MIRANDA UNDER FIRE

"[T]he constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[1]

Jonathan L.H. Blaine

I. INTRODUCTION

The right against self-incrimination is one of the fundamental rights guaranteed in the Bill of Rights.[2] The right is so fundamental that the Supreme Court held "the privilege applicable to the States and held that the substantive standards underlying the privilege applied with full force to state court proceedings."[3] In its landmark decision *Miranda v. Arizona*,[4] the Supreme Court found state law enforcement interrogation procedures so inherently coercive that their use in questioning a criminal suspect required safeguards which would ensure the suspect a meaningful opportunity to either exercise or waive this fundamental right.[5] The Court entertained several suggestions regarding what type of safeguards, if any, would provide a workable balance between the government's interest in effective and efficient law enforcement and an individual's constitutional right against self-incrimination.[6] The majority decided that in order to pro-

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[1] Miranda v. Arizona, 384 U.S. 436, 460 (1966).

[2] *See* U.S. CONST. amend. V.

[3] *See Miranda*, 384 U.S. at 463-64 (citing Malloy v. Hogan, 378 U.S. 1 (1964)).

[4] 384 U.S. 436 (1966).

[5] *See id.* at 467-68.

[6] *See* Leslie A Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 741 – 42 (1999) (suggesting that the court had at least two alternative bases

vide a suspect with a "full opportunity"[7] to exercise his rights under the constitution, law enforcement officials must inform a suspect of these constitutional rights *prior* to police interrogation.[8] Because choosing to waive these rights subjects the suspect to one of the most psychologically coercive and manipulative experiences of his life,[9] officers must also inform the suspect of the consequences of such a waiver.[10] Only then can "there be any assurance of real understanding and intelligent exercise of the privilege."[11]

At present, there is little if any debate that the interrogation tactics used by law enforcement officials to extract incriminating statements are coercive and that their *raison d'être* is the extraction of incriminating information.[12] After all, it is a guilty suspect who knows all the facts of the case.[13] Any incriminating statement made by a guilty suspect should lead to evidence that can be used as

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for deciding the cases presented, the first being continued reliance on the voluntariness standard with a clearer definition of the analysis one should utilize in its application and the second being an analysis and clarification of the attachment of the right to assistance of counsel under *Escobedo.)*

The right against self-incrimination was not the only fundamental right addressed in *Miranda.* Another included the right to counsel. Since this comment focuses on the right against self-incrimination, as does the *Dickerson* opinion at issue here, this piece will also limit its discussion accordingly.

[7] *Miranda*, 384 U.S. at 467.

[8] *See id.* at 467–68.

[9] *See generally,* Kate Greenwood & Jeffery A. Brown, *Investigation and Police Practices, Custodial Interrogations,* 86 GEO. L.J. 1318 (1998) (detailing modern police practices and interrogation methods). *See also, Miranda*, 384 U.S. at 445-58 (reviewing police interrogation tactics and citing INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962), a popular manual providing detailed instructions on the effective performance of police interrogations and finally concluding that police interrogation methods are inherently coercive).

[10] *See id.* at 469.

[11] *Id.*

[12] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action,* 74 DENV. U. L. REV. 979, 988 (1997).

[13] *See* Gerald M. Caplan, *Questioning Miranda,* 38 VAND. L. REV. 1417, 1422 (1985); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action,* 74 DENV. U. L. REV. 979, 1119 (1997).

proof of guilt at trial.[14] Law enforcement officials should be able to get a full confession, upon receipt of which, arrest, indictment and a guilty plea should no doubt follow.[15] Obtaining this confession and a subsequent guilty plea saves law enforcement time and money because criminals would be punished at the lowest possible cost to society by avoiding the need for costly trials, thereby promoting effective and efficient law enforcement.[16] Under this system, everyone appears to win. Everyone that is, except the poor soul wrongly accused of having committed a crime for which he is innocent.[17]

This comment will review the recent Fourth Circuit Court of Appeal's decision in *United States v. Dickerson*,[18] in which Judges Williams and Kiser took the activist step of addressing, *sua sponte*, which standard the federal courts should apply in determining the admissibility of self incriminating statements: the warning rule set forth in *Miranda v. Arizona*[19] or the pre-*Miranda* voluntariness standard set forth by Congress in 18 USC § 3501.[20] In contradiction of over

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[14] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 992 (1997).

[15] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 984, 1114 (1997).

[16] *See* Jean Choi Desombre, *Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L.J. 103, 120 (1995).

[17] *See generally id.* (citing Richard J. Ofshe & Richard A. Leo, THE SOCIAL PSYCHOLOGY OF POLICE INTERROAGTION: THE THEORY AND CLASSIFICATION OF TRUE AND FALSE CONFESSIONS, 189-251 (1997) and concluding based on the evidence presented therein that innocent suspects confess to crimes they did not commit on a regular basis). *See id.* at 982.

[18] 166 F.3d 667 (4th Cir. 1999), *cert. granted in part*, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000).

[19] 384 U.S. 436 (1966).

[20] Omnibus Crime Control and Safe Streets Act of 1968, Title II § 701(a), Pub. L. No 90-351, 82 Stat 210, codified as amended at 18 USC § 3501 (1994) [hereinafter, § 3501]. This statute reads in pertinent part:

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

30 years of Supreme Court precedent, the Fourth Circuit held that 18 USC §

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jury feels it deserves under all the circumstances.

The trial judge in determining the issue of volutariness 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.

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 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 such available magistrate or other officer.

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.

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.

18 USCA § 3501(a)-(e)(West Supp. 1994).

3501 overruled the warning requirements set forth in *Miranda*.[21] The Fourth Circuit asserted that the standard for determining the constitutionality of a confession and consequently, its subsequent inclusion or exclusion as evidence in federal court, was the very voluntariness test that the Supreme Court had rejected in *Miranda*.[22]

After detailing the Fourth Circuit's opinion and the reasoning proffered in justification for this activist move and the dissent's scathing attack on the same, this comment will focus on developing a more appropriate analysis of the interplay between *Miranda* and § 3501. The discussion will demonstrate that while both rules have a role to play in the criminal justice system, *Miranda* protects two correlative procedural rights which Congress overlooked in its passage of §3501, specifically, the right to be informed of one's rights prior to interrogation and the right to a continuous opportunity to exercise those rights during the interrogation.[23] The discussion will then review the several policy arguments set forth in *Aimicus* briefs on appeal, which demonstrate that contrary to Justice Scalia's assertion in *Davis v. United States*,[24] prudence does not dictate that the Court address the constitutionality of § 3501, *sua sponte*. Finally, this article concludes that while Congress attempted to overrule the Court's decision in *Miranda* by enacting § 3501, it failed to do so.

II. *UNITED STATES V. DICKERSON* - A SUMMARY

In *United States v. Dickerson*,[25] the United States in an interlocutory appeal

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[21] *See Dickerson*, 166 F.3d at 672.

[22] *See Miranda*, 384 U.S. at 468-69.

[23] *See id.* at 467 (stating 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 . . . safeguards must be followed") (emphasis added); *id.* at 479 (restating in summary that "[A suspect] *must be warned* . . . that he has a right to remain to remain silent . . .[and an o]*pportunity* to exercise . . . [his] rights must be afforded to him throughout the interrogation.") (emphasis added).

[24] 512 U.S. 452 (1994) (Scalia, J., concurring) (agreeing, "that it is *proper*, given the Government's failure to raise the point, to render judgement without taking account of § 3501," yet then arguing that this "proper . . . refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate," and finally asserting that "there are times when prudence dictates the contrary . . . [and that] such a time will have arrived when a case that comes within the terms of this statute [§ 3501] is next presented to [the Court]") (emphasis in original). *See id.* at 464.

[25] 166 F.3d 667 (4th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3361, 68 U.S.L.W. 3365 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000).

from a denial of the government's motion to reopen a suppression hearing, requested that the Fourth Circuit Court of Appeals reverse the district court's exclusion of an incriminating statement made by the defendant, Charles Dickerson.[26] Dickerson was soon to stand trial for bank robbery and conspiracy to commit bank robbery.[27] The court expressed concern over the result of excluding Dickerson's confession stating that, "[w]ithout his confession it is possible, if not probable, that he will be acquitted."[28] Because of this concern and the fact intensive nature of the case, the court began its opinion with an extensive detailing of the facts, which are summarized here.[29]

On January 24, 1997, robbery occurred at the First Virginia Bank in Old Town, Alexandria, Virginia.[30] An eyewitness claimed the robber got away in a car bearing D.C. license plates numbered D5286.[31] Charles Dickerson was the registered owner of this car.[32]

On January 27, 1997, the FBI and Alexandria police went to Dickerson's home.[33] The agents sought entry to Dickerson's home.[34] When Dickerson answered the door, agents informed him they would like to ask him some questions about the bank robbery.[35]

Agents then entered his home and asked Dickerson to come to the FBI Field.[36] While in his home, agents saw money lying on the bed, which Dickerson claimed, was gambling winnings.[37] Dickerson refused to let the FBI search

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[26] *See id.* at 676.

[27] *See id.* at 671–73.

[28] *Id.* at 672.

[29] *See id.* at 673 – 74.

[30] *See id.* at 673.

[31] *See Dickerson*, 166 F.3d at 673.

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See Dickerson*, 166 F.3d at 673.

his apartment.[38] Dickerson and the FBI agents then went to FBI Office.[39] Dickerson voluntarily accompanied the agents and was not under arrest at this time.[40]

When interviewed by an FBI special agent and an Alexandria police detective, Dickerson claimed no knowledge of the robbery.[41] Dickerson admitted being Old Town the day of the robbery.[42] He stated that he ran into his friend, Terrance and gave his friend a ride Suitland, Maryland.[43]

Special Agent Lawlor then sought a phone warrant to search Dickerson's apartment.[44] Judge Kenkel granted the warrant based on information relayed to him by the agent.[45] A search of Dickerson's home ensued.[46] The agent told Dickerson about the impending search.[47]

Dickerson then at some point stated that he had been a getaway driver in some bank robberies.[48] Dickerson implicated Jimmy Rochester in the robberies saying that they both went to Old Town the day of the robbery in question.[49] Dickerson claimed that Rochester actually committed the robbery and that he drove the getaway car and agreed to hide some of the evidence at Rochester's request.[50] Dickerson was then formally arrested, as was Rochester.[51] Upon arrest, Rochester confessed to committing several banks in Georgia, Virginia and

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[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *See id.*

[43] *See Dickerson*, 166 F.3d at 673.

[44] *See id.*

[45] *See id.* at 674.

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See Dickerson*, 166 F.3d at 674.

[50] *See id.*

[51] *See id.*

Maryland and confirmed that Dickerson had been the getaway driver in the Virginia and Maryland robberies.[52]

When agents searched Dickerson's apartment they found evidence of participation in bank robberies and a subsequent search of Dickerson's car additional items related to the bank robberies.[53] Based on this evidence and the confessions of Dickerson and Rochester, a federal grand jury charged Dickerson with several counts of bank robbery, conspiring to commit bank robbery.[54] Having set out the facts and procedural history of the case in "painstaking detail,"[55] the court turned to the preliminary question of jurisdiction.[56]

The Fourth Circuit Court of Appeals addressed the initial issue of whether a circuit court had jurisdiction to hear the type of appeal sought.[57] The question specifically addressed the government's "right to appeal an order denying reconsideration of a suppression ruling."[58] As this was an issue of first impression in

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[52] *See id.*

[53] *See id.*

[54] *See id.*

[55] *Dickerson*, 166 F.3d at 673.

[56] *See id.* at 677, n.10.

[57] *See id.* at 677.

This question arose due to the procedural posture of this case, which arrived at the 4th Circuit Court of Appeals in the following manner.

Charles Dickerson was indicted by a federal grand jury for bank robbery and conspiracy to commit bank robbery. Dickerson's attorney immediately filed a motion requesting suppression of, among other evidence, an incriminating statement made while in FBI custody prior to having been read his *Miranda* warnings. After the suppression hearing, the district court issued an Order and Memorandum Opinion finding that the incriminating statement was taken in violation of *Miranda* and consequently ordering its suppression as required under *Miranda*.

The Government then filed a motion for reconsideration requesting that the district court reopen the suppression hearing for the introduction of new evidence. The District court denied the motion for reconsideration on the grounds that the Government could not establish that the evidence they sought to introduce had been unavailable at the time of the original suppression hearing. The Government then sought an interlocutory appeal, which the Fourth Circuit granted and is the case under discussion here.

See id. at 674-77.

[58] *See id.* at 677, n. 10.

the Fourth Circuit,[59] the court utilized both statutory authority and other circuit court decisions to decide whether the Fourth Circuit had jurisdiction to hear the government's appeal.[60] Considering the applicable level of review, the court then adopted an abuse of discretion standard, as had the First, Fifth and Ninth Circuits.[61] Armed with jurisdiction to review the district court's denial of the motion for reconsideration and the applicable standard of review, the court turned its attention to the merits of the case.[62]

The court then sought to tackle the two main issues presented by the case.[63] First, the court considered whether the district court abused its discretion in denying the Government's motion for reconsideration.[64] Second, and more importantly, the judges then focused on the Government's assertion that § 3501, as opposed to *Miranda*, governed the admissibility of Dickerson's confession.[65] Utilizing the abuse of discretion standard identified previously, Judge Williams, writing for the Majority, decided against the Government on the first, less controversial issue and for the Government on the second and much more controversial question.[66]

The Fourth Circuit first considered the district court's denial of the Government's motion for rehearing, which sought to introduce as new evidence, officer affidavits and Dickerson's written statement, which existed and which the Government possessed at the time of the original hearing.[67] In its search for the ap-

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[59] *See id.* at 677-78.

[60] *See id.* at 677, n 10. (concluding, *inter alia*, that the Supreme Court had concluded that 18 USC § 3731 provides the government with the statutory authority to appeal a decision denying a government motion for reconsideration.) *See id.*

[61] *See Dickerson*, 166 F.3d at 678 (citing United States v. Hassan, 83 F.3d 693, 696 (5th Cir. 1996); United States v. Roberts, 978 F.2d 17, 20 (1st Cir. 1992); United States v. Buffington, 815 F.2d 1292, 1298 (9th Cir. 1987)).

[62] *See id.* at 678.

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See id.* at 680; 692.

[67] *See Dickerson*, 166 F.3d at 678-81. The government sought to have the suppression hearing reopened so as to admit the affidavits of Detective Durkin and Agent Wenko and Dickerson's hand-written statement, in which he admitted having been read his *Miranda* warnings prior to making the statements excluded by the district court. The Government of-

propriate governing rule, the circuit court held that the district court's reliance on a rule of federal civil procedure, while instructive, was not binding in the criminal context.[68] Noting that the federal rules of criminal procedure strictly prohibit the granting of a new trial based on the desire to introduce evidence that existed at the time of trial, the Fourth Circuit determined that the Government had not requested a new trial, but rather had requested a rehearing of a motion to suppress evidence.[69] Therefore, having found no contrary authority, the court held that a district court is not prohibited from reopening a suppression hearing based solely on the movant's desire to introduce evidence that existed at the time of the

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fered two justifications for not including these items in evidence during the suppression hearing nor introducing them in its supplemental memorandum.

The Government first asserted error of prosecutorial strategy based on the belief that the testimony of Special Agent Lawlor regarding when the reading of the *Miranda* warnings occurred, would be sufficient to overcome any assertion by Dickerson that his statements were made prior to being informed of his *Miranda* rights. The court found this argument unfounded given that the Government had been given a chance, after the hearing, to supplement its memorandum and even in light of the district court's findings, failed to introduce the affidavits and Dickerson's statement at that time.

The Government then argued that it would have been burdening the court with cumulative evidence if the prosecution had introduced these items into evidence. The Circuit Court found this argument flawed as well because to be needlessly cumulative, each piece of evidence would go to making the same proof. Since the Government asserted that the addition of the affidavits and Dickerson's statement would have lead to a different outcome, these items do not prove the same facts and therefore are by definition not needlessly cumulative. *See id.* at 678-81.

[68] *See id* at 678-79. In the absence of a federal rule of criminal procedure addressing the issue of what showing must be made by a party moving for reconsideration for the purpose of introducing evidence it had at the time of the suppression hearing, the district court relied on the analogous Federal Rule of Civil Procedure 59(e) which, "requires a showing that the evidence supporting a motion for reconsideration was not available at the time of the initial hearing." *See id.* at 678-79.

The 4th Circuit found that while this rule was instructive it was not binding in the criminal context holding that simply because "evidence was available to the movant prior to the suppression hearing [this] does not, as a matter of law, defeat a motion for reconsideration in a criminal case." *See id.*

Without creating a hard fast rule for criminal cases, the 4th Circuit stated that when a party makes a motion for reconsideration based on evidence that he had in his possession at the time of the original hearing, that movant, "must provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress." *See id.*

[69] *See id.* at 679 n.11.

original suppression hearing.[70]

Because the district court could have granted the motion for reconsideration in this context, yet failed to do so, the Fourth Circuit then reviewed the district court's denial and sought to determine the appropriate standard of review to apply in determining whether the district court's denial was proper.[71] Relying on guidance from other circuits,[72] the court chose the abuse of discretion standard as the proper standard of review.[73] The court then provided guidance in applying the abuse of discretion standard by holding that before the circuit court can find that a district court abused its discretion by denying a motion for reconsideration based on the Government's desire to introduce new evidence that existed at the time of the hearing, "movant must provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress . . . ."[74] Pursuant to this rule, the Fourth Circuit then considered the reasons offered by the Government for its failure to introduce evidence.[75]

The Government made proffered two excuses for not introducing the evidence at the original suppression hearing.[76] First, the Government stated that it thought that introduction of Special Agent Lawlor's testimony would provide sufficient evidence to defeat Dickerson's motion to suppress.[77] Second, the Government urged that introduction of the affidavits and Dickerson's written statement would have "burdened the district court with cumulative evidence."[78] Before addressing the Government's arguments, the court focused on what would turn out to be the dispositive issue of timing.[79]

While considering the legitimacy of the Government's explanations, the Cir-

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[70] *See id.*

[71] *See id.* at 677-678.

[72] *See id.* at 678.

[73] *See Dickerson*, 166 F.3d at 678.

[74] *Id.* at 679.

[75] *See id.* at 679.

[76] *See id.*

[77] *See id.*

[78] *See id.*

[79] *See Dickerson*, 166 F.3d at 679.

cuit Court found that the Government had been granted opportunities to introduce the evidence prior to, during, and even after the hearing.[80] Based on this fact alone, the Fourth Circuit found the Government's reasons untenable.[81] The court posited that if prior to and during the hearing, the Government failed to introduce evidence because it misjudged the credibility the court would grant to evidence already introduced, surely "[a]fter the hearing . . . the Government should have been firmly disabused of any misconceptions concerning whom the district court would find more credible . . . and . . . should have known after the hearing that additional evidence was not only not needlessly cumulative, but absolutely necessary."[82] As such, the Fourth Circuit found that the district court had not abused its discretion by denying the government's motion for reconsideration.[83] Having decided that the district court had acted within its discretion,[84] the court then turned its attention to the more difficult and challenging issue of voluntarily extracted, pre-Mirandized confessions which, pursuant to § 3501, should be admissible in federal court and, yet under *Miranda* are not.[85]

The Fourth Circuit Court of Appeals based its ability to review this constitutional issue on the theory that the district court's denial of the motion was an abuse of discretion if the district court had made an "error of law."[86] In its motion for reconsideration, the Government asserted that the standard for deter-

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[80] *See id.*

[81] *See id.*

[82] *Id.* at 679-80. The Circuit Court found that the Government had at least three separate opportunities to introduce the evidence that it sought to have admitted upon rehearing. These opportunities included its response memorandum answering Dickerson's call for suppression of the statements at issue, the actual suppression hearing itself and in a supplemental brief called for by the District Court subsequent to the hearing. The Government failed to introduce the evidence at all three of these stages. *See id.*

[83] *See id.* at 681.

[84] *See id.* at 680.

[85] *See Dickerson*, 166 F.3d at 680 – 95.

[86] *Id.* at 680 (quoting Koon v. United States, 518 U.S. 81 (1996)). The court appears to suggest that the error of law need not occur in the denial of the motion for reconsideration itself. Although the court was not clear on this point, this case demonstrates that errors of law in the original suppression hearing provide a sufficient basis for holding that a district court's refusal to grant a rehearing on which law should apply is an abuse of discretion. While this may be an abuse of discretion, it is not without remedy. In the normal course of a criminal trial, the Government would be permitted to appeal the district court's granting of defendant's motion to suppress a confession at the conclusion of the trial.

mining the constitutionality, and subsequently the admissibility of a confession in federal cases, is governed by § 3501 and not *Miranda*.[87] The court reasoned that if § 3501 governed, an error of law would be found because the district court would have applied the wrong standard in its decision.[88] In this context, the court took the highly unusual step of considering, *sua sponte*, which standard should apply.[89]

In its attempt to determine which standard applies, *Miranda* or § 3501, the Circuit Court found two questions controlling.[90] The first question queried whether "Congress intended to supersede" *Miranda* with § 3501.[91] If so, then the court would have to address a second question, whether Congress acted within its constitutional authority in attempting to legislatively dispense with the safeguards enumerated by the Supreme Court in *Miranda*.[92] If so, then § 3501 would be the applicable standard for determining the admissibility of confessions in federal court as opposed to the rule set forth in *Miranda*.[93]

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[87] *See id.* at 680 n.14. The Court makes note of the fact that "[a]lthough raised by the Government in its motion for reconsideration, the applicability of § 3501 was not briefed by the Government on appeal." However, the court then dismisses this lack of briefing by the Government based on the fact that the Washington Legal Foundation and the Safe Streets Coalition moved to file a joint brief as *amici* and that this unopposed motion was granted under Local Rule 27(c). *Id.*

[88] *See id.*

[89] *See id.* This case presents an unusual situation in that the Government did not argue that § 3501 is the standard for determining the constitutionality of confessions in the federal system. In spite of the Government's refusal to rely on § 3501, the court, *sua sponte*, addressed the issue, even though the Government refused to brief the issue.

The court relied solely on an amicus brief by the Washington Legal Foundation and the Safe Streets Coalition for presentation of the argument and even went so far as to permit the extraordinary step of allowing *amici* to address the court and argue the issue, despite the government's lack of reliance on § 3501. *See id.; See also, id.* at 695-97 (Michael, Cir. J., dissenting in part and concurring in part) (arguing that the court improperly addressed the issue of § 3501 because it was not properly before this court as an issue for review); Davis v. United States, 512 U.S. 452, 457, note *. (declining the invitation of *amici* to consider 18 U.S.C. § 3501 where the Government does not rely on the statute.)

[90] *See id.* at 680.

[91] *See Dickerson*, 166 F.3d at 680.

[92] *See id.*

[93] *See id.*

In beginning the discussion, Judge Williams offered a brief chronology of the history of confessions.[94] Judge Williams first touched on the early common law treatment of confessions and their virtually unrestricted use at trial.[95] Judge Williams then detailed the rise of the voluntary confession standard and its nearly 180 year unchallenged reign as the standard for admissibility.[96] Next, the Judge addressed the adoption of *Miranda*, declaring that *Miranda* "announced a new analytical approach to the admissibility of confessions."[97] Judge Williams

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[94] *See id.* at 684-685.

[95] *See id.* at 684. The court relayed the common law treatment of confessions as follows:

At early common law, confessions were admissible at trial without restrictions. In the latter part of the eighteenth century, however, courts began to recognize that certain confession were not trustworthy. Although several tests were developed to determine whether a confession was trustworthy, a confession was generally though to be reliable only if made voluntarily.

In *Hopt v. Utah,* the Supreme Court specifically adopted the common law rule that a confession was reliable, and therefore admissible, if it was made voluntarily. In subsequent cases, the Supreme Court applied the common law test of voluntariness to confessions. Similarly, in *Wilson v. United States,* the Supreme Court specifically held that the failure to warn a suspect of his right to remain silent and of his right to counsel did not render a confession involuntary.

In *Bram v. United States,* the Supreme Court asserted, for the first time, a constitutional basis for its requirement that a confession be made voluntarily. According to the Court, the Fifth Amendment privilege against self incrimination 'was but a crystallization' of the common law rule that only voluntary confession are admissible as evidence. Although the Supreme Court – prior to Miranda – would eventually place less reliance upon the approach taken in *Bram*, the Supreme Court in *Brown v. Mississippi*, invoked another constitutional basis for its requirement that a confession be made voluntarily: the Due Process Clause. Thereafter, a confession was admissible only if voluntary within the meaning of the Due Process Clause.

Thus, prior to Miranda, the rule governing the admissibility of confessions in federal court – if not the rule's justification – remained the same for nearly 180 years: confessions were admissible at trial if made voluntarily. Indeed, in *Lisenba v. California,* the Supreme Court specifically referred to "voluntariness" as the federal test for determining the admissibility of confessions.

Id. (citations omitted).

[96] *See Dickerson,* 166 F.3d at 684.

[97] *See id.* at 685.

suggests that the chronicle ended with the enactment of § 3501[98] and the majority's conclusion that this statute had ". . .the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court."[99] The Judges supported this conclusion with a lengthy discussion of legislative history.[100] Having effectively demonstrated that Congress clearly intended to overrule the Supreme Court's decision in *Miranda* and replace the enumerated safeguards with the case-by-case voluntariness standard,[101] Judge Williams' opinion then turned to the larger question of congressional authority to enact § 3501 under the Constitution.[102]

Tackling the issue of congressional authority, the Fourth Circuit looked first to scholarly opinion for guidance on the subject, concluding that most scholars have focused on the wrong question.[103] The court suggested that most academic discussion to date had revolved around the question of whether *Miranda* should have been overruled and not the question of whether Congress had the power to overrule it through legislative enactment.[104] The court clearly believed that the second question carried more importance, for if Congress did not have the authority to overrule *Miranda*, then the debate over whether Congress should overrule *Miranda* truly becomes an academic one.[105] Finding legal scholarship

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[98] *See id.*

[99] *Id.* at 686.

[100] *See id.* at 686-87. (citing the Senate Report accompanying § 3501 and noting that the Report, "specifically stated that 'the intent of the bill is to reverse the holding of *Miranda.*' Indeed, although acknowledging that 'the bill would also set aside the holdings of such cases as *McNabb* and *Mallory*, the Report stated that *Miranda* 'is the case to which the bill is directly addressed.'") (citations omitted).

The majority also cites the statements of Rep. Celler, Rep. Corman, Rep. Poff, Rep. Taylor, Rep. Randall and Rep. Pollock finding that they each made note of Congresses intention to overrule *Miranda* in their speeches on the floor of the House of Representatives. *See id.*

[101] *See id.* at 687.

[102] *See Dickerson,* 166 F.3d at 687.

[103] *See id.* at 687. The court suggested that the literature focused on the overall impact *Miranda* has had on law enforcement, either positive or negative. However, the court cites only two scholars, namely Professor Paul Cassell and Professor Stephen Schulhofer in support of this position.

[104] *See id.*

[105] *See id.*

lacking of any real relevance, the court set forth the question in more appropriate terms.[106]

The court framed the real issue as a question of ". . .whether the rule set forth by the court in *Miranda* is required by the Constitution."[107] If the constitution requires the *Miranda* safeguards, then Congress acted outside its authority when it passed § 3501 and therefore § 3501 is unconstitutional, leaving the *Miranda* rule to govern the admissibility of confessions. If the *Miranda* safeguards are not constitutionally based, then § 3501 overrules *Miranda* and therefore, governs.[108] Having restated the question, the court then turned to an analysis of how other federal courts had addressed this question.[109]

The majority reviewed the legal decisions of other federal courts that had utilized the same analysis, yet in a different context, that of determining whether § 3501 or the *McNabb/Mallory* standard governed confession admissibility.[110] Despite claiming that several courts found that Congress had constitutional authority to enact § 3501,[111] the court proceeded to cite only the Eighth and Sixth Circuits.[112] Claiming that the Eighth and Sixth Circuits had found that the

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[106] *See id.* at 687-88.

[107] *Dickerson*, 166 F.3d at 687-88.

[108] *See id.* at 687. In *Dickerson*, the court formulated the question as follows:

> If [the *Miranda* rule] is [required by the Constitution], Congress lacked the authority to enact § 3501, and *Miranda* continues to control the admissibility of confessions in federal court. If it is not required by the Constitution, then Congress possesses the authority to supersede *Miranda* legislatively, and § 3501 controls the admissibility of confessions in federal court.

Id. (citations omitted).

[109] *See id.* at 688.

[110] *See id.* In *McNabb v. United States*, 318 U.S. 332 (1943), the Supreme Court considered the admissibility of a confession taken after a suspect's arrest and prior to his arraignment. The Court held that under its power to supervise the federal courts it could require the exclusion of a confession taken in this context if an unreasonable delay existed between arrest and arraignment. *See id.* at 343-44. In Mallory v. United States, 354 U.S. 449 (1957), the Supreme Court found further support for its ability to require exclusion of confessions in the *McNabb* context based on Federal Rule of Criminal Procedure 5(a). *See id.* at 455-56.

[111] *See id.* at 688.

[112] *See id.* (citing United States v. Pugh, 25 F.3d 669 (8th Cir. 1994) (holding that con-

McNabb/Mallory rule, "was not required by the Constitution," the Fourth Circuit concluded that its sister courts had "little difficulty concluding that Congress possessed the legislative authority to overrule both cases."[113] With this in mind, the court began its search for an answer with a review of the *Miranda* decision.[114]

The Fourth Circuit utilizes the *Miranda* Court's own language to attack the constitutional supports for the safeguards set forth in that opinion.[115] A negative inference is drawn from the lack of affirmative language referring to the warnings as constitutional rights.[116] The majority contorts the flexibility that the *Miranda* Court built into its own opinion to support this negative inference.[117] Having laid siege upon the opinion itself, Judge Williams then detailed the tortured and painful evisceration that *Miranda* has undergone since the Warren court handed down its opinion in 1966.[118]

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gress had superceded the *McNabb/Mallory* rule by enacting § 3501 and that § 3501 governed the admissibility of confessions taken in custody despite that fact that an unreasonable delay existed between arrest and arraignment); United States v. Christopher, 956 F.2d 536 (6th Cir. 1991) (finding § 3501 superceded *McNabb/Mallory*, and therefore governed confession admissions in federal court)).

[113] *Dickerson*, 166 F.3d at 688 (citing *Pugh*, 25 F.3d at 678; *Christopher*, 956 F.2d at 538-39). It should be noted that both of these cases were pre-*Miranda* cases and the court's reliance on them in a post-*Miranda* argument may not prove persuasive. These cases dealt with delays in the arraignment process and not Constitutionally required minimal safeguards that assure appraisal of the right of silence and the continuous opportunity to exercise this constitutionally protected right. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[114] *See id.* at 688.

[115] *See id.* at 688-89.

[116] *See id.*

[117] *See id.* (taking the Court's own words out of context and asserting that:

> the Court acknowledged that the Constitution did not require the warnings, disclaimed any intent to create a 'constitutional straightjacket', repeatedly referred to the warnings as 'procedural safeguards', and invited Congress and the States 'to develop their own safeguards for protecting the privilege.')

Id. (citations omitted).

[118] *See id.* For a more detailed recounting of the initial expansion and then the extreme narrowing that the opinion has undergone, *see generally*, Leslie A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727 (1999).

The majority discussed a line of cases which created numerous exceptions to *Miranda's* exclusionary rule and the broadened these exclusions over time.[119] First, the court cited Harris v New York[120] which created an exception to *Miranda*, by permitting the admission of statements made prior to receiving warnings in order to attack the credibility of a suspect.[121] Second, the court discussed Michigan v. Tucker,[122] where the Supreme Court refused to apply the "tainted fruits" fruits doctrine to a witnesses testimony even thought to witness' identity resulted from a defendant's statements made prior to receiving *Miranda* warnings.[123] Third, the court detailed the creation of the emergency exception in New York v. Quarles.[124] Finally, the Fourth Circuit addressed the Supreme Court's refusal to apply the "tainted fruits" doctrine in Oregon v. Elstad.[125] This tail of destruction and evisceration ended with the conclusion that:

the irrebuttable presumption created by the Court in *Miranda*. . .is *a fortiori* not required by the Constitution . . . and . . . [accordingly], Congress necessarily possesses the legislative authority to supersede the conclusive presumption created by *Miranda* pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts.[126]

The court concluded that *amici* presented the correct argument.[127] The court found that 18 U.S.C. § 3501 was enacted under color of congressional authority[128] and intended to eliminate the presumption created by the Court in *Miranda*.[129] The Fourth Circuit held that *Miranda* was legislatively overruled by

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[119] *See Dickerson*, 166 F.3d at 688-90.

[120] 401 U.S. 222 (1971).

[121] *See Dickerson*, 166 F.3d at 689.

[122] 417 U.S. 649 (1984).

[123] *See Dickerson*, 166 F.3d at 689.

[124] 467 U.S. 649 (1984).

[125] 470 U.S. 298 (1985).

[126] *Dickerson*, 166 F.3d at 690-91.

[127] *See id.*

[128] *See id.* (finding that Congress had the authority to overrule the *Miranda* presumption based on its ability to "prescribe the rules of procedure and evidence in federal courts.") *Id.*

[129] *See id.* at 692. It is interesting to note that most opponents of *Miranda* focus solely

Congress' passage of § 3501[130] and that this rule, not *Miranda*, governs the admissibility of confessions in federal courts.[131]

The court then instructed that the normal procedure would be to "remand the case for a determination of whether Dickerson's confession was voluntary" because factual determinations are not reviewable on appeal.[132] However, the majority then determined that remand was unnecessary because the lower court had already made the factual determination that Dickerson's confession was voluntary.[133] Therefore, the court ordered that the "voluntary," yet un-*Mirandized*, confession be admitted into evidence in accordance with 18 U.S.C. § 3501.[134]

Judge Michael dissented from the portion of the majority's opinion that addressed which standard applies to the admission of confessions in federal courts,[135] but concurred with that portion of the majority's opinion that focused on search warrant issues.[136] Judge Michael dissented from the main portion of

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on the presumption that a confession obtained without warnings is involuntary. What is often omitted from the presentation is the fact that the presumption also tends to run the other direction in that a confession obtained post warning and waiver is presumed voluntary. If fact there have been only 2 cases where the Supreme Court has found that a confession obtained post-warning was, nevertheless, involuntary and therefore inadmissible. *See* Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2015-21 (discussing Mincey v. Arizona, 437 U.S. 385 (1978) and Colorado v. Connelly, 479 U.S. 157 (1986) and the Court's application of the voluntariness standard to confessions elicited after Miranda warnings were provided to the suspect.)

[130] *See id.* at 692.

[131] *See id.*

[132] *See Dickerson*, 166 F.3d at 692.

[133] *See* United States v. Dickerson, 971 F. Supp. 1023, 1024 n.1 (E.D. Va. 1997), *rev'd*, 166 F.3d 667 (4th Cir. 1999), *cert. granted in part*, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000).

[134] *See* United States v. Dickerson, 166 F.3d 667, 692-93 (4th Cir. 1999), *cert. granted in part*, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000). The court then entered into a discussion of warrant requirements which, while worthy of discussion, are beyond the scope of this comment and will therefore be left to the reader's discretion. *See id.* at 693-95.

[135] *See id.* at 695-98 (Michael, Cir. J., dissenting in part and concurring in part). *See id.* As this part of Judge Michael's opinion is relevant to the issues addressed in this comment it will be set out in the discussion to follow.

[136] *See id.* at 698 (Michael, Cir. J., dissenting in part and concurring in part). As this part of Judge Michael's opinion is not relevant to the issues addressed in this comment no there will be no further discussion of this portion of the Judge's opinion.

the majority's opinion and, therefore, would have upheld the denial of the motion for a rehearing thereby supporting the exclusion of Dickerson's confession.[137]

In what can only be characterized as a scathing dissent, Judge Michael called the majority to task for its activism and its "reach to inject § 3501 into [its consideration of] this case."[138] The dissent took exception to the majority's assertion that simply because the Department of Justice will not defend the constitutionality of §3501, the court should take it upon itself to address this issue.[139] The dissent also objected to addressing a constitutional issue of first impression upon which neither party relied, briefed or argued.[140] Finally, Judge Michael asserted that the majority inappropriately exercised its discretion in considering § 3501[141] and called for judicial restraint on behalf of the majority, cautioning that the court ". . .should stay away from the § 3501 issue."[142]

Judge Michael mainly objected to the majority's decision because taking the extraordinary step of addressing § 3501, *sua sponte*, directly defied Supreme Court precedent.[143] In *Davis v. United States,*[144] the Supreme Court refused to address the constitutionality of § 3501 solely at the invitation of an *amicus*.[145] Discounting the majority's attempt to factually distinguish *Davis* from *Dickerson,* the dissent found the issue at bar identical to that mentioned in *Davis*.[146] Accordingly, Judge Michael asserted that the Fourth Circuit should have fol-

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[137] *See id.* at 698.

[138] *Dickerson,* 166 F.3d at 667, 695 (Michael, Cir. J. dissenting in part and concurring in part).

[139] *See id.*

[140] *See id.* at.695-96.

[141] *See id.* at 696

[142] *Id.* at 696.

[143] *See id.* (citing Davis v. United States, 512 U.S. 452, 457 n.* (1994) (specifically rejecting an *amicus* invitation to consider the constitutionality of § 3501)).

[144] 512 U.S. 452 (1994).

[145] *See id.* at 457 n.* (1994).

[146] *See Dickerson,* 166 F.3d at 696 (Michael, Cir. J. dissenting in part and concurring in part).

lowed the Supreme Court's lead by refusing to address § 3501, *sua sponte*.[147] Having concluded that *stare decisis* counsels against the Fourth Circuit's actions, Judge Michael then moved to a discussion of prudential concerns that support following the Supreme Court's precedent.[148]

Judge Michael's dissenting opinion sets forth three prudential reasons why the majority should have refrained from addressing the § 3501 issue.[149] Michael's first objection was based on separation of powers principles.[150] His second concern rested in the notion that the courts of appeals should resolve issues actually presented and argued by the parties in the case.[151] The Judge's third prudential contention asserted that congressional hearings, delving into the Department of Justice's refusal to invoke § 3501, would be the more appropriate remedy and one that is consistent with separation of powers principles.[152] For these reasons Judge Michael eventually opined that the court should not invoke § 3501 and, therefore, the district court's order should stand.[153]

III. ANALYSIS OF THE *DICKERSON* OPINION

Judges Williams and Kiser abused their discretion in addressing, *sua sponte*, the constitutionality of § 3501, a statute, which the parties in the case neither relied, briefed nor argued on appeal.[154] The Fourth Circuit also failed to consider whether its actions would usurp the power of the executive branch with regard to controlling the prosecution process, a violation of separation of powers principles.[155] In addition, by stepping into the shoes of the executive and deciding that

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[147] *See id.* at 697.

[148] *See id.*

[149] *See id.*

[150] *See id.*

[151] *See Dickerson*, 166 F.3d at 697 (Michael, Cir. J. dissenting in part and concurring in part).

[152] *See id.*

[153] *See id.* at 698.

[154] *See id.* at 695-98.

[155] *See id.* at 696-97. *See also*, Brief of Benjamin R. Civiletti *Amicus Curiae* at 7-16, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000) [hereinafter Civiletti].

this court had the power to enforce statutes that the executive chose not to enforce,[156] the court circumvented the normal remedy for dealing with executive refusal to enforce constitutionally enacted legislation, congressional hearings.[157] Next, even if the court did not abuse its discretion in addressing the conflict between § 3501 and *Miranda*, the court's holding that Congress overruled *Miranda* by enacting § 3501 overlooks significant differences between what *Miranda* protects and what § 3501 protects.[158] Finally, Judges Williams and Kiser discounted several prudential concerns that support maintaining the safeguards required by the Supreme Court in *Miranda*.[159] The *Dickerson* majority took a constitutionally unsupportable, activist approach in addressing § 3501's constitutionality, *sua sponte*. Accordingly, the court's decision should be overturned by the Supreme Court.

SUA SPONTE REVIEW OF CONSTITUTIONAL ISSUES OF FIRST IMPRESSION

Appellate courts play a very specific role in an adversarial system. They act, "essentially as arbiters of legal questions presented and argued by the parties before them."[160] In fulfilling this role, the courts of appeals commonly refuse to review questions not argued in the lower courts or issues that neither party presents.[161] This common practice of judicial restraint is premised on the courts' reluctance to answer questions not presented for review.[162] *Dickerson* is one such

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[156] *See Dickerson*, 166 F.3d at 672 (citing Letter from Janet Reno, Attorney General, to Congress (Sept. 10, 1997) (asserting that the Department of Justice would not defend § 3501, as it is believed to be unconstitutional)).

[157] *See id.* at 697. *See also*, Civiletti, *supra* note 155, at 7-16 (asserting that the constitutionality of § 3501 "is reviewable in other forums – by Congress and ultimately by the people at election time."). *Id.*

[158] *See* Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice at 18-19, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000) [hereinafter NACDL Brief] (arguing that "§ 3501 does not create *any* procedural safeguards at the time of custodial interrogation" in opposition to the Supreme Court's finding that the Constitution requires "procedural protection at the time of interrogation.") *Id.*

[159] *See id.* at 20-29.

[160] *Dickerson*, 166 F.3d at 697 (citing Carducci v. Regan, 230 U.S. App D.C. 80 (D.C. Cir. 1983).

[161] *See* Davis v. United Sates, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (recognizing that not considering arguments not raised is "proper" but then asserting that this is merely a "prudential practice.").

case.

In *Dickerson*, the Department of Justice specifically refused to invoke § 3501.[163] It had been the consistent policy of the Department of Justice to refuse to invoke § 3501 since its enactment into law.[164] This policy was based on the argument that § 3501 was unconstitutional.[165] Therefore, enforcement of such a statute would be in violation of the executive's obligation to comport with the constitution in its enforcement of the law.[166] Consequently, in order to meet its obligations under the constitution, the executive branch, through the actions of the Department of Justice, had a solid basis for refusing to rely on § 3501.[167] As a result of the Justice Department's refusal to invoke § 3501 the Fourth Circuit Court of Appeals was not asked by the prosecution to determine the admissibility of Dickerson's confession under this statute.

It was unlikely that the defense would raise the § 3501 issue.[168] The defense

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[162] The two notable exceptions to this practice are jurisdiction and standing. *See* United States v. Dickerson, 166 F.3d 667, 696 (4th Cir. 1999), *cert. granted in part,* Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000) (citing Mt. Healthy City Sch. Dist. B. of Educ. v. Doyle, 429 U.S. 274, 278 (1997) (asserting that courts must address the issue of federal jurisdiction, sua sponte); Juidice v. Vail, 430 U.S. 327, 331 (1977) (noting that the case-or-controversy requirement of Art. III obligates the Court to address standing issues, whether raised by the parties or not)). The constitutionality of § 3501 falls under neither of these specific categories. *See id.*

[163] *See Dickerson,* 166 F.3d at 672.

[164] Since passage of § 3501 in 1968 no attorney general has ever invoked this statute in a federal prosecution. *See* Davis v. United States, 512 U.S. 452, 464 (1994) (citing Office of Legal Policy, U.S. Dept. of Justice, Report to Attorney General on Law of Pre-Trial Interrogation 72-73 (1986) (discussing the historical reluctance of the executive to invoke § 3501 since its beginnings in 1968)). Some Attorney's General have even refused to brief the issue of § 3501 applicability to a case despite the federal court order that they do so. *See Dickerson,* 166 F.3d at 682 (discussing the Fourth Circuit Court of Appeals order as part of *United States v. Leong,* 116 F3d 1474 (4th Cir. 1997) (unpublished) (ordering the United States Department of Justice to address the issue of the constitutionality of § 3501)).

[165] *See* Letter from Janet Reno, Attorney General, to Congress (Sept. 10, 1997) (asserting the intention of the Department of Justice to refuse to defend the constitutionality of § 3501 based on its unconstitutionality).

[166] *See* U.S. CONST. art. II, § 3; *See also,* Letter from Janet Reno, Attorney General, to Congress (Sept. 10, 1997) (asserting the intention of the Department of Justice to refuse to defend the constitutionality of § 3501 based on its unconstitutionality).

[167] *See* Civiletti, *supra* note 155, at 7-8.

[168] *See Dickerson,* 166 F.3d at 680-84.

in *Dickerson* successfully argued that Dickerson's confession, while voluntary, had been elicited in violation of *Miranda*.[169] It would have been ill-advised for the defense to mention § 3501, because if this statute controlled, as opposed to *Miranda*, then Dickerson's confession would be permitted to enter the record as evidence against him.[170]

The Washington Legal Foundation and the Safe Streets Coalition filed an *amicus* brief on behalf of the prosecution.[171] This "non-party" addressed the issue of §3501's constitutionality and its applicability in *Dickerson*.[172] *Amici* requested permission to address the court by utilizing a portion of the time allotted to the U.S. Government for presentation of its argument.[173] The Fourth Circuit granted the request and permitted *amici's* participation in oral argument.[174] In both its brief and oral argument, *amici* requested a review of § 3501 in the specific context of this case.[175]

Based on the arguments presented in *amici's* brief and oral presentation, the court decided that it was proper to address the constitutionality of § 3501, despite its being a constitutional issue of first impression.[176] This act was an abuse of discretion on behalf of the Fourth Circuit, because neither "party" relied or invoked the statute nor briefed or argued the issue of the statute's constitutionality.[177] The Fourth Circuit, thereby, defied Supreme Court precedent by addressing it, *sua sponte*.[178]

The Supreme Court had addressed this very situation in *Davis v. United*

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[169] *See id.* at 675.

[170] *See id.* at 683.

[171] *See id.* at 680 n.14.

[172] *See id.*

[173] *See id.*

[174] *See Dickerson*, 166 F.3d at 680 n.14. The court acknowledged that granting such a request is an extraordinary event. The court justified granting such a request on the grounds that "the Department of Justice's refusal to defend the constitutionality of an act of Congress is an extraordinary event" *Id.*

[175] *See id.*

[176] *See id.* at 683; Davis v. United States, 512 U.S. 452, 457 n.* (1994).

[177] *Dickerson*, 166 F.3d at 680 n.14.

[178] *See Davis*, 512 U.S. at 457 n.* (1994).

States.[179] The majority in *Davis* clearly rejected an invitation to address § 3501's constitutionality when requested to do so only by *amici*.[180] In declining to address this issue the Court acknowledged having previously considered arguments briefed only by *amici*,[181] yet stated it would be "reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position."[182] Realizing that *Davis* had binding potential and could prevent the court from addressing the issue of §3501, the majority in *Dickerson* tried unsuccessfully to distinguish *Davis* on prudential grounds.[183]

The majority in *Dickerson* argued that *Davis* did not prevent Fourth Circuit review of the constitutionality of § 3501.[184] The majority reasoned that *Davis* addressed ambiguous references to the right to counsel, unlike *Dickerson*, which involved the right to silence.[185] As such, the Supreme Court in *Davis* had no occasion to address the constitutionality of § 3501 as this relates solely to the right to silence.[186] Because the Court could dispose of the case by resolving the invocation of counsel issue and the Fourth Circuit could treat any references to § 3501 as dicta, which have no binding effect upon the court.[187] By taking this position, the Fourth Circuit completely disregarded the Supreme Court's established reason for specifically refusing to address the constitutionality of § 3501, namely the Department of Justice's express refusal to take a position on the issue.[188] The Supreme Court refused to inappropriately exercise its discretion at

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[179] 512 U.S. 452 (1994).

[180] Interestingly enough, the *amici* urging, *sua sponte*, consideration of the constitutionality of § 3501 in both *Davis* and *Dickerson* is the Washington Legal Foundation and the Coalition for Safe Streets. *See Davis* at 457, n.*; *Dickerson*, 166 F.3d at 680 n.14.

[181] *See Davis*, 512 U.S. at 457 n.* (1994) (citing Teaque v. Lane, 498 U.S. 288, 300 (1989)).

[182] *See id.*

[183] *See Dickerson*, 166 F.3d at 683.

[184] *See id.*

[185] *See id.*

[186] *See id.*

[187] *See id.*

[188] *See* Davis v. United States, 512 U.S. 452, 457 n.* (1994)

the mere invitation of an *amicus*,[189] while Judges Williams and Kiser defied the Supreme Court in deciding to ignore binding precedent and abuse theirs.[190]

IV. SEPARATION OF POWERS

The American political system is based on a delicate balance between three branches of government with each branch having a significant and valuable role to play.[191] The executive "faithfully execute[s] the laws according to the constitution."[192] Congress establishes and controls the inferior courts by enacting legislation, investigates executive action or inaction through public hearings and has the authority to propose amendments to the constitution.[193] The judiciary "say[s] what the law is."[194] The Fourth Circuit disregarded this balance of power when deciding *Dickerson*.

A. THE EXECUTIVE BRANCH AND PROSECUTORIAL DISCRETION

The constitution charges the executive branch with the duty to "take Care that the Laws be faithfully executed."[195] It follows that the President and his appointees must carry out this duty in accordance with the constitution.[196] As such,

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[189] *See id.*

[190] *See Dickerson*, 166 F.3 at 683.

[191] *See* U.S. CONST. art. I, § 1.; (providing that legislative power resides in the Congress); U.S. CONST. art. II, § 1 (providing that executive power resides in the President); U.S. CONST. art. III, § 1 (providing that judicial power resides in the Supreme Court and other inferior courts). *See generally*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[192] U.S. CONST. art. II, § 3, (stating "[the President] shall take care that the laws be faithfully executed . . . ."

[193] U.S. CONST. art. I, § 1, (granting all legislative power to the Congress); U.S. CONST. art. I, § 8, cl. 9 (providing the power to establish federal courts); CRAIG R. DUCAT & HAROLD W. CHASE, CONSTITUTIONAL INTERPRETATION 150 (5th ed. 1992) (discussing investigation of the executive as an inherent legislative power); U.S. CONST. art. V. (granting Congress the power to propose amendments to the Constitution).

[194] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[195] U.S. CONST. art. II, § 3. *See also*, Civiletti, *supra* note 155, at 7-12.

[196] *See* Civiletti, *supra* note 155, at 9 (recognizing that the Attorney General and United States Attorneys are appointees of the President and have the statutory authority to assist him in discharging of his constitutional duties and they therefore, "have broad discretion to enforce the criminal laws.").

if the Executive believes that enforcement of a statute passed by Congress would violate the Constitution, the Executive has an obligation to either not enforce the unconstitutional statute or find a means of enforcing the statute that conforms to the Constitution.[197] This separation was created as a counter balance to the legislative authority granted to Congress.[198]

Given this unquestionable balance of power, if the Executive in its capacity as enforcer of the laws believes a law to be unconstitutional, it must refuse to enforce that law.[199] Otherwise, the Executive itself would be in violation of the Constitution.[200] It follows that the Executive has not only the power, but also a constitutional duty, to refuse to enforce unconstitutional legislation.[201] This is exactly what the executive branch has done in its refusal to utilize § 3501 in federal criminal prosecutions.[202]

The authority to direct prosecutions is housed in the executive branch.[203] It has long been recognized that the Executive alone is charged with the power to prosecute and has broad discretion in deciding how to prosecute a criminal case.[204] The prosecution's choice to present an issue or prosecute based on a particular statute clearly falls under prosecutorial discretion.[205]

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[197] *See id.* at 7-8.

[198] *See* U.S. CONST. art. I, § 1.

[199] *See* Civiletti, *supra* note 155, at 7-8.

[200] *See id.* at 8.

[201] *See id. See also,* Morrison v. Olson, 487 U.S. 654, 707 (1988) (Scalia, J., dissenting). In his dissent, Justice Scalia states that "the Executive can decline to prosecute under unconstitutional statues . . ." and that this "retaliation" is one of the checks the Executive has against congressional abuse of power. *See Id.*

[202] *See* Letter from Janet Reno, Attorney General to Congress (Sept. 10, 1997) (asserting that the administration will not defend the constitutionality of § 3501 because the statute is unconstitutional).

[203] *See* Civiletti, *supra* note 155, at 8 (citing United States v. Nixon, 418 U.S. 683, 693 (1974). *See also, Morrison,* 487 U.S. at 707-08 (Scalia, J., dissenting) (stating, "the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law . . . .") (emphasis in original). *Id.*

[204] *See* United States v. Dickerson, 166 F.3d 667, 696-97 (4th Cir. 1999) (Michael, Cir. J., dissenting in part and concurring in part) (citing U.S. v. Armstrong, 517 U.S. 456 (1996); U.S. v. Juvenile Male J.A.J., 134 F.3d 905, 907 (8th Cir. 1998)), *cert. granted in part,* Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000).

[205] *See* Civiletti, *supra* note 155, at 8 (citing United States v. Nixon, 418 U.S. 683, 693

Since its enactment into law in 1968, the executive branch has never once invoked §3501 in a federal prosecution.[206] Not only has the executive branch, through the Department of Justice, consistently refused to base even a single prosecution on this statute,[207] it has even gone so far as to forbid reliance on § 3501 by federal prosecutors.[208] The United States Department of Justice has even defied an order by the Fourth Circuit Court of Appeals, which requested that the Justice Department address the application of § 3501 in United States v. Leong, 116 F.3d 1474 (4th Cir. 1997) (unpublished).[209] In response to this order, the Department informed both the Fourth Circuit and Congress that it refused to defend the constitutionality of § 3501 in a court of law.[210]

In summary, the executive branch has the power to direct the enforcement process.[211] This enforcement process includes the power to prosecute crimi-

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(1974); Morrison v. Olson, 487 U.S. 654, 707 (1988)) (Scalia, J., dissenting) (stating "[G]overnmental investigation and prosecution of crimes is a quintessentially executive function.").

[206] *See* Davis v. United States, 512 U.S. 452, 464 (1994) (citing Office of Legal Policy, U.S. Dept. of Justice, Report to Attorney General on Law of Pre-Trial Interrogation 72-73 (1986) (discussing the historical reluctance of the executive to invoke § 3501 since its origins in 1968)).

[207] *See Dickerson,* 166 F.3d at 672 (4th Cir. 1999) (citing *Davis,* 512 U.S. at 463-64) (Scalia, J., concurring). *See also,* Office of Legal Policy, U.S. Dept. of Justice, Report to Attorney General on Law of Pre-Trial Interrogation 72-73 (1986).

[208] *See id.* at 681 (1999) (citing Letter from John C. Keeney, Acting Assistant Attorney General, to all United States Attorneys and all Criminal Division Section Chiefs (Nov. 6, 1997)).

[209] *See id.* at 682 (citing *Leong*) The court related the pertinent fact of Leong as follows:

> In June of 1997, th[e Fourth Circuit] Court issued an opinion upholding the suppression of a confession obtained in technical violation of *Miranda*. Although the United States did not seek rehearing, the Washington Legal Foundation and the Safe Streets Coalition moved th[e] court for leave to proceed as *amici curiae*. In their motion, the putative *amici* took the Government to task for failing to assert that applicability of § 3501. As a result, we ordered the Department of Justice to address the effect of § 3501 on the admissibility of Leong's confession.

Id.

[210] *See id.*

[211] *See* U.S. CONST. art. II, § 3; Civiletti, *supra* note 155, at 7-12.

nals.[212] The choice not to invoke a particular statute falls within the executive's prosecutorial discretion.[213] Refusing to defend the constitutionality of a statute that the executive believes is unconstitutional also falls within this discretion and fulfills the executive's constitutional duty to faithfully execute the laws according to the Constitution.[214] Therefore, refusal to invoke § 3501 or support its constitutionality is not only a legitimate exercise of Executive authority, but also a constitutionally mandated one.

B. CONGRESS – THE POWER TO OVERRULE MIRANDA?

The Constitution grants Congress specific powers.[215] One such power is the power to create inferior courts through legislation.[216] Another power, though not specifically provided for in the text of the Constitution, is Congress' recognized power to hold public hearings and investigate potential abuses of power by the other two branches of the federal government.[217] Congress also possesses the ability to propose amendments to the Constitution.[218] Supporters of the constitutionality of § 3501 contend that of these three powers, Congress relied upon its legislative authority in its "intentional"[219] attempt to overrule *Miranda.*[220]

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[212] *See* Civiletti, *supra* note 155, at 8. *See also,* Morrison v. Olson, 487 U.S. 654, 707(1988) (Scalia, J., dissenting) (stating, "the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law . . . .") (emphasis in original).

[213] *See* Civiletti, *supra* note 155, at 8. *See also,* Morrison v. Olson, 487 U.S. 654, 707(1988) (Scalia, J., dissenting) (stating, "the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law . . . .") (emphasis in original).

[214] *See id. See also,* Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

[215] *See* U.S. CONST. art. I.

[216] *See* U.S. CONST. art. I, § 8, cl.9.

[217] *See* DUCAT & CHASE, *supra* note 193, at 150.

[218] *See* U.S. CONST. art. V.

[219] *See* United States v. Dickerson, 166 F.3d 667, 686-87 (4th Cir. 1999) (concluding that "Congress enacted § 3501 with the express purpose of returning to the pre-*Miranda* case-by-case determination of whether a confession was voluntary."), *cert. granted in part,* Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000).

[220] *See id.* at 688 (4th Cir. 1999) (discussing whether Congress had the legislative authority to overrule *Miranda).*

Congress passed § 3501 with the expressed intent of overruling *Miranda*.[221] Congress believed it possessed legislative authority to accomplish this task. Under the Constitution Congress has the authority, "[t]o constitute tribunals inferior to the Supreme Court."[222] As a corollary to this power, Congress thereby posses the power to create the federal rules of procedure.[223] Therefore, in order to legislatively supersede *Miranda*'s warning requirements, these safeguards must be reduced to no more then "judicially created rules of evidence and procedure that are not required by the Constitution."[224] This is the claim of supporters of § 3501.[225]

Supporters of *Miranda* see the situation in an entirely different light.[226] The safeguards set forth in *Miranda* represent constitutionally required minimum procedures.[227] The right against self-incrimination is itself substantive while being procedural in its execution.[228] The manner of violating that right is through actions and procedures, the safeguards protecting that right can be no different.[229] As these procedures represent constitutionally required minimum proce-

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[221] *See id.* at 686-87.

[222] U.S. CONST. art. I, § 8, cl. 9.

[223] *See Dickerson*, 166 F.3d at 687.

[224] *See id.* at 687.

[225] *See id.* at 691 n. 21.

[226] *See* Brief for the United States at 29, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000) [hereinafter Brief for United States] (concluding that "the Court in *Miranda* expressly rested its decision on constitutional grounds); NACDL Brief, *supra* note 158, at 4 (concluding that "the Court . . . made clear that the Constitution did require *some* equally effective measures prior to custodial interrogation.") (emphasis in original); Brief of *Amicus Curiae*, The National Legal Aid and Defender Association at 15, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000) [hereinafter NLADA Brief] (concluding that "*Miranda's* procedures embody th[e] constitutional minimum."); Brief *Amicus Curiae* of the House Democratic Leadership at 5, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000) [hereinafter House Democratic Leadership] (concluding that the Supreme Court has "consistently describe[d] *Miranda* . . . as having a constitutional basis).

[227] *See Miranda*, 384 U.S. 436, 467 (1966).

[228] *See id.* at 448-57; 467-70 (discussing the procedures and circumstances of custodial interrogation, the actions of the interrogators and the responding actions of suspects and focusing not on theoretical discussions of the existence of a right but on the practical actions evidencing the exercising and infringing of the right to remain silent.)

dures they can only be replaced with others "which are at least as effective"[230] as those prescribed by the Supreme Court and subsequently reaffirmed by every Court for the past thirty years.[231] Thus it cannot be said at this late date that Congress had the authority to legislatively overrule *Miranda*.[232] If Congress truly desired to overrule *Miranda* at any time in the past thirty years it had legitimate powers by which to do so, such as amending the Constitution.

Congress posses the power to propose amendments to the Constitution.[233] Pursuant to this power it has amended the Constitution twenty seven times.[234] It is significant to note that over the past thirty years, Congress has not amended the Constitution to overrule *Miranda*.[235] This is significant because Congress has known since its passage in 1968, that § 3501 would not be enforced by the Executive.[236] Congress' failure to act to amend the Constitution demonstrates that over Congress has never intended to mount a serious challenge to *Miranda*.[237] It also supports the argument that § 3501 was "largely symbolic" legislation that "would demonstrate to the public, in an election year, a concern for law and order and an opposition to the asserted excessive leanings of the Warren Court."[238] Yet, Congressional inaction on the matter of § 3501 is not only evident in its lack of amendment activity. Congress posses another significant power at its disposal, the power to investigate through public hearings.

While not specifically provided for in the text of the Constitution, Congress

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[229] *See id.*

[230] *See id.* at 467.

[231] *See id.* at 478; House Democratic Leadership, *supra* note 226, at 5-6 (discussing the "[Supreme] Court's decades of reaffirming *Miranda*").

[232] *See* House Democratic Leadership, *supra* note 226, at 5.

[233] *See* U.S. CONST. art. V.

[234] *See* U.S. CONST. amend I-XXVII.

[235] *See id.*

[236] *See* House Democratic Leadership, *supra* note 226, at 20 (discussing the Johnson administration's interpretation of *Miranda* "as leaving Executive Branch discretion to preserve existing FBI *Miranda*-model practices, and as allowing the Attorney General to decide whether to invoke the section, which he decided against doing."). *Id.*

[237] *See id.* at 8.

[238] *Id.* at 16-17

posses the power to investigate the other branches of government through the public hearing process.[239] This power includes the ability to call upon the executive to explain its activities and to inquire into why the executive refuses to enforce constitutionally enacted legislation.[240] Again, it is significant to note that Congress has not called on the Executive to appear before Congress and explain its refusal to enforce, invoke or defend the constitutionality of § 3501, not once in over thirty years. Exercising this power is significantly less arduous then amending the Constitution and yet Congress has never sought to invoke this power.[241] In fact, Congressional enactment of § 3501 stands as the only manifestation of congressional dissatisfaction with *Miranda*.

Congress enacted § 3501 through the legislative process.[242] Congress has not amended the Constitution to address *Miranda*.[243] Congress has not called for public hearings to investigate why the Executive has refused to enforce this statute.[244] § 3501 stands as a failed attempt by Congress to legislatively overrule *Miranda*.[245] Granting Congress the ability to say what the constitution requires and overrule more then thirty years of exacting jurisprudential refinement and experienced executive law enforcement with the simple adoption of a statute would set a dangerous precedent, indeed.

C. THE JUDICIARY – POWER TO SAY WHAT THE LAW IS

The Constitution entrusts judicial power to the Supreme Court and other inferior courts.[246] In order to execute this power the Judiciary must posses the correlative power to, "say what the law is."[247] Yet, it is also recognized that this

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[239] *See* DUCAT & CHASE, *supra* note 193, at 150.

[240] *See id.*

[241] *See* Civiletti, *supra* note 155, at 15.

[242] *See* United States v. Dickerson, 166 F.3d 667, 686-87 (4th Cir. 1999) *cert. granted in part,* Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000).

[243] *See* U.S. CONST. amend I-XXVII.

[244] *See* Civiletti, *supra* note 155, at 15.

[245] *See* NACDL Brief, *supra* note 158, at 19 (concluding that "the statute is beyond the power of Congress . . . and is thereby void.").

[246] *See* U.S. CONST. art III, § 1.

[247] Marbury v. Madison, 5 U.S. (1 Cranch) 137.

power has limits.[248] Issues regarding jurisdiction and standing, demonstrate such limitations on this power.[249] Other limitations include the judiciary's inability to review actions that are clearly within the purview of the executive and legislative branches of government.[250] Judges Williams and Kiser bypassed these limitations in addressing the constitutionality of § 3501 in *Dickerson*.

In deciding *Miranda*, the Supreme Court exercised its power to say what the law is, including the power to say what the constitution requires.[251] The Court based its safeguard requirements on the constitutionally protected privilege against self-incrimination.[252] The Court noted that the Constitution "prescribes the rights of the individual when confronted with the power of government."[253] The Court concluded that it is for the suspect to decide when to exercise his rights not the authorities.[254] The Supreme Court found that the Constitution required procedural safeguards prior to the initiation of interrogation by a government agent in order to protect the exercising of constitutional rights.[255] Having found such, the Fourth Circuit and Congress are bound by this holding and do not have the power to overrule the Supreme Court.

Questions such as jurisdiction[256] and standing[257] limit the Court's ability to hear cases.[258] These limitations bind the court to such an extent that courts are bound to consider these issues regardless of their political or constitutional im-

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[248] *See* DUCAT & CHASE, *supra* note 193, at 15-21 (discussing the institutional limitations on judicial power).

[249] *See id.*

[250] *See id.* at 17, 20-21.

[251] *See supra* note 247.

[252] Miranda v. Arizona, 384 U.S. 436, 442 (1966).

[253] *Id.* at 479.

[254] *See id.* at 480.

[255] *See id.* at 467.

[256] *See* United States v. Dickerson, 166 F.3d 667, 696 (4th Cir. 1999) *cert. granted in part,* Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000); DUCAT & CHASE, *supra* note 193, at 5.

[257] *See Dickerson,* 166 F.3d at 696 (Michael, J., dissenting in part and concurring in part); DUCAT & CASE, *supra* note 194, at 16.

[258] *See* DUCAT & CASE, *supra* note 194, at 16-17.

portance.[259] Because of their special significance to a case, courts take the activist step of addressing them, *sua sponte*.[260] The question of § 3501's constitutionality falls under neither of these categories.[261] Therefore, the exercise of *sua sponte* review should err on the side of judicial restraint due to the potential for conflict with the executive's prosecutorial power.[262]

In addressing the issue of the constitutionality of § 3501, *sua sponte*, the court is substituting its own judgement for that of the executive in a matter falling squarely within the authority of the executive branch.[263] The authority to direct prosecutions is an executive function.[264] This judicial second guessing of executive actions sets dangerous precedent and must be avoided if separation of powers is to have any meaning under the Constitution.[265]

For the Forth Circuit to address § 3501 *sua sponte*, it must exercise discretion in doing so.[266] The Supreme Court has spoken and stated what the Constitution requires.[267] In addition, the issue of § 3501 is not a question of jurisdiction or standing and therefore, not central to *Dickerson*.[268] Finally, the decision to rely on § 3501 in the context of a given case falls within the executive branch's prosecutorial discretion. Judges Williams and Keif, answering Justice Scalia's invitation in Davis v. United States,[269] call for upsetting the delicate balance cre-

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[259] *See id.*

[260] *See Dickerson*, 166 F.3d at 696 (Michael, J., dissenting in part and concurring in part).

[261] *See id.*

[262] *See id.* at 696-97. *See also supra* Part III.B.1.

[263] *See supra* Part III.B.1.

[264] *See id.*

[265] *See id.*

[266] *See Dickerson*, 166 F.3d at 696 (Michael, J., dissenting in part and concurring in part).

[267] *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[268] *See Dickerson*, 166 F.3d at 696 (Michael, J., dissenting in part and concurring in part).

[269] Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J. concurring).

Justice Scalia's dissent in this case should been seen as a surprising and remarkable move.

ated by the separation of powers.[270] They would have the Courts overstep their authority and usurp executive authority. They would allow Congress to misuse its legislative authority to override the Supreme Court and eliminate constitutionally required minimum protections.[271]

Justice Scalia is not known for his judicial activism. Quite to the contrary, Justice Scalia, has a reputation for espousing non-activist judicial restraint and strict statutory construction. This dissent's direct call for the raising of an issue never before argued nor asserted by the executive branch smacks of extreme judicial activism at its most blatant. Can a known non-activist justify judicial activism in the name of strict constructionism, without jeopardizing the legitimacy of his non-activist stance? *See* Davis v. United States, 512 U.S. 452, 465 (Scalia, J. concurring).

[270] *See Dickerson*, 166 F.3d at 695.

[271] These judges, and Justice Scalia, apparently would not only permit but encourage violations of stare decisis principles, judicial restraint and separation of powers principles simply to address the constitutionality of a statute that has not been invoked since its passage over thirty years ago. This activism leads one to question whether the constitutionality of § 3501 is the real issue. The real target appears to be the constitutionality of the *Miranda* decision. They appear to seek to overturn this important decision indirectly, so as not to have to argue *Miranda's* constitutional merits. *See id.* at 686-87.

It should be noted that the majority in *Dickerson* avoids addressing the constitutionality of *Miranda* by stating, "that Congress did not completely abandon the central holding of *Miranda*, i.e., the four warnings are important safeguards in protecting the Fifth Amendment privilege against self-incrimination." *Id.* By stating this, they hope to limit the question to the exclusion of a confession obtained in violation of *Miranda*, by asserting that this part of the holding merely creates an irrebutable presumption of involuntariness. *See id.* This however, misstates the central holding of *Miranda*, which was that, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444.

The distinction here being that the exclusion was not necessarily based on a presumption of involuntariness but on the idea that the exercise of one's rights must be a volitional act. In order to act of one's volition one must have conscious awareness of the action or inaction one chooses. As such prior to exercising one's right to remain silent, one must have actual knowledge of the right. Since it is the state that seeks to impose upon this constitutionally protected right, it is the state that should advise an individual of his rights and ensure that its actions do not infringe upon the suspect's rights, without the suspect's permission. This procedure is required under the Supreme Court's interpretation of the Constitution. The Court's requirement that any statements be excluded if obtained after the state has failed to meet its procedural obligations under the Constitution, acts more as a remedial device for the state's failure to ensure that when it intrudes into the private lives of citizens and detains them for questioning, it does so in the least intrusive of manners and looks to protect their constitutional rights, then as an irrebutable presumption of involutariness. *See generally, Miranda*, 388 U.S. 436 (1966).

V. § 3501 FAILS TO OVERRULE *MIRANDA* BECAUSE § 3501 FAILS TO PROTECT THE SAME INTERESTS

In enacting § 3501 it is undeniable that Congress intended to re-establish the pre-*Miranda*, voluntariness test as the standard governing confessions.[272] Under *Miranda's* holding, Congress could only replace the required warning safeguards if the suggested structure is "equally as effective" in protecting the constitutional interests at jeopardy in that case.[273] To be equally as effective, the protections afforded under the new system would have to provide the same or greater protections then those provided by the warning framework.[274] To determine whether the voluntariness standard meets this requirement, an analysis of what *Miranda* protects and how it does so must proceed any discussion of whether § 3501 protects these interests in an equally effective manner.[275]

To be certain *Miranda*, protected the suspect's right to silence in the context of custodial interrogation.[276] Not only did it protect the right to silence itself, i.e. the act of not speaking, but also required that procedural safeguards ensure the protection of the privilege.[277] The Court required that an interrogator inform the suspect of his constitutional rights.[278] In addition, *Miranda* required that the suspect be informed of these rights *prior* to custodial interrogation.[279] The Court also required that the suspect be afforded a continuous opportunity to exercise the right not to speak.[280] Accordingly, for § 3501 to effectively replace *Miranda*, it must either provide the same procedural protections or replace them with

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[272] *See Dickerson*, 166 F.3d at 686-87.

[273] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[274] *See id.*

[275] *See* NACDL Brief, *supra* note 158, at 3-8, 18-19.

[276] *See Miranda*, 384 U.S. at 478.

[277] *See id.* at 478-79. In requiring actual procedures the Court gave practical life to an abstract concept. They recognized that a right of the sort considered here manifests itself through action or inaction and that violations of that right take the same form. Procedures are by their very essence, required actions. In this context, the procedural safeguards, required state actions protect the ability of a suspect to act to exercise his right not to speak.

[278] *See id.* at 479.

[279] *See id.*

[280] *See id.*

equally effective substitutes. § 3501 fails to do either of these.[281]

First and foremost, the Court specifically, required that a suspect be informed of his right to remain silent.[282] § 3501 has no such procedural requirement.[283] § 3501 reduces the knowledge of one's rights to a mere factor to be considered in determining whether a confession is voluntary.[284] In addition, § 3501 fails to require that an interrogator apprise a suspect of his rights.[285] Therefore, knowledge of one's right is not guaranteed under § 3501 as is required by *Miranda*.[286]

Second, § 3501 fails to require any protections to the suspect *prior* to interrogation.[287] The right being protected is not the right to have involuntarily elicited, incriminating statements excluded from evidence. The right to not speak is being protected.[288] This right is violated at the time of the interrogation.[289] By providing only a post interrogation remedy, the actual right to silence itself is not protected.[290] The only protection afforded in this context is that the unconstitutionally obtained statements may be excluded *after* the violation has taken place.[291] This is not adequate because once the violation has occurred, the remedy is inadequate to erase the violation.[292]

Third, § 3501 ignores the Court's mandate the a suspect be, "assured a con-

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[281] *See* NACDL Brief, *supra* note 158, at 18-19.

[282] *See Miranda*, 384 U.S. at 479.

[283] *See* NACDL Brief, *supra* note 158, at 18 (arguing that § 3501 "does not (and does not even purport to) create *any* procedural safeguard . . . .") *Id.*(empahsis in original). *See supra* note 20 (citing the full text of § 3501).

[284] *See* NACDL Brief, *supra* note 158, at 18.

[285] *See Miranda*, 384 U.S. at 467 ("the accused must be . . . apprised of his rights").

[286] *See id.* at 468-69, 479; *supra* note 20

[287] *See* NACDL Brief, *supra* note 158, at 18; *Miranda*, 384 U.S. at 445, 467.

[288] *See Miranda*, 384 U.S. at 460.

[289] *See* NACDL Brief, *supra* note 158, at 19.

[290] *See id.* at 18.

[291] *See id.* at 19.

[292] *See id.*

tinuous opportunity to exercise [the right]."[293] For a person to exercise a right or make the affirmative choice to waive exercising the right he or she must have not only knowledge of the right but an opportunity to decide, free from interference, what course of action or non-action to take.[294] Police interrogation procedures are inherently coercive.[295] The fear that this coercive environment will necessarily coerce a suspect into making an incriminating statement, while a valid and real concern, is not the sole basis for requiring exclusion of statements taken in such an environment absent *Miranda* warnings.

The Court was not merely protecting the right against self-incrimination itself, but in essence ensuring a tangible and real opportunity to exercise that right. What the court is effectively accomplishing by excluding statements elicited outside of *Miranda* is vindication of the suspect's lost opportunity to exercise his constitutional rights.[296] § 3501 simply provides no such protection and does not provide an adequate remedy for law enforcement interference with the opportunity to exercise one's rights.

§ 3501 attempts to roll back to clock to the pre-*Miranda* standard. This legislation, while purporting to protect the right against self incrimination, simply fails to comport with the constitutional requirement that any alternative to the safeguards set out in *Miranda* must protect that right in a manner that is at least as effective as the safeguards prescribed. § 3501's fails to assure appraisal of rights prior to interrogation and an opportunity to exercise these rights. Therefore, in order for the statute to actually fulfill its stated mission of replacing *Miranda*, the Supreme Court must overrule *Miranda* to the extent that it held that the Constitution requires procedural safeguards of any type.[297] Before taking

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[293] *Miranda*, 384 U.S. at 467.

[294] *See id.* at 445, 467.

[295] *See id.* at 467; NACDL Brief, *supra* note 158, at 28. *See generally*, Ofshe & Leo, *supra* note 15 (discussing the inherently coercive nature of modern police interrogation procedures and their tendency to elicit false confessions).

[296] This explains why the Court can still find that an involuntary confession taken in full compliance with the *Miranda* safeguards is nonetheless involuntarily given, and therefore excludable. This also explains why the court will deny admission of a voluntarily given confession simply because it does not comport with the safeguards given in *Miranda*.

[297] *See* Brief for United States, *supra* note 226, at 29 ("... before Section 3501 could be applied in a manner that is inconsistent with this Court's *Miranda* jurisprudence, the Court would have to reconsider and overrule *Miranda*"). *Id. See also*, Brief of Griffin B. Bell, *et al.*, as *Amici Curiae*, at 4, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000) [hereinafter Bell Brief]. ("We also agree with the United States that 18 U.S.C. § 3501 could only be constitutional if this court were to overrule *Miranda*"). *Id.*

this extraordinary step, the Court must consider several prudential arguments against overruling *Miranda*.

VI. PRUDENTIAL SUPPORTS FOR *MIRANDA'S* SAFEGUARDS.

In *amicus* briefs filed in support of petitioner Dickerson, the United States,[298] Griffin B. Bell, et al.,[299] Benjamin R. Civiletti,[300] the National Association of Criminal Defense Lawyers (NACDL),[301] California Attorneys for Criminal Justice (CACJ),[302] the American Civil Liberties Union (ACLU),[303] the National Legal Aid and Defender Association,[304] the Rutherford Institute[305] and the House Democratic Leadership[306] address many prudential and pragmatic reasons for not overruling *Miranda*.[307] *Amici* argue that the warning framework set forth by the

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[298] *See* Brief for United States, *supra* note 226. The participation of the United States is unusual in this case. Because the issue being considered on appeal is whether § 3501 overruled *Miranda* and given that the Department of Justice has taken the position that § 3501 is unconstitutional, the United States has found itself in the unusual position of having to file a brief on behalf of petitioner, Charles Dickerson, even though the United States is named as respondent. *See id.* at 5-6.

[299] *See* Bell Brief, *supra* note 297.

[300] *See* Civiletti, *supra* note 155.

[301] *See* NACDL Brief, *supra* note 158.

[302] *See id.*

[303] *See* Brief for *Amicus Curiae* the American Civil Liberties Union, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000)[hereinafter ACLU Brief].

[304] *See* NACDL Brief, *supra* note 158.

[305] *See* Brief *Amicus Curiae* of the Rutherford Institute, Dickerson v. United States, 120 S.Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525) (argued April 19, 2000) [hereinafter Rutherford Brief].

[306] *See* House Democratic Leadership, *supra* note 226.

[307] *See* Brief for United States, *supra* note 226, at 30-31. In its brief on appeal the United States cites Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854-55 (1992) and lists the considerations governing whether to overrule prior case law to be:

whether the rule has proven to be intolerable simply in defying practical workability,

Supreme Court in *Miranda* presents a "workable requirement," that fits into our modern criminal justice system.[308] *Amici* also assert that a societal reliance interest "support[s] adherence to *Miranda's* dictates."[309] *Amici* then demonstrate that legal changes since *Miranda* have not "rendered *Miranda's* requirement obsolete."[310] Finally, *amici* review current custodial interrogation procedures and find that, "the factual premises underlying *Miranda* remain valid" today.[311] *Amici* concludes that these prudential arguments call for continuing to require the *Miranda* safeguards and against overruling its core holding.[312]

First, *Amici* argue the warning and waiver framework created by the Supreme Court in *Miranda* provides a workable requirement based on the following;[313] The warnings are simple and easily administered by law enforcement agents.[314] The benefits of *Miranda* outweigh any costs.[315] *Miranda* provides easily under-

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> whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and ass inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, at to have robbed the old rule of significant application or justification.

Id. (citations omitted).

[308] NACDL Brief, *supra* note 158, at 21. *See also,* Brief for United States, *supra* note 226, at 31-38; Bell Brief, *supra* note 297, at 6-13; Civiletti, *supra* note 155, at 3; ACLU Brief, *supra* note 303, at 12.

[309] NACDL Brief, *supra* note 158, at 24. *See also,* Brief for United States, *supra* note 226, at 38; Bell Brief, *supra* note 297, at 22-28; ACLU Brief, *supra* note 303, at 13.

[310] NACDL Brief, *supra* note 158, at 25. *See also,* Brief for United States, *supra* note 226, at 39-47; House Democratic Leadership, *supra* note 226, at 5-8.

[311] NACDL Brief, *supra* note 158, at 27. *See also,* Brief for United States, *supra* note 226, at 47-49; ACLU Brief, *supra* note 303, at 14-19; NLADA Brief, *supra* note 226, at 9-14.

[312] NACDL Brief, *supra* note 158, at 29.

[313] *See id.* at 21-24; Brief for United States, *supra* note 226, at 31-38; Bell Brief, *supra* note 297, at 6-13; Civiletti, *supra* note 155, at 3; ACLU Brief, *supra* note 303, at 12.

[314] *See id.* at 21 ("There can be no serious doubt that *Miranda* sets forth a workable requirement, particularly given its suggestion of specific warnings that meet that requirement."). *Id.*; Brief for United States, *supra* note 226, at 33 ("*Miranda's* core procedures are not difficult to administer.") *Id.*; Bell Brief, *supra* note 297, at 11 ("... *Miranda* provides an easy and effective guide to compliance with constitutional limits."). *Id.*

[315] *See* NACDL Brief, *supra* note 158, at 23 ("... it is manifestly apparent that the bene-

standable, bright-line rules for the police, the courts and citizens alike.[316] Congress and the States have the ability to refine the procedural safeguards, which adds to *Miranda's* workability.[317] In addition to its workability, supporters of *Miranda* point out that society has come to rely on and expect that *Miranda* warnings be delivered at the point when the investigative process turns adversarial.

Second, *Amici* assert that the warnings and safeguards set forth in *Miranda* have become so engrained in the American perceptions of due process and fairness, that to overrule *Miranda* would cause uncertainty among the citizenry as to their actual rights under the Constitution.[318] These safeguards have become a symbol of fairness in the interrogation process.[319] To many, these warnings delineate the line between police restraint and police misconduct.[320] So much so, that "overruling . . . *Miranda* would tend to have a destabilizing effect on public confidence in the fairness of the criminal justice system and public trust in th[e Supreme] Court's legitimacy."[321] This reliance has developed because of over thirty years of law enforcement compliance with *Miranda's* dictates and the Supreme Court's consistent assertions that these warnings are constitutionally required. Upsetting this public reliance should only occur if the legal or factual supports for *Miranda* have changed substantially.[322]

Third, *Amici* argue that the legal environment in which *Miranda* was decided

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fits of *Miranda's* protections outweigh any attendant costs."). *Id.*; Brief for United States, *supra* note 226, at 32 (". . . the cost of *Miranda's* exclusionary rule doe not so impede or undermine law enforcement that the overruling of *Miranda* is warranted."). *Id.*; Bell Brief, *supra* note 297, at 7 (". . . the occasional adverse impact in individual cases is far outweighed by the systemic benefits *Miranda* provides to the functioning of our criminal justice system."). *Id.*; ACLU Brief, *supra* note 303, at 19 (". . . the empirical data are clear and . . . strikingly consistent in finding no net cost to law enforcement attributable to *Miranda*."). *Id.*

[316] *See* Brief for United States, *supra* note 226, at 34.

[317] *See* NACDL Brief, *supra* note 158, at 23.

[318] *See* NACDL Brief, *supra* note 158, at 24-25. *See also,* Brief for United States, *supra* note 226, at 38; Bell Brief, *supra* note 297, at 22-28; ACLU Brief, *supra* note 303, at 13.

[319] *See* NACDL Brief, *supra* note 158, at 24.

[320] *See* Bell Brief, *supra* note 297, at 23.

[321] Brief for United States, *supra* note 226, at 38.

[322] *See supra* note 306.

has not change significantly.[323] For and foremost, they point to the fact that the Supreme Court in over thirty years of jurisprudential rule making and interpretation of *Miranda* "has never suggested that *Miranda's* core holding should be overruled."[324] They also argue that contrary to the suggestion of commentators, no civil, criminal or administrative remedies have been instituted which effectively replace *Miranda's* exclusionary rule.[325] *Miranda* imposed safeguards prior to interrogation as a means of ensuring an opportunity to exercise one's rights prior to having them violated and as a means of ensuring that constitutional violations will not inure to the benefit of the rights violator, i.e., not be usable by the state at trial.[326] The development of *post hoc* remedies, however laudable, does not adequately protect the constitutionally violated suspect from having the fruits of the violation used against him.[327] Demonstrating that legal developments have not made "*Miranda* irrelevant,"[328] *Amici* then focus on the factual underpinnings of *Miranda* and the continued validity of those findings.

Finally, *Amici's* most compelling prudential contention is that the factual findings made by the Supreme Court in *Miranda* are still valid today and have undergone no significant modifications.[329] They rightfully claim that custodial interrogation is still as inherently coercive now as at the time of the *Miranda* Court's original finding.[330] Interrogated still occurs in isolation.[331] The suspect

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[323] *See* NACDL Brief, *supra* note 158, at 25-27. *See also,* Brief for United States, *supra* note 226, at 39-47; House Democratic Leadership, *supra* note 226, at 5-8.

[324] NACDL Brief, *supra* note 158, at 25; Brief for United States, *supra* note 226, at 39 (positing that were the Supreme Court to overrule *Miranda* it would "also have to overrule . . . at least eleven cases that have reaffirmed that a confession obtained in violation of *Miranda* must be suppressed . . . ."). *Id.*

[325] *See* NACDL Brief, *supra* note 158, at 26.

[326] *See id.*

[327] *See id.* at 26-27.

[328] Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?,* 10 ST. THOMAS L. REV. 461 (1998) (arguing that Supreme Court's subsequent to *Miranda* have created so many exceptions to the holding in the case as to have rendered the case legally irrelevant).

[329] *See* NACDL Brief, *supra* note 158, at 27-29; Brief for United States, *supra* note 226, at 47-49; ACLU Brief, *supra* note 303, at 14-19; NLADA Brief, *supra* note 226, at 9-14.

[330] *See* Brief for United States, supra note 226, at 48.

[331] *See* NACDL Brief, *supra* note 158, at 28.

is still held incommunicado.[332] Police officers still use psychologically coercive techniques.[333] In addition, police officers have become increasingly overt in their willingness to ignore *Miranda's* dictates altogether, just to get a confession.[334] Police interrogation practices were inherently coercive at the time of the *Miranda* decision and remain so today.

Stare Decisis counsels against overturning prior precedent.[335] Only if circumstances surrounding the original *Miranda* decision have changed significantly, should the Court exercise its powers to overturn this important case.[336] Given the workable framework created in *Miranda*, the public's strong expectations and reliance on these procedures, the more then thirty years of Supreme Court support for *Miranda's* core holding and the continued coercive, if not increasingly coercive nature of police interrogation procedures, overruling *Miranda* would not be justified. *Miranda* still stands as the vanguard against the abuses of law enforcement officials who in the name of effective law enforcement, decide for themselves when they will or will not obey the Constitution's dictates. Prudence argues that it continue to do so.

VII. THE FEDERALISM ISSUE

Opponents of *Miranda* see that cases mandate that state law enforcement officials give *Miranda* warnings as a possible violation of federalism.[337] This issue also concerned the *Miranda* court.[338] In *Miranda* the Court opined that the privilege against self-incrimination and the procedural safeguards which protect the privilege are of constitutional dimensions and are therefore applicable at both the federal and state levels.[339] Indeed the *Miranda* case itself came to the Su-

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[332] *See* ACLU Brief, *supra* note 303, at 14

[333] *See id.* at 15-16.

[334] *See id.* at 16-19 (discussion the practice of questioning outside *Miranda* and concluding that "it has become an institutionalized feature of several major police departments."). *Id.* at 18. *Accord,* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 132-39 (1998) (citing instances in thirty-eight states where officers appear to have deliberately violated *Miranda*).

[335] *See* Brief for United States, *supra* note 226, at 49.

[336] *See id.* at 30.

[337] *See* United States v. Dickerson, 166 F.3d 667, 691 n.21 (4th Cir. 1999), *cert. granted in part,* Dickerson v. United States, 120 S. Ct. 578 (U.S. Dec. 6, 1999) (No. 99-5525).

[338] *Miranda,* 384 U.S. at 463-64.

preme Court via the State Supreme Court of Arizona.[340]

The Court focused on state law enforcement officials instead of federal officials in part because federal law enforcement officials had already established a practice of providing warnings to suspects under arrest.[341] The FBI and other federal agencies had long standing policies requiring federal agents to advise suspects of their rights prior to interrogation.[342] Incidentally, these agencies also continued the practice of issuing warnings even after Congress passed §3501.[343] The focus clearly was on State applications of the voluntariness standard and its propensity for abuse by state law enforcement officials.[344]

Overturning *Miranda* in the federal context would allow the states to disregard *Miranda* and make their own rules for the admission of incriminating statements because if Congress can legislatively overrule *Miranda* then its safeguards are not of constitutional dimension and therefore not binding on the states. This would lead to an inconsistency in state criminal procedure that would eventually have to be resolved by the Supreme Court on a state by state basis.[345] The states would be left to devise their own approaches to the protection of the constitutionally guaranteed right against self-incrimination.[346]

This was clearly what concerned the Supreme Court when it decided to grant *certiorari* to the group of cases that comprised *Miranda*. Of these four cases, only one came to the Supreme Court through the federal court system and involved federal law enforcement agents.[347] The other three cases traveled through

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[339] *See id.* 465-68.

[340] Miranda v. Arizona, 98 Ariz. 18, 401 P.2d 721 (1964).

[341] *See Miranda,* 384 U.S. at 483-86 (discussing in detail the warnings provided by the Federal Bureau of Investigations, the timing of their delivery to a suspect and the applicability of these procedures to state and local law enforcement.

[342] *See id.*

[343] *See* Omnibus Crime Control and Safe Streets Act of 1968, Title II § 701(a), Pub L No 90-351, 82 Stat 210, codified at 18 USC § 3501 (1994).

[344] *See Miranda,* 384 U.S. at 463-65.

[345] *See id.* Indeed this was the situation that existed at the time Miranda was decided and exactly what the majority decided was wrong with the voluntariness test. *See id.*

[346] *See* U.S. CONST. amend. V.

[347] *See Miranda,* 384 U.S. at 494-97 (discussing one of the cases on appeal, Westover v. United States, 342 F.2d 684 (1964), *rev'd,* Miranda v. Arizona, 384 U.S. 436, 494 (1966)).

state court systems and *certiorari* was sought upon completion of proceedings in the highest courts of those states.[348] In choosing these cases, the Supreme Court clearly sought to address whether the actions of state and local law enforcement officials violated rights protected by the federal constitution.[349] The Supreme Court had little trouble finding that their actions did and that procedural safeguards were constitutionally required as protection against such violations.[350]

VIII. CONCLUSION

The warnings, presumptions and exclusions set forth in *Miranda* safeguard not only the constitutional right against self-incrimination but in addition, require appraisal of one's rights, that the appraisal be prior to the initiation of in custody interrogation, and a continuous opportunity to exercise his rights.[351] §3501 fails to provide any procedural safeguards and therefore, by adopting the rejected pre-*Miranda,* voluntariness standard § 3501 fails to replace the *Miranda* safeguards as an increasingly effect way of protecting a suspect's constitutional rights. Therefore, the warning requirements and exclusionary rule set out by the Supreme Court in *Miranda* still dictate the standard for determining the admissibility of confessions in both federal and state courts, unless *Miranda* is overruled by the Supreme Court.

Given the prudential reasons and stare decisis considerations arguing against overruling *Miranda*, the Supreme Court should decline Justice Scalia's invitation in *Davis*[352] and overturn the Fourth Circuit's opinion. The voluntariness test, while a valid test for the protection of the right against self-incrimination, does not ensure that a suspect is provided a real and tangible opportunity to exercise that right. In light of the inability of the voluntary confession standard to provide appraisal of one's rights leading to knowledgeable exercising of those rights, it's inability to counter the inherently coercive nature of in custody inter-

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[348] *See Miranda,* 384 U.S. at 441. Of the four cases granted *certiorari* and consolidated into *Miranda*, three arrived at the Supreme Court of the United States via State Supreme Courts and involved state or local enforcement agencies. *See* Miranda v. Arizona, 401 P.2d 721 (Ariz. 1964), *rev'd,* Miranda v. Arizona, 384 U.S. 436, 492 (1966); Vignera v. New York, 207 N.E.2d 527 (N.Y. 1964), *rev'd,* Miranda v. Arizona, 384 U.S. 436, 494 (1966); California v. Stewart, 400 P.2d 97 (Cal. 1964), *aff'd,* Miranda v. Arizona, 384 U.S. 436, 498 (1966).

[349] *See Miranda,* 384 U.S. at 463-65.

[350] *See id.*

[351] *See Miranda,* 384 U.S. at 467; 479

[352] Davis v. United States, 512 U.S. 452, 464 (1994).

rogation by failing to require appraisal of one's rights prior to interrogation and its complete failure to ensure a real opportunity to exercise constitutionally protected rights, this standard fails to fulfill the constitutional mandate of protection of the right against self-incrimination. Congress attempted to legislatively overrule *Miranda* by enacting § 3501, yet failed to have the authority to do so. Accordingly, the majority in *Dickerson* erred in its finding that § 3501 dictates the applicable standard and violated several judicial and constitutional principles in addressing the issue, *sua sponte*. Accordingly their opinion should be overruled overturned by the Supreme Court based on the precedent setting cases of *Davis*[353] and *Miranda*.[354]

In the battle between the government's interest between effective and efficient law enforcement, a balance must be struck. A suspect may lose a constitutionally protected right. The state may lose a valuable, but not constitutionally guaranteed, piece of evidence. A constitutional right clearly outweighs an interest in obtaining evidence. The balance must err on the side of the constitutionally protected right, even if it means the loss of state's evidence. Only then does the government fulfill its constitutional obligation to accord, "respect . . . to the dignity and integrity of its citizens."[355]

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[353] *See id.*

[354] Miranda v. Arizona, 384 U.S. 436 (1966).

[355] *Id.* at 460.