights) (case is set for a retrial in November).

3. *United States* v. *Ronald Gardner,* No. 3:97CR244–Mu (W.D.N.C. March 9 1999) (district court discredited government witnesses and found that defendant had not voluntarily waived his *Miranda* rights) (government dismissed indictment).

4. *United States* v. *Zhi Man Liu and Tommy Chen,* No. CR 98–0162 (N.D. Calif. Dec. 9, 1998) (district court found that defendant was in custody and entitled to *Miranda* warnings), appeal pending.

5. *United States* v. *Walter Fleming,* No. 98–0223 (D.D.C. Dec. 11, 1998) (district court held that request for consent to search after assertion of *Miranda* rights violated *Edwards*) (defendant pleaded guilty to charges in the E.D. Va. and agreed to cooperate in return for dismissal of charges in D.C.).

6. *United States* v. *George Chamberlain,* 163 F.3d 499 (8th Cir. (D. Minn.) Dec. 24, 1998) (holding that the defendant was in custody and hence entitled to *Miranda* warnings) (following vacation of his conviction, defendant pleaded guilty to one child pornography count and was sentenced to 51 months' imprisonment).

7. *United States* v. *Clara Castano,* No. 98–8065–CR–Ryskamp (S.D. Fla. Oct. 16, 1998) (district court found that defendant was in custody and hence entitled to *Miranda* warnings) (convicted following a jury trial without suppressed statements; sentenced to 135 months' imprisonment).

8. *United States* v. *Willie Tyle,* 164 F.3d 150 (3d Cir. (M.D. Pa.) Dec. 15, 1998) (court of appeals found an *Edwards* violation and remanded for further proceedings; no decision yet on remand).

9. *United States* v. *Errolyn Cherrymae Romero,* No. CR97–1264 (C.D. Calif. July 14, 1998) (district court held that officer should have reissued *Miranda* warnings after polygraph exam) (tried to a hung jury (11–1 for conviction), followed by a guilty plea to the conspiracy charge; the defendant is awaiting sentencing).

10. *United States* v. *Jose Rosario Garibay,* 143 F.3d 534 (9th Cir. (S.D. Calif.) May 5, 1998) (court of appeals held that defendant's waiver of *Miranda* rights was not knowing and intelligent) (retrial ended with a hung jury, after which, the government dismissed the charges).

11. *United States* v. *Robert Dice,* No. CR–2–96–136 (S.D. Ohio Nov. 24, 1997) (district court found an *Edwards* violation), pretrial appeal pending on unrelated issue.

12. *United States* v. *Khalid Bey,* No. 97–191 (E.D. Pa. Mar. 10, 1998) (the district court found that the defendant was in custody for *Miranda* purposes), affirmed, 168 F.3d 479 (3d Cir. 1998) (Table) (defendant was convicted at trial despite suppression of statements).

13. *United States* v. *Herman Joseph Byram, Jr.,* 145 F.3d 405 (1st Cir. (D. Me.) May 20, 1998) (district court suppressed unwarned statement finding that defendant was in custody for *Miranda* purposes, and suppressed subsequent testimony on ground that it was the fruit of the *Miranda* violation; government appealed suppression of testimony only; court of appeals affirmed) (on remand, defendant pleaded guilty as charged and was sentenced to 96 months' imprisonment).

14. *United States* v. *Jesse Gary Soliz,* No. 96–50685 (9th Cir. (S.D. Calif.) Nov. 12, 1997) (court of appeals held that defendant had not waived his *Miranda* rights) (the government dismissed the case because we could not proceed without the confession).

15. *United States* v. *Leon Thomas, Jr.,* No. CR 99–0045 CRB (N.D. Calif. Sept. 3, 1999) (defendant was read his *Miranda* rights, but district court found that the government failed to establish defendant's oral waiver of rights) (no appeal; government will proceed without the statement; case is still pending in the district court).

16. *United States* v. *Anthony Zerbo,* No. 98 Cr. 1163 (RPP) (S.D.N.Y. Oct. 8, 1999) (court found that defendant, who has a low IQ and a history of mental illness, did not voluntarily waive his *Miranda* rights) (no appeal; no disposition yet of criminal charges).

17. *United States* v. *Thomas Melendez Sanchez,* No. 98–129 (SEC) (D.P.R. July 19, 1999) (defendant was entitled to *Miranda* warnings prior to testifying pursuant to a subpoena in a bank robbery trial of others), appeal pending.

18. *United States* v. *Juan Felipe Bermudez, No. 99–20071–M1 (W.D. Tenn. July 21, 1999) (defendant was in custody and hence entitled to Miranda* warnings; also suppressing post-*Miranda* statement as fruit of unwarned statement), appeal pending.

19. *United States* v. *Jorge Romero,* No. CR–99–0174–KKK (E.D. Calif. Sept. 10, 1999) (statement by police was tantamount to interrogation necessitating *Miranda* warnings) (no appeal; defendant pleaded guilty as charged and is awaiting sentencing).

Question 11. I understand that the FBI recently announced that local offices could use videotaping of interrogations. Please describe how the use of videotaping is proceeding within the FBI today, including information about whether agents have found it to help or hinder their efforts to obtain confessions and whether it has been useful in preventing improper coercion against suspects.

Answer 11. The FBI announced revised procedures in July 1998, designed to encourage field offices to consider when videotaping investigations would be appropriate in specific cases. It will take time for the FBI field offices to digest and implement broadly the revised policy. Only after sufficient time has elapsed, and videotaping has been employed in a sufficient number of cases, will the FBI be equipped to assess whether the use of videotaping has helped or hindered its investigative efforts.

U.S. DEPARTMENT OF JUSTICE,
CRIMINAL DIVISION,
Washington, DC, March 4, 1999.

RE: Memorandum for All United States Attorneys in the Fourth Circuit and All Criminal Section Chiefs

FROM: James K. Robinson, Assistant Attorney General

SUBJECT: 18 U.S.C. § 3501

In *United States* v. *Dickerson,* 1999 WL 61200 (Feb. 8, 1999), a divided panel of the Fourth Circuit reversed a district court order suppressing a confession because of its finding that the confession had been obtained in violation of *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The panel majority held that the defendant's confession was admissible under 18 U.S.C. 3501(a), which provides that a confession "shall be admissible in evidence if it is voluntarily given." The majority determined that Congress had the authority to supercede *Miranda* by legislation because *Miranda's* requirements are not mandated by the Constitution.

In a memorandum dated February 12, 1999, the Criminal Division advised all United States Attorneys and Criminal Division section chiefs that the Department continues to adhere to the view that the United States is not free to urge the lower courts to admit statements under Section 3501 that *Miranda* would exclude. Should the Supreme Court grant certiorari in a case involving the validity of Section 3501, the Department would then be free to ask the Court to reconsider *Miranda's* constitutional status, although the Department has not yet determined what position it would take in such a case. The Department recognizes, however, that in the in-

terim, the *Dickerson* decision poses special concerns for prosecutors practicing in the Fourth circuit,

It is the Department's view that when a defendant seeks the suppression, of a statement allegedly obtained in violation of *Miranda,* prosecutors in the Fourth Circuit discharge their professional and ethical obligations if they call the district court's attention to the existence of Section 3501 and the *Dickerson* decision. The prosecutor should acknowledge that *Dickerson* is controlling authority insofar as it holds that (§ 3501, rather than *Miranda,* governs the admissibility of confessions in federal court." The prosecutor should also advise the court, however, that the Department disagrees with *Dickerson's* holding, and that the decision remains subject to possible further review in the Fourth Circuit and the Supreme Court. Moreover, prosecutors should urge district courts to rule on the defendant's claim under traditional *Miranda* analysis as well.

If you have any questions about this issue, please contact Appellate Section attorney Lisa Simotas, at (202) 616–9842, or by e-mail.

U.S. DEPARTMENT OF JUSTICE,
CRIMINAL DIVISION,
Washington, DC, February 12, 1999.

Memorandum for All United States Attorneys and All Criminal Division Section Chiefs

FROM: James K. Robinson, Assistant Attorney General

SUBJECT: 18 U.S.C. § 3501

In *United States* v. *Dickerson,* 1999 WL 61200 (Feb. 8, 1999), a divided panel of the Fourth circuit reversed a district court order suppressing a confession because of its finding that the confession had been obtained in violation of *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The panel majority held that the defendant's confession was admissible under 18 U.S.C. 3501(a) which provides that a confession "shall be admissible in evidence if it is voluntarily given." The majority determined that Congress had the authority to supersede *Miranda* by legislation because *Miranda's* requirements are not mandated by the Constitution. The *Dickerson* decision remains subject to possible further review in the Fourth Circuit and the Supreme Court.

In a memorandum dated November 6, 1997 (a copy of which is attached), the Criminal Division advised all United States Attorneys and Criminal Division section chiefs that, after thoroughly reviewing the legal issues, the Department had concluded that unless the Supreme Court were to modify or overrule *Miranda* and the cases that have continued to apply it, the lower courts are not free to rely on Section 3501 to admit statements that *Miranda* would exclude, and the United States is not free to urge lower courts to do so. The Department continues to adhere to the views expressed in the November 6, 1997, memorandum.

Accordingly, federal prosecutors should not rely on the voluntariness provision of Section 3501 to urge lower federal courts to admit statements taken in violation of *Miranda* without first consulting with the Criminal Division. If you have any questions about this issue, please contact Appellate Section attorney Lisa Simotas, at (202) 616–9642, or by e-mail.

Attachment

U.S. DEPARTMENT OF JUSTICE,
CRIMINAL DIVISION,
Washington, DC, November 6, 1997.

Memorandum for All United States Attorneys and All Criminal Division Section Chiefs

FROM: John C. Keeney, Acting Assistant Attorney General

SUBJECT: 18 U.S.C. § 3501

Section 3501 of Title 18, United States Code, provides that "in any criminal prosecution brought by the United States," a confession "shall be admissible in evidence if it is voluntarily given." The statute requires trial judges to make a threshold determination of voluntariness outside the presence of the jury, and provides that voluntariness shall be assessed based on the totality of the circumstances—including whether or not the defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him," and whether the defendant had been advised of his right to counsel. Section 3501(b) states, however, that the "presence or absence" of any particular factor—including whether the defendant received the warnings required by *Miranda* v. *Arizona,* 384

U.S. 436 (1986)—"need not be conclusive on the issue of voluntariness of the confession."

Section 3501 was intended by Congress to secure the admissibility, in federal courts, of voluntary statements that would otherwise be suppressed under *Miranda.* Since its enactment in 1968, the statute has rarely been invoked by federal prosecutors. However, in part due to questions as to its constitutionality that were recognized even by Congress when it passed the law. *See, e.g.,* S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. and Admin. News 2112, 2137–2138 ("No one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted * * *. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability is, that this legislation would be upheld.").

Recently, in *United States* v. *Leong,* No. 96–4876, the Fourth Circuit directed the parties to address the applicability of Section 3501 in a case in which a defendant's admission was suppressed for failure to give *Miranda* warnings. The Department thoroughly reviewed the legal issues and came to the conclusion that unless the Supreme Court were to modify or overrule *Miranda* and the cases that have continued to apply it, the lower courts are not free to rely on Section 3501 to admit statements that would be excluded by *Miranda,* and the United States is not free to urge lower courts to do so. The Fourth Circuit ultimately declined to address the applicability of Section 3501 because the issue was not raised in the district court.

The Dapartment has not yet decided whether it would ask the Supreme Court in an appropriate case to overrule or modify *Miranda.* While the Department considers this issue, federal prosecutors should not rely on the voluntariness provision of Section 3501 to urge the admission of a statement taken in violation of *Miranda* without first consulting with the criminal Division.

Copies of the brief in the *Leong* case are available from the Appellate Section of the Criminal Division. If you have any questions about this issue, please contact Patty Merkamp Stemler, Chief of the Appellate Section, at (202) 514–2611, e-mail CRM04 (STEMLER).

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, November 5, 1997.

The Hon. FRED THOMPSON,
U.S. Senate Washington, DC.

DEAR SENATOR THOMPSON: This responds to your June 4, 1997, letter to the Attorney General, in which you asked several questions relating to the Justice Department's use of Section 3501. I apologize for the delay in responding to your inquiry. As you know, the Department of Justice has been actively engaged during the past several months in a comprehensive analysis of the constitutionality of Section 3501. That analysis was prompted by a supplemental briefing order in *United States* v. *Leong,* 116 F.3d 1474 (4th Cir. June 26, 1997) (table), which was issued while the Fourth Circuit was considering whether to rehear the case sua sponte and which required the government to address the constitutionality of Section 3501. Following a thorough review of the case law, the Attorney General determined that the federal appellate and district courts may not apply Section 3501 to admit a voluntary confession in a case in which *Miranda* v. *Arizona,* 384 U.S. 436 (1966), would require its exclusion. Nor may federal prosecutors urge the lower federal courts to rely on Section 3501 in such circumstances. We have previously provided you with a copy of the government's supplemental brief in *Leong,* but we are again enclosing a copy of that brief which details the legal reasoning behind the Department's recently announced policy with respect to section 3501.

Following the submission of the government's supplemental brief in *Leong,* the court of appeals declined to rehear the case, albeit for a different reason than that urged by the government. I have attached a copy of the court's order disposing of the case.

You also ask why the government did not raise Section 3501 in the district court in *United States* v. *Sullivan, a firearm prosecution from the Eastern District of Virginia. Defendant Sullivan caught suppression of an incriminatory statement and a gun on the ground that he had been subjected to custodial interrogation during a traffic stop but had not received Miranda* warnings. The government argued at the suppression hearing that defendant Sullivan was not in custody when he confessed to possessing a gun, and therefore he was not entitled to *Miranda* warnings. The government did not raise Section 3501 in the district court because the prosecutor

was reasonably confident that the government would prevail on the merits of the custody issue.

The district court held that Sullivan was in custody when he admitted that he had a gun, and therefore the officer should have issued *Miranda* warnings prior to eliciting this admission. After the district court suppressed the statement and the gun as fruits of a *Miranda* violation, the United States Attorney's office sought authorization to appeal from the Solicitor General's Office. As you know, the permission of the Solicitor General must be obtained before an appeal is taken from a decision adverse to the United States, and the United States Attorney's office is required to advise the Solicitor General of all issues it intends to raise on appeal. Specifically, the United States Attorney's Office sought permission to argue that Sullivan was not in custody, and hence he was not entitled to *Miranda* warnings, when he made the incriminatory statement that led to the discovery of the gun. In accord with standard procedure, the recommendation was reviewed by the criminal Division, which endorsed the custody argument, and the Acting Solicitor General Walter A. Dellinger authorized the appeal on that ground. The United States Attorney's Office did not seek authorization to raise Section 3501 on appeal, nor did the Acting Solicitor General give such authorization. Nevertheless, in the government's opening brief, the United States Attorney's Office argued that Section 3501 precluded suppression of the evidence.

Shortly thereafter, Sullivan's counsel brought this argument to the attention of the Solicitor General's Office and inquired whether Mr. Dellinger had authorized the United States Attorneys Office to make the Section 3501 argument. Upon reviewing the brief, the record below, and the letter of the United States Attorney's Office seeking authorization to appeal, and after consulting with the United States Attorney, Acting Solicitor General Dellinger decided to withdraw the government's brief because it presented "issues that were not raised or addressed in the district court and that were not presented to [him] for consideration at the time [he] authorized the government to appeal, as required by Department of Justice regulations." March 26, 1997 letter from Walter Dellinger, Acting Solicitor General, to Patricia S. Conner, Clerk, United States Court of Appeals for the Fourth Circuit. The Acting Solicitor General drew the court of appeals' attention to 28 C.F.R. 0.20, which states that the Solicitor General shall "determin[e] whether, and to what extent, appeals will be taken by the Government to all appellate courts." Mr. Dellinger reassigned the case to an attorney in the Criminal Division, who resubmitted the brief without the Section 3501 argument. The appeal is still pending in the Fourth Circuit.

You also ask, for "a list of all cases since 1989 in which the Justice Department has raised as an appellant before the court of appeals an argument that was not raised in the district court." This information is not readily accessible; we could not prepare such a list without reviewing in detail approximately 4,000 case files. Although the government may often defend a favorable judgment on appeal on a legal ground not presented in the lower court, the Department can assure you that the instances in which the Solicitor General authorizes the government as appellant to advance an argument that was not preserved below are rare. The Solicitor General's restraint in this regard promotes the Department of Justice's strong institutional interest in preventing criminal defendants from gaining relief based on arguments raised for the first time on appeal. As you are aware, such arguments are subject to stringent legal limitations.

You also ask that the Department inform you of every case since 1989 in which a federal court ordered the suppression of any statement under *Miranda.* The Department's filing system and records do not readily yield a definitive list of such cases. We have, however, reviewed all memoranda submitted to the Solicitor General, as of November 1, 1997, concerning such cases and have found a total of 57 cases (some involving multiple, decisions) in which adverse *Miranda* rulings made by the federal courts have been reviewed by the Solicitor General. The cases reviewed by the Solicitor General are listed in an addendum to this letter. We recognize that this list no doubt excludes a number of cases in which confessions were suppressed under *Miranda,* including cases that were ultimately resolved in a manner favorable to the United States. As far as we have been able to determine, *United States* v. *Cheely,* 36 F.3d 1439, 1448 (9th Cir. 1994), is the only one of these cases since 1989 in which Section 3501 was affirmatively relied upon by the government and addressed on the merits by a federal court. The government raised Section 3501 in the district court in *United States* v. *Dickerson,* No. 97–159–A (E.D. Va. July 1, 1997), but the district court did not address this argument in its suppression order. It would be extremely difficult, if not impossible, to ascertain the particular reasons why the government did not raise section 3501 in each of the other listed cases. However, it is likely that section 3501 has been raised infrequently over the

last 28 years at least in part because of the serious questions as to its constitutionality that were recognized even at the time of the law's enactment.

You also ask the Department to inform you "of every case in which the Department of Justice has relied on Section 3501 since 1989, and, in every such case whether the court reached the issue and what the result was." It would be nearly impossible to provide a definitive answer to the question you pose inasmuch as the Department of Justice does not maintain a listing of the arguments that federal prosecutors have made in responding to the myriad claims raised by criminal defendants in the district and appellate courts. We have noted above two cases of the type you have inquired about, and we are not presently-aware of others. However, short of ordering the individual United States Attorneys' Offices to conduct a case-by-case audit of their pleadings in all cases since 1989 in which the admissibility of a confession has been challenged, we have no way of determining for certain whether federal prosecutors have relied on Section 3501 in other cases to defend the admissibility of a confession.

Finally, the Department has not previously considered it necessary to provide guidance to the United States Attorneys concerning reliance on Section 3501. In light of the supplemental brief that was filed in *Leong*, the Department plans to provide future guidance to the United States Attorneys as is appropriate.

I hope that this information adequately responds to your inquiries on Section 3501. Please do not hesitate to contact me if I can be of further assistance on this or any other matter.

Sincerely,

ANDREW FOIS,
Assistant Attorney General.

ADDENDUM

ADVERSE *Miranda* Rulings Reviewed by the Solicitor General

January 1, 1989–November 1, 1997

United States v. *Charles T. Dickerson,* No. 97–159–A (E.D. Va. July 1, 1997), appeal pending (4th Cir.)

United States v. *Erving Lewis,* No. 96–747–MV (D.N.M. July 1, 1997), appeal pending (10th Cir.)

United States v. *Roger Martin,* No. 96–851–CR–Ferguson (S.D. Fla. May 27, 1997)

United States v. *Sheri Lynn Bulacan,* No. 96–00801 (D. Hi. May 1, 1997)

United States v. *Leaburn Alexander,* 106 F.3d 874 (9th Cir. Feb. 3, 1997) (reinstating suppression order that district court had vacated prior to second trial)

United States v. *Bernard Watson,* 871 F. Supp. 988 (N.D. Ill. Dec. 5, 1994), reversed and remanded, 87 F.3d 927 (7th Cir. July 3, 1996), suppressing on remand, 1997 WL 24673 (N.D. Ill. Jan. 17, 1997), denying suppression on motion to reconsider, 1997 WL 124268 (N.D. Ill. Mar. 24, 1997)

United States v. *Robert H. Sullivan,* 948 F, Supp. 519 (E.D.Va. Nov. 19, 1996), appeal pending, No. 97–4017 (4th Cir.)

United States v. *Amando Fernandez Ventura and Milagros Cedeno,* 892 F.Supp. 362 (D.P.R. June 30, 1995), reversed and remanded, 85 P.3d 708 (1st Cir. 1996), suppressing on remand, 947 F. Supp. 25 (D.P.R. Nov. 14, 1996)

United States v. *Patrick Elie,* No. 96–203–A (E.D.Va. July 18, 1996), reversed, 111 F.3d 1135 (4th Cir. April 24, 1997)

United States v. *Pablo Hernandez & Suleima Silva,* No., CR–95–65–Seay (E.D. ok. Dec. 19, 1995), reversed and remanded, 93 F.3d 1493 (10th Cir. Aug. 30, 1996)

United States v. *Tony Leong,* No. AW–96–0272 (D. Md. Oct. 18, 1996), affirmed, No. 96–4676 (4th Cir. June 26, 1997)

United States v. *Aaron L. Salvo,* No. 1:96 CR 352 (N.D. Ohio Feb. 27, 1997), appeal pending (6th Cir.)

United States v. *Aimee Lowry,* No. LR–CR–94–180 (8.D. Ark. Nov. 22, 1994)

United States v. *James Edward Rogers,* No. 94–CP–0133–01D (D.Wy. June 26, 1995)

United States v. *Achille Barbel,* Crim. No. 93–30 (April 12, 1993 D. V.I. 1993)

United States v. *Kelly Richards,* et al., No. CR. S–92–193–LKK (E.D. Calif. Feb. 250 1994)

United States v. Jaime Vargas, No. 93–207–CR–MORENO (S.D. Fla. July 16, 1993)

United States v. *Michael LaPorta,* No. 91–290C (W.D. N.Y. Nov. 18, 1993)

United States v. *Sieni Tagovailoa,* No. 92–00949 (D. Haw. Oct. 5, 1992), affirmed, 5 F.3d 543 (Table), 1993 WL 343151 (9th Cir. 1993)

United States v. *Gregory Lee Martin,* No. 92–30146–WLB (S.D. Ill. March 11, 1993), reversed and remanded, 9 F.3d 113 (Table), 1993 WL 430154 (7th Cir. 1993)

United States v. *Roderick J. Hanks,* No. CR 92–10087–01 (D. Kan. May 3, 1993), appeal dismissed, 24 F.3d 1235 (10th Cir. 1994)

United States v. *Raymond Cheely, Jr.,* No, A92–073 (D. Alaska Dec. 22, 1992), affirmed, 21 F.3d 914 (9th Cir. 1994), superseded and amended, 36 F.3d 1439 (9th Cir. 1994)

United States v. Kevin R. Smith, et al., 3 F.3d 1088 (7th Cir. Aug. 26, 1993)

United States v. *Vincent Anthony Purdue,* No. 92–3140 (10th Cir. Nov. 1, 1993)

United States v. *Brian Edward Henley,* 984 F.2d 1040 (9th Cir. Jan. 29, 1993)

United States v. *Phillip Ramsey, Jr.,* 992 F.2d 301 (11th Cir. 1993)

United States v. Patrick William Swint (M.D. Pa. Apr. 28, 1993)

United States v. *Teresa Mechell Griffin,* 7 F.3d 1512 (10th Cir. Oct. 26, 1993), on appeal from remand, 48 F.3d 1147 (Feb. 23, 1995)

United States v. *Lowell Green,* 592 A.2d 985 (D.C. App. 1991), cert. granted, 504 U.S. 908 (1992), cert. dismissed as moot, 507 U.S. 545 (1993)

United States v. *Gordon Lynn Smith,* Crim. No. 6:92CR29 (E.D. Tex. Dec. 12, 1992), reversed, 7 F.3d 1164 (5th Cir. 1993)

United States v. *Brian E. Benton,* No. 1:CR–92–227 (M.D. Pa. Dec. 2, 1992), reversed, 996 F.2d 642 (3d Cir. 1993)

United States v. *Thomas Lowell Allen,* Crim. No. 91–20294–TU (W.D. Tenn. July 24, 1992)

United States v. *Pasquale G. Barone,* 968 F.2d 1378 (1st Cir. 1992)

United States v. *Sidney Taylor,* No. 92–14–02 (M.D.N.C. May 21, 1992)

United States v. *Cordell L. Tillman,* 963 F.2d 137 (6th Cir. 1992)

United States v. *Edwin Etcitty,* No. 91–487–JB (D.N.M. March 18,,.1992)

United States v. *Robin Rene Warner (Juniata Marla Redd),* 955 F.2d 441 (6th Cir. 1992), superseded by, 971 F.2d 1189 (6th Cir. 1992)

United States v. *Guillermo Soto,* 953 F.2d 263 (6th Cir. 1992)

United States v. Gerald W. Swims Under, No. CR–92–01–GF–PGH (D. Mont. March 16, 1992), affirmed in part and vacated in part, 990 F.2d 1265 (9th Cir. 1993) (table)

United States v *Avaughn 0. Green,* Crim. No. 91–0462 (D.D.C. Oct. 28, 1991)

United States v. *Jacinto Antonio Alava-Solano,* No. CR91–1058B (W.D. Wash., Oct. 17, 1991)

United States v. *Dominick Mark Peso,* No. CR–90–452 (D.N.M. July 31, 1991)

United States v. *Isaza Gonzalo,* No. 90–CR–583 (E.D.N.Y. June 26, 1991)

United States v. *Pawel Zygmunt Szymaniak,* No. 90–1620 (2d Cir. May 30, 1991)

United States v. *Leonard David Griffin,* 922 F.2d 1343 (8th Cir. 1990)

United States v. *Mjcheal Spencer,* No. 90–CR–359 (S.D.N.Y. Oct. 17, 1990)

United States v. *Rene Martin & Barry Williams,* No. J90–00015(W)/00016(W) (S.D. Miss., July 16, 1990)

United States v. *Warren James Bland,* 908 F.2d 471 (9th Cir. 1990)

United States v. *Gerald Charles Alexander,* No. 2:90–CR–03 (W.D. Mich., July 3, 1990), affirmed, 925 F.2d 1465 (6th Cir. 1991) (table)

United States v. *Clarence Edward Coles,* No. 89–80324 (E.D. Mich., April 10, 1990)

United States v. *Wallace Lewis Miles,* CR 89–60068–2 (D. Ore., Jan. 11, 1990), reversed, 917 F.2d 1307 (9th Cir. 1990) (table)

United States v. *Terry Gene Carter,* 884 F.2d 368 (8th Cir. 1989), affirming district court's suppression order, No. CR–88–40017–01 (D.S.D. Aug. 18, 1988)

United States v. *Mikelis Kirsteins,* No. 87–CV–946 (N.D.N.Y. Aug. 21, 1989), reversed, 906 F.2d 919 (2d Cir. 1990)

United States v. *Bruce Miller,* 722 F. Supp. 1 (W.D.N.Y. Aug. 18, 1989)

United States v. *John Doe (Lynn M. O'Brien),* 878 F.2d 1546 (1st Cir. 1989)

United States v.*Earnestine Mack and Albert Ray Macklin,* Crim. No. 88–20235 (W.D. Tenn., May 30, 1989), reversed, 900 F.2d 948 (6th Cir. 1990)

United States v. *Roger W. Bosier,* No. CR–1–88–086–01 (S.D. Ohio, Feb. 22, 1989)

ADDITIONAL SUBMISSIONS FOR THE RECORD

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 97–4017

UNITED STATES OF AMERICA,

APPELLANT,

v.

ROBERT H. SULLIVAN,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND UNITED STATES SENATORS JEFF SESSIONS, JON KYL, JOHN ASHCROFT, AND STROM THURMOND, SUPPORTING APPELLANT ON ALTERNATIVE GROUNDS

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a national, nonprofit law and policy center based in Washington, D.C., that devotes substantial resources to litigating cases raising constitutional issues, including cases concerning the rights of victims of crime and the proper administration of the criminal law. In that regard, WLF has participated in numerous cases before the Supreme Court and this Court, and has filed briefs addressing the very issue WLF addresses in this case, namely, the applicability of 18 U.S.C. § 3501. *See, e.g., Davis* v. *United States,* 512 U.S. 452, 457 n.* (1994) (noting amicus brief by WLF raising the 18 U.S.C. § 3501 issue).

United States Senators Jeff Sessions, Jon Kyl, John Ashcroft, and Strom Thurmond are duly elected Members of the United States Senate and members of the Senate Judiciary Committee. They have a strong interest in the proper administration of federal criminal laws and procedure in both their representational and legislative capacities. In particular, the congressional amici are concerned that a duly-enacted law of Congress—18 U.S.C. § 3501—has not been effectively enforced to the detriment of the criminal justice system and crime victims in this country. As Associate Justice Antonin Scalia has observed, the failure to enforce section 3501 may have produced "the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens." *Davis* v. *United States,* 512 U.S. 452, 465 (1994) (Scalia, J., concurring).

ISSUE PRESENTED

Whether the district court erred in suppressing under *Miranda* custody doctrine the defendant's incriminating and voluntary statement in light of Congress' mandate in 18 U.S.C. § 3501 that all voluntary statements "shall be admissible in evidence."

STATEMENT OF THE CASE AND FACTS

Amici adopt the "Statement of the Case" and "Statement of the Facts" of the United States. In brief, the defendant's car was stopped by United States Park Police on the George Washington Parkway near National Airport because of a missing front license plate. After examining the defendant's license and registration and running a computer check, the officer returned them to the defendant with the admonition to take care of the missing front plate (rather than issuing him a citation for a clear violation of Virginia Traffic Code § 46.2–715.). At this point, Sullivan was free to go. The officer then asked Sullivan if he had anything illegal in the car, whereupon Sullivan did not at first respond. The officer asked again, telling Sullivan it would be better to tell him now. Sullivan then told the officer he had a gun under the seat of the car. The officer looked under the seat and found a loaded Browning 9mm pistol with 14 rounds. Sullivan was charged with illegally carrying a weapon because he had a prior felony conviction.

The district court suppressed the statement and the gun itself because it ruled that Sullivan was in "custody" for *Miranda* purposes and should have been given *Miranda* warnings.

SUMMARY OF THE ARGUMENT

The district court erred in suppressing defendant's voluntary incriminating statement. In 1968, Congress enacted 18 U.S.C. § 3501 to supersede the *Miranda* rules as conditions on the admission of statements made by suspects and to restore the traditional voluntariness standard. *See* 18 U.S.C. § 3501(a) (voluntary statements "shall" be admitted in evidence).[1] Section 3501 complies with the Constitution. Since the *Miranda* rules are not of constitutional stature, Congress possesses the power to modify or even abrogate them. The Supreme Court has emphasized that *Miranda* warnings are not themselves constitutional requirements. Rather, they are merely "suggested safeguards." *See, e.g., Michigan* v. *Tucker,* 417 U.S. 433, 444–45 (1974); *New York* v. *Quarles,* 467 U.S. 649, 645–55 & n.5, 658 n.7 (1984). In the absence of unconstitutional compulsion in violation of the Fifth Amendment there is no constitutional impediment to admitting a suspect's voluntary incriminating statements despite non-compliance with *Miranda.* According, section 3501 provides the governing law for federal cases. *Accord United States* v. *Crocker,* 510 F.2d 1129, 1137 (10th Cir. 1975) (upholding section 3501).

While this issue was originally raised by the United States but withdrawn in their redacted brief, this Court can and should nevertheless consider the § 3501 issue as more fully stated in our unopposed motion for leave to file this brief.

ARGUMENT

For the convenience of the Court and in the interests of judicial economy, amici adopt Part II of the original brief of the United States, filed in this case on March 5, 1997, at 15–23.("Part II. Sullivan's statements were not subject to suppression in any event, because Congress has directed that voluntary statements shall be admissible, notwithstanding the failure to give *Miranda* Warnings, 18 U.S.C. 3501"). This portion of the government's original brief is reproduced here in the Addendum to this brief (A2–A12) and is hereby incorporated by reference as part of amici curiae's brief.

Rather than draft their own brief on this issue (as amicus WLF has done in prior cases), amici believe that this Court should have the benefit of the original brief filed on behalf of the United States by the career prosecutors handling the case; accordingly, we adopt it as our own.

CONCLUSION

For the foregoing reasons and those stated in our unopposed motion for leave to file our amici brief, the judgment of the district court suppressing defendant's statement should be reversed.

Respectfully submitted,

DANIEL J. POPEO,
PAUL D. KAMENAR,
Washington Legal Foundation.

PAUL G. CASSELL,
(Counsel of Record),
University of Utah.

[1] Pursuant to Local Rule 28(b), the full text of 18 U.S.C. § 3501 is included in the Addendum to this brief.

COUNSEL FOR AMICI CURIAE

NO. 97–4750

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLANT,

v.

CHARLES THOMAS DICKERSON,

DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR REHEARING

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation.

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Counsel Amicus Curiae

Date: March 19, 1999

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR REHEARING

INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) appeared as amicus curiae in this case arguing both in its brief and at oral argument that 18 U.S.C. § 3501 governs the admissibility of the confession made by the defendant Charles Dickerson. The panel agreed with WLF's argument. *United States* v. *Dickerson*, 166 F.3d 667 (4th Cir. 1999).

This Court requested that WLF respond to Dickerson's petition for rehearing and rehearing en banc after receiving the submission by the Department of Justice on behalf of the United States which, although having prevailed (albeit on grounds that it did not urge), agreed with the defendant that the issue of 18 U.S.C. § 3501 warranted rehearing en banc. While Dickerson requests rehearing not only of the Sec-

tion 3501 issue but also of the validity of the search warrant, this brief will address only the Section 3501 issue.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case does not warrant further review by this Court for two reasons. First, contrary to the arguments by Dickerson and the Justice Department, the panel's conclusion that 18 U.S.C. § 3501 rather than *Miranda* v. *Arizona,* 384 U.S. 436 (1966), governs the admissibility of Dickerson's confession is correct in all respects. Thus, just as the Department argues that the search warrant issue was correctly decided and therefore should not be reheard, so too should the Court decline to rehear the Section 3501 issue. As the panel concluded in a comprehensive and well-reasoned opinion, Section 3501, enacted after *Miranda,* is an Act of Congress that directly establishes the rules under which confessions are admissible in federal prosecutions. Accordingly, that statute must govern unless *Miranda's* exclusionary rule takes precedence. That exclusionary rule can take precedence only if it is constitutionally required. The panel convincingly demonstrated that *Miranda's* rule is not constitutionally required, because of what *Miranda* itself said on the subject and because of numerous subsequent Supreme Court decisions so stating and holding, the most important of which both Dickerson and the Justice Department assiduously avoided addressing in their respective briefs.

Second, even if there were some doubt about whether the panel has decided this question correctly, the Court should still exercise its discretion against a grant of en banc rehearing. The question whether Section 3501 or *Miranda* governs the admissibility of confessions in federal prosecutions is, to be sure, of "exceptional importance" which is a necessary but not sufficient reason for rehearing en banc under Fed. R. App. Proc. 35(b). But the question is of sufficient importance that certiorari is likely to be granted by the Supreme Court if the panel decision is left undisturbed. Accordingly, the likelihood that the Supreme Court will ultimately resolve the question is a proper basis for the en banc court to decline to consider it and avoid the delay that such consideration inevitably will entail.

If, on the other hand, rehearing is granted and the en banc Court were to reverse the panel for any reason, it is highly unlikely that the Section 3501 question will ever reach the Supreme Court because the United States, which will be the only party with standing to seek certiorari, is all but certain not to do so. Thus, the practical effect would almost certainly be to allow the Department of Justice to continue to refuse to enforce an Act of Congress on the basis of asserted doubts about its constitutionality that, it claims, only the Supreme Court can resolve—while simultaneously preventing the Supreme Court from resolving them. Thus, this unique and unwarranted posture of the Department of Justice is itself reason enough for the Court to exercise its discretion to deny en banc rehearing.

This course seems especially appropriate here, because the Department of Justice has stated repeatedly that the position it is advancing before this Court—that *Miranda* rather than § 3501 governs—is not, the Department says, necessarily the position it will take in the Supreme Court if this case is heard there. Where a question seems important enough to warrant Supreme Court review in any event, and where one of the parties to a case has announced that it is planning on presenting a position to this Court that may change once the case is before the Supreme Court, it is almost impossible to see why the en banc court should spend its resources on the case. Rather, the preferable course would be to let the question be decided by the Supreme Court, which, at least, may have the benefit of the Department's ultimate position on the matter.

ARGUMENT

I. En banc rehearing is unnecessary because the panel's decision was correctly decided

There is no good reason for the full court to rehear a case that the panel decided correctly. Especially in light of the discretionary nature of a court of appeals' decision to rehear a case en banc, this threshold for en banc review is so compelling and so obvious that it is only rarely stated. *See Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1022 (Oakes, J., dissenting from denial of rehearing en banc) ("if one agrees fully with the panel decision one does not generally vote to hear it en banc"). After all, the purpose of rehearing is to allow the full court to develop subsequent

[1] The Department of Justice argued in its answer brief that the issue regarding the validity of the search warrant was correctly decided and does not warrant rehearing en banc. Br. of U.S. at 13. WLF concurs with that position.

law without being bound by a panel decision that a majority of the full court believes to be incorrect. *See generally Arnold* v. *Eastern Airlines,* 712 F.2d 899, 912 (411 Cir. 1983), *cert. denied,* 464 U.S. 1040 (1984) (Widener, J., dissenting from grant of en banc).

The question in this case is whether *Miranda* governs the admissibility of confessions in federal court, or whether Section 3501 does so. That question, in turn, depends on whether *Miranda's* exclusionary rule is, or is not, required by the Constitution.

In an exhaustive and comprehensive opinion, the panel correctly concluded that *Miranda's* exclusionary rule is not constitutionally compelled and that Section 3501 accordingly governs. This is most clearly demonstrated by a trio of Supreme Court decisions cited in the panel decision as well as in WLF's brief on the merits. In *Harris* v. *New York,* 401 U.S. 222, 224 (1971), and *Oregon* v. *Hass,* 420 U.S. 714, 722 (1975), the Court held that statements taken in violation of *Miranda* could be admitted into evidence to impeach the testimony of a defendant who took the stand at his own trial. And in *New York* v. *Quarles,* 467 U.S. 649, 654 (1984), the Court ruled that a confession obtained as a result of a police question "Where's the gun?," asked of a person in police custody, was admissible in the prosecution's case in chief despite the failure to give *Miranda* warnings.[2]

These cases rule out any possibility that *Miranda's* exclusionary rule is mandated by the Constitution. This is not only because that was how the Court explained its decision in all these cases. *See, e.g., Quarles,* 467 U.S. at 658 n.7 ("absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind."). It is also because the only theory that has ever been offered to explain how *Miranda's exclusionary rule could be constitutionally required is one that posits that any custodial confession obtained without compliance with Miranda* must have been obtained by "compelling" the defendant to give it; and that therefore, introduction into evidence of such a confession violates the Fifth Amendment which forbids any person from being "compelled in any criminal case to be a witness against himself." *See generally Miranda,* 384 U.S. at 467–469.

But in *Quarles, Harris,* and *Hass,* the *Miranda* rules were not complied with, yet the defendant's self-incriminating statements, given while he was in custody, were nevertheless held admissible. Therefore, even apart from the Supreme Court's oft-repeated statements that *Miranda* rules are only prophylactic and not a component of the Constitution, it simply cannot be the case that obedience to *Miranda* is a constitutional prerequisite for such a statement to be rendered voluntary, and hence admissible. As the panel correctly noted, statements taken in violation of the Fifth Amendment's prohibition on compelled testimony cannot be admitted into evidence for any purpose. 166 F.3d at 689, citing *Mincey* v. *Arizona,* 437 U.S. 385, 401–02 (1978). That the statements were admitted in *Harris, Hass,* and *Quarles* despite failure to comply with the measures set out in *Miranda* must surely mean that *Miranda's* exclusionary rule is not required by the Fifth Amendment. Congress therefore acted within its authority in superseding *Miranda's* exclusionary rule when it adopted Section 3501. *See United States* v. *Crocker,* 510 F.2d 1129, 1136–38 (10th Cir. 1975) (alternative holding that confession was admissible under Section 3501); *United States* v. *Rivas-Lopez,* 988 F. Supp. 1424 (D. Utah 1997).

As noted, the Department and Dickerson avoid discussing these Supreme Court cases, and instead maintain that the Supreme Court's continued application of *Miranda's* exclusionary rule to the States admits of one and only one conclusion: that the Court must view it as required by the Constitution.[3]

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[2] Dickerson's petition does not cite, let alone discuss, any of these cases. The Department also avoids *Harris* or *Hass,* and only cites *Quarles* parenthetically. Br. of U.S. at 9.

[3] The Department maintains that the Supreme Court regards its *Miranda* rulings in state cases as "implementing and effectuating constitutional rights" (Br. of U.S. at 12), and that the *Miranda* rules are based on "constitutional premises" (*id.* at 6); "rest[s] on a constitutional foundation" (*id.* at 7–8); or has "constitutional footings" (*id.* at 11) or "moorings" (*id.* at 12). These phrases have no fixed meaning and are of little assistance in answering the question actually at issue: whether *Miranda's* exclusionary rule can be modified by Congress.

But even the Department's constitutional characterization of *Miranda* suggest that *Miranda's* exclusionary rule is subject to legislative modification. Under our constitutional system of government, ordinary legislation that Congress enacts generally has, and indeed it has to have, "constitutional moorings" or "footings." One legitimate purpose of such ordinary congressional legislation is to "implement and effectuate constitutional rights," for example, by creating remedies for their violation. See 42 U.S.C. § 1983; Voting Rights Act of 1965, upheld in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966). But the fact that legislation has "constitutional footings", or is designed to "implement constitutional rights," certainly does not prevent Congress

Continued

It is true that, as the panel recognized, the basis for *Miranda's* applicability to the States (an issue obviously not presented in this federal case) presents "an interesting academic question." 166 F.3d at 691, n.21. The panel's view was shared by the Department's most detailed analysis of *Miranda*—a 120-page report that fully supports the validity of Section 3501. As the report observed: "*Miranda's* continued application in state proceedings has a decidedly mysterious character * * *. U.S. Dep't of Justice, Office of Legal Policy, *Report to the Attorney General on the Law of Pre-Trial Interrogation* 104 (1986), reprinted in 22 U. Mich. J.L. Ref. 437, 550. But to say that the only possible solution to that mystery is that *Miranda's* exclusionary rule is constitutionally required, however, is to suggest that the Supreme Court does not know what it is talking about when it has repeatedly denied that this is so. *See* 166 F.3d at 689–91 (discussing cases). But beyond that, Dickerson's and the Department's reasoning also leads to the conclusion that in the many instances in which the Supreme Court and this Court have issued holdings that openly and explicitly depend on *Miranda's* non-constitutional status, those cases cannot be squared with *Miranda* and would have to be overruled.[4]

Although we do not believe that this Court needs to solve this "mystery" of *Miranda's* application to the states in order to conclude that the panel decision was correct, we can posit several possible theories that do not require the conclusion that either *Miranda* itself was wrongly decided or that these later cases were.

First, like *Mapp* v. *Ohio,* 367 U.S. 643 (1961) and *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971), *Miranda* may be a "constitutional common law" decision. *See* Henry P. Monaghan, Foreword: Constitutional Common Law, 89 *Harv. L. Rev.* 1 (1975); *see also* Br. for the United States, *City of Boerne* v. *Flores,* No.95–2074 (1996) (suggesting something akin to this theory).[5] In such cases, where the Court is presented with an issue implicating a constitutional right for whose violation there is no legislatively specified remedy, many believe that the Court may take it upon itself to devise one, and that the remedy it devises may extend *beyond* simply redressing the constitutional violation. Under this theory, however, it is also proper for Congress to step in later and substitute an alternative remedy that sweeps more or less broadly, provided the substitute remedy is adequate to correct any underlying constitutional violation. *See Bush* v. *Lucas,* 462 U.S. 367, 377 (1983); *see also* panel opinion, 166 F.3d at 691 (discussing *Palermo* v. *United States,* 360 U.S. 343, 345–48 (1959) and other cases). It is also possible that the States may do so as well.

This theory is consistent with the suggestion made by the *Miranda* Court itself that the national and State legislatures may substitute alternative remedial schemes for the one set out in *Miranda, see Miranda,* 384 U.S. at 467—a suggestion that has not been addressed in any of the Court's post-*Miranda* cases because none of them has involved instances where the Congress or a State has sought to avail

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from modifying it, because legislation may be constitutionally based without being constitutionally required. So, too, *Miranda's* exclusionary rule.

[4] It would also raise questions about all the cases in which the Department has urged the Supreme Court to apply Section 3501 in other contexts not involving whether it supersedes *Miranda.* For example, the Department successfully urged the Court not to suppress a confession under 18 U.S.C. § 3501(c) (six hour safe harbor provision), in the course of which it noted that Section 3501(a) "requires the admission" of voluntary statements. *See* Br. for the U.S. at *passim, United States* v. *Alvarez-Sanchez,* No. 92–1812, 511 U.S. 350 (1994). At no point did the Department advise the Supreme Court that any part of the statute was unconstitutional, nor did it address the complex severability issues that would arise from invalidating the most important provision in it. In another case, the Department invoked Section 3501 to admit a statement into evidence, albeit not over a *Miranda* objection. Br. for the United States at 17–23, *United States* v. *Jacobs,* No. 76–1193, cert. dismissed as improvidently *granted,* 436 U.S. 31 (1978). Here again, the Department did not appraise the Court of any constitutional infirmities of the statute.

Additionally, it would eviscerate the basis for the holdings in many other circuit courts that mere *Miranda* violations during the questioning of a defendant in custody do not give rise to liability under 42 U.S.C. § 1983 because they are not violations of the Constitution, *see, e.g., DeShawn* v. *Safir,* 156 F.3d 340, 346 (2d Cir. 1998); *Clay* v. *Brown,* 1998 U.S. App. Lexis 17115, reported in table format, 151 F.3d 1032 (7th Cir.); *Winsett* v. *Washington,* 130 F.3d 269, 274 (7th Cir. 1997); *Mahan* v. *Plymouth County House of Corrections,* 64 F.3d 14, 17 (1st Cir. 1995); *Giuffre* v. *Bissell,* 31 F3d 1241, 1256 (3d Cir. 1994); *Warren* v. *City of Lincoln,* 864 F.2d 1436, 1441–42 (8th Cir. en banc), cert. denied, 490 U.S. 1091 (1989); *Lucero* v. *Gunter,* 17 F.3d 1347, 135–51 (10th Cir. 1994); *Bennett* v. *Passic,* 545 F.2d 1260, 1263 (10th Cir. 1976), thereby creating potential federal litigation every time a suspect in custody is questioned.

[5] The Supreme Court ruled against the constitutionality of the Religious Freedom Restoration Act, the statute at issue in *Boerne,* 521 U.S. 507 (1997), but *not* because it rejected Congressional power to modify a non-constitutionally mandated remedy established by the Court. Rather, it concluded that Congress's powers under section 5 of the Fourteenth Amendment were limited to defining appropriate remedies for violations of rights established in the Constitution, and that Congress could not change the scope of the rights themselves. *Id.*

itself of this option. Thus, the continued application of *Miranda* to the States may represent no more than the application of the Court's judicially-created, but not constitutionally mandated, remedial scheme in the absence of a legislatively devised alternative.[6]

Miranda's exclusionary rule, of course, operates in much the same way: it, too, is an incentivizing device rather than a constitutional mandate per se. Both thus use as their jumping-off point the prohibition on compelled self-incrimination at trial to try to protect suspects from compulsion in the course of interrogation. It is difficult to argue (and the *Miranda* Court did not argue) that the Fifth Amendment itself actually requires either: all that it would appear to do is bar the admission of any statement obtained through compulsion at trial. Therefore, it is difficult to see how Congress's preference for the incentives it established over the incentives *Miranda* created through its exclusionary rule could be a *constitutionally* inadequate means for enforcing the Fifth Amendment.

How well each of these incentivizing devices will work is obviously a prudential judgment that the legislature is far better positioned to make than the courts. But like the panel, we would expect that the incentive Section 3501 creates for giving the warnings will be sufficient to result in their being given in much the same fashion and regularity as they are today. For as the panel explained, "federal courts rarely find confessions obtained in technical compliance with *Miranda* to be involuntary under the Fifth Amendment," and therefore, "providing the four *Miranda* warnings is still the best way to guarantee a finding of voluntariness." 166 F.3d at 692. On the other hand, use of Section 3501 rather than *Miranda* to determine the *admissibility* of confessions will avoid problems like the one this case otherwise presents, where for no good reason whatsoever, Dickerson's unquestionably voluntary incriminating statements may be excluded at trial simply because of the way the government presented its belated evidence showing that indeed, Dickerson was Mirandized *before* making them.

Second, the *Miranda* Court does not appear to have focused on the question whether the federal courts have supervisory power over the States. It was, after all, addressing other questions. Since *Miranda* was handed down, we are aware of no case where a party has seriously presented to the Court the question whether *Miranda's* prophylactic approach can be reconciled with the Court's post-*Miranda* cases such as *Smith* v. *Phillips,* 455 U.S. 209, 221 (1982) and *Doyle* v. *Ohio,* 426 U.S. 610, 618 n.8 (1976), holding that the federal courts lack supervisory power over the States. The Justice Department report on Section 3501 concluded with respect to this point that "[t]here is no real explanation for the persistence of *Miranda* in light of these considerations aside from the fact that the Supreme Court has not yet faced up to them." *Report to the Attorney General on the Law of Pretrial Interrogation, supra,* at 80.

Whatever the answer to this question, however, the solution cannot be that *Miranda's* exclusionary rule is constitutionally required, since, as already discussed, the Supreme Court in *Harris, Hass,* and *Quarles,* allowed the admission into evidence of confessions not satisfying the procedures laid out in *Miranda.* In addition, of course, and as the panel noted, in numerous state and federal cases, the Supreme Court has repeatedly and pointedly continued to state that *Miranda's* procedural regimen, and its exclusionary rule in particular, are prophylactic and not constitutional requirements.[7] Thus, the Department's position boils down to a claim that it

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[6] The Department essentially ignores this possibility, although it briefly argues that Section 3501 cannot be defended as a proper acceptance of *Miranda's* invitation to the Congress to devise alternatives equally effective in protecting a suspect's Fifth Amendment rights because it "do[es] not require that suspects be informed of their rights" but simply "relegated warnings to their-pre-*Miranda* status as but one of several non-exclusive factors to be considered in determining voluntariness." Br. of U.S. at 7. In fact, as the panel noted, by requiring a court determining voluntariness to consider several of the *Miranda* factors, as well as some additional ones not mentioned in *Miranda,* Section 3501 does more than simply restore the pre-*Miranda* voluntariness test. By listing the warnings as factors for the court to consider, the statute creates significant incentives for officers to give them, since doing so will, ultimately, help secure the admission into evidence of whatever information the suspect provides. 166 F.3d at 692.

[7] See *Davis* v. *United States,* 512 U.S. 452, 457–58 (1994) (referring to *Miranda* warnings as "a series of recommended procedural safeguards"); *Withrow* v. *Williams,* 507 U.S. 680, 690–91 (1993) (acknowledging that "*Miranda's* safeguards are not constitutional in character"); *Duckworth* v. *Eacran,* 492 U.S. 195, 203 (1989) (noting that the *Miranda* warnings are not required by the Constitution); *Connecticut* v. *Barrett,* 479 U.S. 523, 528 (1987) (noting that "the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights"); *Moran* v. *Burbine,* 475 U.S. 412, 42 (1986) ("As is now well established, "[the] * * * *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory self-incrimination (is] pro-

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knows better than the Supreme Court the true meaning of the Court's own holdings. We respectfully submit that, to the contrary, after more than a dozen statements over many years asserting *Miranda's* non-constitutional status, the Court simply has to be taken at its word, "no matter how misguided (others] may think it to be." *Hutto* v. *Davis,* 454 U.S. 370, 374 (1982) (reversing 646 F.2d 123 (4th Cir. 1981) (*en banc*).

Finally, we note that adoption of the view that *Miranda* is constitutionally compelled—the central proposition the Department and Dickerson advance and that the panel rejected is at odds with the holdings of other cases that are part of the law of this circuit, and at odds with arguments the Department of Justice itself has made to this Court that have helped it to develop that law. How can it be squared, for example, with *United States* v. *Elie,* 111 F.3d 1135 (4th Cir. 1997), where this Court concluded that "[i]t is well established that the failure to deliver *Miranda* warnings is *not* itself a constitutional violation"? *Id.* at 1142 (emphasis added). "As a result," this Court added, "errors made by law enforcement officers in administering the prophylactic *Miranda* procedures are treated differently from errors that violate a constitutional right like the Fourth or Fifth Amendment." *Id.* at 1142 n.9. This ruling, it is worth noting, came at the invitation of the Department, which asked the Court to distinguish between "a technical violation of *Miranda*—as opposed to a Fifth Amendment violation." Reply Br. for the U.S. at 6, *United States* v. *Elie,* No. 96–4638 (4th Cir. 1996).

Elie is not the only circuit precedent in jeopardy if *Miranda* were now suddenly discovered to be constitutionally required. In *Correll* v. *Thompson,* 63 F.3d 1279, 1290 (4th Cir. 1995), this Court concluded that "a breach of the rule established in *Edwards* is also a technical violation of *Miranda,* not a Fifth Amendment violation," and therefore refused to suppress a second confession that was derivative of an earlier confession obtained in violation of *Miranda.*[8]

For all these reasons, the panel's decision was correct and should stand.

II. Rehearing en banc is not appropriate where the effect will be to delay or preclude Supreme Court review of this important question and thereby allow the Department of Justice to continue to refuse to enforce an Act of Congress

The question that both Dickerson and the Department of Justice are asking the Court to rehear en banc is whether Section 3501 or *Miranda* governs the admissibility of confessions in federal court. This question admits of one of two answers: either Section 3501 governs or *Miranda* governs. The Department of Justice, however, tries to suggest a third answer: that Section 3501 may govern, but that this "lower court" is not free to apply it. The Department acknowledges that there is language in an entire line of Supreme Court opinions "that might be read to support" the constitutionality of Section 3501. Br. of the U.S. at 9. The Department, however, asks the Court to rely instead on what it describes as an "*equally* well-established line of Supreme Court cases" purportedly viewing *Miranda* as a constitutional right. *Id.* (emphasis added).[9] According to the Department, these cases are binding on the

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tected.'" (quoting *Quarles* quoting *Tucker*); *Oregon* v. *Elstad,* 470 U.S. 298, 306 (1985) (noting that the *Miranda* exclusionary rule "may be triggered even in the absence of a Fifth Amendment violation"); *Edwards* v. *Arizona,* 451 U.S. 477, 492 (1981) (Powell, J., concurring) (noting that the Court in *Miranda* "imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution "); *Michigan* v. *Tucker,* 417 U.S. 433, 444 (1974) *Miranda* warnings are "not themselves rights protected by the Constitution").

Indeed, the Department of Justice filed briefs in many of these cases and others arguing the very rationale the panel in this case adopted, namely, that *Miranda* was not constitutionally required. *See, e.g.,* Briefs for the United States filed in *City of Boerne* v. *Flores,* No. 95–2074; *Withrow* v. *Williams* No. 91–1030; *United States* v. *Green,* No. 91–1521; *Minnick* v. *Mississippi,* No. 89–6332; *Michigan* v. *Harvey,* No. 88–512; *New York* v. *Quarles,* No. 82–1213. We are aware of no case argued in the past nineteen Supreme Court terms (which is as far back as the Lexis data base containing Supreme Court briefs goes) where the Department has taken the position in the Supreme Court that the *Miranda* procedures are constitutionally required.

[8] It would also throw into serious doubt cases applying Section 3501 in other contexts, where this Court has routinely relied on the statute at the Department's urging. In none of these cases, so far as we are aware, has the Department suggested to this Court that applying the statute would raise constitutional problems. *See, e.g. United States* v. *Braxton,* 112 F.3d 777, 784 & n. (4th Cir. 1997) (*en banc*); *United States* v. *Wilson,* 895 F.2d 168, 172 (4th Cir. 1990); *United States* v. *Pelton,* 835 F.2d 1067, 1074 (4th Cir. 1987), *cert. denied,* 468 U.S. 1010 (1988); *United States* v. *Peoples,* 748 F.2d 934, 936 (4th Cir. 1984).

[9] These views of the Justice Department regarding Section 3501 merely repeat its views fully presented to this Court in *United States* v. *Leong,* 116 F.3d 1474 (4th Cir. 1997) (unpublished) which, in turn, were specifically referenced in the Department's Dickerson brief on the merits. Thus, with all due respect to the dissent in this case, the majority did not reach the issue based only on "two pages" of a brief by amicus Washington Legal Foundation. 166 F.3d at 697 (Michael, J., dissenting). Moreover, the Foundation's Dickerson brief was 14 pages in length, much

"lower courts," but apparently not necessarily on the Supreme Court. *Id.* at 12. At bottom, then, the Department is asking the court to rehear this question in order to apply different law than the panel did, even though the Department acknowledges that the law it is asking this Court to apply may, in fact, be incorrect, and the Department itself may, or may not, take that position at the next step down the road.

These circumstances hardly present a compelling case for the court to invest the time and resources needed for *en banc* review simply to indulge the Department's determination to play coy. If this Court grants the rehearing petition, two outcomes are possible. First, the Court may conclude that the panel decided the question correctly. Dickerson would then almost certainly petition for certiorari and the question is of sufficient importance that certiorari is likely to be granted. *See Davis* v. *United States,* 512 U.S. 452, 464 (1994) (Scalia, J., concurring) (promising to decide the Section 3501 issue "when a case that comes within the terms of this statute is next presented to us"). Under these circumstances, we submit that this Court should exercise its discretion and refuse en banc review because the issues "are of such extraordinary importance that we are confident the Supreme Court will accept these matters under its certiorari jurisdiction." *Green* v. *Santa Fe Industries,* 533 F.2d 1309, 1310 (2d Cir. 1976), j*udgment on the merits reversed,* 430 U.S. 462 (1977).

Second, the en banc Court may decide that the panel was wrong, that Section 3501 is unconstitutional, and that *Miranda* governs the admissibility of Dickerson's confession. In that case, the matter will almost certainly be left there. The only party with standing to seek further review would be the Department of Justice. But the Department's determined efforts since *Davis* to keep Section 3501 arguments out of cases presenting *Miranda* questions, well chronicled in the panel opinion, *see* 166 F.3d at 681, provide every reason to believe that the last thing the Department actually wants is for a case presenting this question to reach the Supreme Court.[10] Even if this were not so, it is difficult to imagine that the Department, having asked this Court to reverse itself, would then turn around and ask the Supreme Court to reverse this Court for doing what the Department had asked. Because no review in the Supreme Court would be sought, Section 3501—a statute that the High Court has twice described as the "governing" law on the question of federal confessions, *Davis* v. *United States,* 512 U.S. 452, 457, n.* (1995), *quoting United States* v. *Alvarez-Sanchez,* 511 U.S. 350, 351 (1994)—would have been effectively nullified by the executive branch.

It has long been established that the executive branch's charge to execute the law does not carry with it the power not to execute it. *Kendall* v. *United States,* 37 U.S. 524, 612 (1838) (concluding that such a power would allow the Executive "entirely to control the legislation of Congress, and paralyze the administration of justice"). Yet not executing the law is precisely what the executive branch is now doing in the case of Section 3501. *See Davis* v. *United States,* 512 U.S. 452, 462–64 (1994) (Scalia, J., concurring). Its position is all the more extraordinary given that the traditional position of the Department of Justice is that the Executive Branch has an obligation to defend an Act of Congress against constitutional challenge whenever

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of which, to be sure, addressed the unique procedural posture of the case rather than Section 3501; but the Dickerson Court was expressly made aware of, and had available to it, the Foundation's voluminous briefs on Section 3501 filed in both *Leong* and *United States* v. *Sullivan,* 138 F.3d 126 (4th Cir. 1998), the predecessor cases to *Dickerson. See* WLF's *Dickerson* Br. at 12, n.3. While Dickerson did not brief Section 3501 in this Court, he had ample opportunity to address it in his brief as appellee, and/or in oral argument, and he could have sought permission to file a supplemental, post-argument brief once he saw the extent of the panel's interest in the issue. In any event, Dickerson's position, as now presented in his petition, simply mirrors the views of the Department that were already presented to the panel.

[10] Despite the Department's assertions that its position here is dictated by special considerations that prevent it from defending this Act of Congress before the "lower federal courts", and that these considerations may not apply in the Supreme Court, it has never taken any of the steps that would ordinarily be taken by a party interested in preserving for Supreme Court review a question it believes only that Court can reach. Thus, neither in its brief on appeal nor in its rehearing brief does the Department say, for example, that it believes that Section 3501 governs the admissibility of Dickerson's confession and that, although it cannot so argue to this Court, it wishes to preserve the question for possible future consideration by the Supreme Court. Rather, the Department simply urges this Court not to apply Section 3501. When pressed by the Senate Judiciary Committee on how a case raising Section 3501 would ever reach the Supreme Court if the Department refused to raise the issue in the lower courts, the Attorney General and Deputy Attorney General simply gave no answer to the question. Senate Judiciary Committee Oversight Hearings, July 15, 1998. After taking almost eight months to answer written questions on this point, the Attorney General finally responded on March 11, 1999: "Some courts have raised Section 3501 sua sponte. It is therefore possible that such a case could reach the Supreme Court." But the Department gave no indication that it would be prepared to bring such a case if it were on the losing side of a Section 3501 argument.

a "reasonable" argument can be made in its defense, 5 *Opinions of the Office of Legal Counsel* 25, 25–26 (Apr. 6, 1981); *see also* confirmation hearings of Seth Waxman for Solicitor General (pledging to adhere to this traditional position) (referred to in March 4, 1999 letter from Senator Orrin Hatch, et al., to Attorney General Reno, attached hereto in addendum).

One would have thought that there must at least be "reasonable" arguments to be made in defense of a statute that has been upheld not only by the panel here, but by the Tenth Circuit[11] and the U.S. District Court for the District of Utah[12] as well; and whose constitutionality has been defended by the Department of Justice during numerous-administrations,[13] and by a number of legal scholars.[14]

The dissent in this case suggests that this may all be true,[15] but the Department's refusal to invoke a rule of evidence enacted by Congress is the concern not of the courts, but of Congress, which should seek to "prod the executive into changing its policy with respect to § 3501." 166 F.3d at 697. (Michael, J., dissenting). We respectfully disagree. The executive branch's disregard of a Congressional enactment is undoubtedly a legitimate concern of Congress in its sphere.[16] But as the panel adequately discussed, 166 F.3d at 681–83, the Court had ample authority to reach the

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[11] *United States* v. *Crocker*, 510 F.2d 1129 (10th Cir. 1975).

[12] *United States* v. *Rivas-Lopez*, 988 F. Supp. 1424 (D. Utah 1997).

[13] The Department has long defended the statute, contrary to the suggestion in the dissenting opinion that upholding Section 3501 "overrides 30 years of Department of Justice prosecutorial policy." 166 F.3d at 695 (Michael, J., dissenting). In the Nixon Administration, Attorney General Mitchell issued a directive encouraging U.S. Attorneys Offices to use the statute to seek the admission into evidence of confessions obtained despite technical defects in the giving of *Miranda* warnings. *See* 115 Cong. Rec. 23236–38 (1969) (reprinting memorandum). This litigation effort resulted in several lower court decisions taking no definite position on the statute's constitutionality, and one unequivocally sustaining the statute in an alternative holding. *See United States* v. *Crocker*, 510 F.2d 1129, 1136–38 (10th Cir. 1975). We are aware of no record of the Carter Administration's ever revoking the Mitchell directive. In the Reagan Administration, the Department of Justice's Office of Legal Policy conducted an exhaustive study of statute, concluding that it was constitutional. *See* U.S. Dep't of Justice, Office of Legal Policy, *Report to the Attorney General on the Law of Pre-Trial Interrogation* 104 (1986), *reprinted in* 22 *U. Mich. J.L. Ref.* 437, 550. Following this study, the Attorney General instructed the litigating divisions to seek out the best case in which to test the statute, and the statute was raised. *See, e.g.*, Br. for the United States, *United States* v. *Goudreau*, No. 87–5403ND (8th Cir. 1987) (arguing confession obtained in violation of *Miranda* could be admitted under Section 3501).

Even the Clinton Administration defended the statute for some time. As Attorney General Reno stated: "The Department of Justice does not have a policy that would preclude it from defending the constitutional validity of Section 3501 in an appropriate case. * * * [T]he most recent case in which we raised Section 3501 held that the statute did not 'trump' Supreme Court precedent (*see United States* v. *Cheely*, 21 F.3d 914, 923 (9th Cir. 1994))." The Administration of Justice and the Enforcement of Laws: Hearing before the Sen. Judiciary Comm., June 27, 1995, at 91 (written answer of Attorney General Reno to question of Senator Hatch).

[14] *See, e.g.*, Joseph Grano, *Confessions, Truth and the Law* 203 (1993); Paul G. Cassell, Miranda's Social Costs: An Empirical Reassessment, 90 *Nw. U.L. Rev.* 387, 471–72 (1996); Stephen Markman, The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering *Miranda*", 54 U. Chi. L. Rev. 938, 948 (1987); Phillip Johnson, A Statutory Replacement for the *Miranda* Doctrine, 24 *Am. Crim. L. Rev.* 303, 307 n.8 (1987); Gerald Caplan, Questioning Miranda, 38 Vand. L. Rev. 1417, 1475 (1985).

[15] Judge Michael dissented on the grounds that the Court should not have reached the Section 3501 issue. He reached no conclusion about the constitutionality of section 3501 ("I don't know whether [*Miranda* is a constitutional rule] or not"), the issue for which the Department supports rehearing en banc. 166 F.3d at 697.

[16] Congress has by no means been silent on this issue. The Chairman and other members of the Senate Judiciary Committee in particular have raised this issue over the last few years with the Attorney General in three oversight hearings; with then-Solicitor General Drew Days at an oversight hearing; and at the confirmation hearings of Deputy Attorney General Eric Holder, Solicitor General Seth Waxman, and Assistant Attorney General James Robinson. In each of these instances, the response from all these officials to questions about the Department's failure to raise the provision was that they were looking for the "appropriate case" in which to urge it.

However, after this Court issued its order directing the Department to state its position on the statute in *United States* v. *Leong*, the Department explained that, in fact, there could be no such "appropriate case" that might arise in one of the "lower federal courts," although there might be one in the Supreme Court. There has been one oversight hearing since that time, at which Judiciary Committee Members sought without success to find out how in that case the question would ever be presented to the Supreme Court. Additionally, soon after Dickerson filed his rehearing petition in this case, the Chairman and eight members of the Senate Judiciary Committee took the unusual step of writing a letter to the Attorney General, expressing their concerns and seeking "a commitment from you-to defend the constitutionality of this Act of Congress before both the lower federal courts and the Supreme Court." Chairman Orrin G. Hatch and eight members of the Senate Judiciary Committee to Atty. Gen. Janet Reno at 2 (Mar. 4, 1999) (attached hereto in addendum). Her response was the filing of the brief urging reversal of the panel opinion on Section 3501.

Section 3501 issue. The judiciary is not required to ignore a controlling authority, whether a judicial opinion or statute, just because the parties either negligently or intentionally failed to raise it.

We also submit that at this stage of the legal proceedings, it is entirely appropriate for the judiciary to take into consideration when making a discretionary decision as whether to grant en banc review, whether by doing so it will be facilitating the executive branch's continued disregard of its duty to carry out a Congressional statute.

Finally, the Court should consider societal interests in the enforcement of Section 3501 beyond these important institutional considerations. Every day, our nation's citizens fall prey to serious criminal offenses. More than a few of those crimes cases will involve criminals who, when apprehended, will voluntarily confess to their crimes under circumstances in which their attorneys can raise technical questions of *Miranda* compliance. To allow the Department to continue its unilateral policy of non-enforcement of Section 3501 while the case is being reheard could lead to "the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this." *Davis* v. *United States,* 512 U.S. 452, 465 (1994) (Scalia, J., concurring) . If the petition for rehearing is denied, the excuses will begin to end.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be denied.

Respectfully submitted,

Daniel J. Popeo,
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Counsel for Amicus Curiae

Date: March 20, 1999.

U.S. SENATE, COMMITTEE ON THE JUDICIARY,
Washington, DC, March 4, 1999.

The Hon. JANET RENO,
Attorney General of the United States,
U.S. Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL RENO: As members of the Senate Judiciary Committee, we bring to your attention the case of *United States* v. *Dickerson,* No. 97–4750, (4th Cir. 1999). In *Dickerson,* the court thoroughly addressed and upheld the constitutionality of 18 U.S.C. § 3501. As you know, this statute provides that in a federal prosecution, "a confession * * * shall be admissible evidence if it is voluntarily given." In a September 10, 1997 letter, you notified Congress that the Department of Justice would neither urge the application nor defend the constitutionality of 18 U.S.C. § 3501 in the lower federal; courts. Given the *United States* v. *Dickerson* rejects your legal position and upholds the constitutionality of the statute, we would like a commitment from you faithfully to execute this federal law.

The facts in *Dickerson* are disturbing: On January 27, 1997, Charles Dickerson confessed to robbing a series of banks in Maryland and Virginia. After being indicted for armed robbery, Dickerson moved to suppress his confession. The U.S. District Court specifically found that Dickerson's confession was voluntary under the Fifth Amendment, but it nevertheless suppressed the confession because of a technical violation of the *Miranda* warnings. In ruling on the admissibility of Dickerson's confession, however, the district court failed to consider 18 U.S.C. § 3501.

Despite the fact that Dickerson voluntarily confessed to a series of armed bank robberies, the Department of Justice prohibited the U.S. Attorney's office from arguing 18 U.S.C. § 3501 in its appeal of the suppression order. Unfortunately, the Department's refusal to apply this law is not an isolated event. As the court in *Dickerson* noted, "over the last several years, the Department of Justice has not only failed to invoke 3501, it has affirmatively impeded its enforcement." In numerous cases the Clinton Administration has adamantly refused to utilize this statute to admit voluntary confessions into evidence. *See Davis* v. *United States, 512 U.S. 452 (1994); Cheely* v. *United States,* 21 F.3d 914 (9th Cir. 1994); *United States* v. *Sulli-*

van, 138 F.3d 126 (4th Cir. 1998); *United States* v. *Leong,* No. 96–4876 (4th Cir. 1997); *United States* v. *Rivas-Lopez,* 988 F. Supp. 1424 (D. Utah 1997).

As the *Dickerson* court noted, "[w]ithout his confession it is possible, if not probable, that [Dickerson] will be acquitted. Despite that fact, the Department of Justice, elevating politics over law, prohibited the U.S. Attorney's office from arguing that Dickerson's confession is admissible under the mandate of 3501." Needless to say, we find this criticism of the Department of Justice from a federal court of appeals deeply troubling.

Many in Congress have long believed that the current Justice Department's position on the constitutionality of 18 U.S.C. § 3501 is suspect and would be so proven in court. The *Dickerson* court, after an exhaustive examination, rejected the Department's position and ruled that 18 U.S.C. § 3501 is "clearly" constitutional. The court stated: "We have little difficulty concluding, therefore, that 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts, is constitutional." The other courts that have directly addressed § 3501 have also rejected your conclusion and upheld the constitutionality of the statute. *See United States* v. *Crocker,* 510 F.2d 1129, 1137 (10th Cir. 1975); *United States* v. *Rivas-Lopez,* 988 F. Supp. 1424, 1430–36 (D. Utah 1997). In addition, every court to which you have presented the other portion of your argument—that there is a bar on the lower federal courts applying this Act of Congress in cases before them—has also rejected that view. *See United States* v. *Dickerson,* No. 97–4750 (4th Cir. 1999); *United States* v. *Leong,* No. 96–4876 (4th Cir. 1997); *United States* v. *Rivas-Lopez,* 988 f. Supp. 1424 (D. Utah 1997).

We want to emphasize that 18 U.S.C. § 3501 does not replace or abolish the *Miranda* warnings. On the contrary, the statute explicitly lists *Miranda* warnings as factors a district court should consider when determining whether a confession was voluntarily given. As the *Dickerson* court recognized, providing the *Miranda* warnings remains the surest way to ensure that a statement is voluntary. As such, we expect federal enforcement officials to continue to give *Miranda* warnings. In our view, the promise of 18 U.S.C. § 3501 is that it retains every incentive to give *Miranda* warnings but does not require the rigid and unnecessary exclusion of a *voluntary* statement.

In his 1997 confirmation hearing, Solicitor General Seth Waxman pledged "to defend the constitutionality of Acts of Congress whenever reasonable arguments are available for that purpose * * * The *Dickerson* decision demonstrates beyond doubt that there are reasonable arguments" to defend 18 U.S.C. § 3501. In fact, these arguments are so reasonable that they have prevailed in every court that has directly addressed their merits.

Given that *United States* v. *Dickerson* upholds the constitutionality of this statute, we believe that the time has come for the Department of Justice faithfully to execute this federal law. This commitment entails seeking the admission in federal court of any voluntary statement that is admissible under § 3501 even if it is in technical violation of *Miranda.* In addition, we also seek and expect a commitment from you to defend the constitutionality of this Act of Congress before both the lower federal courts and the Supreme Court.

Accordingly, we look forward to hearing from you by March 15 concerning:

(1) What position the Department of Justice will take in *Dickerson* should the Fourth Circuit call for a reply to the defendant's petition for rehearing;

(2) What position the Department of Justice will take in *Dickerson* should the Fourth Circuit grant rehearing;

(3) What position the Department of Justice will take in *Dickerson* should the defendant seek certiorari;

(4) Whether the Department of Justice will now take the necessary steps to ensure that its attorneys invoke § 3501 in cases where it is needed to ensure the admissibility of voluntary statements that may otherwise be found inadmissible.

Sincerely,

JON KYL
JOHN ASHCROFT
BOB SMITH
CHUCK GRASSLEY
MIKE DEWINE
ORRIN HATCH
STROM THURMOND
SPENCER ABRAHAM
JEFF SESSIONS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing brief were served by first-class mail, postage pre-paid, this 20th day of March, 1999, to the following counsel:

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PREPARED STATEMENT OF JAMES K. ROBINSON, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, CRIMINAL DIVISION

Good afternoon, Mr. Chairman and members of the Subcommittee. I am pleased to have the opportunity to present you with our thoughts on section 3501 of the Federal criminal code, 18 U.S.C. § 3501 ("admissibility of confessions ").

The Self-Incrimination Clause of the Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." In 1966 the Supreme Court held in *Miranda* v. *Arizona* [1] that no statements made by a suspect during custodial interrogation may be admitted in the government's case-in-chief unless the police first provide the suspect with four specific warnings—or equally effective alternative safeguards. The *Miranda* warnings are now familiar to us all: suspects must be told (1) that they have the right to remain silent; (2) that any statements they make can be used against them; (3) that they have the right to the presence of an attorney during questioning; and (4) that an attorney will be appointed for them if they cannot afford one. These warnings were necessary, the Court found, because of what it viewed as the "inherently coercive environment of custodial interrogation." Thus, the Court held, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

In 1968, in response to the Supreme Court's decision in *Miranda*, Congress enacted Section 3501, which directs federal courts to admit into evidence all voluntary confessions, regardless of whether a suspect had been first read the *Miranda* warnings. Under Section 3501, the absence of *Miranda* warnings is one factor that may be considered in determining whether a statement is voluntary; but the ultimate de-

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[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

termination must be made in light of "all the circumstances surrounding the giving of the confession." The Senate Report that accompanied Section 3501 made clear that Congress intended to overrule *Miranda*. The Report cited with approval Justice Harlan's dissenting view that the majority opinion in *Miranda* "represents poor constitutional law."[2]

There is no question that Congress has the power to enact a statute to change evidentiary rules that the Supreme Court has prescribed for federal courts, if the Court's prescribed rules were not based on an interpretation of the Constitution. The Supreme Court is, however, the final expositor of the Constitution. As the Supreme Court recently emphasized in *City of Boerne* v. *Flores*,[3] Congress has no power to overrule the Supreme Court's interpretation of the Constitution, even when it disagrees with that interpretation, that is, even when it concludes that a Supreme Court decision "represents poor constitutional law."

Since Section 3501's enactment, there has been substantial debate over whether the Supreme Court's *Miranda* decision is constitutionally based. *Miranda* itself clearly based its holding on the constitutional right against self-incrimination. That decision, however, made it clear that the warnings were not themselves required by the Constitution; rather, the Court said that *Miranda* warnings are required unless the federal government or States provide equally effective means of apprising suspects of their rights. In several cases decided after *Miranda*, the Court has reiterated that the *Miranda* warnings themselves are not necessarily a constitutional requirement, and it has also said on occasion that a *Miranda* violation is not necessarily a constitutional violation.[4] But since 1966 the Court has also reiterated that *Miranda's* holding with respect to the admissibility of confessions is constitutionally grounded.[5]

Whatever ambiguity exists in what the Supreme Court has variously *said* in the post-*Miranda* cases, what the Supreme Court has consistently *done*—and without any ambivalence—has been apply the *Miranda* holding to the admissibility of confessions in a government's case-in-chief in cases arising in state courts. That is significant for this reason: while the Supreme Court can announce rules that bind the *federal* courts, it can only bind the state courts with rules that are designed to implement and protect constitutional rights. The Court's continued application of *Miranda* to the state courts demonstrates that *Miranda* is constitutionally based. There is simply no other basis on which the *Miranda* admissibility holding can be imposed on the States. And if you draw the conclusion that *Miranda* is constitutionally based, you cannot avoid the conclusion that Section 3501 is unconstitutional under current Supreme Court precedent.

At this point, I would like to briefly point out something that often gets overlooked in the debate over Section 3501: federal prosecutors work very hard to preserve the admissibility of confessions outside the context of Section 3501. We continually urge that *Miranda* should be limited to its core reasoning, which means that we routinely win suppression hearings. And we also frequently get suppression orders reversed on appeal—by arguing that a suspect was not in custody, or that he was not being interrogated, at the time he made a confession. It is an infrequent occurrence that a case is lost on *Miranda* grounds.

Because federal prosecutors, with isolated exceptions, have not relied on Section 3501 to defeat a motion to suppress based on *Miranda*, until recently no Attorney General ever formally explained in a court filing the Department's views on whether Section 3501 could be reconciled with the *Miranda* decision. That changed in 1997, when, in *United States* v. *Leong*,[6] a government appeal from an order suppressing an unwarned statement, the Fourth Circuit asked the Department to address the constitutionality and applicability of Section 3501. In response, the Department filed a brief arguing that the lower courts may not apply Section 3501 to admit a defendant's statement in a case in which *Miranda* and its progeny would require its suppression. Our brief also argued that the Department may not urge the lower courts to apply Section 3501, unless and until the Supreme Court overrules *Miranda*. The Department thereafter advised all federal prosecutors that they must adhere to this position in the future.

The Fourth Circuit ultimately did not resolve the constitutionality of Section 3501 in *Leong*, holding instead that the failure of the district court to apply the statute

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[2] S. Rep. No. 1097, 90th Cong., 2d Sess. (1968).

[3] *City of Boerne* v. *Fores*, 521 U.S. 507 (1997).

[4] See, e.g., *Michigan* v. *Tucker*, 417 U.S. 433 (1974); *Davis* v. *United States*, 512 U.S. 452 (1994).

[5] See, e.g., *Illinois* v. *Perkins*, 496 U.S. 292 (1990); *Edwards* v. *Arizona*, 451 U.S. 477 (1981).

[6] *United States* v. *Leong*, 116 F.3d 1474 (4th Cir. 1997) (Table).

sua sponte was not plain error. This year, however, in *United States* v. *Dickerson*,[7] the Fourth Circuit held, in a divided opinion, that Section 3501 is constitutional and that it supersedes *Miranda* as the standard for evaluating the admissibility of confessions in federal criminal cases. Like *Leong, Dickerson* was a government appeal in which the Department challenged the district court's finding that certain statements had been taken in violation of *Miranda*. The Fourth Circuit upheld the district court's finding of a *Miranda* violation, but nevertheless held that the statements were admissible under Section 3501—an argument that the government had not pressed in the court of appeals. The Fourth Circuit thereafter denied Dickerson's request for en banc review, which we joined in part, by a vote of 8 to 5.

We believe that *Dickerson* was incorrectly decided. Although there is language in a number of Supreme Court decisions indicating that the Fifth Amendment does not require the exclusion of all statements taken in violation of *Miranda*, the Supreme Court has never overruled *Miranda*, and, in fact, the Court continues to apply that decision to the States. As I have already explained, it can do so only if *Miranda* has constitutional underpinnings. Moreover, two years ago, in *Agostini* v. *Felton*,[8] the Supreme Court reaffirmed "that if precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its decisions."

The Supreme Court may have the opportunity to exercise that prerogative next term, as Mr. Dickerson has indicated that he intends to file a certiorari petition seeking review of the Fourth Circuit decision ordering the admission of his statement under Section 3501. Mr. Dickerson's petition is due in late June. Although it is therefore likely that *Dickerson* will provide a vehicle for determining Section 3501's validity in the Supreme Court, the Department has not yet decided what position it will take in that case. It is the established practice of the Department to make such a serious determination in specific and concrete settings, in which we can take into account the particular facts, and the respect accorded to Supreme Court decisions under the doctrine of stare decisis. It has been, and continues to be the traditional practice of the Department of Justice to defend Acts of Congress unless they are plainly unconstitutional under governing Supreme Court precedent, or where they impermissibly encroach upon the Executive's authority. Where there is a Supreme Court decision that interprets or implements the Constitution, however, the question of defending a congressional enactment that is inconsistent with that decision implicates additional considerations. The duty of the Attorney General and the Solicitor General includes upholding the Constitution itself. In a case such as this, those officials must carefully weigh the practice of defending congressional enactments against the obligation to respect the rulings of the Court. If Mr. Dickerson files a certiorari petition, we will, of course, provide the Committee with a copy of the Department's response as soon as it is filed.

In the meantime, the Department has advised prosecutors outside the Fourth Circuit to adhere to the position set forth in our brief in *Leong* and not to ask the lower courts to invoke Section 3501 to admit, in the government's case-in-chief, a confession taken in violation of *Miranda*. In the Fourth Circuit, in contrast, we have instructed federal prosecutors to bring the *Dickerson* decision and Section 3501 to the attention of the district courts whenever a *Miranda* violation is alleged.

Thank you for the opportunity to present our views regarding this matter.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, August 28, 1997.

Hon. JANET RENO,
Attorney General of the United States,
U.S. Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL RENO: For some time now, the undersigned members of the Senate Judiciary Committee have been concerned that the Department of Justice has been unwilling to enforce, and defend the constitutionality of an Act of Congress: namely, 18 U.S.C. § 3501, "the statute governing the admissibility of confessions in federal prosecutions," *Davis* v. *United States*, 512 U.S. 452, 457 n.* (1994) (citation omitted). In recent years, this issue has arisen in several contexts: in the course of litigation in the federal courts (specifically, in the Supreme Court, in at least two federal circuit courts, and in at least one federal district court); in

[7] *United States* v. *Dickerson*, 166 F.3d 667 (4th Cir. 1999).
[8] *Agostini* v. *Felton*, 521 U.S. 203 (1997).

testimony given by several members of the Department before the Senate Judiciary Committee; and in the absence of any Section 3501-related directive in the U.S. Attorney's Manual.

It has come to our attention that the United States Court of Appeals for the Fourth Circuit, in a case called *United States* v. *Leong,* No. 96–4876, has ordered the Department of Justice to file a brief discussing the effect of 18 U.S.C. § 3501 on the admissibility of a statement made by the defendant in that case, as well as any relevant constitutional issues arising from the application of Section 3501. It is our understanding that the position that you adopt in that case will affect the position that you will take in another case pending in the Tenth Circuit, *Nafkha* v. *United States,* scheduled for oral argument on September 10, a case on appeal from the District Court in Utah, and in a case pending in District Court in Utah, *United States* v. *Rivas-Lopez.*

As you know, the Supreme Court's decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), long has been, and remains to the present, a highly controversial decision. We agree with the Court that involuntary confessions should not be used at trial. Where we part company with the Court is over its decision to promulgate extraconstitutional procedural rules governing the interrogation process as a means of safeguarding the Fifth Amendment Privilege Against Self-Incrimination. As we have explained below, Congress enacted Section 3501 in order to ensure that a violation of the *Miranda* rules would not automatically lead to suppression of a suspect's statements; Section 3501, as so applied, is constitutional; you and other senior members of the Justice Department assured this Committee that the Department will raise and defend Section 3501 in an appropriate case; and this case clearly fits that bill.

We address these points in this letter for two principal reasons. The first reason is that this issue is of considerable importance to sound federal law enforcement. As you know, a statement obtained in violation of the prophylactic, procedural rules promulgated in *Miranda* can be, and ordinarily will be, not only highly probative, but also reliable. As a result, the needs of public safety dictate that such statements be admitted at trial when they are voluntary, regardless of whether the statements were obtained in compliance with the *Miranda* rules. For example, it is our understanding that, without the statement at issue in the *Leong* case, the Department will be required to forego prosecution of a felon on the charge of possession of a firearm. In fact, we understand that the Department already may have moved to dismiss the indictment in *Leong.*

The second reason we have addressed this issue is that you and other senior Department of Justice officials on several occasions have testified before the Senate Committee on the Judiciary that the Department will urge the application of, and will defend the constitutionality of, Section 3501 in what such officials consistently have identified as "the appropriate case." Clearly, the *Leong* case is an "appropriate" one: The Fourth Circuit has directed the government to brief the issue, and, as discussed below, the statute clearly applies to the facts of this case. Under these circumstances, it seems to us that the Department should urge the courts to rule that Section 3501 requires that such voluntary statements be admitted notwithstanding any violation of the rules promulgated in *Miranda.*

A lengthier explanation follows of why we believe that you should endorse that position.

The text of Section 3501 (see attached) makes clear that Congress, exercising its power to adopt rules of evidence for use in the federal courts, sought to overrule the automatic rule of exclusion promulgated by the Supreme Court in *Miranda,* barring admission into evidence of a confession whenever *Miranda's* prophylactic requirements were not satisfied. Section 3501 replaces that rule with a rule mandating admission of any voluntary statement. At the same time, Section 3501 continues to bar admission of involuntary confessions and to require federal courts to consider whether *Miranda's* prophylactic requirements were satisfied in evaluating whether a confession was, in fact, voluntarily given. By so doing, the statute eliminates the most significant drawback of *Miranda's* automatic exclusionary rule—*viz.,* the result that a voluntary confession will be excluded due to an officer's failure to satisfy one of *Miranda's* requirements—while also preserving the most significant contribution of *Miranda viz.,* giving federal law enforcement officials an incentive to comply with *Miranda's* judge-made prophylactic rules, since courts must consider compliance with those rules in evaluating whether a confession was voluntary and hence admissible.

The evident meaning of the text of Section 3501 is confirmed by its legislative history. The Congress repeatedly described Section 3501 as an automatic rule of exclusion promulgated by the Supreme Court in *Miranda.* As the Judiciary Committee explained the matter:

> The committee is convinced * * * that the rigid and inflexible requirements of the majority opinion in the Miranda case are unreasonable, unrealistic, and extremely harmful to law enforcement. * * * The unsoundness of the majority opinion was forcefully shown by the four dissenting justices. * * * The committee is of the view that the [proposed] legislation would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws. By the express provisions of the proposed legislation the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors. * * * Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors. * * *
>
> * * * No one can predict with any assurance what the Supreme Court might at some future decide if these provisions are enacted. The committee has concluded that this approach * * * is constitutional and that Congress should adopt it. * * * The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability * * * is that this legislation would be upheld.

S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2123–38. Similarly, the opponents of Section 3501 entitled their discussion of this provision "Confessions—The Repeal of Miranda" and noted that "Section 3501 (a) and (b) are squarely in conflict with" that decision.

The understanding that Section 3501 would substitute a more flexible approach turning on voluntariness for *Miranda's* rigid prophylactic exclusionary rule was repeated throughout the floor debate in the Senate by both supporters and opponents of the provision. *See* 114 Cong. Rec. 11,611–13 (Senator Thurmond), 11,594 (Senator Morse), 11,740, 11,891, 11,894, 13,990–91, 14,082 (Senator Tydings), 13,202–03 (Senator Scott), 14,136 (Senator Fong), 14,158–59 (Senator Hart), 14,167 (Senator McIntyre). That was likewise the understanding reflected in the House debate and among the general public. *See Justice Department Report,* 22 U. Mich. J.L. Ref. at 518–19, and materials cited therein.

The question, then, for the Department of Justice to answer in preparing its brief in *Leong* is not whether the Congress, through Section 3501, intended to overturn *Miranda's* prophylactic evidentiary rules; it clearly did. The question is whether the Congress has the authority to do so. As explained below, the Congress clearly does.

We believe that Section 3501 is constitutional. While the Supreme Court has not passed on this question directly, we believe that the Court would uphold the statute as construed above. On numerous occasions, the Supreme Court has described *Miranda's* rules as prophylactic measures that are designed to assist in effectuating the Fifth Amendment's prohibition against compelled self-incrimination, but that are not required by the Fifth Amendment itself. *See, e.g., Davis* v. *United States,* 512 U.S. 452, 457–58 (1994); *Connecticut* v. *Barrett,* 479 U.S. 523, 528 (1986); *Oregon* v. *Elstad,* 470 U.S. 298, 307 (1985); *New York* v. *Quarles,* 467 U.S. 649, 654 (1984); *New Jersey* v. *Portash,* 440 U.S. 450 (1979); *Oregon* v. *Hass,* 420 U.S. 714 (1975); *Michigan* v. *Tucker,* 417 U.S. 433, 444–52 (1974); *Harris* v. *New York,* 401 U.S. 222 (1971).

There is direct authority for the proposition that Section 3501, as construed in this letter, is constitutional. The Tenth Circuit is the only federal circuit court that, at the behest of the Department of Justice, has specifically addressed the constitutionality of Section 3501. *See United States* v. *Crocker,* 510 F.2d 1129 (10th Cir. 1975). In that case, the district court applied Section 3501, rather than *Miranda,* and admitted a defendant's statements, on the ground that they were voluntary. The principal holding of the court of appeals was that the district court acted properly and that the statute is constitutional, although the circuit court also ruled in the alternative that the statements would be admissible under *Miranda.* The Tenth Circuit's decision in *Crocker* serves as further evidence that the conclusions stated above are reasonable.

It is not just our conclusion that Congress has the power to enact Section 3501. On many past occasions, the Justice Department has argued to the Supreme Court that the *Miranda* rules are not constitutionally required.[1] Indeed, we are aware of

[1] To our knowledge, the Department filed briefs in at least half a dozen cases in the Supreme Court arguing that admission of statements obtained in violation of *Miranda* does not violate the Constitution. *Withrow* v. *Williams,* No. 91–1030, Brief for the United States as Amicus Curiae Supporting Petitioner; *United States* v. *Green,* No. 91–1521, Brief for the United States; *Minnick* v. *Mississippi,* No. 89–6332, Brief for the United States as Amicus Curiae Supporting

Continued

no case in which the Department has offered a contrary submission to the Supreme Court.

As you informed the committee, "the Department of Justice does not have a policy that would preclude it from defending the constitutional validity of section 3501 in an appropriate case." Solicitor General Days testified similarly during his confirmation hearing. He reiterated that "there is no policy in the Department, and the Attorney General has already advised the Committee of that fact, against raising 3501 in an appropriate case." S. Hrg. 104–818, *Solicitor General Oversight*, Committee on the Judiciary, United States Senate, November 14, 1995, 31; *see also id.* at 42. Mr. Days attributed the Department's refusal to take a position on it in *Davis* v. *United States* and to pursue the issue any further in the Ninth Circuit case of *United States* v. *Cheely* not to doubts about its constitutionality—indeed, he never suggested in the course of the hearing that the Department had any such doubts—but, instead, to various litigation strategy considerations. He specifically stated that the decision not to press the argument in those cases "doesn't mean that we won't under other circumstances." Since then, you reaffirmed that the Department would invoke Section 3501 "if it's right in an appropriate case."

Most recently, the then-U.S. Attorney for the District of Columbia and Deputy Attorney General nominee, Eric Holder stated that "[m]y experience has been that we have not had significant difficulty in getting the federal district court to admit voluntary confessions under *Miranda* and its progeny. However, I would support the use of Section 3501 in an appropriate circumstance."

The only remaining question, then, is whether the *Leong* case is an "appropriate" case in which to invoke and defend Section 3501. We believe that it is. The statute is plainly applicable, since it is "the governing law" on the question before the court whether a confession was properly suppressed in a federal prosecution. Moreover, the Fourth Circuit has directed the Department to tell the court whether Section 3501 requires admission of Leong's confession and whether, so applied, the statute is constitutional. The facts of the *Leong* case also indicate that the only basis for excluding the defendant's confession would be that it was obtained in violation of *Miranda*. Leong was a passenger in a car that a Park Police officer pulled over for speeding. After determining that some of the passengers might have been drinking and that all were under 21, the officer asked them for permission to search the car, which he was given. When the officer found a handgun in a plastic holster on the floor, he told the passengers that no one could leave until he learned who owned the gun. When no one responded, the officer stated, without first administering *Miranda* warnings, that everyone was "going to be placed under arrest" until he learned who owned the gun. Leong then stated that the gun was his. Under those circumstances, the statement at issue seems to us to be voluntary. Finally, there seems to be no other reason for refusing to invoke and defend Section 3501 in the *Leong* case.

* * * * * * *

Given the reasons cited, we are hopeful that the Department will invoke and defend the constitutionality of Section 3501 as Congress intended for it to be read and applied. The undersigned Members do not want to see a guilty offender go free due to a technical error if the Justice Department easily can prevent such a miscarriage of justice by invoking the current written law.

We would ask you to respond to this letter by close of business August 28, and to let us know what position the Department will take in the Fourth Circuit.

Sincerely,

ORRIN G. HATCH, *Chairman*,
STROM THURMOND,
FRED THOMPSON,
JON KYL,
JOHN ASHCROFT,
JEFF SESSIONS.

ATTACHMENT

Congress enacted 18 U.S.C. 3501 as part of Title II of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90–351. Section 3501 reads, in part, as follows:

Respondent; *Michigan* v. *Harvey*, No. 88–512, Brief for the United States as Amicus Curiae Supporting Petitioner; *Arizona* v. *Roberson*, No. 87–354, Brief for the United States as Amicus Curiae Supporting Petitioner; *New York* v. *Quarles*, No. 82–1213, Brief for the United States as Amicus Curiae Supporting Petitioner.

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

* * * * *

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, September 11, 1997.

The Honorable STROM THURMOND,
U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: Thank you for your letter to the Attorney General, jointly signed with five other members of the Judiciary Committee, requesting that the Department urge the Fourth Circuit Court of Appeals to apply 18 U.S.C. § 3501 in the case of *United States* v. *Leong,* which is now pending before that court. As your letter points out, the court expressly requested that all of the parties to the *Leong* case file briefs addressing the applicability of this statute. That request prompted the Department to undertake a full review of the disputed provision. We have now come to the conclusion, in light of the Supreme Court's controlling decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and the Court's subsequent decisions applying that precedent, that the lower federal courts are not at liberty to apply section 3501 in any way that would contravene the rules set forth by the Supreme Court in *Miranda.* Of course, the same considerations would not control if the question of section 3501's validity were presented to the Supreme Court, since that Court (unlike the lower courts) is free to reconsider its prior decisions.

The reasons for our conclusion about the application of section 3501 in the lower federal courts are set forth more fully in the brief that we filed August 29 with the Fourth Circuit. A copy of that brief is enclosed.

The Department appreciates hearing your views on this legal matter. We have sent an identical response to the other Senators who signed your letter. Please do not hesitate to contact this office if we can be of further assistance on this or any other matter.

Sincerely yours,

(Signed) Andrew Fois
(Typed) ANDREW FOIS,
Assistant Attorney General.

Enclosure.

[EDITOR'S NOTE: The enclosure mentioned in this letter was retained in Subcommittee files.]

CRIMINAL JUSTICE LEGAL FOUNDATION,
Sacramento, CA, May 10, 1999.

Re: Enforcement of 18 U.S.C. § 3501.

Hon. STROM THURMOND, *Chairman,*
Subcommittee on Criminal Justice Oversight,
Senate Judiciary Committee, Washington, DC.

DEAR SENATOR THURMOND: We, at the Criminal Justice Legal Foundation, understand that your subcommittee is inquiring into the Justice Department's decision not to enforce 18 U.S.C. § 3501. Section 3501, which replaces *Miranda's* exclusionary rule, raises the interesting constitutional question of whether Congress can overrule this landmark decision. Because *Miranda* is not a constitutional right on its own, but is instead a court-created prophylactic rule, Congress may overrule this decision through its power over federal criminal procedure.

The Supreme Court has repeatedly labeled *Miranda* as a mere prophylactic rule. See, e.g., *Withrow* v. *Williams,* 507 U.S. 680, 690 (1993); *McNeil* v. *Wisconsin,* 501 U.S. 171, 176 (1991); *Michigan* v. *Harvey,* 494 U.S. 344, 350 (1990); *Oregon* v. *Elstad,* 470 U.S. 298, 309 (1985); *Michigan* v. *Tucker,* 417 U.S. 433, 446 (1974). Confessions taken contrary to *Miranda* are not necessarily coerced or involuntary; *Miranda* simply creates presumption that custodial interrogation without adequate warnings are inherently coercive. See *Elstad, supra,* 470 U.S., at 304; *New York* v. *Quarles,* 467 U.S. 649, 654 (1984). *Miranda* is thus no more than a bright-line rule of evidence. See *Elstad supra,* 407 U.S., at 307.

While Congress may not overturn a constitutional decision of the Supreme Court, it most certainly may overturn a court-created rule of evidence or criminal procedure. See, e.g., *Bank of Nova Scotia* v. *United States,* 487 U.S. 250, 254–255 (1988). Section 3501 is thus no more than the valid exercise of Congress' power to regulate the federal rules of evidence and criminal procedure. Therefore, the Constitution is not an impediment to invoking section 3501 to preserve voluntary confessions that run afoul of *Miranda's* bright line.

Very truly yours,

(Signed) Charles L. Hobson
(Typed) CHARLES L. HOBSON.

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION,
East Northport, NY, May 28, 1999.

Hon. STROM THURMOND,
U.S. Senate, Russell Building, Washington, DC.

DEAR SENATOR THURMOND: On behalf of the over 15,700 members of the Federal Law Enforcement Officers Association (FLEOA), I wish to inform you of FLEOA's support for a recent 4th Circuit court decision, *United States* v. *Dickerson,* which upholds the principle of law allowing a volunteered confession into evidence. This principle, codified as Section 3501 of Title 18, United States Code, was passed into law in 1968, to prevent the exclusion of an otherwise voluntary and competent confession. It provides for the use of a criminal defendant's confession, notwithstanding whether the defendant was given his or her *Miranda* Warnings.

Section 3501 does not render *Miranda* Warnings obsolete. This section allows a trial judge, after determining the circumstances surrounding the giving of a confession, to admit a volunteered confession into evidence. There are several exceptions to *Miranda* Warnings already codified in law, such as excitable utterances, and public safety. As the Supreme Court previously stated, the *Miranda* Warnings are just part of the safeguards to ensure no defendant is compelled to be a witness against themselves. It is not intended to be taken as a constitutional straightjacket. FLEOA believes the Fourth Circuit clearly recognized in its *Dickerson* opinion the fine line between a coerced confession and a criminal trying to finesse the court. *Miranda* Warnings are a shield for law enforcement, behind which no defendant can claim duress, yet at the same time, the logic behind Section 3501 is impeccable. Allowing district judges to view the total circumstances is clearly and undoubtedly constitutional and prudent.

If you have any questions or need further information please contact me through FLEOA's Corporate Services Office. Thank you for your time and assistance.

(Signed) Richard J. Gallo
(Typed) RICHARD J. GALLO.

MAJOR CITIES CHIEFS,
May 18, 1999.

Re: Admission of Voluntary Confessions.

Hon. STROM THURMOND, *Chairman,*
Hon. CHARLES E. SCHUMER, *Ranking Member,*
Subcommittee on Criminal Justice Oversight,
Committee on the Judiciary, Washington, DC.

[Attention: Mr. Gary Malphrus]

DEAR CHAIRMAN THURMOND AND SENATOR SCHUMER: I am to you on behalf of the Major Cities Chiefs organization, which represents the chief police executives of the fifty largest cities/jurisdictions in the United States as well as Montreal, Toronto, Vancouver, and Winnipeg, Canada. As you know, this organization was formed to address the unique needs and solutions necessary in large urbanized communities. We are dedicated to the advancement of research, legislation, policy, and programs that will ensure the safety of our citizens and the officers that protect them. Our members serve a United States population in excess of forty-seven million and employ more than 154,000 sworn law enforcement officers.

We strongly support the recent Fourth Circuit decision in *United States* v. *Dickerson,* 166 F.3d 667 (4th Cir. 1999), which admitted a purely voluntary confession over the defendant's technical *Miranda* objections. As the Fourth Circuit explained, Congress has directed that the touchstone for admitting confessions is whether those confessions are "voluntary." Under 18 U.S.C. 3501, Congress has directed federal courts to examine all of the circumstances in making these voluntariness determinations and to give juries the benefit of hearing those confessions. In short, rather than focusing on purely technical questions surrounding the confession, the courts will focus on the totality of the circumstances, that is, the "big picture." As the Fourth Circuit put it, "No longer will criminals who have voluntarily confessed their crimes be released on mere technicalities."

At the same time, the decision recognized that police should continue to give *Miranda* warnings. If the principles of the *Dickerson* opinion are extended more broadly beyond that the Fourth Circuit, our members will continue to give *Miranda* warnings. Indeed, section 3501 itself specifically mentions *Miranda* warnings as a factor to be considered in assessing voluntariness. For this reason, the Fourth Circuit emphasized, "nothing in today's opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings." Thus, the essential effect of *Dickerson* is to encourage police to follow *Miranda* while, at the same time, not allowing dangerous criminals to escape if police officers have mistakenly deviated from some part of the various *Miranda* procedures. This approach properly recognizes both a suspect's rights to be free from coercion and society's right to be protected from dangerous criminals.

We also support the *Dickerson* opinion because it follows in a long line of Supreme Court decisions emphasizing that the *Miranda* safeguards are not constitutional rights but court-created procedural devices. Along this line, this holding is also important to law enforcement because of the implications which would arise in the civil context, should *Dickerson* be reversed presumably on the ground that *Miranda* rights are part of the Constitution. Under these circumstances, an entire new area for civil litigation under section 1983 will occur. The time and energy of police officials are too valuable to our nation's efforts in community policing to be unnecessarily diverted in this fashion.

We hope that your subcommittee will support the *Dickerson* opinion and its holding which will ensure that voluntary confessions are admitted in court.

In closing, I wanted to thank you and your committee members for their support of law enforcement, and we look forward to working with you in the future.

Sincerely,

(Signed) Ruben B. Ortega
(Typed) RUBEN B. ORTEGA,
Chairman.

II

106TH CONGRESS
1ST SESSION

S. 899

To reduce crime and protect the public in the 21st Century by strengthening Federal assistance to State and local law enforcement, combating illegal drugs and preventing drug use, attacking the criminal use of guns, promoting accountability and rehabilitation of juvenile criminals, protecting the rights of victims in the criminal justice system, and improving criminal justice rules and procedures, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 28, 1999

Mr. HATCH (for himself, Mr. THURMOND, Mr. SPECTER, Mr. DEWINE, Mr. ASHCROFT, Mr. ABRAHAM, Mr. SESSIONS, and Mr. GRAMS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To reduce crime and protect the public in the 21st Century by strengthening Federal assistance to State and local law enforcement, combating illegal drugs and preventing drug use, attacking the criminal use of guns, promoting accountability and rehabilitation of juvenile criminals, protecting the rights of victims in the criminal justice system, and improving criminal justice rules and procedures, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 and the Rules Governing Section 2255 Cases), the
2 number of members who represent or supervise the
3 representation of defendants in the trial, direct re-
4 view, or collateral review of criminal cases shall not
5 exceed the number of members who represent or su-
6 pervise the representation of the Government or a
7 State in the trial, direct review, or collateral review
8 of criminal cases."; and
9 (2) in subsection (b), by adding at the end the
10 following: "The number of members of the standing
11 committee who represent or supervise the represen-
12 tation of defendants in the trial, direct review, or
13 collateral review of criminal cases shall not exceed
14 the number of members who represent or supervise
15 the representation of the Government or a State in
16 the trial, direct review, or collateral review of crimi-
17 nal cases.".

18 **Subtitle B—Reform of Judicially**
19 **Created Exclusionary Rules**

20 **SEC. 7201. ENFORCEMENT OF CONFESSION REFORM STAT-**
21 **UTE.**

22 (a) IN GENERAL.—Section 3501(e) of title 18,
23 United States Code, is amended—
24 (1) by striking "(e) As used in this section, the
25 term" and inserting the following:

1 "(e) DEFINITIONS.—In this section:

2 "(1) ANY CRIMINAL PROSECUTION BY THE
3 UNITED STATES.—The term 'any criminal prosecu-
4 tion by the United States' includes a prosecution by
5 the United States under the Uniform Code of Mili-
6 tary Justice.

7 "(2) CONFESSION.—The term"; and

8 (2) by adding at the end the following:

9 "(3) OFFENSE AGAINST THE LAWS OF THE
10 UNITED STATES.—The term 'offense against the
11 laws of the United States' includes an offense under
12 the punitive articles of the Uniform Code of Military
13 Justice (Subchapter X of chapter 47 of title 10).".

14 (b) EFFECTIVE DATE.—The amendment made by
15 subsection (a)—

16 (1) takes effect on the date of enactment of this
17 Act; and

18 (2) applies to any criminal prosecution brought
19 by or under the authority of the United States, in-
20 cluding a military prosecution or a prosecution
21 brought by the District of Columbia, regardless of
22 whether the prosecution was commenced before that
23 date if the prosecution did not become final before
24 that date.

1 **SEC. 7202. CHALLENGES TO CONVICTION OR SENTENCE ON**
2 **THE BASIS OF VOLUNTARY CONFESSION.**

3 (a) IN GENERAL.—Chapter 153 of title 28, United
4 States Code, is amended by adding at the end the fol-
5 lowing:

6 **"§ 2255A. Challenges to conviction or sentence on the**
7 **basis of voluntary confession**

8 "(a) DEFINITION OF CONFESSION.—In this section,
9 the term 'confession' has the meaning given the term in
10 section 3501(e) of title 18.

11 "(b) LIMITATION.—No writ of habeas corpus or other
12 post-conviction remedy under section 2241, 2244, 2254,
13 or 2255 or any other provision of Federal law shall lie
14 to challenge the custody or sentence of a person on the
15 ground that the custody or sentence of the person is the
16 result in whole or in part of the voluntary confession of
17 the person.

18 "(c) DETERMINATIONS REGARDING POST-CONVIC-
19 TION REMEDIES.—For purposes of subsection (a), in de-
20 termining whether a post-conviction remedy lies under a
21 provision of law described in subsection (b), and in deter-
22 mining whether any such remedy should be granted—

23 "(1) the court shall apply the standards set
24 forth in section 3501(b) of title 18; and

25 "(2) in applying the standards under paragraph
26 (1) in a case seeking a post-conviction remedy from

1 a State court conviction, the court shall apply the
2 standards set forth in section 2254(d).
3 "(d) NO EFFECT ON OTHER LAW.—Nothing in this
4 section modifies or otherwise affects any requirement
5 under Federal law relating to the obtaining or granting
6 of post-conviction relief.".
7 (b) CONFORMING AMENDMENT.—The chapter anal-
8 ysis for chapter 153 of title 28, United States Code, is
9 amended by adding at the end the following:

"2255A. Challenges to conviction or sentence on the basis of voluntary confession.".

10 **SEC. 7203. OBLIGATION OF ATTORNEYS FOR THE UNITED**
11 **STATES TO PRESENT CERTAIN ARGUMENTS.**
12 Section 518 of title 28, United States Code, is
13 amended by adding at the end the following:
14 "(c) VOLUNTARY CONFESSIONS.—
15 "(1) DEFINITION OF CONFESSION.—In this
16 subsection, the term 'confession' has the meaning
17 given the term in section 3501(e) of title 18.
18 "(2) IN GENERAL.—When, in any Federal
19 criminal prosecution, the defendant seeks to sup-
20 press or to exclude from evidence the defendant's
21 own voluntary confession, the attorney for the
22 United States shall seek the admission of the confes-
23 sion into evidence under section 3501(a) of title 18.

1 "(3) APPEAL.—In any appeal from a ruling ad-
2 mitting or suppressing a defendant's voluntary con-
3 fession, the attorney for the United States shall
4 argue that section 3501(a) of title 18 requires the
5 admission of the confession or forbids its suppres-
6 sion.".

7 **SEC. 7204. ADMISSIBILITY OF VOLUNTARY CONFESSIONS IN**
8 **STATE COURT PROCEEDINGS.**

9 (a) DEFINITION OF CONFESSION.—In this section,
10 the term "confession" has the meaning given the term in
11 section 3501(e) of title 18, United States Code.

12 (b) ADMISSIBILITY.—Federal law shall not bar the
13 admission into evidence in State court of the voluntary
14 confession of any defendant in the criminal prosecution
15 of that defendant if—

16 (1) the prosecuting authority does not seek ad-
17 mission of the confession to establish its case in
18 chief; or

19 (2) the confession was obtained by interrogation
20 reasonably prompted by a concern for public safety.

21 (c) STANDARDS.—For purposes of this section, the
22 standards specified in section 3501(b) of title 18, United
23 States Code, shall govern whether a confession is vol-
24 untary.

1 (d) RULE OF CONSTRUCTION.—Nothing in this sec-
2 tion requires the exclusion from evidence of a voluntary
3 confession under circumstances not described in sub-
4 section (b).

5 **SEC. 7205. NO POLICE OFFICER LIABILITY FOR SEEKING**
6 **OR OBTAINING VOLUNTARY CONFESSION.**

7 (a) DEFINITION OF CONFESSION.—In this section,
8 the term "confession" has the meaning given the term in
9 section 3501(e) of title 18, United States Code.

10 (b) NO LIABILITY.—The act of a person acting under
11 color of any statute, ordinance, regulation, custom, or
12 usage of the United States or of any State or territory
13 or the District of Columbia in seeking or obtaining the
14 voluntary confession of another person shall not, by itself
15 and in the absence of any other act that violates a person's
16 right under the Constitution, give rise to any liability of
17 the person in an action under section 1979 of the Revised
18 Statutes (42 U.S.C. 1983) or any other Federal law.

19 (c) STANDARDS.—For purposes of this section, the
20 standards specified in section 3501(b) of title 18, United
21 States Code, shall govern whether a confession is vol-
22 untary.

Military Reservists: An amendment to authorize the Small Business Administration to provide financial and business development assistance to military reservists' small business, and for other purposes.

Menominee: An amendment to provide for the settlement of claims of the Menominee Indian Tribe of Wisconsin.

33RD ANNIVERSARY OF MIRANDA VERSUS ARIZONA

Mr. THURMOND. Mr. President, 33 years ago this week, the Supreme Court issued possibly its most famous and far-reaching criminal law decision of the twentieth century: Miranda v. Arizona. In response, the Congress enacted a law, codified at 18 U.S.C. section 3501, to govern the admissibility of voluntary confessions in Federal court. The Criminal Justice Oversight Subcommittee, which I chair, recently held a hearing to discuss the Clinton Justice Department's refusal to use this Federal statute to help Federal prosecutors in their work to fight crime.

Issued in 1966, the Miranda decision imposed a code-like set of interrogation rules on police officers. Essentially, the Court held that before a confession can be admitted against a defendant, regardless of whether the confession was voluntary, the police must read the defendant the now familiar Miranda warnings, and the defendant must affirmatively waive his rights. We will never know how many crimes have gone unsolved or unpunished because of Miranda.

The Miranda decision acknowledged that the warnings were not themselves constitutionally protected rights but only procedural safeguards designed to protect the Fifth Amendment right against self-incrimination. Subsequent Supreme Court opinions have repeatedly reaffirmed this conclusion. Further, the Miranda court expressly invited Congress and the States to develop legislative solutions to the problem of involuntary confessions.

In response to the Court's invitation, the Congress held extensive hearings on this issue as part of Federal criminal law reform. A bipartisan Congress with my participation and that of many others on both sides of the aisle in 1968 passed an omnibus crime bill that included a provision that eventually became law as section 3501. That statute, of which I was an original cosponsor, provides that "In any criminal prosecution brought by the United States . . . a confession . . . shall be admissible in evidence if it is voluntarily given." The statute goes on to list five nonexclusive factors that a judge may consider in determining whether a confession is voluntary and, hence, admissible. One of those factors is whether the Miranda warnings were given. Thus, the statute continues to provide police with an incentive to deliver the Miranda warnings.

More than thirty years after the original hearings on § 3501, the Senate Judiciary Committee's Subcommittee on Criminal Justice Oversight, under my leadership, conducted a hearing to examine the statute's enforcement.

The history of the statute begins with the Johnson Administration. Although President Johnson signed § 3501 into law, his administration viewed the statute unfavorably and refused to enforce it. Then, in 1969, the Nixon Justice Department issued an important memorandum setting forth the Department's official policy toward section 3501. According to that policy, "Congress has reasonably directed that an inflexible exclusionary rule be applied only where the constitutional privilege itself has been violated." The memorandum also concluded that "the determination of Congress that an inflexible exclusionary rule is unnecessary is within its constitutional power."

In 1975, the Department succeeded in enforcing the statute when the 10th Circuit in United States v. Crocker affirmed a district court's decision to apply § 3501 rather than Miranda and upheld the constitutionality of the statute.

The next significant chapter in the history of § 3501 occurred during the Reagan Administration. Judge Stephen Markman, who was then Assistant Attorney General in charge of the Justice Department's Office of Legal Policy, also testified before our Subcommittee. In response to an assignment from Attorney General Meese, Judge Markman's team issued a comprehensive report on the law of pre-trial interrogation that concluded that section 3501 represented a valid, constitutional response by the Congress to the Miranda decision. Later, as Judge Markman testified, the Reagan Justice Department continued the litigation effort to apply section 3501.

Judge Markman also testified that while he was U.S. Attorney in the Bush Administration, he and other U.S. Attorneys attempted to apply the statute, although appellate cases did not develop. Certainly, the Bush Justice Department never sought to undermine the statute's enforcement.

During the Clinton Administration, this Committee repeatedly has encouraged the Justice Department to enforce the statute. During an oversight hearing in 1997, Attorney General Reno indicated to the Committee that the Department would enforce it in an appropriate case, as did Deputy Attorney General Holder during his nomination hearing the same year. However, when such a case clearly arose in United States v. Dickerson, the Administration refused.

In that case, Charles Dickerson was suspected of committing a series of armed bank robberies in Virginia and Maryland. During questioning, he voluntarily confessed his crimes to the authorities and implicated another armed bank robber, but the Miranda warnings were not read to him beforehand. The U.S. Attorney's office in Alexandria urged the trial court to admit the confession under section 3501, but the Justice Department refused to permit the U.S. Attorney to raise it on appeal. It was only the intervention of third parties in an amicus brief of Professor Cassell and the Washington Legal Foundation, that the issue was presented to the Fourth Circuit for its consideration.

The Fourth Circuit ruled solidly in favor of § 3501's constitutionality, holding that this statute, not the Miranda decision, governs the admissibility of confessions in Federal court. The court criticized the Justice Department for its failure to enforce the statute, saying that the Department's prohibition of the U.S. Attorney from arguing section 3501 was an elevation of politics over law.

The administration's actions in the Dickerson case are part of a larger pattern by which the Clinton Justice Department has blocked opportunities for career prosecutors to raise section 3501. The Department has even gone so far as to order career Federal prosecutors to withdraw already filed briefs that contained arguments in favor of section 3501. The Supreme Court in Davis v. United States expressly made note of the Justice Department's decision not to rely on the statute in a 1994 case where it was clearly relevant. In a concurring opinion in that same case, Justice Scalia wrote that "[t]he United States' repeated refusal to invoke § 3501 . . . may have produced—during an era of intense national concern about the problem of run-away crime—the acquittal and the non-prosecution of many dangerous felons. There is no excuse for this."

The Executive Branch has a duty under Article II, Section 3, of the Constitution to "take care that the laws be faithfully executed." Section 3501 is a law like any other. In Davis, Justice Scalia also questioned whether the refusal to invoke the statute abrogated this duty.

Our hearing also demonstrated the strong level of support that exists for the Justice Department to enforce section 3501, especially in the law enforcement community. I have received supportive letters in this regard from the Fraternal Order of Police, whose National President testified at our hearing, as well as from the National Association of Police Organizations, the Federal Law Enforcement Officers Association, the Major Cities Chiefs of Police, and others. Former Attorney General Ed Meese also expressed his support for our efforts.

If section 3501 is upheld by the Supreme Court, this will encourage the states to enact their own versions of the law in this area. Arizona already has a statute almost identical to § 3501, and the Maricopa County Attorney in Phoenix, whose predecessor prosecuted Miranda, testified at our hearing that he and others could enforce their statute in Arizona if the Supreme Court upholds section 3501.

The Justice Department will not say what position it will take if the

Dickerson case is considered by the Supreme Court. Unfortunately, they refused my invitation to testify at the hearing on section 3501. I recognize the Department's reluctance to discuss specifics about pending cases, but this is no excuse for its failure to discuss in person its refusal to explain its general treatment of the law governing voluntary confessions. Even the dissenting judge in Dickerson recognized that the Congress could invoke its oversight authority and investigate why the law is being ignored. As he stated, the "Congress . . . may legitimately investigate why the executive has ignored § 3501 and what the consequences are."

In my view, the Administration clearly has a duty to defend § 3501 before the Supreme Court and should be enforcing it in the lower Federal courts. The Justice Department has a long-standing policy that it has a duty to defend a duly enacted Act of Congress whenever a reasonable argument can be made in support of its constitutionality. Thus far, all Federal courts that have directly considered § 3501's constitutionality have upheld it. Accordingly, reasonable arguments in defense of the statute clearly exist and have been accepted by the courts—most recently by the Fourth Circuit in Dickerson.

Indeed, before the Dickerson case, the Fourth Circuit in United States v. Leong expressly rejected the Justice Department's argument that it was not free to press § 3501 in the lower Federal courts unless and until the Supreme Court overrules Miranda. In concluding that the Government was "mistaken" in this regard, the Leong court stated that "[t]he question of whether Miranda establishes a rule of constitutional dimension, and thus whether Congress acted within its authority in enacting § 3501, is easily within the compass of the authority of lower federal courts."

Our subcommittee inquiry into section 3501 is ongoing. America does not need its Justice Department making arguments on behalf of criminals. On this the 33rd anniversary of Miranda v. Arizona, it is appropriate to note the Fourth Circuit's statement in Dickerson that "no longer will criminals who have voluntarily confessed their crimes be released on mere technicalities." I hope the Clinton Justice Department will help make this promise a reality.

MESSAGE FROM THE PRESIDENT

A message from the President of the United States was communicated to the Senate by Mr. Williams, one of his secretaries.

EXECUTIVE MESSAGE REFERRED

As in executive session the Presiding Officer laid before the Senate a message from the President of the United States submitting a withdrawal which was referred to the Committee on Finance.

(The withdrawal received today is printed at the end of the Senate proceedings.)

REPORT OF THE COMMODITY CREDIT CORPORATION FOR FISCAL YEAR 1997—MESSAGE FROM THE PRESIDENT—PM 37

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Agriculture, Nutrition, and Forestry.

To the Congress of the United States:

In accordance with the provisions of section 13, Public Law 806, 80th Congress (15 U.S.C. 714k), I transmit herewith the report of the Commodity Credit Corporation for the fiscal year ending September 30, 1997.

WILLIAM J. CLINTON.

THE WHITE HOUSE, *June 15, 1999.*

REPORT RELATIVE TO THE EXCHANGE STABILIZATION FUND—MESSAGE FROM THE PRESIDENT—PM 38

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; referred jointly, pursuant to 31 United States Code 5302, to the Committee on Appropriations, to the Committee on Banking, Housing, and Urban Affairs, and to the Committee on Foreign Relations.

To the Congress of the United States:

On November 9, 1998, I approved the use of the Exchange Stabilization Fund (ESF) to provide up to $5 billion for the U.S. part of a multilateral guarantee of a credit facility for up to $13.28 billion from the Bank for International Settlements (BIS) to the Banco Central do Brazil (Banco Central). Eighteen other central banks and monetary authorities are guaranteeing portions of the BIS credit facility. In addition, through the Bank of Japan, the Government of Japan is providing a swap facility of up to $1.25 billion to Brazil under terms consistent with the terms of the BIS credit facility. Pursuant to the requirements of 31 U.S.C. 5302(b), I am hereby notifying the Congress that I have determined that unique or emergency circumstances require the ESF financing to be available for more than 6 months.

The BIS credit facility is part of a multilateral effort to support an International Monetary Fund (IMF) standby arrangement with Brazil that itself totals approximately $18.1 billion, which is designed to help restore financial market confidence in Brazil and its currency, and to reestablish conditions for long-term sustainable growth. The IMF is providing this package through normal credit tranches and the Supplemental Reserve Facility (SRF), which provides short-term financing at significantly higher interest rates than those for credit tranche financing. Also, the World Bank and the Inter-American Development Bank are providing up to $9 billion in support of the international financial package for Brazil.

Since December 1998, international assistance from the IMF, the BIS credit facility, and the Bank of Japan's swap facility has provided key support for Brazil's efforts to reform its economy and resolve its financial crisis. From the IMF arrangement, Brazil has purchased approximately $4.6 billion in December 1998 and approximately $4.9 billion in April 1999. On December 18, 1998, the Banco Central made a first drawing of $4.15 billion from the BIS credit facility and also drew $390 million from the Bank of Japan's swap facility. The Banco Central made a second drawing of $4.5 billion from the BIS credit facility and $423.5 million from the Bank of Japan's swap facility on April 9, 1999. The ESF's "guarantee" share of each of these BIS credit facility drawings is approximately 38 percent.

Each drawing from the BIS credit facility or the Bank of Japan's swap facility matures in 6 months, with an option for additional 6-month renewals. The Banco Central must therefore repay its first drawing from the BIS and Bank of Japan facilities by June 18, 1999, unless the parties agree to the roll-over. The Banco Central has informed the BIS and the Bank of Japan that it plans to request, in early June, a roll-over of 70 percent of the first drawing from each facility, and will repay 30 percent of the first drawing from each facility.

The BIS's agreement with the Banco Central contains conditions that minimize risks to the ESF. For example, the participating central banks or the BIS may accelerate repayment if the Banco Central has failed to meet any conditions of the agreement or Brazil has failed to meet any material obligation to the IMF. The Banco Central must repay the BIS no slower than, and at least in proportion to Brazil's repayments to the IMF's SRF and to the Bank of Japan's swap facility. The Government of Brazil is guaranteeing the performance of the Banco Central's obligations under its agreement with the BIS, and, pursuant to the agreement, Brazil must maintain its gross international reserves at a level no less than the sum of the principal amount outstanding under the BIS facility, the principal amount outstanding under Japan's swap facility, and a suitable margin. Also, the participating central banks and the BIS must approve any Banco Central request for a drawing or roll-over from the BIS credit facility.

Before the financial crisis that hit Brazil last fall, Brazil had made remarkable progress toward reforming its economy, including reducing inflation from more than 2000 percent 5 years ago to less than 3 percent in 1998,

For Record

Should this come to pass, it would not mean that the clock had been turned back to the days when men sometimes were convicted on the basis of extorted, even false, confessions. It would mean, presumably, that a legal principle of long-standing had been revived, that a confession, if given voluntarily, could be used as evidence. To our way of thinking, this would serve the true ends of justice and would be a very desirable modification of the judge-made law as it stands today.

DEPARTMENT OF JUSTICE,
Washington, D.C., June 11, 1969.

Memo No. 584 Supplement No. 3.
To: United States Attorneys.
Subject: Title II of the Omnibus Crime Control and Safe Streets Act of 1968.

The attached memorandum sets forth the Department's position in respect to implementing Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (concerning the admissibility of confessions and eye-witness testimony in federal criminal prosecutions). All cases presenting problems under *Miranda* or *Wade* should be examined in light of the arguments suggested by the memorandum. Those arguments, in brief, are as follows:

Section 3501—Under this section, the failure to give all aspects of the warnings required by *Miranda* will not necessarily require exclusion of a resulting confession; Congress has reasonably directed that an inflexible exclusionary rule be applied only where the constitutional privilege against compelled self incrimination itself has been violated, not where a particular protective safeguard has been violated without affecting the privilege itself.

Section 3502—Under this section, the positive testimony by a witness that he saw the accused commit the crime will suffice, for the purpose of admitting his identifying testimony at trial, to show that the basis of his ability to identify the accused is independent of any observation of a lineup at which the accused was not accorded the right to the presence of counsel.

In enacting Title II, Congress was, in effect, expressing its concern with the inflexible results of the *Miranda* and *Wade* decisions, and seeking to induce a judicial reexamination of the underlying bases for those holdings. The interpretation of Title II expressed in the attached memorandum attempts to avoid a direct conflict between the legislation and the constitutional requirements of *Miranda* and *Wade*, and yet to achieve the benefit to law enforcement intended by Congress. The arguments outlined, if adopted by the courts, could salvage some cases which otherwise might be lost. As emphasized in the memorandum, however, the arguments presuppose the necessity of continuing to have federal agents give the *Miranda* warnings before interrogations, and afford an opportunity for the presence of counsel at lineups, as matters of standard practice.

WILL WILSON,
Assistant Attorney General,
Criminal Division.

MEMORANDUM

SUBJECT: TITLE II OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351) contains provisions relating to the admissibility of confession in federal criminal prosecutions which differ from the rules regarding such admissibility as announced by the Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436, and further contains a provision relating to the admissibility of eyewitness testimony which does not expressly set forth the limitations upon such admissibility as announced by the Court in *United States* v. *Wade*, 388 U.S. 218, and *Stovall* v. *Denno*, 388 U.S. 293. This memorandum sets forth the Department's position with respect to interpreting and relying upon provisions of Title II in cases tried subsequent to June 19, 1968, the effective date of the Act.

Section 3501 and Miranda

Title II of the Act amends Title 18 of the United States Code by adding Section 3501. That section provides in pertinent part:

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

The various factors set forth in subsection (b) do refer to the matters specified in *Miranda* as well as the prompt hearing element earlier laid down in *Mallory* v. *United States*, 354 U.S. 449, although a modification of the *Mallory* rule appears in Section 3501(c). Aside from any constitutional issues, therefore, it is impossible to predict how much weight a particular court will give to the absence of any one of the factors mentioned. For this reason, the only safe course for federal investigative agents, and for such United States Attorneys as may have occasion to talk with defendants, is to continue their present practice of giving the full *Miranda* warnings.

The area where we believe the statute can be effective and where a legitimate constitutional argument can be made is the situation where a voluntary confession is obtained after a less than perfect warning or a less than conclusive waiver, as, for example, where an agent inadvertently fails to fully explain the right to have counsel appointed for an indigent, or a written waiver is not obtained. The admissibility of the confession may be urged in an argument framed along the following lines:

In *Miranda* v. *Arizona*, 384 U.S. 439, the Supreme Court stated that confessions by persons accused of crime were "a proper element in law enforcement" and that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S. at 478. The Court found, however, that persons in police custody are, by virtue of that custody alone, subject to a form of "compulsion inherent in custodial surroundings." *Id.*, at 458; see *id.*, 465, 467, 478. In order to dispel this inherent compulsion and thus to safeguard the individual's Fifth Amendment right "to remain silent unless he chooses to speak in the unfettered exercise of his own will" (*id.*, at 460), the Court held that accused persons must be made aware of their "right of silence" and assured a "continuous opportunity to exercise it." *Id.*, at 444; see *id.*, at 467, 479, 490.

The Court stated that it "cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process" (*id.*, at 467), as long as any solution devised is "effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it" (*ibid.*). Various solutions, the Court noted, "might be devised by Congress or the States in the exercise of their creative rule-making capacities" (*ibid.*). However, the Court stated, until such "potential alternatives for protecting the privilege" are devised by Congress and the States (*ibid.*), a person must be warned prior to any in-custody questioning that he has a right to remain silent, that anything he says can be used against him in court, that he has a right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning (*id.*, at 444, 479). The warnings are thus "procedural safeguards." *Id.*, at 444, 476; see *id.*, at 467.

The core of the *Miranda* decision is that, in order for a statement by an accused who has been questioned in police custody to be considered free from any form of compelling influence, it must have been made with the understanding on the part of the accused that he did not have to speak at all. The specific warnings enunciated by the decision constitute a means, suggested by the Court, by which the accused's Fifth Amendment privilege may be safeguarded in the custodial situation. It was *some* "system" to safeguard against inherently compulsive circumstances which the Court found necessary under the Constitution; it did not find a *particular* system necessary. The effect of the statute, in our view, is to instruct the courts that exact compliance with *Miranda* is not the only means by which the requirements of the privilege can be said to have been met. Section 3501(b) directs district court judges to look to "all the circumstances surrounding the giving of the confession" in determining whether a breach of a protective measure resulted in an actual breach of the privilege itself. If it did not, the confession is admissible even if a particular aspect of the *Miranda* warnings was not fully complied with. Since these specific warnings are not themselves constitutional absolutes, the determination by Congress—that their absence in a case should not entail an inflexible imposition of the exclusionary rule—is within the power of Congress. The Court stated in *Miranda* that "[w]here rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." 384 U.S. at 491. Clearly the Court was referring to the privilege, not the delineated means of protecting it. In the same paragraph, the Court emphasized that "the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation." *Id.*, at 490; see *id.*, at 467.

In short, while the Court in *Miranda* tried to set forth a set of rules which would avoid the necessity of considering all the circumstances of a particular case,[1] Congress has, in effect, told the courts that it does want

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[1] It was in this context that the Court characterized the expedient of giving "a warning as to the availability of the privilege" as so simple that it would not "pause

the cases considered on an individualized basis. "The rigid, mechanical exclusion of an otherwise voluntary and competent confession," the Senate Committee on the Judiciary stated, "is a very high price to pay for a 'constable's blunder.'" S. Rep. No. 1097, 90th Cong., 2d Sess. 38 (1968). The statute, however, clearly recognizes that a statement must be voluntary in the sense that it must not only be free of physical coercion, but must be made with awareness of the individual's Fifth Amendment rights; the statute does not abrogate constitutional rights. Congress has reasonably directed that an inflexible exclusionary rule be applied only where the constitutional privilege itself has been violated, but not where a protective safeguard system suggested by the Court has been violated in a particular case without affecting the privilege itself. The determination of Congress that an inflexible exclusionary rule is unnecessary is within its constitutional power.[1]

Section 3502, Wade, and Stovall

Section 3502 of Title 18 of the United States Code provides:

Admissibility in evidence of eyewitness testimony—

The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.

1. The purpose and effect of the statute must be considered against its judicial background.

In *Stovall* v. *Denno*, 388 U.S. 293, 302, the Court held that if a district court finds, upon considering "the totality of the circumstances surrounding" a pretrial identification, that the procedure "was so unnecessarily suggestive and conducive to irreparable mistaken identification that * * * [the accused] was denied due process of law," the identifying testimony of the witnesses who observed the procedure must be suppressed. See also *Simmons* v. *United States*, 390 U.S. 377, 384. These decisions apply to any means of identification held to be unfair, whether by lineup or otherwise.

Specifically, with respect to a lineup, the Supreme Court found in *United States* v. *Wade*, 388 U.S. 218, 235–237, that "there is a grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial" by the usual cross-examination of government witnesses. Therefore, "[I]nsofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial," the Court stated, "the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." Since the "presence of counsel * * * [at a lineup] can often avert prejudice and assure a meaningful confrontation at trial," the Court concluded that under existing practice a pretrial lineup was a "critical stage of the prosecution" at which an accused is entitled to have counsel present. *Id.*, at 236–237.

Although the broad language of Section 3502 might be read as affecting *Stovall* as well as *Wade*, the legislative history indicates that Congress was concerned with the *Wade* requirement of counsel at a lineup.[2] Moreover, it would be difficult to assert that Congress could overrule a constitutional right to due process in protecting an accused from basically unfair means of identification.

The question thus is to what extent the new statute constitutionally permits the use of testimony of an eyewitness, even though the witness did identify the accused at a lineup at which the accused was not represented by counsel.

2. To some extent, the necessity for counsel's presence may be eliminated even without resort to the statute. The Court in *Wade* made clear that its announcement of a right of an accused to the presence of counsel at a lineup was only as a means of safeguarding the accused's rights to due process and to a meaningful confrontation of the identifying witnesses at trial. It emphasized that the decision "in no way creates a constitutional straitjacket" which would handicap the development of alternative safeguards. It said "Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'" 388 U.S. at 239.

Since *Wade* was decided, some federal law enforcement agencies have issued instructions to their agents regarding the manner of conducting lineups. Some of these instructions have directed, *inter alia*, that a lineup contain at least six persons of generally similar physical characteristics, that any opportunity for suggestive influences be avoided, and that the witnesses' identifications be communicated to the agents singly and privately. The instructions have also directed that a photograph be taken of the lineup, that the witnesses' identifying statements be transcribed, and that the agent conducting the lineup describe the event in writing. The requirements designed to assure the fairness of the proceedings, together with the requirements designed to permit a reconstruction of the event, may well be sufficient to qualify as adequate alternative safeguards under the decision in *Wade*. In an appropriate case, such an argument should be tried.

With respect to identifications conducted by local police departments, it is necessary, of course, if counsel was not present at a lineup, to ascertain whether they have equivalent rules before any such argument can be made.

3. Beyond that, it should be noted that the *Wade* decision did not hold that the fact that a witness saw the accused at a lineup where counsel was not present automatically results in exclusion of the testimony of the witness. The Court held that, where an accused is identified at a lineup without having been accorded the right to the presence of counsel, he may raise the matter at a hearing at which the government will have the burden of establishing "by clear and convincing evidence" that the ability of the eyewitnesses to identify the accused is "based upon observations of the suspect other than the lineup identification." *Id.*, at 240. If, after "consideration of various factors" which would bear upon the foundation of the witnesses' memories, the trial judge concludes that the witnesses' ability to identify the accused has not been "come at by exploitation of" the improper lineup, but had "an independent origin," the testimony of the witnesses identifying the accused as the perpetrator of the offense will be admissible in evidence at trial. *Id.*, at 241–242. If, on the contrary, the trial judge finds that the lineup substantially contributed to the ability of the witnesses to identify the accused, their identifying testimony will be excluded at trial.[4] In our view, Section 3502 can constitutionally be read as directed to the collateral rule of evidence under which the government must show by "clear and convincing" evidence that, where a pretrial identification occurred without an opportunity for counsel or other safeguards, a proposed in-court identification by a witness is based upon observations of the suspect other than the pretrial identification proceeding.

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to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Id.*, at 468. The "system," the Court felt, should require giving this warning even to a person who might be presumed to know of the right. It was this aspect of the *Miranda* holding—that even a lawyer would have to be warned under this system—that apparently prompted the Senate sponsors to specify as a factor in the district court's assessment of voluntariness under 3501(b) "whether or not such a defendant was advised *or knew* that he was not required to make any statement" (emphasis added). See *e.g.*, 114 Cong. Rec. S5007 (daily ed., May 6, 1968). While this does not change the necessity of giving this warning even to a lawyer under the "system" currently in effect, it does indicate that the reason for the phrase "or knew" is the conclusion by Congress that *obvious* knowledge is logically equitable with a warning in this situation. In light of this background, and in light of the overall import of the entire section, this phrase cannot properly be read as indicating that a district court could find a statement free from inherently compulsory influences when elicited from a person who was in fact totally unaware that he need not make a statement.

[1] The English practice is comparable. Although a warning is required under the Judges' Rules, a failure to give the warning in a particular case will not necessarily result in exclusion from evidence of a resulting statement; the matter lies within the discretion of the court. See Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1091, 1093–1094 (1966).

[2] The *Wade*, *Gilbert*, and *Stovall* decisions were announced on June 12, 1967. When the Senate hearings on the general subjects later embodied in the Omnibus Crime Bill resumed on July 10, 1967, Senator McClellan adverted to the fact that "the Supreme Court, since our last hearing, has laid down a new rule affording suspects the right to counsel at a police lineup." Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 840. The hearings, which ended two days later, contained no further reference to any of the lineup decisions. Thereafter, on April 29, 1968, the present Section 3502 appeared as an amendment to S. 917 in the bill reported on that date. S. 917, 90th Con., 2d Sess., § 701(a), at p. 46. The accompanying report of the Senate Committee on the Judiciary, in discussing the bill's provision regarding the admissibility of eyewitness testimony, referred only to the *Wade* case, noted its holding that "an in-court identification of the suspect by an eyewitness is inadmissible unless the prosecution can show that the identification is independent of any prior identification by the witness while the suspect was in custody [and without counsel]," stated that this "rule of evidence" appeared unwarranted, and stated that the provisions of the present Section 3502 were intended "to counter this harmful effect." S. Rep. No. 1097, 90th Cong., 2d Sess. 53 (1968). While the report of the minority views at one point stated that the section would conflict with *Wade*, *Gilbert*, and *Stovall*, both the headnote to that criticism and the ensuing discussion made it clear that the minority considered only *Wade* to be really affected. *Id.*, at 154–155. Similarly, although the later debate on the floor of the Senate included occasional combined references to all three cases, most references and arguments involved only *Wade*.

[4] Where a witness testified before the jury on direct that he had identified the accused at a lineup, the conviction was reversed because of the illegality of the lineup on the theory that this testimony was a "direct result of the illegal lineup." *Gilbert* v. *California*, 388 U.S. 263.

Congress, in providing that "[t]he testimony of a witness that he saw the accused commit * * * the crime * * * shall be admissible in evidence," has, in effect, established a simple but adequate statutory measure by which the independent basis of the witness's memory may be gauged for the purpose of determining the admissibility of his identifying testimony. That measure is whether the witness is able to testify positively that he did in fact see "the accused commit * * * the crime." In other words, it has simplified and clarified the "clear and convincing" standard of independent origin. It is the uncertainty caused by the employment of this term, in a situation where an independent origin may almost be assumed, that appears to be at the heart of Congress's concern with the *Wade* decision. See, *e.g.*, 114 Cong. Rec. S. 5222, S. 5546 (daily ed., May 9 and 14, 1968 (remarks of Senator Ervin).

As a practical matter, if an accused moves to suppress an eyewitness's proposed identification testimony on the ground that it is the product of a defective lineup, there must still be a hearing on such a motion. At that hearing the district court must first determine if any alleged unfairness was so unnecessarily suggestive as to violate due process. If not, the court must then determine whether the witness's ability to identify the accused is the product of seeing him commit the offense or rather of seeing him at the lineup. If the witness is able to testify flatly that he did, in fact, see "the *accused* commit * * * the crime," an independent basis for his current ability to identify the accused is thereby demonstrated under the statute, at least to the degree necessary to justify submitting the issue for consideration of the jury. If, to the contrary, the witness is able to testify only to the general effect that the accused resembles the man he saw commit the crime, the witness's testimony by itself is insufficiently positive to meet the standard set by Congress. In such a situation the district court must examine various other factors set forth in the *Wade* opinion as pertinent to an evaluation of the basis for the witness's current memory of the offender (388 U.S. at 241) in order to determine whether such an ability to identify the accused as does exist has been "come at by exploitation" of the lineup. Congress has thus provided, in effect, that a positive identification of an accused as the person observed committing the offense will itself be sufficient to warrant a finding that the witness's identification had a basis independent of the lineup, and thereby to justify admission of the witness's identifying testimony at trial where its foundation will be subject to the customary testing by cross-examination and its weight will be subject to evaluation by the jury.

The effect of the statute is to elevate positiveness from an important factor among several relevant factors (see *Simmons* v. *United States*, 390 U.S. 377, 385) to an initially controlling factor. This is neither unreasonable nor impermissible. In the situation involved in an attempt to suppress eyewitness identification, a true independent origin is the rule rather than the exception. Under the circumstances, the action of Congress in making an eyewitness's positiveness a simple, expedient, but logical preliminary test of admissibility appears to be an appropriate exercise of its traditional rule-making power.[3]

[3] It should be noted that the statute as drafted is not applicable to the testimony of an eyewitness whose observation of the accused occurred shortly before or after the commission of the offense, if, at the time of the observation, the accused could not be said to be "participat[ing] in the commission of the crime."

WIRETAPPING, PRIVACY, AND TITLE III

Mr. McCLELLAN. Mr. President, on June 19, 1968, at 7:14 p.m., President Johnson signed Public Law 90-351, the "Omnibus Crime Control and Safe Streets Act of 1968." Title III of that act, which dealt with wiretapping and electronic surveillance, represented the culmination of an attempt, over the past 40 years, embracing approximately 50 bills, resolutions, and joint resolutions, to arm law enforcement with a sorely needed tool to combat the forces of organized crime. District Attorney Frank S. Hogan, who has been one of our Nation's outstanding district attorneys for over 27 years, has aptly described this tool as: "The single most valuable weapon in law enforcement's fight against organized crime."

Mr. President, I worked hard to secure the enactment of title III of the Omnibus Crime Control Act, of the Senate on this point, and we were supported by a large majority. When a motion was offered on the floor to strike title III of the bill, it was defeated, as I recall, by a vote of 68 to 12. Nevertheless, more was involved in that fight than an attempt to strengthen the hand of law enforcement. Each of us who worked so long and hard for title III had as an equally important goal: the protection of the privacy of the law-abiding citizen. And it is to that aspect of title III that I now rise to speak.

Mr. President, on April 30, 1969, the Administrative Office of the U.S. Courts filed its first annual report on wiretapping and bugging to the Congress in accordance with the provisions of title III. Under the statute, the Administrative Office of the U.S. Courts is required to transmit to the Congress in April of each year a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year, along with a summary and analysis of certain data required under the act to be filed with the Administrative Office of the U.S. Courts by State and Federal judicial and prosecutional officials. These data must include the following:

First, the fact that an order or extension was applied for;

Second, the kind of order or extension applied for;

Third, the fact that the order or extension was granted as applied for, was modified, or was denied;

Fourth, the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

Fifth, the offense specified in the order or application, or extension of an order;

Sixth, the identity of the applying investigative or law-enforcement officer and agency making the application and the person authorizing the application;

Seventh, the nature of the facilities from which or the place where communications were to be intercepted;

Eighth, a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate number of persons whose communications were intercepted, and (iii) the approximate nature, amount and cost of the manpower and other resources used in the interceptions;

Ninth, the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

Tenth, the number of trials resulting from such interceptions;

Eleventh, the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

Twelfth, the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions.

This first report covers a period just in excess of 6 months—from June 20, 1968, to December 31, 1968. In addition, the report covers only those few States, including New York, Arizona, Georgia, and Massachusetts, which have electronic surveillance statutes. I add, incidentally, that New Jersey, Colorado, Florida, and Minnesota have recently enacted electronic surveillance statutes. Pursuant to the policy of the previous administration—a policy I am glad to report has now been modified—no applications were made on behalf of the Federal Government during this period. The report, therefore, covers only State activity.

I recognize, of course, that it is premature to draw sweeping conclusions from this preliminary information, information, too, which is wholly statistical in character. Indeed, it was with this in mind that I directed the staff of the Subcommittee on Criminal Laws and Procedures to undertake a confidential survey of the use of wiretapping and bugging techniques in a selected number of instances in New York to test at firsthand the degree to which inferences might be validly drawn from this first report under the new Federal legislation. That survey of State action has now been completed. In addition, I have satisfied myself as to the present quality and quantity of Federal electronic surveillance. Consequently, I now believe that certain remarks are appropriate.

My initial reaction to the report itself and our investigation is that the opponents of this legislation who predicted widespread and promiscuous use of wiretaps and bugs by law enforcement authorities are being proven wrong in their prognostications. Indeed, the indications are that few orders have been applied for or granted and that most of those granted were for wiretaps. I note, too, that statute is fast proving itself on the Federal level to be the valuable law enforcement tool that we had expected. The most spectacular success to date has been the seizure of 124 pounds of heroin in New York. This seizure was reported in the New York Times on March 11, 13, and 16. It was valued at $8 million. Since it is under active prosecution, I do not want to discuss the case in great detail now, but I note that a challenge to the

For Board

The Augusta Chronicle 2/14/99

Miranda, finally

South Carolina is lucky. It is one of the five Southeast states — not including Georgia — to be under the jurisdiction of the 4th U.S. Circuit Court of Appeals which just loosened *Miranda* restrictions on police.

Every moviegoer or TV viewer knows about "Mirandizing" criminal suspects: "You have the right to remain silent. Anything you say can and will be used against you in a court of law... You have a right to an attorney and if you cannot afford one (etc)..."

Miranda, in effect, was legislated by the ultraliberal Earl Warren Supreme Court in 1966. It made voluntary confessions all but impossible to be admitted in court and was widely denounced at the time by police, prosecutors and other crime-fighters as "coddling criminals."

In response to the public outrage, Congress two years later passed legislation to allow voluntary confessions in federal courts — regardless of whether the suspect had been read his Miranda rights.

The 1968 revision to *Miranda* was ignored by President Lyndon Johnson's soft-on-crime Justice Department, headed by mush-brained Attorney General Ramsey Clark who believed criminals had more rights than victims.

What's inexplicable is that every attorney general since Clark — including several "law-'n-order" types — continued to let Congress' law lay dormant for three decades.

Finally last week, in *U.S. vs. Dickerson*, the 4th Circuit's three-judge panel — without any prodding from Janet Reno's Justice Department even though it helped the agency win — reached back to the 1968 law to rule 2-1 that failure to "Mirandize" a suspect does not automatically invalidate a voluntary confession.

At long last, criminal coddling appears in retreat! If the *Dickerson* decision is upheld by the full 4th Circuit and ratified by a not-so-liberal U.S. Supreme Court, more violent criminals will be brought to justice.

To be sure, American Criminal Liberties Union types will whine that curbing *Miranda* will legitimize police beatings to get confessions. That's nonsense. A forced confession is, by definition, not voluntary. Besides, police beatings have always been against the law, even before *Miranda*.

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GOP slams White House over Miranda rights law

By CASSANDRA BURRELL
The Associated Press

WASHINGTON — Senate Republicans angrily criticized the Clinton administration on Thursday for failing to use a 31-year-old law that would make it easier for prosecutors to use voluntary confessions against defendants in court.

Aggressive use of a law that would permit admission of the confessions into evidence at trial — even when officers do not read suspects their Miranda rights — could keep more dangerous criminals off the streets, Sen. Strom Thurmond, R-S.C., said.

"America does not need its Justice Department making arguments on behalf of criminals," Thurmond said.

"I cannot understand why the Clinton administration refuses to use this law against criminals and even prohibits its career federal prosecutors from doing so," he said.

Seven presidential administrations, Republican and Democratic alike, have refused to enforce the law out of concern for its constitutionality.

The law, passed by Congress in 1968, says a suspect's confession can be used at trial as long as federal judges are sure the statement was given voluntarily regardless of whether law enforcement officers recited the Miranda warning.

Police nationwide have been giving such warnings before questioning criminal suspects in custody ever since the Supreme Court said they had to.

Failure to do so often means a confession or incriminating remark made to police is inadmissible as evidence in court.

Thurmond

The disagreement is over whether Miranda warnings are constitutionally required or just one way to ensure that any incriminating statements are made voluntarily.

Critics have said Miranda warnings discourage guilty suspects from confessing, make their prosecutions more difficult and increase the chance that their cases will be thrown out on technicalities.

And in February a three-judge panel of the 4th U.S. Circuit Court of Appeals said the 1968 federal law trumped the Miranda decision and freed federal law enforcement officers from having to give the warnings in every case.

Confessions are key in many prosecutions, and prosecutors often are unable to win their cases without them, Stephen Markman, a former Reagan administration assistant attorney general, told the Senate Judiciary Committee's criminal justice oversight subcommittee.

"When Miranda works, it discourages people from giving that information," Markman said Thursday.

In a written statement submitted to the subcommittee, the Justice Department said it believes the 4th Circuit's decision was incorrect, and the Supreme Court has never overruled the Miranda decision.