LEXSEE 85 IOWA L. REV. 175

October, 1999

85 Iowa L. Rev. 175

LENGTH: 38882 words

ARTICLE: The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda

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BIO:

* Copyright (c) 1999 and all rights reserved by Paul G. Cassell. Professor of Law, University of Utah College of Law (cassellp@law.utah.edu). This Article comments on a number of cases in which I represented various clients, e.g., the Washington Legal Foundation and several United States Senators, a fact that is noted with specific footnotes where applicable. Thanks to Akhil Amar, Doug Beloof, Paul Kamenar, Yale Kamisar, Scott Matheson, Michael McConnell, Michael O'Neill, Mike Ramsey, George Thomas and others who must remain nameless for their help, and to Shane Krauser for research assistance.

This Article is dedicated to my ailing friend, Joe Grano, whose brilliant book, CONFESSIONS, TRUTH, AND THE LAW (1993), makes the compelling doctrinal case against Miranda. Joe predicted, with sadness, that Miranda's exclusionary rule would not be reformed in his lifetime. Id. at vii. Hang in there Joe, you may be proven wrong yet.

SUMMARY:
... On February 8, 1999, the United States Court of Appeals for the Fourth Circuit handed down its landmark opinion in *United States v. Dickerson*, concluding that *Miranda* no longer governs federal cases. ... Miranda, noting the gravity of the officer's look, shifted uneasily in his chair and then asked, "How did I do?" ... The Court enforced these new rights with an exclusionary rule: the suppression of the suspect's confession if police deviated from the requirements. ... Judge Michael dissented, arguing the court should not have reached the issue of the statute's application where it was not presented by the Department of Justice. ... For example, two leading *Miranda* scholars have recently written articles discussing the *Dickerson* opinion. ... While federal law enforcement agencies "have encountered difficulties" with extensions of *Miranda* forbidding reinitiation of questioning after invocation of a right to counsel, the warning-and-waiver requirements themselves have not proven difficult to administer. ... The Court conceded that *Miranda* might require suppression of a confession that was not involuntary, the reason the decision has been called prophylactic. ... As the Department of Justice explained in connection with the Fourth Amendment exclusionary rule, devices for preventing constitutional violations include:

... As the Department of Justice explained in connection with the Fourth Amendment exclusionary rule, "the remedial landscape has changed considerably" since the early 1960s. ...

HIGHLIGHT: "In any criminal prosecution brought by the United States . . . a confession . . . shall be admissible in evidence if it is voluntarily given."

-- 18 U.S.C. § 3501

TEXT:

[*177] Scholars and jurists have criticized *Miranda* for 33 years, but the most powerful attack appeared unexpectedly earlier this year. On February 8, 1999, the United States Court of Appeals for the Fourth Circuit handed down its landmark opinion in *United States v. Dickerson*, n1 concluding that *Miranda* no longer governs federal cases. Instead, the court concluded a statute Congress passed in 1968 -- often called simply § 3501 n2 -- requires the admission of all "voluntary" confessions without regard to technical compliance with the *Miranda* procedures. Congress acted within its powers in enacting such a statute, the court explained, because the *Miranda* decision itself disclaimed any intent to "create a 'constitutional straitjacket'" n3 and "encouraged 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." n4 As a result, the Fourth Circuit had "little difficulty" in finding 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." n5 Applying the statute, the court refused to suppress voluntary statements made by Charles Dickerson inculpating him in a string of armed bank robberies, even though he had, possibly, not received his *Miranda* warnings until after he made the statements. n6

The court's opinion prompted considerable reaction from *Miranda's* supporters across the country. Professor Yale Kamisar, perhaps the nation's leading academic defender of *Miranda*, called [*178] the decision "stunning" n7 and a "body blow" to the Warren Court's ruling. n8 Professor Stephen Schulhofer described it as "the most surprising and ill-considered instance of 'judicial activism' in recent memory." n9 For good measure, the *New York Times* intoned that the ruling was "extraordinarily regressive" and "defied both the Supreme Court's landmark decision in *Miranda v. Arizona* and the Constitution's limits on judicial authority." n10

Such negative reactions seem excessive, and their validity will soon be put to the test before the Supreme Court. Dickerson's attorney has filed a petition for certiorari, arguing the statute should be struck down as unconstitutional. n11 As of this writing, the Court has agreed to review the case, n12 setting the stage for the Court's most closely-watched criminal procedure decision in recent times.

This Article contends that the Court should uphold § 3501 against constitutional challenge and apply it, rather than *Miranda*, as the governing standard for admitting confessions in federal courts. It reaches this conclusion by exploring one of the most curious features of the recent *Dickerson* ruling: that it came not at the behest of the United States, as represented by the Department of Justice (the Department), but rather of the Washington Legal Foundation ("WLF"), an amicus curiae. n13 One would expect the Department to support a statute passed to assist federal prosecutors by admitting vital evidence in federal prosecutions. To the contrary, however, over the last two years the Department has prohibited its prosecutors from defending the statute in cases like *Dickerson*, and has asserted that the statute is unconstitutional. Indeed, after the Fourth Circuit's favorable ruling on the statute, the Department joined defendant Dickerson in asking the full Fourth Circuit to review [*179] and reverse the panel decision. n14 The Department's peculiar posture of supporting a criminal defendant has continued in the Supreme Court. There, the Attorney General, over the strong objection of U.S. Attorneys around the country, n15 filed a brief urging the Court to grant Dickerson's petition for certiorari and strike down the statute. The brief even gratuitously comments on issues beyond the § 3501 question, praising *Miranda* as a boon to law enforcement. n16 How the Department's alliance with the bank robber it is seeking to prosecute will be viewed by the Supreme Court has yet to be seen. n17 This maneuver did not find favor with the Fourth Circuit, which said that the action of the Department in "prohibiting the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501 . . . elevated politics over law . . . ." n18 The Justice Department's position troubled the Fourth Circuit because, under our system of separated powers, it is the duty of the Executive Branch to "take care that the Laws be faithfully executed." n19 As a consequence of that constitutional obligation, the Department has historically defended the constitutionality of Acts of Congress where "reasonable" arguments can be made on their behalf. n20 This Article explores the Department's failure to defend § 3501 in the Fourth Circuit and the Supreme Court, and concludes that the Department lacks a plausible basis for its

position. Reasonable -- indeed, compelling -- arguments support the conclusion that § 3501 is a proper exercise of congressional power and that its enforcement is vital to the protection of public safety. This was, in fact, the position of the Department of Justice for many years.

[*180] In Part I, this Article explores the almost-forgotten history leading to *Miranda* and the congressional reaction reflected in § 3501. Part I reports, apparently for the first time, some of the details of the investigation of Ernest Miranda's crimes, as recounted by the detective who interrogated him. It then briefly reviews the Supreme Court's decision in *Miranda* and the congressional response in § 3501.

The remaining Parts of this Article turn next to the various reasons that the Justice Department and its supporters in the academy have proffered as grounds for refusing to defend the law. The Article first considers the claim that declining to defend § 3501 accords with long-standing Justice Department policy. When asked after *Dickerson* about the Department's failure to defend the statute, Attorney General Reno asserted: "In this administration and in other administrations preceding it, both parties have reached the same conclusion [that the statute could not be defended]." n21 This is inaccurate. In fact, the well-settled policy of the Department was to defend the statute, a litigation posture that had produced a favorable reported appellate decision in the Tenth Circuit. Part II reviews the Department's venerable position that the statute was constitutional, a position that the political appointees in the current administration recently reversed, overruling career prosecutors.

The Article next turns to the critical issue of the statute's constitutionality. The Department, joined by academic defenders of *Miranda*, takes the position that the statute rests on constitutional "foundations" or "underpinnings" that a mere Act of Congress cannot override. n22 Part III explains why the Fourth Circuit in *Dickerson* correctly rejected this position and held that § 3501 is constitutional. Two arguments strongly support this result. Part III.A develops the argument, accepted in *Dickerson*, that Congress has the power to override the *Miranda* rules. The Supreme Court has repeatedly held that the *Miranda* rights are not constitutional rights [*181] but rather are "prophylactic" rules designed to "safeguard" constitutional rights. Given Congress' undoubted power to establish rules of evidence for federal courts, § 3501 survives constitutional challenge. Part III.B provides an independent argument for this same conclusion, an argument not addressed by the *Dickerson* court. 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" n23 by drafting alternatives to *Miranda*. Section 3501, considered not by itself (as its critics are wont to do), but as part of a full package of measures covering questioning by federal police officers, is one such reasonable alternative. Part III.C then briefly explains why upholding the constitutionality of the statute will not inadvertently "unleash" the police to violate constitutional rights.

A final objection raised by the Department and the critics of the statute is that § 3501 need not be defended because federal prosecutors can prevail even laboring under the *Miranda* exclusionary rule. n24 This argument wrongly diverts focus away from the cases at which § 3501 was targeted: cases like *Dickerson*, in which dangerous criminals can escape justice if they can take advantage of the *Miranda* exclusionary rule. More generally, *Miranda's* procedural requirements seriously harm public safety. Part IV explains why *Miranda's* heavy toll on this country's ability to prosecute serious crimes would be reduced if the Department raised and the courts applied § 3501.

I. THE FORGOTTEN HISTORY BEHIND *MIRANDA* AND § 3501

Discussion of the *Miranda* rules conventionally starts with the Supreme Court's opinion and ignores the backdrop to the decision. This occurs in part because *Miranda* broke with past precedents and constitutional traditions. n25 Historians and legal scholars pay attention, appropriately enough, to the Court's ruling, but do so to the exclusion of the important events that set it in motion. The tendency to focus purely on the legal arguments of the Court has also produced a curious distortion in the way in which Ernest Miranda is conventionally portrayed. Lawyers typically regard him as the central *dramatis personae* in the Supreme Court's most famous [*182] criminal law decision, n26 rather than as a dangerous criminal who robbed and raped a number of women. This view of Miranda is captured in the perhaps apocryphal story of the woman who, when told that Miranda had died, replied, "Oh, that's terrible, after all he's

done." It is also captured in the *Miranda* opinion itself, where Miranda is charitably described as a "seriously disturbed individual with pronounced sexual fantasies." n27 The victims of this "disturbed" individual have not, to my knowledge, ever had their story told. n28

It is, therefore, interesting to depart from the conventional approach and to consider Miranda from a different perspective. Since the Court's 1966 decision requiring the *Miranda* warnings, scholars have written much about the judicial points of the case; however, few people, including the police officers and attorneys who work with the results of the decision, know the details of the actual crimes and investigation. I have come into possession of a first-hand account of the interrogation of Ernest Miranda, written by the interrogating officer: former Phoenix police Captain Carroll F. Cooley. n29 Because of its potential historical value, Captain Cooley's recitation of the events leading up to the Supreme Court decision follows here verbatim. n30

[*183] * * * *

A. CAPTAIN COOLEY'S FIRST-HAND ACCOUNT OF THE INTERROGATION OF ERNEST MIRANDA

This is not an effort to defend or justify police actions, but rather to give a true account of what happened, and perhaps shatter myths as to the abuses to which Miranda was allegedly subjected.

1. The Crime

Sandra Smith, n31 eighteen, a shy, naive, withdrawn girl, left the Paramount Theater, where she worked selling tickets, at 11:45 p.m. on March 2, 1963. She and another employee walked the two blocks to the downtown Phoenix, Arizona bus stop and boarded a bus for Northeast Phoenix, where she lived.

Sandra left the bus, alone, at 7th Street and East Marlette. She began the five-block walk along the unlighted street. A line of large overhanging trees accentuated the darkness. A car pulled slowly from behind a nearby ballet school, passed, and stopped just in front of her as she walked. A man Sandra later guessed to be twenty-seven or twenty-eight got out, grabbed her, and pressed something sharp against her throat. "Don't scream," he said. "Don't scream and you won't get hurt." Opening the back door, he ordered her to get in and lie down. Shocked and frightened, she complied.

He then tied her wrists and ankles with rope, entered the car and drove off. She was crying, begging him to let her go, but he was unmoved. "Be quiet," he told her repeatedly. "Just be quiet and I won't hurt you." Some twenty minutes later he stopped the car in a deserted area northeast of the city.

Sandra managed to work free of the ropes, but to no avail. The man exited the car, got in the back seat with her, and ordered her to remove her clothes. She refused. She was crying and pleading with him to let her go. He then removed her clothes for her. Within moments, the suspect forcibly raped Sandra Smith. He then put on his clothes, ordered her to get dressed, and drove her back to the area where he had picked her up.

The young man asked Sandra if she had any money. She gave [*184] him the four dollars in her purse. He stopped the car, turned to her, and said, "Whether you tell your mother what happened or not is none of my . . . business, but pray for me." She left the car, and he drove off. She did not see which way. Hysterical, she ran to the nearby home of her older married sister, with whom she was living, and told her what happened. Her sister telephoned the Phoenix Police Department.

2. The Investigation

A uniformed officer responded and routinely called detectives to make the investigation. Sandra was taken to a hospital for examination. Detectives Kyle Gourdoux and Don Davis made their report and went home.

Detective Carroll F. Cooley, twenty-seven, a five-year veteran police officer in the Crimes Against Persons Detail,

came to work on the Monday morning of March 4, 1963. His boss, Sergeant Seymour Nealis, assigned him to investigate the Sandra Smith rape case.

Cooley began with a routine interview with Sandra. She now recalled her attacker as a Mexican or possibly Italian, with dark, curly hair, combed back, about twenty-five or so, average height and build, wearing a white T-shirt and blue jeans. She said the car was an old four-door sedan, light green, with a piece of rope across the back of the front seat. She added that the upholstery was a light beige with vertical stripes; there were paint brushes on the floor and she remembered smelling turpentine.

Police talked with Sandra's sister, who remembered once telling Sandra that she would have a better chance of escaping injury, even death, if she didn't resist a rapist. The sister, however, was unable to offer police much help.

The investigation continued, producing few results. Police questioned the other employee who rode with Sandra on the bus, but he had seen nothing suspicious. Sandra viewed photographs of known sex offenders but none looked like the suspect. Detectives showed her several different makes and models of cars to see if she could identify the one the suspect used. She could not. A week passed. Police found no substantial leads or possible suspects. Detectives routinely noted a marked similarity between Sandra's description of her assailant and the descriptions given by several other women who reported being accosted and robbed. However, these incidents had all occurred in downtown Phoenix, some distance from where Sandra was attacked.

Sandra returned to her job, but observed caution. She no [*185] longer walked home alone from the bus stop. Dave Henry, n32 a relative, waited to accompany her each night. On Saturday, March 9, 1963, a week after the assault, Dave saw an old, light-colored sedan with a lone occupant drive slowly back and forth by the bus stop several times. He mentally noted the license number as DFL-317. Shortly thereafter, Sandra stepped from the bus. As they walked home, Dave spotted the car again, parked on a sidestreet. Pointing, he asked her if it could be the car the kidnapper used. She looked carefully at the car as they walked toward it for a closer look. "It could be the one," she replied. "It looks the same." At that moment, the driver started the car and sped away. Dave immediately called the police.

The license number Dave noted was registered to a 1958 Oldsmobile. Unlike Sandra, Dave was more familiar with cars. He was sure the car was not an Oldsmobile, but rather a 1953 Packard, similar to one owned by a friend of his.

The following Monday, March 11th, Dave Henry told Detective Cooley he was quite sure about the car being an old model Packard, and that the letters of the license plate had been DFL. He was less certain about the three numbers. Cooley showed Dave a 1953 Packard and verified that this was the make and model car he had seen. Police also photographed the car for use in a bulletin to be sent to all officers.

Detective Cooley asked the Motor Vehicle Department to pull its records on all Packards with license numbers beginning with the DFL prefix. They found one, registered to a Twila M. Hoffman on North LaBaron Street in the nearby community of Mesa, Arizona. The car was a 1953 Packard, license DFL-312 -- one digit off from the number reported by Dave Henry.

The next day, March 12th, Detective Cooley and a partner, Detective Bill Young, drove to the address given for Twila Hoffman. It was vacant. Neighbors said the people who lived there, Ernie Miranda and his wife, Twila, had moved out on Sunday, March 10th. They had used a truck marked "United Produce" to haul their things away, but no one knew where they were now living.

The detectives routinely checked the name "Ernest Miranda" out with the Mesa Police Department, and learned that the name had a background: twenty-three year old Mexican male, juvenile record of assault with intent to commit rape in 1956, a juvenile arrest in Los Angeles, California for robbery in 1957, and an arrest [*186] and conviction for auto theft in Tennessee in 1959, resulting in a one-year sentence to federal prison.

The detectives returned to the downtown Phoenix area and stopped at the United Produce Company where they

learned that Ernest Miranda was employed there as a dock worker on the evening shift. The company did not have his address, but employees knew he had just moved. They had loaned him one of their trucks to move his family from Mesa to Phoenix.

On Wednesday morning, March 13, 1963, the detectives continued their investigation, stopping to check with the Phoenix Post Office on the slim chance that Miranda might have filed a change of address card. It paid off. The card had been filed, directing them now to the new address on West Mariposa Street in Phoenix. As the detectives drove up, they saw a light gray 1953 Packard four-door parked in the driveway. The license number was DFL-312. Cooley noted the light colored upholstery: it had a vertical pattern. There was also a cord attached to the rear of the front seat, similar to what Sandra had described as a rope handle.

A woman carrying a small baby answered the door. After the officers introduced themselves and asked to see Ernest Miranda, she told them he was asleep, but offered to awaken him if necessary. The woman disappeared back into the house. Several minutes later, a young man came out, clad only in a pair of khaki trousers, and asked them what they wanted. Detective Cooley asked him if he was Ernest Miranda. He replied that he was. The officer then asked him if he would come down to the police station with them where they could talk.

"What's this all about?" Miranda asked.

"It concerns a police investigation, and we would rather not discuss it here, in front of your family," replied the detective.

"O.K." said Ernest. "Let me get dressed first, and I'll be right with you." As he turned to go back in the house, he said "Come on in," inviting the officers to wait for him in the living room, where they waited until he returned a short time later, having added a pair of shoes and a white T-shirt to his attire.

Miranda rode alone in the back seat, unrestrained, making small talk with the two detectives in the front seat. He was not placed under arrest, and, as a result, if he had decided not to go downtown with them, they could not have rightfully made him go involuntarily.

Thus far, the detectives had a man with access to a car that might have been the one seen under suspicious circumstances near [*187] the scene of the kidnapping -- a full week later. The license number, although similar, was not the one Dave Henry gave police, and the car was not the color Sandra reported the suspect's car to be. Miranda did have a record, and did fit the general description of the suspect, but even with the composite evidence, Detective Cooley still did not feel he had enough probable cause to arrest him. If he had, Miranda would have been handcuffed, and one of the detectives would have ridden in the back seat with him. They avoided discussion of the crimes under investigation, and at one point, Detective Young told Miranda he did not have to talk to them if he did not want to.

Arriving at the Main Police Building, the officers took Miranda to the Detective Bureau and seated him at a table in Interview Room # 2, a 12-foot square room with a two-way mirror in the door for viewing line-ups. Detective Cooley seated himself in one of the other chairs in the room and began the interview at approximately 10:30 a.m.

He told Miranda what Sandra Smith reported had happened to her on the night of March 3, 1963, and that through the license number, police had identified Miranda's car as the one used by the man who picked Sandra up that night. Miranda emphatically denied knowing anything about the incident, and claimed that he was working that night at United Produce.

Detective Cooley continued talking with Miranda for over thirty minutes, asking him about the Sandra Smith case and others in which the suspects' descriptions were similar to Miranda. They discussed Miranda's past record for assault with intent to commit rape. Cooley advised Miranda of his potential need of psychiatric help, but expressed that he knew Miranda was the perpetrator of several of these offenses (which was not true; he only suspected it). Miranda was adamant in his denial. He maintained his innocence and admitted nothing.

The interview was short; however, it enabled the detectives to establish a degree of rapport with Miranda because of the cordial, sympathetic approach used in talking with him. Because he had made no admissions, the officers asked if he would consent to being viewed by the victims while he stood in a line-up with several other men of his general description. He agreed, but only after the officers told him they would take him home if none of the victims could identify him.

While Detective Young secured three prisoners from City Jail to stand in the line-up, Cooley tried to locate the victims of the cases [*188] in which Miranda was a suspect. He could only find two on such short notice: Sandra Smith and a Betty McDermitt, n33 who was robbed at knifepoint by a Mexican male on the night of November 27, 1962. The suspect tried to rape her and took eight dollars from her.

Sandra Smith and Betty McDermitt arrived at the station shortly before 11:30 a.m. when the line-up was held. The detectives told Miranda that he could choose his position in the line by selecting one of the four large numbered cards that would be worn around the necks of the participants for identification. He chose # 1, the first position in line.

The line-up was held in the same room as the initial interview. Sandra Smith viewed the line-up first. Looking through the two-way glass, she paused momentarily, and said she thought number one looked like the man. She was not positive. She said if she could hear him speak, she might be more sure. Betty McDermitt then came in and looked through the glass. She also thought number one looked like the same man who robbed and tried to rape her, but could not be positive.

The officers were right back where they started, left with nothing but their suspicions. Detective Cooley asked the two women to wait while he talked further with Miranda. Somewhat dejected and frustrated, unsure of what approach to use, Cooley returned to the interview room where Miranda waited, alone. Miranda, noting the gravity of the officer's look, shifted uneasily in his chair and then asked, "How did I do?"

"Not too good, Ernie," replied Cooley, picking up on Miranda's obvious concern.

"They identified me then?" Miranda asked.

"Yes Ernie, they did," Cooley replied gravely.

"Well," said Miranda resignedly, "I guess I'd better tell you about it then."

"Yes Ernie, I think you should," replied the officer.

And thus ended the chain of events leading to the confession of Ernest Arthur Miranda.

3. The Confession

Miranda told Detective Cooley that he was driving around Northeast Phoenix when he saw a woman walking alone down a dark street. He said he pulled up and stopped just ahead of her, and got [*189] out of the car. When she came close enough, he said he told her not to make any noise, to get in the car and that he would not hurt her. He conveyed how he tied her ankles and wrists with a piece of rope and then drove to an isolated place in the nearby desert where he stopped and got in the back seat.

He said he told her to undress, but she refused so he removed her clothes. She begged him not to rape her, he said, telling him she had never had relations with a man before, but he did not believe her. Miranda said he tried to have intercourse but was unable to at first. He told Cooley he was successful the second time, and after completing the act, he took the woman back to the area where he found her and let her go after taking four dollars from her purse. Miranda looked up as he finished telling the story, and added, "I asked her to pray for me."

Detective Cooley then told Miranda he had also been identified by another young woman who was robbed at

knifepoint on November 27, 1962, by a suspect who had also tried to rape her. Miranda went on to recite how he forced his way into Betty McDermitt's car, put his hand over her mouth, and told her not to scream and that she would not be hurt. He said he drove her car into a nearby alley and stopped, intending to rape her, but she talked him out of it so he simply took her money.

Detective Cooley asked Miranda if he used a knife to rob this woman. He replied that it was only a fingernail file, held up his sleeve, which he used to simulate a knife by pressing the point against the woman's side when he got in the car.

The officers questioned Miranda about other crimes in which his description and actions were similar to the suspects', but he denied knowing anything about them. However, after police confronted him with one case in which the suspect had a tattoo identical to one on Miranda's arm, which occurred at exactly the same time of day as the attack on Betty McDermitt -- 8:45 p.m. -- Ernest did admit to the crime. He said he used the fingernail file again to simulate a knife, but was frightened away by a passing motorist before getting any money. The detectives did not charge Miranda with this offense, as the officers were unable to locate the victim.

The detectives then asked Miranda if he would give them a written statement as to his actions in the incident with Sandra Smith. He readily agreed and they gave him a standard form on which was written Miranda's name, the names of the officers, and the date and time: March 13, 1963, 1:30 p.m. The case -- Rape D.R. # 63-08380 -- was entered, and the location, Interview Room # 2, followed [*190] by a typed paragraph:

> I, [Miranda's signature], do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me. I, [Miranda's signature], am [23] years of age and have completed the [8th] grade in school.

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

Ernest Miranda wrote the following statement in longhand, initialed at the beginning and end, and at one point at the beginning where he made an error:

> eam. [O> Picked <O] eam. Seen a girl walking up street. Stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in car. Got in car without force tied hands and ankles. Drove away for a few mile. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did. Could not get penis into vagina got about 1/2 (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done but asked her to pray for me. eam.

The form reads next:

> "I have read and understand the foregoing statement and hereby swear to its truthfulness. [Signed] Ernest A. Miranda
>
> WITNESS: [Signed] Carroll Cooley [Signed] Wilfred M. Young # 182

This is Ernest A. Miranda's written confession to the kidnap, rape and robbery of Sandra Smith. Notably, it covers only one of the incidents. He was not asked to include the other crimes to which he confessed verbally, for several reasons.

First, the detectives' main concern was the rape case. Because they could not establish attempted rape, but only robbery, in the Betty McDermitt case, that case was the responsibility of the Robbery Detail. In addition, they did not

wish to risk jeopardizing Miranda's successful prosecution by opening his written confession to attack because of the mention of other, unrelated crimes.

[*191] 4. The Arrest

After completing the statement, officers brought Sandra Smith into the room and asked Miranda to state his name, and if he recognized the woman, whom they had not identified to him. He stated his name and said he did recognize her. After leaving the room, Sandra told Detective Cooley she was positive Miranda was the man who raped her; she was sure the moment he spoke.

The police then brought Betty McDermitt into the room, and the scene repeated. Miranda said he also recognized her, and he even repeated some of the things she said to him that caused him to change his mind about raping her. She also identified him as her assailant, and said she had forgotten some of the things she said to him the night she was attacked, until he reminded her of them.

Detective Cooley then told Ernest Miranda that he was under arrest for the kidnap, rape and robbery of Sandra Smith and the robbery of Betty McDermitt. He was handcuffed, taken to the Fourth Floor City Jail, and booked on those charges.

* * * *

B. THE SUPREME COURT'S DECISION

With Detective Cooley's account of the facts in mind, we can return to the events that are more generally known. At Miranda's trial for the rape, the court admitted the confession Detective Cooley had obtained over objection. Miranda was convicted and sentenced to twenty years in prison. The Arizona Supreme Court affirmed the conviction, concluding that the confession was voluntary and Miranda was not entitled to counsel because he never asked for a lawyer. n34 The Supreme Court then granted Miranda's petition for certiorari (along with three other consolidated cases). Miranda's brief on the merits argued that the detectives violated his Sixth Amendment right to counsel in obtaining his confession. Miranda's skilled appellate lawyers did not even cite the Fifth Amendment, let alone develop an argument for its application. n35 Yet on June 13, 1966, the Court handed down its landmark, 5-to-4 decision interpreting [*192] the Fifth Amendment in *Miranda v. Arizona*. n36 The decision had a decidedly unusual, legislative feel about it, as Professor Joseph Grano has nicely summarized:

> *Miranda's* opening paragraph informed the reader that the case had something to do with the Fifth Amendment and the admissibility of statements produced by custodial interrogation. Without describing the specifics of what the police had done in the four cases before the Court, subsequent pages of the opinion then . . . summarized the holding, reviewed precedent, analyzed the history of the Fifth Amendment, surveyed police manuals to present a general picture of police interrogation, imposed various mandates by way of dicta . . . and examined the law in other countries to show that the holding was really not that extreme. After more than fifty pages, the opinion acknowledged that the preceding discussion, which included all the Court's new rules, had occurred without "specific concentration on the facts of the cases before us." Belatedly turning to the facts, the opinion then spent only eight pages in concluding that the police in each case had obtained the confession in violation of the new rules. n37

The dramatic changes wrought by *Miranda* are 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. n38 Under this approach, courts admitted a defendant's confession into evidence only if it was voluntary. In making this voluntariness determination, courts considered a host of factors. If police officers used physical force or the threat of force, for example, courts almost automatically deemed the resulting confession involuntary; lesser pressures (or inducements) could also lead to a finding of involuntariness. n39 Courts also considered such factors as length of interrogation and types of questions [*193] asked in making the voluntariness determination.

The *Miranda* decision largely replaced this case-by-case voluntariness analysis with general procedural requirements governing law enforcement questioning of suspects in custody. The required warnings 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. n40

While the *Miranda* warnings are the most famous part of the decision, even more important are the additional "waiver" and other requirements that the Court imposed. n41 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. n42 At any time during an interrogation, however, a suspect can halt the process by retracting his waiver or requesting a lawyer. From that point on, the police cannot suggest that the suspect reconsider. The Court enforced these new rights with an exclusionary rule: the suppression of the suspect's confession if police deviated from the requirements. n43 The Court, however, made clear that its approach was not the only acceptable one. The majority held that "the 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 . . . to develop their own safeguards for the privilege, so long as they are fully as effective as those described above . . . ." n44 In disposing of Miranda's case, the Court concluded that, because the officers [*194] questioning Miranda had not followed the (heretofore unannounced) rules, his conviction could not stand.

C. THE CONGRESSIONAL RESPONSE

The Court's ruling ignited a firestorm of controversy. Justice Harlan warned in his dissenting opinion that "viewed 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." n45 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 . . . ." n46 He also predicted 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." n47 Critics outside the Court also immediately predicted the requirements would put "handcuffs on the police," n48 and prevent prosecution of countless dangerous criminals. n49

The uproar over *Miranda* did not escape the notice of Congress. The Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures held hearings in 1967, during which numerous Senators unequivocally denounced the *Miranda* decision. n50 In addition, various law enforcement witnesses explained how the *Miranda* rules hindered their efforts to apprehend dangerous criminals. n51

To mitigate the decision's harmful effects on law enforcement, the Senate Judiciary Committee drafted the legislation which ultimately became § 3501. The rationale for the reform was stated by [*195] the accompanying Committee report:

> Crime 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. n52

Senator McClellan, the principal sponsor of the measure, privately summarized his view of the bill more succinctly, calling it "my petition for rehearing" on *Miranda*. n53

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 included not only a provision on *Miranda*, but also legislation divesting the federal courts of jurisdiction to review state court decisions admitting confessions. The jurisdiction-stripping part of the package was eliminated, but the legislation intended to replace *Miranda*, as well as to overrule the *McNabb-Mallory* n54 line of cases excluding confessions obtained as the result of unreasonable delay in presenting a suspect to a magistrate, n55 and the *United States v. Wade* n56 case creating a right to counsel during police line-ups, remained intact. n57 After debates in the Senate and the House, a strong bipartisan majority passed the legislation. n58

The statute Congress approved -- § 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 [*196] 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 obvious import of the provision was to restore, at least in some fashion, n59 a voluntariness determination as the basis for admitting confessions in federal courts. The question then became how the Justice Department would enforce this Act of Congress challenging the Supreme Court's decision.

[*197] II. SECTION 3501 AND THE DEPARTMENT OF JUSTICE: FROM SUCCESS TO SURRENDER

The conventional wisdom about § 3501 is that the Justice Department has never enforced it because of doubts about its constitutionality. Attorney General Janet Reno, for example, recently asserted at a press conference following the Fourth Circuit's decision in *Dickerson* that "in this administration and in other administrations preceding it, both parties have reached the same conclusion [that the statute could not be enforced]." n60 Her claim was echoed by prominent legal academics such as Yale Kamisar, n61 Laurence Tribe, n62 and Stephen Schulhofer, n63 and repeated in criminal procedure casebooks, the popular press, and elsewhere. n64 With all due respect to the impressive support for the received wisdom, it is demonstrably wrong. As respected veteran Supreme Court reporter Lyle Denniston recently concluded, "Reno's perception . . . that this has always been the federal government's view is mistaken." n65

These misperceptions about § 3501 may have arisen because a comprehensive history of the statute does not exist.

n66 In fact, with [*198] only one brief exception, *no* administration, other than the current one, has ever expressed the view that the statute is unconstitutional. 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 demonstrates that the Department's current position is at odds with those of its predecessors.

A. 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, n67 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. n68

The Department of Justice would later characterize this action as "disingenuous[]," n69 and it is hard to argue with this assessment. The proposed legislation was not in any way ambiguous; everyone involved in its drafting was aware of both its intent and its basic effect. n70 In any event, the result of President Johnson's statements was that the statute was ignored by courts and prosecutors in the first few months after it was signed into law. n71

[*199] This position proved to be very short-lived. During the 1968 Presidential campaign, 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." n72 After Nixon was elected, his Attorney General, John Mitchell, quickly issued new guidance to federal prosecutors and agents. He directed them to follow the *Miranda* rules, but to also use § 3501 to help obtain the admission of confessions. Will Wilson, Assistant Attorney General of the Criminal Division, circulated a memorandum that set forth the Department's position that it could apply § 3501:

> 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. n73

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." n74

Following this approach, federal prosecutors raised § 3501 in federal courts around the country in an effort to secure favorable rulings 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*. n75

[*200] The Justice Department's litigation efforts did, however, successfully produce one decision from a federal court of appeals upholding § 3501. In *United States v. Crocker*, n76 the Tenth Circuit affirmed a district court's decision to apply the provisions of § 3501 rather than *Miranda*. The case involved a woman who confessed to participating in a counterfeiting ring. The trial court admitted the confession on authority of § 3501 rather than considering the requirements of *Miranda*. n77 The Tenth Circuit upheld this approach, relying heavily on a Supreme Court decision the previous year allowing the use of the "fruits" of evidence obtained via a non-Mirandized confession. The Tenth Circuit concluded that this decision, *Michigan v. Tucker*, n78 "although not involving the provisions of section 3501, did, in effect, adopt and uphold the constitutionality of the provisions thereof." n79 The Tenth Circuit

explained that *Tucker* essentially concluded that the *Miranda* warnings were not constitutionally mandated, relying on language in *Miranda* that the "suggested" safeguards were not intended to "create a constitutional straitjacket." n80 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." n81

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

After the favorable decision in *Crocker* in 1975, the Justice Department shifted, almost by accident, into a posture of litigating § 3501 only in selected "test cases" with favorable facts. Initially after *Crocker*, § 3501 appeared to have simply slipped the collective consciousness of federal prosecutors. The argument that the statute supersedes *Miranda* was not pressed in the courts from approximately 1975 to about 1986. This inaction was not the result of any new policy from the Justice Department. To the contrary, the Department's [*201] 1969 directive supporting the statute remained in effect through the Ford, Carter, Reagan, and Bush administrations. The directive was clearly in effect as of 1974, n82 and, later in 1986, an exhaustive Department of Justice report disclosed no change in policy and encouraged further use of the statute. n83

The Department's Office of Legal Policy prepared the 1986 report. In an extended and scholarly analysis, it concluded that the statute was constitutional and that the Supreme Court would so find:

> *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. n84

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 had replaced *Miranda*. n85 From 1986 to 1988, I served as an Associate Deputy Attorney General in the Department of Justice. One of my specifically assigned responsibilities [*202] was to locate a good "test case" for the argument. The idea was, rather than test § 3501 in random cases, to identify cases in which the facts made a favorable ruling for the statute more likely. Department lawyers identified several cases in which it appeared that they could make a good argument for § 3501. This resulted in the filing of at least one brief seeking to invoke the statute. In *United States v. Goudreau*, n86 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*. n87 Both the Office of the Solicitor General and the Assistant Attorney General for the Civil Rights Division specifically approved this argument. In *Goudreau*, the Eighth Circuit ultimately issued an opinion that did not cite § 3501 and, instead, found that federal agents had complied with the requirements of *Miranda*. n88

Again during the Bush Administration, the Justice Department followed the "test case" approach of litigating § 3501. As former Attorney General Bill Barr explained in a letter to Congress, during his tenure the Department "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." n89 Attorney General Barr also indicated that he had directed one of his special assistants to find a specific "test case" in which to raise § 3501 and obtain a favorable ruling in the appellate courts. n90 Although they did not find such a case at the Departmental level in Washington, D.C., some federal prosecutors around the country presented the § 3501 argument in cases with good facts for the government. n91 No federal [*203] courts appear to have ruled on the merits of the claim during this time.

C. THE IMPLEMENTATION OF § 3501 IN THE CLINTON ADMINISTRATION: UNDERMINING THE STATUTE

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 was that § 3501 was constitutional. The Department's policy, however, began to change in subtle ways with President Clinton's election and the appointment of his political appointees to policy-making positions in the Department.

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

The first evidence that the Department might have a new posture on the statute surfaced in the dubious handling of the defense of § 3501 before the Ninth Circuit in *United States v. Cheely*. n92 Defendant Cheely, who had been convicted of murder, arranged for an accomplice to send a mail bomb to the post office box of George Kerr, a key witness against him. 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. Postal inspectors obtained voluntary, incriminating statements from Cheely, but the district court suppressed the statements under *Miranda*. n93

Because of the importance of the confession to the circumstantial case against Cheely, the government considered 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. The memo states: "As I understand it, we have made arguments based on Section 3501 to courts of appeals in the past." n94

The career attorneys in the Department of Justice authorized [*204] the appeal on this basis, but before the brief could be finalized, political appointees of the Clinton Administration arrived and became involved in the case. By the time the Department's brief was actually filed in the Ninth Circuit, it contained a weaker, uninspired argument in support of the statute. The Department's abbreviated argument on § 3501 off-handedly mentions the statute and cites no authority more recent than 1975. n95 The § 3501 portion of the Department's brief appears to be so far below the normal standards of appellate advocacy that it gives reason to question whether it was written by unsympathetic political officials rather than the Department's experienced career attorneys who, in contrast to earlier and later pleadings, did not sign this particular brief.

The Department's less-than-competent defense of the statute continued following a predictable (given the briefing) adverse ruling on § 3501 from the Ninth Circuit. The Ninth Circuit tersely concluded that § 3501 did not "trump" the *Miranda* doctrine. n96 After the ruling, the Department did not petition for rehearing. In an extraordinary move, however, the Ninth Circuit then entered an order *sua sponte* directing the parties to address the question of whether the case merited rehearing en banc. n97 The Department of Justice, however, did not take the cue and, surprisingly, even filed a memorandum *opposing* further review, arguing that the "factbound decision is neither contrary to the holdings of any other panel of this Court nor of sufficient systemic importance to merit plenary review." n98 Its position is problematic in several respects. To begin with, it is difficult to accept that a decision regarding a federal statute replacing the *Miranda* decision in all federal cases could lack "systemic importance." n99 Moreover, it is curious that the Department did not apprise the Ninth Circuit of the potential conflicts *Cheely* created, [*205] both within and without the circuit. n100 Finally, the memorandum contains inadequate discussion of the one case *Cheely* cited in support of its conclusion that § 3501 did not "trump" the *Miranda* rules: *Desire v. Attorney General of California*. n101 *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 no application. The memorandum does not make any of these obvious points, and, interestingly enough, 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 avoid the question of § 3501 in *Cheely*. Shortly after the Department filed its memorandum on rehearing, the United States Supreme Court handed down its decision in *Davis v. United States.* *n102* There, too, the Justice Department now appeared to be undermining the statute.

In 1993, the Supreme Court granted certiorari in *Davis v. United States*, n103 a federal court martial case involving Davis' attempt to use his ambiguous request for counsel as grounds for suppressing his subsequent incriminating statements implicating him in a murder. Davis raised no claim that his statement was involuntary; instead, he asserted only that the "prophylactic" questioning cut-off rules of *Miranda* were triggered by his reference to counsel.

The Washington Legal Foundation (WLF) filed an amicus brief in support of the United States, arguing that § 3501 required the admission of Davis' voluntarily-made incriminating statements. n104 A few days later, the brief of the Solicitor General affirmatively and [*206] gratuitously undermined the WLF attempt to support the United States. The Solicitor General's brief dropped a footnote arguing that military court-martials are not "criminal prosecutions" subject to § 3501. n105

Even before the case was argued, this peculiar interpretation of the statute n106 raised a suspicion that the Solicitor General's Office was attempting to avoid the issue without explaining that it disliked the statute. In oral argument before the Court, these 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." n107

This refusal to address the statute in response to specific questions from the Court did not go unnoticed. In her majority opinion, Justice O'Connor indicated an inability to discuss the issue because of the Department's failure to address the law, 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 . . .' n108 and we therefore decline the invitation of some amici to [*207] 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. n109

Justice Scalia, in a concurring opinion in the case, was even more specific, castigating the Department's reluctant approach to the statute:

> 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 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*. n110

At this stage, the story of § 3501 returns 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 apprising them of this decision and explaining briefly how it applied to the issues at hand. n111 Later that same day, political appointees in the Department of Justice apparently learned of this letter, as Solicitor General Drew Days himself called the clerk of the court for the Ninth Circuit. General Days followed the call with a letter withdrawing the earlier letter from the career prosecutor n112 and replacing it with a new letter that blandly mentioned that *Davis* might have some relevance to [*208] the Department's pending memorandum. n113

Apparently not enlightened by this letter, the Ninth Circuit ordered briefing by the parties on whether *Davis* affected its earlier ruling. n114 This led the Department to file a "Supplemental Memorandum" concerning *Davis*. n115 Curiously, the memorandum's argument section, however, fails to argue the applicability of § 3501, despite the suggestions along those lines in *Davis*.

The Ninth Circuit ultimately decided against rehearing 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 convicted. Despite the conviction, 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*, some surmised that the Justice Department had decided to reverse its long-standing policy supporting § 3501. Late in 1995, I raised these concerns in testimony before the Senate Judiciary Committee. n116 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 federal prosecutor) Fred Thompson about why the Department had not defended § 3501 in these cases, Solicitor General Days denied that the Department had decided not to defend the statute:

> 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 [*209] 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. n117

The Solicitor General's position was consistent with that of other high-ranking Departmental representatives at the time. For example, in response to a written question from Senator Orrin 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." n118 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." n119 In a 1997 oversight hearing, Attorney General Reno testified "I'd do it [raise the statute] if it's right in an appropriate case." n120 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: "I would support the use of Section 3501 in an appropriate circumstance." n121 It thus appeared that the Department committed to defend the statute, provided an appropriate case could be found.

3. Fourth Circuit Litigation Over § 3501 in *Sullivan* and *Leong*.

The "appropriate circumstance" for raising § 3501 would turn out to be elusive for the Clinton administration. Indeed, in the next case presenting the issue, *United States v. Sullivan*, n122 political appointees [*210] in the Department even tried to "unfile" a brief filed by a career prosecutor defending § 3501.

Sullivan involved a routine vehicle stop that led to the discovery of a firearm in the possession of a felon, Robert Sullivan. n123 In the subsequent prosecution for illegal possession of a firearm, the trial court suppressed Sullivan's incriminating statements on the ground that the investigating officer did not read Sullivan his *Miranda* rights. n124 In its opinion suppressing the statement, however, the district court specifically asked for higher courts to reassess whether mechanical application of the exclusionary rule should continue to be the law. n125

Career prosecutors in the United States Attorney's Office for the Eastern District of Virginia appealed. Their brief argued that no *Miranda* warnings were needed because Sullivan was not in the officer's custody and, even if Sullivan had been in custody, the statement should be admitted because of § 3501's replacement of the *Miranda* rules. n126

Three weeks later, the Acting Solicitor General, Walter Dellinger, submitted a letter and an accompanying motion to the Fourth Circuit Court, seeking to file a new government brief, which simply omitted the § 3501 argument. n127 A few days later, apparently anticipating the court granting the government's motion, Sullivan's counsel filed a brief that

did not discuss the admissibility of the statement under 18 U.S.C. § 3501. n128 Shortly after that, the Fourth Circuit granted the government's motion to file the new, redacted brief. n129

The WLF learned of these maneuvers and determined that § 3501 should be brought to the court's attention. On June 26, 1997, the WLF filed a motion to submit an amicus brief in the *Sullivan* case on behalf of the WLF and four members of the Senate Judiciary Committee -- Senators Jeff Sessions, Jon Kyl, John Ashcroft, and [*211] Strom Thurmond. n130 The WLF simply asked the court to accept for refiling the arguments the career prosecutors previously submitted on behalf of the statute. In support, the WLF explained why the Court should reach the issue of the applicability of § 3501, and developed arguments that the statute was binding on the court even when not raised by the parties. n131 The motion by the WLF also explained that the Department's decision to file a new brief not discussing § 3501 raised serious issues of professional responsibility. The Virginia Code of Professional Responsibility, for example, indicates [*212] that courts expect "pertinent law [to be] presented by the lawyers in the cause." n132 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." n133 Thus, a duty of candor should have compelled the Department of Justice to make the Court aware of this controlling legal authority. n134

The Fourth Circuit granted the WLF motion to file the brief, n135 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 was in custody; the police officer, accordingly, was not required to give *Miranda* warnings. The court dropped a footnote concluding that the § 3501 issue was "moot[]" in light of this disposition. n136

While the *Sullivan* case shed little light on § 3501, *United States v. Leong* n137 was more illuminating. While the WLF's § 3501 argument was pending in *Sullivan*, the WLF learned of another Fourth Circuit case in which, coincidentally, another felon, illegally in possession of a firearm, was apprehended in the course of a routine traffic stop. The district court had concluded that the felon, Tony Leong, was in "custody" when he confessed, and suppressed his admission to ownership of the gun found under one of the seats. n138 Because there were several other persons in the car at whom Leong's attorney could point the finger, the ruling had the practical effect of blocking Leong's prosecution. The government appealed, arguing that Leong was not in fact in custody at the time he confessed. The Fourth Circuit, however, reluctantly affirmed the district court's suppression order "under the narrow facts presented by this case." n139

The WLF learned of the case and filed a motion suggesting the appropriateness of a sua sponte rehearing to examine the applicability [*213] of § 3501. n140 In its motion, the WLF explained that the parties had failed to apprise the court of potentially relevant legal authority, specifically 18 U.S.C. § 3501. n141 In its accompanying brief, the WLF argued that the issue was one of exceptional importance that should be considered by the full Fourth Circuit to avoid an escape from justice by a presumptively dangerous felon in the face of a federal statute to the contrary. n142

Astonishingly, five days after the WLF's filing -- before the Fourth Circuit had an opportunity to rule on the WLF's motion and before the Fourth Circuit mandated returning the case to the district court -- the Department of Justice moved in the district court to dismiss the indictment against Leong. The district court entered a dismissal order on July 16, 1997. n143 This gave the appearance of a brazen maneuver by the Department simply to avoid the § 3501 issue by rendering the case moot, in spite of any jeopardy to public safety. The Department's ploy in the district court, however, had no legal effect on the Fourth Circuit, as the Court of Appeals still retained jurisdiction over the case. n144

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. § 3501 on the admissibility of Leong's confession, including the effect of the statute on *Miranda v. Arizona* . . . and any constitutional issues arising therefrom." n145 This order seemed to present an "appropriate" case for the Department of Justice to defend the statute because the Fourth Circuit had asked specifically for the Department's views. The Chairman and five members of the Senate Judiciary Committee expected the Department to do this. On August 28, 1997, the six Senators wrote a detailed letter to Attorney General Reno carefully analyzing the legal issues and concluding with a strong plea for her [*214] 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 . . . . 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. n146

The Senators also recalled the repeated assurances they had received from the Department that it would defend the statute in an "appropriate case." n147 They recounted, for example, Solicitor General Days' testimony about the decision of the Department not to pursue § 3501 further in the *Cheely* case, n148 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.'" n149

In spite of its prior representations to Congress, the Justice Department 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 the Supreme Court's 1966 decision in *Miranda* had decided the issue. n150 Second, the Department argued that on the merits, the statute was unconstitutional, at least in the lower courts, because *Miranda* created constitutional rights. n151 "The Court's description of the *Miranda* rules as 'prophylactic,'" the Department contended, "does not require the conclusion that the rules are therefore extraconstitutional." n152 In the Supreme Court, however, they conceded [*215] that the outcome 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." n153 Shortly thereafter, the Attorney General gave notice to Congress that she would not defend § 3501 in the lower courts. n154

Defendant and convicted felon Tony Leong and the National Association of Criminal Defense Lawyers joined the Department's argument in a strange (and, some might say, unholy) alliance. In response, the WLF filed a reply, explaining why § 3501 was a valid exercise of congressional power to modify prophylactic, evidentiary rules created by the Supreme Court. n155

On September 19, 1997, the Fourth Circuit issued its order declining to rehear the case. The court first recapitulated the Department's argument that lower courts could not reach the question of § 3501, concluding succinctly: "We disagree." n156 The court reviewed a number of other situations where lower courts had decided similar issues and concluded "the Government is mistaken, therefore, in asserting that it may not urge the applicability of § 3501 before a lower court." n157 The court, however, went on to decide that, because the WLF had belatedly raised § 3501 in 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 constitutionality of § 3501 was unsettled, the Fourth Circuit declined to consider the statute for the first time on an appellate petition for rehearing. n158

The decision in *Leong* 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 an action that insured this would not happen. On November 6, 1997, John C. Keeney, Acting Assistant Attorney General for the Criminal Division, sent a [*216] memorandum to all United States Attorneys noting the Department's position against § 3501 in *Leong* and requiring the prosecutors to "consult[]" with the Criminal Division in all cases concerning the voluntariness provisions of the statute. n159 The Department's efforts to consign § 3501 to oblivion in the trial courts, however, came too late, as will be recounted presently in connection with the *Dickerson* decision. n160

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

Before turning to the 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 cited both *Crocker* and § 3501 favorably, n161 by and large the courts and prosecutors within the Tenth Circuit appeared to be unaware of the decision. A few experienced prosecutors in that Circuit, however, realized the value of § 3501 and attempted to use it in appropriate cases. n162 One such case was *United States v. Nafkha*. n163 The defendant there, Mounir Nafkha, was involved in a series of armed "takeover" bank robberies and was a dangerous, career criminal. Apart from Nafkha's confession, the evidence against him was circumstantial. Under *Miranda*, the admissibility of the confession appeared to be a close question because Nafkha made a reference to a lawyer during questioning that, under the *Miranda* rules, could potentially qualify as an invocation of his [*217] rights that required police to stop all questioning. Ultimately, both the Justice Department and amicus curiae WLF n164 filed briefs arguing for the admission of Nafkha's confession under § 3501. n165 The magistrate ruled that while the § 3501 argument was "logical and intriguing, this issue need not be reached" because police had complied with *Miranda*. n166 The prosecution presented Nafkha's confession to the jury, and the jury convicted him.

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 the *Miranda* doctrine and § 3501. n167 The WLF also filed a brief defending § 3501, joined by the International Association of Chiefs of Police, the Law Enforcement Alliance of America, and other groups. n168 While the case was awaiting argument, the Department filed its brief in the Fourth Circuit in *Leong* attacking § 3501. The Department then sent a letter to the clerk of the Tenth Circuit, withdrawing the portion of the *Nafkha* brief defending § 3501, and substituting as the government's position copies of the brief from *Leong*. n169 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 years earlier in *Crocker*, n170 and later circuit precedent cited favorably both *Crocker* and § 3501. n171 The *Leong* brief from the Fourth Circuit did not argue that *Crocker* had been overruled and did not discuss later Tenth Circuit precedent. The *Leong* brief merely stated that "the Tenth Circuit has not had occasion to reexamine *Crocker* in light of subsequent developments in the Supreme [*218] Court's *Miranda* jurisprudence . . . ." n172 This was not, however, a sufficient reason to ignore a binding precedent within that circuit. Ultimately, the issue fizzled out. The Tenth Circuit ruled that the confession was obtained in compliance with *Miranda* and, therefore, it did not have to consider the effect of § 3501. n173

Around this time, the Justice Department's seemingly determined efforts to keep courts from reaching the merits of § 3501 began to unravel. The Department's position was first rebuffed by a federal district court in Utah in *United States v. Rivas-Lopez*. n174 There, the Safe Streets Coalition 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. n175 The Department responded by simply referencing its brief in the *Leong* case. n176 The Safe Streets Coalition replied by criticizing the "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*. n177 The district court fully agreed, issuing a published opinion that upheld § 3501. n178 The court first noted the Department's "curious position" in agreeing with the defendant "that § 3501 does not apply and is unconstitutional." n179 The court rejected the Department's claim, finding that the Supreme Court had repeatedly described the *Miranda* rules as not constitutionally mandated. n180 Moreover, the court argued that the Tenth Circuit had "squarely upheld the constitutionality of" § 3501 in *Crocker*. n181 The court concluded:

> The government implies that the *Miranda* jurisprudence [*219] 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. n182

Rivas-Lopez presented an opportunity to obtain a clear-cut appellate ruling on the merits of § 3501, as the decision

surmounted the recent position of the Justice Department against § 3501. The case, however, ultimately petered out. Defendant 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. n183 Nonetheless, 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 recently 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 raising § 3501 in the trial court n184 prevented the statute from playing a role in all 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 promulgated its directive against using § 3501. The case involved a serial bank robber who FBI agents took into custody and interviewed. At the suppression hearing, the lead agent testified that he gave Dickerson his *Miranda* warnings and obtained a waiver, after which Dickerson made incriminating statements. Dickerson, in contrast, testified that he first gave statements in an interview, and only afterwards received his *Miranda* warnings. Courts routinely decide such one-on-one "swearing contests" in favor of law enforcement officers, but in this case the district court sided with the defendant, [*220] citing alleged discrepancies between the officer's testimony and the times scribbled on the waiver of rights form. n185 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 the agents had given Dickerson his *Miranda* warnings at the start (rather than the end) of the interview, and providing specific explanations of the alleged discrepancies on the time Dickerson signed the waiver form. The motion for reconsideration also specifically raised § 3501 as a basis for admitting the statements. n186 The district court, however, refused to reconsider its decision because all of these arguments were available to the prosecutors at the time of the first hearing. n187

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. n188 In the meantime, the Department had announced its new policy on § 3501. Consistent with that policy, the brief contained a footnote, noting that the Department prohibited the government from raising § 3501 on appeal. n189 The WLF filed an amicus brief arguing that § 3501 was binding on the court, noting that, in contrast to *Leong*, in this case the prosecution had presented § 3501 to the trial court, albeit in a motion for reconsideration. n190 The Fourth Circuit allowed the WLF to defend the statute during oral argument in January 1998.

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 it to admit Dickerson's incriminating statements. n191 In a lengthy opinion, the court held that "we have little difficulty concluding . . . that § 3501, enacted [*221] 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." n192 The court noted that a defense of the statute by the Department of Justice was absent, and it observed that the career prosecutor on the case was "prohibited by his superiors at the Department of Justice from discussing § 3501." n193 The Fourth Circuit described the decision by the Department as one that "elevated 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." n194 Citing the Virginia Code of Professional Responsibility, the Court also noted that the Department's failure to discuss § 3501 abdicated its "responsibility to call relevant authority to this Court's attention." n195 Perhaps in response to this point, the Department of Justice sent out a memorandum to all U.S. 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." n196 The Department does not appear to have sent out a similar memorandum to all U.S. Attorneys in the Tenth Circuit, suggesting they call the Tenth Circuit's *Crocker* opinion to the attention of courts there.

Judge Michael dissented, arguing the court should not have reached the issue of the statute's application where it was not presented by the Department of Justice. n197

After the decision was handed down, Dickerson filed a petition for rehearing en banc, n198 supported by the American Civil Liberties [*222] Union and the National Association of Criminal Defense Lawyers. n199 The question then arose as to how the Department of Justice should respond since it had "won" the case, with a little help from the participation of the WLF as amicus. At this stage, too, the Department now indisputably had a "reasonable" argument on behalf of the statute -- specifically the detailed argument carefully advanced by a respected Fourth Circuit Judge, Karen Williams, in her opinion for the Fourth Circuit. Senator Orrin Hatch, Chair of the Senate Judiciary Committee, and eight of his colleagues -- Senators Jon Kyl, John Ashcroft, Robert Smith, Charles Grassley, Michael DeWine, Strom Thurmond, Spencer Abraham, and Jeffrey Sessions -- made this point forcefully in a letter to the Attorney General. The Senators recounted the Fourth Circuit's criticism of the Department for "elevating politics over law," finding this to be "deeply troubling." n200 The Senators went on to observe that the Department had pledged to defend Acts of Congress where it could make reasonable arguments: "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." n201 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. n202 The Department argued against the court's decision to apply § 3501, contending that the decision was an "error, and that its holding deserves reconsideration by the full court of appeals." n203 Of the four career prosecutors who had been handling the case up to that point, not one signed the Department's brief attacking § 3501.

The WLF filed a reply, 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 Justice Department had always said in its recent pleadings that it might take a different position on [*223] § 3501 in the Supreme Court, further review in the Fourth Circuit was not a wise use of the court's time. n204 On April 1, 1999, the full Fourth Circuit apparently agreed, voting 8-5 to deny rehearing en banc.

Dickerson then sought review in the Supreme Court. n205 The Department of Justice again joined Dickerson, urging the Court to grant certiorari to reverse the Fourth Circuit. n206 The WLF filed an amicus memorandum urging a grant of certiorari to affirm the Fourth Circuit. n207 The court recently granted certiorari and appointed me to defend the decision of the Fourth Circuit, setting the stage for an important decision on § 3501. n208

6. The Department's Obligation to Defend Acts of Congress

The Justice Department's current position in the Supreme Court of not defending, and actually condemning, § 3501 raises serious constitutional questions. The bedrock obligation of the Executive Branch is to "take Care that the Laws be faithfully executed." n209 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." n210 Reasoning from this holding and others like it, a number of respected constitutional scholars have concluded that the President must enforce *all* Acts of Congress, regardless of the Executive's views of their constitutionality. n211 One need not go as far as these scholars have to [*224] agree with the conventional position that, at the very least, the Executive should defend Acts of Congress where reasonable arguments can be made on their behalf. n212 The Department has even described the need to raise reasonable arguments as rising to the level of a "duty," explaining "the 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." n213 This is particularly the case where, if the Executive does not present an argument, the effect will be to deny the courts any opportunity to review the issue. n214 Top ranking officials in the Department have said that they follow these established principles. n215

Given this conventional understanding of the Department's obligations, its current position of declining to defend

the constitutionality of § 3501 is sustainable if -- and only if -- no "reasonable" argument can be made on behalf of the statute. As the history just [*225] recounted suggests, this aggressive position requires the conclusion that the views of many -- including, among others, both Houses of Congress in 1968, a number of distinguished Senators in recent years, high ranking officials in the Department of Justice from 1969 to 1993, the Tenth Circuit, the District Court of Utah, and most recently the Fourth Circuit -- are not simply wrong, but "unreasonably" wrong. Such a conclusion seems dubious. In fact, not only reasonable, but compelling arguments support the constitutionality of § 3501. This Article turns now to the constitutionality of the statute.

III. SECTION 3501 AND THE CONSTITUTION

If the constitutionality of § 3501 were to be determined under the original meaning of the Fifth Amendment, the statute would undoubtedly comply with the Constitution. Even interpreted most aggressively, as simply restoring the pre-Miranda voluntariness test, n216 the statute would do no more than return to the traditional approach for determining the admissibility of confessions. n217 Such restoration would not violate the original intent of the Constitution. n218

Those who challenge the constitutionality of § 3501, however, rely little on history and tradition in their arguments. For them, interrogation law dawned in 1966 with *Miranda*, and, they argue, § 3501 cannot be squared with what the Court has said about the most-famous of its criminal law creations. n219 Even on these terms, [*226] however, § 3501 is constitutional under the *Miranda* doctrine for at least two reasons. First, the Court itself has repeatedly held that the *Miranda* rules are not constitutionally required. Accordingly, as the *Dickerson* opinion concludes, the rules are subject to congressional override. A second independent argument, not needed and therefore not discussed in the *Dickerson* opinion, is that § 3501 simply accepts the direct invitation from the *Miranda* Court itself that Congress could draft alternative rules governing confessions. The Article explains both of these arguments below.

Before turning to the specific legal arguments, however, it is important to recognize that, by passing § 3501, Congress implicitly attached to the Act a stamp of constitutionality. The "gravest and most delicate duty" of the Supreme Court is reviewing the constitutionality of federal statutes. n220 An Act of Congress, after all, is an expression of elected representatives of the American people about how the Constitution ought to be interpreted. While the final decision rests with the Court, n221 the congressional determination is itself an important consideration.

A. SECTION 3501 AS AN EXERCISE OF CONGRESSIONAL POWER TO ESTABLISH FEDERAL COURT RULES

1. Congressional Rulemaking Power

The Supreme Court has described § 3501 as "the statute governing the admissibility of confessions in federal prosecutions." n222 The rules the statute establishes differ, of course, from those set by the *Miranda* Court. 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 "the statute as interpreted does not reach any constitutional barrier." n223 The Court specifically went out of its way to explain that Congress may trump even a conflicting Supreme Court procedural or evidentiary rule, as long as the Constitution does not require the Court-imposed rule. The Court [*227] specifically noted that its power "to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." n224

The validity of § 3501, therefore, boils down to whether the Constitution requires the *Miranda* exclusionary rule. As the *Dickerson* opinion properly observed, "if it is, Congress lacked the authority to enact § 3501, and *Miranda* continues to control the admissibility of confessions in federal 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." n225

2. The *Miranda* Rights as Sub-Constitutional "Safeguards"

With the question thus framed, there can be little doubt of the answer: The Constitution simply does not require the *Miranda* rules. The Supreme Court has held that the *Miranda* procedures are not constitutional rights or requirements. Rather, they are only "recommended procedural safeguards" n226 with the purpose of reducing the risk that the police will violate the Fifth Amendment's prohibition of compelled self-incrimination in custodial questioning. Quite simply, to violate any aspect of *Miranda* is not necessarily -- or even usually -- to violate the Constitution.

The Supreme Court, in a series of cases starting in the early 1970s, has repeatedly described the *Miranda* warnings as mere prophylactic rights that are "not themselves rights protected by the Constitution." n227 The Court has relied on that characterization in refusing to exclude unwarned or imperfectly warned custodial confessions and the fruits of such confessions in a variety of contexts. Because this characterization has been necessary to, and the principal basis for, 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 the constitutionality of § 3501, which requires *only* the admission of "voluntary" confessions -- confessions obtained without violating the Fifth Amendment's prohibition against compelled self-incriminating [*228] testimony. n228

The view that *Miranda* rights are not constitutionally required is not some "gloss" or "spin" on the Supreme Court's opinions; rather it is the way the Supreme Court itself has described *Miranda* rights. In *Davis v. United States*, for example, the Court referred to *Miranda* warnings as "a series of *recommended* procedural safeguards." n229 In *Withrow v. Williams*, the Court acknowledged that "*Miranda's* safeguards are *not* constitutional in character." n230 In *Duckworth v. Eagan*, the Court said "the prophylactic *Miranda* warnings are *not* themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination is protected." n231 In *Oregon v. Elstad*, the Court explained that the *Miranda* exclusionary rule "may be triggered even in the absence of a Fifth Amendment violation." n232

Such statements are not idle dicta, but rather a critical part of the Court's holdings. A prime illustration is *New York v. Quarles*. n233 In *Quarles*, the Court ruled that a confession obtained as a result of a police question about the location of a gun, asked of a suspected [*229] rapist, was admissible despite the failure to give *Miranda* warnings. n234 Similarly, in *Harris v. New York* n235 and *Oregon v. Hass*, n236 the Court held that a confession gained in the absence of *Miranda*, and 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. n237 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 that they are voluntary. n238 All of these cases, among others, would have been wrongly decided if *Miranda's* procedures were constitutionally required rather than prophylactic. If the failure to give the *Miranda* warnings to a defendant meant that the defendant was thereby automatically "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 Fifth Amendment of the Constitution, because 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." n239 And, indeed, the Supreme Court concluded in other cases that the Fifth and Fourteenth Amendments forbid the use of involuntary confessions even for impeachment purposes. These cases distinguished *Harris* and *Hass* as involving confessions obtained after mere *Miranda* violations, rather than confessions obtained in violation of the Constitution. n240 Accordingly, the Supreme Court's admission of un-Mirandized statements in *Quarles*, *Harris*, and *Hass* proves that the Constitution does not require *Miranda* warnings, as virtually every federal court of appeals in the country has concluded. n241 In addition, the proposition that the Constitution [*230] does not require the procedures set out in *Miranda* is the view that the Department of Justice has consistently taken in litigation throughout the federal court system since *Miranda* was decided. n242

This evidence demonstrates that the Court does not conclusively presume a violation of the Fifth Amendment when the police violate *Miranda*. Instead, actual compulsion in violation of the Fifth Amendment exists only where law enforcement has transgressed the traditional voluntariness standards. n243 In the absence of such compulsion, there is

no constitutional impediment to admitting a suspect's [*231] statements despite non-compliance with *Miranda*. n244

3. The Constitutional Critics of § 3501

The opponents of § 3501 typically acknowledge that there is considerable force to the argument viewing *Miranda* as a subconstitutional safeguard. For example, two leading *Miranda* scholars have recently written articles discussing the *Dickerson* opinion. Professor Yale Kamisar wonders in print whether he had "spoken too quickly" in concluding, before *Dickerson*, that the time to overrule *Miranda* had "come and gone." n245 Professor George Thomas, in a thoughtful piece, writes that "it is no exaggeration to say that *Miranda* for the first time in decades hangs in the balance." n246 Both of these scholars eventually conclude that § 3501 is, most likely, unconstitutional, advancing in different ways the notion that the *Miranda* rights have sufficient constitutional grounding to block congressional alteration. Professor Kamisar finds this foundation in the idea that courts must frequently create prophylactic rules as a "'central and necessary feature of constitutional law.'" n247 Professor Thomas sees a constitutional basis in the Court's recent decisions extending *Miranda's* prophylactic rules in certain contexts. n248 In taking these positions, Kamisar and Thomas echo that of the Justice Department, which asserted as part of the *Dickerson* litigation in the Fourth Circuit that "*Miranda* implements and protects constitutional rights." n249

Kamisar and Thomas' positions are identical to that articulated in the Justice Department's brief in the Supreme Court. The Department concedes that the Court "has retreated" from viewing *Miranda* rights as constitutional rights and has "frequently observed that the *Miranda* rules are 'prophylactic' in character. . . ." n250 The [*232] Department also agrees that the language in these cases could, "viewed in isolation," be used "to support an inference that *Miranda* is not a constitutional rule." n251 Indeed, the Department goes so far as acknowledging that the more recent language "generates tension" within the Court's doctrine. n252 Nonetheless, the Department concludes that the Court's cases "require[] the conclusion that *Miranda* . . . does indeed rest on a constitutional basis." n253

According to the Department, the Court "has regularly described the *Miranda* holding, and subsequent extensions of that holding, as resting on constitutional grounds." n254 Moreover, the "Court's continued application of the *Miranda* rulings to the states and on habeas review cannot be explained on any other ground than that the Court regards them as implementing and effectuating constitutional rights." n255 As a consequence of these holdings, Congress is not free to supercede *Miranda* and, to uphold § 3501, the Court would have to "reconsider and overrule" *Miranda*. n256

The Department's brief urges the Court not to overrule *Miranda*. Not only would considerations of stare decisis be in play, but *Miranda* has proven to be "workable in practice" and to "serve[] significant law enforcement objectives." n257 While federal law enforcement agencies "have encountered difficulties" with extensions of *Miranda* forbidding reinitiation of questioning after invocation of a right to counsel, n258 the warning-and-waiver requirements themselves have not proven difficult to administer. Moreover, to overrule *Miranda*, the Court would have to "disavow the reasoning of virtually all of its cases that have addressed the *Miranda* rule. . . ." n259 These cases, the Department argues, have created a simplifying, bright line rule to avoid case-by-case litigation on voluntariness issues. Such an approach is not unusual in constitutional adjudication. n260 Finally, in a closing paean to *Miranda* that sounds like it was written by the ACLU litigators rather than Justice Department [*233] prosecutors, the brief concludes that *Miranda* helps play a "unique and important role in the nation's conception of our criminal justice system. . . ." n261 For all those reasons, the Department concluded that § 3501 is unconstitutional.

The fundamental problem with all these claims is that they succeed in invalidating § 3501 only if *Miranda* is 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 ability to craft constitutional common law or remedies for constitutional violations -- Congress has significant authority to modify *Miranda's* holding by legislation.

To be sure, if the Supreme Court had 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, the Court

itself has said that this question of using § 3501 is open. In *United States v. Davis*, n262 far from suggesting that precedent controlled the issue, the Court explained "the issue is one of *first impression*." n263 The Court ultimately concluded 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." n264 This led to a concurring opinion from Justice Scalia, who, consistent with the majority, said he was "entirely open" to various arguments on § 3501. n265 Also worthy of note is *United States v. Alvarez-Sanchez*. n266 In that case, the Court identified § 3501 without qualification as "the statute governing the admissibility of confessions in federal prosecutions." n267 *Alvarez-Sanchez* and *Davis* are not the only Supreme Court cases citing § 3501. Although Miranda-related cases decided by the Court in recent [*234] 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. n268

All of this suggests that the arguments of the opponents of § 3501 are not well founded. The following subsections review the critics' main contentions.

a. The Original Meaning of Miranda.

The Supreme Court's post-Miranda decisions repeatedly assert and hold that *Miranda's* procedural prerequisites for admitting a custodial confession are "prophylactic" -- meaning that a police violation of *Miranda* is not necessarily a violation of the Fifth Amendment. In arguing against § 3501, the Department and the statute's academic detractors first contend that these cases should be minimized, and even ignored, because they have "retreated" from the original meaning of *Miranda*. n269 In fact, the *Miranda* opinion 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 straight-jacket," repeatedly referred to the warnings as "procedural safeguards," and invited Congress and the states "to develop their own safeguards for [protecting] the privilege." n270

The *Miranda* opinion does contain some language that can be read as suggesting that a *Miranda* violation is a constitutional violation [*235] because custodial interrogation is inherently compulsive. n271 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 -- the Court wrote much of the opinion in the language of prophylaxis. Not only does the opinion have a curious "legislative" feel about it, n272 but at various points the Court spoke of the "potentiality" of compulsion and the need for "appropriate safeguards" in order "to insure" that statements were the product of free choice. n273 The Court also discussed the possibility of Fifth Amendment rights being "jeopardized" (not actually violated) by custodial interrogation. n274 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 in precisely the sense the more recent cases have used the term.

Further, the Court said that "unless 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." n275 A prophylactic rule, of course, seeks to prevent constitutional violations 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," n276 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 [*236] that all the confessions were obtained in violation of its new rules. In three of the cases, including Miranda's, the Court gave no indication that the police had compelled the defendant's statements. Rather, it rejected the confessions because no "steps" had been taken to protect Fifth Amendment rights. n277 Only in defendant Stewart's case did the Court suggest the existence of actual compulsion. n278

To reject a prophylactic reading would defy not only common sense, but also recent empirical observations that "very few incriminating statements, custodial or otherwise, are held to be involuntary." n279 To violate *Miranda* is not necessarily to violate the Constitution and, although ambiguous in spots, *Miranda* recognized this from the beginning. n280

b. Miranda's *Application to the States*.

The critics' attack on § 3501 rests primarily on *Miranda's* application to the states. The Justice Department, for example, has said that "the Court's continued application of *Miranda's* exclusionary rule in state cases necessarily means that *Miranda* rests on the Court's authority to apply the Constitution." n281 The basis for *Miranda's* applicability to the states is interesting and (as the Department itself has explained) perplexing. n282 Nevertheless, there is no need to come to a definitive conclusion when considering § 3501, [*237] provided that there are explanations available other than that *Miranda's* exclusionary rule is constitutionally required.

Several others come readily to mind. Most obviously, like *Mapp v. Ohio* n283 and *Bivens v. Six Unknown Named Agents*, n284 *Miranda* can be best understood not as a constitutional command, but as an exercise of this Court's authority to improvise a remedy when it is presented with an issue implicating a constitutional right for which there is not at the time of the decision a constitutionally or legislatively specified remedy. The judicially devised remedy may sweep more broadly than is strictly necessary to vindicate a particular constitutional right. n285 This devising of interstitial remedies not themselves required by Constitution but designed to assist in protecting constitutional rights, has become known as the Court's power to create "constitutional common law." n286 Because the Court has crafted such remedies to protect constitutional rights against the States as well as against the federal government, n287 this understanding of *Miranda's* exclusionary rule is entirely consistent with its application to the States. This position (unlike the position of the Department) is also 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*. 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 represents no more than the application of the Court's judicially-created, but not constitutionally mandated, remedial scheme in the absence of litigation concerning a legislatively devised alternative. n288

Such a remedial scheme can be modified by Congress. n289 The existence of such a residual power in Congress is, for example, presumed [*238] throughout *Bivens*, n290 and lies at the heart of the Court's later holding in *Bush v. Lucas*. n291 In that case, the Court refused to allow a "*Bivens*" remedy for money damages in an action brought by a federal employee alleging a breach of his First Amendment rights, because Congress, by statute, had provided for a different remedy. n292 Moreover, whatever the outer constitutional limits of Congress's power may be in this context, it is plain that Congress acts within them so long as the remedial scheme it establishes provides "meaningful" relief for any actual constitutional violation. n293 Replacing *Miranda's* automatic exclusionary rule with § 3501's regime was a proper exercise of such congressional authority. Under § 3501, compelled custodial statements remain inadmissible in all circumstances. Hence, § 3501 leaves intact the core holding of *Miranda*: that the prohibition against compelled self-incrimination extends beyond in-court statements to regulate any use at trial of a defendant's pre-trial custodial statements. Indeed, the relief of the statute affords for an actual constitutional violation involving such statements is *identical* to the relief afforded by *Miranda*. That is sufficient per se to establish the statute's propriety, entirely apart

from the supplemental features of § 3501 and related law which will be discussed shortly. n294

The act of state doctrine provides a related illustration of the Court imposing rules on the state beyond what the Constitution requires -- rules susceptible to congressional alteration. *Banco Nacional de Cuba v. Sabbatino*, n295 decided just two years before *Miranda*, involved a diversity action brought in federal court under New York state law. New York had its own version of the act of state doctrine. Thus, a preliminary question was whether the Court was bound by the New York courts' application of the New York act of state doctrine, or whether the Court could fashion a federal act of state rule to govern the case. The Court unambiguously held the [*239] latter. In the Court's view, the federal interest in protecting the separation of powers in foreign affairs gave the doctrine "constitutional underpinnings" n296 that permitted the Court to impose this limitation on state law, even though the Constitution did not actually require the act of state rule. n297 In words that echo language found in *Miranda* cases, *Sabbatino* described the act of state doctrine as "a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution," and explained that "there are enclaves of federal judge-made law which bind the States." n298 Since *Sabbatino*, Congress has passed legislation overriding the act of state doctrine (that is, permitting federal and state courts to adjudicate the legality of the acts of foreign governments) in several specific instances. n299 Courts have routinely upheld these laws, n300 thus confirming the Court's statement in *Sabbatino* that the Constitution does not require the act of state doctrine. However, in the absence of specific congressional legislation, lower courts have used the federal act of state doctrine to limit the scope of state statutes that would otherwise require a judgment upon an act of a foreign government -- thus confirming that the (nonconstitutional) *Sabbatino* rule applies to the states. By analogy, then, just as Congress is free to alter the application of the act of state doctrine, so too is it free to alter the application of the *Miranda* doctrine.

Entirely apart from the questions of constitutional common law and the like, the *Miranda* Court may not have focused on the question of whether the federal courts have supervisory power over the States. It was, after all, resolving a slew of other important issues. Since the *Miranda* decision, no case has arisen where a party has seriously presented to the Court the question of whether *Miranda's* prophylactic approach can be reconciled with the Court's cases holding that the federal courts lack supervisory power over the [*240] States. Let there be no mistake about it, however, in both 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 simple failure to administer *Miranda* warnings is not itself a violation of the Fifth Amendment." n301 To uphold § 3501 in a federal case, therefore, a court need go no further than recognize congressional power to supercede rules that are not constitutionally required. n302

c. Miranda*'s Application in Federal Habeas Corpus*

Critics of § 3501 have additionally claimed that *Miranda's* constitutional status is supported by the fact that the Court held *Miranda* claims to be cognizable in federal habeas corpus proceedings in *Withrow v. Williams*. n303 Habeas corpus extends to persons who are in custody "in violation of the Constitution, laws or treaties of the United States." n304 The critics like the Justice Department reason that, "because *Miranda* is not a 'law' or a treaty, the Court's holding in *Withrow* necessarily depends on the premise that" *Miranda* is a constitutional right. n305 A "law" for purposes of federal habeas review, however, consists not merely of federal statutes. n306 This prompted one leading commentator to conclude that *Miranda* claims present issues about a "law" of the United States. n307

Of course, we do not know precisely on what jurisdictional basis the *Withrow* Court relied, because that issue was not before the Court and the majority specifically wrote to chide the dissent for [*241] addressing a point which "goes beyond the question on which we granted certiorari." n308 In any event, the question surrounding § 3501 is whether *Miranda* is ordinary constitutional law or something akin to common law, which Congress can overrule. 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. n309 The Court conceded that *Miranda* might require suppression of a confession that was not involuntary, n310 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. n311 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 most recent discussion of the status of the *Miranda* rules) that they are "not themselves rights protected by the Constitution." n312

B. SECTION 3501 AS A CONSTITUTIONALLY ADEQUATE ALTERNATIVE TO MIRANDA

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 [*242] for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." n313 The Court explained:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by *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. n314

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 Court could simply dispense with the *Miranda* safeguards. n315

The Court's statements about which "other procedures" would be sustained was obviously dicta, because no such alternatives were before the Court and, indeed, no briefing discussing such alternatives was provided. n316 Relying on this language, however, the statute's [*243] critics have attempted to make short work of the possibility of sustaining § 3501 on this basis. The Justice Department has argued that "Congress did not accept the Court's invitation to devise an alternative procedural safeguard for Fifth Amendment rights; rather, it sought through Section 3501 to restore the test for admissibility of custodial statements that prevailed before *Miranda*." n317 Similarly, Professor Kamisar simply views the statute as "repealing" *Miranda* and "reinstating the due process 'totality of the circumstances' -- 'voluntariness' test for the admissibility of confessions." n318 These arguments are flawed in at least two important respects.

First, in some ways the statute extends beyond the pre-Miranda voluntariness law that existed before 1966 and beyond current Supreme Court *Miranda* doctrine. n319 For example, § 3501(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 . . . ." n320 This requirement actually reaches beyond current case law, as the Supreme Court held that a suspect can waive her *Miranda* rights even if she does not know the offense about which she 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." n321 Going farther than the *Spring* decision, § 3501(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 such statement could be used [*244] against him . . . ." n322 This section is broader than pre-Miranda law in recognizing a suspect's right to remain silent during police questioning, a position that critics of pre-Miranda case law had long espoused. n323 And in making relevant the question of whether a defendant was "advised" of this right, the section promotes direct recognition of the need for federal officers to give Miranda-style warnings to suspects. Section 3501(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." n324 Section 3501(b)(5) further requires consideration of "whether or not such defendant was without the assistance of counsel when questioned and when giving such confession." Before *Miranda*, no general right to assistance of counsel existed during police questioning. n325 Finally, the statute apparently enhances jury scrutiny of confessions by requiring the trial judge to instruct the jury to give the confession only such weight as the jury feels it deserves "under all the circumstances." n326 Accordingly, these parts of § 3501 provide to defendants more consideration than they had under the pre-Miranda voluntariness test. n327 If there is any ambiguity on this point, conventional rules of statutory construction would require the Court to read the statute so as to save it from unconstitutionality. n328 The statute directs federal trial courts to "*take into consideration* all the circumstances surrounding the giving of the confession . . . ." n329 While the absence of any of the factors "need not be conclusive" on the issue of admissibility, n330 the Court is certainly free to read the statute as requiring courts to give, for example, "strong consideration" to the absence of warnings as a factor suggesting a confession is involuntary.

Second, not only does § 3501 by itself go beyond the pre-Miranda [*245] rules, but the statute must be examined against the backdrop of all federal law bearing on the subject. n331 Critics simply look at the statute by itself, concluding that it alone is not a viable alternative to *Miranda*. n332 The Supreme Court, however, 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 judicially created exclusionary rule in *Miranda*.

Congress 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 person in 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." n333 Similarly, 18 U.S.C. § 241 prohibits conspiracies to violate constitutional rights. These statutes apply to federal law enforcement officers n334 who obtain coerced confessions. n335 While Congress adopted these statutes during the Reconstruction Era, they have undergone significant judicial interpretation since *Miranda*. Indeed, the Supreme Court recently explicated the breadth of the statute. n336 In addition, the Justice Department's Civil Rights Division and the FBI now fully support enforcement of these statutes against federal officials. n337

Civil penalties against federal officers who violate constitutional rights are also now available. When the Court decided *Miranda*, as a practical matter it was not possible to seek damages from federal law enforcement officers who violated Fifth Amendment rights. n338 [*246] That changed in 1971, when the Supreme Court decided *Bivens v. Six Unknown Named Agents*. n339 The Court held that a complaint alleging that federal agents acting under color of their authority violated the Fourth Amendment and gave 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 Amendment Self-Incrimination Clause or violations of the Due Process Clause. n340

When the Court decided *Miranda*, the federal government was also effectively immune from civil suits arising out of Fifth Amendment violations. At the time, sovereign 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. n341 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." n342

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, devices 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; [*247] (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. n343

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

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 the interpretation of § 3501. n344

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 explained in connection with the Fourth Amendment exclusionary rule, "the remedial landscape has changed considerably" since the early 1960s. n345 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's* prophylactic remedy overprotective 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[,]" n346 the criminal and civil sanctions Congress adopted focus more narrowly on conduct that directly implicates the Fifth Amendment proscription against compelled self-incrimination. n347 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. n348 Thus, the [*248] *Miranda* exclusionary rule would not be expected to have much effect on police intent on coercing confessions or otherwise violating constitutional 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." n349

In contrast, civil remedies directly affect the offending officer. As the Department itself explained some years ago, "even if successful *Bivens* suits are relatively rare, the mere prospect of such cases 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." n350 Similarly, civil actions against the United States provide a tangible financial incentive to insure federal practices comport with constitutional requirements. Likewise, internal disciplinary actions against federal agents are an important part of the calculus. In refusing to extend the Fourth Amendment exclusionary rule to civil deportation proceedings, the Supreme Court explained that "by 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." n351

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

approach to insure that federal agents respect the Fifth Amendment. That regime subjects officers who forcibly extract confessions to criminal sanctions, n352 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. n353 At the same time, that regime allows federal prosecutors to use voluntary confessions as evidence. n354 This is an entirely reasonable and, in many ways, more effective approach to securing respect for the Fifth Amendment [*249] than the *Miranda* exclusionary rule and, therefore, is fully compatible with both the Constitution and *Miranda's* call for Congress to develop alternative approaches. n355

[*250] *C. SECTION 3501 AND POLICING THE POLICE*

Because critics sometimes exaggerate the effects of § 3501, it is important to note that a decision upholding the law, on whatever theory, will not somehow "unleash" federal enforcement agents to trample on the rights of suspects. n356 Section 3501 permits the introduction of only "voluntary" statements, a determination made by the judiciary -- not the police. Supplementing the requirement of a judicial finding of voluntariness, § 3501 imposes the additional safeguard that the jury, too, assess voluntariness and the ultimate truthfulness of any confession. n357 The voluntariness test, even before *Miranda*, was developing into a powerful tool for blocking police abuses. n358 If the substantive issue of voluntariness, rather than technical questions of *Miranda* compliance, became the focus of suppression hearings, courts might well wield a more discriminating tool for dealing with improper interrogation tactics. n359 They would probably even have greater success in identifying situations in which an innocent person has falsely confessed to a crime. n360 At the same time, focusing on voluntariness is not, as is sometimes claimed, a task beyond judicial ken. To the contrary, courts across America regularly make such determinations. n361 For example, whenever a court suppresses a confession on *Miranda* grounds, it must go on to make a voluntariness ruling, as this governs whether the prosecution can impeach the defendant with the statement n362 or can use derivative evidence from the confession. n363

Section 3501 also specifically provides that warnings to suspects are relevant considerations in the voluntariness determination. n364 [*251] While warnings are only one factor in the voluntariness determination, n365 the fact that they are singled out provides strong incentives for law enforcement officers to provide advice of rights. n366 The *Dickerson* opinion was quite clear on this point, stating: "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. . . . Those warnings are among the factors a district court should consider when determining whether a confession was voluntarily given." n367 Indeed, after the ruling in *Dickerson*, federal law enforcement agencies have continued to follow the *Miranda* procedures in the five states comprising the Fourth Circuit. The Attorney General has also stated that even if *Miranda* was overruled outright, "federal law enforcement agencies would, as a matter of policy, continue to comply with the warnings requirements of *Miranda*." n368

While many police practices would thus remain unchanged under § 3501, the courts would no longer have to wrestle with fine points of *Miranda* compliance (custody, interrogation, waivers, and the like). This is no small benefit, as despite the frequent claim that *Miranda's* "bright line" rules are straightforward, in fact they present myriad complications. Some of the leading criminal procedure casebooks, for example, spend dozens and dozens of pages on the doctrine. n369 The resulting complexities produce substantial litigation. n370 Section 3501 thus presents the "win-win" solution of maintaining [*252] judicial oversight of police tactics while ending the need to free guilty criminals on, as *Dickerson* put it, "mere technicalities." n371 In light of all this, § 3501 survives constitutional challenge.

IV. SECTION 3501 AND THE FUTURE OF POLICE INTERROGATION

So far this article has developed the arguments why the Department of Justice should be defending § 3501 and why, in any event, the courts should uphold it. A final issue, however, remains to be considered: What real world difference would the statute make? The critics of § 3501 have occasionally suggested that § 3501 would not enhance public safety because federal prosecutors can often prevail even under the *Miranda* exclusionary rule. n372 For example, the Justice

Department's recent brief contends that § 3501 should not be applied because "*Miranda* is workable in practice" and that "*Miranda's* core procedures are not difficult to administer." n373 Such claims entirely miss the point of § 3501. The provision seeks not to stop the delivery of *Miranda* warnings n374 but rather the suppression of voluntary confessions that have, for some [*253] reason, been obtained in a way that departs from *Miranda*. In such cases, of course, the *Miranda* rules have proven to be "difficult to administer" because the police officer has somehow departed from them. The *Dickerson* case itself serves as a good illustration. The district judge found Dickerson's confession was voluntary, n375 a conclusion hard to fault. n376 Yet because of a question over precisely when his *Miranda* warnings were delivered, it is possible that Dickerson's confession may be excluded. n377 While *Dickerson* has not reached a final conclusion, there is no doubt about the result of the failure to apply § 3501 in *United States v. Leong*. In that case, a routine traffic stop had, apparently in less than a minute, matured into a "custodial" situation requiring the delivery of *Miranda* warnings. n378 Because of the officer's failure to instantly recognize this transformation, n379 defendant Tony Leong suppressed his confession on *Miranda* grounds and escaped conviction for being a convicted felon in possession of a firearm.

No one has compiled a list of cases actually brought where the convictions of criminals were imperiled by *Miranda's* rigid exclusionary rule. A few such cases are collected below. n380 Such cases [*254] are, of course, only the proverbial tip of the iceberg, because many other prosecutions undoubtedly are not pursued because of *Miranda* problems. n381

Beyond the cases in which the *Miranda* rules might suppress a confession that police have already obtained are the far larger number cases in which the *Miranda* rules prevent the police from ever obtaining confessions. In a trilogy of recent articles, I have attempted to quantify the harmful effects of *Miranda* on law enforcement efforts to gather confessions. In the *Northwestern University Law Review*, I exhaustively canvassed the before-and-after studies of confession rates in the wake of the *Miranda* decision, concluding that virtually all the reliable studies showed a substantial drop in the confession rate. n382 In the *UCLA Law Review*, Bret Hayman and I [*255] report original empirical research on the confession rate in Salt Lake County, Utah, in 1994, reporting an overall confession rate of only 33 percent -- well below that reported in the available pre-Miranda data. n383 Finally, in the *Stanford Law Review*, Richard Fowles and I demonstrated that crime clearance rates fell sharply all over the country immediately after *Miranda* and remained at these lower levels over the next three decades. n384 We develop at length reasons for attributing this decline to the Supreme Court's imposition of the *Miranda* requirements, n385 a conclusion supported by recent testimony from the nation's largest organization of law enforcement professionals. n386

If my conclusions in these earlier articles are correct, *Miranda* substantially harms the ability of law enforcement to protect society. Its technical rules prevent the conviction of countless guilty criminals, condemning victims of these crimes to see justice denied and fear crimes reprised. Its barriers to solving crimes also create substantial risks for innocent persons wrongfully caught up in the criminal justice system, who desperately need a confession from the true offender to extricate themselves. n387 This article, however, is not [*256] the place to revisit the details of the debate over the precise scope of *Miranda's* costs. For present purposes it is enough to follow intuition and logic to posit that *Miranda* entails at least *some* identifiable harm to law enforcement n388 -- otherwise, there is no point to the restrictions. n389 The real tragedy of *Miranda* is not that the decision produces costs, but that it produces *unnecessary* costs that could be avoided by perfectly reasonable alternatives -- such as § 3501.

The *Miranda* rules are, obviously, only one way of regulating police questioning. As emphasized in this article, the *Miranda* Court itself promised that "our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform," and invited Congress and the States to consider possible replacements. n390 Justice Harlan responded that, "despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform . . . ." n391 Justice White, too, predicted that "the Court's constitutional straitjacket" would "foreclose[] more discriminating treatment by legislative or rule-making pronouncements." n392 On this dispute, no one can doubt that the majority was wrong and the dissenters were right. More than three decades after the decision, virtually no serious efforts at reform have materialized other than § 3501. 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 [*257] 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. n393

The reasons for lack of experimentation in this area are not hard to imagine. No state is willing to risk possible invalidation of criminal convictions by deviating from *Miranda* until the Supreme Court clearly explains what alternatives will survive its scrutiny.

What is at stake with the current litigation over § 3501, then, is whether the 5-to-4 decision by the Warren Court will be forever enshrined as the mandated approach for regulating police interrogation, or whether the Supreme Court is serious about its promise to consider reasonable alternatives. The *Miranda* rules are not an end in themselves, but rather a means of safeguarding the Fifth Amendment -- that is, a means of insuring that confessions are voluntary. The *Miranda* rules overprotect the Fifth Amendment, extending beyond the Fifth Amendment's voluntariness requirements. Perhaps that overbreadth could be justified if it purchased considerable benefits. But with thirty years of experience to draw upon, we know that the *Miranda* rules have not done much to restrict whatever abusive police practices might have existed. As one careful scholar concluded, "what evidence there is suggests that any reductions that have been achieved in police brutality are independent of the Court and started before *Miranda*." n394 Another general survey concluded that there appears to be "general agreement among writers on the subject that *Miranda* is an inept means of protecting the rights of suspects . . . ." n395 The decision, thus, has done little to protect core Fifth Amendment values while, at the same time, exacting its social costs. These costs, it should be emphasized, stem not from the famous *Miranda* warnings, which appear to have little effect on suspects, but rather from the less-appreciated *Miranda* waiver and questioning cut-off rules, which block police questioning of a large number of suspects. n396 These costs also fall most heavily on those in the worst position to bear them, including racial minorities and the poor. n397

[*258] Against this backdrop, simply replacing *Miranda* with § 3501 would, by itself, be a good bargain for society. But a Court decision upholding § 3501 would, unlike *Miranda* for the last three decades, encourage further exploration of how to regulate police questioning. A favorable ruling on § 3501 could well usher in consideration of new approaches to protect against police extorting involuntary confessions while, at the same time, producing more voluntary confessions. Following a favorable ruling on § 3501, for example, one would expect federal agencies to seriously consider expanding the limited videotaping program that FBI has recently announced. n398 Commentators have suggested videotaping as a substitute for some of the *Miranda* procedures, arguing that taping of interrogations can both offer superior protection against police abuses while, at the same time, not deterring suspects from voluntarily providing confessions. n399 Another possibility that might be explored would be bringing arrested suspects before a magistrate, who would ask reasonable questions about the crime. n400 Here again, this approach might better protect against police abuse while, at the same time, gain for society the benefits of voluntary information about criminals offenses. Alternatives like this will prosper if the Supreme Court upholds § 3501 and signals that the *Miranda* rules are not set in stone. n401 On the other hand, should the Court strike down § 3501, reform efforts will remain stultified. n402

Justice White's dissent in *Miranda* warned that "in 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 [*259] pleases him." He continued, "There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case." n403 In passing § 3501, Congress sought to consider not only criminal suspects who could press their claims before the courts but also these "unnamed and unrepresented" victims of crime. The congressional enactment reflects "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." n404

Yet in spite of this clear command from Congress, § 3501 truly became the law that time forgot. It has been largely ignored by the courts and, in recent years, actually undermined by the Department of Justice. The refusal to use the law

has had harmful consequences for public safety that will probably never be completed calculated. As Justice Scalia bluntly concluded, applying *Miranda* rather than § 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." n405

It is time for the excuses to end. It is time for the Supreme Court to uphold § 3501.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsSearch & SeizureExclusionary RuleCriminal Law & ProcedureInterrogationMiranda RightsPublic Safety ExceptionGovernmentsLocal GovernmentsPolice Power

FOOTNOTES:

n1 166 F.3d 667 (4th Cir. 1999).

n2 Pub. L. No. 90-351, tit. II, § 701(a), 82 Stat. 210 (1968) (codified as amended at 18 U.S.C. § 3501).

n3 *Dickerson*, 166 F.3d at 672, 688 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

n4 *Miranda*, 384 U.S. at 467.

n5 *Dickerson*, 166 F.3d at 672.

n6 *Id.* at 692-93. The district court concluded that Dickerson received his *Miranda* warnings only after he confessed, a factual conclusion the Fourth Circuit questioned but did not find to be clearly erroneous. *See id.* at 676-80 (questioning, but not correcting, the district court's conclusion).

n7 Yale Kamisar, *Confessions, Search and Seizure, and the Rehnquist Court*, 34 TULSA L.J. 465, 470 (1999) [hereinafter Kamisar, *Confessions*].

n8 Yale Kamisar, *The* Miranda *Warning Takes a Body Blow*, L.A. TIMES, Feb. 17, 1999, at B7 [hereinafter Kamisar, *Body Blow*].

n9 Stephen J. Schulhofer, "Miranda" *Now on the Endangered Species List*, NAT'L L.J., Mar. 1, 1999, at A22.

n10 Miranda *Mischief*, N.Y. TIMES, Feb. 15, 1999, at A1 [hereinafter *Mischief*].

n11 Petition for Writ of Certiorari at 9-14, Dickerson v. United States, (July 30, 1999) (No. 99-55-25).

n12 Dickerson v. United States, 166 F.3d 667 (1994), *cert. granted*, 1999 WL 593195 (U.S. Dec. 6, 1999)) (No. 92-1949). I have been appointed to brief and argue the case on behalf of the Fourth Circuit's ruling. For a general discussion of what the Court will do with the case, see Roger Parloff, Miranda *on the Hot Seat*, N.Y. TIMES, Sept. 26, 1999, § 6 (Magazine), at 85.

n13 Along with Paul Kamenar, I represented WLF in this action.

n14 Brief for the United States in Support of Partial Rehearing En Banc, United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750).

n15 Carrie Johnson, *DOJ Gets* Miranda *Warning: Prosecutors Mount Campaign Urging Solicitor General to Back Superseding Statute*, LEGAL TIMES, Nov. 1, 1999, at 1.

n16 Brief for the United States, Dickerson v. United States (Nov. 1999) (No. 99-5525).

n17 One immediate consequence is that, after the Court granted certiorari, it needed to appoint an amicus to defend the decision of the Fourth Circuit. *See, e.g.*, Borsley v. United States, 523 U.S. 614, 618 (1998) (appointing amicus); The Washington Legal Foundation, represented by Paul Kamenar and I, has filed an amicus brief supporting the Fourth Circuit and offering its service as such an amicus should the Court find it useful. *See* Brief of Amicus Curiae WLF, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525) (visited Nov. 17, 1999) <http: www.law.utah.edu/faculty/bios/cassell>. The court accepted the offer, and appointed me to defend the opinion below.

n18 *Dickerson*, 166 F.3d at 672.

n19 U.S. CONST. art. II, § 3.

n20 *See* 5 Op. Off. Legal Counsel 25, 25-26 (Apr. 6, 1981).

n21 Attorney General Janet Reno, Press Conference (Feb. 11, 1999) (transcript available at <http://www.usdoj.gov/ag/speeches/1999/feb1199.htm>); *see* Brief for the United States at 37 n.23, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525).

n22 *See* Brief for the United States at 17, *Dickerson* (No. 99-5525) ("In sum, this Court's *Miranda* jurisprudence establishes that the *Miranda* rules . . . have a constitutional foundation."); Brief for the United States in Support of Partial Rehearing En Banc at 12, United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750) ("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.").

n23 Miranda v. Arizona, 384 U.S. 436, 467 (1966) (emphasis added).

n24 *See infra* notes 372-73 and accompanying text.

n25 *See infra* notes 37-44, 218 and accompanying text.

n26 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) (citing the ABA's informal survey of the readers of the American Bar Association Journal, which asked the respondents to vote on the "Milestones" of "Two Hundred Years of American Law." Of the Supreme Court decisions chosen, *Miranda* was the third most noted).

n27 *Miranda*, 384 U.S. at 457. For a fascinating discussion of the Warren Court's characterization of Miranda and other criminal defendants, see Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 BROOK. L. REV. 1165, 1192-96 (1995).

n28 I have argued that the interests of crime victims should be considered in our criminal justice system. *See, e.g.*, Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 (symposium edition); Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5 (arguing for passage of the Victim's Rights Amendment); *cf.* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (developing an argument for independent consideration of victims' interests). In that vein, I attempted to contact the victim in the *Miranda* case about her reaction to the Supreme Court's ruling. I heard through an intermediary that she had no interest in revisiting the past events.

n29 *See* Captain Carroll F. Cooley, You Have the Right to Remain Silent . . .: The Inside Story of *Miranda v. Arizona* (unpublished manuscript) (on file with author). I appreciate Captain Cooley's gracious permission to reproduce his work here.

n30 The material between the asterisks below is from Captain Cooley's account. I have added the footnotes to Captain Cooley's text and extracted only the portion of his manuscript dealing with Miranda's interrogation. The editors of the *Iowa Law Review* have lightly edited this section for clarity.

n31 Not her real name.

n32 Not his real name.

n33 Not her real name.

n34 Arizona v. Miranda, 401 P.2d 721, 733 (Ariz. 1965).

n35 *See* Brief for Petitioner at 2, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 759) (listing only the Sixth and Fourteenth Amendments as the "constitutional provisions involved"); *see also* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, QUESTIONS 474-75 (9th ed. 1999) (discussing how Miranda's Supreme Court lawyer explained that his brief focused entirely on the Sixth Amendment).

n36 384 U.S. 436 (1966).

n37 JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 173 (1993) (quoting *Miranda*, 384 U.S. at 491); *see also* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (stating that *Miranda* "reads more like a legislative committee report with an accompanying statute").

n38 *See generally* GRANO, *supra* note 37, at 59-83 (discussing the "voluntariness" doctrine in confessions).

n39 *See* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996) (summarizing the doctrine); Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963) (same); *see also* Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998) (updating Kamisar's analysis).

n40 *See Miranda*, 384 U.S. at 467-74 (discussing warning requirement).

n41 *See* James Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 977-78 (1986) (describing standards for waiver of counsel).

n42 *See Miranda*, 384 U.S. at 474-77 (holding a suspect's Fifth Amendment rights are not violated if police refrain from questioning him after he invokes his right to counsel).

n43 *See id.* at 478-79 ("But unless and until such warnings and waiver are demonstrated at trial, no evidence obtained as a result of interrogation can be used against him.").

n44 *Id.* at 490.

n45 *Id.* at 505 (Harlan, J., dissenting).

n46 *Id.* at 531 (White, J., dissenting).

n47 *Miranda*, 384 U.S. at 542 (White, J., dissenting).

n48 *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).

n49 *See id.* (noting Professor Fred E. Inbau's prediction that law enforcement officials would choose not to prosecute many cases because of *Miranda*).

n50 *See Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong. (1967) [hereinafter

Controlling Crime Hearings].

n51 *See id.* at 326-29 (citing the statement of Quinn Tamm, Exec. Dir., Int'l Ass'n of Chiefs of Police) (explaining that Supreme Court decisions hindering effective law enforcement have decreased the morale of the police and hampered police efforts to decrease crime).

n52 S. REP. NO. 90-1097, at 37, 46 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2123-38.

n53 *See* FRED P. GRAHAM, THE SELF-INFLICTED WOUND 320 (1970).

n54 *See* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

n55 *See* 18 U.S.C. § 3501(c) (1994) (addressing the time restraints for obtaining confessions).

n56 388 U.S. 218 (1967).

n57 *See* 18 U.S.C. § 3502 (1994) (addressing the admission into evidence of eyewitness testimony).

n58 *See* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 67 (1986) [hereinafter OLP REPORT], *reprinted in* 22 U. MICH. J.L. REFORM. 437, 515 (1989).

n59 *See infra* notes 319-30 (explaining how § 3501 extends beyond the pre-Miranda voluntariness test).

n60 Reno, *supra* note 21; *see* Brief for the United States at 37 n.23, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525) (asserting decision not to invoke § 3501 in *Dickerson* was "consistent with the virtually unbroken practice of the government since the enactment of the statute").

n61 Kamisar, *Body Blow*, *supra* note 8, at B7 (describing § 3501 as a "31-year-old statute which has never been enforced").

n62 Laurence Tribe, *Miranda Warning Is the Law of the Land*, BOSTON GLOBE, Feb. 15, 1999, A99 (describing § 3501 as a provision "which no President has ever enforced in light of its evident violation of the Constitution").

n63 Schulhofer, *supra* note 9, at A22 (stating that "the administrations of seven presidents, from Lyndon Johnson through Bill Clinton, all treated § 3501 as an unenforceable dead letter").

n64 *See, e.g.*, Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) (asserting § 3501 "has been studiously avoided by every Administration . . . since its enactment more than 25 years ago"); JAMES B. HADDAD ET AL., CRIMINAL PROCEDURE: CASES AND COMMENTS 2 (5th ed. Supp. 1999) ("Since

the passage of § 3501 no federal prosecutor has argued that the courts should rely upon it and refuse to apply *Miranda* rules to exclude confessions."); Lyle Denniston, *The Right to Remain Silent? Law Professor, Justice of Supreme Court Aim to Replace Miranda*, BALTIMORE SUN, Feb. 28, 1999, at C1 (noting that the perception that the statute has never been enforced is "widely held"); *Mischief, supra* note 10, at A22 (asserting that "every Republican and Democratic Attorney General going back to John Mitchell has declined to enforce that law because of its dubious constitutionality").

n65 Denniston, *supra* note 64, at C5.

n66 A somewhat dated treatment is found in OLP REPORT, *supra* note 58, at 64-74. For an excellent discussion focusing primarily on the legislature background to § 3501 and initial implementation by the Department of Justice, see Michael O'Neill, *Undoing* Miranda (Dec. 3, 1999) (unpublished manuscript) (on file with author).

n67 Pub. L. No. 90-351, 82 Stat. 197 (codified in various sections of titles 5, 18, 28, 42 and 47 U.S.C.).

n68 4 WEEKLY COMP. PRES. DOC. 983 (June 24, 1968).

n69 *See* OLP REPORT, *supra* note 58, at 72 (stating that the "administration knew as well as everyone else what § 3501 was meant to do").

n70 *See Controlling Crime Hearings, supra* note 50, at 72 (noting the conflict between legislation and the *Miranda* decision in letter of Attorney General Ramsey Clark; bill would be constitutional if *Miranda's* requirements were "read into" or added as a "constitutional gloss," but if this were done, it would be superfluous); *see also* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2210 (discussing § 3501's "repeal of *Miranda*").

n71 *See* Fred P. Graham, *Federal Lawyers Seeking to Soften Confession Curb*, N.Y. TIMES, July 28, 1969, at 22 (stating that Attorney General Ramsey Clark instructed federal attorneys to ignore § 3501 and to offer only evidence complying with *Miranda*).

n72 114 CONG. REC. 12,936, 12,937 (1968) (detailing Mr. Mundt's reading into the record of RICHARD M. NIXON, TOWARD FREEDOM FROM FEAR (1968)); *see* LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS 248 (1983) (citing Nixon campaign speeches attacking *Miranda*).

n73 Memorandum from Will Wilson, Assistant Attorney General, Criminal Division, to United States Attorneys (June 11, 1969), *reprinted in* 115 CONG. REC. 23,236 & 23,237 (1969).

n74 *The Improvement and Reform of Law Enforcement and Criminal Justice in the United States: Hearings Before the House Select Comm. on Crime*, 91st Cong. 250 (1969) (statement of Attorney General John N. Mitchell).

n75 *See, e.g.*, United States v. Vigo, 487 F.2d 295, 299 (2d Cir. 1973); United States v. Marrero, 450 F.2d

373, 379 (2d Cir. 1971) (Friendly, C.J., concurring); Ailsworth v. United States, 448 F.2d 439, 441 (9th Cir. 1971); United States v. Lamia, 429 F.2d 373, 377 (2d Cir. 1970). *See generally* OLP REPORT, *supra* note 58, 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).

n76 510 F.2d 1129 (10th Cir. 1975).

n77 *Id.* at 1136.

n78 417 U.S. 433 (1974).

n79 *Crocker*, 510 F.2d at 1137.

n80 *Id.* (quoting *Tucker*, 417 U.S. at 449).

n81 *Id.* at 1138. The Court also held, in a single sentence, that Crocker's confession was obtained in compliance with *Miranda*.

n82 *See* Letter from Department of Justice to Daniel Gandara (May 15, 1974), *in* Gandara, *supra* note 75, at 312 n.66 (stating that the policies set forth in the 1969 memorandum "are still considered current and applicable").

n83 *See* OLP REPORT, *supra* note 58, at 73-74. During this time period, Congress exhibited considerable interest in § 3501. During the 93rd to the 97th Congresses, the Senate considered revisions of the federal criminal code that, with only minor changes in wording, would have re-enacted 18 U.S.C. § 3501. *See* S. 1, 93d Cong., 3-11A4 (1973); S. 1400, 93d Cong. § 102 (1973); S. 1, 94th Cong., § 3713-4 (1975); S. 1437, 95th Cong. § 3713 (1977); S. 3089 96th Cong. § 3713 (1980); S. 1630, 97th Cong., § 3713 (1981). In 1977, the criminal code revision with the recodification of § 3501 passed the Senate but died in the House for reasons unrelated to § 3501. Part of the reason for the Senate to recodify § 3501 was to demonstrate congressional support for the provision. The Senate Judiciary Committee Report specifically noted the 10th Circuit's favorable decision in *Crocker*, noting that the decision was "endorsed" by the Committee. *See* S. REP. NO. 95-605, at 1049 n.5 (1977); *accord* S. REP. No. 96-553, at 1129 n.5 (1980); S. REP. NO. 97-307, at 1218 n.5 (1981).

n84 OLP REPORT, *supra* note 58, at 103.

n85 *See The Department of Justice's Failure to Enforce § 3501: Hearings Before the Subcomm. on Criminal Justice Oversight of the Senate Judiciary Comm.*, 106th Cong. 5-7 (1999) (statement of former Assistant Attorney General Stephen Markman) [hereinafter *1999 Senate Hearings*].

n86 854 F.2d 1097 (8th Cir. 1988).

n87 Brief for the United States at 19 n.11, United States v. Goudreau, 854 F.2d 1097 (8th Cir. 1988) (No. 87-5403N0). The filing of this brief is somewhat at odds with recollections published in then-Solicitor General

Fried's book that during the Meese tenure nothing was to be done on the "*Miranda* issue." *See* CHARLES FRIED, ORDER AND LAW 46-47 (1991). Fried may have a skewed impression because he remembers a decision not to move forward on one single case for tactical reasons as a decision not to move forward on any case. *See* Letter from former Attorney General Edwin Meese III to Senator Strom Thurmond (May 12, 1999) (on file with author) (discussing meeting described in Charles Fried's book and noting filing of *Goudreau* brief after that meeting).

n88 *Goudreau*, 854 F.2d at 1097.

n89 Letter from William P. Barr to Senator Strom Thurmond (July 22, 1999) (on file with author).

n90 *Id.*

n91 Telephone Interview with Stephen Markman, former Assistant Attorney General (May 7, 1999).

n92 21 F.3d 914 (9th Cir. 1994), *amended* 36 F.3d 1439 (9th Cir. 1994).

n93 United States v. Cheely, 814 F. Supp. 1447, 1448-49 (D. Alaska 1992).

n94 Memorandum to Solicitor General (Mar. 12, 1993) (citing Dep't of Justice document) (on file with author).

n95 Brief of the United States at 20-22, United States v. Cheely 21 F.3d 914 (9th Cir. 1994) (Nos. 92-30257, 92-30504).

n96 *Cheely*, 21 F.3d at 923. The brevity of the Ninth Circuit's ruling leaves it unclear as to precisely what that court meant. Was the Circuit concluding that, as a matter of constitutional law, the statute was unconstitutional, or that, as a matter of statutory construction, the statute did not cover the situation at hand?

n97 Order, *Cheely* (9th Cir. May 25, 1999) (Nos. 92-30257, 92-30504).

n98 Memorandum of the United States Relating to the Question Whether to Entertain Rehearing En Banc at 9, *Cheely* (Nos. 92-30257, 92-30504).

n99 Indeed, just one week after the Department filed its rehearing memorandum, the United States Supreme Court in *Davis* noted the importance of the § 3501 issue, with the majority opinion calling it a question of "first impression" and Justice Scalia's concurring opinion calling the Department's failure to raise the statute "inexcusable." *See infra* notes 109-10 and accompanying text.

n100 Within the Ninth Circuit, *compare Cheely*, 21 F.3d at 923 (stating that § 3501 does not "trump" the *Miranda* doctrine), *with* Cooper v. Dupnik, 963 F.2d 1220, 1256-57 (9th Cir. 1992) (Leavy, J., dissenting) (recognizing without direct response from the majority, that § 3501 establishes the standards for admissibility of

confessions in federal cases); United States v. Cluchette, 465 F.2d 749, 754 (9th Cir. 1972) (viewing § 3501 as seemingly establishing the controlling factors for admissibility of confessions), *and* Reinke v. United States, 405 F.2d 228, 230 (9th Cir. 1968) (discussing § 3501 before concluding that it was technically inapplicable there). Outside the Ninth Circuit, *compare Cheely*, 21 F.3d at 923, *with* United States v. Crocker, 510 F.2d 1129, 1138 (10th Cir. 1975) (upholding the trial court's use of § 3501 to determine the admissibility of a confession).

n101 969 F.2d 802, 805 (9th Cir. 1992).

n102 512 U.S. 452 (1994)

n103 Davis v. United States, 510 U.S. 942 (1993), *cert. granted*, 62 U.S.L.W. 3319 (U.S. Nov. 1, 1993) (No. 92-1949).

n104 *See* Amicus Curiae Brief for the Washington Legal Foundation, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949) (arguing that "Congressionally enacted statutes" require a different result). Paul Kamenar and I represented the Foundation.

n105 *See* Brief for the United States at 18 n.13, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949) ("Court-martial cases are not 'criminal prosecutions' within the meaning of the Sixth Amendment . . . .").

n106 If the Solicitor General's view was correct, Congress superceded overly-protective rules for criminal defendants in civilian cases by passing § 3501, but left these same rules in place in the military justice system.

n107 Official Transcript of Oral Argument at 44, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949); *see also id.* at 47 ("Again, we don't take a position in this case [on § 3501].").

n108 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 year about the "safe harbor" provision allowing up to six hours of police interrogation contained in 18 U.S.C. § 3501(c). It is interesting that the Department of Justice vigorously defended this part of § 3501, 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. Brief for the United States at *passim*, United States v. Alvarez-Sanchez, 511 U.S. 350 (1994) (No. 92-1812). At no point did the Department of Justice tell the Supreme Court that § 3501(a) was unconstitutional, nor did the Department address any of the various severability issues that would arise if other parts of the statute were unconstitutional. The Department also urged the Court to admit a statement pursuant to § 3501 in another case, albeit not over a constitutional objection from a defendant. *See* Brief for the United States at *passim*, United States v. Jacobs, 436 U.S. 31 (1978) (No. 76-1193), *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978).

n109 Davis v. United States, 512 U.S. 452, 457 n.* (1994). The Court also briefly raised § 3501 in oral argument in a case the previous Term, *United States v. Green*, 592 A.2d 985 (D.C. Cir. 1991), *cert. granted*, 504 U.S. 908 (1992). The Court, however, never published an opinion in the case, because the case became moot when Green died in prison. *See* United States v. Green, 507 U.S. 545 (1993), *vacating as moot*, 592 A.2d 985 (D.C. Cir. 1991).

n110 *Davis*, 512 U.S. at 465 (Scalia, J., concurring) (emphasis added).

n111 *See* Letter from Mark H. Bonner to Cathy Catterson, Clerk, United States Court of Appeals for the Ninth Circuit (June 29, 1994) (on file with author) (notifying the court of *Cheely* and explaining its relevance).

n112 *See* Letter from Drew S. Days III, Solicitor General, to Cathy Catterson, Clerk, United States Court of Appeals for the Ninth Circuit (June 29, 1994) (on file with author) (referring to "our telephone conversation today").

n113 *See* Letter from Drew S. Days III, Solicitor General, to Cathy Catterson, Clerk, United States Court of Appeals for the Ninth Circuit (June 29, 1994) (on file with author) (citing *Davis* and noting "the decision in *Davis* relates to Point 3" of the government's brief). I am indebted to Solicitor General Days for providing me with copies of this letter as well as the letter referred to in the preceding footnote.

n114 Order, United States v. Cheely, 21 F.3d 914 (9th Cir. 1994) (No. 92-30257) (directing parties to file briefs "on the issue of suppression in light of the Supreme Court's decision in *Davis v. United States*").

n115 Supplemental Memorandum of the United States at 5-12, *Cheely* (No. 92-30257) (relating to the question of whether Cheely waived his right to counsel).

n116 *See Solicitor General Oversight: Hearing on the Operation and Activities of the Office of the Solicitor General Before the Senate Comm. on the Judiciary*, 104th Cong. 72-80 (1995) (statement of Professor Paul G. Cassell).

n117 *Id.* at 31, 33; *see also id.* at 42 (answering question from Senator Biden that "with respect to § 3501, as I indicated earlier, there is no department policy against using § 3501 in an appropriate case").

n118 *Department of Justice Oversight: Hearing on Focusing on the Administration of Justice and the Enforcement of Laws Before the Senate Comm. on the Judiciary*, 104th Cong. 91 (1995) (noting the written answer of Attorney General Reno to the question of Senator Hatch).

n119 *Id.* (citing United States v. Cheely, 21 F.3d 914, 923 (9th Cir. 1994)).

n120 *Department of Justice Oversight: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong. 89-90 (1997) (including statement of Attorney General Reno).

n121 *Confirmation of Deputy Attorney General Nominee Eric Holder: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong. 124 (1997)

n122 138 F.3d 126 (4th Cir. 1998).

n123 *See* United States v. Sullivan, 948 F. Supp. 549, 551 (E.D. Va. 1996).

n124 *Id.* at 558.

n125 *Id.*

n126 Brief for the United States at 18, United States v. Sullivan, 138 F.3d 126 (4th Cir. 1997) (No. 97-4017).

n127 Letter from Walter Dellinger, Acting Solicitor General, to Patricia S. Connor, Clerk, United States Court of Appeals for the Fourth Circuit (Mar. 26, 1997) (on file with the Department of Justice); *see also* Motion to Substitute Redacted Brief for the United States, *Sullivan* (No. 97-4017).

n128 Brief for Appellee at 8-23, *Sullivan* (No. 97-4017).

n129 Order Granting Motion to Substitute Redacted Brief for the United States, *Sullivan* (No. 97-4017).

n130 Paul Kamenar and I represented WLF and the four senators.

n131 WLF explained that the Supreme Court has described § 3501 as "the statute governing the admissibility of confessions in federal prosecutions." Davis v. United States, 512 U.S. 452, 457 (1994) (quoting United States v. Alvarez-Sanchez, 511 U.S. 350, 351 (1994)). 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. 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.*, 508 U.S. 439, 445-48 (1992), the Court concluded it was free to reach the issue whether Congress had repealed a 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 the Supreme Court. The Court held that it would be absurd to allow the parties' decisions about what arguments to pursue 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." *Id.* at 447, *cited in Davis*, 512 U.S. at 464 (Scalia, J., concurring). 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. *See Department of Justice Oversight: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., 1997 WL 210888, at * 296 (remarks of Senator Thompson). This was done in the teeth of a statute governing not the conduct of private parties outside the courtroom, but rather the conduct of the courts themselves. *See* 18 U.S.C. § 3501(a) (providing that "in any [federal] criminal prosecution" a confession "*shall* be admissible in evidence") (emphasis added); *see also Davis*, 512 U.S. at 465 (Scalia, J., concurring) (stating § 3501 "is a provision of law directed *to the courts*") (emphasis in original).

In the interest of brevity, this Article will not discuss the binding quality of § 3501 any further. Both the Fourth Circuit and a recent scholarly review of the issues have agreed that § 3501 is binding on the courts even without the parties raising it. *See* United States v. Dickerson, 166 F.3d 667, 681-83 (4th Cir. 1999) (stating that even parties' refusal to raise relevant law does not prevent the court from deciding cases based on that law); Eric D. Miller, Comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1029

(1998) (answering question in the affirmative); *see also* George Thomas III, *2001: The End of the Road for* Miranda v. Arizona? *On the History and Future of Rules for Police Interrogation*, 36 AM. CRIM. L. REV. (forthcoming 1999) (agreeing that the Supreme Court should review the issue).

n132 VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-20 (1999).

n133 *Id.*

n134 *Cf.* Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 565 (4th Cir. 1997) (en banc) (criticizing the Justice Department for, "on virtually every occasion when it recited [the relevant statute's] requirement[s]," intentionally omitting three manifestly relevant words the statute contained, which the Department apparently did not like).

n135 Order, United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998) (No. 97-4017).

n136 United States v. Sullivan, 138 F.3d 126, 134 n. * (4th Cir. 1998).

n137 No. 96-4876, 1997 WL 351214 (4th Cir. June 16, 1997)

n138 *Leong*, 1997 WL 351214, at * 1.

n139 *Id.* at * 4.

n140 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, 116 F.3d 1474, 1997 WL 351214 (4th Cir. 1997) (No. 96-4876). Paul Kamenar and I represented WLF.

n141 *Id.* at 2.

n142 Brief of Amici Curiae WLF and Safe Streets Coalition Suggesting the Appropriateness of a Sua Sponte Rehearing and Rehearing En Banc at 8, *Leong* (No. 96-4876).

n143 *See* Supplemental Brief for the United States at 23, *Leong* (No. 96-4876) (discussing the court's order).

n144 The Fourth Circuit simply ignored this action, consistent with established precedent. *See* United States v. Rodgers, 101 F.3d 247, 251 (2d Cir. 1996) (noting that developments in district court do not deprive courts of appeals of jurisdiction).

n145 Order at 1, *Leong* (No. 96-4876).

n146 Letter from Senators Orrin Hatch, Strom Thurmond, Fred Thompson, Jon Kyl, John Ashcroft, and Jeff

Sessions to Attorney General Janet Reno 3, 5 (Aug. 28, 1997) (on file with author).

n147 *See supra* notes 116-21 and accompanying text.

n148 *See supra* notes 111-15 and accompanying text.

n149 Letter from Senators Orrin Hatch et al., *supra* note 146, at 4-5 (quoting testimony of Solicitor General Drew Days).

n150 Supplemental Brief for the United States at 23, *Leong* (No. 96-4876).

n151 *Id.* at 18.

n152 *Id.* at 21.

n153 *Id.* at 7.

n154 *See* Letter from Attorney General Janet Reno to Hon. Albert Gore, Jr., President of the Senate 1 (Sept. 10, 1997) (on file with author); *cf.* 2 U.S.C. § 288 (1994) (requiring notice to Senate of Department's decision not to defend constitutionality of an Act of Congress).

n155 Brief of Amici Curiae Washington Legal Foundation and Safe Streets Coalition in Response to Supplemental Briefs of the Parties and Amicus Nat'l Ass'n of Criminal Defense Lawyers at 5-7, *Leong* (No. 96-4876).

n156 Order at 3, *Leong* (No. 96-4876).

n157 *Id.* at 4.

n158 *Id.* at 4-6.

n159 Memorandum for all United States Attorneys and all Criminal Division Section Chiefs from John C. Keeney, Acting Asst. Atty. Gen., Crim. Div. 2 (Nov. 6, 1997) (on file with author).

n160 *See infra* notes 184-208 and accompanying text.

n161 *See, e.g.*, United States v. Glover, 104 F.3d 1570, 1583 (10th Cir. 1997); United States v. March, 999 F.2d 456, 462 (10th Cir. 1993); United States v. Miller, 987 F.2d 1462, 1464 (10th Cir. 1993); United States v. Caro, 965 F.2d 1548, 1552 (10th Cir. 1992); United States v. Short, 947 F.2d 1445, 1450 (10th Cir. 1991); United States v. Fountain, 776 F.2d 878, 886 (10th Cir. 1985); United States v. Benally, 756 F.2d 773, 775-76 (10th Cir. 1985); United States v. Hart, 729 F.2d 662, 666-67 (10th Cir. 1984); United States v. Fritz, 580 F.2d

370, 378 (10th Cir. 1978); United States v. Shoemaker, 542 F.2d 561, 563 (10th Cir. 1976); United States v. Brown, 540 F.2d 1048, 1053 (10th Cir. 1976); *see also* United States v. DiGiacomo, 579 F.2d 1211, 1217-18 (10th Cir. 1978) (Barrett, J., dissenting).

n162 *See* Government Response to Motion to Suppress at 12, United States v. Cale (D. Utah July 14, 1997) (No. 1:97-CR-9B) (unpublished decision) (citing § 3501 and noting that *Crocker* "is the law in this circuit").

n163 United States v. Nafkha, No. 96-4130, 1998 WL 45492 (10th Cir. Feb. 5, 1998).

n164 Paul Kamenar and I represented the WLF.

n165 Memorandum of the Washington Legal Foundation in Support of the United States on Issues Raised by the Defendants' Motions to Suppress Statements at 19-20, United States v. Nafkha, (No. 95-CR-220C) (D. Utah Feb. 7, 1996); Government's Response to Motion to Suppress Statement-Nafkha at 9, *Nafkha* (No. 95-CR-220C) (D. Utah Feb. 7, 1996)

n166 Report and Recommendation at 22, *Nafkha* (No. 95-CR-220C) (D. Utah Apr. 5, 1996)

n167 Brief of Appellee United States at 17, *Nafkha* (No. 96-4130) (10th Cir. Apr. 23, 1997).

n168 *See* Brief of Washington Legal Foundation et al., *Nafkha* (No. 96-4130) (10th Cir. Apr. 28, 1997).

n169 Letter from Lisa Simotas, Attorney, U.S. Dep't of Justice, to Patrick Fisher, Clerk, United States Court of Appeals for the Tenth Circuit (Sept. 2, 1997) (on file with author).

n170 *See supra* note 76 and accompanying text.

n171 *See supra* note 161.

n172 Supplemental Brief for the United States at 17 n.6, United States v. Leong, 116 F.3d 1474, 1997 WL 351214 (4th Cir. 1997) (No. 96-4876).

n173 United States v. Nafkha, No. 96-4130, 1998 WL 45492, at * 1 n.1 (10th Cir. Feb. 5, 1998).

n174 988 F. Supp. 1424 (D. Utah 1997).

n175 Motion of Safe Streets Coalition et al. on the Applicability of 18 U.S.C. § 3501 to Defendant's Motion to Suppress Statements at 3, United States v. Rivas-Lopez, 988 F. Supp. 1424 (D. Utah 1997) (No. 97-CR-104G). I represented the Safe Streets Coalition.

n176 Government Supplemental Response to Defendant's Motion to Suppress at 14, *Rivas-Lopez* (No.

97-CR-104G) (D. Utah Sept. 5, 1997).

n177 Reply Memorandum of Amici Curiae Safe Streets Coalition et al. Replying to the Position of the Dep't of Justice and the Defendant on the Applicability and Constitutionality of § 3501, *Rivas-Lopez* (No. 97-CR-104G) (D. Utah Sept. 12, 1997).

n178 *Rivas-Lopez*, 988 F. Supp. at 1430.

n179 *Id.*

n180 *Id.* at 1431-34.

n181 *Id.* at 1435.

n182 *Id.*

n183 Recently the District of Utah reaffirmed that § 3501 superseded *Miranda. See* United States v. Tapia-Mendoza, 41 F. Supp.2d 1250 (D. Utah 1999).

n184 *See supra* note 159 (noting memorandum from Criminal Division forbidding reliance on § 3501.

n185 *See* Memorandum Opinion at 18-19, United States v. Dickerson (E.D. Va. July 1, 1997) (No. 97-159-A) (unpublished decision).

n186 Government Motion for Reconsideration at 12-14, United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (No. 97-159-A).

n187 United States v. Dickerson, 971 F. Supp. 1023 (E.D. Va. 1997), *rev'd*, 166 F.3d 667 (4th Cir. 1999).

n188 *See* Brief for United States at 22-23, *Dickerson* (No. 97-4750) (4th Cir. Dec. 15, 1997).

n189 *See id.* at 34 n.19.

n190 Brief for Washington Legal Foundation in Support of Appellant United States at 12-13, *Dickerson* (No. 97-4750) (4th Cir. Nov. 5, 1997). Paul Kamenar and I represented WLF.

n191 United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), *petition for cert. pending*.

n192 *Id.* at 672.

n193 *Id.* at 681 n.14.

n194 *Id.* at 672 (citing United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 445-48 (1993)).

n195 *Id.* at 682 (citing VIRGINIA CODE PROFESSIONAL RESPONSIBILITY EC 7-20 (1999)).

n196 Memorandum for all U.S. Attorneys in the Fourth Circuit from James K. Robinson, Assistant Attorney General (Mar. 8, 1999) (on file with author).

n197 Judge Michael also argued the court should not decide the § 3501 issue because there was no briefing in opposition to WLF's position. *Dickerson*, 166 F.3d at 697 (Michael, J., dissenting). However, the Justice Department's brief cross-referenced its earlier extensive briefing on the alleged unconstitutionality of § 3501 in the *Leong* case. *See* Brief for the United States at 34 n.19, United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750). The defendant, perhaps deeming it a clever tactical maneuver, simply declined to write anything about the statute.

n198 Petition for Rehearing and Petition for Rehearing En Banc, *Dickerson* (No. 97-4750) (4th Cir. Feb. 22, 1999).

n199 Brief for the American Civ. Liberties Union in Support of Rehearing, *Dickerson* (No. 97-4750) (4th Cir. Feb. 20, 1999); Brief Amicus Curiae for the Nat'l Ass'n of Criminal Defense Lawyers in Support of Defendant-Appellee's Petition for Rehearing, *Dickerson* (No. 97-4750) (4th Cir. Feb. 22, 1999).

n200 Letter from Senator Orrin Hatch and Members of the Senate Judiciary Comm. to Attorney General Reno 1-2 (Mar. 4, 1999) (available at <http://www.law.utah.edu/faculty/bios/cassell>).

n201 *Id.*

n202 Brief for the United States in Support of Partial Rehearing En Banc, *Dickerson* (No. 97-4750) (4th Cir. Mar. 8, 1999).

n203 *Id.* at 6.

n204 Brief for the Washington Legal Foundation as Amicus Curiae in Opposition to Petition for Rehearing at 3-4, *Dickerson* (No. 97-4750) (4th Cir. Mar. 19, 1999).

n205 *See* Petition for Writ of Certiorari, Dickerson v. United States (U.S. July 30, 1999) (No. 99-5525).

n206 Brief for United States, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 97-5525).

n207 Brief of Amicus Curiae WLF, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525) (visited Nov. 17, 1999) <http: www.law.utah.edu/faculty/bios cassell>.

n208 Dickerson v. United States, 166 F.3d 667 (4th Cir. 1999), *cert. granted*, 1999 WL 593195 (U.S. Dec. 6, 1999)) (No. 99-5525).

n209 U.S. CONST. art. II, § 3.

n210 Kendall v. United States, 37 U.S. 524, 613 (1838).

n211 *See, e.g.*, RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 306 (1974) ("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."); EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS 79 (3d ed. 1948) ("Once a statute has been duly enacted, whether over his protest or with his approval, [the President] must promote its enforcement . . . ."); 3 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1503 (2d ed. 1929) ("If, upon his own judgment, [the President] refuses to execute a law and thus nullifies it, he is arrogating to himself controlling legislative functions, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President."); *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 99th Cong. 46 (1985) (statement of Professor Eugene Gressman) ("In our constitutional system of government, such a refusal by the Executive to 'take care that the Laws be faithfully executed' cannot and must not be tolerated.").

n212 The Solicitor General, for example, (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 Division v. Smith*, 494 U.S. 872 (1990). *See* Brief for the United States, City of Boerne v. Flores, 521 U.S. 507 (1997).

n213 5 Op. Off. Legal Counsel 25, 25-26 (Apr. 6, 1981) (emphasis added).

n214 *See* Memorandum for the Counsel to the President Abner Mikva from Asst. Attorney General Walter Dellinger (Nov. 2, 1994) (available at <http://www.usdoj.gov/olc/mem_ops.htm>) ("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.").

n215 For example, Senator Hatch asked Solicitor General nominee Seth Waxman 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 replied: "I absolutely will." *Nomination of Seth Waxman to be Solicitor General: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 8 (1997) [hereinafter *Hearings on the Nomination of Seth Waxman*] (including testimony of Seth Waxman, nominee to be Solicitor General of the United States); *see also id.* at 6-7 (stating that Solicitor General should defend a law "except in the rarest instances").

n216 *But see infra* notes 319-30 (explaining why statute should be read as extending beyond the pre-Miranda voluntariness rules).

n217 *See generally* GRANO, *supra* note 37, at 87-118.

n218 The most recent comprehensive attempt to understand the meaning of the Fifth Amendment in light of its history and structure concludes that a variety of schemes might be used to regulate police interrogation, and even describes a system that somewhat resembles § 3501. *See* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 909 (1995) (describing system in which suspect given warnings but also encouraged to speak); *cf.* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 970 (1995) (responding vigorously to the Amar/Lettow analysis, but conceding that "according to a majority of the present Court, [failure to follow *Miranda*] does not seem to violate a constitutional right at all"); Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1477-85 (1997) (reviewing Amar's analysis, as published in THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997), and concluding that Amar's premises are even more damaging to *Miranda* than Amar realizes).

n219 A prime example is the recently filed Justice Department brief in *Dickerson*. It contains not even a single textual or historical argument to support its attack on § 3501. *See* Brief for the United States, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525).

n220 *See* Blodgett v. Haden, 275 U.S. 142, 148 (1927), *quoted in* Fullilove v. Klutznick, 448 U.S. 448, 472 (1980).

n221 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that judicial review is the responsibility of the courts).

n222 United States v. Alvarez-Sanchez, 511 U.S. 350, 351 (1994).

n223 Palermo v. United States, 360 U.S. 343, 353 n.11 (1959).

n224 *Id. See generally* GRANO, *supra* note 37, at 173-222 (developing the argument as a basis for upholding § 3501).

n225 United States v. Dickerson, 166 F.3d 667, 687-88 (4th Cir. 1999).

n226 Davis v. United States, 512 U.S. 452, 457-58 (1994) (internal quotation omitted).

n227 Michigan v. Tucker, 417 U.S. 433, 444 (1974).

n228 Many commentators have concluded that § 3501 is constitutional on similar reasoning. *See, e.g.*, Bruce Fein, *Congressional and Executive Challenge of* Miranda v. Arizona, *A Strategy for Correcting Error or Excesses in the Supreme Court, in* CRIME AND PUNISHMENT IN MODERN AMERICA 171, 175-80

(Patrick B. McGuigan & Jon S. Pascale eds., 1986); GRANO, *supra* note 37, at 203; Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1475 & n.271 (1985); Phillip Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM. CRIM. L. REV. 303, 307 n.8 (1987); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to* "*Reconsidering* Miranda," 54 U. CHI. L. REV. 938, 948 (1987). *But see* WAYNE R. LaFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.5(e), at 316-17 (2d ed. 1992 & 1998 Supp.) (criticizing § 3501 as unconstitutional "to the extent that it purports to repeal *Miranda*); *infra* notes 245-312 and accompanying text (discussing § 3501's constitutional critics).

n229 512 U.S. at 457-58 (emphasis added).

n230 507 U.S. 680, 690-91 (1993) (emphasis added).

n231 492 U.S. 195, 203 (1989) (emphasis added) (internal quotation omitted).

n232 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, 424 (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) (stating that *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") (quoting Miranda v. Arizona, 384 U.S. 436, 526 (1966) (White, J., dissenting)).

n233 467 U.S. 649 (1984).

n234 *Quarles*, 467 U.S. at 655.

n235 401 U.S. 222 (1971).

n236 420 U.S. 714 (1975).

n237 *Harris*, 401 U.S. at 222; *Hass*, 420 U.S. at 722.

n238 *Quarles*, 467 U.S. at 654-58 (discussing *Harris* and *Elstad*).

n239 U.S. CONST. amend. V.

n240 New Jersey v. Portash, 440 U.S. 450, 458-59 (1979); Mincey v. Arizona, 437 U.S. 385, 397-98 (1978).

n241 Mahan v. Plymouth County House of Corrections, 64 F.3d 14, 17 (1st Cir. 1995); Deshawn v. Safir,

156 F.3d 340, 346 (2d Cir. 1998); Clay v. Brown, 151 F.3d 1032 (7th Cir. 1998) (unpublished table decision); United States v. Abrego, 141 F.3d 142, 168-70 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 182 (1998); Winsett v. Washington, 130 F.3d 269, 274 (7th Cir. 1997); 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. Davis, 919 F.2d 1181, 1186 (6th Cir. 1990), *reh'g en banc denied*, 1991 U.S. App. Lexis 3934; Warren v. City of Lincoln, 864 F.2d 1436, 1441-42 (8th Cir. 1989), *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, 1350-51 (10th Cir. 1994); Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976). *But cf.* California Attorneys for Criminal Justice, v. Butts, Nos. 97-56499, 97-56510, 1999 WL 1005103 (9th Cir. Nov. 8, 1999) (suggesting, but holding, that *Miranda* rights have some constitutional stature).

n242 *See* Brief for the United States, 1995 U.S. Briefs LEXIS 2074, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074) (citing *Miranda* as an example of judicially created prophylactic rules that "enforce" constitutional guarantees but "are not constitutionally compelled"); Transcript of Oral Argument at 47, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949) (reporting a 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 Department of Justice: "No, this Court has repeatedly made clear that the Miranda rules are prophylactic"); Brief for the United States as Amicus Curiae Supporting Petitioner, 1991 U.S. Briefs LEXIS 1030, Withrow v. Williams, 507 U.S. 680 (1992) (No. 91-1030) (noting that 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* Brief for the United States, 1991 U.S. Briefs LEXIS 1521, United States v. Green, 504 U.S. 908 (1992), *vacated by writ of cert. dismissed*, 507 U.S. 545 (1993) (No. 91-1521) (discussing *Miranda's* prophylactic status); Brief for the United States as Amicus Curiae Supporting Petitioner, 1989 U.S. Briefs LEXIS 6332, Minnick v. Mississippi, 498 U.S. 146 (1990) (No. 89-6332) (same); Brief for the United States as Amicus Curiae Supporting Petitioner, 1988 U.S. Briefs LEXIS 512, Michigan v. Harvey, 494 U.S. 344 (1990) (No. 88-512) (same); Brief for the United States as Amicus Curiae Supporting Petitioner, Arizona v. Roberson, 486 U.S. 675 (1988) (No. 87-354); Brief for the United States as Amicus Curiae Supporting Petitioner at 20, New York v. Quarles, 467 U.S. 649 (1984) (No. 82-1213) (same); *Nomination of Seth Waxman to be Solicitor General*, *supra* note 215, at 101 (including Seth Waxman's responses to questions from Senator Hatch) ("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.").

n243 *See* New York v. Quarles, 467 U.S. 649, 654-55 & n.5, 658 n.7 (1984) (holding that a failure to provide *Miranda* rights does not, without more, make a confession involuntary); Oregon v. Elstad, 470 U.S. 298, 306-09 (1985) (same); Michigan v. Tucker, 417 U.S. 433, 444-45 (1974) (holding that a confession is sufficiently voluntary despite inadvertent disregard of procedural rules established in *Miranda*).

n244 *See* Davis v. United States, 512 U.S. 452, 458 (1994) (stating that *Miranda* rights are "not themselves rights protected by the Constitution, but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected"); *Quarles*, 467 U.S. at 654-55 & n.5, 658 n.7 (stating that "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").

n245 Kamisar, *Confessions*, *supra* note 7, at 467.

n246 Thomas, *supra* note 131.

n247 Kamisar, *Confessions*, *supra* note 7, at 471 (quoting David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988)).

n248 Thomas, *supra* note 130.

n249 Brief for the United States in Support of Partial Rehearing En Banc at 6, United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750).

n250 Brief for the United States at 13, *Dickerson* (U.S. Nov. 1, 1999) (No. 99-5525).

n251 *Id.* at 14.

n252 *Id.*

n253 *Id.*

n254 *Id.* at 16.

n255 Brief for the United States at 17, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525).

n256 *Id.*

n257 *Id.* at 20.

n258 *Id.* at 23 (citing Edwards v. Arizona, 451 U.S. 477 (1981); Arizona v. Roberson, 486 U.S. 675 (1988)).

n259 Brief for the United States at 26, *Dickerson* (No. 99-5525).

n260 *Id.* at 30-34.

n261 *Id.* at 36.

n262 512 U.S. 452 (1994), discussed *supra* notes 103-10 and accompanying text.

n263 *Id.* at 457 n. * (emphasis added).

n264 *Id.* at 457-58 n. *.

n265 *Id.* at 464 (Scalia, J., concurring).

n266 511 U.S. 350 (1994).

n267 *Id.* at 351. The case involved a decision by the Ninth Circuit interpreting the provisions of 18 U.S.C. § 3501(c), which provides that a confession "shall not be inadmissible solely because of delay in bringing such persons before" a judicial officer if the confession was made voluntarily and "within six hours" following the arrest. The Court concluded that these provisions were not triggered until there was an arrest by a *federal* officer. *Id.* at 358 (emphasis added). The Court therefore did not need to reach the question of the extent to which the provision superseded the Supreme Court's so-called *McNabb-Mallory* rule requiring the suppression of voluntary confessions obtained during delay in presenting a suspect to a magistrate.

n268 *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, 207 n.3 (1973). Indeed, in at least 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 its entirety).

n269 *See, e.g.*, Brief for the United States at 13, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525) ("The Court has retreated from that aspect [the constitutionalization] of its reasoning in *Miranda*."); Kamisar, *Confessions, supra* note 7, at 467-69 (discussing Burger's and Rehnquist's moves to "deconstitutionalize" *Miranda*). *See generally* Leslie A. Lunney, *The Erosion of* Miranda: *Stare Decisis Consequences*, 48 CATH. U. L. REV. 727 (1999) (tracing doctrinal developments since *Miranda*).

n270 United States v. Dickerson, 166 F.3d 667, 688-89 (4th Cir. 1999) (quoting *Miranda*).

n271 *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

n272 *See supra* note 37 and accompanying text.

n273 *Miranda*, 384 U.S. at 458, 467.

n274 *Id.* at 457, 479.

n275 *Id.* at 447.

n276 *Id.* at 505 (Harlan, J., dissenting).

n277 *Id.* at 492, 494.

n278 *Miranda*, 384 U.S. at 499.

n279 United States v. Elie, 111 F.3d 1135, 1144 (4th Cir. 1997) (internal quotation omitted).

n280 *See generally* GRANO, *supra* note 37, at 173-82. The Justice Department, at least until quite recently, seemed to take this view as well. *See* Brief for the United States as Amicus Curiae, 1991 U.S. Briefs LEXIS 1030, Withrow v. Williams, 507 U.S. 680 (1992) (No. 91-1030) (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)).

n281 Brief for the United States at 14, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525).

n282 *See* OLP REPORT, *supra* note 58, at 104 ("The [Supreme] Court could perpetuate *Miranda* only by holding that it has supervisory authority over the state courts."); *see also* Oregon v. Elstad, 470 U.S. 298, 370-71 & n.15 (1985) (Stevens, J., dissenting) (arguing that the "Court's power to require state courts to exclude probative self-incriminating statements rests entirely" on the power to enforce the Constitution); United States v. Dickerson, 166 F.3d 667, 691 n.21 (4th Cir. 1999) (noting that *Miranda's* application to the states is "an interesting academic question"); GRANO, *supra* note 37, at 183-98 (questioning the legitimacy of *Miranda* and the supervisory power it gives the federal government over state courts).

n283 367 U.S. 643 (1961).

n284 403 U.S. 388 (1971).

n285 *See id.* at 397; *cf. id.* at 406-08 (Harlan, J., concurring).

n286 *See generally* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

n287 *See Mapp*, 367 U.S. at 655.

n288 Although this argument was presented in WLF's pleadings in the Fourth Circuit in *Dickerson*, the Justice Department's recent brief in the Supreme Court studiously avoids any discussion of this argument.

n289 *Cf.* Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) (upholding congressional modification of court rule).

n290 403 U.S. at 397; *id.* at 406-08 (Harlan, J., concurring).

n291 462 U.S. 367 (1983).

n292 *Id.* at 377.

n293 *See Lucas*, 462 U.S. at 372, 386; Schweiker v. Chilicky, 487 U.S. 412, 425 (1988). *See generally*, Harold J. Krent, *How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative*

Reform Efforts, 26 PEPP. L. REV. 855, 862-71 (1999) (discussing legislative replacement of Fourth Amendment exclusionary rule).

n294 *See infra* notes 313-55 and accompanying text.

n295 376 U.S. 398 (1964). For good discussions of the doctrine, see Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1 (1990); Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. J. INT'L L. 1 (1998).

n296 *Sabbatino*, 376 U.S. at 423.

n297 *Id.* at 424-26.

n298 *Id.* at 426-27.

n299 *See* Amendment to the Foreign Assistance Act of 1961, Pub. L. 89-171, § 620, 79 Stat. 653 (1965) (codified at 22 U.S.C. § 2370(e)(2) (1994)).

n300 *See generally* Dellapenna, *supra* note 295, at 109-23, 126-31. As one illustration, in the *Sabbatino* case itself, the statute referred to in the previous footnote was applied retroactively to essentially supersede the Court's decision. *See* Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) (holding that the Hickenlooper Amendment, which directs that the act of state doctrine should not apply to prevent decisions on the merits in cases arising out of foreign expropriations unless the executive branch intervenes, is constitutional).

n301 Oregon v. Elstad, 470 U.S. 298, 306 n.1 (1985); *accord* New York v. Quarles, 467 U.S. 649, 655 n.5 (1984).

n302 *See supra* notes 222-25 (discussing congressional power to supersede non-constitutional rules).

n303 507 U.S. 680 (1993).

n304 28 U.S.C. § 2254(a) (1994).

n305 Brief for the United States at 16, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525); *see* Kamisar, *Confessions*, *supra* note 7, at 475-76; Thomas, *supra* note 130, at 72 & n.115.

n306 *See* Bush v. Muncy, 659 F.2d 402, 407 (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 R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (noting that the phrase "laws of the several States" in Rules of Decision Act includes the States' judicial decisional law).

n307 *See* LARRY W. YACKLE, POST CONVICTION REMEDIES § 97, at 371 (1981 & Supp. 1996) ("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.").

n308 *Withrow*, 507 U.S. at 685 n.2.

n309 *Id.* at 690.

n310 *Id.*

n311 *Id.* at 691-94.

n312 Davis v. United States, 512 U.S. 452, 457 (1994) (citing Michigan v. Tucker, 417 U.S. 433, 443-44 (1974)).

n313 Miranda v. Arizona 384 U.S. 436, 467 (1966) (emphasis added).

n314 *Id.* (emphasis added). This may be the appropriate point to underscore that § 3501 only extends to federal prosecutions, *see* 18 U.S.C. § 3501(a) ("In any criminal prosecution brought by the United States . . . ."), and that a Court decision validating § 3501 would not immediately extend to state prosecutions. Presumably to gain the benefit of § 3501, the states would then need to adopt their own versions of the statute. One such statute already exists, in Miranda's home state of Arizona. *See* ARIZ. REV. STAT. 13-3988 (1998). The constitutionality of such state statutes may present different issues than § 3501. *See infra* notes 331-55 and accompanying text (discussing ways in which § 3501 is supplemented by additional safeguards in the federal system).

n315 Miranda v. Arizona, 384 U.S. 436, 467 (1966). This fact by itself provides a striking reason to view *Miranda* as a non-constitutional decision. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch . . . .").

n316 *See supra* note 35 and accompanying text (noting that Fifth Amendment issues were not raised in Miranda's brief); *cf.* Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend."). To this, it might be retorted that *Miranda's* language about the acceptability of alternatives was itself dicta. That statement, however, was recapitulated in the Court's characterization of *Miranda* as establishing "recommended" procedural safeguards, which obviously envisions the possibility of alternative approaches. *See Davis*, 512 U.S. at 457 (citing *Michigan v. Tucker* for its observation that "established in *Miranda* was one of a 'series of recommended procedural safeguards'"). Moreover, allowing alternatives to *Miranda* is consistent with everything that the Supreme Court said in the 175 years preceding the decision and the more than 30 years since.

n317 Brief for the United States at 12, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525).

n318 Kamisar, *Confessions*, *supra* note 7, at 469.

n319 I am indebted to my friend, Professor Thomas, for bringing several of these arguments to my attention. This point, however, has long been recognized. *See, e.g.*, GRAHAM, *supra* note 53, at 324 ("Parts of [§ 3501] would have been a progressive expansion of suspects' rights if Congress had passed it prior to *Miranda*."); Robert A. Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 129 (stating that § 3501 "does not wholly sweep aside *Miranda* . . . [and] the legislative enumeration of factors arguably gives them a special status . . . that did not necessarily obtain" before *Miranda*).

n320 18 U.S.C. § 3501(b)(2) (1994).

n321 Colorado v. Spring, 479 U.S. 564, 577 (1987).

n322 18 U.S.C. § 3501(b)(3) (1994).

n323 *See* YALE KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in* CRIMINAL JUSTICE IN OUR TIME 19-36 (1965).

n324 18 U.S.C. § 3501(b)(4) (1994).

n325 *See, e.g.*, Crooker v. California, 357 U.S. 433 (1958).

n326 18 U.S.C. § 3501(b) (1994).

n327 *Accord* Thomas, *supra* note 131.

n328 *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("Every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.") (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

n329 18 U.S.C. § 3501(b) (1994) (emphasis added).

n330 *Id.*

n331 *See* Gracey v. International Bhd. of Elec. Workers, 868 F.2d 671, 675 (4th Cir. 1989).

n332 *See* Brief for the United States at 12, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525) (examining only § 3501); Thomas, *supra* note 131 (same).

n333 18 U.S.C. § 242 (1994).

n334 United States v. Otherson, 637 F.2d 1276, 1278-79 (9th Cir. 1980).

n335 *See* United States v. Lanier, 520 U.S. 259, 271 (1997) (noting that "beating to obtain a confession plainly violates § 242") (citing Williams v. United States, 341 U.S. 97, 101 (1951)).

n336 *Lanier*, 520 U.S. at 270-72.

n337 *See* 28 C.F.R. § 0.50 (1998) (establishing the Justice Department's Civil Rights Division).

n338 *See* Bell v. Hood, 327 U.S. 678 (1946).

n339 403 U.S. 388 (1971).

n340 *See* 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 confessions are used at trial; considering Due Process challenge to police conduct during questioning).

n341 *See* S. REP. NO. 93-588, at 2-4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791 (accompanying H.R. 8245, 93rd Cong. (1973), which provided "a remedy against the United States for the intentional torts of its investigative and law enforcement officers").

n342 28 U.S.C. § 2680(h) (1994).

n343 U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE 36 (1986) [hereinafter U.S. DEP'T OF JUSTICE], *reprinted in* 22 U. MICH. J.L. REFORM 575, 622 (1989).

n344 *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 397-98 (1978).

n345 U.S. DEP'T OF JUSTICE, *supra* note 343.

n346 Oregon v. Elstad, 470 U.S. 298, 306 (1985).

n347 *Id.* at 306-10.

n348 Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

n349 OLP REPORT, *supra* note 58, at 98 (collecting citations).

n350 Brief for the United States at 34, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (No. 83-491).

n351 INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

n352 18 U.S.C. §§ 241, 242 (1994).

n353 28 U.S.C. § 2680(h) (1994).

n354 18 U.S.C. § 3501(a) (1994).

n355 An entirely separate argument for the constitutionality of § 3501 is based on the fact that Congress has now rejected the factual findings underpinning *Miranda*. The court in *Dickerson* alluded to this argument, explaining that "Congress, utilizing its superior fact-finding ability, concluded that custodial interrogations were not inherently coercive." United States v. Dickerson, 166 F.3d 667, 692 n.22 (4th Cir. 1999). *See generally* Burt, *supra* note 319, at 81, 118 (noting congressional power findings undergirding § 3501); Monaghan, *supra* note 286, at 42 n.217 ("Congress may have already concluded that it is too costly to treat violation of *Miranda* rules as a per se violation.").

This argument appears to be a strong one, as the Court's view is filtered through the litigated cases that reach it. The Court remains entirely unaware, for example, of cases never charged because *Miranda* rules blocked a confession, which is the great bulk of *Miranda's* harm. *See* Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 391-94 (1996) ("Analysis of numbers of suppressed confessions . . . tells us nothing about cases in which police *fail* to obtain confessions because of the *Miranda* rules."). Congress, on the other hand, has the ability to gather facts from a wide range of sources, including law enforcement officials and others knowledgeable about how police interrogation really operates. Although Congress is not required to make formal findings of fact, *see* United States v. Lopez, 514 U.S. 549, 562 (1995) ("Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."); Perez v. United States, 402 U.S. 146, 156 (1971) ("Congress need [not] make particularized findings in order to legislate."), Congress actually made such findings in connection with § 3501. In the months leading up to the passage of § 3501, the Senate Judiciary Committee held hearings about police interrogation and ultimately concluded that "the Court overreacted to defense claims that police brutality is widespread." S. REP. NO. 90-1097, at 48 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2134. The Senate thus specifically rejected the central factual premise underlying *Miranda*: that custodial interrogation has an "inherently compelling" character. *Compare* Miranda v. Arizona, 384 U.S. 436, 457-58 (1966) ("Incommunicado interrogation is at odds with [the principle that] the individual may not be compelled to incriminate himself."), *with* S. REP. NO. 90-1097, at 51 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2137-38 ("The committee feels . . . that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right."). The argument from superior fact-finding abilities also works in a slightly different fashion. The Court has expressly invited Congress to "search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Miranda*, 384 U.S. at 467. What constitutes such an "increasingly effective way" is an empirical question about the effects of rules on real-world police operations. The Senate specifically concluded § 3501 "would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws." S. REP. NO. 90-1097, at 51 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2137. The Court must give that finding deference because Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) (internal quotations omitted). Because § 3501 is constitutional on the arguments developed in the text, there is no need to fully develop here these alternative grounds for upholding the statute.

n356 *Cf.* Thomas, *supra* note 131 (arguing that the "symbolism of overruling *Miranda* . . . would be ominous indeed" because of the message it would send to police).

n357 *See* 18 U.S.C. § 3501(a) (1994) ("The trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness . . . .").

n358 *See* Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 572-75 (1990) (arguing that, even in the early 1960s, the "voluntariness" test was on its way to becoming a formidable restriction on police interrogation methods).

n359 *See* Thomas, *supra* note 131 (raising this possibility).

n360 *See* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions -- And From* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 538-56 (1998).

n361 *See* Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 877 (1981) (noting that in a number of important situations "the primary criterion of [confession] admissibility under current law is [still] the 'old' due process voluntariness test").

n362 *See* Michigan v. Tucker, 417 U.S. 433, 444-46 (1974).

n363 *See* Oregon v. Elstad, 470 U.S. 298, 306-07 (1985).

n364 *See* 18 U.S.C. § 3501(b)(3)-(4) (1994).

n365 *See* 18 U.S.C. § 3501(b).

n366 *Cf.* Thomas, *supra* note 131 (conceding that the police would continue to give *Miranda* warnings if § 3501 were upheld, but arguing that this would diminish over time).

n367 United States v. Dickerson, 166 F.3d 667, 692 (4th Cir. 1999).

n368 Brief for the United States at 35 n.21, United States v. Dickerson (U.S. Nov. 1, 1999) (No. 99-5525).

n369 *See, e.g.*, JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE 558-679 (1999) (reviewing the *Miranda* doctrine); PHILLIP E. JOHNSON, CASES AND MATERIALS ON CRIMINAL PROCEDURE 463-606 (2d ed. 1994) (same); YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 468-600 (9th ed. 1999) (same); ARNOLD H. LOEWY & ARTHUR B. LAFRANCE, CRIMINAL PROCEDURE: ARREST AND INVESTIGATION 489-612 (1996) (same); MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 570-652 (1998) (same); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 527-96 (5th ed. 1996) (same); WELSH S. WHITE

& JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS ON INVESTIGATION AND PROOF 479-578 (1990) (same).

n370 *See* Fred E. Iubau & James P. Monak, Miranda v. Arizona-*Is it Worth the Cost? A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort*, 24 CAL. W. L. REV. 185 (1988).

n371 *Dickerson*, 166 F.3d at 693.

n372 *See Confirmation of Deputy Attorney General Nominee Eric Holder: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong. 124 (1997) (including written response of Deputy Attorney General Designate Holder to question from Senator Strom 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.").

n373 Brief for the United States at 20, Dickerson v. United States (U.S. Nov. 1, 1999) (No. 99-5525). These statements appear to represent the views of the top political echelon at the Department, not those of line prosecutors or federal agents. *See* Carrie Johnson, *DOJ Gets a* Miranda *Warning: Prosecutors Mount Campaign Urging Solicitor General to Back Superseding Statute*, LEGAL TIMES, Nov. 1, 1999, at 1 (noting efforts by "some of the nation's top federal prosecutors" to urge the Department to defend § 3501); Mark Johnson & Tom Campbell, *U.S. Seeking to Defend Law on Valid Confessions*, RICHMOND TIMES DISPATCH, Oct. 30, 1999, at A8 (noting that issue of § 3501 has "divided career Justice Department lawyers and some political appointees, including Attorney General Janet Reno"); Letter from Richard J. Gallo, President, Federal Law Enforcement Officers Association, to Senator Strom Thurmond (May 28, 1999) (supporting § 3501). Moreover, the Department is able to make these representations only by drawing a peculiar distinction between *Miranda's* "core" procedures and other aspects of the *Miranda* doctrine. Thus, the Department's brief concedes that "federal law enforcement agencies have encountered difficulties with some of the extensions of *Miranda*," notably those cases forbidding any contact with a suspect once he has invoked his rights in any fashion. *See* Brief for the United States at 23, *Dickerson* (No. 99-5525). The brief seeks to put such cases to one side on grounds that they do not involve *Miranda* proper. But § 3501, of course, would cover such situations as well as those involving *Miranda's* core procedures.

n374 *See supra* notes 364-68 and accompanying text (noting that officers would continue to give *Miranda* warnings if § 3501 is upheld).

n375 *See Dickerson*, 166 F.3d at 693.

n376 A review of the record finds nothing from which a good voluntariness claim could be built. *See* Memorandum Opinion, United States v. Dickerson (E.D. Va. Aug. 4, 1997) (No. 97-159-A). Indeed, in reviewing the record, the Fourth Circuit found strong reason to believe that, contrary to the district court's findings, Dickerson had in fact been given his *Miranda* warnings. *Dickerson*, 166 F.3d at 676-80.

n377 *Dickerson*, 166 F.3d at 672 ("Without [Dickerson's] confession it is possible, if not probable, that he will be acquitted."). 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 seventeen banks in three different states, as well as an armored car.

n378 *See* United States v. Leong, 116 F.3d 1474, No. 96-4876, 1997 U.S. App. LEXIS 15480, at * 3 (4th Cir. June 26, 1997) (per curiam) (following officer's discovery of an illegal firearm, passengers in car asked about ownership; after "a few moments" driver asks friends to admit who owns gun, and, after officer says they are all going to be placed under arrest until he finds out, Leong admits it is his).

n379 Even the Department of Justice concedes that this problem occurs with some frequency. *See* Brief for the United States at 24 n.11, Dickerson v. United States, (U.S. Nov. 1, 1999) (No. 99-5525) (noting problems arising from officers detaining a suspect who might later be found to be "in custody"); *see also* Oregon v. Elstad, 470 U.S. 298, 309 (1985) (internal quotation omitted) ("The task of defining 'custody' is a slippery one, and policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever.").

n380 *See, e.g.*, OLP REPORT, *supra* note 58, at 122 (collecting "miscarriages of justice resulting from *Miranda* and related decisions"); United States v. Tyler, 164 F.3d 150 (3rd Cir. 1998), *cert. denied*, 119 S. Ct. 1480 (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 the grounds that the suspect was 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 the grounds that 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) (suppressing some statements under *Miranda* on grounds discussion during drive to booking after defendant asked what was going on constituted "interrogation"); Arizona v. Rodriguez, 921 P.2d 643 (Ariz. 1996) (reversing a death penalty sentence on the grounds that *Miranda* warnings not given; case awaiting retrial), discussed in *1999 Senate Hearings*, *supra* note 85 (statement of Richard Romley, Maricopa County Attorney); United States v. Ramsey, 992 F.2d 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) (reversing defendant's conviction for horribly abusing his two-year-old stepdaughter because confession admitted; second police officer who obtained Mirandized confession not aware that defendant declined to make statement to first officer); Commonwealth v. Zook, 553 A.2d 920 (Pa. 1989) (reversing death sentence on *Miranda* grounds); Commonwealth v. Bennett, 264 A.2d 706 (Pa. 1970) (overturning defendant's first degree murder conviction because non-Mirandized confession admitted; defendant acquitted on retrial); Commonwealth v. Singleton, 266 A.2d 753 (Pa. 1970) (holding that a police warning that any statement could be used "*for or* against" defendant deviated from *Miranda*; defendant's conviction for beating deaths reversed; defendant acquitted on retrial).

n381 *See* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 43-44 (1993).

n382 *See* Cassell, *supra* note 355 (discussing the social costs of empirical reassessment). For further discussion of this estimate, compare Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996), with Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U. L. REV. 1084 (1996). *See also* Paul G. Cassell, Miranda's *"Negligible" Effect On Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 327 (1997) (responding further to Schulhofer).

n383 *See* Paul G. Cassell & Brett S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 869 (1996) (reviewing statistics of incriminating statements and denials). For an interesting, though ultimately unpersuasive, argument that the Salt Lake County confession rate is actually higher, see George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 944-53 (1996), which is responded to in Cassell & Hayman, *supra*, at 871-76.

n384 *See generally* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).

n385 *See id.* at 1107-19 (discussing *Miranda* as causing the decline in clearance rates).

n386 *See 1999 Senate Hearings*, *supra* note 85, at 7-8 (statement of Gilbert G. Gallegos, President of the Grand Lodge, Fraternal Order of Police)

> 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.

n387 *See* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions-And from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 538-56 (1998) (developing this argument at length); *see also* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 534 n.44 (1999) (collecting sources advancing similar arguments); *cf.* Thomas, *supra* note 131 (identifying this as "truly a worst-case scenario which, if true, calls for abolition of *Miranda*," but not reaching a judgment on whether the scenario is actually occurring today).

n388 *See* Laurie Magid, *The* Miranda *Debate: Questions Past, Present, and Future*, HOUS. L. REV. (forthcoming 1999) ("Although one may dispute the precise figures reached in Professor Cassell's research, he does make a persuasive claim that the *Miranda* procedures exact a substantial cost on law enforcement.") (reviewing THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING (Richard A. Leo & George C. Thomas III eds., 1998)).

n389 *Cf.* George C. Thomas III, *An Assault on the Temple of* Miranda, 85 J. CRIM. L. & CRIMINOLOGY 807, 826 (1995) ("If *Miranda* is not generally effective, why should courts suppress confessions of guilty suspects just because the police failed to do what would likely not have made any difference?").

n390 Miranda v. Arizona, 384 U.S. 436, 467 (1966). For an interesting discussion of how Justice Brennan persuaded Chief Justice Warren to add this language into the opinion, see Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 122-25 (1998).

n391 *Miranda*, 384 U.S. at 524 (Harlan, J., dissenting).

n392 *Id.* at 545 (White, J., dissenting).

n393 OLP REPORT, *supra* note 58, at 99.

n394 GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 326 (1991).

n395 OLP REPORT, *supra* note 58, at 98.

n396 Cassell, *supra* note 355, at 493-96.

n397 *See* 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").

n398 *See* FBI Directive on Videotaping of Questioning of Suspects (1998).

n399 *See, e.g.*, JUDGE HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 237 (1996); Cassell, *supra* note 355, at 486-92; OLP REPORT, *supra* note 58, at 105-07.

n400 *See* WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY: CRIMINAL PROCEDURE AND CONVERGING CONSTITUTIONAL DOCTRINES (1967); RICHARD UVILLER, THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR 200-06 (1999); Amar & Lettow, *supra* note 218, at 908-09; Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 721-25 (1968).

n401 *See Notebook: Let's Go to the Videotape*, NEW REPUBLIC, Mar. 8, 1999, at 12 (applauding videotaping and concluding "the Fourth Circuit's [*Dickerson*] ruling could provide the Supreme Court the perfect opportunity to modernize *Miranda* . . .").

n402 Perhaps the Court could provide some suggestions as to what other reforms would survive its scrutiny, but coming (as they would have to) in the form of dicta, it could not provide much assurance to federal and state legislators considering other options.

n403 Miranda v. Arizona, 384 U.S. 436, 542-43 (1966) (White, J., dissenting).

n404 Davis v. United States, 512 U.S. 452, 465 (1994) (Scalia, J., concurring).

n405 *Id.*