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Much Ado About Miranda

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Recent Development

Much Ado About Miranda

Kathryn E. Crossley*

I. INTRODUCTION

From 1958 to 1964, the Federal Bureau of Investigation reported in the Uniform Crime Reports that the "incidence of crime had been growing six times faster than the American population."[1] In the midst of this crime growth, the Supreme Court focused on balancing the need for order while simultaneously protecting the constitutional rights of criminal defendants.[2] The Court selected cases involving poor, uneducated defendants and used these cases to revolutionize criminal procedure.[3] With this in mind the Supreme Court reviewed *Miranda v. Arizona*.[4]

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1. Alfredo Garcia, *Is Miranda Dead, Was It Overruled, Or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 465-66 (1998) (citing LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 40 (1983)).

2. *See also* Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (stating that an individual's fundamental right to counsel is protected by the Sixth Amendment). In *Gideon* the Court held that in state felony prosecutions indigent defendants were entitled to counsel. *Id.* at 342-44. The Supreme Court reasoned that if indigent defendants did not have counsel the contest would be unequal and thus the trial would be fundamentally unfair. *Id.* at 344. The Court explained that attorneys were necessities and not luxuries. *Id. See also* Massiah v. United States, 377 U.S. 201, 201-04 (1964) (focusing on the time period during which the right to counsel became operative). In *Massiah* a co-defendant's cooperation with the government allowed the government to elicit incriminating statements from the defendant. *Id.* at 202-04. The prosecution later introduced these statements. *Id.* at 201-02. Additionally, in *Escobedo v. Illinois* the Supreme Court focused on the right to counsel as a condition precedent to the interrogation of a suspect. 378 U.S. 478, 480-91 (1964). The Court determined that the right did not hinge on the initiation of formal adversarial proceedings. *Id.*

3. *See* Garcia, *supra* note 1, at 465-66.

4. *See* 384 U.S. 436 (1966); *see also* Laurie Magid, *The Miranda Debate: Questions Past, Present, and Future*, 36 HOUS. L. REV. 1251, 1253 n.6 (1999) (stating that "[t]he *Miranda* decision is so well known that it has spawned an entire lexicon of new words and phrases: '*Miranda* warnings,' '*Miranda* rights,' '*Miranda* waivers, 'to *Mirand*ize,' and to 'get

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Miranda brought forth a prophylactic rule requiring police officers to advise criminal suspects of certain constitutional rights before questioning them.[5] In *Miranda* the Supreme Court departed from its traditional totality of the circumstances standard of determining when a confession violated the self-incrimination protection of the Fifth[6] and Fourteenth Amendments. Instead, the Court adopted a bright line rule that required police to read suspects a series of "Miranda rights" prior to custodial interrogation.[7] If the police officers did not follow the Court's dictate before questioning the criminal suspect, then they could not use any confession, voluntary or not, in trial.[8]

Critics met the *Miranda* decision with hostility.[9] Law enforcement officers were particularly outraged by the *Miranda* decision, because they felt that the *Miranda* requirements would hinder effective law enforcement.[10] They were concerned that the Court's interpretation of

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Miranda'd.'"); Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1418 n.7 (1985) (explaining that, in a 1976 poll regarding milestone events in American history, American Bar Association members ranked *Miranda* the highest ranking criminal law decision and fourth highest overall).

5. *See Miranda*, 384 U.S. at 444; *see also* Michael D. Hathcher, *Printz Policy: Federalism Undermines* Miranda, 88 GEO. L.J. 177 (1999).

6. The Fifth Amendment to the United States Constitution states that:

> [n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. V.

7. 384 U.S. at 444.

8. *Id.* at 478-79

9. *See* Eric D. Miller, Comment, *Should Courts Consider 18 USC § 3501 Sua Sponte*?, 65 U. CHI. L. REV. 1029, 1031 n.14 (1998) (citing Office of Legal Policy, United States Department of Justice, *Report to the Attorney General on the Law of Pre-Trial Interrogation* 62-63 (1986)); *see also* 113 CONG. REC. 21187, 21187 (1967) ("Recently our struggle to keep the criminal element under control has been hobbled by judicial decision.").

10. Miller, supra note 9, at 1031; *see also* Magid, *supra* note 4 (discussing the effects of *Miranda*).

> Without knowledge of many limiting cases that follow, a person reading the *Miranda* decision might well conclude that the Court did not want the police to obtain confessions very often. The *Miranda* warnings go beyond informing a suspect of his right to remain silent. Arguably, they were intended to encourage suspects to exercise

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the Fifth Amendment would significantly decrease criminal conviction rates.[11]

Two years after the Supreme Court's decision in *Miranda*, Congress responded to this near hysteria by enacting the Omnibus Crime Control and Safe Streets Act of 1968.[12] Section 3501 of the act made all voluntary statements made by a criminal suspect admissible in federal court, provided the statement passed a totality of the circumstances standard.[13] Congress made its intent that § 3501 clearly replace *Miranda*, but that is not what happened.[14] Instead, since its enactment thirty-two years ago, § 3501 has remained essentially dormant.[15] The Justice Department and the courts essentially ignored § 3501 in favor of the *Miranda* approach.[16]

In February of 1999, the United States Court of Appeals for the Fourth Circuit revived Congress' Safe Streets Act in *United States v. Dickerson* when it refused to suppress a criminal defendant's

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> their rights, reducing the number of confessions made to the police. The majority opinion railed against many forms of manipulation, trickery, and downright sneakiness employed by the police to obtain confessions. *Miranda* did not outrightly prohibit these tactics, but the Court's obvious distaste for them certainly affected its decision. Under the majority's apparent view of how an interrogation should be conducted—that is, with no manipulation—there would be precious few confessions.

Id. at 1263-64.

11. *See* Miller, *supra* note 9, at 1031 n.14. Additionally, Justice White believed that criminal defendants who would have been convicted on what the Court previously believed to be good evidence would now, under the new Fifth Amendment analysis, either not be tried at all or would be acquitted if the state's evidence, absent the confession, was put to the litigation test. 384 U.S. at 542 (White, J., dissenting). The Fifth Amendment only prohibits self-incrimination in criminal proceedings.

12. Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 18 U.S.C. § 3501 (1994)).

13. *Id.*

14. *See* Magid, *supra* note 4, at 1275 n.114 (citing S. REP. NO. 90-1097, at 54 (1968), *reprinted in* 1968 U.S.C.A.A.N. 2112, 2141) (stating that "[t]he intent of the bill is to reverse the holding in *Miranda v. Arizona*"); *see also* Miller, *supra* note 9, at 1033 (explaining that the legislative history of § 3501 shows that "Congress made no secret its hope that § 3501 would undo *Miranda*.").

15. *See* Miller, *supra* note 9, at 1033-38.

16. *Id*. While no administration has clearly stated its reasons for neglecting to use § 3501, there are two plausible explanations. *Id*. at 1036. "First, government lawyers may believe that the bright line *Miranda* rules are easier for law enforcement officers to follow than the flexible totality of the circumstances standard of Section 3501. . . . Second, the government may doubt the constitutionality of Section 3501. Consequently, it may be reluctant to rely on it and risk reversal of a conviction." *Id.* at 1036-37.

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statement.[17] The Fourth Circuit explained that § 3501 overruled *Miranda* as it applied to federal law enforcement officers and thus unwarned confessions are admissible in the prosecution's case.[18] The Supreme Court, however, has decided to review the *Dickerson* opinion to determine whether Congress has the power to supersede the thirty-four year old *Miranda* rule.[19]

Part II of this Recent Development focuses on the actual *Miranda* decision and Congress' subsequent enactment of § 3501. it also reviews the Fourth Circuit's decision in *United States v. Dickerson* as it applies to § 3501. Part III analyzes how and why Congress had the authority to supersede *Miranda* by enacting § 3501. Finally, Part IV concludes by explaining how the Supreme Court should handle subsequent cases in light of its oversight in *Miranda*.

II. BACKGROUND

Prior to the Supreme Court's decision in *Miranda*, courts looked at the methods used to obtain confessions and the circumstances surrounding criminal interrogations to determine whether the criminal suspect voluntarily confessed.[20] Courts determined whether

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17. 166 F.3d 667 (4th Cir. 1999).

18. *Id.* at 671. *See* United States v. Cheely, 21 F.3d 914, 923 (9th Cir. 1994), *amended and superseded by* 36 F.3d 1439, 1448 (9th Cir 1994) (discussing § 3501's application to the issue of admissibility of confessions and concluding that the statute is not dispositive); United States v. Rivas-Lopez, 988 F. Supp. 1424, 1434 (D. Utah 1997) (concluding that *Miranda*'s warnings are not constitutional requirements, and thus § 3501 applies when determining the admissibility of a defendant's confession). Additionally, in United States v. Crocker the police arrested the defendant for using counterfeit money at a club. 510 F.2d 1129, 1131 (10th Cir. 1975). The police detained the defendant for approximately six and one half hours before reading her the *Miranda* rights. *Id.* During the next twelve hours the police questioned the defendant two more times and read her the *Miranda* rights prior to each period of questioning. *Id.* at 1131-32. The trial court held that the defendant's subsequent confession and her statements obtained during questioning were admissible. *Id.* at 1133. The trial judge permitted the jury to hear evidence regarding the voluntariness of her confession and then instructed the jury to determine, based on the surrounding circumstances, what weight such testimony should be given. *Id.* The Tenth Circuit held that the trial court correctly applied § 3501 to admit a confession that also would be admissible under *Miranda*. *Id.* at 1138.

19. United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), *cert. granted in part*, 68 U.S.L.W. 3365 (U.S. Dec. 6, 1999) (No. 99-5525).

20. *See* Haynes v. Washington, 373 U.S. 503 (1963); *see also* Payne v. Arkansas, 356 U.S. 560 (1958); Chambers v. Florida, 309 U.S. 227 (1940); White v. Texas, 310 U.S. 530 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

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the "techniques and methods [were] offensive to due process" or if the interrogation was made in such a way that the criminal suspect "clearly had no opportunity to exercise a free and unconstrained will."[21] If either of these tests were met, then the court found that the confessions were involuntary and thus inadmissible.[22]

In 1966 the Supreme Court granted certiorari to review a case involving Ernesto Miranda, a poor Mexican-American who lacked money and education and had an extensive history of prior arrests.[23] In addition to Ernesto, the case also involved three other inmates.[24] In each situation the police interrogated the appellant without any warning explaining his constitutional rights.[25] Additionally, each appellant made an incriminating statement, which the court later allowed into evidence.[26]

The Court began its analysis by reviewing the history of police officers' use of mental and physical abuse to obtain confessions from criminal suspects in police custody.[27] The appellants argued that the

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21. Oregon v. Elstad, 470 U.S. 298, 304 (1985) (quoting Haynes v. Washington, 373 U.S. at 515).

22. *See id. See also* Garcia, *supra* note 1, at 473 (explaining that the Justices who created *Miranda* had three choices before them: "(1) preserve the status quo; (2) reject the status quo by injecting the lawyer at the arrest stage, thereby ensuring the end of confessions; or (3) reach a solution which straddled these two extremes."). The Court choose to "straddle" the two extremes. *Id.* This choice was arguably conservative despite the harsh reception it received from law enforcement. *Id.* A more radical approach could have completely ended confessions. *Id.* at 465. Additionally, a weaker decision would have countervailed the interests of the poor, the uneducated, and those similarly situated. *Id.*

23. 384 U.S. 436 (1966).

24. 384 U.S. at 456-57. Village of Menomonee Falls v. Kunz, 376 N.W.2d 359, 361-62 (Wis. Ct. App. 1985).

25. 384 U.S. at 456-57. *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) (holding that it is perfectly legitimate for police to plant an informant who functions as a listener, not a questioner, near a jail inmate to obtain incriminating information); Rhode Island v. Innis, 446 U.S. 291, 301-02 (1980) (stating that pursuant to *Miranda*, police initiated "interrogation" refers to "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police *should know* are reasonably likely to elicit an incriminating response. . ..") (emphasis added).

26. 384 U.S. at 456-57. *See also* Pennsylvania v. Muniz, 496 U.S. 582, 590-92 (1990) (determining that the issue of whether the suspect's behavior is testimonial turns on the content of that person's communication to the police, rather than the manner in which that person is speaking); State v. Mitchell, 482 N.W.2d 364, 370 (Wis. 1992) (holding that *Miranda* applies when the suspect's behavior is both testimonial and responsive to the questions asked).

27. 384 U.S. at 445-47. *See* Pennsylvania v. Bruder, 488 U.S. 9 (1988); State v. Milhollin, 751 P.2d 43 (Colo. 1988); People v. Laspica, 612 N.E.2d 994 (Ill. App. 1993). Additionally, in *Berkemer v. McCarty* the Court stated that the custody requirement mandates an objective test

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police interrogation tactics took advantage of particular vulnerabilities of the poor, the uneducated, the inexperienced, and minorities.[28] Presumably, the police viewed these individuals as easy targets for extracting confessions.[29] Thus, the Court could not assume that these individuals knew their rights.[30]

Against this backdrop, the Court set out to examine the Fifth Amendment's protection against self-incrimination with hopes of providing "concrete constitutional guidelines for law enforcement agencies and courts to follow."[31] The Court stated that these safeguards must be followed "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it."[32] The Court later stated its desire 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."[33] The Court also explained that it "cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted."[34] The Court later expanded on this notion,

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that a reasonable person in the suspect's position would have believed himself to be in custody. 468 U.S. 420, 442 (1984). Thus, the officer's thoughts or intentions are irrelevant to the inquiry. *Id. See also* Stansbury v. California, 511 U.S. 318, 325 (1994) (stating that "[e]ven a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest"). *Id.*

28. *See* Robert W. Landry, *Miranda Challenged in Federal Criminal Cases*, 72 WIS. LAW. 18 (1999); *see also* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1418 n.7 (1985). Caplan stated:

> [t]he Miranda approach reflects a bias against self-accusation on principle. This bias has roots in the desire to treat suspects equally. Suspects who do not know their rights, or do not assert them, as a consequence of some handicap—poverty, lack of education, emotional instability—should not, it is felt, fare worse than more accomplished suspects who know and have the capacity to assert their rights. This "equal protection" appeal finds its way repeatedly into judicial opinions and legal commentary.

Id. at 1456.

29. Landry, *supra* note 28, at 19.

30. *Id.*

31. 384 U.S. at 441-42.

32. *Id.* at 444.

33. *Id*. at 467.

34. *Id*.

stating that the "Constitution does not require any specific code of procedure for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege so long as they are fully as effective as those described above. . . ."[35] However, the Court then explained that "[t]he issues presented are of constitutional dimensions and must be determined by the Courts. . .. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."[36] The Court concluded that the prosecution must demonstrate that it utilized certain procedural safeguards during the custodial interrogation that induced the statements made by the criminal suspect.[37] The Court also stated that precedent indicated that this Fifth Amendment safeguard extended beyond federal trials involving interrogation by federal officers and encompassed state police as well.[38]

To ensure that the prosecution and law enforcement officials met the Fifth and Fourteenth Amendments' protections, the Court indicated that, prior to questioning, an officer must warn a suspect: (1) that he has the right to remain silent; (2) that any statement he does make may be used against him; (3) that he has the right to the presence of an attorney; and (4) that if he cannot afford an attorney, he has the right to appointed counsel.[39] Furthermore, the defendant may waive these rights, provided that the waiver is voluntary, knowing, and intelligent.[40] The Court explained that if the officers do not read the above mentioned warnings to a suspect or if the officers

35. *Id* at 490.
36. *Id* at 490-91.
37. *Id.* at 444.
38. *Id*. at 463-65.
39. *Id.* at 478-79.
40. *Id*. at 479. The Court explained the procedural safeguards:

> If, however, [the defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to being questioned.

Id. at 444.

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do not honor the suspect's right to remain silent or right to counsel, then any statement the criminal suspect makes during the custodial interrogation may not be used against him in a court of law.[41] Finally, the Court noted that these safeguards must be followed unless other effective means are established to ensure that the Fifth Amendment right is a protected one.[42]

Dissatisfied with the procedures set out in *Miranda*, Congress enacted § 3501 as a part of the Omnibus Crime Control and Safe Streets Act in 1968.[43] Section 3501 only applies in federal cases[44] and provides that confessions, if voluntary, are admissible evidence.[45]

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41. *Id.* at 479.

42. *Id*. at 444.

43. Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 18 U.S.C. § 3501 (1994)).

44. Proposed § 3502 would have made the statute applicable to federal review of state cases as well. However, 3502 was eliminated from the final version. See S. REP NO. 90-1097, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2138-39.

45. 18 U.S.C. § 3501 (1994) (emphasis in original).

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confessions is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of confession.
>
> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons

The section provides that courts should determine the voluntariness of confessions according to the circumstances surrounding the confession, including: (1) the elapsed time between the arrest and the suspect's arraignment; (2) whether the suspect knew of the nature of the offense charged; (3) whether the police advised the suspect, or whether the suspect knew, that she was not required to make a statement, and that any statement she made could be used against her; (4) whether or not the police advised the suspect of her right to counsel prior to questioning; and (5) whether counsel assisted the suspect at the time of confession.[46] The statute declares that the presence or absence of such factors may aid courts in the determination of whether the suspect made the confession voluntarily; however, these factors are not conclusive.[47] Through § 3501, Congress eliminated *Miranda*'s "bright-line" test, which required the police to advise a suspect of her rights. Section 3501 replaced the bright line test with an approach that resembles the totality of the circumstances approach that existed prior to *Miranda*.[48]

Despite § 3501's clear contradiction of *Miranda*, courts have

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charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention. *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Id.

46. *Id.* at § 3501(b).

47. *Id.*

48. *See* Haynes, 373 U.S. at 513 (stating that "whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all the attendant circumstances.").

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never used the statute.[49] In *Davis v. United States* Justice Scalia stated that § 3501 "has been avoided . . . by every Administration . . . since its enactment more than 25 years ago."[50] Additionally, Scalia explained that courts should take up § 3501 sua sponte because § 3501 "is a provision of law directed *to the courts*, reflecting the people's assessment of the proper balance to be struck. We shirk our duty if we systematically disregard that statutory command simply because the Justice Department systematically declines to remind us of it."[51]

In 1999 the United States Court of Appeals for the Fourth Circuit heeded Justice Scalia's advice when it decided the momentus case of *United States v. Dickerson*,[52] involving a 1997 Virginia bank robbery. A witness observed the robbery and identified Dickerson as the culprit.[53] Then, on January 27, 1997, approximately ten Federal Bureau of Investigations (FBI) agents, accompanied by a local police detective, scurried to Dickerson's residence.[54] The police observed the car used in the robbery at Dickerson's residence, approached Dickerson's door, knocked on his door, and identified themselves.[55] Dickerson eventually opened the door, after which the police officers explained that they were investigating a bank robbery.[56] Dickerson then agreed to accompany the officers to the FBI station, but first insisted that he get his jacket.[57] When the police escorted Dickerson into his bedroom to retrieve his jacket, they noticed a large amount of cash on Dickerson's bed.[58] Dickerson put the cash in his pocket and

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49. *See* Brooke B. Grona, *United States v. Dickerson: Leaving Miranda and Finding a Deserted Statute*, 26 AM. J. CRIM. L. 367, 370-71 (1999).

50. 512 U.S. 452, 464 (1994) (Scalia, J., concurring). In *Davis*, the Supreme Court held that police officers may continue to interrogate a suspect until he clearly and unambiguously requests the presence of counsel. *Id.* at 461-62. The Court explained that an unambiguous statement does not require the police to cease questioning. *Id.* Although the Court relied on Miranda and its progeny, it refused to consider the implications of § 3501. *Id.* at 463.

51. *Id.* at 465.

52. 166 F.3d at 673.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 166 F.3d at 673.

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refused to allow the officers to search the rest of his apartment.[59] At this point the agents had not placed Dickerson under arrest.[60]

At the FBI station the officers interviewed Dickerson.[61] Dickerson first indicated that he had no involvement with the robbery but that he had been near the robbery location.[62] The officers then obtained a search warrant from a magistrate judge based on Dickerson's statements and the cash at his residence.[63] Agents searched Dickerson's residence and then resumed their interview.[64] Dickerson eventually informed the police that he drove the car involved in the robbery, while another man, Jimmy Rochester, robbed the bank.[65] The government charged Dickerson with conspiracy, four counts of bank robbery, and three counts of using a firearm in relation to a crime of violence.[66]

Dickerson moved to suppress his confession and the silver handgun and money the agents obtained through their search.[67] The United States District Court for the Eastern District of Virginia held a hearing on this issue.[68] At the hearing an agent testified that they read Dickerson his rights, and Dickerson waived his rights prior to his confession.[69] Dickerson, however, stated that he confessed before the police advised him of his rights.[70] The district court ordered the suppression of Dickerson's confession but denied the motion to suppress the evidence obtained as a result of the confession.[71] The district court suppressed the evidence obtained through a search of Dickerson's apartment, because the issued warrant did not

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. 166 F.3d at 674.
65. *Id.*
66. *Id.*
67. *Id.*
68. 166 F.3d at 675.
69. *Id.* at 675.
70. *Id.*
71. *Id.* at 675-76. *See* United States v. Elie, 111 F.3d 1135, 1142 (4th Cir. 1997) (stating that evidence obtained after a confession made in violation of a criminal suspect's rights will only be excluded if the confession was not made voluntarily under Fifth Amendment due process scrutiny).

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specifically describe the items police were searching.[72] The government filed a motion to reconsider the admissibility of Dickerson's confession, but the court denied the motion.[73] The government appealed to the Fourth Circuit.[74]

No party to the case presented or argued § 3501, but at the direction of amicus, the Fourth Circuit held that "Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court."[75] The sole dissenter in the Fourth Circuit opinion stated his dissatisfaction with the majority's choice to argue issues not before the court.[76] Judge Michael stated that "[w]e perform our role as neutral arbiters best when we let the parties raise the issues, and both sides brief and argue them fully."[77] Additionally, he stated, that "[i]t is a sound prudential practice for us to avoid issues not raised by the parties."[78]

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72. 166 F.3d at 676.

73. *Id.* at 676-77.

74. *Id.* at 677.

75. *Id.* at 671. The two amicus groups were the Washington Legal Foundation (WLF) and the Safe Streets Coalition. *Id.* at 667. The WLF was also amicus in *United States v. Davis*, 512 U.S. at 457 n.*, where the court explained that although briefs could be filed by amicus, it must decline the invitation, put forth by many of the amici, to consider § 3501. The WLF also was amicus in *United States v. Sullivan*, 138 F.3d 126, 134 n.* (4th Cir. 1998), where the court stated that the amicus could file a brief, but the court would not reach the issue of § 3501. The Safe Streets Coalition was amicus in *United States v. Rivas-Lopez*, the only recent case declaring that § 3501 trumps *Miranda*. 988 F. Supp. at 1434. *See* Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 470 (1999) (explaining that the Fourth Circuit originally upheld the district court's finding that the statement of the defendant should be suppressed). However, after the amicus organizations argued that the confession should have been admitted unless it did not satisfy the totality of the circumstances test in § 3501, the Fourth Circuit issued an order directing the parties involved in the case to consider the effect of § 3501 on the case. *Id. See also* Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 99 (1991) (explaining that it is well settled that "[w]hen an issue or claim is properly before the court, 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.") *Id.*

76. 166 F.3d at 695 (Michael, J., dissenting in part and concurring in part).

77. *Id.* at 697.

78. *Id.*

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III. ANALYSIS

The Supreme Court soon will decide the validity of § 3501. The Court will decide that the *Miranda* warnings are of such constitutional magnitude that they cannot be discarded or that it is time to revert to Congress' long-ignored approach laid out in § 3501.

Clearly the *Miranda* Court wanted to establish a constitutional basis under the Fifth Amendment, but it is entirely unclear what that basis is.[79] The boundaries of this landmark opinion are open to interpretation. The Court explained that the guidelines it established are "concrete";[80] however, it then explained that other methods are acceptable as well.[81] The Court then encouraged Congress and the states to formulate methods of protection, but the court did not elucidate the extent or limit of Congress' or States' discretion.[82] Finally, the Court renounced its goal to encourage Congress and the States to adopt other methods,[83] explaining that these issues are to be left to the Court and no legislative efforts can interfere with these rights.[84] Thus, the Court leaves a giant gap in its reasoning, inviting Congress and the Court to interpret the case as they wish.

In post-*Miranda* cases the ambiguity of *Miranda* is more obvious. In 1974 the Court explained that the *Miranda* rules were "not themselves rights protected by the Constitution," but simply "procedural safeguards" designed to protect an individual's right against compulsory self-incrimination.[85] In 1985 the Court struck a giant blow when it explained that the poisonous tree doctrine, a doctrine which presupposed the existence of an underlying constitutional violation, did not apply to *Miranda*; thus, unwarned confessions did not taint the admissibility of subsequent evidence.[86]

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79. *See* CRIMINAL LAW—FOURTH CIRCUIT HOLDS THAT 18 U.S.C. § 3501, NOT MIRANDA V. ARIZONA, GOVERNS THE ADMISSIBILITY OF CONFESSIONS IN FEDERAL COURTS—*UNITED STATES V. DICKERSON*, 166 F.3d 667 (4th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3361 (U.S. Dec. 6, 1999) (No. 99-5525), 113 HARV. L. REV. 1039 (2000).

80. 384 U.S. at 441-42.

81. *Id*. at 444.

82. *Id*. at 467.

83. *Id.*

84. *Id*. at 490-91.

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

86. Oregon v. Elstad, 470 U.S. 298, 307-08 (1985).

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One year later the Court explained that Fifth Amendment rights could be protected by less intrusive means.[87] Then, in 1993 the Court stated that the *Miranda* safeguards are not constitutional in nature.[88] Finally, in 1994 the Court described the *Miranda* warnings as merely a "series of recommended procedural safeguards."[89]

Miranda and its progeny beg the question: Why would the Supreme Court issue an opinion and then undermine it in every possible way?[90] Perhaps the answer lies in the fact that the Warren Court issued the *Miranda* opinion, while the Burger and Rehnquist Courts dealt the blows to the integrity of the opinion. The ideological differences among the various courts arguably could be the reason for the changes.[91] In any event, the Burger and Rehnquist Courts recognized and took advantage of the lack of clarity presented in the *Miranda* decision.

With in mind the ambiguity of *Miranda* and the subsequent efforts of the Court to feast on this lack of clarity, only one question remains regarding § 3501: Is § 3501 constitutional? Unless rules are constitutional, Congress generally has the final say regarding rules of evidence and procedure in federal court.[92] Thus, as long as the Constitution does not require a court-imposed rule, Congress can trump the Supreme Court, even if the two branches are conflicting.[93]

Those who find clarity in the *Miranda* decision argue that the Supreme Court has already rejected the totality of the circumstances approach evident in § 3501.[94] However, this is not the case. When creating § 3501, Congress created new safeguards and expanded the preexisting protections apparent in the old totality test.[95] Congress incorporated *Miranda* into a legislative scheme designed to balance

87. Moran v. Burbine, 475 U.S. 412, 426 (1986).

88. Withrow v. Williams, 507 U.S. 680, 690-91 (1993).

89. Davis v. United States, 512 U.S. 452, 457-58 (1994).

90. *See, e.g.*, *Tucker*, 417 U.S. at 144; *Oregon*, 470 U.S. at 307; *Moran*, 475 U.S. at 426; *Withrow*, 507 U.S. at 680.

91. *See* Leslie A. Lumey, *The Erosion of* Miranda*: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 800 (1999).

92. *See* Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. 3501 and the Overhauling of Miranda*, 85 IOWA L.REV. 175, 226 (Oct. 1999).

93. *Id.* (citing Joseph D. Grano, *Confessions, Truth and the Law*, 173, 173-22 (1993)).

94. 384 U.S. at 444.

95. 18 U.S.C. § 3501 (1994).

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the individual rights against society's needs.[96] First, Congress incorporated the factor of whether the police had informed the criminal suspect of the nature of the charged offense into its test.[97] Second, in § 3501 Congress made the presence or absence of an attorney a consideration when determining the issue of the voluntariness of a confession.[98] Congress did not simply revive the amorphous totality of the circumstances test; instead, it expanded the old test and established new safeguards and protections. The guidelines established are appropriate in light of the ambiguities evident in *Miranda*. In remedying its own blunder, the Court should ensure that § 3501 is applied strictly, correcting the *Miranda* oversight by protecting the original constitutional intentions of the decision.[99]

IV. CONCLUSION

The Supreme Court is bound to uphold § 3501, but this is somewhat disconcerting because the bright-line test established in *Miranda* is good policy. The test assures that a suspect, at the very least, will be informed of his constitutionally protected rights.[100] If the suspect is not informed, then any confession obtained is presumptively involuntary.[101] Section 3501 creates a test in which the question of whether a suspect has been informed of his rights might be a mere factor.[102] Thus, because no one factor is dispositive, a suspect ignorant of his Fifth amendment rights and without an attorney could still voluntarily confess.[103] Unsettling as it may be, it is the necessary result. The Supreme Court made a mistake. Its ambiguity opened the door for the creation of § 3501 and its own

96. *See* Edmund Oneill, *Miranda Remediated*, 3 Green Bag 2d 149, 152.
97. 18 U.S.C. § 3501(b) (1994).
98. *Id.*
99. 384 U.S. at 441-42.
100. *Id.* at 478-79.
101. 384 U.S. at 479.
102. *See* CRIMINAL LAW—FOURTH CIRCUIT HOLDS THAT 18 U.S.C. 3501 NOT *MIRANDA V. ARIZONA*, GOVERNS THE ADMISSIBILITY OF CONFESSIONS IN FEDERAL COURTS—UNITED STATES V. DICKERSON 166 F.3D 667 (4th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3361 (U.S. Dec. 6, 1999) (No. 99-5525), 113 HARV. L. REV. 1039, 1043 (2000).
103. *Id.* at 1044.

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subsequent attacks.

Accordingly, the Court should uphold § 3501 and rehabilitate the original foundations of *Miranda* by applying § 3501 strictly. In short, the Court should take measures to ensure unambiguously that the constitutional right against compelled self-incrimination is protected.

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