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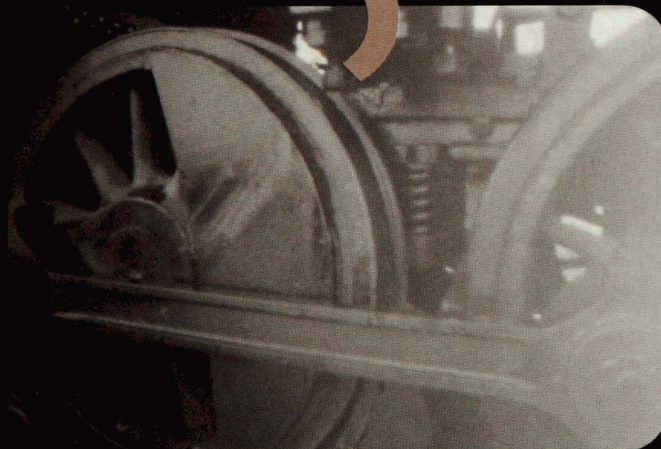
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Congress' Arrogance



— BY YALE KAMISAR

Does Dickerson v. U.S., reaffirming Miranda and striking down § 3501 (the federal statute purporting to “overrule” Miranda), demonstrate judicial arrogance? Or does the legislative history of § 3501 demonstrate the arrogance of Congress?

Shortly after Dickerson v. U.S. reaffirmed Miranda and invalidated § 3501, a number of Supreme Court watchers criticized the Court for its “judicial arrogance” in peremptorily rejecting Congress’ test for the admissibility of confessions. The test, pointed out the critics, had been adopted by Congress after extensive hearings and debate about Miranda’s adverse impact on law enforcement.

The Dickerson Court did not discuss the legislative history of § 3501 at all. However, in an article published six weeks before the decision in Dickerson, “Can (Did) Congress ‘Overrule’ Miranda?” 85 Cornell Law Review 8833 (2000), Professor Yale Kamisar discussed the legislative history of § 3501 at length. He concluded, in effect, that Congress — not the Supreme Court — should be awarded the prize for arrogance. According to Kamisar, proponents of § 3501 were determined to “overrule” Miranda by simple legislation; they hoped to bypass the prescribed process for amending the Constitution and to persuade the Court to retreat from Miranda. Extracts from the article appear here with permission of Cornell Law Review. (Experts representing the many sides of the issue will gather at the Law School in November to ponder “Confession Law After Dickerson.” See story on page 34.)

As Professor Otis Stephens noted in “The Supreme Court and Confessions of Guilt” (1973), his book-length study of the Supreme Court and confessions: “In the aftermath of *Miranda v. Arizona*, an array of Supreme Court critics, in and out of Congress, insisted on linking the new interrogation requirements with what they described as an unparalleled national crisis in crime control and law enforcement.” In newspaper editorials, as well as in legislative halls, *Miranda* was charged with wreaking havoc and the Warren Court accused of “coddling criminals,” handcuffing police, and otherwise undermining “law and order” at the very time when police faced their most perilous and overwhelming challenge.”

Section 3501 and other provisions of Title II of the Omnibus Crime Control and Safe Streets Act of 1968 were written and debated against this general background. As Fred Graham, then the Supreme Court correspondent for the *New York Times*, observed, “[w]hen Title II burst from the relative obscurity of the Senate Judiciary Committee onto the Senate floor in April of 1968 it was immediately seen as a bald congressional attempt to rap the Supreme Court’s knuckles over crime. Its provisions read like a catalogue of familiar grievances against the Warren Court:

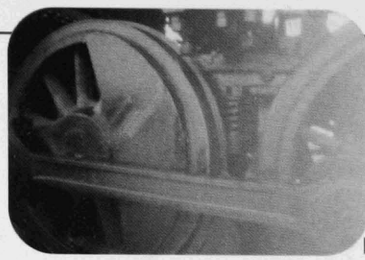
“First, it purported to reverse *Miranda* . . . [in] federal trials. . . . Second, it included the similar effort to overrule *United States v. Wade*, a 1967 case that established the right to counsel at pretrial lineups. . . . These two sections applied only to federal courts, but it was assumed that state legislatures would pass similar laws if these were to get by the

Supreme Court. Third, it overturned *Mallory*. . . . Fourth, it abolished the jurisdiction of the federal courts to review state convictions in *habeas corpus* proceedings. Fifth, it stripped away the jurisdiction of the Supreme Court and all other [federal] courts to overturn a state court’s finding that a confession was voluntary or a . . . trial court’s holding that an eye-witness identification was admissible.

“Nothing quite so irregular had ever been aimed at the Supreme Court by Congress before. It was essentially an attempt to use a statute to reverse a string of Supreme Court decisions, most of which had been interpretations of the Constitution. . . . The supporters of Title II made little effort to disguise their intent to blackjack the Court into changing its course. In private, Senator McClellan called it ‘my petition for a rehearing’ on *Miranda* [As the Senate Judiciary Committee] explained, ‘the *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that the legislation would be upheld.’

“Those were the sentiments of a committee that was dominated by Southern senators who had been nursing hurt feelings over the school desegregation decision of 1954 and who wanted to take it out on the Supreme Court over crime.”

Graham characterized Title II as “a piece of dubious statesmanship designed more to chastise the Supreme Court than to improve the law.” Another close observer of the debate over Title II, Professor Robert Burt, put it more strongly: “Title II was, to an important degree, a gesture of defiance at a Court that protected criminals and Communists, and attacked traditional religious, political, and social institutions.”



During the debates on Title II, Senator John McClellan told his colleagues that “the tone is set at the top” and that “the Supreme Court has set a low tone in law enforcement.” As already noted, Senator McClellan chaired the Senate subcommittee hearings on Title II and drafted some of the Crime Bill provisions. He also managed the Judiciary Committee’s bill. Moreover, McClellan dominated both the subcommittee hearings and the debates on the Senate floor. One might say that as far as the congressional battle over Title II was concerned, Senator McClellan “set the tone at the top,” and he set it very low indeed. The depth of his anger at the Court and the intensity of his emotion-charged language is evident in many of his statements, as the following examples demonstrate:

- [The] tone is set at the top. The Supreme Court has set a low tone in law enforcement, and we are reaping the whirlwind today. Look at [the crime graph] chart. Look at it and weep for your country. Crime spiraling upward and upward and upward. Apparently nobody is willing to put on the brakes. I say to my colleagues today that the Senate has the opportunity — and the hour of decision is fast approaching. . . .
- [If] this confessions provision is defeated, the law-breaker will be the beneficiary, and he will be further encouraged and reassured that he can continue a life of crime and depredations profitably with impunity and without punishment. . . . [If Title II is defeated] every gangster and overlord of the underworld; . . . every murderer, rapist, robber . . . will have cause to rejoice and celebrate.

Whereas, if it is defeated, the safety of decent people will be placed in greater jeopardy and every innocent, law-abiding . . . citizen in this land will have cause to weep and despair.

- Today, why should a policeman go out and risk his life to catch a known murderer or criminal who is armed with a gun, when the Supreme Court will find some small technicality . . . to find a way to turn that murderer or criminal loose and then, [in its decisions], attack the officer who risked his life and reflect

upon his integrity, by inferring that we cannot trust a policeman to do right. . . . That is their attitude.

- Under the Court’s logic in the *Miranda* case, the day may come when a parent cannot ask his child about any harm the child has committed upon his mother without the parent giving him a warning that anything the child says may be used against him. Should fathers and mothers be required [to give the *Miranda* warnings] before they ask a child about an act that may be criminal. . . . [?]
- [T]he spiraling rate of crime that now plagues our nation and endangers our internal security will continue unabated — even worsen — so long as this rigid and arbitrary prohibition against the admission into evidence of voluntary confessions by criminals is imposed on the processes of justice. As chosen representatives of our people we have a duty to do something about it.”
- It was not the Constitution that changed. It was five members of the Court [in *Miranda*] who undertook to change the Constitution. . . .

This is nothing less than an usurpation by the Court of the power to amend the Constitution. That power is not reposed in the Court by the Constitution.

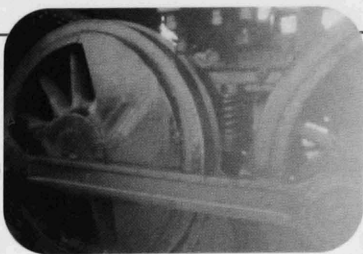
It is that usurpation of power and its exercise that we are truly trying to correct.

I wholeheartedly agree that [changes in the Constitution should be made by constitutional amendment]. We are here protesting and trying to rectify 5-4 Court decisions which have had the effect of amending the Constitution — a power the Supreme Court does not have under the Constitution.

Throughout the subcommittee hearings and the debates on the Senate floor, Senator Sam Ervin proved to be McClellan’s chief lieutenant. He, too, had drafted some of the provisions contained in the Judiciary Committee’s Crime Bill. As we have seen, at first Ervin had balked at attempting to overturn *Miranda* by legislation. But then Ervin threw himself into the battle with considerable gusto:

- 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 murderers, rapists, robbers, arsonists, burglars, and thieves ought to go unpunished, you ought to vote against Title II. . . . But if you believe as the senator from North Carolina believes, that enough has been done 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.
- When the Supreme Court takes the words of the Constitution and attributes to them a meaning which allows self-confessed murderers and rapists and arsonists . . . to go free of justice, then I think it is time for us to do something because we are the only power on earth which can do anything to protect American people against decisions like this, decisions which constitute a usurpation of power denied to the majority of the Supreme Court by the very instrument they profess to interpret.
- All I can say is that the majority of the Supreme Court, in the *Miranda* case, . . . evidently wedded themselves to the strange theory that no man should be allowed to confess his guilt, even though the Bible says, even though psychiatrists assert, and even though those interested in the rehabilitation of prisoners declare that an honest ‘confession is good for the soul.’ Hence, they invented rules in the *Miranda* case to keep people from confessing their crimes and sins. The wisest of men could not have devised more efficacious rules to accomplish this object had he pondered the question a thousand years.

As the Senate debate on the Crime Bill intensified, Republican Presidential Candidate Richard M. Nixon issued his position paper on crime, “Toward Freedom from Fear.” This paper demonstrated that when it came to using the Court as a scapegoat for the crime and violence that beset the nation, Mr. Nixon yielded neither to Senate McClellan nor Senator Ervin nor



any other Democratic politician. Nixon urged Congress to pass the bill overturning *Escobedo* and *Miranda* and restoring the voluntariness test as a way to “redress the imbalance” caused by these decisions — a way to offset the blow suffered by “the peace forces in our society.”

Said Nixon in “Toward Freedom from Fear”: “In the last seven years while the population of this country was rising some 10 percent, crime in the United States rose a staggering 88 percent. . . .

“[A] contributing cause of this staggering increase is that street crime is a more lucrative and less risky occupation than it has ever been in the past. Only one of eight major crimes committed now results in arrest, prosecution, conviction, and punishment — and a 12 percent chance of punishment is not adequate to deter a man bent on a career in crime. Among the contributing factors to the small figure are the decisions of a majority of one of the U.S. Supreme Court.

[The “only one-in-eight crimes results in conviction” statistic is especially jolting — but highly misleading, as I noted in “How to Use, Abuse — and Fight Back With — Crime Statistics,” 25 *Oklahoma Law Review* 251-52 (1972). Even if the conviction rate (the percentage of those held for prosecution who are found guilty) were 100 percent, only one reported crime in six would result in a conviction, because only one reported crime in six leads to a criminal prosecution. The great bulk of reported crimes never lead to an arrest.]

“The *Miranda* and *Escobedo* decisions of the high court have had the effect of seriously ham stringing [sic] the peace forces in our society and strengthening the criminal forces.

“From the point of view of the peace forces, the cumulative effect [of] these decisions has been to very nearly rule out the ‘confession’ as an effective and major tool in prosecution and law enforcement. . . .

“From the point of view of the criminal forces, the cumulative impact of these decisions has been to set free patently guilty individuals on the basis of legal technicalities.

“The tragic lesson of guilty men walking free from hundreds of courtrooms across the country has not been lost on the criminal community. . . .

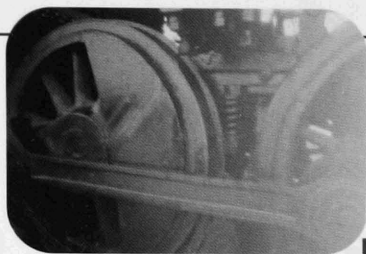
“The balance must be shifted back toward the peace forces in our society and a requisite step is to redress the imbalance created by these specific decisions. I would thus urge Congress to enact proposed legislation that — dealing with both *Miranda* and *Escobedo* — would leave it to the judge and the jury to determine both the voluntariness and the validity of any confession. . . .

“[I] think [the Warren Court’s criminal procedure decisions] point up a genuine need — a need for future presidents to include in their appointments to the United States Supreme Court men who are thoroughly experienced and versed in the criminal laws of the land.”

Senator Karl Mundt, who asked and obtained unanimous consent to print Nixon’s position paper in the *Congressional Record*, noted that “[m]uch of what the former Vice President discusses in his position paper is before us in the form of” the Crime Bill. So Senator McClellan would have had his colleagues believe. One close observer of the Senate debate opined that “McClellan’s most eminent supporter turned out to be Richard Nixon.”

During the debate on the Senate floor, Senators Ervin and McClellan repeatedly referred to the transcript of the McClellan subcommittee hearings for overwhelming evidence of the heavy blow the Warren Court’s confession rulings had dealt law enforcement and the strong need to right the situation by overturning the rulings. Unfortunately, when it came to open-mindedness and fair play, Senator McClellan’s subcommittee hearings left a great deal to be desired. As one close student of Title II pointed out, “the familiar claims of a direct connection between the enlargement of procedural requirements and a rising crime rate were repeated by a parade of district attorneys, police chiefs, and other representatives of what might be

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called the 'law enforcement lobby.'" Senator McClellan himself noted (with evident pride) that the record of his subcommittee hearings "contains letters from 122 chiefs of police in 37 states."

When Senator Joseph Tydings, who led the opposition to Title II in the Senate, charged that not a single constitutional law professor or criminal law professor had been given an opportunity to testify before Senator McClellan's subcommittee on the wisdom or constitutionality of this proposal, McClellan did not deny it. He responded simply that every member of the Senate had been invited to testify and that a person from Tydings' own state has also testified (the president of the Maryland District Attorneys Association).

The conspicuous absence of any law professors at the subcommittee hearings (or any defense lawyers or public defenders for that matter) could hardly be attributed to a lack of interest by those in academia. When asked by Senator Tydings to state their views on the desirability of § 3501 and other anti-Court provisions and on the power of Congress to enact them, 212 law professors (including 24 law school deans) from 43 law schools had responded. Most attacked the constitutionality of the anti-*Miranda* provision; not a single one defended it.

Almost all of the law enforcement officials who appeared before the Senate subcommittee talked about both the need for and the constitutionality of Title II, thus telling McClellan, Ervin, and their allies what they wanted, and expected, to hear. But the testimony of the most eminent witness to appear before the subcommittee, J. Edward Lumbard, chief judge of the U.S. Court of Appeals for the Second Circuit and chairman of the ABA special Committee on Minimum Standards for Criminal Justice, probably surprised and disappointed proponents of Title II.

A year earlier, Judge Lumbard had voiced his unhappiness with the approach the Supreme Court had taken in *Escobedo*. And during his appearance before the subcommittee he made it clear he was not enamored of *Miranda*. At one point he agreed that the self-incrimination clause would seem to have no bearing whatever on the admissibility of a confession that

satisfied the traditional pre-*Miranda* voluntariness test (calling this his "own personal view"). At another point, he agreed that there is "no better evidence" of a person's guilt than his own voluntary confession. Nevertheless, Judge Lumbard balked at overturning *Miranda* by legislation.

He told the subcommittee that if Congress were unhappy with *Miranda* because it unduly hampered police efforts to apprehend criminals "the only way to correct the situation would be by amendment to the Constitution . . . we must apply the Constitution and the law as the Supreme Court has interpreted them." When asked specifically whether the much-quoted language in *Miranda* "encourag[ing] Congress and the States to consider their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our law" "opens the door for legislation [such as Title II] which would permit our avoiding the constitutional amendment process," Judge Lumbard answered, "No; I don't think it permits you to do that." He added that Congress could not enact legislation that failed to do everything the Court said had to be done "[u]nless you can find some suitable substitute for the requirements laid down by the Supreme Court."

At this point, Senator McClellan made it plain that he was only interested in abolishing *Miranda*, not in finding a "suitable substitute" for it. He also left little doubt that he was well aware that abolishing *Miranda* by legislation would be a risky venture. Consider the following exchange:

Senator McClellan: ". . . If they [a majority of the justices] base the *Miranda* decision strictly on constitutional issues, I don't understand 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 can 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 their 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 that this be done?"

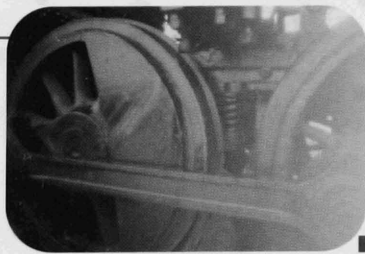
In the Senate Committee on the Judiciary's report recommending that Title II be enacted into law, the committee maintained that "[t]he Supreme Court itself suggests" that Congress is free to overturn *Miranda* by statute and that Congress should accept this invitation because it "is better able to cope with the problem of confessions than is the Court." With one exception, the committee relied only on law enforcement officials and several U.S. senators who had testified before the subcommittee. The one exception was Judge Lumbard, even though, as we have seen, he appeared to have said just the opposite of what the committee wished to hear. How did this remarkable turn of events come about?

The Judiciary Committee report took Judge Lumbard's testimony out of context. The report quotes the judge as follows:

"In my opinion, it is most important the Congress should take some action in the important areas I have discussed. The legislative process permits a wide variety of views to be screened and testimony can be taken from those who know the facts and those who bear the responsibility for law enforcement.

"The legislative process is far better calculated to set standards and rules by statute than is the process of announcing principles through court decisions in particular cases where the facts are limited. 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."

This testimony sounds as if Judge Lumbard was cheering on the Congress in its efforts to abolish *Miranda* by legislation, but only because the Judiciary Committee omitted both what the judge had told the subcommittee earlier and what he was to tell it later. Judge Lumbard had pointed out earlier that the *Miranda* Court had not dealt with certain situations, such as what rules,



if any, should apply when the police are questioning someone not in custody, e.g., interviewing a person in his own home with other family members present. He told Congress it should "feel free to state a policy and lay down appropriate rules regarding the admission of evidence" in these situations. These were "the important areas" Judge Lumbard was talking about in the portion of his testimony quoted by the Judiciary Committee (areas for which the *Miranda* opinion had not provided definite answers) when he testified he thought it "most important that the Congress should take some action in the important areas I have discussed."

If there were any doubts about what Judge Lumbard meant in the testimony quoted by the Committee Report, he resolved them later when responding to a question from Senator Hugh Scott:

"No; I don't think [the language encouraging the Congress to establish other procedures which are equally effective in apprising suspects of their rights] permits you to do that [overturn *Miranda* without invoking the constitutional amendment process], but there certainly is a wide area which obviously the Court had not covered in its opinion in the *Miranda* cases, not only the matter of questioning before a person is in custody, but then 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.

"I think that this whole area is open to the Congress and . . . it would be most helpful and most important that Congress should attempt to deal with these areas, and lay down the rules and the standards so far as federal cases are concerned."

The Judiciary Committee report was also less than honest in its treatment of the testimony of another federal judge who appeared at the subcommittee hearings:

Judge Alexander Holtzoff, a federal district judge for the District of Columbia. The committee assured the full Senate that Judge Holtzoff "sees no constitutional bar to congressional abrogation of the *Mallory* rule," quoting from his testimony. But when it discussed Congress' freedom to enact legislation overturning *Escobedo* and *Miranda*, the committee omitted any reference to Judge Holtzoff's testimony, no doubt because this time he told the subcommittee that there was a constitutional bar to congressional action:

"Of course, the *Escobedo* and the *Miranda* cases are in a different class [than *Mallory*] 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."

Those asked to testify at the Senate subcommittee hearings on the Crime Bill were those whose testimony was expected to advance the cause of the subcommittee's chairman, Senator John McClellan. As the Senate Judiciary Committee Report's treatment of testimony of Judges Holtzoff and Lumbard well illustrates, on those rare occasions when a witness said something that disappointed Senator McClellan, that testimony was misrepresented, or simply ignored.

The legislative history of § 3501 makes it hard to take seriously any argument that courts should defer to Congress' superior fact-finding capacity. On this occasion at least, the much vaunted superior fact-finding capacity of Congress was little in evidence. The legislative history of § 3501 also greatly impairs, if it does not destroy, other arguments that proponents of the provision have made — that § 3501 takes into account the *Miranda* warnings or recognizes the central holding of *Miranda* or represents a "blend" of the old voluntariness test and the new *Miranda* decision. The last thing congressional proponents of § 3501 wanted to do was to pay respect to *Miranda*. They were determined to bury *Miranda*, not to recognize it.

Yale Kamisar, a graduate of New York University and Columbia Law School, has written extensively on criminal law, the administration of criminal justice, and the "politics of crime." He is author of *Police Interrogation and Confessions: Essays in Law and Policy* and co-author of *Criminal Justice in Our Time* and *The Supreme Court: Trends and Developments* (five annual volumes). He wrote the chapter on constitutional criminal procedure for *The Burger Court: The Counter-Revolution that Wasn't; The Burger Years; and The Warren Court: A Retrospective*. He is also co-author of two widely used casebooks: *Modern Criminal Procedure: Cases, Comments & Questions*, all nine editions, and *Constitutional Law: Cases, Comments & Questions*, all eight editions. In addition, he has written many articles on euthanasia and assisted suicide. Professor Kamisar taught at the University of Minnesota Law School from 1957-64 and joined the University of Michigan law faculty in 1965. He is currently the Clarence Darrow Distinguished University Professor of Law.

