



THE STATUTE THAT TIME FORGOT: 18 U.S.C. § 3501
AND THE OVERHAULING OF *MIRANDA*

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**THE STATUTE THAT TIME FORGOT:
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“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

Miranda has been criticized by conservative scholars and jurists for 33 years, but the most powerful attack unexpectedly appeared 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*,¹ concluding that *Miranda* no longer governs federal cases. Instead, a statute passed by Congress in 1968 — often called simply § 3501² — 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” 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.”³ As a result, the Fourth Circuit had “little difficulty” in finding that “section 3501, enacted at the invitation of the Supreme Court and pursuant to Congress’s unquestioned power to establish the rules of procedure and evidence in federal courts, is constitutional.”⁴ Applying the statute, the court refused to suppress voluntary statements made by Charles Dickerson inculcating him in a string of armed bank robberies, even though he had, possibly, not received his *Miranda* warnings until after the statements were made.⁵

The court’s opinion prompted considerable reaction from *Miranda*’s supporters across the country. Professor Yale Kamisar, perhaps the nation’s leading defender of *Miranda*, called the decision “stunning”⁶ and a “body blow” to the Warren Court’s ruling.⁷ Professor Stephen Schulhofer called it “the most surprising and ill-considered instance of ‘judicial activism’ in recent memory.”⁸ 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.”⁹ And the *Washington Post* agreed that the decision was “hair-raising.”¹⁰

¹ 166 F.3d 667 (4th Cir. 1999).

² Pub. L. 90-351, Title II, § 7-1(a), June 19, 1968, 82 Stat. 210 (codified at 18 U.S.C. § 3501).

³ 166 F.3d at 689 (*quoting* *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

⁴ 166 F.3d at 672.

⁵ *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* 166 F.3d at 676-80.

⁶ Yale Kamisar, *Confessions, Search and Seizure, and the Rehnquist Court*, 34 TULSA L.J. 465, 470 (1999) [forthcoming-citations to page proofs].

⁷ Yale Kamisar, *The Miranda Warning Takes a Body Blow*, L.A. TIMES, Feb. 17, 1999, at B7.

⁸ Stephen J. Schulhofer, *Miranda Now on the Endangered Species List*, NAT’L L.J., Mar. 1, 1999, at A22.

⁹ *Miranda Mischief*, N.Y. TIMES, Feb. 15, 1999, at A22.

¹⁰ *Overturing Miranda*, WASH. POST, Feb. 13, 1999, at A26.

Such negative reactions seem excessive, and their validity may soon be put to the test before the Supreme Court. Dickerson's attorney has filed a petition for certiorari this summer, arguing the statute should be struck down as unconstitutional.¹¹ As of this writing, it appears likely that the Court will agree to review the case. If so, the stage will be set for the Court's most closely-watched criminal procedure decision in recent memory.

This article contends 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 that 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, but rather of the Washington Legal Foundation, an *amicus curiae* in the case.¹² One would assume the Department would support a statute passed to assist federal prosecutors by admitting vital evidence in federal prosecutions. But, to the contrary, for the last two years the Department has prohibited its prosecutors from defending the statute in cases like *Dickerson* and has instead even asserted that the statute is unconstitutional. This maneuver did not find favor with the Fourth Circuit, which said that the action of the Department in "prohibit[ing] the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501 . . . [was] elevating politics over law"¹³

The Fourth Circuit was troubled by the Justice Department's position because, under our system of separated powers, it is the duty of the Executive Branch to "to take care that the Laws be faithfully executed."¹⁴ As a consequence of that constitutional obligation, the Department has always defended the constitutionality of Acts of Congress where "reasonable" arguments can be made on their behalf.¹⁵ Perhaps the most immediately pressing question about § 3501, therefore, is whether reasonable arguments can be made on its behalf. This article explores the Department's failure to defend § 3501, concluding that there is not even 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, indeed, the position of the Department of Justice for many years.

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 then turn to the various reasons that have been proffered by the

¹¹ Petition for Writ of Certiorari, *United States v. Dickerson*, No. Xxxx (July 30, 1999).

¹² Along with Paul Kamenar, I represented WLF in this action.

¹³ 166 F.3d at 672.

¹⁴ U.S. CONST. art. II, § 3.

¹⁵ See 5 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 25, 25-26 (Apr. 6, 1981).

Department and its supporters in the academy as grounds for refusing to defend the law. The article first turns to the claim that the refusal 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 that: "In this administration and in other administrations preceding it, both parties have reached the same conclusion [that the statute could not be defended.]"¹⁶ This is untrue. In fact, the well-settled policy of the Department was to defend the statute, a litigation posture that had even 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, apparently over the objections of 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 "underpinnings" that cannot be overridden by a mere Act of Congress.¹⁷ Part III explains why the Fourth Circuit in *Dickerson* correctly rejected this position and found § 3501 to be 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 but rather mere "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 that *Dickerson* found it unnecessary to address. 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"¹⁸ 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 such a reasonable alternative. Part III.C then briefly explains why upholding the constitutionality of the statute does not somehow "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.¹⁹ This argument wrongly diverts focus away from the cases at which § 3501 was targeted: those in which, as in *Dickerson*, dangerous criminals would be set free were *Miranda* applied. More generally, *Miranda*'s procedural requirements seriously harm public safety. Part IV explains why *Miranda*'s heavy toll on the this country's ability to prosecute serious crimes would be reduced if § 3501 were to be raised by the Department

¹⁶ Press Conference of Attorney General Janet Reno, Feb. 11, 1999.

¹⁷ See, e.g., Br. for the United States in Support of Partial Rehearing En Banc at, *United States v. Dickerson*, No. 97-4750 (4th Cir. Mar. 8, 1999) ("on the current state of the Supreme Court's *Miranda* jurisprudence, taken as a whole, this Court may not conclude that the *Miranda* rules lack a constitutional foundation").

¹⁸ 384 U.S. at 467 (emphasis added).

¹⁹ See *Confirmation of Deputy Attorney General Nominee Eric Holder: Hearings before the Sen. Comm. on the Judiciary*, 105th Cong., 1st Sess. 124 (June 13, 1997) (written response of Deputy Attorney General Designate Holder to question from Senator Thurmond) ("My experience has been that we have not had significant difficulty in getting the federal district court to admit voluntary confessions under *Miranda* and its progeny").

and applied by the courts.

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

Discussion of the *Miranda* rules conventionally starts with the Supreme Court's opinion, ignoring the backdrop to the decision. In part this is because *Miranda* broke with past precedents and constitutional traditions, as will be explained shortly.²⁰ In addition, historians and legal scholars pay attention, appropriately enough, to Chief Justice Earl Warren's ruling, but do so to the exclusion of the events that set it in motion. This 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. He is typically regarded as the central *dramatis personae* in the Supreme Court's most famous criminal law decision,²¹ not as a dangerous criminal who robbed and raped a number of women. This view is captured in the story, perhaps apocryphal, 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 somewhat fancifully described as a "seriously disturbed individual with pronounced sexual fantasies."²² The victims of this "disturbed" individual have not, to my knowledge, ever had their story told.²³

It is interesting to depart from the conventional approach and consider *Miranda* from a different perspective. 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.²⁴ Because it may be thought to be of some historical importance, Captain Cooley's recitation of the events leading up to the Supreme Court decisions follows here verbatim.²⁵

A. *Captain Cooley's First-Hand Account of the Interrogation of Ernest Miranda*

²⁰ See *infra* note 30 and accompanying text.

²¹ 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).

²² 384 U.S. at 457.

²³ I have argued that the interests of crime victims should be considered in our criminal justice system. See Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. __ (forthcoming symposium edition); see also Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5. In that vein, I attempted to contact the victim in the *Miranda* case about her reaction to the Supreme Court's ruling. I heard back through an intermediary that she had no interest in revisiting the past events.

²⁴ Capt. Carroll F. Cooley, "You Have the Right to Remain Silent . . .": *The Inside Story of Miranda v. Arizona* (unpublished manuscript on file with author). Apart from circulation in some police training materials in Arizona, the manuscript has not been distributed.

²⁵ I have added the footnotes to Capt. Carroll's text and extracted only the portion of his manuscript dealing with Miranda's interrogation. I appreciate Capt. Carroll's gracious permission to reproduce his work here.

Since the Court's 1966 decision requiring the *Miranda* warnings, much has been written on the case's judicial points; however, few of the details of the actual crimes and investigation are known, even by police officers and attorneys who work with the results of the decision. This is not an effort to defend or justify police actions, but rather to give a true account of what really happened, and perhaps shatter myths as to the abuses *Miranda* is alleged to have been subjected.

1. The Crime

Sandra Smith,²⁶ 18, a shy, naive, withdrawn girl, left the Paramount Theater, where she worked selling tickets, at 11:45 p.m. on March 2nd, 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 27 or 28 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 had worked 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 had 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 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 didn't see which way. Hysterical, she ran to the nearby home of the 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.

²⁶ Not her real name.

Detective Carroll F. Cooley, 27, a five-year veteran police officer in the Crimes Against Persons Detail, came to work on the morning of March 4th, 1963, a Monday. 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 25 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 her she would have a better chance of escaping injury, even death, if she didn't resist a rapist. She was unable to offer police much help.

The investigation continued, producing few results. The other employee who rode with Sandra on the bus was questioned, but had seen nothing suspicious. Sandra viewed photographs of known sex offenders but none looked like the suspect. She was shown several different makes and models of cars to see if she could identify the one used by the suspect. She could not. A week passed. No substantial leads or possible suspects were found. 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 caution was observed. She no longer walked home alone from the bus stop. Dave Henry,²⁷ a relative, waited to accompany her each night. On Saturday, March 9th, 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 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 wasn't an Oldsmobile, but rather a 1953 Packard, similar to one owned by a friend.

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 last three numbers. Cooley showed Dave a 1953 Packard and verified that this was the make and model car he had seen. The car was also photographed for use in a bulletin to be sent to all officers.

²⁷ Not his real name.

Detective Cooley asked the Motor Vehicle Department to pull their 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: Mexican, 23, 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 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. They didn't have his address, but they 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 13th, 1963, the detectives continued their investigation, stopping to check with the Phoenix Post Office on the slim chance that Miranda may 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 grey 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 wasn't under arrest. If he had decided not to go downtown with them, they could not have rightfully made him go involuntarily.

So far, the detectives had a man with access to a car that might have been the one seen under suspicious circumstances near the scene of the kidnaping — 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 added together, 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 didn't have to talk to them if he didn't want to.

Arriving at the Main Police Building, Miranda was taken to the Detective Bureau and seated 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 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 3rd, 1963, and that through the license number, Ernest's car had been identified as the one used by the man who had 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. His past record for assault with intent to commit rape was discussed. Cooley told Miranda he may be in need of psychiatric help, but that he knew Miranda was the perpetrator of several of these offenses (which wasn't true; he only suspected it). Miranda was adamant. He maintained he was innocent 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. Since he had made no admissions, he was 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, 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 in which Miranda was a suspect. Only two could be found on such short notice: Sandra Smith and a Betty McDermitt,²⁸ who had been robbed at knifepoint by a Mexican male on the night of November 27th, 1962. The suspect had tried to rape her and had taken eight dollars from her.

²⁸ Not her real name.

Sandra Smith and Betty McDermitt arrived at the station shortly before 11:30 A.M. when the line-up was held. Miranda had been told he could choose his position in the line by selecting one of the four large numbered cards that would be worn around their necks 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 wasn't 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 couldn't be positive.

The officers were right back where they started, 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. Ernest, 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 how he had been driving around Northeast Phoenix when he saw the woman walking alone down a dark street. He said he pulled up and stopped just ahead of her, and got 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 he wouldn't hurt her. He told how he had tied her ankles and wrists with a piece of rope and then driven 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 took her clothes off. She had begged him not to rape her, he said, telling him she had never had relations with a man before, but he didn't 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 27th, 1962 by a suspect who had also tried to rape her. Ernest went on to tell how he had forced his way into Betty McDermitt's car, put his hand over her mouth, and told her not to scream and she wouldn't be hurt. He said he drove her car into a nearby alley and stopped, intending to rape her, but she had talked him out of it so he had just taken her money.

Miranda was asked if he had 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 and admitted nothing. However, after being confronted 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 being the suspect. He said he had used the fingernail file to simulate a knife, but had been frightened away by a passing motorist before getting any money. Miranda was not charged 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 was given a standard form on which had been written Miranda's name, the names of the officers, and the date and time: March 13th, 1963, 1:30 P.M. The case — Rape D.R. #63-08380 — was entered, and the location, Interview Room #2, followed 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.”

The following statement was written in longhand by Ernest Miranda, and initialed by him at the beginning and end, and at one point at the beginning where he made an error:

“eam. ~~Picked~~ 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 following is then typed on the form:

“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. It covers only the one incident. He wasn’t asked to include the other crimes to which he confessed verbally, for several reasons.

First, the detectives main concern was their rape case. Since attempted rape couldn’t be established in the Betty McDermitt case, it would become the Robbery Detail’s responsibility. Also, they didn’t wish to risk jeopardizing Miranda’s successful prosecution by opening his written confession to attack because of the mention of other, unrelated crimes.

4. The Arrest

After completing the statement, Sandra Smith was brought into the room and Miranda was asked to state his name, and if he recognized the woman, who hadn’t been 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.

Betty McDermitt was then taken into the room, and the scene repeated. Miranda said he also recognized her, and even repeated some of the things she had told 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 confession Detective Cooley had obtained was admitted over objection, and Miranda was convicted and sentenced to 20 years in prison. The Arizona Supreme Court affirmed the conviction, concluding the confession was voluntary and Miranda was not entitled to counsel because he never asked for a lawyer.²⁹ 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.³⁰ Yet on June 13, 1966, the

²⁹ Arizona v. Miranda, 401 P.2d 721 (Ariz. 1965).

³⁰ See Br. for Petitioner at 2, Miranda v. Arizona, No. 759 (U.S. 1965) (listing only the 6th and 14th Amendments as the

Court handed down its landmark, 5-to-4 decision interpreting the Fifth Amendment in *Miranda v. Arizona*.³¹ The decision had a decidedly unusual non-judicial, 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.³²

The dramatic changes wrought by *Miranda* can be best understood by comparing the new rules to those in place before the decision. Before June 13, 1966, police questioning of suspects in custody was covered by the "voluntariness" doctrine.³³ Under the Fifth and Fourteenth Amendments to the Constitution, courts admitted a defendant's confession into evidence if it was voluntary, but excluded if it was involuntary. 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, but lesser pressures (or inducements) could also lead to a finding of involuntariness.³⁴ Courts also considered such factors as length of interrogation and types of questions asked in making the voluntariness determination.

The decision largely replaced this case-by-case voluntariness analysis with general procedural requirements governing the questioning by law enforcement officials of suspects in custody. The required warnings are familiar to anyone who has ever watched a police show on television:

"constitutional provisions involved"); see also John J. Flynn, *Panel Discussion on the Exclusionary Rule*, 61 F.R.D. 259, 278 (1972) (Miranda's Supreme Court lawyer explains that his brief focused entirely on the Sixth Amendment).

³¹ *Miranda v. Arizona*, 384 U.S. 435 (1966).

³² JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 173-74 (1993) (quoting *Miranda*); see also David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (*Miranda* "reads more like a legislative committee report with an accompanying statute").

³³ See generally GRANO, *supra* note 31, at 59-86.

³⁴ See Yale Kamisar, *What is an "Involuntary" Confession?: Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963) (classic summary of the doctrine); see also Welsh S. White, *What is an Involuntary Confession Confession Now?*, 50 RUTGERS L. REV. 2001 (updating Kamisar's analysis).

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.³⁵

While the *Miranda* warnings are the most famous part of the decision, even more important are additional “waiver” and other requirements that the Court imposed. After reading a suspect his rights, an officer must ask whether the suspect agrees to waive those rights. If the suspect refuses to waive — that is, declines to give his permission to be questioned — the police must stop questioning.³⁶ At any time during an interrogation, a suspect can halt the process by retracting his waiver or asking for a lawyer. From that point on, the police cannot even suggest that the suspect reconsider. All of these new rights were enforced by an exclusionary rule: the suppression of the suspect’s confession if police deviated from the requirements.³⁷ The Court, however, made clear that its approach was not the only acceptable one. “. . . [T]he Constitution does not require any specific code of procedure for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free,” the majority held, “to develop their own safeguards for the privilege, so long as they are fully as effective as those described above”³⁸ In disposing of *Miranda*’s case, the Court concluded that, because the officers questioning *Miranda* had not followed the (heretofore unannounced) rules, his conviction had to be overturned.

³⁵ See *Miranda*, 384 U.S. 467-74.

³⁶ See *id.* at 474-77.

³⁷ See *id.* at 478-79.

³⁸ *Id.* at 490.

C. The Congressional Response

The Court's ruling ignited a firestorm of controversy. Justice Harlan warned in his dissenting opinion that "[v]iewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances."³⁹ 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 . . ."⁴⁰ He also predicted that "[i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."⁴¹ Critics outside the Court also immediately predicted the requirements would put "handcuffs on the police"⁴² and prevent the prosecution of countless dangerous criminals.⁴³

The uproar over *Miranda* did not escape the notice of Congress. The Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures held hearings on these alarms in 1967, during which numerous Senators denounced the *Miranda* decision in no uncertain terms.⁴⁴ Various law enforcement witnesses also talked about the difficulties that the *Miranda* rules were causing in their efforts to apprehend criminals.⁴⁵

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

[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities. The traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored. . . . The committee is convinced . . . that the rigid and inflexible requirements of the majority opinion in the *Miranda*

³⁹ *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting).

⁴⁰ *Id.* at 531 (White, J., dissenting).

⁴¹ *Id.* at 542 (White, J., dissenting).

⁴² *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).

⁴³ *See id.* (Prof. Fred E. Inbau predicting that law enforcement officials would choose not to prosecute a number of cases because of *Miranda*).

⁴⁴ *See Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcom. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967) (hereinafter *Controlling Crime Hearings*).

⁴⁵ *See, e.g., id.* at 326 (statement of Quinn Tamm, Int'l Assoc. of Chiefs of Police).

case are unreasonable, unrealistic, and extremely harmful to law enforcement.⁴⁶

Senator McClellan, the principal sponsor of the measure, privately summarized the purpose of the bill more succinctly, calling it “my petition for rehearing” on *Miranda*.⁴⁷

The anti-*Miranda* legislation was included as Part of Title II of the Omnibus Crime Control and Safe Streets Act, a broad criminal justice reform bill that also included not only a provision on *Miranda*, but also legislation divesting the federal courts of jurisdiction to review state court decisions admitting confessions. This jurisdiction-stripping part of the package was eliminated; but other legislation was left in to replace *Miranda*, as well as to overrule the *McNabb-Mallory* line of cases excluding confessions taken more than six hours after a suspect was taken into custody⁴⁸ and the *United States v. Wade* case creating a right to counsel during police line-ups.⁴⁹ After debates in the Senate and the House, the legislation was passed by a strong bipartisan majority.⁵⁰

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

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

(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

⁴⁶ S. REP. NO. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS. 2112, 2123-38.

⁴⁷ FRED P. GRAHAM, THE SELF-INFLICTED WOUND 320, 329 (1970).

⁴⁸ *See* 18 U.S.C. § 3501(c).

⁴⁹ *See* 18 U.S.C. § 3502.

⁵⁰ *See* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: THE LAW OF PRE-TRIAL INTERROGATION 67 (1986) (hereinafter OLP REPORT), *reprinted in* 22 MICH. J.L. REFORM 512-21 (1989).

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,⁵¹ a voluntariness determination as the basis for admitting confessions in federal courts. The question then became how would the Justice Department enforce this Act of Congress that challenged the Supreme Court's decision.

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 Reno, for example, recently asserted at a press conference a few days after the Fourth Circuit's decision in *Dickerson* that "[i]n this administration and in other administrations preceding it, both parties have reached the same conclusion [*i.e.*, that the statute could not be enforced]."⁵² Her claim was echoed by prominent legal academics such as Yale Kamisar,⁵³ Laurence Tribe,⁵⁴ and Stephen Schulhofer⁵⁵ and repeated in criminal procedure casebooks, the popular press, and elsewhere.⁵⁶ With all due respect to the impressive support for the received wisdom, it is demonstrably false. This is not just my view, but the view of others who have carefully studied the issue. For example, respected veteran Supreme Court reporter Lyle Denniston recently wrote a lengthy newspaper article that reached the conclusion that "Reno's perception . . . that this has always been the federal government's view is mistaken."⁵⁷

These misperceptions about § 3501 may have arisen because no comprehensive history of the statute

⁵¹ See *infra* note 264 (explaining how § 3501 extends beyond the pre-*Miranda* voluntariness test).

⁵² Press Conference of Attorney General Janet Reno, Feb. 11, 1999. The transcript is available in www.usdoj.gov/ag/speeches/1999/feb1199.htm.

⁵³ Kamisar, *supra* note 7, at B7 (describing § 3501 as a "31-year-old statute which ha[s] never been enforced").

⁵⁴ 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").

⁵⁵ Schulhofer, *supra* note 8, at A22 ("the administrations of seven presidents, from Lyndon Johnson through Bill Clinton, all treated 3501 as an unenforceable dead letter").

⁵⁶ See, e.g., 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"); *Miranda Mischief*, N.Y. TIMES, Feb. 15, 1999, at A22 (every Republican and Democratic Attorney General going back to John Mitchell has declined to enforce that law because of its dubious constitutionality"); see generally Denniston, *supra* note 56, at C5 (nothing that perception the statute has never been enforced is "widely shared"); *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).

⁵⁷ Lyle Denniston, *The Right to Remain Silent? Law Professor, Justice of Supreme Court Aim to Replace Miranda*, BALTIMORE SUN, Feb. 28, 1999, at C1, C5.

has been written.⁵⁸ The fact of the matter is that, with only one brief exception, *no* Administration, other than the current one, has ever expressed the view that the statute is unconstitutional. 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 will demonstrate 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 law⁵⁹ 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.⁶⁰

The Department of Justice would later characterize this action as “disingenuous[],”⁶¹ and it is hard to argue with this harsh assessment. The proposed legislation was not in any way ambiguous, as everyone involved in its drafting was well aware of both its intent and its basic effect.⁶² In any event, the result of President Johnson's statements was that the law was ignored in the first few months after it was signed into the law.⁶³

This position proved to be very short-lived. During the 1968 Presidential campaign, then-candidate Richard Nixon attacked the Warren Court's criminal procedure jurisprudence in general and *Miranda* in particular. Nixon explained that *Miranda* “had the effect of seriously ham stringing [sic] the peace forces in our society and strengthening the criminal forces.”⁶⁴

⁵⁸ A somewhat dated treatment is found in OLP Report, *supra* note 49, at 64-74.

⁵⁹ PUB. L. NO. 90-351, 82 STAT. 197 (codified in various section of titles 5, 18, 28, 42 and 47 U.S.C.).

⁶⁰ 4 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 983 (June 24, 1968).

⁶¹ OLP REPORT, *supra* note 49, at 72.

⁶² See *Controlling Crime Hearings*, *supra* note 43, at 72 (letter of Attorney General Ramsey Clark noting conflict between legislation and *Miranda*; bill would be constitutional if *Miranda*'s requirements were “read into” it or added as a “constitutional gloss,” but if this were done it would be superfluous); see also S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News. 2112, 2210 (discussing § 3501's “repeal of *Miranda*”).

⁶³ See N.Y. TIMES, July 28, 1969, at 22.

⁶⁴ 114 CONG. REC. 12,936, 12,937 (1968) (Mr. Mundt reading into the record Richard M. Nixon, *Toward Freedom from Fear* (1968)); see also LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 248 (1983) (citing Nixon campaign speeches attacking *Miranda*).

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

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

The determination of Congress that an inflexible exclusionary rule is unnecessary is within its constitutional power.⁶⁵

In explaining this policy, Attorney General Mitchell testified before the House Select Committee on Crime that “[i]t 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.”⁶⁶

Following this approach, federal prosecutors raised § 3501 in federal courts around the country in an effort to secure a favorable ruling on it. This litigation effort produced a number of decisions in which courts referenced the statute, but found it unnecessary to reach the question of whether it actually replaced the *Miranda* procedures, usually because the federal agents had followed *Miranda*.⁶⁷

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*,⁶⁸ the Tenth Circuit affirmed a district court's decision to apply the provisions of § 3501 rather than *Miranda*. The Tenth Circuit concluded that the Supreme Court's decision in *Michigan v. Tucker*,⁶⁹ “although not involving the provisions of section 3501, did, in effect, adopt and uphold the constitutionality of the provisions thereof.”⁷⁰ The Tenth Circuit explained that *Tucker* authorized the use of a statement taken outside of *Miranda* to impeach a defendant's testimony, relying on language in *Miranda* that the “suggested” safeguards were not intended to “create a constitutional straitjacket.”⁷¹ The Tenth Circuit concluded by specifically stating its holding: “We thus hold that the trial court

⁶⁵ Memorandum from Will Wilson, Asst. A.G., Criminal Division, to United States Attorneys (June 11, 1969), *reprinted in* 115 CONG. REC. 23236 (Aug. 11, 1969)

⁶⁶ *The Improvement and Reform of Law Enforcement and Criminal Justice in the United States: Hearings Before the House Select Comm. on Crime*, 91st Cong, 1st Sess. 250 (1969) (statement of Attorney General John N. Mitchell).

⁶⁷ See, e.g., *United State v. Vigo*, 487 F.2d 295, 299 (2d Cir. 1973); *United States v. Marrero*, 450 F.2d 373, 379 (2d Cir. 1971) (Friendly, J., concurring); *Ailsworth v. United States*, 448 F.2d 439, 441 (9th Cir. 1971); *United States v. Lami a*, 429 F.3d 373, 377 (2d Cir. 1970). See generally OLP REPORT, *supra* note 49, 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).

⁶⁸ 510 F.2d 1129 (10th Cir. 1975).

⁶⁹ 417 U.S. 433 (1974).

⁷⁰ 510 F.2d at 1137.

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

did not err in applying the guidelines of section 3501 in determining the issue of the voluntariness of Crocker's confession."⁷²

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 appears to have shifted, almost by accident, into a posture of litigating § 3501 only in selected "test cases" where the argument could be most successfully advanced. At first after *Crocker*, § 3501 appears to have simply slipped the collective consciousness of federal prosecutors. The argument that the statute supercedes *Miranda* does not appear to have been pressed in the courts from about 1975 to about 1986. This was not the result of any new policy from the Department. To the contrary, it appears the Department's 1969 directive supporting the statute remained in effect through the Ford, Carter, Reagan, and Bush Administrations. The directive was clearly in effect as of 1974⁷³ and, writing later in 1986, an exhaustive Department of Justice report encouraging further use of the statute reported no change in policy.⁷⁴

The 1986 Report was prepared by the Department's Office of Legal Policy. In an extended and scholarly analysis, the Report 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.⁷⁵

Following on the heels of this comprehensive study, the Attorney General approved this view of the constitutionality of the statute and instructed the litigating divisions to seek out the best case in which to argue that the statute replaced *Miranda*.⁷⁶ From 1986 to 1988, I served as an Associate Deputy Attorney General in the Department of Justice. One of my specifically assigned responsibilities was to locate a good "test case"

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

⁷³ See Gandara, *supra* note 66, at 312 (letter from Dept. of Justice dated May 15, 1974, stating the policies set forth in the 1969 memorandum "are still considered current and applicable").

⁷⁴ See OLP REPORT, *supra* note 49, at 73-74.

⁷⁵ *Id.* at 103.

⁷⁶ 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., 1st Sess. (May 13, 1999) (statement of former Asst. A.G. Stephen Markman) (hereinafter *1999 Sen. Hearings*).

for the argument. The theory was that, rather than test § 3501 in random cases, it made sense to identify cases in which the facts made a favorable ruling for the statute more likely. Department lawyers did identify several cases in which it appeared that a good § 3501 argument could be made. This resulted in the filing of at least one brief seeking to invoke the statute. In *United States v. Goudreau*,⁷⁷ 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*).”⁷⁸ This argument was specifically approved both by the Office of the Solicitor General and the Assistant Attorney General for the Civil Rights Division. In that case, the Eighth Circuit ultimately issued an opinion that did not cite § 3501 and that found that federal agents had complied with the requirements of *Miranda*.⁷⁹

Again during the Bush Administration, the “test case” approach of litigating § 3501 was followed. 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.”⁸⁰ Attorney General Barr also 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.⁸¹ Although no such case was found at the Departmental level in Washington, D.C., some federal prosecutors around the country presented the § 3501 argument in cases in which the facts appeared to suggest a favorable ruling.⁸² No federal 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 the election of President Clinton and the appointment of his political appointees to policy making positions in the Department.

⁷⁷ No. 87-5403ND (8th Cir. 1987).

⁷⁸ Brief for the United States, *United States v. Goudreau*, No. 87-5403ND (8th Cir. 1987). 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* 47 (1991). Fried may have a misimpression 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 A.G. Edwin Meese III to Sen. Strom Thurmond (May 12, 1999) (discussing meeting described in Charles Fried’s book and noting filing of *Goudreau* brief after that meeting).

⁷⁹ 854 F.2d 1097 (8th Cir. 1988).

⁸⁰ Letter from William P. Barr to Sen. Strom Thurmond (July 22, 1999).

⁸¹ *Id.*

⁸² See Telephone Interview with former Asst. A.G. Stephen Markman (May 7, 1999).

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 *Cheely v. United States*.⁸³ Defendant Cheely, who had been convicted of murder, then arranged for a mail bomb to be sent 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*.⁸⁴

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, a recommendation that was apparently accepted without any issue on the question. The memo states: "As I understand it, we have made arguments based on Section 3501 to courts of appeals in the past."⁸⁵

The career attorneys in the Department of Justice authorized the appeal on this basis, but before the brief could be finalized political appointees arrived in town. By the time the Department's brief was actually filed in the Ninth Circuit, it contained what might be called, charitably, an uninspired argument supporting the statute. The Department's argument on § 3501, barely two double-spaced pages long (in a brief that appears to have been well below applicable page limits), off-handedly mentions the statute and cites no authority more recent than 1975.⁸⁶ The § 3501 portion of the Department's brief appears to be so far below the normal standards of appellate advocacy that one wonders whether it was written by unsympathetic political officials rather than the Department's experienced career attorneys. With this question in mind, it is informative to learn that the brief was, in contrast to earlier and later pleadings, not signed by the Department's accomplished career attorney on the matter.

The Department's less-than-competent defense of the statute continued following a predictable (given the briefing) adverse ruling on § 3501 from the Ninth Circuit. The Ninth Circuit, citing *Edwards v. Arizona*⁸⁶ (a leading 1981 Supreme Court decision that the Department's brief had not attempted to distinguish),

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

⁸⁴ *United States v. Cheely*, 814 F. Supp. 1430 (D. Alaska 1992).

⁸⁵ Solicitor General Memorandum, March 12, 1993 (*citing* other Dep't of Justice document).

⁸⁶ Brief of the United States at 20-22, *U.S. v. Cheely*, No. 92-30504 (9th Cir.) (brief filed Mar. 30, 1993).

⁸⁶ 451 U.S. 477 (1981) (holding that *Miranda*'s prophylactic rules prohibit reapproaching a suspect after a request for a lawyer).

concluded that § 3501 could not “trump” *Edwards*.⁸⁵

After the ruling, the Department did not petition for rehearing. In an extraordinary move, however, the Ninth Circuit then *sua sponte* entered an order directing the parties to address the question whether the case merited rehearing *en banc*.⁸⁶ 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.”⁸⁷ Its position is deceptive in several respects. To begin with, it is hard to understand how a decision regarding a federal statute overruling the *Miranda* decision in all federal cases could lack “systemic importance.”⁸⁸ Moreover, it is curious that the Department did not apprise the Ninth Circuit of the potential conflicts the *Cheely* decision created, both within and without the circuit.⁸⁹ Finally, the memorandum contains inadequate discussion of the single case *Cheely* cited in support of its conclusion that § 3501 did not “trump” the *Miranda* rules: *Desire v. Attorney General of California*.⁹⁰ *Desire* does not even 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, unsurprisingly, the signature of the Department’s career prosecutor does not appear on this memorandum as well.

This was not the end of the Department’s efforts to dodge the question of § 3501 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*. It is necessary here, to keep matters in chronological order, to shift from the Ninth Circuit to the United States Supreme Court. There, too, the Clinton Justice Department appeared to be undermining the statute.

⁸⁵ 21 F.3d at 923. The brevity of the Ninth Circuit’s ruling leave it unclear precisely what the Ninth Circuit 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 *Edwards* situation at hand?

⁸⁶ Order, *U.S. v. Cheely*, No. 92-30257 (9th Cir. May 25, 1994).

⁸⁷ Memorandum of the United States Relating to the Question Whether to Entertain Rehearing *En Banc* at 9, *U.S. v. Cheely*, No. 92-30257 (1994).

⁸⁸ Indeed, just one week after the Department filed its rehearing memorandum, the United States Supreme Court in *Davis* would note the importance of the § 3501 issue, with the majority 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* note 97 and accompanying text.

⁸⁹ Within the Ninth Circuit, compare *Cheely*, 21 F.3d at 923, with, e.g., *United States v. Cluchette*, 465 F.2d 749, 754 (9th Cir. 1972) (seemingly viewing § 3501 as establishing the controlling factors for admissibility of confessions); *Cooper v. Dupnik*, 963 F.2d 1220, 1256-57 (9th Cir. 1992) (*en banc*) (Leavy, J., dissenting) (pointing out, without direct response from the majority, that § 3501 establishes the standards for admissibility of confessions in federal cases); *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* with *United States v. Crocker*, 510 F.2d 1129 (10th Cir. 1975).

⁹⁰ 969 F.2d 802, 805 (9th Cir. 1992).

In 1993, the Supreme Court granted certiorari in *Davis v. United States*,⁹¹ a federal court martial case involving Davis' attempt to suppress an incriminating statement made after an ambiguous request for counsel. There was no claim that Davis' statement was involuntary, only that the "prophylactic" rules of *Miranda* somehow required the statement implicating Davis in a murder be suppressed.

The Washington Legal Foundation filed an *amicus* brief in support of the United States, arguing that § 3501 required the admission of Davis' voluntarily-made incriminating statements.⁹² A few days later that the brief of the Solicitor General affirmatively and gratuitously undermined WLF's attempt to support the United States. The Solicitor General's brief dropped a footnote arguing that military courts-martial are not "criminal prosecutions" subject to § 3501.⁹³

Even before the case was argued, this peculiar interpretation of the statute (which would apparently extend *greater* protection to suspected criminals in military prosecutions) raised a suspicion that the Solicitor General's Office was looking for a way to duck the issue without forthrightly explaining that it disliked the statute. In oral argument before the Court, the suspicions were publicly confirmed. The Court repeatedly asked Assistant to the Solicitor General Richard H. Seaman about the effect of § 3501. He gave generally unresponsive answers and finally, after being pressured by several questions, stated, "We don't take a position on that issue."⁹⁴

This refusal to address the implications of the statute in response to specific questions from the Court did not go unnoticed. Justice O'Connor's majority opinion indicated an inability to discuss the issue because of the Department's failure to do so, 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,'⁹⁵ and we therefore decline the invitation of some amici to consider it [citing Brief of WLF]. Although we will consider arguments raised only in an amicus brief, . . . we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on

⁹¹ *Davis v. U.S.*, No. 92-1949.

⁹² Brief *Amicus Curiae* of the Washington Legal Foundation, *Davis v. U.S.*, No. 92-1949 (1994). Paul Kamenar and I represented the Foundation.

⁹³ Brief of the United States at 18 n.13, *Davis v. U.S.*, No. 92-1949 (1994).

⁹⁴ Official Transcript of Oral Argument at 44, *Davis v. U.S.*, No. 92-1949 (1994); *see also id.* at 47 ("Again, we don't take a position in this case [on § 3501]").

⁹⁵ Justice O'Connor's opinion here was quoting from *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994), a case decided that same term about the six-hour "safe harbor" provision for police interrogation contained in 18 U.S.C. § 3501(c). It is interesting that the Department of Justice vigorously defended this 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. Br. for the U.S. at *passim*, *United States v. Alvarez-Sanchez*, No. 92-1812, 511 U.S. 350 (1994). At no point did the Department of Justice tell the Supreme Court that § 3501(a) was unconstitutional; nor did the Department address any of the complex severability issues that would arise if other parts of the statute were unconstitutional. The Department had also urged the Court to admit a statement pursuant to § 3501 in another case, albeit not over a constitutional objection from a defendant. *See Br. for the United States, United States v. Jacobs*, No. 76-1193, *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978).

which the Department of Justice expressly declines to take a position.”⁹⁶ Justice Scalia, in a concurring opinion in the case, was even more specific, noting the Department’s bizarre behavior:

The United States’ repeated refusal to invoke § 3501, combined with the courts’ traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of “*Miranda*” issues that might be entirely irrelevant under federal law Worse still, it may have produced — during an era of intense national concern about the problem of run-away crime — the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. *There is no excuse for this.*⁹⁷

The story of § 3501 can now return to the Ninth Circuit, where the Department’s career prosecutor handling the *Cheely* case read Justice Scalia’s favorable remarks about § 3501. He then promptly sent a letter to the Ninth Circuit apprising them of this decision and explaining briefly how it applied to the issues at hand.⁹⁸ Later that same day, political appointees in the Department of Justice learned of this letter. This prompted a telephone call, apparently from Solicitor General Drew Days himself, to the clerk of the court for the Ninth Circuit. General Days then sent a letter from the Solicitor General withdrawing the earlier letter from the career prosecutor⁹⁹ and replacing it with a new letter that blandly mentioned that *Davis* might have some relevance to the Department’s pending memorandum.¹⁰⁰

Apparently not enlightened by this letter, the Ninth Circuit then ordered briefing by the parties on whether *Davis* affected its earlier ruling.¹⁰¹ This led the Department to file a “Supplemental Memorandum” concerning *Davis*.¹⁰² Curiously, the memorandum’s argument section fails to even argue the applicability of § 3501, despite the obvious implications of the discussions of the statute in *Davis*.

⁹⁶ See *Davis v. U.S.*, 512 U.S. 452, 457 n.* (1994). The Court had also briefly raised § 3501 in oral argument in a case the previous Term, *United States v. Green*, 592 A.2d 985 (D.C. App. 1991), *cert. granted*, 504 U.S. 908 (1992). The Court, however, never published an opinion in the case, because Green died in prison. See 507 U.S. 545 (1993) (vacating order granting cert).

⁹⁷ 512 U.S. at 465 (Scalia, J., concurring) (emphasis added).

⁹⁸ Letter from Mark H. Bonner to Cathy Catterson, Clerk, United States Court of Appeals for the Ninth Circuit (June 29, 1994).

⁹⁹ Letter from Drew S. Days, III, Solicitor General to Cathy Catterson, Clerk, United States Court of Appeals for the Ninth Circuit (June 29, 1994) (referring to “our telephone conversation today”).

¹⁰⁰ Letter from Drew S. Days, III, Solicitor General to Cathy Catterson, Clerk, United States Court of Appeals for the Ninth Circuit (June 29, 1994) (citing *Davis* and noting “[t]he decision in *Davis* related to Point 3” of the government’s brief). I am indebted to Solicitor General Days for providing me copies of this letter and the letter referred to in the preceding footnote.

¹⁰¹ Order, *U.S. v. Cheely*, No. 92-30257 (9th Cir. Aug. 9, 1994) (directing parties to file briefs “on the issue of suppression in light of the Supreme Court’s decision in *Davis v. U.S.*”).

¹⁰² Supplemental Memorandum of the United States Relating to the Question Whether Appellee Cheely Waived His Right to Counsel, *U.S. v. Cheely*, No. 92-30257 (9th Cir. 1994).

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

2. The Department's Commitment to Raise § 3501 in an "Appropriate" Case.

After the Department's curious machinations in *Cheely* and *Davis*, there were those of us who surmised that the Justice Department's had decided to reverse its long-standing policy supporting § 3501. Late in 1995, I raised these concerns in testimony before the Senate Judiciary Committee.¹⁰³ 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 there was some decision 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 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.¹⁰⁴

The position taken by the Solicitor General was the same as that taken by other high-ranking Departmental representatives at this time. For example, in response to a written question from Senator Hatch in an oversight hearing in 1995, Attorney General Reno stated: "The Department of Justice does not have a policy that would preclude it from defending the constitutional validity of Section 3501 in an appropriate case."¹⁰⁵ 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."¹⁰⁶ In a 1997 oversight hearing, Attorney General Reno testified "I'd do it [raise the statute] if it's right in an appropriate case."¹⁰⁷ United States Attorney Eric Holder, when his nomination to

¹⁰³ See *Solicitor General Oversight: Hearing Before the Sen. Comm. on the Judiciary*, 104th Cong., 1st Sess. 72-80 (1995) (statement of Prof. Paul G. Cassell).

¹⁰⁴ *Id.* at 31, 33; see also *id.* at 42 (answer to question from Senator Biden) ("with respect to 3501, as I indicated earlier, there is no Department policy against using 3501 in an appropriate case).

¹⁰⁵ The Administration of Justice and the Enforcement of Laws, Hearings Before the Sen. Judiciary Committee, 104th Cong., 1st Sess. 91 (June 27, 1995) (written answer of Attorney General Reno to question of Senator Hatch).

¹⁰⁶ *Id.* (citing *United States v. Cheely*, 21 F.3d 914, 923 (9th Cir. 1994)).

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.”¹⁰⁸

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

The “appropriate circumstance” for raising § 3501 would turn out be elusive for the Clinton Administration. Indeed, in the next case presenting the issue — *United States v. Sullivan*¹⁰⁹ — political appointees 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 Robert Sullivan, a felon. 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. 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.¹¹⁰

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, in any event, even if Sullivan had been custody, the statement should be admitted because of § 3501’s replacement of the *Miranda* rules.¹¹¹

Three weeks later, the Acting Solicitor General, Walter Dellinger, submitted a letter and accompanying motion to the Fourth Circuit Court, seeking to file a new government brief — a brief that simply omitted the § 3501 argument.¹¹² 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. § 3501.¹¹³ A few days after that, the Fourth Circuit granted the government’s motion to file the new, redacted brief.¹¹⁴

¹⁰⁷ *Department of Justice Oversight: Hearings Before the Sen. Comm. on the Judiciary*, 105th Cong., 1st Sess. 89-90 (April 30, 1997).

¹⁰⁸ *Confirmation of Deputy Attorney General Nominee Eric Holder: Hearings before the Sen. Comm. on the Judiciary*, 105th Cong., 1st Sess. 124 (June 13, 1997) (written response of Deputy Attorney General Designate Holder to question from Senator Thurmond).

¹⁰⁹ 138 F.3d 126 (4th Cir. 1998).

¹¹⁰ *See United States v. Sullivan*, 948 F. Supp. 549, 558 (E.D. Va. 1996).

¹¹¹ Brief for the United States at 18, *United States v. Sullivan*, No. 97-4017 (4th Cir. Mar. 5, 1997).

¹¹² Letter from Walter Dellinger, Acting Solicitor General to Patricia S. Connor, Clerk, U.S. Court of Appeals for the Fourth Circuit, Mar. 26, 1997; Motion to Substitute Redacted Br. for the U.S., *United States v. Sullivan*, No. 97-4017 (4th Cir. Mar. 26, 1997).

¹¹³ Br. for Appellee, *United States v. Sullivan*, No. 97-4017 (4th Cir. Mar. 31, 1997).

¹¹⁴ Order Granting Motion to Substitute Redacted Br. for the U.S., *United States v. Sullivan*, No. 97-4017 (4th Cir. Apr. 3,

The Washington Legal Foundation learned of the decision and thought § 3501 should be brought to the court's attention. On June 26, 1997, WLF filed a motion to submit an amicus brief in the *Sullivan* case on behalf of WLF and four members of the Senate Judiciary Committee — Senators Jeff Sessions, Jon Kyl, John Ashcroft, and Strom Thurmond.¹¹⁵ WLF simply asked the court to accept for refiling the arguments the career prosecutors had previously submitted on behalf of the statute.

In support, WLF explained why the Court should reach the issue of the applicability of § 3501, developing arguments that the statute was binding on the court even when not raised by the parties.¹¹⁶ WLF also explained that the Department's decision to file a new brief not discussing § 3501 also raised serious issues of professional responsibility. The Virginia Code of Professional Responsibility, for example, indicates that courts expect "pertinent law [will be] presented by the lawyers in the cause."¹¹⁷ 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."¹¹⁸ A duty of candor should have

1997).

¹¹⁵ Paul Kamenar and I represented WLF and the four senators.

¹¹⁶ 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 press to force the Court to decide the meaning of a statute that had been repealed. "The contrary conclusion," the Court explained, "would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory." *Id.* at 447, cited in *Davis v. United States*, 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 *Dept. of Justice Oversight: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (Apr. 30, 1997) (remarks of Sen. 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 (providing that "in any [federal] criminal prosecution" a confession "shall be admissible in evidence") (emphasis added); see also *Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (§ 3501 "is a provision of law directed to the courts") (emphasis in original).

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 being raised by the parties. See *United States v. Dickerson*, 166 F.3d 667, 681-83 (4th Cir. 1999); Eric D. Miller, Comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 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*, 25 & n.67 (manuscript currently circulating for publication) (agreeing that the Supreme Court should review the issue).

¹¹⁷ Va. Code Prof. Resp., Ethical Consideration 7-20.

¹¹⁸ *Id.*

compelled the Department of Justice to make the Court aware of this controlling “legal authority.”¹¹⁹

The Fourth Circuit granted the motion of WLF and the four senators to file the brief.¹²⁰ But ultimately the court’s ruling gave it no occasion to reach the § 3501 issue. The Court reversed the district court’s decision that Sullivan had been in custody; the police officer, accordingly, was not required to give *Miranda* warnings. The court dropped a footnote concluding that the § 3501 issue was “moot” in light of this disposition.”¹²¹

While the *Sullivan* case shed little light on § 3501, *United States v. Leong*¹²² was more illuminating. While WLF’s § 3501 argument was pending in *Sullivan*, 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. 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 making the prosecution of Leong impossible. The government appealed, arguing the 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.”¹²³

The Washington Legal Foundation then learned of the case and filed a motion suggesting the appropriateness of a *sua sponte* rehearing to examine the applicability of § 3501.¹²⁴ In its motion, WLF explained that the parties had failed to apprise the court of potentially relevant legal authority, specifically 18 U.S.C. § 3501. In its accompanying brief, WLF argued the issue was one of exceptional importance that should be considered by the full Fourth Circuit to avoid the escape from justice of a presumptively dangerous felon in the face of a federal statute to the contrary.¹²⁵

Astonishingly, five days after WLF’s filing — before the Fourth’s Circuit had an opportunity to rule on WLF’s motion and even before the Fourth Circuit’s mandate had issued returning the case to the district court

¹¹⁹ Cf. *Virginia v. Riley*, 106 F.3d 559, 565 (4th Cir. 1997) (en banc) (criticizing the Department for, “on virtually every occasion when it recite[d] the relevant statute’s requirements,” “intentional[ly] omit[ting] . . . three manifestly relevant words” the statute contained which the Department apparently did not care for).

¹²⁰ Order, *United States v. Sullivan*, No. 97-4017 (Sept. 10, 1997).

¹²¹ *United States v. Sullivan*, 138 F.3d 126, 134 n.* (4th Cir. 1998).

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

¹²³ 1997 WL 3512414 at *2-3.

¹²⁴ Motion of the Washington Legal Foundation and Safe Streets Coalition to File as Amici Curiae A Suggestion of Appropriateness of *Sua Sponte* Rehearing and Rehearing En Banc, *United States v. Leong*, 96-4876 (July 9, 1997). Paul Kamenar and I represented WLF.

¹²⁵ Br. of Amici Curiae WLF and Safe Streets Coalition Suggesting the Appropriateness of a *Sua Sponte* Rehearing and Rehearing En Banc at 8, *United State v. Leong*, 96-4876 (4th Cir. July 9, 1997).

— the Department of Justice moved in the district court to dismiss the indictment against Leong, and a dismissal order was entered on July 16, 1997.¹²⁶ This appeared to be a brazen maneuver by the Department to simply avoid the § 3501 issue by rendering the case moot, in spite of any jeopardy to public safety this might pose. The Department’s ploy in the district court, however, turned out to be without legal effect on the Fourth Circuit, as the Court of Appeals still retained jurisdiction over the case.¹²⁷

On July 16, 1997, the Fourth Circuit issued an order directing the Department of Justice and counsel for Leong “to submit supplemental briefs addressing the effect of 18 U.S.C.A. § 3501 on the admissibility of Leong’s confession, including the effect of the statute on *Miranda v. Arizona* . . . and any constitutional issues arising therefrom.”¹²⁸ This order seemed to present an “appropriate” case for the Department of Justice to defend the statute, particularly since the Fourth Circuit had asked specifically for the Department’s views. The Chairman and five members of the Senate Judiciary Committee certainly expected the Department to do this. On August 28, 1997, the six Senators wrote a careful letter to Attorney General Reno carefully analyzing the legal issues and strongly urging her to defend the law:

We believe that Section 3501 is constitutional. While the Supreme Court has not passed on this question directly, we believe that the Court would uphold the statute 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.¹²⁹

The Senators also recalled the repeated assurances they had received from the Department that it would defend the statute in an “appropriate case.” The Senators recounted, for example, Solicitor General Days’ testimony about the decision of the Department not to pursue § 3501 further in the *Cheely* case,¹³⁰ 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.’”¹³¹

In spite of its prior representations to Congress, the Justice Department filed a brief in *Leong* actually joining the defendant in arguing the statute was unconstitutional. The Department’s brief advanced two claims.

¹²⁶ See Supp. B Supp. Br. for the United States at 23, *United States v. Leong*, No. 96-4876 (4th Cir. Aug. 29, 1997).

¹²⁷ The Fourth Circuit simply ignored this action, consistent with established precedent. See, e.g., *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996).

¹²⁸ Order, *United States v. Leong*, No. 96-272 (4th Cir. July 16, 1997).

¹²⁹ Letter from Senators Orrin Hatch, Strom Thurmond, Fred Thompson, Jon Kyl, John Ashcroft, and Jeff Sessions to Attorney General Janet Reno at 3, 5 (Aug. 28, 1997).

¹³⁰ See *supra* note 104 and accompanying text.

¹³¹ Letter from Senators Orrin Hatch *et al.*, *supra* note 129, at 4-5 (quoting testimony of Solicitor General Drew Days).

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.¹³² Second, the Department argued that on the merits, the statute was unconstitutional, at least in the lower courts, because *Miranda* created constitutional rights.¹³³ In the Supreme Court, however, things might be different: “Should the issue of § 3501’s validity . . . be presented to the Supreme Court . . . the same considerations would not control, since the Supreme Court (unlike the lower courts) is free to reconsider its prior decisions, and the Department of Justice is free to urge it to do so.”¹³⁴ Shortly thereafter, the Attorney General sent, for the first time, a notice to Congress that she would not defend § 3501 in the lower courts.¹³⁵

The Department’s argument was joined, in a curious (and, some might say, unholy) alliance, by defendant and convicted felon Tony Leong and the National Association of Criminal Defense Lawyers. WLF then filed a reply to all of this, explaining why § 3501 was a valid exercise of Congressional power to modify prophylactic, evidentiary rules created by the Supreme Court.¹³⁶

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

The *Leong* decision seemed to set the stage for a successful defense of § 3501, if only a case could be found in the Fourth Circuit in which the statute had been raised not on appeal but in the trial court. The Department, however, took pains to make sure this would not happen. On November 6, 1997, John C. Keeney, Acting Assistant Attorney General for the Criminal Division, sent a memorandum to all United States

¹³² Supp. Br. Of the United States at 23, *supra* note 126.

¹³³ *Id.* at 18.

¹³⁴ *Id.* at 7.

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

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

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

¹³⁸ *Id.* at 4.

¹³⁹ *Id.* at 4-6.

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.¹⁴⁰ Fortunately for the statute, however, the Department's efforts to consign § 3501 to oblivion in the trial courts came too late, as will be recounted presently in connection with the *Dickerson* decision.¹⁴¹

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

Before turning to this final act in the Fourth Circuit, it is necessary to complete the chronology of § 3501 litigation by returning briefly to the Tenth Circuit. After the Tenth Circuit's 1975 ruling in *Crocker* upholding § 3501, one would have thought that other cases involving the statute would have been plentiful. Yet, while later cases from the Circuit had cited both *Crocker* and § 3501 favorably,¹⁴² by and large the courts and prosecutors within the Tenth Circuit appeared to be unaware of the decision. A few experienced, career prosecutors in that Circuit, however, realized the value of § 3501 and attempted to use it in appropriate cases.¹⁴³ One such case was *United States v. Nafkha*. The defendant there, Mounir Nafkha, was involved in a series of armed "takeover" bank robberies and was a dangerous, career criminal. Apart from Nafkha's confession, the evidence against him was circumstantial. Under *Miranda*, the admissibility of the confession appeared to be a close question, as Nafkha had made a reference to a lawyer that might, under the *Miranda* rules, possibly be viewed as requiring police to stop all questioning. Ultimately, both the United States and *amicus curiae* WLF¹⁴⁴ filed briefs arguing for the admission of Nafkha's confession under § 3501.¹⁴⁵ The magistrate ruled that while the § 3501 argument was "logical and intriguing, this issue need not be reached" because police had complied with *Miranda*.¹⁴⁶ Nafkha's confession was presented to the jury, and he was convicted.

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

¹⁴¹ See Part II.C.5, *infra*.

¹⁴² See *United States v. Brown*, 540 F.2d 1048, 1053 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *United States v. Shoemaker*, 542 F.2d 561, 563 (10th Cir.), *cert. denied*, 429 U.S. 1004 (1976); *United States v. Fritz*, 580 F.2d 370, 378 (10th Cir.) (*en banc*), *cert. denied*, 439 U.S. 947 (1978); *United States v. Hart*, 729 F.2d 662, 666-67 (10th Cir. 1984); *United States v. Benally*, 756 F.2d 773, 775-76 (10th Cir. 1985); *United States v. Fountain*, 776 F.2d 878, 886 (10th Cir. 1985); *United States v. Short*, 947 F.2d 1445, 1450 (10th Cir. 1991); *United States v. Caro*, 965 F.2d 1548, 1552 (10th Cir. 1992); *United States v. Miller*, 987 F.2d 1462, 1464 (10th Cir. 1993); *United States v. March*, 999 F.2d 456, 462 (10th Cir. 1993); *United States v. Glover*, 104 F.3d 1570, 1583 (10th Cir. 1997); *see also United States v. DiGiacomo*, 579 F.2d 1211, 1217-18 (10th Cir. 1978) (Barrett, J., dissenting).

¹⁴³ See, e.g., Govt's Resp. to Motion to Suppress at 12, *United States v. Cale*, No. 1:97-CR-9B (D. Utah 1997) (citing § 3501 and noting that *Crocker* "is the law in this circuit").

¹⁴⁴ Paul Kamenar and I represented WLF.

¹⁴⁵ See Memorandum of *Amicus Curiae* Washington Legal Foundation in Support of the United States on Issues Raised by the Defendants' Motions to Suppress Statements, *United States v. Nafkha*, No. 95-CR-220C (D. Utah Feb. 7, 1996); Government's Response to Motion to Suppress Statement-Nafkha, *United States v. Nafkha*, No. 95-CR-220C (D. Utah Feb. 7, 1996).

¹⁴⁶ Report and Recommendation at 22, *United States v. Nafkha*, No. 95-CR-220C (Apr. 5, 1996).

On Nafkha's appeal to the Tenth Circuit, the career prosecutor filed a brief on behalf of the United States defending the admission of the confession under both *Miranda* doctrine and § 3501.¹⁴⁷ WLF, too, filed a brief defending § 3501, joined by the International Association of Chiefs of Police, the Law Enforcement Alliance of America, and other groups.¹⁴⁸ 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 *Nafkha* brief by the career prosecutor defending § 3501, and substituting as the government's position copies of the politically-approved brief from *Leong*.¹⁴⁹ Curiously, in executing this xerox-and-file maneuver to briefing, the Department never explained why § 3501 did not apply in the Tenth Circuit. The Circuit, after all, had previously and specifically *upheld* the statute (at the behest of the Department) more than twenty years earlier in *Crocker*¹⁵⁰ and later Circuit precedent favorably cited both *Crocker* and § 3501.¹⁵¹ The *Leong* brief from the Fourth Circuit did not argue that *Crocker* had been overruled and did not discuss later Tenth Circuit precedent. All the *Leong* brief said was that "the Tenth Circuit has not had occasion to reexamine *Crocker* in light of subsequent developments in the Supreme Court's *Miranda* jurisprudence"¹⁵² This was, obviously, no reason to ignore a binding Tenth Circuit precedent within the that circuit. Ultimately, the Tenth Circuit ruled the confession had been obtained in compliance with *Miranda* and, therefore, did not have to consider the effect of § 3501.¹⁵³

Around this time, the Justice Department's determined efforts to keep courts from reaching the merits of the effects 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*.¹⁵⁴ 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.¹⁵⁵ The Department responded by simply referencing its brief in the *Leong* case.¹⁵⁶ Safe Streets

¹⁴⁷ See Brief of Appellee United States at 17, *United States v. Nafkha*, No. 96-4130 (10th Cir. Apr. 23, 1997).

¹⁴⁸ See Brief of Amici Curiae WLF *et al.*, *United States v. Nafkha*, No. 96-4130 (10th Cir. Apr. 28, 1997).

¹⁴⁹ Letter from Lisa Simotas, U.S. Dep't of Justice, to Patrick Fisher, Clerk, U.S. Court of Appeals for the Tenth Cir. (Sept. 2, 1997).

¹⁵⁰ See *supra* note 67 and accompanying text.

¹⁵¹ See *supra* note 142.

¹⁵² Supp. Br. of the United States, *supra* note 126, at 17 n.6.

¹⁵³ *United States v. Nafkha*, 139 F.3d 913, 1998 WL 45492 at *1 n.1 (unpublished 10th Cir. Feb. 5, 1998).

¹⁵⁴ 988 F. Supp. 1424, 1430 (D. Utah 1997).

¹⁵⁵ Memorandum of Amici Curiae Safe Streets Coalition *et al.* on the Applicability of 18 U.S.C. § 3501 to Defendant's Motion to Suppress Statements, *United States v. Rivas-Lopez*, No. 97-CR-104G (July 25, 1997). I represented the Safe Streets Coalition.

¹⁵⁶ Govt's Supp. Response to Defendant's Motion to Suppress, *United States v. Rivas-Lopez*, NO. 97-CR-104G (Sept. 5, 1997).

replied by criticizing this “one size fits all” approach to briefing, explaining that the Department’s brief from *Leong* in the Fourth Circuit contained no analysis of why district courts within the Tenth Circuit should ignore *Crocker*.¹⁵⁷ The district court fully agreed, issuing a published opinion upholding § 3501. The court first noted the Department’s “curious position” agreeing with the defendant “that § 3501 does not apply and is unconstitutional.”¹⁵⁸ The court rejected the Department’s strange claim, finding that the Supreme Court had repeatedly described the *Miranda* rules as not constitutionally mandated. Moreover, the Tenth Circuit had “squarely upheld the constitutionality of” § 3501 in *Crocker*.¹⁵⁹ The court concluded:

The government implies that the *Miranda* jurisprudence since the *Crocker* case would undoubtedly persuade this circuit to alter its course if given the chance, but apparently the government does not want to give the Tenth Circuit that chance. Given the above review of the cases and post-*Miranda* decisions, this court declines to so speculate, and will and must follow the precedent set in this circuit.¹⁶⁰

Rivas-Lopez appeared to present an opportunity to obtain a clear-cut appellate ruling on the merits of § 3501, as the decision surmounted the current Justice Department’s determined efforts to avoid any ruling on the issue. The case, however, ultimately petered out. 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.¹⁶¹ 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 just a few months ago in the Fourth Circuit. There, the circuit’s September 1997 ruling in *Leong* meant that only § 3501 issues raised in the trial court could be considered on appeal. The Department’s November 1997 directive against raising § 3501 in the trial court¹⁶² headed off 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 had promulgated its directive against using § 3501. The case involved a serial bank robber, who had been taken into custody and interviewed by FBI

¹⁵⁷ Reply Mem. of Amici Curiae Safe Streets Coalition et al. Replying to the Position of the Dep’t of Justice and the Defendant on the Applicability of § 3501, *United States v. Rivas-Lopez*, No. 97-CR-104G (Sept. 12, 1997).

¹⁵⁸ *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1430 (D. Utah 1997).

¹⁵⁹ *Id.* at 1435.

¹⁶⁰ *Id.*

¹⁶¹ Recently the District of Utah reaffirmed that § 3501 superceded *Miranda*. See *United States v. Tapia-Mendoza*, 1999 WL 137658 (D. Utah Mar. 10, 1999).

¹⁶² See *supra* note 140.

agents. At the suppression hearing, the lead agent testified he gave Dickerson his *Miranda* warnings, obtained a waiver, after which Dickerson made incriminating statements. Dickerson, on the other hand, testified he gave statements in an interview, and only afterwards received his *Miranda* warnings. Such one-on-one “swearing contests” are routinely decided in favor of law enforcement officers, but in this case the district court sided with the accused bank robber, citing alleged discrepancies between the officer’s testimony and times scribbled on the waiver of rights form.¹⁶³ The United States Attorney’s Office then mobilized a strong response to the district court opinion, filing a motion for reconsideration which contained affidavits from several other officers fully corroborating that Dickerson had been given his *Miranda* warnings at the start (rather than the end) of the interview, and providing specific explanations of the alleged discrepancies on the time the waiver form was signed. The motion for reconsideration also specifically raised § 3501 as a basis for admitting the statements.¹⁶⁴ The district court, however, refused to reconsider its decision because none of these arguments were unavailable to the prosecutors at the time of the first hearing.¹⁶⁵

Career prosecutors then filed an appeal to the Fourth Circuit, arguing that the district court should have reconsidered its first ruling in light of the subsequently-provided affidavits. In the meantime, the Department’s new position on § 3501 had been announced. Consistent with that policy, the brief contained a footnote, noting that the government was prohibited from raising § 3501 on appeal. The Washington Legal Foundation filed an *amicus* brief arguing that § 3501 was binding on the court, noting that, in contrast to *Leong*, in this case § 3501 had been presented to the trial court, albeit in a motion for reconsideration.¹⁶⁶ The Fourth Circuit allowed WLF to defend the statute during oral argument held 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.¹⁶⁷ In a lengthy opinion, the court held that “[w]e have little difficulty concluding . . . that § 3501, enacted at the invitation of the Supreme Court and pursuant to Congress’s unquestioned power to establish the rules of procedure and evidence in federal courts, is constitutional.”¹⁶⁸ The court noted the absence of a defense of the statute from the Department of Justice, observing that the career prosecutor on the case “had been prohibited by his superiors at the Department of Justice from discussing § 3501.”¹⁶⁹ This was, the Fourth Circuit said, a decision “elevating politics over law Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by

¹⁶³ See Memorandum Opinion, *United States v. Dickerson*, No. 97-159-A (E.D. Va. July 1, 1997).

¹⁶⁴ Gov’t’s Mot. for Reconsideration at 12-14, *United States v. Dickerson*, No. 97-159-A (E.D. Va. July 15, 1997).

¹⁶⁵ *United States v. Dickerson*, 971 F. Supp. 1023 (E.D. Va. 1997), *rev’d*, 166 F.3d 667 (4th Cir. 1999).

¹⁶⁶ Brief of WLF in Support of Appellant *United States*, *United States v. Dickerson*, No. 97-4750 (4th Cir. Nov. 5, 1997). Paul Kamenar and I represented WLF.

¹⁶⁷ *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).

¹⁶⁸ *Id.* at 672.

¹⁶⁹ *Id.* at 681 n.14.

refusing to argue it.”¹⁷⁰ The Court also noted that for the parties to fail to discuss § 3501 was for them to “abdicate their responsibility to call relevant authority to his Court’s attention,” citing the Virginia Code of Professional Responsibility.¹⁷¹ 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.¹⁷²

After the decision was handed down, Dickerson filed a petition for rehearing en banc,¹⁷³ supported by the American Civil Liberties Union and the National Association of Criminal Defense Lawyers.¹⁷⁴ The question then arose as to what the Department of Justice should say, since it had “won” the case, with help from WLF as amicus. At this stage, too, the Department now indisputably had a “reasonable” argument on behalf of the statute — specifically the argument advanced by a respected Fourth Circuit Judge, Karen Williams, in her opinion for the Fourth Circuit. This point was made forcefully in a letter to the Attorney General by Senator Orrin Hatch, Chair of the Senate Judiciary Committee and eight of his colleagues — Senators John Kyl, John Ashcroft, Bob Smith, Chuck Grassley, Mike DeWine, Strom Thurmond, Spence Abraham, and Jeff Sessions. The Senators recounted the Fourth Circuit’s criticism of the Department for “raising politics over law,” finding this to be “deeply troubling.”¹⁷⁵ The Senators went on to observe that the Department had pledged to defend Acts of Congress where reasonable arguments could be made: “The *Dickerson* opinion demonstrates beyond doubt that there are ‘reasonable arguments’ to defend 18 U.S.C. § 3501. In fact, these arguments are so reasonable that they have prevailed in every court that has directly addressed their merits.”¹⁷⁶ Despite this letter, the Department actually filed a brief supporting the defendant,

¹⁷⁰ *Id.* at 672 (citing *United States Nat’l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-48 (1993)).

¹⁷¹ 166 F.3d at 682 (citing Va. Code Prof. Resp. 7-20).

Perhaps in response to this point, the Department of Justice sent out a memorandum to all United States Attorneys in the Fourth Circuit shortly after *Dickerson*, explaining that, in response to motions to suppress statements, “prosecutors in the Fourth Circuit discharge their professional and ethical obligations if they call the district court’s attention to the existence of Section 3501 and the *Dickerson* decision.” Memorandum for All U.S. Attorneys in the Four Circuit from James K. Robinson, Asst. Attorney General (Mar. 8, 1999). Curiously, the Department does not appear to have sent out a similar memorandum to all United States Attorneys in the Tenth Circuit, suggesting they call the Tenth Circuit’s *Crocker* opinion to the attention of courts there.

¹⁷² Judge Michael also argued the court should not decide the § 3501 issue because there was no briefing in opposition to WLF’s position. 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 Br. for the U.S. at 34 n.19, *United States v. Dickerson*, No. 97-4750 (4th Cir. 1997), and the defendant, perhaps deeming it a clever tactical maneuver, simply declined to write anything about the statute.

¹⁷³ Petition for Rehearing and Petition for Rehearing *En Banc*, *United States v. Dickerson*, No. 97-4750 (4th Cir. Feb. 22, 1999).

¹⁷⁴ Brief of the Am. Civil Liberties Union in Support of Rehearing, *United States v. Dickerson*, No. 97-4750 (Feb. 20, 1999); Brief Amicus Curiae of the Nat’l Assoc. of Criminal Defense Lawyers in Support of Defendant-Appellee’s Petition for Rehearing, *United States v. Dickerson*, No. 97-4750 (Feb. 22, 1999)

¹⁷⁵ Letter from Senator Orrin Hatch and eight members of the Senate Judiciary Comm. to Attorney General Reno at 2 (Mar. 4, 1999).

¹⁷⁶ *Id.*

the ACLU, and the National Association of Criminal Defense Lawyers in seeking rehearing.¹⁷⁷ The Department argued the Court's decision to apply § 3501 "is error, and that its holding deserves reconsideration by the full court of appeals."¹⁷⁸ Of the four career prosecutors who had been handling the case up to that point, not one signed the Department's brief attacking § 3501.

WLF filed a reply to all this, explaining that not only was the panel decision correct on the merits, but that it made little sense to review the matter en banc. Because the Clinton Justice Department had always said it might take a different position on § 3501 in the Supreme Court, further review in the Fourth Circuit was not a wise use of the court's time.¹⁷⁹ On April 1, 1999, the full Fourth Circuit apparently agreed, voting 8-5 to deny rehearing en banc. As of this writing, Dickerson will apparently file a petition for certiorari to the United States Supreme Court over the summer. A Supreme Court decision on whether to review the case will be made late in the Fall, with many observers predicting the Court will take the case.

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

The Justice Department's current policy 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."¹⁸⁰ Long ago the Supreme Court concluded that "[t]o 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."¹⁸¹ Reasoning from this case 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.¹⁸² One need not go as far as these respected scholars have to 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.¹⁸³ The Department has even described the need to raise reasonable arguments as rising to the level of a "duty."¹⁸⁴ 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.¹⁸⁵ The current political appointees in the Department claim to follow these established principles.¹⁸⁶

¹⁷⁷ Br. for the United States in Support of Partial Rehearing En Banc, *United States v. Dickerson*, No. 97-4750 (Mar. 8, 1999)

¹⁷⁸ *Id.* at 6.

¹⁷⁹ Brief of the WLF as Amicus Curiae in Opposition to Petition for Rehearing at 3-4, *United States v. Dickerson*, No. 97-4750 (Mar. 19, 1999).

¹⁸⁰ U.S. CONST. art. II, § 3.

¹⁸¹ *See Kendall v. United States*, 37 U.S. 524, 612-613 (1838).

¹⁸² *See, e.g.*, EDWARD CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 79 (3d ed. 1948) ("[o]nce a statute has been duly enacted, whether over his protest or with his approval, [the President] must promote its enforcement"); 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."); 3 WESTEL W. 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

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 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 — all are not simply wrong, but “unreasonably” wrong. Such a conclusion seems dubious, to put it mildly. In fact, not only reasonable, but compelling arguments support the constitutionality of § 3501. We can turn, then, 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,¹⁸⁷ the statute would do no more than return to the traditional approach for determining the admissibility of confessions.¹⁸⁸ Such restoration would not violate the original intent of the Constitution.¹⁸⁹

legislative foundations, 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., 1st Sess. 46 (1985) (statement of Professor Eugene Gressman) (“In our constitutional system of govern, such a refusal by the Executive to ‘take care that the Laws be faithfully executed’ cannot and must not be tolerated.”).

¹⁸³ 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 Div. v Smith*, 494 US 872 (1990).

¹⁸⁴ 5 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 25, 25-26 (Apr. 6, 1981) (“[T]he Department has *the duty* to defend an act of Congress whenever a *reasonable* argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts”) (emphases added).

¹⁸⁵ See Memorandum for the Counsel to the President Abner Mikva from Asst. Attorney General Walter Dellinger, Nov. 2, 1994 (“the President may base his decision to comply . . . [with a questioned statute] in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch”).

¹⁸⁶ For example, Solicitor General Seth Waxman was asked by Senator Hatch during confirmation hearings whether he would adhere to the view that the Department “is bound to defend the constitutionality of all acts of Congress unless no reasonable arguments can be made in support.” Mr. Waxman replied: “I absolutely will.” *Hearing on the Nomination of Seth Waxman to be Solicitor General of the United States: Sen. Comm. on the Judiciary*, 105th Cong., 1st Sess. 8 (Nov. 5, 1997); see also *id.* at 6-7 (Solicitor General should defend a law “except in the rarest instances”).

¹⁸⁷ *But see infra* note 264 (explaining why statute should be read as extending beyond the pre-*Miranda* voluntariness rules).

¹⁸⁸ See generally GRANO, *supra* note 31, at 87-118.

¹⁸⁹ 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

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 this most-famous of its criminal law creations. Even accepting the battle on these terms, § 3501 is constitutional under *Miranda* doctrine for at least two reasons. First, the Court itself has repeatedly held 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. Both of these arguments are explained below.

Before turning to the specific legal arguments, however, it is important to recognize that Congress has itself made a determination that the Act is constitutional. The “gravest and most delicate duty” of the Supreme Court is reviewing the constitutionality of Acts of Congress.¹⁹⁰ An Act of Congress, after all, expresses the view of the elected representatives of the American people as to how their Constitution ought to be interpreted. While the final say rests in the hands of the Court,¹⁹¹ that 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.”¹⁹² The rules the statute establishes, of course, differ from those set by *Miranda*. But it is generally accepted that, unless the rules are unconstitutional, Congress has the final say regarding the rules of evidence and procedure in federal courts. For example, the Supreme Court upheld congressional modification of a Court-promulgated rule concerning production of impeaching materials on government witnesses, explaining that “[t]he statute as interpreted does not reach any constitutional barrier.”¹⁹³ The Court specifically

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 (1995) (responding vigorously to the Amar/Lettow analysis but conceding that “according to 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 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).

¹⁹⁰ *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980).

¹⁹¹ *Marbury v. Madison*, 1 Cranch 137 (1803).

¹⁹² *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994).

¹⁹³ *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959).

went out of its way to explain that Congress may trump even a conflicting Supreme Court procedural or evidentiary rule, so long as the Court-imposed rule was not required by the Constitution, noting that “[t]he power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.”¹⁹⁴

The validity of § 3501, therefore, boils down to whether the *Miranda* exclusionary rule is required by the Constitution. “If it is,” the *Dickerson* opinion observed, “Congress lacked the authority to enact § 3501, and *Miranda* continues to control the admissibility of confessions in 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.”¹⁹⁵

2. The *Miranda* Rights as Sub-Constitutional “Safeguards”.

With the question thus framed, there can be little doubt of the answer: The *Miranda* rules are simply not required by the Constitution. The Supreme Court has held the *Miranda* procedures are not constitutional rights or requirements. Rather, they are only “recommended procedural safeguards”¹⁹⁶ whose purpose is to reduce the risk that the Fifth Amendment’s prohibition of compelled self-incrimination will be violated in custodial questioning. Quite simply, to violate any aspect of *Miranda* is not necessarily — or even usually — to violate the Constitution.

There can be no doubt that the Supreme Court, in a series of cases starting in the early 1970’s, has repeatedly described the *Miranda* warnings as mere prophylactic rights that are “not themselves rights protected by the Constitution”¹⁹⁷ and has relied on that characterization in refusing to exclude unwarned or imperfectly warned custodial confessions and their fruits in a variety of contexts. Because this 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 § 3501’s constitutionality, which requires only the admission of “voluntary” confessions, that is, confessions obtained without violating the Fifth Amendment’s prohibition against compelled self-incriminating testimony.¹⁹⁸

¹⁹⁴ *Id.* See generally GRANO, *supra* note 31, at 173-222.

¹⁹⁵ *Dickerson*, 166 F.3d at 688.

¹⁹⁶ *Davis v. United States*, 512 U.S. 452, 457-58 (1994) (internal quotation omitted).

¹⁹⁷ *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

¹⁹⁸ Many commentators have concluded that § 3501 is constitutional on similar reasoning. See, e.g., GRANO, *supra* note 31, at 203; Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 U. CHI. L. REV. 938, 948 (1987); Phillip Johnson, *A Statutory Replacement for the Miranda Doctrine*, 24 AM. CRIM. L. REV. 303, 307 n.8 (1987); Bruce Fein, *Congressional and Executive Challenge of Miranda v. Arizona*, in CRIME AND PUNISHMENT IN MODERN AMERICA 171, 180 (P. McGuigan & J. Pascale eds. 1986); Gerald Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1475 & n.271 (1985). *But see, e.g.*, WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.5(e) at 317 (2d ed. 1992 & 1998 Supp.); *but see also infra* notes 212-25 and accompanying text (discussing § 3501’s constitutional critics).

It is important to emphasize that the view that *Miranda* rights are not constitutionally required is not some “gloss” or “spin” on the Supreme Court’s opinions, but rather the way 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.”¹⁹⁹ In *Withrow v. Williams*, the Court acknowledged that “*Miranda*’s safeguards are *not* constitutional in character.”²⁰⁰ In *Duckworth v. Eagan*, the Court said “[t]he 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.”²⁰¹ In *Oregon v. Elstad*, the Court explained that the *Miranda* exclusionary rule “may be triggered even in the absence of a Fifth Amendment violation.”²⁰²

Such statements are not idle dicta, but rather a critical part of the Court’s holdings. A prime illustration is *New York v. Quarles*,²⁰³ where the Court ruled that a confession obtained as a result of a police question “Where’s the gun?,” asked of a person with an empty gun holster suspected of having just committed a rape, was admissible despite the failure to give *Miranda* warnings. Similarly, in *Harris v. New York*²⁰⁴ and *Oregon v. Hass*,²⁰⁵ the Court held that an un-Mirandized confession, obtained where police questioning continued after a suspect said he would like to call a lawyer, could be used to impeach the testimony of a defendant who took the stand at his own trial. The basis the Court gave for these rulings is that *Miranda*’s exclusionary rule is not constitutionally required, and hence un-Mirandized confessions may constitutionally be admitted provided they are voluntary. All of these cases, among others, would have been wrongly decided if *Miranda*’s procedures were constitutionally required rather than prophylactic. If a defendant’s failure to be given *Miranda* warnings meant the defendant had thereby automatically been “compelled” to confess, *any* use of his confession at trial, including the ones allowed by the Court in *Quarles*, *Harris*, and *Hass*, would be forbidden by the Fifth Amendment of the Constitution, since it bars *any* use at trial of compelled self-incrimination of any kind. The Fifth Amendment provides: “No person . . . shall be compelled in any criminal case to be a witness against

¹⁹⁹ 512 U.S. 452, 457-58 (1994) (emphasis added).

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

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

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

²⁰³ 467 U.S. 649, 654 (1984).

²⁰⁴ 401 U.S. 222, 224 (1971).

²⁰⁵ 420 U.S. 714, 722 (1975).

himself.²⁰⁶ And, indeed, the Supreme Court has concluded that the Fifth and Fourteenth Amendments forbid the use of involuntary confessions even for impeachment purposes, distinguishing *Harris* and *Hass* as involving confessions obtained after mere *Miranda* violations rather than confessions obtained in violation of the Constitution.²⁰⁷ Accordingly, the Supreme Court's admission of un-Mirandized statements in *Quarles*, *Harris*, and *Hass* proves beyond argument that *Miranda* warnings are *not* required by the Constitution, as every federal court of appeals in the country has concluded.²⁰⁸ And the proposition that the procedures set out in *Miranda* are not required by the Constitution is the view that the Department of Justice has consistently taken in litigation throughout the federal court system since *Miranda* was decided.²⁰⁹

All of this demonstrates that a violation of the Fifth Amendment is not conclusively presumed to be present when *Miranda* is violated. Instead, actual compulsion in violation of the Fifth Amendment exists only where law enforcement has transgressed the standards established by the traditional voluntariness test.²¹⁰ In the absence of such compulsion, there is no constitutional impediment to admitting a suspect's statements despite non-compliance with *Miranda*.²¹¹

3. The Constitutional Critics of § 3501

²⁰⁶ U.S. CONST. amend. V.

²⁰⁷ See *New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979); *Mincey v. Arizona*, 437 U.S. 385, 397 (1978).

²⁰⁸ *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); *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994); *United States v. Elie*, 111 F.3d 1135, 1142 (4th Cir. 1997); *United States v. Abrago*, 141 F.3d 142, 168-70 (5th Cir.), cert. denied, 119 S.Ct. 182 (1998); *United States v. Davis*, 919 F.2d 1181, 1186 (6th Cir. 1990), reh'g en banc denied, 1991 U.S. App. Lexis 3934; *Clay v. Brown*, 1998 U.S. App. Lexis 17115, reported in table format, 151 F.3d 1032 (7th Cir.); *Winsett v. Washington*, 130 F.3d 269, 274 (7th Cir. 1997); *Warren v. City of Lincoln*, 864 F.2d 1436, 1441-42 (8th Cir. en banc), cert. denied, 490 U.S. 1091 (1989); *United States v. Lemon*, 550 F.2d 467, 472-73 (9th Cir. 1977); *Lucero v. Gunter*, 17 F.3d 1347, 135-51 (10th Cir. 1994); *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976).

²⁰⁹ See *City of Boerne v. Flores*, No. 95-2074, Brief for the United States (*Miranda* cited as an example of judicially created prophylactic rules that “enforce” constitutional guarantees but “are not constitutionally compelled”); Transcript of Oral Argument *Davis v. United States*, (Question from one of the Justices: “Is *Miranda* required by the Fifth Amendment? I thought it wasn't required. Have we said it's required by the Fifth Amendment?” Response of Assistant to the Solicitor General Seamon, speaking on behalf of the Clinton Department of Justice: “No, this Court has repeatedly made clear that the *Miranda* rules are prophylactic”); *Withrow v. Williams* No. 91-1030, Brief for the United States as Amicus Curiae Supporting Petitioner (statements admitted despite *Miranda* violations should not serve as a basis for grants of habeas, in part because admission of such statements did not violate the Constitution); see also *United States v. Green*, No. 91-1521, Brief for the United States; *Minnick v. Mississippi*, No. 89-6332, Brief for the United States as Amicus Curiae Supporting Petitioner; *Michigan v. Harvey*, No. 88-512, Brief for the United States as Amicus Curiae Supporting Petitioner; *Arizona v. Roberson*, No. 87-354, Brief for the United States as Amicus Curiae Supporting Petitioner; *New York v. Quarles*, No. 82-1213, Brief for the United States as Amicus Curiae Supporting Petitioner; Hearing on the Confirmation of Seth Waxman as Solicitor General, Committee on the Judiciary, United States Senate, November 5, 1997 at 101 (“It is my understanding of *Miranda*, and of the Supreme Court's further jurisprudence in this field, that the *Miranda* warnings themselves were not ever regarded as direct requirements compelled by the Constitution.”)

²¹⁰ See *New York v. Quarles*, 467 U.S. at 654-55 & n.5, 658 n.7; *Oregon v. Elstad*, 470 U.S. at 306-09; *Michigan v. Tucker*, 417 U.S. at 444-45.

²¹¹ See *Davis v. United States*, 512 U.S. at 458; *New York v. Quarles*, 467 U.S. at 654-55 & n.5, 658 n.7.

The opponents of § 3501 typically acknowledge that there is considerable force to this argument. For example, two leading *Miranda* scholars have recently written articles discussing the *Dickerson* opinion. Professor Yale Kamisar wonders out loud whether he had “spoken too quickly” in concluding, before *Dickerson*, that the time to overrule *Miranda* had “come and gone.”²¹² 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.”²¹³ Both of these scholars go on to conclude that § 3501 is, probably, 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.”²¹⁴ Professor Thomas sees a constitutional basis in the Court’s recent decisions extending *Miranda*’s prophylactic rules in certain contexts.²¹⁵ In taking these positions, Kamisar and Thomas echo that of the Justice Department, which believes that “*Miranda* implements and protects constitutional rights.”²¹⁶

The fundamental problem with these positions is that they work 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 quasi-supervisory powers or the Court’s ability to craft constitutional common law (in which the Court devised one form of remedy to guard against Fifth Amendment violations but acknowledged that that remedy could be replaced with an alternative) — Congress has significant authority to modify *Miranda*’s holding by legislation.

To be sure, if the Supreme Court had really foreclosed any reading of *Miranda* other than that its holding is constitutionally required, there would be no basis for considering possible application of § 3501. However, one need not guess about whether the question is open; the Court has said it is. In *United States v. Davis*,²¹⁷ far from suggesting that precedent controlled the issue, the Court explained “the issue is one of *first impression*.”²¹⁸ 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.”²¹⁹ This led to a concurring opinion from Justice

²¹² Kamisar, *supra* note 6, at 467.

²¹³ Thomas, *supra* note 116, at [39].

²¹⁴ Kamisar, *supra* note 6, at 471 (quoting David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988)).

²¹⁵ Thomas, *supra* note 116, at [67-72].

²¹⁶ Br. for the United States in Support of Partial Rehearing En Banc at 6, *United States v. Dickerson*, No. 97-4750 (4th Cir. Mar. 8, 1999).

²¹⁷ 512 U.S. 452 (1994).

²¹⁸ *Id.* at 457 n.* (emphasis added).

²¹⁹ *Id.* at 457-58 n.*.

Scalia, who consistently with the majority said he was “entirely open” to various arguments on § 3501.²²⁰ Also worthy of note is *United States v. Alvarez-Sanchez*.²²¹ In that case, which, to be sure, did not involve a custodial confession, the Court identified § 3501 without qualification as “the statute governing the admissibility of confessions in federal prosecutions.”²²² Nor are *Alvarez-Sanchez* and *Davis* the only cases by the Supreme Court citing § 3501. Although *Miranda*-related cases decided by the Court in recent years have generally involved state proceedings to which § 3501 does not apply, the Court has cited § 3501 in several of them without any indication of constitutional infirmity.²²³

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

a. The Original Meaning of *Miranda*.

The Supreme Court’s post-*Miranda* decisions repeatedly not only state but hold that that case’s procedural prerequisites for admitting a custodial confession in the government’s case in chief are “prophylactic” — meaning that a police violation of *Miranda* is not necessarily a violation of the Fifth Amendment. In arguing against § 3501, the statute’s critics first contend that these cases should be minimized, and even ignored, because they have “retreated” from this original meaning of *Miranda*.²²⁴ 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 straightjacket,” repeatedly referred to the warnings as “procedural safeguards,” and invited Congress and the states “to develop their own safeguards for [protecting] the privilege.”²²⁵

To be sure, the *Miranda* opinion contains some language that can be read as suggesting that a *Miranda*

²²⁰ *Id.* at 464 (Scalia, J., concurring).

²²¹ 511 U.S. 350 (1994).

²²² 511 U.S. at 351.

²²³ See, e.g., *Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *United States v. Raddatz*, 447 U.S. 667, 678 (1980); *Brown v. Illinois*, 422 U.S. 590, 604 (1975); *Keeble v. United States*, 412 U.S. 205, 208 n.3 (1973). Indeed, in one case, the Court’s opinion seems to have gone out of its way to cite § 3501. See *Lego v. Twomey*, 404 U.S. 477, 486 n.14 (1972) (quoting § 3501 in full).

²²⁴ See, e.g., Kamisar, *supra* 6, at 467-69 (discussing Burger and Rehnquist moves to “deconstitutionalize” *Miranda*); Supp. Brief for the U.S. at 5, *United States v. Leong*, No. 97-4876 (4th Cir. 1997) (arguing that *Miranda* binds the lower courts to constitutional view of *Miranda* until explicitly overruled by the Supreme Court itself). See generally Leslie Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U.L. REV. 727 (1999) (tracing doctrinal developments since *Miranda*).

²²⁵ *Dickerson*, 166 F.3d at 688-89 (quoting *Miranda*).

violation is a constitutional violation because custodial interrogation is inherently compulsive.²²⁶ But notwithstanding this inherent compulsion rationale — which would make every statement taken without *Miranda* warnings compelled and every case admitting a custodial confession as voluntary both before and after *Miranda* wrongly decided — much of the opinion is written in the language of prophylaxis. Not only does the opinion have a curious “legislative” feel about it,²²⁷ but at various points the Court spoke of the “potentiality” of compulsion and the need for “appropriate safeguards” “to insure” that statements were the product of free choice, as well as the possibility of Fifth Amendment rights being “jeopardized” (not actually violated) by custodial interrogation.²²⁸ 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.

The Court also said that “[u]nless a proper limitation upon custodial interrogation is achieved — such as these decisions will advance — there can be no assurance that practices of this nature [practices gleaned from police interrogation manuals, not from the records in the four cases before the Court] will be eradicated in the foreseeable future.”²²⁹ 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,”²³⁰ not actually involved in the cases. This total neglect of the facts is itself an indication that the Court was not interested in the actual constitutionality of what had occurred. When it finally turned to the facts, the Court spent only eight pages in concluding that all the confessions had been obtained in violation of its new rules. In three of the cases, including *Miranda*’s, the Court gave no indication that the defendant’s statements had been compelled. Rather, it rejected the confessions because no “steps” had been taken to protect Fifth Amendment rights.²³¹ Only in defendant *Stewart*’s case did the Court suggest the existence of actual compulsion.²³²

To reject a prophylactic reading would defy not only common sense, but also empirical recent

²²⁶ See *Miranda*, 364 U.S. at 458, 467.

²²⁷ See *supra* note 31 and accompanying text.

²²⁸ 384 U.S. at 457, 479.

²²⁹ *Id.* at 447.

²³⁰ *Id.* at 505 (Harlan, J., dissenting).

²³¹ *Id.* at 492, 494.

²³² *Id.* at 499.

observation that “very few incriminating statements, custodial or otherwise, are held to be involuntary.”²³³ To violate *Miranda* is not necessarily to violate the Constitution — and, although ambiguous in spots, *Miranda* recognized this from the beginning.²³⁴

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 “[t]he most important indication that the Court does not regard *Miranda* as resting simply on its supervisory powers is the fact that the Court has continued to apply the *Miranda* rules to cases arising in state courts.”²³⁵ The basis for *Miranda*’s applicability to the states is interesting and (as the Department itself has explained) perplexing.²³⁶ Nevertheless, there is no need come to a definitive conclusion when considering § 3501, provided that there are explanations available other than that *Miranda*’s exclusionary rule is constitutionally required.

Several others come readily to mind. Most obviously, like *Mapp v. Ohio*²³⁷ and *Bivens v. Six Unknown Named Agents*,²³⁸ *Miranda* may be a constitutional common law decision. In such cases, the Court is presented with an issue implicating a constitutional right for whose violation there is no legislatively specified remedy. It is conceivable that generally in such circumstances the judicial power may include the crafting of a remedy, and the remedy may extend beyond simply redressing the constitutional violation. It is clear, however, that exercising its powers, Congress may step in and substitute an alternative remedy that sweeps more or less broadly, provided the substitute remedy is adequate to correct the violation.²³⁹ It is also entirely possible that the States may do so as well. This theory (unlike the position of the Department) is consistent with the suggestion made by the *Miranda* Court itself that the national and State legislatures may substitute alternative remedial schemes for the one set out in *Miranda*. 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

²³³ *United States v. Elie*, 111 F.3d 1135, 1144 (4th Cir. 1997) (internal quotation omitted).

²³⁴ See generally GRANO, *supra* note 31, at 173–182. The Justice Department, at least until quite recently, seemed to take this view as well See, e.g., Br. for the United States as Amicus Curiae, *Withrow v. Williams*, No. 91-1030 (1992) (arguing against habeas review of *Miranda* claims and explaining that “the most important factor” is “that ‘the *Miranda* rule is not, *nordid 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)).

²³⁵ Supp. Br. for the U.S. at 18, *United States v. Leong*, No. 96-4876 (4th Cir. 1997).

²³⁶ See OLP Report, *supra* note 49, at 550; see also *Oregon v. Elstad*, 470 U.S. 298, 370 & 371 n.15 (1985) (Stevens, J., dissenting); GRANO, *supra* note 31, at 183-198; *United States v. Dickerson*, 166 F.3d 667, 691 n.21 (4th Cir. 1999) (how *Miranda* applies to the states is “an interesting academic question).

²³⁷ 367 U.S. 643 (1961).

²³⁸ 403 U.S. 388 (1971).

²³⁹ See *Bush v. Lucas*, 462 U.S. 367, 377 (1983).

a legislative effort may represent no more than the application of the Court's judicially-created, but not constitutionally mandated, remedial scheme in the absence of a legislatively devised alternative.

A related illustration is provided by the act of state doctrine, most explicitly recognized by the Supreme Court just two years before *Miranda* in *Banco Nacional de Cuba v. Sabbatino*.²⁴⁰ There, the Supreme Court imposed nonconstitutional limitations on the states that go beyond what is actually required by the Constitution. *Sabbatino* 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 latter. In the Court's view, the federal interest in protecting the separation of powers in foreign affairs gave the doctrine "constitutional underpinnings"²⁴¹ that permitted the Court to impose this limitation on state law, even though the act of state rule was not actually required by the Constitution.²⁴² 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," explaining that "there are enclaves of federal judge-made law which bind the States."²⁴³ 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.²⁴⁴ These laws have been routinely upheld,²⁴⁵ thus confirming the Court's statement in *Sabbatino* that the act of state doctrine is not constitutionally required. 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) rule announced by *Sabbatino* 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 whether the federal courts have supervisory power over the States. It was, after all, resolving a slew of other important issues. Since *Miranda* came down, no case has arisen where a

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

²⁴¹ 376 U.S. at 423.

²⁴² *Id.* at 424-26.

²⁴³ *Id.* at 427.

²⁴⁴ See, e.g., 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)).

²⁴⁵ See generally Dellapenna, *supra* note 240, 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.3d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

party has seriously presented to the Court the question whether *Miranda*'s prophylactic approach can be reconciled with the Court's cases holding that the federal courts lack supervisory power over the States.

Let there be no mistake about it, however. Both in state and federal cases, the Court has described *Miranda* as prophylactic. In *Oregon v. Elstad*, for example, the Court, in response to Justice Stevens, said most directly that "a failure to administer *Miranda* warnings is not itself a violation of the Fifth Amendment."²⁴⁶ 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.²⁴⁷

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

Section 3501's critics have additionally claimed that *Miranda*'s constitutional status is supported by the fact that *Miranda* claims were held to be cognizable in federal habeas corpus proceedings in *Withrow v. Williams*.²⁴⁸ Habeas corpus extends to persons who are in custody "in violation of the Constitution or the laws or treaties of the United States."²⁴⁹ The critics reason that, "[b]ecause *Miranda* is not a 'law' or a treaty, the Court's holding in *Withrow* depends . . . on the conclusion that" *Miranda* is a constitutional right.²⁵⁰ A "law" for purposes of federal habeas review, however, consists not merely of federal statutes.²⁵¹ This has led a leading commentator to conclude that *Miranda* claims present issues about a "law" of the United States.²⁵²

Of course, we do not know precisely what jurisdictional basis *Withrow* relied upon, because that issue was not before the Court and the majority specifically wrote to chide the dissent for addressing a point which "goes beyond the question on which we granted certiorari."²⁵³ In any event, the question surrounding § 3501

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

²⁴⁷ 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), and others would presumably be passed in the wake of a favorable decision on the federal statute.

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

²⁴⁹ 28 U.S.C. § 2254(a).

²⁵⁰ Supp. Br. for the U.S. at 19, *United States v. Leong*, No.97-4876 (4th Cir. 1997); *see also* Kamisar, *supra* note 6, at 475-76; Thomas, *supra* note 116, at [72 & n.115].

²⁵¹ *See, e.g.,* *Bush v. Muncy*, 659 F.2d 402 (4th Cir. 1981) (finding interstate compact on detainer procedures to be "a law of the United States within the meaning of section 2254"). *See generally* *Davis v. United States*, 417 U.S. 333, 346 (1974) (recognizing that a "fundamental defect" can be reviewed on habeas); *see also* *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (phrase "laws of the several States" in Rules of Decision Act includes the States' judicial decisional law).

²⁵² *See* LARRY W. YACKLE, *POST CONVICTION REMEDIES* § 97, at 371 (1981 & 1996 Supp.) ("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").

²⁵³ 507 U.S. at 685 n.2.

is whether *Miranda* is ordinary constitutional law or something akin to common law, which can be overruled by Congress. Either way, *Miranda* is cognizable in federal habeas corpus and *Withrow* is unilluminating.

Withrow also did not change the Court's view of *Miranda* as prophylactic. The Court in fact accepted the petitioner's premise (supported by the Department as amicus curiae) that the *Miranda* safeguards are "not constitutional in character, but merely 'prophylactic,'" but it rejected her conclusion that, for that reason, *Miranda* issues should not be cognizable in habeas corpus.²⁵⁴ The Court conceded that *Miranda* might require suppression of a confession that was not involuntary,²⁵⁵ 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.²⁵⁶ 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."²⁵⁷

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 for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."²⁵⁸ The Court explained:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by *Congress* and the States in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have that effect.²⁵⁹

²⁵⁴ 507 U.S. at 690.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 691-94.

²⁵⁷ *Davis v. United States*, 512 U.S. at 457 (internal citation omitted).

²⁵⁸ 384 U.S. at 467 (emphasis added).

²⁵⁹ *Id.* (emphasis added).

The Court concluded that, if it were “shown other procedures which are at least as effective in appraising accused persons of their right of silence and in assuring a continuous opportunity to exercise it,” the *Miranda* safeguards could simply be dispensed with.²⁶⁰

The Court’s statements about which “other procedures” would be sustained was, obviously, pure dicta, because no such alternatives were before the Court and, indeed, no briefing discussing such alternatives had been provided.²⁶¹ Relying on this language, however, the statute’s critics have attempted to make short work of the possibility of sustaining § 3501 on this basis. The Justice Department has argued that “Congress cannot be deemed to have taken advantage of” this invitation to develop alternatives because “Congress simply relegated warnings back to their pre-*Miranda* status.”²⁶² Similarly, Professor Kamisar simply views the statute as “repealing” *Miranda* and “reinstat[ing] the due process ‘totality of the circumstances’-’voluntariness’ test for the admissibility of confessions.”²⁶³ This argument is 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 today.²⁶⁴ For example, section 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.”²⁶⁵ This requirement actually extends beyond current case law, as the Supreme Court has held that a suspect can waive his *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.”²⁶⁶ Extending beyond the *Spring* decision, section (b)(2) makes the subject matter of the interrogation a relevant factor in determining whether to admit the statement.

²⁶⁰ *Id.* 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, 520 (1997) (“When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch”).

²⁶¹ See *supra* note 29 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, ___ (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, has been recapitulated in the Court’s characterization of *Miranda* as establishing “recommended” procedural safeguards, which obvious envisions the possibility if alternative approaches. See, e.g., *Davis v. United States*, 512 U.S. 452, 457 (1994); *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974). 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.

²⁶² Supp. Br. for the U.S. at 13, *United States v. Leong*, No. 96-4876 (4th Cir. 1997).

²⁶³ Kamisar, *supra* note 6, at 469.

²⁶⁴ 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 46, at 324 (“parts of [§ 3501] would have been a progressive expansion of suspects’ rights if Congress had passed it prior to *Miranda*”).

²⁶⁵ 18 U.S.C. § 3501(b)(2).

²⁶⁶ 479 U.S. 564, 577 (1987).

Section 3501(b)(3) also requires consideration of “whether or not such defendant was advised or knew that he was not required to make any statement and that any statement could be used against him.”²⁶⁷ This section is broader than pre-*Miranda* law in implicitly recognizing that a suspect does not have to make any statements during police questioning, a position that critics of pre-*Miranda* case law had long espoused. Section (b)(3) extends well beyond pre-*Miranda* case law with its apparent statutory recognition of a right to counsel during interrogation. Section 3501(b)(4) requires consideration of “whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel.”²⁶⁸ And (b)(4) further requires consideration of “whether or not such defendant was without the assistance of counsel when questioning and when giving such confession.” Before *Miranda*, no right to assistance of counsel existed during police questioning. 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.”²⁶⁹ These parts of § 3501, accordingly, provide to defendants more consideration than they had under the pre-*Miranda* voluntariness test.²⁷⁰ And, 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.²⁷¹

Second, not only does § 3501 by itself go beyond the pre-*Miranda* rules, but the statute must be examined against the backdrop of all federal law bearing on the subject.²⁷² Critics simply look at the statute by itself, concluding that it alone is not a viable alternative to *Miranda*.²⁷³ 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 *Miranda* exclusionary rule.

Congress has established criminal penalties for federal law enforcement officers who wilfully violate the constitutional rights of others. A federal civil rights statute provides that whoever “under color of any law . . . willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,” shall be subject to criminal

²⁶⁷ 18 U.S.C. § 3501(b)(3).

²⁶⁸ 18 U.S.C. § 3501(b)(4).

²⁶⁹ 18 U.S.C. § 3501(b).

²⁷⁰ *Accord* Thomas, *supra* note 116, at [30-35].

²⁷¹ *See, e.g.*, *Edward J. DeBartolo Corp. V. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (“every reasonable construction must be resorted to, in order to save a statute from unconstitutionality”).

²⁷² *See, e.g.*, *Gracey v. International Brotherhood of Electrical Workers*, 868 F.2d 671, 675 (4th Cir. 1989).

²⁷³ *See, e.g.*, Thomas, *supra* note 116, at [65-74] (examining § 3501 by itself).

liability.²⁷⁴ Similarly, 18 U.S.C. § 241 prohibits conspiracies to violate constitutional rights. These statutes apply to federal law enforcement officers²⁷⁵ who obtain coerced confessions.²⁷⁶ While Congress adopted these statutes during the Reconstruction Era, they have undergone significant judicial interpretation since *Miranda*. Indeed, the Supreme Court recently explicated the proper standard for coverage of the statute.²⁷⁷ In addition, the Department’s Civil Rights Division and the FBI now fully support enforcement of these statutes against federal officials.²⁷⁸

Civil penalties against federal officers who violate constitutional rights are also now available. When *Miranda* was decided, as a practical matter it was not possible to seek damages from federal law enforcement officers who violated Fifth Amendment rights.²⁷⁹ That changed in 1971, when the Supreme Court decided *Bivens v. Six Unknown Named Agents*²⁸⁰ The Court held that a complaint alleging the Fourth Amendment had been violated by federal agents acting under color of their authority gives rise to a federal cause of action for damages. Since then, courts have held that *Bivens* actions apply to abusive police interrogations, either as violations of the Fifth Amendment Self-Incrimination Clause or violations of the Due Process Clause.²⁸¹

When *Miranda* was decided, 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.²⁸² 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

²⁷⁴ 18 U.S.C. § 242.

²⁷⁵ *United States v. Otherson*, 637 F.2d 1276, 1278-79 (9th Cir. 1980).

²⁷⁶ *See United States v. Lanier*, 520 U.S. 259, 271 (1997) (noting that “beating to obtain a confession plainly violates § 242”) (internal citation omitted).

²⁷⁷ *Lanier*, 520 U.S. at 270-72.

²⁷⁸ *See* 28 C.F.R. § 0.50 (establishing Justice Department’s Civil Rights Division).

²⁷⁹ *See Bell v. Hood*, 327 U.S. 678 (1946).

²⁸⁰ 403 U.S. 388 (1971).

²⁸¹ *See, e.g., Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) (finding a *Bivens* claim under the Due Process Clause for police misconduct during custodial interrogation); *Bradt v. Smith*, 634 F.2d 796, 800 (5th Cir.1981) (suggesting § 1983 recognizes Fifth Amendment claims); *see also Riley v. Dorton*, 115 F.3d 1159, 1164-66 (4th Cir. 1997) (discussing but finding factually unsupported a § 1983 claim for Fifth Amendment violations; Fifth Amendment claims arise only when coerced confession used at trial; considering Due Process challenge to police conduct during questioning).

²⁸² *See* Senate Rep. No. 93-588, 1974 U.S.C.C.A.N. 2789, 2791.

prosecution.”²⁸³

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; (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.²⁸⁴

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

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

The *Miranda* decision, of course, is not binding on the question of alternatives, as the Court in 1966 had no opportunity to consider such subsequent developments as the *Bivens* decision in 1971 and the amendment of the Federal Tort Claims Act in 1974. As the Department of Justice has explained in connection with the Fourth Amendment exclusionary rule, “[t]he remedial landscape has changed considerably” since the early 1960s.²⁸⁵ Taken together, the combination of criminal, civil, and administrative remedies now available for coerced confessions — along with the Fifth Amendment’s exclusion of involuntary statements — renders *Miranda* prophylactic remedy unnecessary and therefore subject to modification in § 3501. Unlike the *Miranda* exclusionary rule, which “sweeps more broadly than the Fifth Amendment itself” and “may be triggered even in the absence of a Fifth Amendment violation,”²⁸⁶ the criminal and civil sanctions adopted by Congress focus more narrowly on conduct that directly implicates the Fifth Amendment proscription against “compelled” self-incrimination. At the same time, they provide stronger remedies against federal agents who coerce confessions than does the *Miranda* exclusionary rule. It is well known that the exclusion of evidence “does not apply any direct sanction to the individual official whose illegal conduct” is at issue.²⁸⁷ Thus, the *Miranda* exclusionary rule would not be expected to have much effect on police intent on coercing confessions

²⁸³ 28 U.S.C. § 2680(h).

²⁸⁴ OLP REPORT, *supra* note 49, at 622.

²⁸⁵ *Id.* at 645.

²⁸⁶ *Oregon v. Elstad*, 470 U.S. 298, 306-10 (1985).

²⁸⁷ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

or otherwise violating Fifth Amendment standards. It should therefore come as no surprise that “there has been broad agreement among writers on the subject that *Miranda* is an inept means of protecting the rights of suspects, and a failure in relation to its own premises and objectives.”²⁸⁸

In contrast, civil remedies directly affect the offending officer. As the Department itself has explained, “[e]ven if successful *Bivens* suits are relatively rare, the mere prospect of such being brought is a powerful disincentive to unlawful conduct. It defies common sense to suppose that fear of a suit against [a federal] officer in his individual capacity, in which he is faced with the possibility of personal liability, has no influence on his conduct.”²⁸⁹ 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 must be considered an important part of the calculus. In refusing to extend the Fourth Amendment exclusionary rule into civil deportation proceedings, the Supreme Court has explained that “[b]y all appearances the INS has already taken sensible and reasonable steps to deter Fourth Amendment violations by its officers, and this makes the likely additional deterrent value of the exclusionary rule small.”²⁹⁰

Bearing firmly in mind that the Fifth Amendment will itself continue to provide an exclusionary rule for involuntary confessions, Congress acted within its powers in accepting *Miranda*’s invitation to craft an alternative regime to insure that the Fifth Amendment is respected by federal agents. That regime subjects officers who forcibly extract confessions to criminal sanctions,²⁹¹ 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.²⁹² At the same time, that regime allows voluntary confessions to be used in evidence.²⁹³ This is an entirely reasonable and, in many ways, more effective approach to securing respect for the values of the Fifth Amendment than the *Miranda* exclusionary rule and, therefore, is fully compatible with both the Constitution and *Miranda*’s call for Congress to develop alternative approaches.²⁹⁴

²⁸⁸ OLP REPORT, *supra* note 49, at 545 (collecting citations).

²⁸⁹ Br. for the United States at 34, *INS v. Lopez-Mendoza*, No. 83-491 (U.S. 1984).

²⁹⁰ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1049 (1984).

²⁹¹ 18 U.S.C. §§ 242, 241.

²⁹² 28 U.S.C. § 2680(h).

²⁹³ 18 U.S.C. § 3501.

²⁹⁴ An entirely separate argument for the constitutionality of § 3501 is based on the fact that Congress has now rejected the factual findings underpinning *Miranda*. *Dickerson* alluded to this argument, explaining that “Congress, utilizing its superior fact-finding ability, concluded that custodial interrogations were not inherently coercive.” 166 F.3d at 692 n.22. See generally Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 118; Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 42 n.217 (1975).

This argument appears to be a strong one, as the Court’s view is filtered through the litigated cases that reach it. The Court remain entirely unaware, for example, of cases never filed because *Miranda* rules blocked a confession, 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). Congress, on the other hand, has the ability to gather facts from a wide range of sources, including testimony from 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

C. Section 3501 and Policing the Police

Because the effects of § 3501 are sometimes exaggerated, 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.²⁹⁵ 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.²⁹⁶ The voluntariness test, even before *Miranda*, was developing into a powerful tool for blocking police abuses.²⁹⁷ 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.²⁹⁸ They would probably even have greater success in identifying situations in which an innocent person has falsely confessed to a crime.²⁹⁹ 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 voluntariness determinations.³⁰⁰ For example, whenever a court suppresses a

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 held hearings about police interrogation and ultimately concluded that “the Court overreacted to defense claims that police brutality is widespread.” S. Rep. No. 1097, 90th Cong., 2d Sess., at 48, *reprinted in* 1968 U.S.C.C.A.N. 2134. The Senate thus specifically rejected the central factual premise underlying *Miranda*: that custodial interrogation has an “inherently compelling” character. Compare *Miranda*, 384 U.S. at 457-58 with S. REP. NO. 1097, 90th Cong., 2d Sess. at 51, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2124-38.

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.” 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. 1097 at 51, *reprinted in* 1968 U.S.C.C.A.N. 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 Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotations omitted).

Because the § 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.

²⁹⁵ Cf. Thomas, *supra* note 116, at [36] (arguing that the “symbolism of overruling *Miranda* . . . would be ominous indeed” because of the message it would send to police).

²⁹⁶ See 18 U.S.C. § 3501(a) (“the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness . . .”).

²⁹⁷ See Yale Kamisar, *Remembering the “Old World” of Criminal Procedure: A Reply to Professor Grano*, 23 U. Mich. J.L. Ref. 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).

²⁹⁸ See Thomas, *supra* note 116, at [20-22] (raising this possibility).

²⁹⁹ 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).

³⁰⁰ See Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 877 (1981) (in a number of important

confession on *Miranda* grounds, it must go on to make a voluntariness determination, as this governs whether the prosecution can impeach the defendant with the statement.³⁰¹

Section 3501 also specifically provides that warnings to suspects are relevant considerations in the voluntariness determination.³⁰² While warnings are only a “factor” in the voluntariness determination,³⁰³ the fact that they are singled out provides undoubted incentives for law enforcement officers to provide advice of rights.³⁰⁴ The *Dickerson* opinion was quite clear on this point, stating: “[L]est there be any confusion on the matter, nothing in today’s opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings. . . . those warnings are among the factors a district court should consider when determining whether a confession was voluntarily given.”³⁰⁵ While many police practices would thus remain unchanged under § 3501, the court 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 that they present myriad complications. Some of the leading criminal procedure casebooks, for example, spend dozens and dozens of pages on the doctrine.³⁰⁶ Section 3501 thus presents the “win-win” solution of maintaining judicial oversight of police tactics while ending the need to free guilty criminals on, as *Dickerson* put it, “mere technicalities.”³⁰⁷ 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 for the Department of Justice to defend § 3501 and for courts to uphold it. But a final issue about § 3501 that needs to be considered is: What real world difference would the statute make? The critics of § 3501 have occasionally suggested that § 3501 makes no difference to public safety because federal prosecutors can often prevail even under the *Miranda* exclusionary rule.³⁰⁸ This claim misses the point of § 3501, which is to reduce the harms of *Miranda* by

situations “the primary criterion of [confession] admissibility under current law is [still] the ‘old’ due process voluntariness test”).

³⁰¹ See *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974).

³⁰² See 18 U.S.C. § 3501(b)(3) & (4).

³⁰³ See 18 U.S.C. § 3501(b).

³⁰⁴ Cf. Thomas, *supra* note 116, at [37] (conceding the police would continue to give *Miranda* warnings if § 3501 were upheld, but arguing that this would diminish over time).

³⁰⁵ *Dickerson*, 166 F.3d at 692.

³⁰⁶ See, e.g., YALE KAMISAR ET AL, *MODERN CRIMINAL PROCEDURE* 468- 600 (9th ed. 1999) (discussing the “*Miranda*” revolution); JOSHUA DRESSLER & GEORGE THOMAS III, *CRIMINAL PROCEDURE* __ (1998) (reviewing *Miranda* doctrine).

³⁰⁷ 166 F.3d at 693.

³⁰⁸ See, e.g., *Confirmation of Deputy Attorney General Nominee Eric Holder: Hearings before the Sen. Comm. on the Judiciary*, 105th Cong., 1st Sess. 124 (June 13, 1997) (written response of Deputy Attorney General Designate Holder to question

admitting confessions in cases where the *Miranda* exclusionary rule would otherwise apply. In the *Dickerson* case itself, for example, the Fourth Circuit warned that “[w]ithout [Dickerson’s] confession it is possible, if not probable, that he will be acquitted.”³⁰⁹ Similarly, in *United States v. Rivas-Lopez*, it will be quite difficult to obtain the conviction of a confessed methamphetamine dealer without the law.³¹⁰ While *Dickerson* and *Rivas-Lopez* have not reached a final conclusion, there is no doubt about the result of the failure to apply § 3501 in *United States v. Leong*. There, defendant Tony Leong escaped convictions, despite the fact that he had confessed to being a convicted felon in possession of a firearm. No one has compiled a list of cases actually brought where the convictions of criminals were imperiled by *Miranda*’s rigid exclusionary rule. A few such cases are collected below.³¹¹ Such cases are, of course, only the proverbial tip of the iceberg, because many other prosecutions undoubtedly are not pursued because of *Miranda* problems.

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

from Senator Thurmond) (“My experience has been that we have not had significant difficulty in getting the federal district court to admit voluntary confessions under *Miranda* and its progeny”).

³⁰⁹ *United States v. Dickerson*, 166 F.3d 667, 672 (4th Cir. 1999). It is also worth noting that Mr. Dickerson’s confession was critical to the arrest of Jimmy Rochester, another bank robber who had been involved in robbing a total of 17 banks in three different states, as well as an armored car.

³¹⁰ *See* 988 F. Supp. at 1426-27 (describing facts; Rivas-Lopez voluntarily consented to search of the car, whereupon drugs were discovered inside a hidden panel; little evidence to connect Rivas-Lopez to the drugs, apart from his confession obtained “outside *Miranda*”).

³¹¹ *See, e.g.*, OLP REPORT, *supra* note 49, at 568 (collecting “miscarriages of justice resulting from *Miranda* and related decisions); *United States v. Tyler*, 164 F.3d 150 (3rd Cir. 1998), *cert. denied*, 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 grounds suspect in custody and should have received *Miranda* warnings); *United States v. Guzman*, 11 F.Supp.2d 292 (S.D.N.Y. 1998) (suppressing statement suggesting involvement in an attempted murder on grounds defendant was in custody and should have been *Mirandized*; also finding that statement was not coerced), *aff’d*, 152 F.3d 921 (2d Cir. 1998); *United States v. Garibay*, 143 F.3d 534 (9th Cir. 1998) (reversing conviction for distribution of 138 pounds of marijuana on grounds defendant did not understand *Miranda* waiver); *United States v. Foreman*, 993 F.Supp. 186 (S.D.N.Y. 1998) (Baer, J.) (suppressing some statements under *Miranda* on grounds discussion during drive to booking after defendant asked what was going on constituted “interrogation”); *Arizona v. Rodriguez*, 921 P.2d 643 (Ariz. 1996) (death penalty reversed on grounds *Miranda* warnings not given; case awaiting retrial) (discussed in *1999 Sen. Hearings, supra* note 75, at ___ (statement of Richard Romley, Maricopa County Attorney); *United States v. Ramsey*, 992 F.3d 301 (11th Cir. 1993) (reversing conviction for distribution of crack on grounds that turning and looking away from officer was invocation of *Miranda* right to remain silent); *United States v. Henly*, 984 F.2d 1040 (9th Cir. 1993) (reversing conviction for armed robbery; defendant in custody and should have been *Mirandized* when sitting in back of police car); *State v. Oldham*, 618 S.W.2d 647 (Mo. 1981) (defendant’s conviction for horribly abusing his two-year-old stepdaughter reversed 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.3d 920 (Pa. 1989) (death sentence reversed on *Miranda* grounds); *Commonwealth v. Bennett*, 264 A.2d 706 (Pa. 1970) (defendant’s first degree murder conviction overturned because non-*Mirandized* confession admitted; defendant acquitted on retrial); *Commonwealth v. Singleton*, 266 A.3d 753 (Pa. 1970) (police warning any statement could be used “for or against” defendant deviated from *Miranda*; defendant’s conviction for beating deaths reversed; defendant acquitted on retrial).

canvassed the before-and-studies of confession rates in the wake of the decision, concluding that virtually all the reliable studies showed a substantial drop in the confession rate.³¹² In the *UCLA Law Review*, Bret Hayman and I 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.³¹³ 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.³¹⁴ We develop at length reasons for attributing this decline to the Supreme Court’s imposition of the *Miranda* requirements,³¹⁵ a conclusion supported by recent testimony from the nation’s largest organization of law enforcement professionals.³¹⁶

If my conclusions in these earlier articles is correct, *Miranda* substantially harms 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 creates 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.³¹⁷ This article, however, is not 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 commonsense and posit that *Miranda* entails at least *some* identifiable harm to law enforcement — otherwise,

³¹² See Cassell, *supra* note 294. For further discussion of this estimate, compare Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, NW. U. L. REV. 500 (1997) with Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda’s Defenders*, NW. U. L. REV. 1084 (1996); Paul G. Cassell, *Miranda’s “Negligible” Effect On Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL’Y 327 (1997).

³¹³ See Paul G. Cassell & Brett S. Hayman, *Police in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLAL. REV. 839, 869 (1996). For an interesting, though ultimately unpersuasive, argument that the Salt Lake County confession rate is actually higher, see Thomas, *supra* note ?, at 944–53 (responded to in Cassell & Hayman, *supra*, at 871-76).

³¹⁴ 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). For more details about our analysis of clearance rates, including methodological issues, see *id.* Our article responds to an anticipatory critique by Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278 (1996). For further discussion of our analysis, compare John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) (confirming some aspects of the analysis and raising questions about others) with Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After Miranda: Coincidence Or Consequence?*, 50 STAN. L. REV. 1181 (1998) (responding to Donohue).

³¹⁵ Cassell & Fowles, *supra* note 314, at 1107-19.

³¹⁶ 1999 Senate Hearings, *supra* note 75, at ___ (statement of Gilbert G. Gallegos, President, 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 same 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.”).

³¹⁷ 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). Thomas, *supra* note 116, at [34] (identifying this as “truly a worst-case scenario which, if true, call for abolition of *Miranda*” but not reaching a judgment on whether the scenario is actually occurring today).

what is the point of the restrictions.³¹⁸ 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 “[o]ur 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.³¹⁹ Justice Harlan responded that, “[d]espite the Court’s disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform”³²⁰ Justice White, too, predicted that “the Court’s constitutional straitjacket” would “foreclose[] more discriminating treatment by legislative or rule-making pronouncements.”³²¹ On this dispute, no one can doubt that the majority was wrong and the dissenters 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 suspected of crime. . . . Nothing is likely to change in the future as long as *Miranda* remains in effects and perpetuates a perceived risk of invalidation for any alternative system that departs from it.³²²

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 and for all time, enshrined as the mandated approach for regulating police interrogation or whether the Supreme Court is serious about considering reasonable alternatives. The *Miranda* rules are not an end in themselves, but a means of safeguarding the Fifth Amendment — that is, a means of

³¹⁸ See Laurie Magid, *The Miranda Debate: Questions Past, Present, and Future*, __ HOUSTON 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). Cf. George C. Thomas III, *An Assault on the Temple of Miranda*, 85 J. CRIM. L. & CRIMINOLOGY 807, __ (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?”).

³¹⁹ *Miranda*, 384 U.S. at 467. 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).

³²⁰ 384 U.S. at 524 (Harlan, J., dissenting).

³²¹ 384 U.S. at 545 (White, J., dissenting).

³²² OLP REPORT, *supra* note 49, at 96.

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*."³²³ 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"³²⁴ 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.³²⁵ These costs also fall most heavily on those in the worst position to bear them, including racial minorities and the poor.³²⁶

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 § 3501 could well usher in consideration of new approaches on ways to protect against police extorting involuntary confessions while, at the same time, producing the largest possible number of 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.³²⁷ Commentators have suggested videotaping as a substitute for some of the *Miranda* procedures, arguing that taping of interrogations can both offer superior protect against police abuses while, at the same time, not deterring suspects from voluntarily providing confessions.³²⁸ Another possibility that might be explored would be bringing arrested suspects before a magistrate, who would ask reasonable questions about the crime.³²⁹ Here again, this approach might better protect against police abuse while, at the same time, gaining for society the benefits of voluntary information about criminals offenses. Alternatives like this will prosper if the Supreme Court upholds § 3501, signaling that

³²³ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 326 (1991).

³²⁴ OLP REPORT, *supra* note 49, at 98.

³²⁵ Cassell, *supra* note 294, at 493-96.

³²⁶ Compare CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980*, at 117 (1984) (reviewing crime statistics and concluding: "Put simply, it was much more dangerous to be black in 1972 than it was in 1965, whereas it was not much more dangerous to be white.").

³²⁷ See FBI Directive on Videotaping of Questioning of Suspects (1998).

³²⁸ See, e.g., JUDGE HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 237 (1996); Cassell, *supra* note ?, at ____; OLP REPORT, *supra* note 32, at 551-53.

³²⁹ Amar & Lettow, *supra* note 189, at 908-09; WILLIAM SCHAEFER, *THE SUSPECT AND SOCIETY* (1967); RICHARD UVILLER, *THE TILTED PLAYING FIELD* 200-06 (1999); Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671, 721-25 (1968).

the *Miranda* rules are not set in stone.³³⁰ On the other hand, should the Court strike down § 3501, reform efforts will remain stultified.³³¹

Justice White's dissent in *Miranda* warned that “[i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him.” He continued, “There is, of course, a saving factor: the next victims are uncertain, unnamed, and unrepresented in this case.”³³² 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.”³³³

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. This 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 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.”³³⁴

It is time for the excuses to end. It is time for the Department of Justice to enforce, and for the Supreme Court to uphold, § 3501.

³³⁰ See NEW REPUBLIC, Mar. 8, 1999 at 12 (applauding videotaping and concluding “[t]he Fourth Circuit's [*Dickerson*] ruling could provide the Supreme Court the perfect opportunity to modernize *Miranda*”).

³³¹ 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*, they could not provide much assurance to state legislators considering other options.

³³² *Miranda*, 384 U.S. at 542-43 (White, J., dissenting).

³³³ *Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring).

³³⁴ *Id.*