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Undoing *Miranda*

Michael Edmund O'Neill*

I. INTRODUCTION

*You have the right to remain silent. If you choose to waive that right, anything you say may, and likely will, be used against you. You have the right to consult with an attorney. If you cannot afford to retain counsel, the state will provide you with legal assistance at no cost to you.*¹

*How are the mighty fallen . . . !*²

Icons sometimes fall. And when they do, they tend to fall hard. While not yet toppled, *Miranda v. Arizona*, an icon of the Warren Court's transformation of American criminal procedure,³ is teetering on the brink. On June 13, 1966, the Supreme Court unleashed a firestorm that not only burned within the legal community, but ignited the popular imagination as well. Watch any generic crime show on television and at some point in the drama, a world-weary cop will

* Assistant Professor of Law, George Mason University Law School; Commissioner, United States Sentencing Commission. This article is dedicated to Akhil Amar, for his support; Paul Cassell, for his indefatigable work; Yale Kamisar, for his provocative scholarship on this subject; and, most of all, to Joseph Grano, without whose seminal scholarship this piece would not have been possible. I would also like to offer special thanks to Laird Kirkpatrick, Erik Jaffe, and my research assistants, Ghida Aljuburi and Danielle Giroux. The views expressed herein are my own. They do not reflect those of the United States Sentencing Commission, and thus any errors can be attributed solely to me.

1. The now-familiar warnings can be heard on any American cop show, circa 1966-present; *see also*, Fred Inbau, *Commentary: Over Reaction—the Mischief of Miranda v. Arizona*, 73 J. CRIM. L. & CRIMINOLOGY 797 (1982) (discussing various formulations of the warnings).

2. 2 *Sam.* 1:25 (King James).

3. A 1974 American Bar Association survey of lawyers, judges, and legal academics discovered that *Miranda* was the third most notable decision of all time, trailing only *Marbury v. Madison* and *United States v. Nixon* in terms of notoriety. Amazingly, given the group that was surveyed, it even ranked ahead of *Brown v. Board of Education*. *See* JETHRO K. LIEBERMAN, MILESTONES! 200 YEARS OF AMERICAN LAW: MILESTONES IN OUR LEGAL HISTORY vi-vii (1976). I daresay that were a survey taken of the public at-large, *Miranda* might rank even higher.

warn the hapless suspect that he has the right to remain silent, to obtain counsel, and, if impoverished, to retain counsel on the state's tab. *Miranda* has so permeated the popular culture that not even my word processor's spell-checker picks it up. Of course, *Miranda* has not only invaded the popular culture; it has also been the fodder for political debate. Listen to any politician on the stump inveighing against the "coddling" of criminals, and some criticism of *Miranda* is almost sure to emerge.

Despite its prominence, *Miranda*'s continuing vitality as a mandatory rule of police procedure has been threatened. The threat? The unlikely resuscitation of a statute long believed dead: 18 U.S.C. § 3501. Enacted by Congress in 1968 to replace *Miranda*'s compulsory warnings with the former "voluntariness" test, § 3501 has enjoyed relative obscurity in the criminal practice world, but has long been a favorite of those bent on rewriting the Warren Court's handbook on criminal procedure. Their efforts to revive the statute have recently paid off. In *United States v. Dickerson*,⁴ the Fourth Circuit resurrected this little-known curiosity of criminal procedure and held that it, not *Miranda*, governs the admissibility of confessions.⁵

The fact that the Fourth Circuit relied on § 3501 to determine a confession's admissibility is not half as interesting as why that statute languished in purgatory for so long. How could a statute, duly enacted by Congress to overrule a controversial decision, signed by the president and upheld (more or less) on several occasions, sink almost without a trace? This article will discuss *Miranda*'s jurisprudential roots and will trace the odd journey of § 3501—the statute that even prosecutors could not quite bring themselves to love.⁶ In so doing, I will revisit *Miranda*'s oft-debated constitutional status and examine Congress's institutional authority to alter rules designed to safeguard constitutional guarantees.

For example, the *Miranda* Court itself suggested that the now-familiar prophylactic warnings were not compelled by the Fifth Amendment, and even went so far as to invite attempts to implement other approaches that would protect criminal suspects' rights. However, the Court never explained how it could purport to exercise su-

4. 166 F.3d 667 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 578 (1999).

5. *See id.* at 692.

6. As I write this piece, the Solicitor General's Office has reversed long-standing Justice Department policy and joined the defendant in *Dickerson* to challenge § 3501's constitutionality.

pervisory authority over state courts—a power the Court has recently recognized it does not possess. Similarly, it is interesting to observe that Congress did precisely what the Supreme Court challenged it to do; namely, it devised an alternate means of protecting suspects' rights. In light of the furor surrounding *Miranda*, and the harsh political criticism brought to bear on the Court in the decision's wake, it is worth asking why the statute purportedly overturning *Miranda* was virtually ignored for well over a quarter century.

In Part II, this article examines the path leading to *Miranda*, focusing on the Supreme Court's early reliance on the voluntariness test for determining the admissibility of confessions and the Court's subsequent abandonment of that test in favor of restraints on police investigatory practices. Part III then discusses the *Miranda* opinion itself, bringing to light what the Warren Court said, and did not say, in that landmark decision. Part IV describes congressional reaction to *Miranda*, recounting the Senate hearings into the decision and detailing the floor debates surrounding § 3501's enactment. Despite Congress's sometime inflammatory rhetoric, it is interesting to note that far from "overruling" the Court, Congress instead artfully incorporated the *Miranda* warnings into a scheme that offered suspects considerably more protection than they had enjoyed prior to *Miranda*, while simultaneously balancing the suspect's rights against law enforcement's legitimate needs. Part V canvasses the statute's curious litigation history, starting with the Johnson Administration's tepid support for the legislation and ending with the Clinton Administration's outright hostility towards it. Part VI revisits recent congressional efforts to reawaken interest in the statute, chiefly by grilling Justice Department officials about their support for the legislation and initiating calls for the statute to be enforced. Part VII discusses § 3501's treatment in the Supreme Court. Finally, Part VIII concludes with some general observations on the constitutional issues swirling around the statute.

I conclude that, while § 3501 survives constitutional scrutiny, it nevertheless raises several important issues demanding judicial resolution, the chief of which involves the role Congress plays in constitutional interpretation. Although the Supreme Court has long dominated the field of "saying what the law is," both legislators and executive branch officials must interpret constitutional provisions in fulfilling their responsibilities. This careful balance creates room for Congress, in enforcing constitutional norms, to use its institutional

advantages to carve out a role for itself in generating procedural rules designed to safeguard substantive constitutional guarantees. It is my claim that the *Miranda* warnings are grounded not in the Fifth Amendment, but are instead designed to be a type of anticipatory remedy for potential constitutional violations. As such, though the warnings serve to secure constitutional rights, they are not themselves constitutionally guaranteed. Where the Court has constructed its “pre-remedy” around *predictive* facts, as opposed to *present* facts, Congress may rely on its own institutional superiority for fact-gathering to reject the Court’s assessment of predictive facts and to modify the Court’s anticipatory remedy—at least so long as Congress’s proposed remedy is sufficient to protect the threatened right.

II. THE ROAD TO *MIRANDA*

If the road to hell is paved with good intentions, then so is the path to contemporary restrictions on police interrogation. Courts have long sought to strike a balance between the state’s need to investigate criminal activity and the individual’s right to privacy and personal autonomy. Throughout history, governments have pursued those suspected of wrongdoing and questioned them about their conduct. This is hardly novel. One does not have to be Sherlock Holmes to understand that the interrogation of suspects generally has been considered the best way—indeed, sometimes the only way—to obtain information about criminal activity.⁷ In the United States, however, this desire to ferret out crime has been tempered by an understanding that police interrogation methods, however laudable, might nonetheless lend themselves to abuse. After all, the desire to obtain a confession provides an incentive for investigators to press suspects. As a result, the framers of the Bill of Rights adopted a pro-

7. Justice Jackson once observed that the “interrogation of those who know something about the facts is the chief means to the solution of crime.” *Stein v. New York*, 364 U.S. 156, 184 (1953). Similarly, Justice Felix Frankfurter once explained that “offenses frequently occur . . . [in which] nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions.” *Culombe v. Connecticut*, 367 U.S. 568, 571 (1961); see also Fred Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. (Northwestern University) 442, 447 (1948) (noting that even the best police departments depend on interrogations and confessions to solve many criminal cases); cf. LEWIS MAYERS, *SHALL WE AMEND THE FIFTH AMENDMENT?* 92 (1959) (stating that “[p]revailing opinion seems to be that police interrogation is the method most effective under contemporary American conditions for fastening guilt on the seasoned lawbreaker”).

vision, by then already popular in the several states, that no person shall “be compelled in any criminal case to be a witness against himself.”⁸ The Fifth Amendment’s provision against compelled self-incrimination, however, was generally construed as applying only to the introduction of the defendant’s confession at trial. Hence, while it may not have been a Fifth Amendment violation for police to coerce a suspect’s confession outside of court, it might well have run afoul of the Constitution if prosecutors had attempted to introduce that statement at the suspect’s trial.

A. The Process of Interrogation

Interestingly, the aggrieved party often conducted early criminal investigations.⁹ Under common law practices, the private prosecutor would bring the suspect before a judicial officer for questioning.¹⁰ The judicial officer would then conduct a preliminary examination to uncover salient information to be used at trial.¹¹ As intermediaries of the state, judicial officers were subject to various formal (and informal) constraints. The nineteenth century, however, witnessed the development of professional police forces, which marked the transition from judicial to police interrogation. Police officers, while cloaked with the state’s authority, were not subject to the same restrictions placed upon magistrates. Unlike magistrates, their investigations were not subject to public scrutiny; indeed, police investigations routinely took place out of the public view, often behind the closed doors of the station house.¹² Police inquiries were thus more efficient in uncovering information than those conducted by judicial officers. As a consequence, pretrial judicial inquiries all but disappeared.

This transition from pretrial judicial inquiries to police inquiries went largely unchallenged. No specific constitutional provision confers the power of interrogation on the government. This power, as Thurgood Marshall observed (while serving as Solicitor General) during oral argument in *Westover v. United States*¹³ (one of

8. U.S. CONST. amend. V.

9. See Michael Edmund O’Neill, Private Vengeance and the Public Good (draft on file with the author).

10. See MAYERS, *supra* note 7, at 16, 86-87, 100-02, 223-24.

11. See *id.*

12. See generally *id.*

13. 384 U.S. 436 (1966).

Miranda's companion cases), "is inherent in the investigatory process. . . . I don't think it has ever been questioned."¹⁴ Broad as this power may have been, the police exercised this authority for the most part without close supervision or any particular judicial oversight. Granting police such authority was generally thought to be "indispensable to crime detection."¹⁵

B. Confessions and Crime Solving

Confessions have long been crucial to the successful resolution of criminal cases. However obtained, confessions generally have been considered to be a reliable form of evidence.¹⁶ A confession, quite unlike most forms of evidence, is capable of supplying "ways of verifying itself," and, like a statement against interest, provides powerful evidence of guilt. Confessions are so powerful, in fact, that courts have been careful to scrutinize the process by which they are extracted. Courts have been concerned not only about the potential harm to the confessor, but also about possible taint to the judicial system from admitting unreliable evidence. A confession obtained by torture is, of course, unlikely to be reliable: a threat to remove one's toenails may induce even the most stalwart soul to say whatever a grand inquisitor might want.

A confession obtained as a result of simple deception, however, presents quite a different matter. The reliability of such a confession might not be compromised if the interrogators do nothing to overcome the suspect's will. For example, in the justly famous Christian Burial case, *Brewer v. Williams*,¹⁷ there was little chance that the confession was erroneous. In that case, a little girl was missing and presumed dead. A suspect, Robert Williams, turned himself into police. Although instructed to not interrogate Williams, the police officers played upon the suspect's religious inclinations, asking him to consider the poor, lifeless little girl lying out in the harsh elements. Such

14. RICHARD J. MEDALIE, FROM *ESCOBEDO* TO *MIRANDA*: THE ANATOMY OF A SUPREME COURT DECISION 134 (1966).

15. *Culombe v. Connecticut*, 367 U.S. 568, 571 (1961); cf. *Watts v. Indiana*, 338 U.S. 49, 58 (1949) (Jackson, J., concurring) (noting that in cases in which no external evidence exists, the alternative to interrogation is "to close the books on the crime and forget it with the suspect at large").

16. See *Watts*, 338 U.S. at 58 (Jackson, J., concurring).

17. 430 U.S. 387 (1977).

a little girl, the officers opined, deserved a “Christian burial.”¹⁸ Williams relented and led the officers to the girl’s body.¹⁹ Such tactics by the officers, while doubtless designed to elicit some sort of response from Williams, likely would not have resulted in a false confession. After all, only the guilty party would likely have known where the body was. A confession can thus be a particularly trustworthy device for separating the guilty chaff from the innocent wheat.

C. Voluntariness as a Proxy for Credibility

The Supreme Court, like the public at large, was not particularly troubled that certain suspects might erroneously believe that they were obligated to cooperate with the police. If police questioning was to be effective, suspects ought to believe they had a duty to cooperate. After all, it was not the investigating officer’s duty to provide the suspect with unsolicited free legal advice, but to interrogate him. Explaining to a suspect her constitutional rights would thus be contradictory to the state’s purpose in permitting custodial interrogation.²⁰ In light of this understanding, the Court did not feel the need to burden the government with any particular duty to inform the suspect that she need not cooperate with police. As long as the confession was freely offered, and hence likely to be credible, the process used to obtain it was of little concern. When police did, in the odd case, choose to advise a suspect of his right to silence, the suspect’s knowledge was traditionally considered a factor contributing to the “voluntariness” of the confession.²¹ Conversely, the absence of such counseling might weigh against the confession’s admissibility given the “totality of the circumstances.”

Understood, if not embraced, was the notion that some pressure upon the suspect was both inevitable and indispensable to the investigatory process.²² For example, confronting a suspect with evidence

18. *Id.* at 393.

19. *See id.* at 390-93.

20. Professors Inbau and Reid, authors of the first influential work on police interrogation methods, noted that “in the absence of a statutory provision specifically requiring a criminal interrogator to warn a suspect or accused person, it is unnecessary to do so.” FRED INBAU & JOHN REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 163-64 (1962).

21. *See Crooker v. California*, 357 U.S. 433, 438 (1958).

22. Professor Fred E. Inbau, in his textbook on interrogation for law enforcement officers, captured the judicial, as well as the popular, sentiment when he asserted that criminal suspects must be dealt with “in a somewhat lower moral plane than that in which ethical, law-abiding citizens are expected to conduct their everyday affairs.” FRED INBAU & JOHN REID,

of her guilt was not an infrequent means of obtaining a confession. Such techniques were, of course, far more effective if the suspect did not have counsel by her side. Consequently, the pre-*Escobedo* Court considered the denial of counsel to a suspect who had requested counsel or who had even retained counsel as but one factor among the “totality of the circumstances” used to determine whether the confession would be excluded as a violation of due process. The Supreme Court realized that counsel’s presence “would effectively preclude police questioning—*fair as well as unfair*,”²³ and “would constrict . . . [police ability] to solve difficult cases.”²⁴

Of course, the police were not granted unbridled discretion in questioning suspects. The confession’s reliability was of obvious import.²⁵ With the movement towards police, as opposed to judicial, interrogation, came the alleged use of so-called “third degree” tactics by police officers.²⁶ The problem with such tactics is that while they may have done an excellent job of producing *a* confession, they could not always be counted on to produce a *reliable* confession.

Pretrial investigatory practices thus came to be judicially scrutinized, at least in part, because courts were concerned about the *reliability* of confessions. In federal cases, the preferred means of scrutinizing such conduct became the Fifth Amendment.²⁷ Although the Fifth Amendment’s compelled self-incrimination clause appeared to pertain strictly to the trial setting, the Supreme Court soon deployed it to examine pretrial interrogations. Before the Court invoked the Fifth Amendment to scrutinize state cases, it relied upon the Fourteenth Amendment’s Due Process Clause. The process due the criminal suspect, it seems, extended to a “fair” interrogation. How-

LIE DETECTION AND CRIMINAL INTERROGATION 196-97 (3d ed. 1948); see also Larson, *Present Police and Legal Methods for the Determination of the Innocence or Guilt of the Suspect*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 219, 252 (1925).

23. *Crooker*, 357 U.S. at 433.

24. *Cicenia v. La Gay*, 357 U.S. 504, 509 (1958).

25. Even in the days when people believed in the existence of witches, there was some awareness that not all confessed witches were credible. For example, in 1672, in Massachusetts Bay Colony, John Broadstreet admitted to “having familiarity with the devil,” but the court was so unimpressed that they fined him for telling a lie and sent him home. K. ERIKSON, *WAYWARD PURITANS* 155 (1966).

26. Such abuses were the subject of the *National Commission on Law Observance and Enforcement, Report on Lawlessness*. WICKERSHAM COMM’N, NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, PUB. NO. 11, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 158-60 (1931).

27. See *infra* Part II.D.

ever, the focus on these cases was not so much on what the interrogators had done, but on whether the confession was the product of the suspect's free will.

D. Voluntariness and the Fifth Amendment

Voluntariness has long been the touchstone for determining whether a confession violated the protection against compelled self-incrimination. In one of its earliest interpretations of the Fifth Amendment, the Court in *Sparf & Hansen v. United States*,²⁸ focused on whether the challenged confession was the product of the confessor's free will. In *Sparf*, the second mate of an American sailing vessel disappeared under mysterious circumstances. The captain of the vessel identified three suspects and promptly ordered them placed in leg irons and held below deck for the return voyage. During the suspects' subsequent trial, the captain and two other crew members testified concerning an alleged confession made to them by one of the imprisoned defendants. The Court ruled that this testimony was admissible on the grounds that the confession was voluntarily given—despite the apparently minor fact that the confessor was clamped in leg irons and held in the brig.²⁹ In *dicta*, the Court suggested that the confession would have been involuntary, and thus inadmissible, only if it had been adduced by violence, the threat of punishment, or false promises of mercy.³⁰ Absent such specific pressures designed to overcome the suspect's will, a confession would be deemed voluntary.

The Court subsequently refined the voluntariness test in *Bram v. United States*.³¹ In *Bram* the Court took a much more nuanced view of what would constitute compulsion. *Bram*, like *Sparf* before it, involved murder on the high seas, specifically the murder of the captain, the captain's wife, and the second mate. When suspicion focused on one Mr. Brown, a crew member, he in turn fingered Bram, the first mate. Bram was placed in irons and, when the ship reached port, turned over to police authorities.³²

28. 156 U.S. 51 (1895).

29. *See id.* at 54.

30. *See id.* at 55-56.

31. 168 U.S. 532 (1897).

32. *See id.* 534-37.

The police interrogation unfolded as follows:

When Mr. Bram came into my office I said to him: "Bram, we are trying to unravel this horrible mystery." I said: "Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder." He said: "He could not have seen me; where was he?" I said: "He states he was at the wheel." "Well," he said, "he could not see me from there." I said: "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But," I said, "some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." He said: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it." He was rather short in his replies.³³

The Supreme Court held that the trial court erred in admitting this testimony and thus reversed Bram's conviction. Relying upon the Fifth Amendment, the Court explained that "the generic language of the [Fifth] Amendment was but a crystallization of the doctrine [excluding involuntary] confessions."³⁴ What was the involuntary confession? The Court observed that Bram's statement that Brown "could not see me from there," might possibly be understood as an inadvertent admission of guilt.³⁵ According to the Court, the police had secured this alleged "confession" by threatening Bram. How? Essentially, in reminding the defendant of Brown's accusation against him, the police "produce[d] upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person."³⁶ Despite the somewhat tenuous nature of this threat, it was clear that the Court was focused on the *process* of the interrogation as creating the Fifth Amendment violation.

E. Due Process and Voluntariness

Although the Court voiced a similar refrain when it embarked upon a review of confessions obtained in state courts, it lacked an

33. *Id.* at 539.

34. *Id.* at 543.

35. *Id.* at 562-64.

36. *Id.*

obvious vehicle to do so. As the Fifth Amendment had yet to be incorporated against the states, the Court instead relied on the Due Process Clause in *Brown v. Mississippi*.³⁷ If ever a case cried out for review, it was *Brown*. At trial, a deputy sheriff admitted to beating the codefendant prisoners with a metal buckled leather strap and boldly claimed that if the decision had been his alone, he would have whipped them harder.³⁸ The beating, he said, was “[n]ot too much for a negro.”³⁹

In unanimously reversing Brown’s conviction, the Court explained that the severe beatings, used to obtain confessions from the shackled defendants, made the confessions involuntary and thus deprived Brown and his codefendants of due process.⁴⁰ *Brown* showcased the Court’s dual concerns about the *means* by which the confession was obtained as well as the confession’s *reliability*. The means used, severe beatings, doubtless led to presumptively unreliable confessions. As in *Sparf*, the issue turned on whether the external pressures brought to bear on the defendant overcame the suspect’s ability to choose to confess freely.

Only a few short years later, in *Chambers v. Florida*,⁴¹ the Court further explored the limits that Due Process placed on obtaining confessions. Following Isaiah Chambers’s arrest for the murder of an elderly man, the local sheriff threatened Chambers with the specter of mob violence and then took him to jail, purportedly for his own

37. 297 U.S. 278 (1936). *Brown* was not the Court’s first confession case. Nearly 40 years earlier, as discussed previously, in *Bram v. United States*, 168 U.S. 532 (1897), the Court utilized the Fifth Amendment privilege against self-incrimination to reverse a federal conviction. Even before *Bram*, the Court relied upon the common law rules of evidence prohibiting promises of leniency or threats to hold confessions inadmissible. The common law rule barring the admissibility of involuntary confessions emerged during the eighteenth century in England. Its development is chronicled in 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 817-820(C) (3d ed. 1940) and LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968). In the United States, the Supreme Court first invoked the rule in *Hopt v. Utah*, 110 U.S. 574 (1884). Reviewing a death sentence for a murder conviction in *Hopt*, Justice Harlan, without referring to any constitutional provision, concluded for a unanimous Court that the confession was voluntary and therefore admissible. *See id.*; cf. *Sparf & Hansen v. United States*, 156 U.S. 51 (1895) (holding that the confessions of a person imprisoned and in irons, given under accusations of having committed a capital offense, are admissible in evidence if the confessions appear to have been made voluntarily and were not obtained by putting the suspect in fear or by making promises).

38. *See Brown*, 297 U.S. at 284.

39. *Id.*

40. *See id.* at 285-86.

41. 309 U.S. 227 (1940).

“safety.” At the jail, a barrage of officers questioned him continuously for five days and an entire night before he made a “sunrise confession.”⁴² A unanimous Court reversed Chambers’s conviction, explaining that the questioning occurred “under circumstances calculated to break the strongest nerves and the stoutest resistance.”⁴³ Essentially, because any person in Chambers’s position would likely have confessed, the Supreme Court determined that the confession was inadmissible.

F. Policing the Police: Voluntariness as Fairness

In both *Bram* and *Chambers*, the Supreme Court used “voluntariness” as the test for determining a confession’s reliability. If the confession was not the product of the suspect’s free will, it was likely not reliable. Of course, the Court could have chosen to permit the confession to have been adduced at trial and subjected to cross examination, but that may have undermined the suspect’s ability to rely effectively on the privilege against compelled self-incrimination. While a voluntariness test made perfect sense in the Fifth Amendment context, it perhaps translated less well to consideration under the Due Process Clause. What, under the Fourteenth Amendment, was the process due the suspect? Over time a subtle shift occurred. The voluntariness test evolved from a credibility determination into a means of assessing police interrogation practices. Voluntariness is a notoriously difficult concept to prove;⁴⁴ whether the police misbehaved, however, is not. As a practical matter, the Court’s focus thus shifted from the defendant to the police—from whether the confession was reliable to whether the process employed to obtain the confession was appropriate. For the Supreme Court, policing the police was a simpler task than trying accurately to assess the defendant’s state of mind.

In *Lisenba v. California*,⁴⁵ for example, the Court expressly stated that to meet due process requirements, the police would have

42. *Id.* at 235.

43. *Id.* at 238-39.

44. The test for determining voluntariness has been oft-criticized. *See, e.g.*, Yale Kamisar, Gates, “*Probable Cause*,” “*Good Faith*” and *Beyond*,” 69 IOWA L. REV. 551, 570 (1984) (stating that in pre-*Escobedo*, pre-*Miranda* days when the voluntariness test prevailed, “[a]lmost everything was relevant, but almost nothing was decisive”); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867-78 (1981) (book review).

45. 314 U.S. 219 (1941).

to use methods that comported with concepts of fundamental fairness to secure confessions.⁴⁶ “The aim of the requirement of due process,” the Court explained, “[was] not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.”⁴⁷ This marked a significant break with the past. If the confession was itself corroborated by evidence beyond the suspect’s statement, the reconstructed voluntariness test still enabled the Court to scrutinize police conduct and to suppress any resulting statement. The Court went so far as to proclaim in *Rogers v. Richmond*⁴⁸ that the defendant’s statement must be evaluated with “complete disregard of whether or not . . . [he] spoke the truth.”⁴⁹

The Court’s turn from credibility to process as the touchstone for voluntariness reached an apex in *Spano v. New York*,⁵⁰ where the Court disapproved the police’s decision to use an officer, who was the accused’s longtime friend, to pressure him into confessing.⁵¹ Defendant Spano allegedly shot a former professional boxer who had stolen his money and physically assaulted him. After the shooting, Spano disappeared, resurfacing only to call one Gaspar Bruno, a close friend of many years’ standing. In addition to being Spano’s friend, Bruno was also a fledgling police officer. According to Bruno’s testimony, Spano told him “that he took a terrific beating, that the deceased hurt him real bad and he dropped him a couple of times and he was dazed; he didn’t know what he was doing and that he went and shot at him.”⁵² Spano also informed Bruno that he intended to get a lawyer and turn himself in.

Spano was as good as his word, surrendering himself to the police the following day. Cautioned by his attorney not to talk, however, Spano repeatedly refused to answer the officers’ questions. After it became apparent that Spano had listened to his counsel’s

46. *See id.* at 236.

47. *Id.*

48. 365 U.S. 534 (1961).

49. *Id.* at 544. In *Stein v. New York*, Justice Frankfurter wrote that judges must avoid being influenced by “the confirmation of details in the confession by reliable other evidence” or by a “feeling of certitude that the accused is guilty of the crime to which he confessed.” *Stein v. New York*, 346 U.S. 156, 200 (1953) (Frankfurter, J., concurring).

50. 360 U.S. 315 (1959).

51. *See id.* at 323.

52. *Id.* at 317.

advice, the officers' tactics changed. They called Bruno and instructed him to tell Spano that his earlier telephone call had gotten him (Bruno) "in a lot of trouble" with his superiors.⁵³ Although Bruno thrice tried to get Spano to open up to him by telling him that his job was in jeopardy unless he confessed, Spano steadfastly refused. Finally, on Bruno's fourth try, Spano succumbed to his friend's pleas to save his job and agreed to talk.⁵⁴

The Court's opinion in *Spano* focuses both on the officers' conduct (the repeated interrogation, the use of trickery) and Spano's personal characteristics (his friendship with Bruno and his status as an immigrant). However, the Court concentrated more closely on the officers' conduct in obtaining the confession than on whether Spano's confession was credible.⁵⁵ *Spano*, in one important respect, presaged *Miranda*. The Court disapproved of the officer's interrogation tactics, even though the credibility of Spano's confession was never seriously questioned, the pressure on Spano was not inordinate, and he did not seem to be an easily subverted defendant.

G. Promulgating Rules of Engagement

Since its first review of a state confession case in *Brown*, the Court increasingly patrolled police interrogation practices. The voluntariness test, based upon a review of the totality of the circumstances surrounding the confession, enabled trial courts to scrutinize the process of obtaining confessions. Commencing with *Haynes v. Washington*,⁵⁶ however, the Supreme Court began a steady drift away from the strict totality-of-the-circumstances test. In *Haynes*, the Court examined evidence of alleged police coercion in securing the defendant's confession.⁵⁷ The trial court had instructed the jury not to consider the fact that the police had not warned the defendant that he was under arrest, had a right to remain silent, or that he had a right to counsel in assessing whether the confession was voluntary.⁵⁸ The trial court was not unreasonable in believing that voluntariness was quite independent of the defendant's awareness of his

53. *Id.* at 319.

54. *See id.*

55. *Id.* at 321-24.

56. 373 U.S. 503 (1963).

57. *See id.* at 506.

58. *See id.* at 514-15.

legal rights. The Supreme Court however, was not so sure and thus made perhaps its first stab at transforming police investigators into legal counsel. Although the Court did not find that the officers' failure to warn the defendant of his rights created an independent ground for reversal, it did note that this omission raised a "serious and substantial question whether a proper constitutional standard was applied by the jury."⁵⁹

If the Court was merely testing the waters in *Haynes*, it jumped in headfirst the following year in *Massiah v. United States*⁶⁰ and *Escobedo v. Illinois*.⁶¹ These cases became the ideological progenitors of *Miranda*.

1. *Massiah and the right to counsel*

Massiah turned on the admissibility of the defendant's incriminating statements to a confederate who, without *Massiah*'s knowledge, was cooperating with the police.⁶² *Massiah* made his statements during an on-going investigation into a narcotics conspiracy in which he was deeply involved. Interestingly, *Massiah* made his slip of the tongue while on bail, after having retained counsel and pleaded not guilty to a narcotics offense.⁶³

The Supreme Court reversed his conviction despite the fact that *Massiah* suffered no (conventional) pressure and had no idea that he was speaking to a government informant. The Court explained that obtaining a statement in this manner violated *Massiah*'s right to assistance of counsel.⁶⁴ In effect, the Court created a rule that officers may not elicit information from a suspect represented by counsel if that counsel is not present. This was truly a remarkable decision. Aside from a reinterpretation (and extension) of the Sixth Amendment's right to assistance of counsel, it also marked the Court's attempt to craft rules of engagement for police. Taken to its logical extreme, the Court's decision in *Massiah* effectively prohibited the police from questioning represented parties.

59. *Id.* at 515.

60. 377 U.S. 201 (1964).

61. 378 U.S. 478 (1964).

62. *See Massiah*, 377 U.S. at 202-03.

63. *See id.* at 202.

64. *See id.* at 207.

2. Escobedo *and the erosion of the voluntariness test*

What *Massiah* did for the right to assistance of counsel, *Escobedo v. Illinois*⁶⁵ did for confessions. *Escobedo* is generally recognized as the beginning of the end for the voluntariness test. In *Escobedo*, the police questioned Danny Escobedo in connection with his brother-in-law's murder.⁶⁶ Although the interrogation lasted for several hours before Escobedo's attorney secured his release, he made no statement. Shortly thereafter, the police learned from another suspect, one DiGerlando, that Escobedo had been the trigger man. The police again plucked Escobedo from the street and subjected him to intense questioning. No fool, Escobedo asked to speak with his lawyer. In the meantime, unbeknownst to Escobedo, his attorney had unsuccessfully attempted to contact him at the station where he was being held. When questioned, Escobedo declared that DiGerlando was a liar. One of the detectives challenged Escobedo to repeat that accusation to DiGerlando's face and Escobedo agreed. When DiGerlando was brought in, Escobedo declared "I didn't shoot Manuel, you did it."⁶⁷ Apparently ignorant of the concept of accomplice liability, Escobedo's statement implicated him in the murder.

The Court's reasoning in *Escobedo* departed significantly from previous cases in this area. The police had not used force or trickery to compel Escobedo's statement; nor was Escobedo a "vulnerable victim." Indeed, Escobedo had successfully resisted earlier attempts at questioning and had even retained counsel. In fact, the record showed that counsel had communicated to Escobedo what he "should do in the event of interrogation."⁶⁸ Thus, it could be argued that Escobedo had sage advice from counsel and had endeavored to follow that advice. In examining the totality of the circumstances surrounding Escobedo's inculpatory statement, it would be difficult to find that the statement was, in the conventional sense, the product of coercion.

The Court nevertheless disagreed. In a five-to-four decision, the Court reversed the conviction and held the statement inadmissible:

65. 378 U.S. 478 (1964).

66. *See id.* at 479.

67. *Id.* at 483.

68. *Id.* at 485 n.5.

We hold . . . that where . . . the investigation . . . has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied “the Assistance of Counsel” in violation of the Sixth Amendment⁶⁹

By ignoring the actual circumstances surrounding the interrogation and focusing instead on Escobedo’s ignorance of the law, the Court laid the foundation for the right to counsel during custodial interrogation and thus opened the door to *Miranda*.

III. *MIRANDA V. ARIZONA*:⁷⁰ DECISION AND MYTH

A. *The Confession*

Ernesto Miranda seemed to be an appropriate poster boy for championing individual liberties in the face of untoward police interrogation tactics.⁷¹ He allegedly kidnapped and brutally raped an eighteen-year-old woman.⁷² Although Miranda’s alleged victim failed to identify him in a police line-up, the investigating officers used a bit of trickery to elicit a confession.⁷³ When Miranda asked how he had done after the line-up, the police disingenuously replied “you flunked.”⁷⁴ Believing (incorrectly) that the victim had positively identified him in the line-up, Miranda resignedly confessed not only to the rape for which he was arrested, but also to the robbery and at-

69. *Id.* at 490-91.

70. 384 U.S. 436 (1966).

71. So were any of the defendants in *Miranda*’s three companion cases, *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*, 384 U.S. 436 (1966). According to the Court, each of the four cases shared certain “salient features,” among them “incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.” *Miranda*, 384 U.S. at 445. Instead of receiving *Miranda* warnings, we could easily be discussing *Vignera*, *Westover*, or *Stewart* warnings.

72. See LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 12 (1983). In his excellent article on § 3501 and *Dickerson*, Paul Cassell describes, apparently for the first time, many of the details surrounding Miranda’s confession. See Paul Cassell, *The Statute that Time Forgot: 18 U.S.C. 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 186-90 (1999).

73. See BAKER, *supra* note 72, at 12.

74. *Id.*

tempted rape of a second victim and to the attempted robbery of a third woman.⁷⁵ Miranda hand-wrote a complete confession and then signed a prepared statement admitting that he had voluntarily confessed “with full knowledge of my legal rights, understanding any statement I make may be used against me.”⁷⁶ No evidence suggested that the police in any way “forced” Miranda to respond to police questioning.

Miranda’s confession readily complied with then-existing standards for voluntariness. Unlike the defendant in *Bram*,⁷⁷ he was not tortured into confessing. One of the officers in fact testified that he told Miranda that he was not required to answer their questions.⁷⁸ In contrast to Chambers, he was not held for hours or subjected to a barrage of questions by numerous law enforcement officers. Instead, Miranda was held for fewer than two hours and questioned during normal business hours by only two officers.⁷⁹ He was subjected to none of the usual deprivations suffered by those who had been “compelled” to confess.⁸⁰ Miranda’s confession thus did not seem a likely candidate for suppression.

B. The Decision

Why did the Court demand that Miranda’s confession be suppressed? Because the Court implicitly found that a *custodial* confession was tantamount to a *compelled* confession. The Court stressed that “without proper safeguards the process of in-custody interrogation . . . contains *inherently compelling pressures* which work to undermine the individual’s will to resist and to compel him to speak where he would otherwise not do so freely.”⁸¹ The Court’s concern was plainly not with so-called third-degree tactics, which were “undoubtedly the exception now.”⁸² Instead, the Court struggled with the very existence of custodial interrogation. “An individual swept

75. *See id.* at 13.

76. *Miranda v. Arizona*, 384 U.S. 436, 492 (1966) (internal punctuation omitted).

77. 156 U.S. 51 (1895).

78. *See Miranda*, 384 U.S. at 491 n.66.

79. *See id.* at 518-19 (Harlan, J., dissenting).

80. Chief Justice Warren noted that “[i]n these cases, we might not find the defendants’ statements to have been involuntary in traditional terms.” *Id.* at 457.

81. *Id.* at 467 (emphasis added).

82. *Id.* at 447. Indeed, Justice Harlan furthered observed that “[p]eaceful interrogation is not one of the dark moments of the law.” *Id.* at 517 (Harlan, J., dissenting).

from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to . . . techniques of persuasion,” the Court explained, “cannot be otherwise than under compulsion to speak.”⁸³ To buttress this factual determination in which it equated custodial interrogation with coercion, the Court did little more than survey police manuals to paint a picture of police interrogation practices;⁸⁴ trot out the then thirty-plus year old Wickersham Report, which described alleged third-degree tactics used by police in the 1930s;⁸⁵ and rehash anecdotal evidence gleaned from individual cases.⁸⁶ While there is assuredly some common-sense truth to the existence of an inherently coercive atmosphere *whenever* the police question a suspect, the Court broke new ground with the breadth of its holding. “[N]ever,” as Justice Harlan pointed out in his dissent, has the Fifth Amendment “been thought to forbid *all* pressure to incriminate one’s self in the situations covered by it.”⁸⁷ Nor had the Court ever found a confession produced during an unwarned interrogation necessarily to be involuntary.

Acknowledging that it might not have found Miranda’s statements “to have been involuntary in traditional terms,” the Court explained that this did not obviate the need “for adequate safeguards to protect” the Fifth Amendment right against compelled self-incrimination.⁸⁸ And what were those “procedural safeguards?” Borrowing a page from that champion of individual liberties, J. Edgar Hoover, the Court held that, prior to any custodial interrogation, the police must warn a suspect that “he has a right to remain silent, that any statement he does make may be used . . . against him, and that he has the right to the presence of an attorney, either retained or appointed.”⁸⁹ Failure to abide by the warnings would result in the automatic exclusion of any statements obtained by the police: “the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-

83. *Id.* at 461.

84. *See id.* at 448-55.

85. *See id.* at 445, 447-48.

86. *See id.* at 445-47.

87. *Id.* at 512 (Harlan, J., dissenting).

88. *Id.* at 457.

89. *Id.* at 444; *see also id.* at 479, 483 n.54.

incrimination.”⁹⁰ Rather than granting those warnings indispensability, the Court-prescribed warnings were required only in the absence of “other fully effective means . . . devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it.”⁹¹

The Court rendered entirely irrelevant a suspect’s personal traits. A serious criticism of the voluntariness test focused on the fact that a suspect who was unfamiliar with his rights as a result of inadequate education, inferior economic status, or emotional or mental instability, was at a serious disadvantage with respect to the more sophisticated criminal defendant.⁹² Consequently, the Court directed that the warnings be uniformly administered without any consideration of the accused’s age, status, experience, or any other criterion examined under the traditional voluntariness test.⁹³ If the police neglected to inform the suspect of his rights prior to questioning, any statement secured thereafter would be held inadmissible.⁹⁴

The Court plainly viewed the arrested suspect from a different perspective than had commonly been held in the past. Earlier Court decisions had always envisioned—rightly or wrongly—an intelligent citizen-suspect, perfectly able to resist standard police questioning and unwilling, absent threats or fabricated promises of leniency, to falsely confess to the commission of a crime. The Court rejected this idealized conception of the criminal suspect as a hardy citizen. “No amount of circumstantial evidence that the person may have been aware of this right will suffice,” the Court declared.⁹⁵ “Only through such a warning is there ascertainable assurance that the accused was aware of this right.”⁹⁶

That the warnings were more a remedy than a constitutional command is evidenced by the fact that the Court admitted, within certain parameters, that legislatures could develop their own rules to safeguard the privilege against compelled self-incrimination. “It is

90. *Id.* at 444.

91. *Id.*

92. See generally Catherine Hancock, *Due Process Before Miranda*, 60 TUL. L. REV. 2195 (1996); Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826 (1987).

93. See *Miranda*, 384 U.S. at 467.

94. See *id.* at 493.

95. *Id.* at 471-72.

96. *Id.*

impossible,” the majority explained, “for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities.”⁹⁷ Apparently expecting some sort of legislative response, the Court thus refused to “say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.”⁹⁸ Until such time as the legislature acted, however, it was up to the Court to devise a means of safeguarding the right because “the issues presented are of constitutional dimensions and must be determined by the courts.”⁹⁹ The means the Court chose, of course, involved the warnings provision. Essentially, the Court adopted an anticipatory remedy to prevent the possible violation of the Fifth Amendment right.

While Courts traditionally had balanced the individual’s right to privacy and personal autonomy against society’s general need for protection, the *Miranda* Court abandoned any such balancing notion and assumed what was a radical posture: treating the self-incrimination right as absolute and inviolable. Waivers of these rights, though permissible, were to be viewed with suspicion. “If the interrogation continues without the presence of an attorney and a statement is taken,” the Court stressed, “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”¹⁰⁰ If the suspect refuses to waive her rights, the police must halt questioning.¹⁰¹

An important thread running through the Court’s opinion is that the warnings serve as a device that protects the underlying substantive right. As Professor David Strauss has observed, *Miranda* “reads more like a legislative committee report with an accompanying statute” than a judicial decision.¹⁰² The *Miranda* majority in fact acknowledged that its decision was a bit out of the ordinary and that a legislature might be a more appropriate authority to deal with the

97. *Id.* at 467.

98. *Id.*

99. *Id.* at 490.

100. *Id.* at 475 (citation omitted).

101. *See id.* at 474-77.

102. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988).

problem confronting the Court: “[i]t is . . . urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule-making.”¹⁰³ To this challenge, the Court responded:

We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.¹⁰⁴

In other words, the Court admitted that, within certain parameters, legislatures could develop their own rules to safeguard the self-incrimination privilege. For, as the Court explained, “[w]here rights secured by the Constitution are involved, there can be no rule-making or legislation which would abrogate them.”¹⁰⁵ These somewhat cryptic, seemingly self-contradictory statements have fueled the debate about whether the Court believed the warnings were themselves compelled by the Fifth Amendment.

I think it is fair to say that while the Court did not consider the specific set of warnings it adopted as constitutionally compelled, it anticipated that some prophylactic device would be legislated to deal with the problem. *Miranda* is best viewed as having adopted a means of enforcing the privilege against compelled self-incrimination in the face of repeated violations. Essentially, the Court simply adopted a practical, easily administered means of safeguarding the right:

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.¹⁰⁶

Because the warnings were not themselves constitutional guarantees, the Court could clarify that *Miranda* “in no way creates a con-

103. *Miranda*, 384 U.S. at 490-91.

104. *Id.*

105. *Id.* at 491.

106. *Id.* at 468.

stitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect.”¹⁰⁷ As opposed to thinking it had rendered the final word on the subject, the Court wanted 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.¹⁰⁸ The sole caveat was that “unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following [*Miranda*] safeguards must be observed.”¹⁰⁹

C. The Loyal Opposition

Each of the three dissenting opinions took a slightly different view of the case. Justice Clark, who dissented in part and concurred in the result of one of the cases, took issue with the Court’s replacement of the traditional voluntariness test. He questioned the Court’s evidence relating to the inherently coercive nature of police questioning, believing that the Court had not “fairly characterized” police officers’ efforts.¹¹⁰ Justice Clark, who was not joined by the other dissenters, merely advocated that the courts continue to adhere to the voluntariness test.¹¹¹

Justice Harlan was more resolute in his dissent. He offered that the Court’s decision “represents poor constitutional law and entails harmful consequences for the country at large.”¹¹² As constitutional law, Harlan explained that the Court’s decision broke with past interpretations of the Fifth Amendment and failed to establish any principled basis for extending that Amendment to police interrogations.¹¹³ He further assailed the opinion as having a necessarily deleterious effect on law enforcement and being based on precious little solid evidence.¹¹⁴ He chided the Court for not allowing legislatures time to consider various solutions, noting that “legislative reform is rarely speedy or unanimous . . . but [has] . . . the vast advantage of

107. *Id.* at 467.

108. *See id.* at 467.

109. *Id.*

110. *Id.* at 500 (Clark, J., dissenting).

111. *See id.* at 503 (Clark, J., dissenting).

112. *Id.* at 504 (Harlan, J., dissenting).

113. *See id.* at 506-15 (Harlan, J., dissenting).

114. *See id.* at 515-26 (Harlan, J., dissenting).

empirical data and comprehensive study, [] would allow experimentation and use of solutions not open to courts, and [] would restore the initiative in criminal law reform to those forums where it truly belongs.”¹¹⁵

Justice White, too, challenged the decision’s historical footings, arguing that neither the text nor the tradition of the Fifth Amendment provided any basis for the Court’s decision: “[T]he 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”¹¹⁶ While Justice White had no problem with the Court “legislating” rules on the basis of purely speculative facts, he did believe that the “advisability of its end product” demanded exploration.¹¹⁷ And in his view, that product was found wanting. He dissected the Court’s determination that all custodial interrogations were necessarily coercive, and found it irrational.¹¹⁸ He pointed out that “if the defendant may not answer without a warning a question such as ‘Where were you last night?’ without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult . . . counsel . . . ?”¹¹⁹ He also observed that “for all the Court’s expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts.”¹²⁰ Justice White explained:

I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police’s asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting

115. *Id.* at 524 (Harlan, J., dissenting). Justice Harlan noted in summary: “The foray which the Court makes today brings to mind the wise and farsighted words of Mr. Justice Jackson . . . ‘This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.’ ” *Id.* at 526 (Harlan, J., dissenting) (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (Jackson, J., separate opinion)).

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

117. *Id.* (White, J., dissenting).

118. *See id.* at 532-37 (White, J., dissenting).

119. *Id.* at 537 (White, J., dissenting).

120. *Id.* (White, J., dissenting).

him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent.¹²¹

In concluding that the warnings represented poor public policy, Justice White 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 . . . to repeat his crime whenever it pleases him.”¹²²

D. Untangling Miranda

Despite the Court’s solemn pronouncement that *Miranda* touched upon fundamental constitutional principles, a mere week after the decision was handed down, the Court ruled in *Johnson v. New Jersey*¹²³ that both *Miranda* and *Escobedo* were to have prospective application only.¹²⁴ The theory uniting these decisions was based upon the Court’s conclusion that *Miranda* had not supplanted the voluntariness test (at least with respect to trials pre-dating *Miranda*), but had simply furnished additional protections to “guarantee full effectuation of the privilege against self-incrimination.”¹²⁵ *Miranda* was thus not viewed as a repudiation of the voluntariness test, but simply as a refinement of that test. “[T]he nonretroactivity of these decisions,” the majority noted, “will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim.”¹²⁶ A defendant may not have been entitled to invoke *Miranda* per se, but could nonetheless argue that the absence of *Miranda* warnings tended to make his confession involuntary.

This conception of *Miranda* warnings as prophylactic rules rather than rights is echoed in *Davis v. North Carolina*.¹²⁷ In *Davis*, the petitioner was convicted of a rape and murder.¹²⁸ The Court recognized that “[t]he sole issue presented for review is whether the confessions were voluntarily given or were the result of overbearing

121. *Id.* at 538 (White, J., dissenting) (citation omitted).

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

123. 384 U.S. 719 (1966).

124. *See id.* at 721.

125. *Id.* at 729.

126. *Id.* at 730.

127. 384 U.S. 737 (1966).

128. *See id.* at 738.

by police authorities.”¹²⁹ Observing that *Miranda* did not apply due to the nonretroactive nature of the decision, the Court explained that whether comparable warnings were given “is a significant factor in considering the voluntariness of statements later made.”¹³⁰ Upon its examination of the totality of the circumstances surrounding the confession, the Court concluded that the petitioner’s confession was not voluntary, but the product of police coercion.¹³¹

The Court’s decision in *Davis* highlighted the fact that the *Miranda* warnings were not exactly a constitutional mandate, but instead served as a pragmatic safeguard to protect the defendant’s constitutional rights. In part, these cases presaged the Court’s later holdings that, for example, a confession taken in violation of *Miranda*, but nevertheless not involuntary, could be used for impeachment purposes.¹³² More will be said about this later. Let us turn now to Congress’s reaction to *Miranda*.

IV. CONGRESS RESPONDS: 18 U.S.C. § 3501

Justice White’s ominous prediction in *Miranda* turned out to be prescient. Escalating crime rates became the byword for the 1968 presidential election.¹³³ Politicians latched on to the fact that fear of crime elects candidates with tough-on-crime agendas. As a political sop to quiet the cries of those clamoring for federal action on the crime problem, President Lyndon Johnson, in February 1967, proposed a legislative package authorizing substantial federal grants to state and local governments to improve law enforcement efforts.¹³⁴ Although loaded with plenty of vote-getting pork, the President’s proposed legislation did not propose any significant legal reforms. Those were to come later.

129. *Id.* at 739.

130. *Id.* at 740.

131. *See id.* at 739, 752-53.

132. *See Oregon v. Hass*, 420 U.S. 714, 723-24 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971).

133. The FBI’s *Uniform Crime Report* reported that from 1958 to 1964 “the incidence of crime had been growing six times faster than the American population.” BAKER, *supra* note 72, at 39.

134. *See* ADAM CARLYLE BRECKENRIDGE, CONGRESS AGAINST THE COURT 1-3 (1970); RICHARD HARRIS, THE FEAR OF CRIME 15-20 (1969).

A. The Legislation

Whether *Miranda* had truly contributed to spiking crime rates, Congress accepted the Court's gracious invitation to "develop [its] own safeguards for the privilege."¹³⁵ As a result of presidentially-sponsored crime reports calling for increased assistance to state and local law enforcement,¹³⁶ Congressman Emanuel Celler (D-N.Y.) introduced President Johnson's legislation in the House to provide federal assistance grants to law enforcement.¹³⁷ This bill was immediately referred to the House Judiciary Committee, which changed the bill's name to the "Law Enforcement and Criminal Justice Act," a foreshadowing of events to come.¹³⁸ Although the House bill significantly expanded federal monetary assistance to local law enforcement,¹³⁹ it did not contain any of the provisions relating to *Miranda* (or, in fact, to any of the Supreme Court's criminal procedure cases). At roughly the same time, Senator John L. McClellan (D-Ark.) introduced the corresponding Senate version of the bill.¹⁴⁰ It, too, lacked the *Miranda* provisions. The House bill, unencumbered by legal reforms and spurred on by parochial interests to subsidize local law enforcement, was the first to emerge from floor debate and was referred to the Senate.

135. *Miranda v. Arizona*, 384 U.S. 436, 490 (1966).

136. The Executive Branch sponsored three influential crime reports that, at least in part, spurred Congress to enact crime-control legislation. See PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT (1966); FBI UNIFORM CRIME REPORT—CRIME IN THE UNITED STATES—1967; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, REPORT—THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967). Although the reports called for greater federal assistance in local crime control, none deduced a link between rising crime rates and Supreme Court decisions affording criminal defendants greater protection. One report, in fact, disavowed any "satisfactory proof of a causal relationship between the increasing crime rate and restraints on police interrogation." PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 613 (1966). The National Report, however, stated that "it is too early to assess the effect of the *Miranda* decision on law enforcement's ability to secure confessions and to solve crimes." THE CHALLENGE OF CRIME IN A FREE SOCIETY, quoted in BAKER, *supra* note 72, at 203. Several on the Commission nevertheless urged that further study be devoted to determining whether such a link existed.

137. See H.R. REP. NO. 90-5037 (1967), reprinted in 113 CONG. REC. 3113 (1967).

138. See *Safe Streets, Gun Control Bills Stalled*, 25 CONG. Q. 2380 (1967).

139. The House legislation was designed to significantly expand the reach of the Law Enforcement Assistance Act of 1965, Pub. L. No. 89-197, 79 Stat. 828 (1965), as amended by Act of Nov. 8, 1966, Pub. L. No. 89-798, 80 Stat. 1506 (1966), repealed by Pub. L. No. 93-83, 87 Stat. 207 (1978).

140. See S. REP. NO. 90-917 (1967), reprinted in 113 CONG. REC. 2886 (1967).

Senator McClellan supported the President's bill, agreeing that "[p]rograms to better train and equip our police personnel are needed."¹⁴¹ He did not, however, believe that the President's bill was an adequate response to the rising tide of crime:

The war on crime must be waged on many fronts. . . . Court decisions that . . . protect and liberate guilty and confirmed criminals to pursue and repeat their nefarious crimes should be reversed and overruled.

. . .

. . . [N]o matter how much money we appropriate for local police departments, we will not have effective law enforcement so long as the courts allow self-confessed killers to go unpunished. The confusion and disarray injected into law enforcement by such decisions as . . . *Escobedo* . . . and *Miranda* . . . are deplorable and demoralizing.¹⁴²

To shore up the President's bill, Senator McClellan introduced what was to become Title II of the Omnibus Crime Control Act, Senate Bill 917, an act devoted to govern the admissibility of evidence in federal courts.¹⁴³ This bill was referred to the Senate Committee on the Judiciary as a separate bill challenging the Supreme Court's *Miranda* decision by directing the federal courts to admit confessions pursuant to the voluntariness standard.¹⁴⁴ Pursuant to the McClellan bill, whether a person had been advised of her rights prior to questioning was to be considered by a court in determining a confession's voluntariness, but was only one of a number of factors to be weighed.¹⁴⁵ The proposed legislation also contained a provision removing the Court's jurisdiction to hear cases involving a confession's voluntariness.¹⁴⁶

141. 114 CONG. REC. 11,200 (1968).

142. *Id.* at 11,200-01.

143. Senator McClellan had introduced several anti-crime measures, several of which were ultimately incorporated into the Omnibus package approved by Congress. *See Hearings on S. 674, S. 917, et. al., Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong. 2-3 (1967) [hereinafter *Hearings on S. 674, S. 917, et. al.*].

144. *See* S. REP. NO. 90-1097, at 47 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2123-24.

145. *See id.* at 47, *reprinted in* 1968 U.S.C.C.A.N. 2123.

146. *See id.*

McClellan's proposal, which was not without controversy, was insufficient to appease certain senators, however, because some members (led by Senator Sam Ervin (D-N.C.)) banded together to cosponsor a joint resolution proposing a constitutional amendment:

[t]o provide that the voluntary admission of the confession of the accused in a criminal prosecution shall be admissible against him in any court sitting anywhere in the United States, and that the ruling of a trial judge admitting an admission or confession as voluntarily made shall not be reversed or otherwise disturbed by the Supreme Court . . . if such ruling is supported by competent evidence. . . .¹⁴⁷

Senator Ervin sponsored the amendment because, while he “favor[ed] the substance” of McClellan’s bill, he doubted whether Congress could, by “a simple legislative enactment,” alter the Supreme Court’s criminal procedure rulings.¹⁴⁸ The other members’ intentions are not clear. The mere fact that an amendment was proposed might suggest that at least some in Congress may have believed that such was required to alter the Court’s decision. It is equally possible, however, that supporters simply wanted to be viewed as “correcting” the Court in a high profile manner.

Shortly after introducing the resolution, Senator Ervin decided there was an even more “direct route” to “rectify the problem” created by the Supreme Court’s imaginative criminal procedure jurisprudence: simply remove the Court’s jurisdiction to hear cases involving the admissibility of confessions.¹⁴⁹ Senator Ervin thus introduced a bill to remove federal courts’ jurisdiction to reverse or otherwise modify district courts’ decisions admitting voluntarily given confessions.¹⁵⁰ The legislation further prevented the Supreme Court from disturbing the judgment of a state’s highest tribunal that had declared a confession to have been made voluntarily.¹⁵¹ Regardless, with a proposed constitutional amendment and several distinct pieces of legislation before it, the Senate Judiciary Committee’s Subcommittee on Criminal Laws and Procedures conducted a hearing to evaluate the various proposals.¹⁵²

147. 113 CONG. REC. S628, S636-39 (1967).

148. *Hearings on S. 674, S. 917, et. al, supra* note 143, at 4.

149. *See id.* at 5.

150. *See id.*

151. *See id.*

152. *See id.* at 4.

B. The Senate Subcommittee Hearings

Senator McClellan took the lead at the subcommittee hearings by remarking that he was “unequivocally convinced . . . that something must be done to alleviate the baleful effects of the Supreme Court’s 5-4 *Miranda* decision.”¹⁵³ Senator Ervin echoed Senator McClellan in identifying the Supreme Court’s recent criminal procedure decisions as culprits in escalating crime rates: “[T]here is no question that these decisions have resulted in the freeing of multitudes of criminals of undoubted guilt and have unduly hampered legitimate law enforcement activities. The situation must be rectified and the duty to do so devolves rightly upon the Congress.”¹⁵⁴

Contrary to claims that the Senate was merely playing on crime fears, the Committee had before it some evidence that *Miranda* had adversely affected criminal law enforcement. Then Philadelphia District Attorney (now Senator) Arlen Specter revealed the startling results of a study conducted by his office to assess *Miranda*’s effects, reporting that “[f]or a period after *Miranda*, out of 5,220 suspects arrested for serious crimes, 3,095 refused to give a statement.”¹⁵⁵

This translated into only “41 percent” of suspects willing to make statements in the wake of *Miranda* and *Escobedo*, which represented a “49 percent” decrease since the latter case was decided.¹⁵⁶

Charles E. Moylan, the State’s Attorney for Baltimore, similarly reported “we used to get . . . [confessions] in 20 to 25 percent of our cases, and now we are getting . . . [them] in 2 percent of our

153. *Id.* at 3.

154. *Id.* at 4.

155. S. REP. NO. 90-1097, at 42 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2128.

156. *Id.* Aaron Koota, the District Attorney for Kings County, New York, and Frank S. Hogan, the New York County District Attorney, reported a similar decrease in confessions. *Id.* at 42, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2128-29. The Subcommittee, of course, was not tethered solely to the testimony presented during the hearing; the Subcommittee also gleaned much of its information from the “mass of evidence . . . much of which is printed in the transcript of hearings.” *Id.* at 46, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2132. In fact, the Subcommittee reported that:

Instance after instance are documented in the transcript where the most vicious criminals have gone unpunished, even though they had voluntarily confessed their guilt. The transcript and subcommittee files contain testimony and statements from District attorneys, police chiefs, and other law enforcement officers in cities and towns all over the country, demonstrating beyond doubt the devastating effect upon the rights of society of the *Miranda* decision.

Id.

cases. The confession as a law enforcement instrument has been virtually eliminated.”¹⁵⁷

A great deal of statistical information was presented to the Subcommittee on both sides of the issue; but by far the greater weight of testimony suggested that *Miranda* (and *Escobedo*) had seriously hampered law enforcement efforts.¹⁵⁸ Moreover, the Committee had testimony demonstrating that the Court’s vision of custodial interrogation did not remotely reflect reality.¹⁵⁹ Although it is true that the hearing was tilted in favor of the law enforcement community, this was in part a result of the Subcommittee’s need to collect information about *Miranda*’s effect on law enforcement efforts. Who better to ask than those in the law enforcement profession? But the subcommittee did not limit itself merely to live testimony. In addition, the Subcommittee sought letters and supplemental information from various sources to complete the record and, with respect to the constitutionality of the *Miranda* warnings, had before it the testimony of witnesses who plainly believed the warnings, or some variant thereof, were required.

The Judiciary Committee thus attempted to fill the alleged gaps in the earlier presidential reports by establishing a link between the Supreme Court’s recent criminal procedure jurisprudence and the escalation in crime rates. Testimony adduced at the hearing suggested that such a link existed. If indeed *Miranda* had frustrated law enforcement efforts, the next issue was whether Congress had the power to do anything about it.

The Subcommittee took to heart the testimony of Chief Judge J. Edward Lumbard, of the United States Court of Appeals for the Second Circuit. Judge Lumbard testified that:

The legislative process is far better calculated to set standards and rules by statute than is the process of announcing principles through court decision in particular cases where the facts are lim-

157. *Id.* at 46, reprinted in 1968 U.S.C.C.A.N. 2112, 2132.

158. See generally *id.* at 42-47, reprinted in 1968 U.S.C.C.A.N. 2112, 2128-33. Indeed, even some commentators who suggested that the Supreme Court’s criminal decisions had little effect upon law enforcement acknowledged the limitations of their study methodology. See, e.g., *id.* at 44, reprinted in 1968 U.S.C.C.A.N. 2112, 2130 (“[W]e are not prepared to say that these decisions have not impaired the efficiency in law enforcement in areas which are at this moment not subject to accurate measurement.”) (citation omitted).

159. District Attorney Specter testified that “the so-called third-degree method deplored by the Supreme Court . . . is not a correct portrayal of what actually goes on in police stations across the country.” *Id.* at 47-48, reprinted in 1968 U.S.C.C.A.N. 2112, 2134.

ited. The legislative process is better adapted to seeing the situation in all its aspects and establishing a system and rules which can govern a multitude of different cases.

Judges seldom have before them all those who are the best informed regarding practical problems and the difficulties in living with any proposed change in the law. Judges usually are advised only by the parties in the case; the parties want to win in the case and do not always care about general principles of wider application.

. . . [I]t is because the Congress and the legislatures of the states have taken so little action in the field of criminal justice that the courts have more and more chosen to lay down rules which have the force of law until changed, and which all too frequently come to us in the form of new constitutional principles which then can be modified only by constitutional amendment.¹⁶⁰

The implication, at least to some senators, was that the Supreme Court's pronouncements were not grounded in the constitution, but were instead predicated on the need to establish remedies for the violation of constitutional rights. When pointedly asked, however, whether the Court's invitation in *Miranda*, which "encourag[ed] 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,"¹⁶¹ "open[ed] the door for legislation which would permit our avoiding the constitutional amendment process,"¹⁶² Judge Lumbard replied: "No, I don't think it permits you to do that."¹⁶³ However, he qualified his denial by acknowledging that Congress could enact legislation that was a "suitable substitute for the requirements laid down by the Supreme Court."¹⁶⁴ The full exchange between Judge Lumbard and Senator McClellan respecting this point warrants consideration:

Senator McClellan: If they [a majority of the Justices] base the *Miranda* decision strictly on constitutional issues, I don't under-

160. *Hearings on S. 674, S. 917, et al., supra* note 143, at 184 (statement of Chief Judge J. Edward Lumbard, United States Court of Appeals for the Second Circuit).

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

162. *Hearings on S. 674, S. 917, et al., supra* note 143, at 195.

163. *Id.*

164. *Id.* at 196.

stand how you could write a statute that did not do everything the Court has said must be done. And if you do that, you destroy everything that you seek to attain anyhow.

Judge Lumbard: Unless you find some suitable substitute for the requirements laid down by the Supreme Court. . .

Senator McClellan: They [a majority of the Justices] wouldn't accept it as suitable unless it accomplished the destruction that this decision does. They say it is based on the Constitution. I don't know how you can do it. They say you have got to do these things. Well, how can you do less if the Constitution requires this be done?¹⁶⁵

Senator McClellan plainly grasped the important point: if the warnings were themselves constitutionally required, Congress could not modify them. Judge Lumbard, in contrast, appeared to suggest that provided Congress established warnings that were a "suitable substitute," Congress was free to alter the *Miranda* warning. While the "devil is in the details" of what constituted a suitable substitute, the two men do not appear to have been at cross purposes in their understanding of the Court's decision. In responding to a question from Senator Hugh Scott, Judge Lumbard tried to clarify his understanding of what Congress could, and could not achieve without resorting to the amendment process: "No; I don't think [*Miranda*'s language encouraging Congress to establish other procedures safeguarding Fifth Amendment rights] permits you to [overturn *Miranda* without initiating the amendment process], but there certainly is a wide area which obviously the Court has not covered in its opinion in the *Miranda* cases."¹⁶⁶ He elaborated that Congress *could* legislate with respect to:

the matter of questioning before a person is in custody . . . the manner in which the defendant or suspect is handled while he is in custody The way in which the warning is given, the record that is made, the presence of other people . . . these are obviously the next questions that are going to be raised in contested cases.¹⁶⁷

165. *Id.* at 196-97.

166. *Id.* at 195

167. *Id.* at 195-96

Though the implication of Judge Lombard's testimony is that some sort of warnings were constitutionally required, even he seemed to acknowledge room for congressional action.

Judge Alexander Holtzoff's testimony was more direct, eschewing the notion that Congress could legislatively modify the *Miranda*'s warnings:

Of course, the *Escobedo* and *Miranda* cases are in a different class [than the *McNabb-Mallory* line] in one important respect. They are based on the Constitution. They hold that the Constitution requires these warnings. Therefore, it would take a constitutional amendment, unless the Supreme Court overrules itself, whereas, the Mallory rule being purely a procedural rule, can be changed by legislation.¹⁶⁸

Judge Holtzoff therefore believed that *Miranda* could be overruled only by constitutional amendment.

Of course, even Judge Holtzoff did not testify that Congress was bound by the precise rules laid down by the Court, or that, even if warnings of some sort were required, failure to follow those warnings to the letter would necessarily demand the exclusion of otherwise admissible evidence.

In the end, the Subcommittee maintained that Congress, better positioned to gather a broad variety of facts, could modify the *rules* established by the Court without trenching upon the Court's constitutional *theory*.¹⁶⁹ California Attorney General Thomas C. Lynch elaborated on this understanding:

The bill under consideration sets out factors bearing on the voluntariness of confessions. If findings of fact are made by Congress that demonstrate the relevance and importance of these factors, and their superiority over the rules laid down in *Miranda*, it would seem that the Court would have little choice but to defer to the expert judgment of Congress. Accordingly, I consider the bill constitutional¹⁷⁰

If, as Judge Lombard had suggested, courts were merely filling the gaps created by inattentive legislators, it was time for those same elected representatives to act. And act they did.

168. *Id.* at 264.

169. *See id.*

170. S. REP. NO. 90-1097, at 47 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2133.

C. The Judiciary Committee Report

Informed by the Subcommittee hearing, the Judiciary Committee ultimately abandoned the more radical path of pursuing a constitutional amendment to “discipline” the judiciary. Instead, the Committee consolidated the Senate Bill affecting the Court’s jurisdiction and criminal procedure decisions with the House-passed crime legislation providing financial assistance to local law enforcement into a single omnibus package. The attraction of such a package, especially in the Senate, was to link the more controversial provisions affecting the Court with the hugely popular sections providing additional funding for state and local law enforcement. Upon voting out the omnibus crime package, the Judiciary Committee published a lengthy report on the bill, explaining that:

[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.¹⁷¹

In other words, *Miranda*’s days as an exclusive anticipatory remedy were numbered. The Committee Report cited the “rigid and inflexible requirements” established in *Miranda* and decried them as “unreasonable, unrealistic, and extremely harmful to law enforcement.”¹⁷² The Committee refused to give constitutional status to the *Miranda* decision. Recognizing *Miranda* as “an abrupt departure from precedent extending back at least to the earliest days of the Republic,” the Report sought to return the sole test of admissibility to one of a “totality of circumstances.”¹⁷³ In the Committee’s view, the decision’s radical break with the past could not possibly be constitutional mandate.

The Committee was not entirely dismissive of the Court’s concerns in erecting the *Miranda* safeguards, however. Mindful of the need to protect individual liberties, the Report explained that the Committee “is of the view that the [proposed] legislation . . . would

171. *Id.* at 37, reprinted in 1968 U.S.C.C.A.N. 2112, 2123.

172. *Id.* at 46, reprinted in 1968 U.S.C.C.A.N. 2112, 2132. Numerous studies were cited demonstrating *Miranda*’s harmful effect on the prosecution of crime. See *id.* at 39, 42, 45, reprinted in 1968 U.S.C.C.A.N. 2112, 2125, 2128, 2131-32.

173. *Id.* at 48, reprinted in 1968 U.S.C.C.A.N. 2112, 2134.

be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws.”¹⁷⁴ “[A] civilized society,” the Report commented, “could not be more fair to persons accused of crime, as the constitutional rights of defendants in criminal cases would be fully protected and respected by the safeguards in this proposed legislation.”¹⁷⁵ How would this be accomplished? At least in part by incorporating the *Miranda* warnings into the statute itself. The Committee Report thus refused to dismiss the warnings out of hand. Rather, those same warnings, while not dispositive, remained important indicators of a confession’s voluntariness.

The Committee, moreover, was sufficiently sanguine to recognize that “a few have expressed the view that legislation by Congress restoring the voluntariness test to the admissibility of confessions and incriminating statements would be declared unconstitutional, on the ground that the provisions do not measure up to the rigid standards set forth in *Miranda*.”¹⁷⁶ *Miranda*’s constitutional status was thus an issue of considerable debate. Both sides pounced upon language in the opinion to buttress their arguments. In testifying before the Judiciary Committee, one of the original bill’s cosponsors, Senator Ervin, explained:

Although I favor the substance of [what became Title II] and strongly feel it is preferable to the present situation, I do not believe the problem can be rectified by such a simple legislative enactment. It is true that the *Miranda* opinion invites legislative action on the subject of police interrogation practices. However, the restrictions set forth in that decision and the *Escobedo* decision are said to be required by the Constitution, and hence any legislative enactment might be deemed by the Supreme Court to be unconstitutional to the extent that it failed to embody rules of police conduct at least as restrictive as those favored in the *Miranda* and *Escobedo* decisions.¹⁷⁷

Ervin articulated what came to be the minority view: that the Constitution required the *Miranda* warnings and Congress could not dispense with them short of a constitutional amendment. Anything else, dissenters argued, risked judicial invalidation. A majority

174. *Id.* at 51, reprinted in 1968 U.S.C.C.A.N. 2112, 2137.

175. *Id.*, reprinted in 1968 U.S.C.C.A.N. 2112, 2137.

176. *Id.*, reprinted in 1968 U.S.C.C.A.N. 2112, 2137.

177. *Hearings on S. 674, S. 970, et al., supra* note 143, at 4.

of the Committee, however, was willing to take that risk given that four justices had dissented in *Miranda* and that “the overwhelming weight of judicial opinion in this country is that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right.”¹⁷⁸ The majority believed that the warnings simply were not constitutionally required. Exhibiting a good sense of real politik, the Report observed that “[n]o one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted.”¹⁷⁹ However, “the *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself.”¹⁸⁰

In addition to offering its report, the Judiciary Committee took the unusual step of including a specially prepared brief in support of the legislation’s constitutionality.¹⁸¹ Although originally written to support a provision that sought to limit federal courts’ jurisdiction in confession cases, the Committee deemed the brief to apply equally well to the provisions limiting *Miranda*.¹⁸²

The supplemental brief argued that *Miranda*’s holding was predicated upon the Supreme Court’s factual determination that custodial interrogation is inherently coercive and that prophylactic warnings of some sort are thus required to mitigate against that inherent compulsion. The Committee’s brief took issue with that factual assertion, however, explaining that the Court’s finding of coerciveness was based solely upon evidence contained in police manuals describing psychological techniques used to exploit a suspect’s weaknesses and to undermine his will to resist. The brief articulated the position that this information was too scant to support the Court’s adoption of specific warnings. Congress, the brief asserted, is in a better position to gather information necessary to enact broad rules, and as a consequence, may enact legislation adopting a contrary factual conclusion. The legislation’s purpose would be, in part, to inform the Court of its erroneous, or inadequate, factual finding that custodial interrogation was inherently coercive. Once this erroneous

178. S. REP. NO. 90-1097, at 51, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2138.

179. *Id.*, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2138.

180. *Id.*, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2138.

181. See Brief of the Legislative Reference Service in Support of Constitutionality of Bill Limiting Jurisdiction of Federal Courts in Confession Cases, *reprinted in* S. REP. NO. 90-1097, at 53-63 (1968).

182. See S. REP. NO. 90-1097, at 53 (1968).

finding was corrected, the brief explained, the support for *Miranda*'s prophylactic warnings would be undermined. Essentially, the brief maintained that it was the Court's factual finding with respect to coercion, not the Fifth Amendment, which compelled the *Miranda* result. The Fifth Amendment therefore did not constitute a bar to congressional attempts to "mold constitutional policy" by "formulating a test of admissibility different from that of the court."¹⁸³ The proposed legislation avoided any constitutional conflict because its reaffirmation of the voluntariness standard would not "follow upon any attempt to change constitutional theory, but rather upon a qualifying of the factual basis of that policy."¹⁸⁴

In support of this theory, the brief relied on *Katzenbach v. Morgan*,¹⁸⁵ a case that involved the constitutionality of § 4(e) of the Voting Rights Act of 1965. In *Katzenbach*, the Supreme Court upheld a federal requirement that prohibited states from using English literacy tests to prevent natives of Puerto Rico from voting.¹⁸⁶ The Court had previously acknowledged that the Fourteenth Amendment did not itself prohibit states from conditioning the eligibility to vote on literacy tests.¹⁸⁷ The *Katzenbach* Court did not reach the question of whether New York's literacy requirement, as applied, violated the Equal Protection Clause. Instead, the Court upheld the federal enactment on the ground that the Court would defer to Congress's factual determination that § 4(e) of the Voting Rights Act was an appropriate means of enforcing the Equal Protection Clause.¹⁸⁸

The Judiciary Committee's brief asserted that *Katzenbach* supported its claim because it involved a situation where the court pre-

183. *Id.* at 60, 63.

184. *Id.* at 63.

185. 384 U.S. 641 (1966).

186. *See id.* at 643 (upholding § 4(e) of Voting Rights Act of 1965).

187. *See Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 50 (1959) (finding that English language literacy requirement did not violate either Fourteenth or Fifteenth Amendment).

188. *See Katzenbach*, 384 U.S. at 653-56. For a sampling of commentary on Congress's § 5 powers, *see* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995); Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971).

viously made a constitutional decision, the validity of English literacy as a requirement for voting, on the basis both of constitutional theory and of its appraisal of the facts that led the court to conclude that no invidious discrimination existed.¹⁸⁹ With § 4(e), Congress did not change the constitutional theory; rather it made its appraisal of the facts and reached a different conclusion than the court had. Similarly, the brief argued, the *Miranda* court based its decision to require prophylactic warnings on a finding that custodial interrogation was inherently coercive. However, in rejecting that factual finding and substituting its own determination, Congress eliminated the need for the *Miranda* warnings, but did not alter the constitutional theory advanced by the Court.

D. The Minority Responds

The minority report, while supportive of the legislation generally, took exception to the anti-*Miranda* provisions.¹⁹⁰ Mirroring Senator Ervin's concerns, the minority report indicated that *Miranda* touched upon fundamental constitutional issues, and thus could not be altered by simple legislative fiat. Although acknowledging that Congress possesses the authority to enact rules of criminal procedure, including rules governing the admissibility of confessions, the minority report explained that Congress had no authority to overturn Supreme Court decisions interpreting basic constitutional requirements. "Congress has the power only to expand," the minority report intoned, "not to contract or abrogate these basic guarantees."¹⁹¹ In the end, however, the Judiciary Committee voted out the proposed legislation as part of Title II of the Omnibus Crime Control and Safe Streets Act.¹⁹²

189. See Brief of the Legislative Reference Service in Support of Constitutionality of Bill Limiting Jurisdiction of Federal Courts in Confession Cases, *supra* note 181, at 53-63 (1968).

190. Senators Tydings, Dodd, Hart, Long (Missouri), Kennedy (Massachusetts), Burdick, and Fong dissented from the majority's report. See S. REP. NO. 90-1097, at 147 (1968).

191. *Id.* at 150.

192. See 114 CONG. REC. S10,852 (1968). The original version of the bill as introduced by Senator McClellan was not limited to overruling *Miranda* in federal prosecutions, but also encompassed the ambitious plan of divesting federal courts of jurisdiction to review state court decisions admitting confessions and would have further abolished federal habeas corpus review of state judgments. See 114 CONG. REC. 11,189 (1968). Title II also contained provisions overruling the *McNabb-Mallory* line of decisions and the decision in *United States v. Wade*, 388 U.S. 218 (1967), which created a right to counsel at police line-ups. These provisions were ultimately enacted as 18 U.S.C. §§ 3501(c) and 3502.

E. On the Senate Floor

The Senate engaged in roughly two weeks of debate over the bill. The bill's supporters focused, not unsurprisingly, on the "confusion and disarray injected into law enforcement" by *Miranda*.¹⁹³

Floor statements make it abundantly clear that the legislation's object was to replace *Miranda*'s seemingly "absolute" requirement with a return to the broader voluntariness standard. Senator McClellan thundered that "[i]t is time for change—time for change in the Supreme Court of the United States. The thrust of the *Miranda* ruling, if it is not changed, will sweep us into the throes of anarchy and horror."¹⁹⁴ While the rhetoric of the debate was certainly emotion-laden,¹⁹⁵ that should not be confused with the substance of the legislation that emerged from the Senate. Proponents of the legislation offered an important constitutional vision by rejecting the notion that the Court had grounded the *Miranda* warnings in the Fifth Amendment. These legislators understood the *Miranda* Court as merely prescribing rules governing the admission of evidence at trial, rules that Congress could alter unilaterally.

Opponents of the bill, however, offered a competing view with equal hyperbole. They believed that the Court had promulgated the warnings pursuant to its interpretation of the Fifth Amendment. As such, the rules were themselves a "part" of the Fifth Amendment, making it so Congress could not in any way alter them. Senator Morse remarked that "[t]he Senate is kidding itself if it thinks it can amend the Constitution or the Bill of Rights with this legislation."¹⁹⁶ This sentiment was echoed by Senator Tydings, who opined that "[m]any of the provisions in title II, if not all, are little more than an

193. 114 CONG. REC. 11,201 (1968) (statement by Senator McClellan).

194. *Id.* at 11,206.

195. Senator Ervin, initially dubious about legislatively altering the *Miranda* warnings, launched himself into efforts to enact the bill:

If you believe that the people of the United States should be ruled by a judicial oligarchy composed of five Supreme Court Justices rather than by the Constitution of the United States, you ought to vote against title II. If you believe that self-confessed murders, rapists, robbers, arsonists, burglars, and thieves ought to go unpunished, you ought to vote against title II. . . . [I]f you believe . . . that enough has been done [presumably by the Supreme Court] for those who murder and rape and rob, and that something ought to be done for those who do not wish to be murdered or raped or robbed, then you should vote for title II.

Id. at 14,155.

196. *Id.* at 11,595 (statement by Senator Morse).

attempt to amend the Constitution by an act of Congress.”¹⁹⁷ If this statement were accurate, then even the bulk of the provision’s supporters might have voted the legislation down. In truth, this debate reflected the larger issues surrounding the Warren Court’s expansive reading of the Bill of Rights. While some in Congress were concerned that the Court’s newfound “activism” placed issues of considerable import outside the political sphere, others welcomed this position.

Critics of the legislation argued that it was a “rushed” piece of work. Senator Morse cautioned that “the bill was made pending business yesterday, though my office was told the printed report would not be available until the afternoon. I obtained a copy of the text of the committee bill only in the morning.”¹⁹⁸ Although it had been claimed that “[f]ew Senators were familiar with the final version of the bill before it was reported on the Senate floor,”¹⁹⁹ the truth was that the substance of the legislation had been the subject of a committee hearing and report, and the Senate had engaged in roughly two weeks of debate over the bill. For the Senate, this was hardly “rushed” legislation. Indeed, Senator Tydings, an opponent of the provisions designed to overturn *Miranda*, found sufficient time to write to law professors throughout the country and solicit their views with respect to the constitutionality of § 3501.²⁰⁰

Predictably, the 108 scholars who responded unanimously agreed (if not uniformly on constitutional grounds) that enactment of § 3501 was unwise.²⁰¹

Moreover, the Senate did not leave the Committee’s work untouched. The bill reported out of the Judiciary Committee contained provisions for the withdrawal of jurisdiction from the federal courts to review state criminal cases involving confessions or eyewitness testimony and to issue writs of habeas corpus to state prisoners.²⁰²

197. *Id.* at 11,740 (statement by Senator Tydings).

198. *Id.* at 11,594. A Washington Post editorial similarly commented that “[a]lthough no printed copy of the bill is yet available, its complex assortment of restraints on freedom is to be presented to the Senate for consideration Why the hurry? . . . [S]ponsors of the bill know it will not bear scrutiny and want to rush it to enactment while hysteria is high.” *Subverting the Law*, WASH. POST, Apr. 29, 1968, at A16.

199. Note, *Title II of the Omnibus Crime Control Act: A Study in Constitutional Conflict*, 57 GEO. L.J. 438 (1968).

200. *See* 114 CONG. REC. 10,888 (1968).

201. *See id.*

202. *See* S. REP. NO. 90-1097, at 9-10 (1967).

Ultimately, while the bill's supporters carried the day, they did not succeed on every provision debated on the floor. The Senate rejected the Committee's jurisdiction-stripping measures and limitations on habeas corpus.²⁰³ A majority of the Senate opposed restricting the federal courts in this manner, approving a motion to strike this subsection by a 51-30 vote.²⁰⁴ While hardly conclusive, this does tend to demonstrate that far from being a leviathan moving through the Senate without proper consideration, the bill was subjected to serious analysis and debate. In the end, the Senate voted 72 to 4 for passage—a significant margin—and returned the bill to the House for consideration.²⁰⁵

F. House Consideration

Two weeks after the Senate had passed the amended crime bill, the House convened to consider it. Once the amended version of the bill returned to the House for passage, the *Miranda* provisions, which had not been treated in the original House version of the legislation, became a magnet for debate.²⁰⁶ In truth, those provisions became the sole focus of the debate, as the House had previously considered and passed the other portions of the bill. The original sponsor of the House bill, Representative Emanuel Celler, condemned the Senate amendments as a “cruel hoax on citizens for whom crime and the fear of crime are facts of life.”²⁰⁷ He argued that “[a] general dissatisfaction with the Supreme Court is no basis for striking out blindly.”²⁰⁸ The battle lines were thus drawn.

As had emerged during Senate consideration, both sides drew support for their positions from the *Miranda* opinion's text. It was

203. See 114 CONG. REC. S6034-45 (1968). Senator Wayne Morse (D-Or.), who opposed Title II, said of the jurisdiction-stripping proposal:

[W]e find in the bill . . . sections that withdraw jurisdiction over several of these issues from the federal courts I find these the most repugnant sections of the whole bill. . . . [I]t smacks of a court packing scheme: When you do not like the decision, change the judges. Or when you do not like the decision, withdraw the jurisdiction.

114 CONG. REC. 11,596 (1968).

204. See *id.* at 14,181.

205. See 114 CONG. REC. S6292 (1968).

206. As initially passed by the House, the Omnibus Crime Bill did not contain Title II, which was later added by the Senate and adopted at conference.

207. 114 CONG. REC. 16,066 (1968).

208. *Id.*

widely recognized during floor debate that the proposed legislation was intended to “overrule” *Miranda*²⁰⁹ and eliminate the automatic suppression of statements in which the interrogating officer had failed to warn the suspects of her rights.²¹⁰ No one from either side of the debate (at least no one whose voice is heard in the record) challenged this understanding.

Representative Rogers of Florida quoted the Supreme Court’s invitation in *Miranda* to continue its search to find ways to protect individual liberties while at the same time promoting efficient law enforcement. Representative Rogers, one of the House bill’s original cosponsors, applauded the Senate’s decision to include the provisions reforming *Miranda*.²¹¹ Others, however, such as Representative Eckhardt, while supportive of the legislation as a whole, railed against the anti-*Miranda* provision, observing that it “tends to undermine the constitutionally enunciated standards respecting the taking of confessions, of giving constitutional warning, and of affording fifth amendment protection.”²¹² However, Representative Eckhardt, mirroring the view of several members, also believed that it was better to send the bill, flawed as it was, to the president.²¹³

Similarly, Representative John Dow, although complaining that the bill was “saddled with amendments that threaten our liberties and may remain to haunt us,” nevertheless indicated that he would vote the legislation “out of deference to so many expressions from constituents in my district who regard protection in our streets as their paramount anxiety today.”²¹⁴

In response to the legislation’s doubters, supporters of the provision answered: “Section 3501 . . . merely returns the law . . . to what it was for more than 175 years prior to the Escobedo and *Miranda* cases.”²¹⁵ Opponents rejoined, however, that “[i]nstead of carefully reviewing decisions of the Supreme Court and amending them by constitutional amendment where improvement is needed, the Senate

209. And *Mallory* and *Wade* as well. See S. REP. NO. 90-1097, AT 38-51, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2124-38.

210. See 114 CONG. REC. 16,274-75, 16,279, 16,280 (1968).

211. See *id.* at 16,274.

212. *Id.*

213. See *id.* Representative Eckhardt did note, however, that if the jurisdiction-stripping measures had remained in the bill, “I could not have voted for it under any circumstances.” *Id.*

214. *Id.* at 16,287.

215. *Id.* at 16,276 (statement of Rep. Anderson).

bill attempts in a patently unconstitutional way to set aside what the Court has declared the Constitution to be.”²¹⁶ Original sponsor and House Judiciary Chairman Emanuel Celler warned that legislation appearing to overturn a Supreme Court decision was destined to be itself declared unconstitutional: “[i]t is built on false premises. Its promises are illusory.”²¹⁷ Representative Kastenmeier echoed this sentiment when he observed that the bill “would presume to overturn three landmark supreme court [sic] cases, two of which were decided . . . on constitutional grounds and cannot be overruled simply by legislative fiat.”²¹⁸

Similarly, Congressman Schwengel expressed concern that Congress was attempting to encroach upon judicial authority by overturning *Miranda*.²¹⁹ He plainly did not consider § 3501 sufficient to safeguard individual rights, noting that: “If the Senate had provided a viable alternative to the exclusionary rule so that under certain conditions it would be possible to admit reliable evidence, even though constitutional rights were violated, I would not be as apprehensive [of the legislation].”²²⁰ Mr. Tenzer was even more forthright in his assessment of the legislation:

The provisions relating to the admissibility of confessions and the admissibility of eyewitness testimony are an attempt to overrule decisions of the U.S. Supreme Court—decisions which stand as interpretations of the U.S. Constitution.

I believe that . . . the U.S. Supreme Court will find this section of the crime bill unconstitutional. The Congress does not have the authority to overrule the Supreme Court in this manner.²²¹

The House also debated the factual assertions underpinning the provisions altering *Miranda*. Representative Fraser, for example, took issue with the data presented to the Senate that the number of confessions had fallen since *Miranda*. “How then,” he asked, “could

216. *Id.* at 16,280 (statement of Rep. Reuss).

217. *Id.* at 16,066.

218. *Id.* at 16,284.

219. *See id.* at 16,289.

220. *Id.*

221. *Id.* Congressman Reid of New York offered a similar assessment of the bill’s constitutionality, noting that “[t]he provisions . . . have been declared of dubious constitutionality by the deans and constitutional law professors of nearly every leading law school in the nation.” *Id.* at 16,295.

an elimination of the sanctions for the failure of police to observe correct procedures lead to an increase in confessions unless increased numbers of confessions were to flow from such failures on the part of the police? Is that the aim of this legislation . . . to encourage abuses of procedures in order to increase the number of confessions?”²²²

The bill’s defenders, however, pointed out that “ample safeguards” existed because the judge reviewing the confession’s voluntariness is required to review all the circumstances surrounding the confession, including whether warnings were given.²²³ Representative Pollock observed that the modifications to *Miranda* “do not give rise to a denial of constitutional or substantive rights, but rather attack the particular procedural limitations which the Court has chosen to impose.”²²⁴

Representative Machen further explained that the Court’s decisions were illegitimate because it was “engaged in making law, not merely interpreting it.”²²⁵ His concern was that the Court, however noble its purposes, had “pretend[ed] . . . that each of its decisions was an interpretation of an existing law” rather than a new creation.²²⁶ This effort undermined the separation of powers and threatened traditional legislative authority. In the end, the House debate informed those present of the significant issues of constitutional import addressed by the legislation. The issues, by and large, appear to have been widely understood and fed into a larger debate that had been percolating for some time: whether it was appropriate for the Court to reinterpret the Constitution so as to “create” rights generally acknowledged not to have previously existed. Some opponents of the bill sought to have it sent to a House-Senate conference committee, where they hoped the offending provisions could be removed. By sad historical coincidence, however, the legislation was returned to the House while the country was mourning Senator Robert F. Kennedy’s assassination. Although the House vigorously debated the bill on the floor, it took the somewhat unusual step of passing the Senate bill as presented and forgoing a joint confer-

222. *Id.* at 16,293.

223. *See id.* at 16,296 (statement of Rep. Randall).

224. *Id.* at 16,298.

225. *Id.* at 16,285.

226. *Id.*

ence.²²⁷ Some cynically expressed that Senator Kennedy's assassination was being exploited by those supporting the statute to ensure its passage. However, while Representative Ryan believed it "highly inappropriate for the House to use the time of the tragic murder of Senator Robert Kennedy as the occasion to enact an unwise measure" and "question[ed] whether we should be legislating at all on this dark day,"²²⁸ the will of the House was otherwise.

G. What did Congress Do?

The foregoing discussion is not an attempt to "divine" any sort of legislative intent with respect to the statute. It is exceedingly difficult to determine the "intent" of any large, deliberative body. These snippets of the congressional debate are reported to demonstrate that, far from being rushed through Congress without the opportunity to debate its provisions, § 3501 was actually the product of considerable debate and significant modification. Regardless of the political winds favoring its enactment, the best evidence of any "legislative intent" is that the legislation was enacted by a substantial margin on the vote of individuals who had been exposed to the relevant constitutional arguments. Often lost in the debate over § 3501 is what Congress actually achieved with the legislation. Far too often, the statute is merely dismissed as "overruling *Miranda*" without paying much attention to the statutory text.²²⁹ While perhaps some of this criticism can be attributed to the inflated rhetoric during the floor debate, it is important to read the statute to see what Congress enacted. While it is true that Congress replaced the "rigid requirements" of *Miranda*, it is interesting to observe that the legislation did so in a balanced and reasonable way.

Professor Yale Kamisar has offered the view that § 3501 merely "repeal[s]" *Miranda* and, far from establishing a system equally protective of suspects' rights, instead simply "reinstat[es] the due process 'totality of the circumstances'-'voluntariness' test for the admis-

227. The House voted 317 to 60 against sending the bill to conference, and 368 to 17 for final passage. *See id.*

228. *Id.* at 16,294.

229. *See* CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 76 (2d ed., 1982) ("It is one thing to devise alternative safeguards and quite another to provide, as the 1968 legislation does, that no safeguards are needed."); *Recent Statute: Title II of the Omnibus Crime Control and Safe Streets Act of 1968*, 82 HARV. L. REV. 1392, 1396 (1969).

sibility of confessions.”²³⁰ As Kamisar has further explained, the Supreme Court recognized this previous test as flawed and thus had replaced it with the *Miranda* safeguards.²³¹ However, as has been exhaustively detailed elsewhere, § 3501 in several important respects goes well *beyond* the pre-*Miranda* voluntariness test.²³² One commentator has noted, “parts of [§ 3501] would have been a progressive expansion of suspects’ rights if Congress had passed it prior to *Miranda*.”²³³

For example, § 3501(a) codifies the so-called *Jackson v. Denno*²³⁴ hearing and requires that while the judge must admit voluntary confessions, she “shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.”²³⁵ Such an instruction permits the defendant to place the confession within its proper context and to seek mitigation from the jury. The statute also codifies the basic *Miranda* warnings, which were not mandated prior to the decision, and specifically directs the trial court to consider whether the warnings were given.²³⁶ Congress thus took into account the testimony of hearing witnesses who indicated that warnings of some sort were required.

Section 3501(b)(2) requires the suppression judge to consider whether the “defendant knew of the nature of the offense with

230. Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 469 (1999).

231. *See id.* at 471-72.

232. *See* Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 129 (observing that § 3501 “does not wholly sweep aside *Miranda*” and stating that “the legislative enumeration of factors arguably gives them a special status . . . that did not necessarily obtain” before *Miranda*).

233. FRED GRAHAM, *THE SELF-INFLICTED WOUND* 324 (1970).

234. 378 U.S. 368 (1964).

235. 18 U.S.C. § 3501(a) (1999).

236. *See id.* Under *Greenwald v. Wisconsin*, 390 U.S. 519 (1968), the results under the statute or the voluntariness test may be similar. In *Greenwald*, the police questioned the defendant for about an hour one evening and for fewer than four hours the next morning before he confessed. *See Greenwald*, 390 U.S. at 519-20. He had not received *Miranda* warnings but apparently had actual knowledge of his constitutional rights to remain silent and to have counsel. *See id.* at 522 (Stewart, J., dissenting). Despite his knowledge, the Court held that the absence of the warnings was strongly probative of involuntariness and that the defendant’s confession was inadmissible under traditional standards. *See id.* at 521. The case had gone to trial before *Miranda* had been decided. Because the Court found the concession involuntary under the “totality of the circumstances” test, it did not have to apply *Miranda* to find the confession inadmissible. *Id.* at 521 n.*. Several other factors, such as the defendant’s physical condition, were also used to find involuntariness. *Id.* at 522.

which he was charged or of which he was suspected at the time of the confession.”²³⁷ This requirement goes not only beyond the law as it existed at the time *Miranda* was decided, but also extends current practice in which the Supreme Court has held that failure of the police to inform a suspect “of the subject matter of the interrogation could not affect [the defendant’s] decision to waive his Fifth Amendment privilege in a constitutionally significant manner.”²³⁸

Section 3501(b)(3) is also considerably broader than pre-*Miranda* law in acknowledging a suspect’s right to remain silent during police questioning and “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.”²³⁹ Though anathema to law enforcement officers, the statute also both recognizes a statutory right to counsel and makes it relevant whether a suspect was advised of his rights and whether he “was without the assistance of counsel when questioned and when giving such confession.”²⁴⁰ Before *Miranda*, no general right to assistance of counsel existed during police interrogation. While the absence of any of the factors “need not be conclusive” on the issue of admissibility, the Court is free to read the statute as requiring courts to give “strong consideration” to the absence of warnings as a factor suggesting a confession was obtained involuntarily.²⁴¹

Essentially, Congress not only took the Supreme Court’s admonitions in *Miranda* to heart, but sought to incorporate them in a reasonable, balanced fashion. Thus, the *Miranda* warnings would be preferred, and would be statutorily made a part of the “totality of the circumstances” evaluation, but no single item would be given presumptively greater weight. Congress did not merely toss out *Miranda*, instead it engaged in a reasoned legislative approach to craft procedural requirements that balanced the need for efficient law enforcement against a suspect’s constitutional rights. The balance was struck, not solely through the lens of a single case, but after hearing testimony from numerous interested parties and engaging in considerable debate. Congress thus provided suspects with greater

237. 18 U.S.C. § 3501(b)(2) (1999).

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

239. 18 U.S.C. § 3501(b)(3).

240. *Id.*

241. *Id.*

protection than they enjoyed prior to *Miranda*, while simultaneously not entirely tying the hands of police.

H. On to the President

On signing the Crime Control Act²⁴² into law on June 19, 1968, President Lyndon Johnson remarked that “[t]he provisions of Title II, vague and ambiguous as they are, can, I am advised by the Attorney General, be interpreted in harmony with the Constitution.”²⁴³

And so it was accomplished. *Miranda* was undone.

V. LITIGATING § 3501

Or was it? One would think that prosecutors, armed with a federal statute enacted largely for their benefit, would lead an all-out assault on *Miranda*. After all, despite certain misgivings, President Johnson had signed legislation teeing up a potential conflict between the Court and Congress. The anticipated battle didn’t take place

242. The legislation ultimately presented to the president contained two important subsections. Subsection (a) provided that “in any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given.” 18 U.S.C. § 3501(a) (1999). Simple enough. It was subsection (b) that posed the problem for *Miranda* aficionados: it provided that courts, in determining voluntariness,

shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel, and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501(b) (1999).

243. *Transcript of Johnson’s Statement on Signing Crime and Safety Bill*, N.Y. TIMES, June 20, 1968, at 23; see also *Statement of the President Upon Signing the Omnibus Crime Control Act of 1968*, 4 WEEKLY COMP. PRES. DOC. 983 (June 24, 1968) [hereinafter *Statement by the President*].

until over thirty years later, however.²⁴⁴ In the sections that follow, I will trace § 3501's tortured litigation history.

A. The Johnson Administration: An Undeclared War On The Statute

Much like Goldilocks's search for the perfect porridge, prosecutors have long struggled to unearth just the "right" case in which to test § 3501's constitutionality. In part, this may have been a result of President Johnson's antipathy towards the legislation. Although he had written to Senator Mike Mansfield and urged him to shepherd passage of the bill's gun control and law enforcement block grant provisions, he requested that the Senator "not encumber the legislation with provisions [i.e., the section overturning *Miranda*] raising grave constitutional questions."²⁴⁵ To avoid these questions, President Johnson announced that he would direct the FBI to continue its practice of informing suspects of their rights—a policy pre-dating *Miranda* itself.²⁴⁶ Attorney General Ramsey Clark took this directive even further, instructing federal prosecutors to offer into evidence

244. It is important to differentiate the different aspects of § 3501. Although the focus of this paper and recent efforts to enforce § 3501 involve the statute's effect on *Miranda*, the statute has other consequences as well. For example, § 3501 sought to overturn *Escobedo* and *United States v. Wade* (which involved precedent from *McNabb-Mallory* and *Massiah v. United States*), and possibly *Wong Sun v. United States*, 371 U.S. 471 (1963). The courts generally determined that Congress's decision to re-write the rules governing pre-arraignment delay did not pose a constitutional problem, because those rules were based upon Rule 5 of the Federal Rules of Criminal Procedure. See, e.g., *United States v. Fouche*, 776 F.2d 1398, 1405-06 (9th Cir. 1985) (citing § 3501 as applied to preindictment delay); *United States v. Perez*, 733 F.2d 1026, 1030-31 (2d Cir. 1984) (same); *United States v. Keeble*, 459 F.2d 757, 760 (8th Cir. 1972) (presuming constitutionality of § 3501 as applied to preindictment delay), *rev'd*, 412 U.S. 205 (1973); *United States v. McCormick*, 468 F.2d 68, 75 (10th Cir. 1972) (invoking § 3501 in considering preindictment delay); *United States v. Evans*, 1995 WL 254422, at *1-*2 (N.D. Ala. Apr. 17, 1995); *United States v. Wilbon*, 911 F. Supp. 1420, 1425 (D.N.M. 1995); *United States v. Eltayib*, 808 F. Supp. 160, 162-63 (E.D.N.Y. 1992) (pre-arraignment delay); *Velasco v. United States*, No. CV-91-2743, 1992 WL 135029, at *6-*7 (E.D.N.Y. May 28, 1992) (same). But see *United States v. Poole*, 495 F.2d 115, 133 & n.13 (D.C. Cir. 1974) (Fahy, J., dissenting) ("In my view these are serious questions whether section 3501 can be sustained as a modification of the *Mallory* rule—questions of constitutional substance as indicated by the *Miranda* reference to the Rule.").

245. *President's Letter to the Majority Leader of the Senate Regarding the Crime Control and Safe Streets Act of 1968*, reprinted in 114 CONG. REC. 12,450 (1968) (statement of Senator Mansfield).

246. See *Statement of the President*, *supra* note 243, at 727.

only those confessions obtained in accordance with *Miranda*.²⁴⁷ To the extent prosecutors adhered to this policy, it would be difficult to test the statute.

As a result, few early cases exist in which prosecutors litigated the salient provisions of § 3501.²⁴⁸ Even in cases where prosecutors chose to invoke the statute, courts found it either inapplicable or simply beside the point, since *Miranda* warnings had been given. In an early test of the statute, for example, the government relied on § 3501(d) for the modest proposition that “*Miranda* . . . should not be applied to non-custodial interrogations.”²⁴⁹ This was hardly an extreme position. The district court nevertheless rejected that argument, explaining the defendant was plainly in custody and “underwent extensive interrogation.”²⁵⁰ The court also found it significant that the defendant was neither apprized of his rights nor informed of the nature of the investigation.²⁵¹ As a consequence, the court concluded: “it cannot be said that [the defendant’s] statements . . . was [sic] voluntary or that he knowledgeablely waived his rights.”²⁵² “Yet,” the court explained, relying upon *Miranda*, “this is precisely what the Constitution requires.”²⁵³ Typical of these early cases, the court failed to consider the issue of whether § 3501 supplanted *Miranda* because the government had made no such assertion. The court could well have considered the § 3501 issue *sua sponte*, but refused to do so.

A similar refrain is heard in *Reinke v. United States*,²⁵⁴ in which the Ninth Circuit declined to reach the issue of § 3501’s constitutionality, explaining “the trial in this case had already been completed when this statute was passed, and the Government in its brief concedes that the statute should have prospective application

247. See Daniel Gandara, *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts*, 63 GEO. L.J. 305, 311-12 (1974).

248. In reconstructing § 3501’s litigation history, I focus only on those cases either officially reported or available through online research services. It is entirely possible, indeed likely, but difficult to unearth, unreported cases in which prosecutors raised § 3501.

249. *United States v. Dickerson*, 291 F. Supp. 633, 637 (N.D. Ill. 1968).

250. *Id.*

251. See *id.* at 638.

252. *Id.* at 637.

253. *Id.*

254. 405 F.2d 228 (9th Cir. 1968).

only.”²⁵⁵ As was to become typical of cases raising § 3501, the court observed that “the [defendant] was given the *Miranda* warnings, so the Government need not rely on the more relaxed procedures of section 701.”²⁵⁶ Little else of note involving § 3501 occurred during the Johnson Administration, probably because of Attorney General Clark’s instructions to federal prosecutors.²⁵⁷

B. The Nixon Administration: Benign Neglect

The prospect that § 3501 would have its day in court brightened considerably in anticipation of the Nixon Administration. After all, *Candidate* Nixon had lambasted *Miranda* as having “the effect of seriously hamstringing [sic] the peace forces in our society and strengthening the criminal forces.”²⁵⁸ It was thus not unreasonable to assume that once elected, tough-on-crime *President* Nixon would enforce § 3501. Despite his campaign rhetoric, however, Nixon pursued a somewhat more cautious route in challenging *Miranda*. His Attorney General, John Mitchell, directed federal prosecutors and law enforcement officers to abide by the *Miranda* rules. Although this directive appeared to be a continuation of the Johnson Administration’s policy, it differed in at least two important respects. First, in contrast to Attorney General Clark, Attorney General Mitchell furnished prosecutors with some wiggle room to invoke § 3501 by indicating that prosecutors could raise the statute where only a minor deviation from *Miranda*’s requirements occurred, such as “where an agent inadvertently fails to fully explain the right to have counsel appointed for an indigent, or a written waiver is not obtained.”²⁵⁹ Thus, in the event of such an insignificant *Miranda* viola-

255. *Id.* at 230.

256. *Id.*

257. See Fred Graham, *Federal Lawyers Seeking to Soften Confession Curb*, N.Y. TIMES, July 28, 1969, at 22 (reporting that Clark instructed prosecutors to offer evidence only in compliance with *Miranda*).

258. Richard M. Nixon, *Toward Freedom from Fear* (May 8, 1968) (position paper on crime), reprinted in 114 CONG. REC. 12,936-38 (1968); see also BAKER, *supra* note 72, at 248 (detailing Nixon Campaign speeches criticizing *Miranda*).

259. United States Department of Justice, *Title II of the Omnibus Crime Control and Safe Streets Act of 1968 to the United States Attorneys*, Memorandum No. 584, Supp. 3 (June 11, 1969), reprinted in 115 CONG. REC. 23,236, Memorandum No. 584, Supp. 3 (1969). The Memorandum continued:

Aside from any constitutional issues, therefore, it is impossible to predict how much weight a particular court will give to the absence of any one of the factors men-

tion, prosecutors could seek admission of the confession pursuant to § 3501. In truth, this represented a fairly small divergence from the policy articulated by his predecessor. A careful reading of Mitchell's directive reveals that agents were still required to provide criminal suspects with full *Miranda* warnings. Only in those narrow instances in which a technical violation occurred would prosecutors be permitted to invoke § 3501. The Department never satisfactorily clarified what constituted a "technical violation," however, making it unlikely that prosecutors would employ the statute.

Second, while the Johnson Administration had serious qualms about § 3501's constitutionality, the Nixon Justice Department took the position that § 3501 was constitutional. In explaining the Department's § 3501 policy to the House Select Committee on Crime, Attorney General Mitchell testified that "[i]t is our feeling . . . that the Congress has provided this legislation, and, until such time as we are advised by the courts that it does not meet constitutional standards, we should use it."²⁶⁰

Despite the Nixon Administration's support of the statute, the Justice Department apparently did not develop a coordinated strategy to implement the statute. Instead, individual field prosecutors apparently sought to invoke § 3501 in select cases. Courts were thus forced to take notice of the statute. However, although prosecutors seemingly attempted to raise the statute, it appears the occasion to litigate the constitutional status of § 3501 did not arise. This is in large part due to the fact that federal agents, in compliance with the Justice Department's long-held policy, continued to provide suspects with *Miranda* warnings.²⁶¹

tioned. For this reason, the only safe course for federal investigative agents, and for such United States Attorneys as may have occasion to talk with defendants, is to continue their present practice of giving the full *Miranda* warnings.

The area where we believe the statute can be effective and where a legitimate constitutional argument can be made is the situation where a voluntary confession is obtained after a less than perfect warning or a less than conclusive waiver . . .

Id.

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

261. See, e.g., *United States v. Vigo*, 487 F.2d 295, 299 (2d Cir. 1973); *United States v. Marrero*, 450 F.2d 373, 379 (2d Cir. 1971) (Friendly, J., concurring); *Ailsworth v. United States*, 448 F.2d 439, 441 (9th Cir. 1971); *United States v. Lamia*, 429 F.2d 373, 377 (2d Cir. 1970); Gandara, *supra* note 247.

Certain opportunities did, however, present themselves. The first opening to enforce § 3501 presented itself in the Virgin Islands. In *Virgin Islands v. Williams*,²⁶² the government sought to introduce a confession taken in violation of *Miranda*. In support of the confession's admissibility, the government offered two arguments. First, it claimed that *Miranda* had not been offended. In the alternative, the government argued that § 3501 would permit the statement's admission because a *Miranda* violation constituted but one of the grounds governing a statement's admission. In applying the totality of the circumstances test, the government asserted that the confession should have been admitted regardless of any minor *Miranda* trespass.²⁶³

The district court, however, declined to consider the § 3501 argument. The court explained that as this case arose in the Virgin Islands, the statute could not be enforced unless the court of appeals, using its supervisory authority, so held.²⁶⁴ As the court of appeals had yet to pass on the matter, the district court determined that the appellate court's "jealous concern for the rights of persons accused of crime" would likely not lead it "to exercise its supervisory powers and make applicable to Virgin Islands prosecutions the provisions" of § 3501.²⁶⁵

While this refusal to address § 3501's constitutional status was not altogether uncommon, one provision of the statute—subsection (c), which involved pre-arraignment delay—did not go unnoticed during the Nixon Administration. In *United States v. Halbert*,²⁶⁶ for example, the Ninth Circuit reviewed the government's interlocutory appeal of the district court's decision to suppress the defendant's confession.²⁶⁷ The district court, in a case of first impression, had concluded that state police officers' failure to timely present the defendant before a magistrate violated § 3501(c), which requires law enforcement officers to bring a suspect before a judicial officer within six hours of "arrest or other detention."²⁶⁸ Although the Ninth Circuit did not expressly construe the *Miranda* provision of § 3501, it

262. 306 F. Supp. 1104 (D.V.I. 1969).

263. See *id.* at 1105.

264. See *id.* at 1106.

265. *Id.*

266. 436 F.2d 1226 (9th Cir. 1970).

267. See *id.* at 1227.

268. *Id.* at 1229.

did explore the statute's legislative history and noted the constitutional issue presented therein.²⁶⁹ Consequently, of all the statute's provisions, the subsection involving pre-arraignment delay was the only one squarely to be addressed (and upheld).²⁷⁰

Oddly, in two of the earliest (reported) mentions of § 3501, the *defendants* invoked the statute. This is perhaps not entirely surprising because defendants gained certain benefits that they did not enjoy in the pre-*Miranda* world. In *Sheer v. United States*,²⁷¹ for example, the defendant raised the statute to argue that the district court had failed to hold a "voluntariness" hearing as § 3501 requires.²⁷² The court of appeals rejected that claim, however, explaining that the statute could not retroactively be applied to the defendant's case.²⁷³

Similarly, in *United States v. White*,²⁷⁴ the defendant "assert[ed] the novel proposition that the government's right to introduce evidence . . . is even more narrowly circumscribed by the requirements for voluntariness of 'confessions' under 18 U.S.C. § 3501."²⁷⁵ "From this," the court explained, the defendant "argue[d] that disclosures and evidence sufficiently voluntary to be admissible under *Miranda* nevertheless may be involuntary as a matter of law under [§ 3501]."²⁷⁶ The court dismissed that contention, however, observing that "neither the language of § 3501 nor its legislative history indicate that Congress intended to expand the protection of potential criminal defendants beyond the scope of protection established by the *Miranda* line of cases."²⁷⁷

Prosecutors doubtless pressed the § 3501 issue in other cases, but apparently without much success. A number of cases during that time period note, without resolving, the potential constitutional conflict between § 3501 and *Miranda*.²⁷⁸ By and large, the courts ap-

269. *See id.* at 1231-37.

270. *See id.* at 1237.

271. 414 F.2d 122 (5th Cir. 1969).

272. *See id.* at 125.

273. *See id.*

274. 417 F.2d 89 (2d Cir. 1969).

275. *Id.* at 91.

276. *Id.* at 92.

277. *Id.* at 91-92.

278. *See, e.g.,* *United States v. Collins*, 462 F.2d 792, 796 n.5 (2d Cir. 1972) (explaining "[w]e do not decide whether section 3501 intended to overrule *Miranda* or would be constitutional if it did") (citations omitted); *United States v. Davis*, 456 F.2d 1192, 1195 (10th Cir. 1972) (noting that "[t]he United States Supreme Court has not ruled on the constitutionality

peared to be cognizant of the issue, but generally declined to consider it either because it was not raised or not quite on point. Contrary to having a dramatic impact on law enforcement, the statute was reduced to something of a fringe issue from the start. Like any policy not pursued with vigor and tended with care, § 3501 began to wither.

C. The Ford Administration: Encouraging Signs on the Enforcement Front

The Ford Administration's position with respect to § 3501 largely reflected that of its immediate predecessor. Early in the administration, the Justice Department reiterated its position that the policies of the Mitchell directive "are still considered current and applicable."²⁷⁹ As before, the Justice Department took the position that the statute was constitutional.²⁸⁰

Career prosecutors invoked the statute in what was doubtless the most significant § 3501 case to be litigated until *Dickerson: United States v. Crocker*.²⁸¹ In *Crocker*, the Tenth Circuit affirmed a district court's decision that § 3501 was valid and that, for a confession to be admissible, perfect compliance with *Miranda* was unnecessary.²⁸²

The Tenth Circuit reasoned that the Supreme Court's decision in *Michigan v. Tucker*,²⁸³ "although not involving the provisions of section 3501, did, in effect, adopt and uphold the constitutionality of the provisions thereof."²⁸⁴ Accordingly, the court concluded that "the trial court did not err in applying the guidelines of § 3501 . . . in determining the issue of the voluntariness of Crocker's confession."²⁸⁵ Oddly, however, the court went on to find that there was

of these provisions [§ 3501]"); *United States v. Marrero*, 450 F.2d 373, 379 (2d Cir. 1971) (Friendly, J., concurring); *United States v. Robinson*, 439 F.2d 553, 574 n.18. (D.C. Cir. 1970) (McGowen, J., dissenting) (observing that § 3501 "is subject to grave constitutional doubts" but notes that its effect on *Miranda* is not raised in this case).

279. Gandara, *supra* note 247, at 312 n.45 (quoting Letter from the Department of Justice to Daniel Gandara (May 15, 1974)) (on file with the *Georgetown Law Journal*).

280. *See id.*

281. 510 F.2d 1129 (10th Cir. 1975).

282. *See id.* at 1138.

283. 417 U.S. 433 (1974).

284. *Crocker*, 510 F.2d at 1137 (citation omitted).

285. *Id.* at 1138.

“full compliance with the *Miranda* mandates,” implying that its discussion of § 3501 was *dicta*.²⁸⁶

Crocker, far from being a lightening rod, neither took firm hold in the Tenth Circuit nor did it engender similar litigation in other circuits. One would think that in light of *Crocker*, the Tenth Circuit would have been inundated with cases relying upon § 3501. That is simply not the case, however. While a number of Tenth Circuit cases favorably cite § 3501 and *Crocker*,²⁸⁷ none relied upon the statute to trump *Miranda* until *United States v. Rivas-Lopez* surfaced in 1997.²⁸⁸

In most cases, federal agents continued to give *Miranda* warnings. Hence, challenges involving § 3501 generally did not concern a question of admitting an un-*Mirandized* statement, but rather some larger issue of voluntariness.²⁸⁹ The Ninth Circuit, for example, noted in *United States v. Gegax*²⁹⁰ that § 3501 directed trial courts “to consider all of the circumstances surrounding the giving of a confession . . . without regarding any as conclusive.”²⁹¹ As a result, the court refused to overturn a district court’s denial of a suppression motion where the only claim was that the government failed to repeat the *Miranda* warnings it had given some thirty minutes earlier.²⁹² Once again, however, it is difficult to determine whether the court viewed the statute as supplanting *Miranda* because federal

286. *Id.*

287. *See, e.g.*, *United States v. Glover*, 104 F.3d 1570, 1583 (10th Cir. 1997); *United States v. March*, 999 F.2d 456, 462 (10th Cir. 1993); *United States v. Miller*, 987 F.2d 1462, 1464 (10th Cir. 1993); *United States v. Caro*, 965 F.2d 1548, 1552 (10th Cir. 1992); *United States v. Short*, 947 F.2d 1445, 1450-51 (10th Cir. 1991); *United States v. Benally*, 756 F.2d 773, 775-76 (10th Cir. 1985); *United States v. Hart*, 729 F.2d 662, 666-67 (10th Cir. 1984); *United States v. Fritz*, 580 F.2d 370, 378 (10th Cir. 1978); *United States v. Shoemaker*, 542 F.2d 561, 563 (10th Cir. 1976); *see also* *United States v. DiGiacomo*, 579 F.2d 1211, 1217-18 (10th Cir. 1978) (Barrett, J., dissenting).

288. *See infra* Part V.G. Interestingly, in *United States v. Duncan*, 857 F. Supp. 852 (D. Utah 1994), the district court both notes that § 3501(c) has “supplanted” the *McNabb-Mallory* rule, *id.* at 860, and observes that “*Miranda* is not a constitutional right.” *Id.* at 859 n.7 (citing *Michigan v. Tucker*, 417 U.S. 433 (1974) and *New York v. Quarles*, 467 U.S. 649 (1984)). This case perhaps demonstrated the District of Utah’s openness to considering § 3501 for the purpose of replacing *Miranda*.

289. *See* *United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1976) (relying on § 3501 to assess the voluntariness of *Mirandized* statements).

290. 506 F.2d 460 (9th Cir. 1974).

291. *Id.* at 461.

292. *See id.*

agents had read the defendant his rights and had claimed that no *Miranda* violation had occurred.

D. The Carter Administration: The Statute Goes Missing

During the Carter Administration, § 3501 was all but a non-issue. Although references to the statute appear frequently in reported cases, it appears that for the most part courts sought to harmonize § 3501 and *Miranda*. In *United States v. Vigo*,²⁹³ for example, the district court, although relying on the voluntariness factors articulated in § 3501(b), nevertheless explained that

[g]iven the importance the Supreme Court attached to the [Miranda] warning . . . this court will not assume that Congress intended to authorize the admission of confessions where this warning is not given, at least in the absence of strong evidence that the defendant was otherwise aware of the consequences of waiving the privilege.²⁹⁴

Of course, had the district court read the statute or paid any heed to the congressional debate, it would have understood that Congress had intended to do just that. Instead, the court held that the failure of the agents to warn the suspect of his rights, coupled with a lack of counsel and no evidence that the defendant otherwise understood his rights, meant the confession would need to be suppressed.²⁹⁵

Similarly, in *United States v. Crook*,²⁹⁶ the Third Circuit stated that “[w]e cannot . . . disregard the congressional mandate of 18 U.S.C. [§] 3501(a).”²⁹⁷ The court nevertheless noted that “[p]resumably, the constitutionally mandated requirements of the *Miranda* decision survive that enactment” and refused to use the statute to negate *Miranda*.²⁹⁸

293. 357 F. Supp. 1360 (S.D.N.Y. 1972); *see also*, *United States v. Vigo*, 487 F.2d 295, 299 (2d Cir. 1973) (declining to determine the constitutionality of § 3501); *Ailsworth v. United States*, 448 F.2d 439, 440 (9th Cir. 1971) (same); DEPARTMENT OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: THE LAW OF PRE-TRIAL INTERROGATION, 73 & n.113 (1986) (stating that in most instances, including *Vigo*, the courts “either found it unnecessary to address” the constitutionality of § 3501 “or side-stepped the issue in some other way”) (footnote omitted) [hereinafter OFFICE OF LEGAL POLICY].

294. *Vigo*, 357 F. Supp. at 1366.

295. *See id.*

296. 502 F.2d 1378 (3d Cir. 1974).

297. *Id.* at 1381.

298. *Id.*

The only reported instance of a judge questioning *Miranda*'s supremacy occurred, predictably, in the Tenth Circuit. In *United States v. DiGiacomo*,²⁹⁹ the Chief Judge of the Tenth Circuit wrote in dissent:

The Supreme Court has not been called upon to rule on the constitutionality of 18 U.S.C. § 3501(b). To be sure, the Supreme Court is the final and ultimate arbiter of any constitutional issue raised involving its applicability. That, however, is no reason for this court to “bury its head in the sand” in avoidance of the provisions of § 3501

The Congress, in obvious recognition of society's needs in the area of effective administration of the criminal justice system, enacted § 3501, . . . in order to vitalize the “totality of the circumstances” rule which, in my judgment, is both common sensed and fair. It *does not* abolish the *Miranda* guidelines, but instead it places them in proper focus based upon the totality of all of the facts and circumstances surrounding the confession or admission against one's Fifth Amendment interest. It avoids a mechanical, unrealistic application of *Miranda*.³⁰⁰

Quoting Chief Justice Burger's dissent in *Brewer v. Williams*, the dissenting Tenth Circuit judge continued:

[I]n cases where incriminating disclosures are voluntarily made without coercion, and hence not violative of the Fifth Amendment, but are obtained in violation of one of the *Miranda* prophylaxes, suppression is no longer automatic. Rather, we weigh the deterrent effect on unlawful police conduct, together with the normative Fifth Amendment justifications for suppression, against “the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce”³⁰¹

Despite these strong words from the court's chief judge and the precedent established in *Crocker*, the Tenth Circuit did not revisit the § 3501 issue until considerably later. Neither did prosecutors litigating in the Tenth Circuit appear to exploit the earlier decision.

299. 579 F.2d 1211, 1219 (10th Cir. 1978) (Barrett, J., dissenting).

300. *Id.* at 1219.

301. *DiGiacomo*, 579 F.2d at 1219 (quoting *Brewer v. Williams*, 430 U.S. 387, 424 (Burger, C.J., dissenting) (quoting *Michigan v. Tucker*, 417 U.S. 433, 450 (1974))).

E. The Reagan Administration: A Near Rebirth?

It was not until the Reagan Administration that the Justice Department contemplated mounting a coherent strategy to implement § 3501.³⁰² The Department's Office of Legal Policy prepared a report for Attorney General Edwin Meese arguing that federal prosecutors should "seek to persuade the Supreme Court to abrogate or overrule the decision in *Miranda v. Arizona*" by relying on § 3501.³⁰³ As a result of this report, "the Attorney General approved this view of the constitutionality of the statute and instructed the litigating divisions to seek out the best test case" to overturn *Miranda*.³⁰⁴

Prosecutors apparently had a difficult time unearthing just such a case, as there are but few examples of Reagan-era prosecutors using § 3501 to gain the admission of un-*Mirandized* confessions. In fact, only one case stands out: in *United States v. Goudreau*,³⁰⁵ the Civil Rights Division relied on the statute to gain the admission of an errant officer's statement in a police brutality prosecution.³⁰⁶ The government argued 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."³⁰⁷ Although the district court rejected the government's argument and suppressed the defendant's statements, the Eighth Circuit reversed.³⁰⁸ The Eighth Circuit's opinion, however, did not cite § 3501 and instead ruled that federal officers had complied with *Miranda*.³⁰⁹

Similarly, in *United States v. Caputo*,³¹⁰ the government argued that, pursuant to § 3501, the district court could not suppress the defendants' statements if they were voluntary—even if taken in viola-

302. Professor Paul Cassell has detailed efforts of the Reagan Justice Department to enforce the statute. See Paul Cassell, *supra* note 72, at 200-02 and accompanying text.

303. OFFICE OF LEGAL POLICY, *supra* note 293, at 96.

304. Cassell, *supra* note 72, at 201.

305. 854 F.2d 1097 (8th Cir. 1988).

306. See Brief for the United States at 19, *United States v. Goudreau*, 854 F.2d 1097 (8th Cir. 1988) (No. 87-5403).

307. *Id.* (citing *United States v. Crocker*, 510 F.2d 1129 (10th Cir. 1975)).

308. See *Goudreau*, 854 F.2d at 1099.

309. See *id.* at 1098.

310. 641 F. Supp. 378 (E.D. Pa. 1986).

tion of *Miranda*.³¹¹ The district court, however, declined to address the government's argument because it deemed the statements to have been made in a non-interrogation setting and thus refused to apply § 3501.³¹²

A *defendant* again raised § 3501 in *United States v. Abell*,³¹³ claiming that it required a more stringent definition of voluntariness.³¹⁴ Without addressing the constitutionality of the statute, the district court concluded that, whatever its status, § 3501 did not expand the traditional *Townsend v. Sain*³¹⁵ test.³¹⁶ If anything, the court opined, § 3501 was intended to narrow the circumstances in which a confession could be excluded.³¹⁷

F. The Bush Administration: Continued Search for a Test Case

The Bush Administration, although not perhaps as aggressively, continued the policies of the Reagan Justice Department with respect to § 3501. Some years after leaving office, Attorney General William Barr explained in a letter to Congress that the Bush Justice Department “took the position that 18 U.S.C. § 3501 was constitutional as an exercise of Congress’s authority to control the admission of evidence before federal courts.”³¹⁸ Attorney General Barr also stated that he had instructed one of his special assistants to find an appropriate case in which to raise the statute.³¹⁹

Prosecutors apparently were again frustrated in their efforts to find the right case, as no important litigation occurred during this period. The most significant reported case during the Bush Administration was *United States v. Bordeaux*,³²⁰ in which the court cited § 3501 for the proposition that in determining whether a confession was involuntary, the court was required to consider “all the circum-

311. *See id.* at 381.

312. *See id.*

313. 586 F. Supp. 1414 (D. Me. 1984).

314. *See id.* at 1422.

315. 372 U.S. 293, 307 (1963), *overruled by* *Keeney v. Tamayo-Reyes*, 540 U.S. 1 (1992).

316. *See Abell*, 586 F. Supp. at 1423. *Sain* held that for a statement to be voluntary, it must be “the product of a rational intellect and a free will.” *Sain*, 372 U.S. at 307.

317. *See Abell*, 586 F. Supp. at 1423.

318. Letter from Attorney General William P. Barr to Senator Strom Thurmond (May 12, 1999) (on file with author).

319. *Id.*

320. 980 F.2d 534 (8th Cir. 1992).

stances surrounding the giving of the confession, including the factors specifically listed in [§ 3501].”³²¹ As the *Miranda* warnings had been given in that case, however, it is difficult to determine whether the court would have relied on § 3501 in *Miranda*’s stead.³²² The statute thus remained something of a dead letter.

G. The Clinton Administration: Miranda Unraveled?

Curiously, much of the litigation surrounding § 3501 has occurred during the Clinton Administration. That administration initially adopted, by inertia, the policy of its predecessors—a sort of “don’t ask, don’t tell” policy applied to a congressional statute. However, the Administration was not able to successfully hide behind this policy because outside sources took up the cudgel. The Clinton Administration was thus forced to take a position on the statute—one that broke with past presidential administrations, if not quite in practice, then surely in theory.

Unfortunately, the Clinton Justice Department got off to something of a rocky start. In *United States v. Cheely*,³²³ postal inspectors obtained voluntary, incriminating statements from a defendant who had sent a mail bomb to a witness instrumental in testifying against him in an earlier murder conviction.³²⁴ The district court, however, had suppressed the statements based upon a technical *Miranda* violation.³²⁵ In light of the crime’s severity and the importance of the defendant’s confession, the government decided to appeal the district court’s suppression order.

An internal Justice Department memorandum to the Solicitor General advised raising § 3501 as one of the four grounds on which to base an appeal.³²⁶ The memorandum noted that, in the author’s understanding, the Justice Department “[had] made arguments

321. *Id.* at 538-39 (quoting *United States v. Casal*, 915 F.2d 1225, 1228 (8th Cir. 1990)).

322. Similarly, the district court in *United States v. Carstens* noted the government’s burden of demonstrating voluntariness, but did not address the constitutional issue because the defendant had consulted with counsel before talking to the agents. *United States v. Carstens*, 747 F. Supp. 528, 531 (N.D. Iowa 1989).

323. 21 F.3d 914 (9th Cir. 1994).

324. *See id.* at 921-22.

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

326. *See* Memorandum to the Solicitor General (Mar. 12, 1993) (citing Dep’t of Justice Doc.) (on file with author).

based on § 3501 to courts of appeals in the past.”³²⁷ In any case, Justice Department attorneys authorized an appeal on the basis of § 3501, but after the intervention of political appointees, and by the time the brief was filed, the § 3501 claim was reduced to little more than a token argument.³²⁸ In the end, the government’s brief made only a passing reference to § 3501 without fully exploring the issue.³²⁹ The Ninth Circuit upheld the suppression of Cheely’s statements, but issued an order requesting briefing on the question of whether the issue merited en banc rehearing.³³⁰ The government, however, opposed further review of the decision.³³¹

*United States v. Sullivan*³³² presented another significant opportunity for the government to litigate § 3501. In *Sullivan*, officers made a routine vehicle stop of Sullivan, a felon, and discovered a firearm.³³³ The government indicted Sullivan for being a felon in possession of a firearm, but, during the subsequent trial, the court suppressed his incriminating statement on the ground that the arresting officer had not informed Sullivan of his rights.³³⁴ In its suppression order, however, the court questioned whether the mechanical application of the exclusionary rule should remain the law.³³⁵

The U.S. Attorney’s office subsequently invoked § 3501 in an appeal of the trial court’s decision to suppress Sullivan’s incriminating statements. The government argued that Sullivan was not in “custody,” hence no *Miranda* warnings were needed.

Alternatively, prosecutors argued that even if Sullivan had been in custody, the statements were nonetheless admissible under § 3501. Acting Solicitor General Walter Dellinger, whose office must approve all government appeals, withdrew the brief and submitted a

327. *Id.*

328. Professor Cassell provides an interesting discussion of the background maneuvering with respect to this brief. See Cassell, *supra* note 72, 203-05.

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

330. See Paul G. Cassell, *Tossing Out the Law on Confessions*, LEGAL TIMES, Apr. 24, 1995, at 26, 30.

331. See Memorandum of the United States Relating to the Question Whether to Entertain Rehearing En Banc at 9, *Cheely*, 21 F.3d 914 (9th Cir. 1994) (Nos. 92-30257, 92-30504).

332. 138 F.3d 126 (4th Cir. 1998).

333. See *id.* at 129.

334. See *id.*

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

replacement that did not discuss § 3501.³³⁶ Although the Fourth Circuit granted the Washington Legal Foundation (WLF) leave to file an amicus brief raising § 3501,³³⁷ it reversed the district court's finding that Sullivan was in custody.³³⁸ Consequently, no *Miranda* warnings were needed and the § 3501 argument was rendered moot.³³⁹ Once again, the government affirmatively squelched any attempt to raise § 3501.

The Fourth Circuit, however, remained a focal point in efforts to raise § 3501 arguments. In *United States v. Leong*,³⁴⁰ for example, the Fourth Circuit rejected the government's argument that the defendant was not in custody for *Miranda* purposes at the time he made an incriminating statement.³⁴¹ In response, the Justice Department moved to dismiss the indictment. The Washington Legal Foundation, however, filed an amicus brief raising § 3501, prompting the court to order the parties to address the statute. The Justice Department argued that *Miranda* "is a rule that Congress cannot supersede by legislation," so "it would not be appropriate for the lower courts . . . to apply § 3501 to admit a defendant's statement in a case in which *Miranda* would require its suppression, or for the Department of Justice to urge the lower courts to do so."³⁴²

The Fourth Circuit, however, retained jurisdiction over the case and ordered the Department and Leong's counsel to brief the § 3501 issue.³⁴³ Doubtless to the defendant's delight, the government joined him in arguing that the statute violated the Constitution.³⁴⁴ Shortly thereafter, Attorney General Janet Reno notified Congress that the Department would not defend § 3501 in the lower

336. See Jody Tabner Thayer, *The Exclusionary Suggestion?*, A.B.A. J., Dec. 1997, at 24, 24; Paul G. Cassell & Paul D. Kamenar, *Another Law Janet Reno Doesn't Like*, WALL ST. J., Aug. 27, 1997, at A13.

337. Four members of the Senate also supported the WLF Brief: Senators Strom Thurmond, Jon Kyl, Jeff Sessions, and John Ashcroft—all Republican members of the Judiciary Committee.

338. See *United States v. Sullivan*, 138 F.3d 126, 132 (4th Cir. 1998).

339. See *id.* at 134 n.*.

340. No. 96-4876, 1997 U.S. App. LEXIS 15480 (4th Cir. Jun. 26, 1997).

341. See *id.* at *11.

342. *Government Won't Defend 1968 Law Designed to Overrule Miranda Decision*, 66 U.S. L. WK. 2170 (Sept. 23, 1997).

343. See Order at 1, *United States v. Leong*, No. 96-4876, 1997 U.S. App. LEXIS 15480 (4th Cir. Jun. 26, 1997) (No. 96-4876).

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

lower courts.³⁴⁵ The Department's *Leong* brief, however, reserved the right to argue § 3501 in the Supreme Court because that 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."³⁴⁶

The circuit court ultimately declined to hear the case, explaining that because an amicus had raised the issue for the first time on a petition for rehearing, it would only decide whether it was "plain error" for the district court to have suppressed the confession in the face of the statute.³⁴⁷ The court furthered explained that because the district court did not act in plain error, the Fourth Circuit would not consider the statute's constitutionality on a rehearing petition.³⁴⁸

The action surrounding § 3501 subsequently shifted to the Tenth Circuit, where the Utah district court upheld the statute in *United States v. Rivas-Lopez*.³⁴⁹ In perhaps the most important § 3501 case since *Crocker*, the district court relied on the statute to admit a confession taken in violation of *Miranda*.³⁵⁰

In *Rivas-Lopez*, state troopers stopped the defendant for a speeding violation.³⁵¹ After noticing what appeared to be drug residue, the troopers requested and received permission to search the rest of the vehicle.³⁵² The troopers advised the defendant of his rights, following which the defendant twice responded that he did not wish to waive his rights; the officer later asked whether he would talk "out of *Miranda*," the suspect agreed and made incriminating statements.³⁵³

In resolving the subsequent motion to suppress, the district court focused on whether *Miranda* or § 3501 would apply.³⁵⁴ The troopers apparently violated *Miranda*, but the question of admissibility under § 3501 was unclear.³⁵⁵ Although the government refused to press the issue, the district court accepted the argument of *amicus*

345. See Letter from Attorney General Janet Reno to Hon. Albert Gore, Jr., President of the Senate 1 (Sept. 10, 1997) (on file with author).

346. Supplemental Brief for the United States at 7, *Leong* (No. 96-4876).

347. See Order at 4-6, *Leong* (No. 96-4876).

348. See *id.*

349. 988 F. Supp. 1424 (D. Utah 1997).

350. See *id.* at 1436.

351. See *id.* at 1426.

352. See *id.*

353. *Id.* at 1426-27.

354. See *id.* at 1429.

355. See *id.* at 1436.

Safe Streets Coalition and applied the statute.³⁵⁶ The district court stated that “[t]he validity of § 3501(a) and (b) therefore depends upon whether *Miranda* imposes constitutional requirements or is an exercise of the Supreme Court’s supervisory powers over the administration of criminal justice in the federal courts.”³⁵⁷ The court held that *Miranda* merely was procedural, declared § 3501 constitutional, applied § 3501 to the facts of the case, and ordered a new evidentiary hearing to explore the relevant factors.³⁵⁸

The district court further acknowledged the government’s “curious position” in agreeing with the *defendant* that § 3501 was unconstitutional.³⁵⁹ The court, however, ruled that the Tenth Circuit had previously “squarely upheld the constitutionality” of § 3501 in *Crocker* and thus felt bound by circuit precedent.³⁶⁰ In questioning the government’s odd stance, the court commented that:

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.³⁶¹

Although *Rivas-Lopez* would have been an excellent vehicle with which to litigate the § 3501 issue, the case ground to a halt when the defendant jumped bail and disappeared.³⁶²

H. Dickerson and Dicta

It has since become clear why the Justice Department has broken with the past several administrations and chosen not to defend the statute: the Clinton Administration has taken the position that § 3501 is unconstitutional. While this is certainly not an uncommon

356. *See id.* at 1430.

357. *Id.* at 1430.

358. *See id.* at 1434-36.

359. *Id.* at 1430.

360. *Id.* at 1435.

361. *Id.*

362. The District of Utah has since reaffirmed *Rivas-Lopez*’s holding that § 3501 supplants *Miranda*. *See* United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1256 (D. Utah 1999).

view within the legal academy, it represents a departure from past administrations and former Justice Department policy.

What no Justice Department had accomplished, and, under the Clinton Administration has even opposed, the private bar achieved. In *United States v. Dickerson*,³⁶³ the Fourth Circuit upheld § 3501 against constitutional challenge.³⁶⁴ The case involved a serial bank robber whom federal agents had taken into custody and interviewed. At the suppression hearing, the agent in charge testified that he gave Dickerson his *Miranda* warnings and obtained a valid waiver.³⁶⁵ According to the agent, Dickerson offered his incriminating statements *after* the waiver was obtained.³⁶⁶ Dickerson, unsurprisingly, testified that he gave his incriminating statements during the interview *before* he received his *Miranda* warnings.³⁶⁷ The district court, noting discrepancies between the agent's testimony and information written on the waiver of rights form, ruled in favor of the defendant and thus suppressed the confession.³⁶⁸ The defendant did not argue however, that his confession was in any way involuntary. Rather, he argued simply that a technical violation of his *Miranda* rights had occurred: that the warning had come after rather than before he had made his slip of the tongue.³⁶⁹

The U.S. Attorney's office filed a motion for reconsideration that included affidavits from several agents corroborating the testimony that Dickerson had received his *Miranda* warnings at the start, as opposed to the end, of the interrogation.³⁷⁰ The government also raised § 3501 as an alternative basis for admitting the statements.³⁷¹ The district court, however, declined to reconsider its ruling.³⁷² The government subsequently filed an appeal with the Fourth Circuit, arguing that the district court's decision should be reversed.³⁷³

363. 166 F.3d 667 (4th Cir. 1999).

364. *See id.* at 671.

365. *See id.* at 675.

366. *See id.*

367. *See id.*

368. *See id.* at 675-76.

369. *See id.* at 675.

370. *See id.* at 676-77.

371. *See id.* at 676.

372. *See id.* at 677.

373. *See id.* at 677-78.

During this time, the Justice Department announced that it would no longer defend § 3501 in the lower courts.³⁷⁴ The government's brief in *Dickerson* duly noted that the Department now prevented the government from raising § 3501 on appeal.³⁷⁵ Amid this, the Washington Legal Foundation filed an *amicus* brief arguing that § 3501 was applicable, noting that the government had presented § 3501 before the district court in its motion for reconsideration, rendering this issue cognizable before the court.³⁷⁶ The Fourth Circuit permitted the Washington Legal Foundation, as *amicus*, to defend the statute during oral argument.

Just over a year later, the Fourth Circuit announced its opinion, upholding § 3501 against constitutional attack. Specifically, 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 the federal courts, is constitutional.”³⁷⁷ However, the Court castigated the Department of Justice for “elevating politics over law” by refusing to defend the statute.³⁷⁸

The court thus firmly held that “§ 3501, rather than the judicially created rule of *Miranda*,” governs the admissibility of confessions in federal court.³⁷⁹ The court explained that Congress had enacted the statute “with the express purpose of legislatively overruling *Miranda*,”³⁸⁰ and that Congress had the authority to do so only if the *Miranda* warnings were not constitutionally mandated.³⁸¹ Relying on post-*Miranda* cases in which the Court referred to the warnings as “prophylactic,”³⁸² and “not themselves protected by the Constitution,”³⁸³ the court of appeals ruled:

374. See Letter from Attorney General Janet Reno, *supra* note 344.

375. Brief for the United States at 34 n.19, *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750).

376. Brief for the Washington Legal Foundation in Support of Appellant United States at 12-13, *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750).

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

378. *Id.*

379. *Id.*

380. *Id.* at 671.

381. *Id.* at 672.

382. *Id.* (quoting *New York v. Quarles*, 467 U.S. 649, 654 (1984)).

383. *Id.* (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

As a consequence, the irrebutable presumption created by the Court in *Miranda*—that a confession obtained without the warnings is presumed involuntary—is *a fortiori* not required by the Constitution. Accordingly, Congress necessarily possess [sic] the legislative authority to supercede the conclusive presumption created by *Miranda* pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts.³⁸⁴

The court noted the dissent’s contention that the *Miranda* warnings were necessarily constitutionally compelled, or they presumably could not have been applied to the states, but concluded it to be an “interesting academic question” that “has no bearing on our conclusion that *Miranda*’s conclusive presumption is not required by the Constitution.”³⁸⁵ The court then applied § 3501 to Dickerson, and determined that the confession should have been admitted.

In dissent, Judge Michael argued that the court should not have reached the § 3501 issue because it had not been presented by the Department.³⁸⁶ After the decision was handed down, Dickerson filed a petition for rehearing *en banc*. In an unusual move, the Department joined Dickerson in asking for the *en banc* review. The Department claimed that the Fourth Circuit’s decision to rely upon § 3501 was in “error, and that its holding deserves reconsideration by the full court of appeals.”³⁸⁷ The WLF filed a reply, defending the circuit’s decision. The WLF further argued that *en banc* review was not warranted in this case because the Department had always maintained that it might take a different position on § 3501 in the Supreme Court. The Fourth Circuit ultimately denied panel rehearing or *en banc* reconsideration. As of this writing, the Supreme Court has granted Dickerson’s petition for *certiorari*.³⁸⁸ The Department of Justice, however, has once again joined Dickerson and will argue that § 3501 is unconstitutional.

384. *Id.* at 690-91.

385. *Id.* at 691.

386. *Id.* at 695 (Michael, J., dissenting in part and concurring in part).

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

388. *Dickerson v. United States*, 120 S. Ct. 578 (1999).

I. Litigation Redux

The litigation history of § 3501 is a bit difficult to decipher. It is surprising that a statute potentially as significant as § 3501 could be so haphazardly enforced. Even presidential administrations that supported the statute in theory failed to adopt any coordinated effort to seek the statute's enforcement. Although a number of possible explanations for this failure exist—constitutional doubts, concerns about the Supreme Court's composition and receptivity of the federal judiciary to the statute, prosecutors' general unfamiliarity with the statute—none seems satisfactory. Perhaps the most important factor in the statute's decline is that federal law enforcement officers, who had been giving *Miranda*-like warnings to suspects years before the Court made it mandatory, had little difficulty continuing that practice. Because warnings were given in the vast majority of cases, it may have been difficult for prosecutors both familiar with the statute and willing to use it to find a proper case. Yet, it remains difficult to believe that the search was particularly aggressive, as so many seemingly "appropriate" test cases were identified during the Clinton Administration.

In fact, courts have invoked the statute in a variety of other contexts.³⁸⁹ By far, the most common use of the statute has been with respect to subsection (c)'s limitation on pre-arraignment delay.³⁹⁰

Cases confronting the *Miranda* issue, however, are few and far between. Even so, numerous courts have been willing to use the factors articulated in § 3501(b) to assess a confession's voluntariness,³⁹¹

389. The cases cited herein represent but a fraction of those in which § 3501 was raised in some fashion. A complete survey of federal cases addressing the statute is on file with the author.

390. A computer-assisted search of cases addressing 3501(c)'s provisions involving pre-arraignment delay uncovered more than 300 cases, many of which are unpublished. *See, e.g.*, *United States v. Broeske*, 178 F.3d 887 (7th Cir. 1999); *United States v. Pugh*, 25 F.3d 669 (8th Cir. 1994); *United States v. Manuel*, 706 F.2d 908 (9th Cir. 1982); *United States v. Pham*, 815 F. Supp. 1325 (N.D. Cal. 1993); *United States v. Rivera*, 750 F. Supp. 614 (S.D.N.Y. 1990); *United States v. Lukens*, 735 F. Supp. 387 (D. Wyo. 1990); *United States v. Yong Bing-Gong*, 594 F. Supp. 248 (N.D.N.Y. 1984); *United States v. Arcediano*, 371 F. Supp. 457 (D.N.J. 1974).

391. *See, e.g.*, *United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1767 (1999); *United States v. Delacorte*, 113 F.3d 1243 (9th Cir. 1997); *United States v. Clarke*, 110 F.3d 612 (8th Cir. 1997); *United States v. Cournoyer*, 118 F.3d 1279 (8th Cir. 1997); *United States v. Solano-Godines*, 119 F.3d 8 (9th Cir. 1997) (unpublished opinion); *United States v. Hornbeck*, 118 F.3d 615 (8th Cir. 1997); *United States v. Weekley*, 130 F.3d 747 (6th Cir. 1997); *United States v. Hodrick*, 81 F.3d 171 (9th Cir. 1996) (table opinion),

but they have, by and large, either read the statute and *Miranda* in harmony, or failed altogether to note the constitutional issue.³⁹² Some courts have acknowledged the constitutional controversy swirling around § 3501, but have avoided it by ruling on alternative grounds.³⁹³ Similarly, where prosecutors have argued on the basis of § 3501, courts have deemed it inapplicable for a variety of reasons, largely involving whether the defendant was in custody when the confession was made.³⁹⁴ Other courts, while relying on the voluntariness factors articulated in the statute, have held that *Miranda* plainly trumps § 3501.³⁹⁵

Interestingly, courts have also been willing to invoke § 3501 in a number of related situations that accrue to the defendant's benefit. For example, courts have often relied upon § 3501 to ensure that a defendant receives a pretrial voluntariness hearing,³⁹⁶ or to instruct

full text *available at* No.94-50549, 94-50554, 1996 WL 155147 (9th Cir. Apr. 3, 1996); *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996); *United States v. Andaverde*, 64 F.3d 1305 (9th Cir. 1995); *United States v. Makes Room for Them*, 49 F.3d 410 (8th Cir. 1995); *United States v. Thigpen*, 19 F.3d 31 (9th Cir. 1994) (unpublished decision); *United States v. Parker*, 997 F.2d 219 (6th Cir. 1993); *United States v. Restrepo*, 994 F.2d 173 (5th Cir. 1993); *United States v. Casal*, 915 F.2d 1225 (8th Cir. 1990); *United States v. Briscoe*, No. CRIM NO. 1999-133, 1999 WL 970247 (D.V.I. Oct. 18, 1999); *United States v. Quiroz*, 57 F. Supp. 2d 805 (D. Minn. 1999); *United States v. Kaminski*, No. 97-CR-382 (RSP/DH), 1998 WL 275594 (N.D.N.Y. May 27, 1998); *United States v. Loeffler*, No. CRIM. A. 97-446, 1998 WL 254962 (E.D. Pa. Apr. 23, 1998); *United States v. Som*, No. CRIM.A.96CR243RSPGJD, CRIM.A.96CR244RSPGJD, 1998 WL 326778 (N.D.N.Y. Feb. 12, 1998); *United States v. Bad Hand*, 926 F. Supp. 891 (D.S.D. 1996); *United States v. Headdress*, 953 F. Supp. 1272 (D. Utah 1996); *United States v. DeJesus*, 912 F. Supp. 129 (E.D. Pa. 1995); *United States v. Saleh*, No. S3 93 Cr. 181(MBM), 1994 WL 549538 (S.D.N.Y. Oct. 6, 1994); *United States v. Copeland*, 830 F. Supp. 216 (S.D.N.Y. 1993); *United States v. Rivera-Ruiz*, 797 F. Supp. 78 (D.P.R. 1992).

392. *See, e.g.*, *United States v. Little*, 122 F.3d 1064 (4th Cir. 1997) (table opinion), full text *available at* Nos. 96-4569, 96-4586, 1997 WL 563148 (4th Cir. Sept. 11, 1997); *United States v. Quinn*, 123 F.3d 1415 (11th Cir. 1997); *United States v. Brown*, 999 F.2d 548 (10th Cir. 1993), full text *available at* No. 91-6366, 1993 WL 261953 (10th Cir. June 29, 1993).

393. *See, e.g.*, *United States v. Doe*, 170 F.3d 1162 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 429 (1999); *United States v. Doherty*, 126 F.3d 769, 781 n.5 (6th Cir. 1997); *United States v. Guerrero*, 114 F.3d 332 (1st Cir. 1997); *United States v. Superville*, 40 F. Supp. 2d. 672 (D.V.I. 1999).

394. *See, e.g.*, *United States v. Nelson*, 984 F. Supp. 1368 (D. Kan. 1997); *United States v. McNaughton*, 848 F. Supp. 1195 (E.D. Pa. 1994).

395. *See, e.g.*, *United States v. Watson*, 871 F. Supp 988 (N.D. Ill. 1994), *rev'd*, 87 F.3d 927 (7th Cir. 1996).

396. *See, e.g.*, *United States v. Cleveland*, 106 F.3d 1056 (1st Cir. 1997); *United States v. Gonzalez*, 105 F.3d 670 (10th Cir. 1997) (table opinion), full text *available at* No. 96-3083, 1997 WL 7273 (10th Cir. Jan. 9, 1997); *United States v. Luciano-Mosquera*, 63 F.3d

the jury to give a confession such weight as it deems appropriate,³⁹⁷ or both.³⁹⁸

Until certain individuals picked up the baton dropped during the Clinton Administration, there existed no coordinated effort to press the statute. “Press” is used here as opposed to “enforce” because until the Clinton Justice Department, while no Administration enforced the statute vigorously, all—save perhaps the Johnson Administration—considered it constitutional. But it was not until the private bar became involved that courts began taking § 3501 seriously.

VI. THE SUPREME COURT AND § 3501

The Supreme Court has not been entirely oblivious to § 3501’s existence. The Court apparently first acknowledged the statute’s potential importance in *Lego v. Twomey*,³⁹⁹ which involved the standard by which the government was required to prove voluntariness and whether, once proved, the issue still called for a separate hearing outside the jury’s presence. The Court did note § 3501, but found it “inapplicable here.”⁴⁰⁰

Although the Court had occasion to cite to the statute over the years,⁴⁰¹ it did not have the opportunity to consider the statute’s

1142 (1st Cir. 1995); *United States v. Lee*, 16 F.3d 1222 (6th Cir. 1994) (table opinion), full text *available at* No. 91-3833, 1994 WL 20089 (6th Cir. Jan. 21, 1994); *United States v. Iwegbu*, 6 F.3d 272 (5th Cir. 1993); *United States v. Miller*, 987 F.2d 1462 (10th Cir. 1993); *United States v. Maxwell*, 484 F.2d 1350 (5th Cir. 1973); *United States v. Douchette*, 979 F.2d 1042 (5th Cir. 1992); *United States v. Wayne*, 977 F.2d 594 (9th Cir. 1992) (table opinion), full text *available at* No. 91-10547, 1992 WL 302183 (9th Cir. Oct. 22, 1992); *Randall v. United States*, 454 F.2d 1132 (5th Cir. 1972); *United States v. Cluchette*, 465 F.2d 749, 754 (9th Cir. 1972); *United States v. Som*, No. CRIM.A.96CR243RSPGJD, CRIM.A.96CR244RSPGJD, 1998 WL 59462 (N.D.N.Y. Feb. 12, 1998); *United States v. De Yian*, No. 94 Cr. 719 (DLC), 1995 WL 368445 (S.D.N.Y. June 21, 1995); *United States v. Barnett*, 814 F. Supp. 1449 (D. Alaska 1992); *United States v. Stevens*, No. 91 Cr. 0881 (KTD), 1992 WL 30586 (S.D.N.Y. Feb. 3, 1992); *United States v. Infelise*, 773 F. Supp. 93 (N.D. Ill. 1991).

397. *See, e.g.*, *United States v. Starks*, 114 F.3d 1190 (6th Cir. 1997) (unpublished opinion); *United States v. Kaba*, 999 F.2d 47 (2d Cir. 1993).

398. *See, e.g.*, *United States v. Valdez*, 16 F.3d 1324 (2d Cir. 1994). The following cases use § 3501 in jury instructions only: *United States v. Goss*, 484 F.2d 434 (6th Cir. 1973); *United States v. Robinson*, 459 F.2d 1164 (D.C. Cir. 1972); *United States v. Fromal*, 733 F. Supp. 960 (E.D. Pa. 1990).

399. 404 U.S. 477 (1971).

400. *Id.* at 486 n.14.

401. *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*

constitutionality. In large part, this was the result of the government's failure to press the issue before the Court. In *United States v. Green*,⁴⁰² for example, the Court took the unusual step of initiating a discussion about the statute from the bench. In *Green*, the Court considered the admissibility of a defendant's potentially incriminating statements. Although the government had failed to raise § 3501 below, the Court raised it, *sua sponte*, during oral argument:

QUESTION: Mr. Roberts [representing the United States], can I ask about a provision that I didn't even know about? I've been listening to Miranda cases and Edwards cases and Minnick cases for seven terms now. Why has the United States never cited in any of those cases 18 USC Section 3501? Is there some reason?

MR. ROBERTS: Well, I don't know why it has never been cited.

...

QUESTION: It's certainly very relevant to this case, very relevant to a lot of other cases. It has never been cited to us.

MR. ROBERTS: Well, we didn't rely on it below in this case, and so we're not in a position to rely upon it here.

...

QUESTION: Well, but don't—does the Government not feel any duty to call the statute to the attention of lower courts?

QUESTION: Or to this Court?

MR. ROBERTS: I'm not aware that we have relied on it at any point.⁴⁰³

In short, the government was not prepared to address § 3501's relevance. Thus, even when the Court presented the issue on the proverbial silver platter, the government seemed reluctant to raise the statute. Unfortunately, the *Green* Court did not have the oppor-

States, 412 U.S. 205, 207 n.3 (1973); *Lego v. Twomey*, 404 U.S. 477, 486 n.14 (1972).

402. 504 U.S. 908, *cert. dismissed*, 507 U.S. 545 (1993) (certiorari dismissed after the death of respondent).

403. Transcript of Oral Argument in *United States v. Green*, No. 91-1521, 1992 WL 687878, at *18-*20 (Nov. 30, 1992).

tunity to consider the statute's applicability. It dismissed the case when the respondent died, postponing § 3501's day of reckoning.

The Court did consider the effect of § 3501(c), concerning pre-arraignment delay. In *United States v. Alvarez-Sanchez*,⁴⁰⁴ the Court identified without qualification § 3501 as "the statute governing the admissibility of confessions in federal prosecutions."⁴⁰⁵ There, the Court concluded that the provisions of § 3501(c), which require a suspect to be brought before a magistrate within six hours, were not triggered until there was an arrest by a *federal* officer.⁴⁰⁶ The Court therefore found it unnecessary to decide whether the statute replaced the Court's so-called *McNabb-Mallory* rule requiring the suppression of a voluntary confession made during delay in presenting a suspect before a magistrate. The Justice Department had no trouble defending this part of § 3501 or explaining in its brief that the statute "requires the admission" of voluntary statements.⁴⁰⁷ The Department neither suggested that § 3501(a) was unconstitutional, nor did it address the severability question that would inevitably arise if the Court upheld one provision of the statute, but not another. While the constitutionality of § 3501(a) was not at issue, it is worth noting that the government expressed no qualms about the statute when it had the chance.

The government again had the opportunity to litigate the issue less than a year later. In *Davis v. United States*,⁴⁰⁸ the government was again asked by the Court to clarify its position with respect to § 3501. *Davis* involved a federal court-martial in which the defendant sought to use his ambiguous request for counsel as a means to suppress his subsequent statements implicating him in a murder. Davis did not contend that his statements were in any way "involuntary"; rather, he argued only that his request for counsel, however inarticulate, should have stopped further questioning.

Despite an *amicus* brief from the Washington Legal Foundation raising the § 3501 issue, the Solicitor General's Office asserted that

404. 511 U.S. 350 (1994).

405. *Id.* at 351.

406. *See id.* at 358.

407. Brief for the United States, *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994) (No. 82-1812).

408. 512 U.S. 452 (1994).

§ 3501 was inapplicable in the context of a court-martial.⁴⁰⁹ During oral argument, Richard Seamon, the Assistant to the Solicitor General was pointedly asked whether § 3501 had any bearing on the case. He declined even to express an opinion on whether it was relevant to *ordinary* criminal prosecutions, however. The Court then grilled him on the government's failure to take a position with respect to the statute:

QUESTION: I find it extraordinary that you don't take a position on that and haven't taken a position on that for many years. I can't understand. The language of 3501 seems to squarely apply, and the Government just comes in time after time and doesn't take any position on raising 3501, continues to argue *Miranda* as though there's no statute specifically addressing it?

MR. SEAMON [representing the United States]: I-

QUESTION: Now, today the reason is that this is under the Uniform Code of Military Justice, which we're going to interpret to be stricter on prophylactic results, contrary to everything else I've ever seen, than is civil or civilian criminal procedures. But it seems to me the Government ought to have a position on this.

MR. SEAMON: You may well be right, Justice Scalia.⁴¹⁰

Although repeatedly pressed by the Court with respect to the government's position on § 3501, Mr. Seamon stated: "We don't take a position on that issue."⁴¹¹ Despite the Court's earlier prodding, as in *Green*, the government was either ill-prepared, or unwilling, to address § 3501.

The *Davis* Court relied on *Miranda* to hold that police officers may continue to interrogate a suspect until he clearly and unambiguously requests counsel. It did not consider the effect (if any) of § 3501; because the Department had not relied on § 3501, the Court would "decline the invitation of some amici to consider it."⁴¹² The government was not permitted to escape entirely unscathed,

409. See Brief for the United States at 18 n.13, *Davis v. United States*, 512 U.S. 452 (1994) (No. 92-1949).

410. Official Transcript of Oral Argument in *Davis v. United States*, at 44-45, 512 U.S. 452 (1994) (No. 92-1949).

411. *Id.* at 44.

412. *Davis v. United States*, 512 U.S. 452, 457 (1994).

however. Justice Scalia penned a concurring opinion devoted to § 3501 in which he argued that the Court should in the future consider the statute *sua sponte* if it is not raised by the parties:

I agree with the Court that it is *proper*, given the Government's failure to raise the point, to render judgment without taking account of § 3501. But the refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary. As far as I am concerned, such a time will have arrived when a case that comes within the terms of this statute is next presented to us.⁴¹³

That time arrived five years later in *Dickerson*. But before we consider that landmark ruling, a review of more recent congressional action is in order.

VII. CONGRESS REDISCOVERS § 3501

Article II of the Constitution requires the Executive Branch to "take Care that the Laws be faithfully executed."⁴¹⁴ At times, this constitutional injunction creates tension between the executive and legislative branches. Ordinarily, the Executive Branch must enforce congressional acts.⁴¹⁵ Although some scholars have argued that the Executive Branch is required to defend *all* such acts,⁴¹⁶ it is more generally understood that the Executive Branch "has the duty to defend an act of Congress whenever a reasonable argument can be made in support, even if the attorney general and the lawyers examining the case concluded that the argument may ultimately be unsuccessful in the courts."⁴¹⁷ Controversy has erupted over whether this requirement to defend all "reasonable" acts extends to statutes which are of dubious constitutionality. Occasionally, the executive department has declined to enforce a statute it concludes is unconstitutional. In such circumstances, Congress has statutorily required the

413. *Id.* at 464 (Scalia, J., concurring) (citations omitted).

414. U.S. CONST. art. II, § 3.

415. Indeed, the Supreme Court has 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." *Kendall v. United States*, 37 U.S. (1 Pet.) 524, 613 (1838).

416. See, e.g., RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 306 (1974); EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS 79 (3d ed. 1948).

417. 5 Op. Off. Legal Counsel 25, 25-26 (1981).

Justice Department to inform the legislative branch when it declines to defend a congressional act.⁴¹⁸ This issue never arose with respect to § 3501, partly because each administration deemed the statute constitutional, and partly because no Department had squarely litigated the statute's constitutionality.

Congress, which appeared largely indifferent to the fate of § 3501, rediscovered the statute in 1995, and ultimately forced the Clinton Administration to take a stand on the statute's constitutionality. Shortly after taking control of the Senate, Republican members called upon the Justice Department to enforce § 3501 and introduced a crime bill that included, among other things, a redrafting of § 3501(a) to place the burden of proving "involuntariness" upon the defendant and limiting the effect of pre-arraignment delay on a confession's admissibility.⁴¹⁹ Although nothing became of the legislation, the Senate took a keen interest in the statute, making it a focus of inquiry during the nominations hearings of several key Department officials.

At first, the Clinton Administration took a cautious view of the statute. In response to a written question from Senator Orrin Hatch following an oversight hearing into the Department of Justice's activities, Attorney General Reno explained "[t]he Department of Justice does not have a policy that would preclude it from defending the constitutional validity of Section 3501 in an appropriate case."⁴²⁰ The Attorney General's statement essentially mirrored that of her predecessors.

When a seemingly appropriate case (*Cheely*) did arise, the Department changed course. During an oversight hearing focusing on the Solicitor General's Office, Senator Fred Thompson queried then Solicitor General Drew Days on the Department's commitment to enforcing § 3501. Questions had arisen as to the Department's enthusiasm to enforce the statute in light of its reversal of course in *Cheely*. Under Senator Thompson's questioning, Solicitor General Days denied that the Department had adopted a policy of declining to enforce the statute.⁴²¹ In fact, he emphatically stated:

418. 2 U.S.C. § 288 (1994).

419. See S.3, Violent Crime Control and Law Enforcement Act of 1995, § 507, 28 U.S.C. § 994 (1995).

420. *Department of Justice Oversight: Hearing on Focusing on the Administration of Justice and the Enforcement of Laws Before the Senate Comm. on the Judiciary*, 104th Cong. 52 (1995).

421. See *Solicitor General Oversight: Hearing on the Operation and Activities of the Office*

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.⁴²²

The Solicitor General's response at the same time echoed that of other key Department officials, and predicted the Department's future position.

Again in 1997, Attorney General Reno, when asked whether the Department would raise § 3501 in appropriate circumstances, promised "I'd do it if it's right in an appropriate case."⁴²³ This "appropriate case" language seemed to make the rounds. In June of 1997, then-United States Attorney Eric Holder, during his hearing to be confirmed as Deputy Attorney General, promised to support the statute in an "appropriate" situation. "I would," he declared, "support the use of Section 3501 in an appropriate circumstance."⁴²⁴

Foreshadowing events to come, he explained, however, that as U.S. Attorney, his "office has not invoked subsections (a) and (b) of Section 3501 . . . even though officers may not have complied with the dictates of Miranda."⁴²⁵ "Nor . . . has my office invoked this provision during the tenure of my predecessors."⁴²⁶

The Department appeared reluctant to invoke the provision at all. In the wake of the *Leong* case, Orrin Hatch, chairman of the Senate Committee on the Judiciary, and five additional members of that committee wrote Attorney General Reno and asked her to defend the statute:

We believe that section 3501 is constitutional. While the Supreme Court has not passed in this question directly, we believe that the

of Solicitor General Before the Senate Comm. On the Judiciary, 104th Cong. 31-33 (1995).

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

423. *Department of Justice Oversight: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong. 89-90 (1997).

424. *Nominations of Joel I. Klein and Eric H. Holder, Jr.: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 124 (1997).

425. *Id.*

426. *Id.*

court would uphold the statute. . . . The undersigned Members do not want to see guilty offenders go free to a technical error if the department easily can prevent such a miscarriage of justice by invoking the current law.⁴²⁷

In that same letter, the Senators recounted the repeated assurances they had received from Department officials that the statute would be defended in “an appropriate case.” They noted, for example, the Solicitor General’s testimony concerning the decision of the Department not to pursue § 3501 in *Cheely*, pointing out 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 we won’t under other circumstances.’⁴²⁸

In response to the Senators’ letter, the Attorney General notified Congress that the Department would not defend § 3501 in the lower courts.⁴²⁹ She explained that the Department reserved the right, however, to invoke the statute in the Supreme Court. Apparently, the only “appropriate case” in the Justice Department’s view was one arising in the Supreme Court. Indeed, John C. Keeny, Acting Assistant Attorney General for the Criminal Division, issued a memorandum explaining the Department’s decision not to defend the statute in *Leong* to all U.S. attorneys and department section chiefs. The memorandum communicated the Department’s position that “unless the Supreme Court were to modify or overrule *Miranda* . . . lower courts are not free to rely on Section 3501 to admit statements that would be excluded by *Miranda*.”⁴³⁰ Although the memorandum explained that the Department had not yet de-

427. Letter from Senators Orrin Hatch, Strom Thurmond, Fred Thompson, Jon Kyl, John Ashcroft, and Jeff Sessions to Attorney General Janet Reno 3, 5 (Aug. 28, 1997) (copy on file with author).

428. *Id.* at 4-5 (quoting testimony of Solicitor General Drew Days).

429. Letter From Attorney General Janet Reno to the Honorable Albert Gore, Jr., President of the Senate 1 (Nov. 1, 1997); *cf.* 2 U.S.C. § 288 (1994) (requiring the Department of Justice to notify Congress when refusing to enforce statute).

430. Memorandum for All United States Attorneys and Criminal Division Section Chiefs from John C. Keeny, Acting Assistant Attorney General for the Criminal Division 2 (Nov. 6, 1997).

cided whether it would ask the Supreme Court to “overrule or modify *Miranda*,” it required prosecutors to “consult[]” with the Criminal Division in any case involving the § 3501’s voluntariness provision.⁴³¹ The difficulty, of course, was that if the Department refused to invoke the statute in the lower courts, it was unlikely but (as subsequent events have shown), not impossible, for the Supreme Court ever to consider the statute.

The Judiciary Committee later pressed the Department on its position with respect to § 3501. Some three months after receiving Attorney General Reno’s notification letter, Judiciary Committee Chairman Orrin Hatch asked Solicitor General nominee Seth Waxman whether he believed that the Fifth Amendment compelled the *Miranda* warnings. Rather than focusing on the Department’s view of § 3501, Chairman Hatch instead decided to uncover whether the Solicitor General nominee believed the *Miranda* warnings to be a constitutional mandate. Mr. Waxman responded:

It is my understanding of *Miranda* . . . that the *Miranda* warnings themselves were not ever regarded as direct requirements compelled by the Constitution. Rather, . . . the Court reached its holding in *Miranda* as one means of implementing the Fifth Amendment’s protection against compulsory self-incrimination in the context of custodial interrogation. The Court itself recognized that Congress or the States might supplant the *Miranda* warnings if those bodies provided equally effective means of apprising suspects of their rights.⁴³²

The crucial issue in this debate would therefore become whether § 3501 satisfied *Miranda*’s holding, as an “equally effective” means of protecting suspects’ rights.

The Committee’s exploration of this issue culminated with Senator Strom Thurmond’s examination of James Robinson, nominated to head the Criminal Division. During Robinson’s confirmation hearing, Senator Thurmond pointedly asked whether he believed § 3501 to be unconstitutional.⁴³³ Mr. Robinson responded by observing “it is a difficult question. To use a law school analogy, . . . it

431. See *id.*

432. *Nomination of Seth Waxman to be Solicitor General: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 101 (1997).

433. See *The Nomination of James K. Robinson to be Assistant Attorney General for the Criminal Division, U.S. Department of Justice: Hearing before the Senate Comm. on the Judiciary*, 105th Cong. 12 (1998).

is an essay question rather than a true-false question,” one that the Department had long struggled with.⁴³⁴

And struggle the Department did. Following the *Dickerson* decision, Senator Hatch, joined by eight of his Senate colleagues, once again urged the Department to enforce § 3501. The Senators noted that Department officials had repeatedly pledged to defend congressional acts where they could make reasonable arguments: “The *Dickerson* decision demonstrates beyond doubt that there are ‘reasonable arguments’ to defend 18 U.S.C. 3501. In fact, these arguments are so reasonable that they have prevailed in every Court that has directly addressed their merits.”⁴³⁵ *Dickerson* forced the Department to take a stand. While Department officials had claimed that they would enforce the statute in an “appropriate case” and intimated that they may choose to argue the case before the Supreme Court, they finally took the stance in *Dickerson* that the statute was unconstitutional.

More recently, Senator Strom Thurmond chaired a subcommittee hearing to examine the Justice Department’s refusal to enforce § 3501.⁴³⁶ The hearing focused on three broad themes: first, whether previous administrations had supported § 3501’s constitutionality, and whether the Clinton Administration could refuse to enforce the statute; second, whether *Miranda* had adversely affected criminal investigations; and finally, whether Congress could, pursuant to its authority to establish judicial rules of evidence and procedure, statutorily supplant the now-familiar warnings. Witnesses affirmed the view that the Clinton Administration’s decision not to enforce the statute broke with long-standing Department precedent.⁴³⁷ Similarly, the subcommittee heard testimony that *Miranda* had a substantial negative impact on criminal investigations.⁴³⁸ Unsurprisingly, the legal scholars who testified at the hearing sharply disagreed over

434. *Id.*

435. Letter from Senator Orrin Hatch and Members of the Senate Judiciary Committee to Attorney General Janet Reno, 1-2 (Mar. 4, 1999) (copy on file with author).

436. *Hearing Before the Subcommittee on Criminal Justice Oversight of the Comm. on the Judiciary* (May 13, 1999).

437. *See id.* at 8-9 (statement of Stephen J. Markman); *id.* at 39 (statement of Paul Cassell).

438. *See id.* at 21-25 (statement of Gilbert G. Gallegos); *id.* at 67-83 (statement of Paul Cassell).

Congress's authority⁴³⁹ to statutorily modify *Miranda*'s requirements. Regardless, the stage was set for the Court to intervene.

VIII. A QUESTION OF CONSTITUTIONALITY

Dickerson has forced consideration of the issue of whether the *Miranda* warnings are constitutionally compelled or, like the rules of evidence, susceptible to modification. Instead of allowing the issue to percolate in the lower courts, the Supreme Court has granted *certiorari* review in *Dickerson* and will soon consider § 3501's constitutionality.⁴⁴⁰ This issue has spawned considerable scholarly debate.

Professor Paul Cassell has eloquently argued on behalf of the statute's constitutionality.⁴⁴¹ His arguments, which I find persuasive, build upon those originally advanced by Professor Joseph Grano in his seminal work.⁴⁴² Those arguments rest largely on two premises. First, the claim is made that the *Miranda* Court expressly invited Congress and the states to draft new procedural protections "equally effective" in safeguarding suspects' Fifth Amendment rights. If, it is argued, the warnings were constitutionally mandated, then why did the Supreme Court invite Congress and the states to craft their own procedures?⁴⁴³

Second, regardless of what the *Miranda* Court may have intended, since that decision, the Court has regularly characterized the warnings as "prophylactic" in nature and not themselves constitutionally guaranteed. In *Michigan v. Tucker*,⁴⁴⁴ for example, the Court considered whether to admit testimony from a suspect about a witness who later incriminated that suspect at trial.⁴⁴⁵ The *Tucker* Court deemed it relevant to ask whether the challenged police interrogation "directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic

439. Compare *id.* at 26-34 (statements of Daniel C. Richman and George Thoma) with *id.* at 34-67 (statement of Paul Cassell).

440. *Dickerson v. United States*, 120 S. Ct. 578 (1999).

441. See Paul Cassell, *supra* note 72.

442. See generally JOSEPH GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993); see also U.S. Dep't of Justice, OFFICE OF LEGAL POLICY, *supra* note 293, reprinted in 22 U. MICH. J.L. REFORM 437, 515 (1989).

443. See Cassell, *supra* note 72; GRANO *supra* note 442.

444. 417 U.S. 433 (1974) (plurality opinion).

445. *Id.* at 436-37.

rules developed to protect that right.”⁴⁴⁶ The police had given the suspect incomplete *Miranda* warnings. The Court nevertheless upheld admission of the contested testimony on the ground that the officers’ failure to provide adequate warnings “did not abridge respondent’s constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege.”⁴⁴⁷ The *Tucker* Court stressed that *Miranda* did not “require[] adherence to any particular solution for the inherent compulsions of the interrogation process.”⁴⁴⁸ In explaining that the warnings were not constitutionally guaranteed rights, the Court observed that *Miranda* styled them as “practical reinforcement” to protect the right against compulsory self-incrimination.⁴⁴⁹

Subsequent to *Tucker*, the Court has continued to describe the warnings as “prophylactic” rather than as “compelled” by the Fifth Amendment.⁴⁵⁰ In *Oregon v. Elstad*,⁴⁵¹ for example, the Court considered whether to exclude, pursuant to the fruit of the poisonous tree doctrine, a statement not preceded by *Miranda* warnings that led to a later confession accompanied by appropriate warnings.⁴⁵² In ruling that the confession was properly admitted, the Court clarified that the *Miranda* rule “sweeps more broadly than the Fifth Amendment itself. . . . *Miranda*’s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.”⁴⁵³ “[A] failure to administer *Miranda* warnings” the Court declared, was not itself a violation of the Fifth Amendment.⁴⁵⁴ A so-called non-*Mirandized* confession was thus not tantamount to an “involuntary” confession. Because it refused to equate a *Miranda* violation with a Fifth Amendment violation, the Court had little

446. *Id.* at 439.

447. *Id.* at 446.

448. *Id.* at 444 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

449. *See id.*

450. *See, e.g., Davis v. United States*, 512 U.S. 452, 457 (1994); *Duckworth v. Eagan*, 492 U.S. 195, 202 (1989); *Oregon v. Elstad*, 470 U.S. 298, 305 (1985).

451. 470 U.S. 298 (1985).

452. *Id.* at 300.

453. *Id.* at 306-07; *see New York v. Quarles*, 467 U.S. 649, 656 (1984) (stating that *Miranda* warnings are necessary to “reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation”); *United States v. Crocker*, 510 F.2d 1129, 1137 (10th Cir. 1975) (suggesting constitutionality of § 3501).

454. *Elstad*, 470 U.S. at 307 n.1.

trouble in deciding that otherwise voluntary statements taken in violation of *Miranda* may nevertheless be used for impeachment purposes.⁴⁵⁵ Presumably, if the warnings were Fifth Amendment requirements, then the government would be forbidden from using statements taken in violation of *Miranda*.

Similarly, in creating a public safety exception to *Miranda*, the court in *New York v. Quarles*⁴⁵⁶ described the *Miranda* warnings as a means for safeguarding Fifth Amendment rights, rather than rights protected by the constitution. Drawing a distinction between the warnings and the right against compelled self-incrimination, the Court explained that “the failure to provide *Miranda* warnings in and of itself does not render a confession involuntary.”⁴⁵⁷ The Court effectively rebuffed the *Miranda* majority’s conclusion that custodial interrogation is inherently coercive. In part, this seeming reversal of course may be a result of the Court’s differentiation between, as Professor Grano has illustrated, “potential” compulsion and “inherent” compulsion. In other words, “jeopardizing Fifth Amendment rights is different from actually violating them; and assuring that Fifth Amendment rights are protected is different from concluding that they have actually been infringed.”⁴⁵⁸ Setting aside these core constitutional issues for the time being, I would like briefly to explore several other problems with which the Supreme Court will likely grapple.

A. If Everyone Agrees, Does a Case or Controversy Exist?

At the outset, the Court must determine whether Article III “case or controversy” requirements are met. This question, normally self-evident in criminal cases, arises because the parties in interest—Dickerson and the United States—agree that § 3501 is unconstitu-

455. See *Oregon v. Hass*, 420 U.S. 714, 721-22 (1975); *Harris v. New York*, 401 U.S. 222, 228 (1971). But see *New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (reaffirming its views that “a defendant’s compelled statements, as opposed to statements taken in violation of *Miranda*,” may not be used even for impeachment purposes at trial).

456. 467 U.S. 649, 655-56 (1984).

457. *Id.* at 655 n.5 (quoting *Miranda v. Arizona*, 384 U.S. 436, 457 (1966)).

458. JOSEPH GRANO, *supra* note 442, at 180. Similarly, the so-called “cat out of the bag rule” applies when police initially failed to warn the suspect of his rights, subsequently realized the oversight, and then afford the suspect the opportunity to confess again after having received proper warnings. The second confession is admissible provided that the first confession, even if taken in violation of *Miranda*, was voluntary. In fact, police need not even inform her that the initial confession was tainted. See *Oregon v. Elstad*, 470 U.S. 298, 314 (1985).

tional. As a consequence, the Court appointed an *amicus* to defend the judgment of the court below.⁴⁵⁹ To say this is odd is a bit of an understatement. If the parties in interest agree with respect to the statute's constitutionality, and the Court is forced to rely on an *amicus* to defend the judgment below, then does an Article III "case" or "controversy" exist?

Article III limits federal courts to deciding "actual controversies arising between adverse litigants."⁴⁶⁰ By adopting this limitation, the framers sought to confine federal courts to resolving only those disputes that "are traditionally thought to be capable of resolution

459. The Supreme Court has since appointed Paul Cassell as *amicus* to defend the judgment below. Although odd, it is not without precedent. In *Bousley v. United States*, 523 U.S. 614 (1998), for example, the Supreme Court appointed *amicus* to brief and argue in support of the decision below where the United States disagreed with the court of appeals' analysis. Similarly, in *Bob Jones University v. United States*, 456 U.S. 922 (1982), the Court invited an *amicus* to file a brief and argue "in support of the judgements below" where the United States was not prepared to do so. *Dickerson*, of course, is a criminal case, which makes the appointment of an *amicus* to represent the court's judgment below a trifle more controversial. Although it is perhaps no more controversial than the United States' unusual position in *Buckley v. Valeo*, 424 U.S. 1 (1976). In that case, the United States actually took two seemingly opposing litigating positions before the Court. In a brief filed on behalf of the Attorney General and the Federal Election Commission, the government argued that the Federal Election Campaign Act was a legitimate means of curbing corruption and did not run foul of the First Amendment. Brief for the Attorney General & Federal Election Comm'n, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437). In a separate brief filed on behalf of the Attorney General as appellee and for the United States as *amicus*, the government took the position that certain aspects of the challenged statute may have infringed upon First Amendment values, but that the case was not sufficiently ripe for the Supreme Court to review. Brief for the Attorney General as Appellee & for the United States as Amicus Curiae, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437). In the second brief, the Attorney General was a named defendant; thus, as a party, the Attorney General joined only a portion of the brief. In addition, the Federal Election Commission filed a brief supporting the statute's constitutionality and arguing on behalf of Congress's authority to create an election commission. Brief of Federal Election Comm'n, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

460. *Muskraat v. United States*, 219 U.S. 346, 361 (1911). Article III states in relevant part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

through the judicial process.”⁴⁶¹ If a court purports to rule on an issue that is not a case or controversy, it is performing a duty that is not “properly judicial,”⁴⁶² and its opinion is merely advisory. The alleged problem in the *Dickerson* case stems from the fact that both the government and the defendant seem to agree that § 3501 is unconstitutional.⁴⁶³

Does this eliminate the Article III case or controversy requirement? Probably not. The Court long ago articulated the basic case or controversy requirements:

By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.⁴⁶⁴

While the parties are not adverse with respect to the legal claim, if the statute is upheld, there will doubtless be “possible” adverse parties in the future. Additionally, the application of a statute to a particular factual scenario plainly bespeaks a situation in which the judicial power is capable of “acting upon” the legal issue presented. Fourth Circuit law in the post-*Dickerson* world states that § 3501 controls the admission of voluntary statements. Although the Executive Branch has concluded that the statute is unconstitutional, and likely will refuse to raise it, lower federal courts are bound by circuit precedent to address it. This places the federal courts in an odd position, one that involves a “pure” legal question the Supreme Court is particularly able to resolve.

Unquestionably, the parties’ agreement about the construction of a particular law is not binding upon the courts. In *Kamen v.*

461. *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

462. *Muskrat*, 219 U.S. at 352 (quoting *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792)).

463. In fact, the government refused to raise the statute either before the district court or the court of appeals and has now joined the defendant before the Supreme Court.

464. *Muskrat*, 219 U.S. at 357 (quoting *In re Pacific Ry. Comm’n*, 32 F. 241, 255 (N.D. Cal. 1887)).

Kemper Financial Services,⁴⁶⁵ the Court explained that “[w]hen an issue or claim is properly before the court,⁴⁶⁶ the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”⁴⁶⁷ Unlike a factual finding, a legal interpretation does not lend itself to stipulation. The Court had recent occasion to address this issue in a related context. In *United States National Bank of Oregon v. Independent Insurance Agents of America*,⁴⁶⁸ a group of insurance agents challenged the Comptroller of the Currency’s decision to permit the bank to sell insurance. The district court granted summary judgment for the bank, ruling that 12 U.S.C. § 92, which authorizes banks to act as insurance agents in towns with populations under five thousand, authorized the Comptroller’s decision. The insurance agents appealed, arguing that the district court had misapplied the statute. The D.C. Circuit, however, expressed some concern about whether the statute had been repealed and, on its own motion, directed the parties to brief the question of the statute’s continuing vitality. Despite the fact that the parties stipulated that § 92 remained in effect, the court of appeals concluded that it had, in fact, been repealed, and thus entered judgment for the agents. In a concurring opinion to the denial of rehearing *en banc*, Judge David Sentelle explained: “[B]y declining to argue that Congress repealed the section, appellants cannot stipulate into existence a repealed statute.”⁴⁶⁹ The Supreme Court subsequently vindicated the court of appeals’s decision to consider the statute *sua sponte*.⁴⁷⁰ The Court explained that the parties’ decision whether the

465. 500 U.S. 90 (1991).

466. While some have suggested that the Court lacked legal authority to address the constitutionality of § 3501, an issue not raised below, it has been persuasively argued that the Court may give *sua sponte* consideration to the applicability of a statute, regardless of whether the parties raised it. See Eric D. Miller, *Should Courts Consider 18 U.S.C. §3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029 (1998) (comment arguing that courts can consider § 3501 *sua sponte*). Indeed, it has long been the case that “[t]he law . . . is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.” *Lamar v. Micou*, 114 U.S. 218, 223 (1885). Moreover, § 3501 is a directive to courts, not to prosecutors; thus it should make no difference whether the parties raised the statute—courts have an independent obligation to consider the applicability of relevant law.

467. *Kamen*, 500 U.S. at 99 (citation omitted) (footnote added).

468. 508 U.S. 439 (1993).

469. *Independent Ins. Agents of Am., Inc. v. Clarke*, 965 F.2d 1077, 1078 (D.C. Cir. 1992) (Sentelle, concurring in the denial of rehearing *en banc*).

470. *U.S. Nat’l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993). Al-

statute was repealed could not possibly bind the federal courts. A contrary decision, as Justice Scalia noted in his concurrence, would put the Court in the position of possibly construing, and applying, a non-existent statute.⁴⁷¹

The Court's refusal to be bound by the parties' construction of a statute is not of recent origin. The Court has long ignored the parties' understanding as to "the legal issues in the present case and those resolved by" precedent.⁴⁷² In truth, the Court's decisions are often predicated on legal theories neither propounded by the parties, nor raised in the courts below.⁴⁷³ The tradition of *amicus curiae* submissions stands as a testament to the Court's ability and occasional need to look beyond the parties' understanding of the law.⁴⁷⁴

Consequently, in cases where a legal theory the Court finds essential to the decision requires further illumination, it has not hesitated to order rebriefing and reargument.⁴⁷⁵

Nor are there prudential reasons for the Court to fret about the case or controversy requirement. The court of appeals undertook its § 3501 analysis openly and carefully. In no sense could the "losing party claim to have been ambushed."⁴⁷⁶ Both the government and the defendant had "an opportunity to be heard" and "the opportunity to offer all the evidence they believe relevant to the issues."⁴⁷⁷

Furthermore, the issue under consideration by the court of appeals was a pure question of law, which appellate courts are particu-

though the Supreme Court reversed the court of appeals, it did so because it believed that the statute had not been repealed. *Id.* at 462-63.

471. *See id.* at 464 (Scalia, J., concurring).

472. *Sanford's Estate v. IRS*, 308 U.S. 39, 51 (1939).

473. *See, e.g.*, *United States v. Burke*, 504 U.S. 229 (1992) (Scalia, J., concurring); *Kamen*, 500 U.S. 90 (1991); *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990); *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660 (1990); *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1989); *Teague v. Lane*, 489 U.S. 288 (1989). Separate opinions frequently set forth legal theories pressed by none of the parties. *See, e.g.*, *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990) (Scalia, J., concurring); *Segura v. United States*, 468 U.S. 796, 805 (1984).

474. *See, e.g.*, SUP. CT. R. 37.1, 28.7; FED. R. APP. P. 29.

475. *See, e.g.*, *Allied-Signal, Inc. v. Director, Div. of Taxation*, 503 U.S. 928 (1992); *McKesson v. Division of Alcohol Beverage and Tobacco*, 496 U.S. 18 (1989); *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1984); *New Jersey v. T.L.O.*, 468 U.S. 1214 (1984); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 422 U.S. 1005 (1975); *Benton v. Maryland*, 393 U.S. 994 (1968).

476. *United States v. Williams*, 504 U.S. 36, 42 n.2 (1992).

477. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

larly well-situated to consider *de novo*.⁴⁷⁸ The only possible factual concern involves the timing of the *Miranda* warnings, but that is wholly incidental to whether § 3501 should apply or how the statute should be construed. Even if the “case or controversy” hurdle is successfully cleared, several other interesting problems remain. It is to these questions I will now turn.

B. The Problem of Miranda’s Application to the States

Those advocating the *Miranda* warnings as being constitutionally required have persuasively argued that the Supreme Court could not have foisted the warnings upon the states unless those warnings were commanded by the Fifth Amendment. If, it is claimed, *Miranda* merely reflects a prophylactic procedural rule, how can the Court compel state courts to follow its terms? After all, the Court has expressly disavowed the power to impose supervisory rules on state courts.⁴⁷⁹ Rather, the Court’s power “is limited to enforcing the commands of the United States Constitution.”⁴⁸⁰ If *Miranda* reflects a procedural rule, the Court cannot easily justify its imposition of that rule on state courts. It can impose its will upon those courts only to the extent that federal constitutional issues are at stake. The warnings thus must be, it is claimed, a constitutional command. The *Dickerson* opinion acknowledges that *Miranda*’s application to the states is “an interesting academic question.”⁴⁸¹

Professor Cassell has offered perhaps the best answer to this perplexing question. He explains that *Miranda* “can be best understood not as a constitutional command, but as an exercise of the Court’s authority to improvise a remedy when it is presented with an issue implicating a constitutional right for which there is not at the time of the decision a constitutionally or legislatively specified remedy.”⁴⁸² As

478. See, e.g., 5 U.S.C. § 706 (1994); *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991).

479. See, e.g., *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (“Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.”). As Justice Stevens has observed, the “Court’s power to require state courts to exclude probative self-incriminating statements rests entirely” on the Court’s power to enforce the Constitution. *Oregon v. Elstad*, 470 U.S. 298, 370-71 & n.15 (1985) (Stevens, J., dissenting).

480. See *Mu’Min v. Virginia*, 500 U.S. 415, 422 (1991).

481. *United States v. Dickerson*, 166 F.3d 667, 691 n.21 (4th Cir. 1999).

482. Cassell, *supra* note 72, at 237.

such, Congress is free to alter the rule as it sees fit—provided, of course, that the remedial scheme enacted by Congress provides “meaningful relief” for any constitutional violation.⁴⁸³

This explanation dovetails nicely with the Court’s persistent characterization of the warnings as “prophylactic.” If the *Miranda* warnings were in fact compelled by the Fifth Amendment then later cases such as *Oregon v. Elstead*⁴⁸⁴ and *Michigan v. Tucker*,⁴⁸⁵ in which the Court draws a distinction between *Miranda* violations and Fifth Amendment violations, cannot easily be explained. As Professor Cassell has noted, “The judicially devised remedy may sweep more broadly than is strictly necessary to vindicate a particular constitutional right,” but is itself not a constitutional command.⁴⁸⁶ As a consequence of this line of reasoning, Congress is free to modify the Court’s chosen remedy.

To understand, one must appreciate that the *Miranda* “remedy” is not really a remedy at all. Rather, it is a *prophylactic* device—an anticipatory remedy—to ensure that no violation of the right, hence no future remedy, is needed. The Court has itself explained that “[t]he prophylactic *Miranda* warnings are not themselves rights protected by the Constitution,”⁴⁸⁷ but instead are merely “recommended procedural safeguards.”⁴⁸⁸ The implications of this understanding are important. In *Miranda*, the Court itself invited Congress to create a system as protective of the suspect’s rights as the *Miranda* warnings. This invitation aptly suits the claim that the particular formulation the Court laid down is not constitutionally required, but instead is an effort to prevent the violation of a right.

Moreover, it is not at all clear that the Court considered the question of whether it had supervisory authority over state courts. It was not until considerably later that this issue was directly addressed by the Court, and even then, no party has squarely presented the

483. See *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). Cf. *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959) (upholding statutory modification of court-created rule).

484. 470 U.S. 298, 306 n.1 (1985) (noting that “a simple failure to administer *Miranda* warnings is not itself a violation of the Fifth Amendment”); accord *New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984).

485. 417 U.S. 433 (1974).

486. Cassell, *supra* note 72, at 237.

487. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (internal quotation omitted).

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

issue of whether *Miranda* was a valid exercise of the Court's supervisory authority.

If the Court decides that *Miranda* is merely a prophylactic safeguard, as Professor Cassell has argued, and upholds § 3501, an interesting question presents itself. What will state courts do, when confronted with a Fifth Amendment claim? After all, § 3501 applies by its own terms only to federal courts. Thus, it does not apply to the states. On the other hand, if *Miranda* is merely a supervisory rule, then it can't be binding upon the states. But, if the warnings are understood as a means of enforcing the Fifth Amendment, then the Court's decision makes sense. The Court disavowed that the states were forever prevented from structuring law enforcement interrogations in a different manner. To assuage this "supervisory" problem, the Court explained that "the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."⁴⁸⁹

Miranda therefore contemplates a role for the states in the elaboration of appropriate safeguards for the compelled self-incrimination privilege. Presumably, the *Miranda* warnings will continue to bind the states, at least until the states pick up the cudgel and enact statutes that mirror § 3501, or Congress chooses to exercise its enforcement authority under the Fourteenth Amendment and create similar rules for application in the states.

C. Boerne and the Problem of Constitutional Interpretation

Whether *Miranda* warnings are constitutionally required is only one side of the equation. Even if the Court declines to equate *Miranda* with the Fifth Amendment, it may nevertheless decide that Congress lacks the statutory authority to resurrect constitutional safeguards that the Court previously rejected as inadequate. After all, § 3501 endeavors to recreate the "voluntariness" doctrine that existed prior to *Miranda*.⁴⁹⁰ However, it could be argued, any congres-

489. *Id.* at 490.

490. The statute's legislative history indeed confirms Congress's objective to supersede that case. *See* S. REP. NO. 90-1097, at 2137 (1968). The Senate Report explained that:

[b]y the express provisions of the proposed legislation the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination. Whether or not the arrested person was informed of or knew his

sional attempt to modify the Court's constitutional judgment would run afoul of the fundamental principles enshrined in *Marbury v. Madison*.⁴⁹¹ Otherwise, as the Court pointed out in *City of Boerne v. Flores*,⁴⁹² "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."⁴⁹³ I think this argument is mistaken.

In *Boerne*, the Court struck down the Religious Freedom Restoration Act of 1993 (RFRA) as an improper encroachment upon the federal courts' duty to construe the Constitution. The background surrounding Congress's decision to enact RFRA offers an interesting—albeit incomplete—parallel to that of § 3501.

Before its decision in *Employment Division v. Smith*,⁴⁹⁴ the Supreme Court had applied a "compelling state interest test" to religious free exercise claims. In *Smith*, however, the Court replaced that test with one permitting laws of general applicability to be enforced without substantially burdening the state. The Court reasoned "[t]hat the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" ⁴⁹⁵ The *Smith* majority thus qualified the compelling interest test's applicability to free exercise claims that might reasonably be restricted because they were geared to all citizens, not simply those espousing a religious belief. However, certain members of Congress (and a substantial coalition of interest groups) were convinced that the compelling state interest test was imperative to safeguard the free exercise of religious beliefs. To this end, Congress enacted RFRA, at least in part, to "restore the compelling interest test" in assessing claims arising under the free exercise clause.⁴⁹⁶ Congress thus statutorily revived a judicially crafted test that the Court had rejected.

rights before questioning is but one of the factors. . . . No one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted.

Id. Comments on the floor of the House were similar. *See, e.g.*, 114 CONG. REC. 16,066 (1968) (remarks of Rep. Celler); 114 CONG. REC. 16,074 (1968) (remarks of Rep. Corman).

491. 5 U.S. (1 Cranch) 137, 177 (1803).

492. 521 U.S. 507 (1997).

493. *Id.* at 529 (striking down Religious Freedom Restoration Act on ground that Congress had exceeded its authority under Section 5 of the Fourteenth Amendment).

494. 494 U.S. 872 (1990).

495. *Id.* at 879 (internal quotation omitted).

496. 42 U.S.C. § 2000bb(b) (1993).

In striking RFRA down, however, the Court determined that Congress had violated the constitutional separation of powers by requiring that courts use a standard of judicial review for free exercise cases that the Court had expressly rejected as inconsistent with the constitution. The Court explained that while Congress “has been given the power to ‘enforce’ ” it has not been given “the power to determine what constitutes a constitutional violation.”⁴⁹⁷ The Court concluded that “RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”⁴⁹⁸ By resurrecting a judicially rejected standard of review for a particular class of constitutional cases, the Court concluded that Congress had improperly encroached upon the judicial power. The Court cautioned that Congress’s attempt to impose the compelling state interest test on the federal courts amounted to a competing interpretation of the First Amendment. In other words, Congress was legislating the exercise of judicial power with respect to a discrete class of cases. “When the Court has interpreted the Constitution,” the Court emphasized, “it has acted within the province of the Judicial Branch,” a power constitutionally forbidden to the legislature.⁴⁹⁹

At first blush, this is precisely the situation confronting the Court in *Dickerson*. Prior to *Miranda*, the Court analyzed the admissibility of confessions under a “totality of the circumstances” standard derived from the Due Process Clause.⁵⁰⁰ Although it did not rewrite the standards governing the Fifth Amendment inquiry itself, *Miranda* altered the procedures governing the voluntariness determination by holding that no statements arising from a custodial interrogation would be admissible at trial unless the suspect was first informed of her rights. In response to *Miranda*, Congress enacted § 3501 to resurrect the former “totality of the circumstances” voluntariness test.

The issue in *Dickerson* may therefore hinge on whether Congress endeavored in § 3501 to overturn the Court’s Fifth Amendment interpretation of what constitutes “voluntariness,” or instead sought

497. *Boerne*, 521 U.S. at 519.

498. *Id.* at 532.

499. *Id.* at 536.

500. See, e.g., *Haynes v. Washington*, 373 U.S. 503, 513-15 (1963); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963); *Reck v. Pate*, 367 U.S. 433, 440-41 (1961); *Crooker v. California*, 357 U.S. 433, 439-40 (1958).

merely to replace the Court's prophylactic rules safeguarding the right with rules of its own creation. In my view, § 3501 can readily be distinguished from RFRA because Congress did not instruct the Supreme Court on how to interpret the compelled self-incrimination clause. Nor does it attempt to offer a competing definition of "voluntariness." Rather, Congress simply adopted new procedural rules courts must use in determining whether a defendant's statements should be admitted at trial. The ultimate question of whether a confession is "voluntary," for Fifth Amendment purposes, remains with the courts. This is not altogether different from Congress's authority to promulgate the federal rules of evidence, many of which serve to protect constitutional rights. The Sixth Amendment, for example, affords defendants the right to "be confronted with the witnesses against him."⁵⁰¹ The Court may define the legal effect of the confrontation clause, but Congress establishes the procedures by which witnesses are called and by which the relevance of testimonial evidence is assessed. "This power," the Court has observed, "rooted in the authority of Congress conferred by . . . the Constitution to create inferior federal courts, is undoubted and has been frequently noted and sustained."⁵⁰² Thus, an evidentiary rule may have as its purpose the protection of a constitutional right, but Congress has the authority to modify that rule, within certain limits, even where it is forbidden to define the substantive right.

Moreover, although the *Boerne* Court did not offer Congress the opportunity to engage in dialogue about the appropriate interpretation of the free exercise clause, the *Miranda* Court expressly invited Congress (and the states) to search for effective means to protect suspects' rights. Indeed, the *Miranda* Court stressed that if it were "shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," the *Miranda* warnings could be dispensed with altogether.⁵⁰³ Certainly, the Court would not have solicited legislative involvement of this sort if it were in fact construing a federal constitutional provision. If the *Miranda* warnings were constitutionally compelled, then the Court would not—and if *Boerne* is

501. U.S. CONST. amend. VI.

502. *Vance v. Terrazas*, 444 U.S. 252, 265-66 (1980) (citing cases).

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

correct—could not have invited Congress and the States to modify them.

To understand the Court's decision in *Boerne*, it is worth considering *United States v. Klein*.⁵⁰⁴ There, Congress had provided for the recovery of private property the United States had captured during the Civil War, if the claimant could prove that "he [had] never given any aid or comfort to the . . . rebellion."⁵⁰⁵ The Supreme Court subsequently affirmed judgments against the United States for such property, based in part on the president's decision to pardon certain individuals.⁵⁰⁶ Angered by what it deemed to be a misuse of the statute, Congress dictated that "any pardon . . . granted by the President . . . shall be taken and deemed . . . conclusive evidence that such person did take part in and give aid and comfort to the . . . rebellion."⁵⁰⁷ Disgruntled claimants challenged the statute as an impermissible congressional interpretation of the legal effect of a presidential pardon. Faced with a hostile Congress during a particularly difficult historical period, the Court nonetheless concluded that the statute breached separation of powers both with respect to the president's pardon power—by effectively nullifying it—and with respect to the judicial power, namely, by prescribing the legal effect of a pardon. Congress, in effect, removed from the federal courts' purview the construction of the pardon power and forced upon the courts a specific constitutional interpretation.

Section 3501, by contrast, is not an effort to establish a binding interpretation of the Fifth Amendment, or to direct the legal outcome of a case. If Congress had sought to dictate what constituted a voluntary confession for Fifth Amendment purposes, then it might be trenching upon judicial authority. Instead, Congress merely outlined the circumstances under which a "voluntary," as defined by the Court, confession could be admitted into evidence. Had the Court not been adamant about *Miranda*'s status as a prophylactic rule, designed to combat the effects of inherently coercive custodial interrogations, § 3501 might pose a problem. Unlike RFRA, which presupposed that the courts would reject the First Amendment claim or

504. 80 U.S. (13 Wall.) 128 (1871).

505. *Id.* at 131.

506. See *Klein*, 80 U.S. (13 Wall.) at 131-33 (citing as an example *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870)).

507. *Id.* at 135.

defense as “without merit” as long as *Smith* remained intact, § 3501 does no such thing.

D. The Court's Institutional Limitations

The *Miranda* warnings are predicated on the ground that custodial interrogations are inherently coercive and that any statements obtained during such an interrogation are necessarily “compelled” in violation of the Fifth Amendment. Before *Miranda*, the Court had struggled to fashion an effective test to determine whether a statement was voluntarily given.⁵⁰⁸ In light of the “difficulty in depicting what transpires at [police] interrogations,”⁵⁰⁹ the Court could not reliably ascertain whether a suspect’s statement had been the product of a free will.⁵¹⁰ Rather than engage in a likely fruitless factual inquiry, the Court instead concluded that bright-line rules would help “to insure that what was proclaimed in the Constitution had not become but a ‘form of words,’ in the hands of government officials.”⁵¹¹ The very existence of such a rule serves to underscore the Court’s limited institutional ability to assure, in the custodial context, the suspect’s right against compelled self-incrimination.

As a result, the warnings serve to protect the right, in part by removing from courts the need to engage in a searching factual inquiry, but are not themselves constitutionally guaranteed. While functionally significant, the warnings are nothing more than a non-constitutional anticipatory remedy. They are “anticipatory” or “pro-

508. *See, e.g.*, *Haynes v. Washington*, 373 U.S. 503, 515 (1963). The line between proper and permissible police conduct and techniques, and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused. *See id.* The critical inquiry was whether the physical or the psychological coercion was of such a degree that “the defendant’s will was overborne at the time he confessed.” *Lynum v. Illinois*, 372 U.S. 528, 534 (1963).

509. *Miranda v. Arizona*, 384 U.S. 436, 445 (1966). The Court explained that “[t]he difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado.” *Id.* The Court also noted that “[p]rivacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.” *Id.* at 448; *see id.* at 470 (arguing that presence of attorney will enhance trustworthiness of subsequent testimony regarding interrogation).

510. *See Miranda*, 384 U.S. at 468-69. The Court in *Miranda* described the difficulty in making “[a]ssessments of the knowledge the defendant possessed” as to the right to remain silent. *Id.* at 468. In addition, the Court noted the “evils” present in the interrogation atmosphere. *Id.* at 456.

511. *Id.* at 444 (quotation omitted).

phylactic” because they do not cure a present violation; rather, they serve to avert a potential violation. Of course, whether a suspect (or a class of future suspects) was coerced into confession is necessarily a factual question.⁵¹² It is one thing, however, for the Court to make a factual determination based upon a case presently before it, and quite another for the Court to predict the facts of a case that may come before it at some future date. Conclusive presumptions that anticipate future factual scenarios are “designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases.”⁵¹³ The *Miranda* Court explained that pursuant to the conclusive presumption it established, “we will not pause to enquire in individual cases whether the defendant was aware of his rights without a warning being given.”⁵¹⁴ Such presumptions “require the Court to make broad generalizations Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.”⁵¹⁵ The *Miranda* Court essentially made a “predictive” factual determination that in future cases courts would have a difficult time discovering whether a confession was voluntarily communicated. If the problem sought to be remedied (inherently coercive custodial interrogations) does not exist, however, or if the Court’s “generalization” is incorrect as a factual matter, may Congress dispense with, or at least modify, the prophylaxis? I think so.

Conclusive presumptions like the one *Miranda* sets forth are dictated by convenience, not the Constitution. Congress, while refusing to quibble with the Court’s construction of the Fifth Amendment, nevertheless rejected the factual assertion underpinning the Court’s decision to mandate warnings; namely, that custodial interrogations are inherently coercive.⁵¹⁶ Congress enjoys a significant institutional advantage over the Court in gathering facts. Unlike the Court, Congress is not bound by the parties’ submissions; rather, it can conduct hearings, canvass constituents, and obtain information from a broad

512. See *Haynes*, 373 U.S. at 515; *Lynum*, 372 U.S. at 534.

513. *Coleman v. Thompson*, 501 U.S. 722, 737 (1991).

514. *Miranda*, 384 U.S. at 468.

515. *Continental TV, Inc. v. GTE Sylvania Inc.* 433 U.S. 36, 50 n.16 (1977).

516. In fact, the *Dickerson* court recognized that Congress had “concluded that custodial interrogations were not inherently coercive.” *United States v. Dickerson*, 166 F.3d 667, 692 n.22 (1999).

range of sources. As Thomas C. Lynch, then Attorney General of California, emphasized during the hearings on § 3501:

Congress, with its vastly superior fact-gathering powers, is in a much better position than the Court to formulate standards most likely to result in a correct determination, in a given case, of the issue of voluntariness of a confession. * * * If findings of fact are made by Congress that demonstrate the relevance and importance of these factors, and their superiority over the rules laid down in *Miranda*, it would seem that the Court would have little choice but to defer to the expert judgment of Congress.⁵¹⁷

In assessing the evidence before it, Congress concluded that the Court's factual basis for creating an anticipatory remedy for all custodial interrogations was unsound. During the subcommittee hearings, for example, Philadelphia District Attorney Arlen Specter pointed out

that the so-called third-degree methods deplored by the Supreme Court and cited as a basis for their opinion in *Miranda* is not a correct portrayal of what actually goes on in police stations across the country. While there are isolated cases of police using coercive tactics, this is the exception rather than the rule.⁵¹⁸

Buttressed by data collected from a broad range of sources, and after considerable deliberation and debate, the Senate Judiciary Committee concluded that "the Court overreacted to defense claims that police brutality is widespread."⁵¹⁹ While Congress could neither change the outcome of *Miranda*, nor alter the Court's constitutional definition of voluntariness, it could, and did, reject the Court's broader prediction that all custodial questioning is inherently coercive and any statement resulting therefrom is involuntary. As a consequence of this determination, the Committee Report explained that "the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right."⁵²⁰ And how could it? The Court had not rejected the voluntariness test per se, rather, it had simply drafted bright line rules to make the voluntariness determination easier to assess.

517. See 1S. REP. NO. 90-1097, 47 (1968) (quoting Thomas C. Lynch, State of California Attorney General), reprinted in 1968 U.S.C.C.A.N. 2133.

518. S. REP. NO. 90-1097, 47 (1968), reprinted in 1968 U.S.C.C.A.N. 2134.

519. *Id.* at 48.

520. *Id.* at 51.

Critics may complain that Congress did not collect sufficient information or give thoughtful consideration to the information it acquired. But Congress, by comparison, had considerably more information at its disposal than the Court. By its own admission, the *Miranda* Court had little evidence that police brutality was widespread at the time it rendered its decision. To support its conclusion, it relied principally upon the famed Wickersham Committee Report,⁵²¹ then more than thirty years old, as well as a number of anecdotal reports of police brutality. The Court's perusal of various police interrogations manuals, none of which was demonstrated to have been used by any actual police force, hardly painted an irrefutable picture of interrogation procedures. As Justice White pointed out in dissent, "for all the Court's expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts."⁵²²

The Court even recognized its inherent institutional limitations when it invited Congress to "search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." What constitutes an "increasingly effective way" is at base an empirical question. The Court has observed that conclusive presumptions of this sort "should not be applied . . . in situations where the generalization is incorrect as an empirical matter."⁵²³ In truth, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time."⁵²⁴ Congress had the benefit both of taking testimony regarding the pre-*Miranda* world, and testimony concerning the impact of *Miranda* upon law enforcement efforts. Based upon this information, Congress concluded the basis for *Miranda*'s conclusive presumption—that unwarned custodial interrogations are inherently coercive—was incorrect as an empirical matter, and the presumption does not reach the correct result—suppressing only involuntary confessions—most of the time that it is applied. According to the Subcommittee's findings, the Judiciary Committee was able specifically to conclude that § 3501 "would be an effective way of protecting the rights of the individual and would

521. *National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement* (1931).

522. *Miranda v. Arizona*, 384 U.S. 436, 536 (1966) (White, J., dissenting).

523. *Coleman v. Thompson*, 501 U.S. 722, 737 (1991).

524. *Id.*

promote efficient enforcement of our criminal laws.”⁵²⁵ The Court has traditionally permitted such a determination considerable deference because Congress “is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.”⁵²⁶ In an insightful dissenting and concurring opinion, Justice O’Connor criticized *Miranda*’s “presumption of coercion” not as an “impenetrable barrier to the introduction of compelled testimony,”⁵²⁷ but rather as “leaking like a sieve.”⁵²⁸

Congress, then, far from overruling the Supreme Court’s interpretation of the Fifth Amendment, instead merely rejected the Court’s factual predicate and the anticipatory remedy tailored to mend that predicate. Of course, critics may grumble that factual determinations are a matter of degree. To some extent, every interpretative decision is grounded in a construction of the facts. If Congress could simply substitute its own factual determination for that of the Court, it might be able to override any of the Court’s ultimate legal conclusions. Such a fear, however, does not imply that Congress can *never* substitute its fact-related conclusions for those of the Court. And the case favoring such congressional action may be particularly strong where the Court has expressly invited the legislature to continue searching for measures to safeguard fundamental rights. As part of that search, Congress must necessarily gather information and from that information, draw legal conclusions.

As the Judiciary Committee had previously observed, Congress’s substitution of its own factual determination for that of the Court is not without precedent. In a thinly veiled effort to prevent certain non-English speaking minorities from voting, North Carolina enacted a statute that established English literacy as a voting prerequisite. The statute’s opponents challenged that literacy requirement as a denial of equal protection under the Fourteenth Amendment. In *Lassiter v. North Hampton Election Board*,⁵²⁹ however, the Court upheld the statute’s facial constitutionality. Congress, however, differed with the Court’s conclusion. Finding, as a factual matter, that such

525. S. REP. NO. 90-1097, at 51 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2137.

526. *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotations omitted).

527. *Withrow v. Williams*, 507 U.S. 680, 712 (1993) (O’Connor, J., concurring in part and dissenting in part).

528. *Id.*

529. 360 U.S. 45 (1959).

requirements did infringe upon equal protection interests, Congress passed § 4(e) of the Voting Rights Act, which provided that literacy requirements could not be enforced against anyone educated beyond the sixth grade in state accredited schools. Shortly thereafter, § 4(e) was attacked as an improper encroachment upon the judicial power. Congress, it was argued, could not enact such a law unless it was first determined that the Fourteenth Amendment guaranteed the right to be secured (or wrong to be abolished). Otherwise, there would be no right for Congress to enforce. Because the *Lassiter* Court had found no equal protection violation with respect to English literacy requirements, § 4(e) was alleged to be an unconstitutional encroachment upon the Court's power to "say what the law is."

In *Katzenbach v. Morgan*,⁵³⁰ however, the Court ruled that the Fourteenth Amendment's implementation clause endowed Congress with broad discretion limited solely by the need for a causal nexus between the right sought to be enforced and the factual evidence before Congress. The issue in *Katzenbach* was whether § 4(e) could, consistent with the Constitution, prevent enforcement of a statute that the judiciary had not declared unconstitutional. Opponents claimed that Congress could not enact such a law unless it first determined that the right to be secured (or wrong to be remedied) was somehow guaranteed by the underlying substantive provisions of the Fourteenth Amendment. Because the Supreme Court had found no such right (or wrong) to exist with respect to English literacy requirements in *Lassiter*, § 4(e) was alleged to be an unconstitutional encroachment upon the Court's power to "say what the law is." The Court nevertheless concluded that Congress had sufficient factual evidence before it to support a reasonable conclusion that § 4(e) was necessary to prevent a denial of equal protection. Congress's factual determination, while different from that of the Court, was not construed as trenching upon the judicial power—even though it had specific legal consequences.

If Congress can substitute its own factual determination for that of the Court in concluding that a right is not being properly enforced, then presumably, the reverse is also true. In other words, if the Court, as a factual matter, predicts evil in certain circumstances, but Congress decides no possible evil exists, then Congress can substitute its own legislative determination, and corresponding prophy-

530. 384 U.S. 641 (1966).

laxis, for that of the Court. Congress could not legislatively dictate the admission of an involuntary confession because that would alter a judicial interpretation, but it may be able statutorily to fashion procedural rules whereby an otherwise voluntary confession would be admitted. Congress may, under this theory, alter the means for protecting *any* right the Supreme Court has identified, provided Congress's alternative mechanism adequately vindicates that right. If it has sufficient evidence, Congress may choose to secure the underlying constitutional right in ways different from that of the Court.

Contrary to what many in legal academia seem to believe, judges do not possess an exclusive monopoly on constitutional interpretation. Legislators and Executive Branch officials must also interpret the Constitution while performing their functions. While past judicial interpretations may guide them, they are nevertheless free, within certain limitations, to enforce their own constitutional determinations.⁵³¹ For those troubled by such congressional power, it is worth noting that the Court is always free to reexamine congressional efforts.

In essence, this differs little from what the Court has encouraged Congress to do with respect to legislative findings pursuant to the Commerce Clause. In *United States v. Lopez*,⁵³² for example, the Court invalidated the so-called Gun-Free School Zones Act on the ground that Congress lacked authority under the Commerce Clause to reach activity that had a tenuous connection to interstate commerce.⁵³³ In reaching that decision, the Court insinuated that "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."⁵³⁴ Properly drawn congressional findings can thus help support statutes the

531. See Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 747 (1985) ("Members of Congress have both the authority and the capability to participate constructively in constitutional interpretation."); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221-27 (1994) (discussing shared power among legislative, judicial, and executive branches to "say what the law is"); Neal E. Devins, *The Supreme Court and Constitutional Democracy*, 54 GEO. WASH. L. REV. 661, 662 (1986) (book review) ("Congress and the executive are undoubtedly authorized to interpret the Constitution.").

532. 514 U.S. 549 (1995).

533. See *id.* at 561.

534. *Id.* at 563.

courts would otherwise invalidate on constitutional grounds.⁵³⁵ Pursuant to *Lopez*, Congress's failure to include legislative findings may diminish, though not completely eliminate, the deference accorded to its legislative product. In both the Commerce Clause and the Fifth Amendment settings, the Court seems to have acknowledged Congress's authority to legislate within certain loosely prescribed parameters that may be adjusted on the basis of congressional findings. While Congress did not attach express findings to § 3501, it held hearings on the statute, filed a comprehensive report, and engaged—both in the House and Senate—in considerable floor debate. To the extent particular legislative findings are necessary, they are laid out in the Senate Judiciary Committee's Report and in the floor debate.

Even so, meaningful differences may distinguish the legislative findings context in *Lopez* from that in *Miranda*. The issue in *Lopez* required the Court to demarcate the limits of congressional power under the Commerce Clause to infringe state interests. The existence of specific legislative findings provides some guarantee that Congress has properly considered whether it has constitutional authority to legislate in the area.⁵³⁶ The legislative findings serve to enable the Court to determine whether the legislation stayed within Congress's Commerce Clause boundaries.

In contrast, the real issue in *Dickerson* is how best to protect the right against compelled self-incrimination, given the need for effective law enforcement. In reviewing § 3501, the Court need not focus exclusively on whether the statute, viewed in isolation, satisfactorily protects the Fifth Amendment right, but whether in light of all the changes in federal law (and federal law enforcement) the right is be-

535. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (requiring Congress to justify affirmative action legislation with specific findings because "classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified") (citation omitted); *Perez v. United States*, 402 U.S. 146, 154-57 (1971) (upholding congressional power to regulate loan sharking).

536. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-54 (1985) (noting that structure of federal system provided inherent protections to state interests); see also PHILIP BOBBITT, *CONSTITUTIONAL FATE* 191-95 (1982) (developing view that Congress protects state sovereignty); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 804-960 (1982) (describing states' role in federal system); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546-47 (1954) (describing role of states in selection and composition of Congress).

ing adequately protected. If Congress has provided a satisfactory alternative to *Miranda*, not just in § 3501, but in the training of federal law enforcement officers, the creation of *Bivens*⁵³⁷ suits, etc., then the factual predicate for mandating warnings may no longer exist and the Court can simply dispense with the warnings. At a minimum, *Dickerson* affords the Court with the opportunity to revisit the problem of protecting Fifth Amendment rights—a problem seemingly in need of review.

E. Is § 3501 Adequate to Protect the Right Against Compelled Self-Incrimination?

Aside from the myriad decisions suggesting that the *Miranda* warnings are but a prophylactic device to secure Fifth Amendment guarantees, the Court has also stated on occasion that the issues presented in *Miranda* are of “constitutional dimensions.”⁵³⁸ *Miranda*’s chief apologists often cite *Withrow v. Williams*,⁵³⁹ for example, to support the view that the warnings are constitutionally compelled, hence unalterable. In *Withrow*, the Court held that a state prisoner who alleges a *Miranda* violation states a constitutional claim that is cognizable on federal *habeas* review. Unlike the Fourth Amendment’s exclusionary rule, which serves to protect constitutional privacy interests,⁵⁴⁰ the Court has squarely held that a police officer’s failure to comply with *Miranda* constitutes a violation of “federal law” or the “Constitution” for purposes of the *habeas* statute. The Court explained that “[p]rophylactic though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a fundamental *trial* right.”⁵⁴¹

What does the Court mean with its apparently conflicting statements with respect to the *Miranda* warnings’ constitutional status? Essentially, prophylactic or not, the *Miranda* warnings are based upon the Court’s decision to create an anticipatory remedy to facilitate compliance with the Fifth Amendment. As such, the warnings serve to safeguard the right to be free from coerced confessions.

537. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

538. *Miranda v. Arizona*, 384 U.S. 436, 490 (1966).

539. 507 U.S. 680 (1993).

540. *See Stone v. Powell*, 428 U.S. 465, 479 (1976) (distinguishing Fourth Amendment exclusionary rule as one designed to deter illegal searches and seizures).

541. *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (internal quotations omitted).

Something, then, is needed to safeguard the right. The question is what that something is—and whether Congress is empowered to create it. In *Dickerson*, of course, the issue is whether § 3501 acceptably reflects Congress's efforts to provide alternative safeguards to ensure that statements to law enforcement officers are voluntary. That question does not properly capture what the Court's inquiry must be. Properly framed, the question is whether current safeguards exist, including, but not limited to § 3501, to protect Fifth Amendment rights.

Although academics have fretted about the inadequacy of the voluntariness test, none have demonstrated that it is an appreciably *less* effective means of protecting a suspect's rights and balancing those rights against society's interest in effective law enforcement. The Court assumed, without the benefit of careful inquiry, that unwarned custodial interrogations necessarily produced coerced statements. But the Court had no idea—other than a bit of speculation leavened by some common sense—that *Miranda* warnings would have their intended effect. However one may feel about the policy of *Miranda*, the Court was not necessarily in the best position to determine the extent of police misconduct, to balance the interests of law enforcement and personal liberty, and to fashion a policy governing police interrogation. Of course, it really didn't attempt to do the latter. Instead, it merely borrowed warnings previously devised by the Executive Branch. Perhaps the determination of whether § 3501 will “work” as an alternative to mandated warnings simply can not be made until the statute is enforced.⁵⁴²

I would venture to say that there is less police brutality now than in 1966, or certainly than in 1931, the year the Wickersham Report was published. Although the data are admittedly inconclusive, there is some evidence to suggest that law enforcement officials abuse suspects' rights far less than during the era preceding *Miranda*.⁵⁴³

542. The Justice Department's Office of Legal Policy explained it this way:

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 left to the change in the future as long as *Miranda* remains in effect and perpetuates a perceived risk of invalidation for any alternative system that departs from it.

OFFICE OF LEGAL POLICY, *supra* note 2933, at 99.

543. See Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police In-*

Doubtless, law enforcement agencies provide more, and better, training and almost certainly place greater stress on internal disciplinary procedures. The so-called educative effect of *Miranda* may even have run its course. Indeed, it might be argued today that *Miranda* warnings have become a shield for law enforcement. In other words, once the suspect has signed the waiver of rights card, the magistrate will look no further. The type of judicial scrutiny available in a “totality of the circumstances” test expands the cursory examination of the rights card to ensure that the signature is indeed the suspect’s.

The legal landscape has also changed considerably since *Miranda* exploded onto the scene. First, it must be remembered that involuntary confessions, as opposed to “mere” *Miranda* violations, will always be excluded at trial.⁵⁴⁴ No revival of § 3501 will change that.

Additionally, expanded criminal and civil penalties provide both a deterrent to police misconduct and relief to citizens whose rights have been violated. A federal civil rights statute that existed before *Miranda* criminalized the actions of anyone who “under color of any Law . . . willfully subjects any person in any state, territory, or District to the deprivation of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”⁵⁴⁵ Similarly, 18 U.S.C. §§ 241 and 242 prohibit conspiracies that violate constitutional rights. The Supreme Court has itself only recently noted that, “[b]eating to obtain a confession plainly violates section 242.”⁵⁴⁶

Congress has also broadened criminal and civil liability for civil rights’ violations. In *Bivens v. Six Unknown Named Agents*,⁵⁴⁷ the

terrogation in America, in 18 CRIME, LAW, AND SOCIAL CHANGE 35 (1992), reprinted in THE MIRANDA DEBATE 65, 65-66 (1998) (Richard A. Leo & George C. Thomas III eds., 1998); NEAL A. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA 208-20 (1971) (describing impact of Miranda on interrogation behavior); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 18-20, 58-59 (1993) (asserting that law enforcement officials currently use less force in questioning defendants, due in part to better training, than in decades past); Paul G. Cassell and Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 871-76 (1996); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENV. U. L. REV. 1, 10 (1970) (asserting that Denver police had much improved rate of proper Miranda warnings because of better training).

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

545. 18 U.S.C. § 242 (1994).

546. *United States v. Lanier*, 520 U.S. 259, 271 (1997).

547. 403 U.S. 388 (1971).

Court held that individuals could sue government officials directly for constitutional injuries.⁵⁴⁸ Since *Bivens*, individuals can recover, contingent upon official immunity doctrine, for injuries arising out of coercive interrogations. And, the Court has clarified that violations of the right against compelled self-incrimination may constitute the basis for a *Bivens* claim.⁵⁴⁹

In addition, Congress waived the federal immunity from such claims in a 1974 amendment to the Federal Tort Claims Act.⁵⁵⁰ In response to publicity surrounding several notorious raids by federal law enforcement personnel, Congress authorized suit under the FTCA for *Bivens* claims as well as for some intentional torts that are based upon acts or omissions of law enforcement officers.⁵⁵¹ Specifically, under the Federal Tort Claims Act, Congress has made it possible for citizens to sue for claims arising “out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.”⁵⁵² As a result, victims can now sue both the government and individual law enforcement officers for abusive interrogation tactics.

In *Dickerson*, the Court’s responsibility will not only be to determine whether § 3501 is adequate, but whether the legal landscape has so changed in the thirty-plus years since *Miranda* was handed down that sufficient alternative safeguards to *Miranda* warnings exist to ensure the voluntariness of statements and to protect the right against self-incrimination. So the question of whether § 3501, standing alone, is equally protective of suspects’ rights is beside the point. The real question for the Court to consider is whether, today, sufficient means are in place to protect suspects, as well as to promote efficient law enforcement. As Professor Cassell has explained, “Taken together, the combination of criminal, civil, and administrative

548. *See id.* at 397.

549. Moreover, victims of police overreaching can now sue municipalities directly under § 1983 for any unconstitutional policy. *See Monnell v. Department of Soc. Servs.*, 436 U.S. 658 (1989). This option did not exist at the time of the *Miranda* decision. *See generally* *Monroe v. Pope*, 365 U.S. 168 (1961).

550. 28 U.S.C. § 2671 (1994).

551. *Id.* at § 2680(h). *Cf.* *Gasho v. United States*, 39 F.3d 1420, 1435-36 (9th Cir. 1994) (recognizing possible FTCA claim for intentional infliction of emotional distress arising out of arrest by law enforcement officials). Criminal penalties are currently theoretically available against law enforcement officials as well. *See United States v. Lanier*, 520 U.S. 259, 268-71 (construing 18 U.S.C. § 242 to apply to constitutional injuries inflicted by officers acting under color of state law).

552. 28 U.S.C. § 2680(h) (1994).

remedies now available for coerced confessions—along with the Fifth Amendment’s exclusion of involuntary statements—renders *Miranda*’s prophylactic remedy overprotective and therefore subject to modification in § 3501.”⁵⁵³

IX. CONCLUSION

Although the *politics* surrounding this issue are complex, the issue itself is not terribly complicated. The Fourth Circuit has observed that if the Constitution mandates the *Miranda* warnings, then: 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 supercede *Miranda* legislatively, and § 3501 controls the admissibility of confessions in federal court.⁵⁵⁴

The apparent simplicity of the legal issue, however, belies the complexity of the political debate and touches upon the appropriate role of the Supreme Court in interpreting the Constitution, and of Congress in prescribing constitutional norms. Crucial to this determination is the degree to which Congress may rely upon its institutional advantages to promulgate rules that serve to safeguard constitutional guarantees. These are questions that extend well beyond *Dickerson* and will continue to be debated as the Court further inserts itself into the national political discourse, and Congress further hands difficult questions to the judiciary. I have tried to articulate a role for Congress in this ongoing constitutional dialogue. Far from being a bit player, Congress has an active role to play in securing rights. It is a role Congress must not abdicate. To the extent it does, our personal liberties will be compromised.

Constitutional questions aside, however, the passage of time is not an insignification factor to consider. While past administrations have signaled their support for the statute, none has consistently sought to enforce it. As a consequence, *Miranda* has flourished while § 3501 has withered. Rightly or wrongly, *Miranda* has evolved into a symbol of the Warren Court, and its supposedly noble efforts to rewrite the Constitution to champion broadly defined individual liberties. Indeed, few decisions have entered the popular consciousness quite so thoroughly. A number of participants in this on-going

553. Cassell, *supra* note 72, at 247.

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

debate privately concede that the *Miranda* warnings have little continuing value as a code of police procedure, but have argued instead that they symbolize a particular era, and with that era a method of constitutional interpretation. While a laches defense of some sort may be appropriate to consider, *Miranda*'s "symbolic" effect should not trump an otherwise constitutional act of Congress. Surely, had *Miranda* gone unenforced, legal scholars of the time would have howled. In this article, I have sought to revisit the congressional debates surrounding § 3501's enactment and to illuminate some of the constitutional issues implicated by Congressional efforts to rewrite the rules protecting the privilege against compelled self-incrimination. Section 3501 has languished far too long in legislative purgatory.⁵⁵⁵

555. Of course, this determination in and of itself may unleash a new storm of protest—and not only in the academic community. The Justice Department has not merely declined to raise § 3501; it has actually joined the defendant in arguing that the statute is *unconstitutional*. This sets up an interesting constitutional conflict. Even if the Court finds that § 3501 has replaced the *Miranda* warnings, the Executive Branch arguably retains authority to abide by *Miranda* in spirit—or perhaps even in the flesh—should it seek to resurrect the legal theories of Andrew Jackson or Abraham Lincoln.