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DEBATE: Will Miranda Survive?: Dickerson V. United States: The Right to Remain Silent, the Supreme Court, and Congress

SUMMARY:
... Professor Paul Cassell v. Mr. Robert LittModerated by Mr. Lyle DennistonMarch 28, 2000Georgetown University Law Center ... MR. DENNISTON: Thank you Professor Cassell. ... But how do you reconcile them with the cases that Professor Cassell cites, particularly how do you reconcile them in one minute, which is what I have left in my opening statement here? The answer, which I hope to develop at greater length given an additional opportunity, is that Professor Cassell is confusing the *Miranda* warnings, which are not constitutionally required, with the *Miranda* holding, which is. ... MR. DENNISTON: It's not required. ... PROFESSOR CASSELL: Well, let me talk a little bit about alternatives for *Miranda*, because I think this is one of the real tragedies of *Miranda*. Mr. Litt is right--there is nothing in *Miranda* that purports to stop states from looking at alternative ways of dealing with police interrogation. ... MR. DENNISTON: Thanks very much. ... STACEY OSTFELD: On behalf of the *American Criminal Law Review* and the Georgetown University Law Center I would like to thank again today's participant debaters, Professor Cassell and Mr. Litt, and our deepest gratitude to Mr. Lyle Denniston for lending his journalistic acumen to today's proceeding. ...

TEXT:
[*1165] Professor Paul Cassell v. Mr. Robert Litt
Moderated by Mr. Lyle Denniston
March 28, 2000
Georgetown University Law Center

STACEY OSTFELD: Students, faculty, members of the administration, and distinguished guests. Good evening and welcome to the *American Criminal Law Review* Fifth Annual Debate. My name is Stacey Ostfeld and I am the Editor-In-Chief of the journal. Published four times a year, the *American Criminal Law Review* provides timely treatment of significant developments in constitutional and criminal law through articles contributed by leading scholars and practitioners, and through notes written by our own student staff. Each year we bring notable speakers to campus during this, our annual debate, to discuss contemporary legal and public policy issues concerning American criminal law. We are pleased to continue this tradition with our program today. I would now like to turn the event over to the Executive Editor of the *American Criminal Law Review* and to thank her in advance for all of her hard work in preparing this program today, Ms. Adriana Rodriguez.

ADRIANA RODRIGUEZ: Welcome to the *ACLR's* annual debate this year entitled, "Will *Miranda* Survive? *Dickerson v. United States*: the Right to Remain Silent, the Supreme Court, and Congress." Before I introduce today's participants I would like to say a few words about our format. After our moderator introduces the topic, each debater

will have the opportunity to make a five-minute opening statement. Following these remarks, our moderator will then direct each question to one participant. That participant will have five minutes to respond and then our other speaker will have three minutes for rebuttal. At the end of the debate each participant will have five minutes to make closing arguments. I now have the distinct privilege of introducing our distinguished guests.

Professor Paul Cassell, a self described "tilter-at-windmills" and Professor of Law at the University of Utah College of Law, filed the amicus brief in *Dickerson* that brings the *Miranda* debate to the Supreme Court and gives us our topic for today. A graduate of Stanford Law School, after serving as clerk for Chief Justice Burger and then Judge, now Justice Scalia, Professor Cassell served in the Department of Justice as a federal prosecutor and for two years as Assistant Deputy Attorney General.

Robert Litt, partner at the Washington, D.C. firm Arnold & Porter, has a [*1166] distinguished record of service to government. He has served as Special Advisor at the Department of State and worked for over ten years in different capacities at the Department of Justice. First, he served as an Assistant U.S. Attorney in the Southern District of New York and later as Deputy Assistant Attorney General in the Criminal Division. Most recently, he served as Principal Associate Deputy Attorney General with responsibility for law enforcement, national security, cyber issues, and independent counsel matters. After earning his J.D. from Yale Law School, Mr. Litt served as a clerk for Judge Weinfeld in the Southern District of New York and for U.S. Supreme Court Justice Potter Stewart. Mr. Litt has served as adjunct faculty member here at Georgetown University Law Center and at American University. Mr. Litt has also authored an amicus brief on behalf of law enforcement in *Dickerson*.

Our moderator, Lyle Denniston, has covered the Supreme Court for forty-two years, currently for the *Baltimore Sun*. One of every four Justices ever to sit on the bench has been covered by Mr. Denniston. He is one of the few non-attorneys to serve as adjunct faculty here at Georgetown University Law Center. He has also served on the faculties of American University, Johns Hopkins University, George-town University's undergraduate school, and he now teaches a course on American constitutional history in Penn State's new Washington program on communications and democracy. In addition to his reporting and teaching, for 15 years Mr. Denniston wrote a monthly column for the *American Lawyer* analyzing attorneys' arguments before the Supreme Court.

We look forward to a lively debate. I turn the stage to Mr. Lyle Denniston.

LYLE DENNISTON: Thank you Adriana, and thank you Stacey for getting us started here and for inviting me. I am delighted to be with you and I am indebted to the judiciary and to the legal profession for allowing me to be here. Today was a day on which we thought the balloon would go up for Microsoft in Judge Jackson's chambers, but it did not. We also thought that there might have been very significant developments today in the Elian Gonzalez case in Miami. There were not. We thought the Supreme Court might today decide issues of profound significance, but aside from a couple of small criminal law decisions, they did not, so all I had to do was to prepare to come and lead our group here tonight and be with you. I must say this is a larger audience than I've ever had in the Georgetown Law Center and I am grateful to the *American Criminal Law Review* for turning out such a crowd. The room where I taught legal process for eight years is now gone, a casualty of the expansion of the Law Center eastward, but my most important continuing connection to the law school is my wife. Pamela graduated here two years ago and is now happily ensconced in intellectual property practice, which of course, is where all the money is.

Let me get started here with an introduction that perhaps will detain our debaters a little long, but I hope it will be able to provide some considerable context and if I succeed in what I undertake to do here, I think it will save our debaters some time [*1167] so that they will not have to put their comments in context. They can simply go at each other.

What I would like to do is begin by going back to June 6, 1968. That day the House of Representatives was moving toward final passage of the Omnibus Crime Control and Safe Streets Act. Gerald Ford, a Republican representative from Michigan and the minority leader in the House, rose to defend Title II of that bill. Congressmen Ford said "I refuse

to concede that the elected representatives of the American people cannot be the winner in a confrontation with the Supreme Court." Now did that mean that there was about to be launched a constitutional shoving match between Congress and the Court, or was it just another example of the verbal hyperbole that occasionally one hears on the floor of the House or the Senate. Well, if it was a confrontation, who was the winner? Not even Gerald Ford could have said at the time that thirty-two years later it would still not be clear whether the elected representatives or the Court had won, and that remains unresolved tonight. Within about three months, however, we may all have an answer.

But in the meantime, the staff of the *American Criminal Law Review*, with the quite indispensable assistance of the two gentlemen you see behind me, hopes to prepare us all to appreciate the outcome when it does emerge. This will be a debate, ladies and gentlemen; it is not a moot court and it is not an attempt to provide a preview of a Supreme Court hearing. It will be a debate that will be centered upon, though not confined to, two cases: *Miranda v. Arizona* n1 and *Dickerson v. United States.* *n2 Miranda*, as almost everyone already knows, if you watch police drama on television, has been decided. *Dickerson* has not, but on April 19, in the closing days of oral argument in this term of the Court, the Justices will hear that case and expect to decide it by summer. As tonight's debate unfolds before you, it will be our goal to try to cover four general areas of inquiry. First, on *Miranda*. What did the decision mean in the beginning? Has its meaning changed since then, and if it has, what are the consequences? Second, on H.R. 5037, the bill that Congressman Ford was addressing in 1968, two years after *Miranda*. Why did Congress enact that legislation and, in particular, its Section 3501? What did the section mean in the beginning and what does it mean today? Third, on the *Dickerson* case, what central themes is the Court likely to address when it hears and decides the *Dickerson* case and what might the result mean to Congress, to the Supreme Court, and to the rest of us? Fourth and finally, why does all of this matter?

But now let me depart from the debate of the moment, the topic of the moment, and bring you some of the background that I think will help the debaters proceed more rapidly when their time begins. For many years before *Miranda*, the Court had been concerned about involuntary or coerced confessions by criminal suspects. [*1168] In 1936 in a famous case, *Brown v. Mississippi*, n3 the Court had excluded from evidence the confessions of three black men, confessions which had literally been beaten out of them by sheriff's deputies. At that time the Fifth Amendment did not apply to states and *Brown* was a state case. The *Brown* decision was based on the Fourteenth Amendment's Due Process Clause.

As time went on, in federal prosecutions the Court relied upon the Due Process Clause of the Fifth Amendment to overturn confessions that had been deemed coerced. Later the Court would articulate another basis for excluding coerced confessions in federal cases: the Court's own supervisory power over procedures in the federal system. Still later, the Court began relying upon the Sixth Amendment right to counsel as an antidote to involuntary confessions. First, it applied the right to counsel in a confessions case in federal court. n4 The individual involved had already been indicted before making admissions to a co-defendant who was cooperating, and the Court ruled that the Sixth Amendment attaches after one has been indicted. In 1964, the Court extended the right to counsel to another confessions case, but this time it was a state case. n5 Now recall that just the year before in 1963 in *Gideon v. Wainwright*, n6 the Court for the first time had extended the Sixth Amendment to state cases, but only, at that point, at trial. In 1964, in the case of *Escobedo v. Illinois*, n7 the Court extended *Gideon* to the police station even before a suspect had been charged with a crime. The Court said the suspect had a Sixth Amendment right to counsel if he has become the focus of the investigation and is confronting police interrogation.

Over the months that followed, the lower courts split, and split widely, over the meaning of *Escobedo* for state cases. A point of particular dispute was whether or not *Escobedo* meant that confessions would be excluded if the suspect had not been warned of his rights. As the fall term of the Court approached in the summer of 1965, the Justices' clerks and especially the clerks to Chief Justice Earl Warren were looking for an *Escobedo* sequel so that the Court could clear up the conflict on its reach. After examining an appeal by an Arizonan, Ernesto Miranda, one of Warren's clerks suggested in a memo to the Chief, "if the Court is ready to consider the scope of *Escobedo*, this case should provide a suitable vehicle for the purpose."

At the Court's first conference discussion that fall of Miranda's petition and the other *Escobedo* cases, Justice

William J. Brennan, Jr. brought into the conversation another decision from the year before, *Malloy v. Hogan*. n8 That ruling, for the first time, had extended the Fifth Amendment privilege against self-incrimination to state cases. In looking at the *Escobedo* cases, Brennan said to his colleagues, "the [*1169] Court should consider whether some form of procedural safeguard was necessary to assure the police during interrogation did not violate the Fifth Amendment." Thus, the *Escobedo* sequels became both Sixth and Fifth Amendment cases and the issue of warnings about rights emerged as the principal question. On November 22, 1965, the Court granted review of Ernesto's petition and three other cases. Three of the four cases granted were state cases. When the Chief Justice went to the bench for the oral argument in late February 1966, he carried with him a bench memo from his clerks about the state cases. That memo said in significant part, "these are the three *Escobedo* cases granted by the Court in order to consider whether warnings are constitutionally required prior to interrogation of a person suspected of crime, what these warnings might consist of, and whether warnings alone are sufficient."

The *Miranda* decision, as you know, then emerged on June 13, 1966 with its famous catalogue of warnings required before police interrogation. Our debaters will give you their perceptions of what *Miranda* means. But let me give you some further history. Even before *Miranda*, many members of Congress had grown deeply upset by the criminal law decisions of the Court. But after *Miranda* was decided, congressional resentment boiled over in Title II of the Omnibus Crime Control and Safe Streets Act two years after *Miranda*. Three provisions in Title II undertook to overrule Supreme Court decisions--or that was at least what the legislative debates suggested they were undertaking to do. One of them was Section 3501, which provided, and I am paraphrasing here and not trying to characterize it in a way perhaps that Professor Cassell would not, if a confession were found to be voluntary under Section 3501 it could be admitted in a federal case even if the suspect had not been given *Miranda* warnings. President Lyndon B. Johnson signed the Act into law but said federal agents would continue to give *Miranda* warnings.

The history of Section 3501 after that is quite checkered. When the Nixon Administration came into office, the Justice Department concluded that *Miranda* warnings were not constitutionally required so Congress did indeed have the authority to pass Section 3501 to authorize the admissibility of voluntary confessions. But as administrations changed, so did the fate of 3501. With President Jimmy Carter in office, the Justice Department dropped the attempt to use 3501 in place of *Miranda*. But then the Ronald Reagan Administration took office and Section 3501 had a new cadre of champions. Assistant Attorney General Steven Markman, in a quite famous report that soon took on his name, embraced Section 3501 and urged its enforcement in federal cases. But Markman went further, arguing in his report that the Department of Justice should seek to persuade the Supreme Court to abrogate or overrule the decision in *Miranda v. Arizona*. No Section 3501 cases, however, were found to be appropriate and the Supreme Court had been asked at least twice by state attorneys general to overrule *Miranda* and had shown no interest in doing so. But in 1992 a new actor entered the picture, Justice Antonin Scalia of the Supreme Court. During the argument in the 1992 case [*1170] of *United States v. Green*, n9 Scalia asked a Justice Department lawyer: "I've been listening to *Miranda*" and related cases "for seven years now. Why has the U.S. never cited in any of these cases 18 U.S.C. § 3501? Is there some reason?" n10 The Department's attorney had no direct response and no reason to explain it. Two years later in *Davis v. United States*, n11 Scalia raised the issue all over again, again without satisfaction.

Before Scalia began questioning the official inattention to Section 3501, the Court had been issuing a series of rulings beginning in 1974 characterizing *Miranda* and its requirement of warnings as prophylactic and, thus, arguably not constitutionally binding. But that was not the position of the Clinton Administration, at least at the top of the Justice Department. *Miranda*, the Department concluded, controls police interrogations and confessions and Section 3501 is unconstitutional because it attempts to override a procedural safeguard that the Court had grounded in the Constitution.

And so our history brings us now to the case of Charles Thomas Dickerson and the confrontation that Gerald Ford had anticipated back in 1968. After a bank robbery in Alexandria, Virginia in January 1997, a witness saw a white Oldsmobile leave the scene. The witness remembered to take down the license plate number. It was Dickerson's car and federal agents in Alexandria traced it and went to his home in Takoma Park, Maryland. There is a dispute between Dickerson and an FBI agent whether Dickerson was given *Miranda* warnings before he made statements implicating himself in the robbery. Dickerson says no and the agent says yes. But the case against Dickerson has moved along on

the undisturbed conclusion of the district court that he was not warned before he incriminated himself and his statement had been suppressed. The case also proceeds on the conclusion that his confession was voluntary. The Fourth U.S. Circuit Court of Appeals ruled against Dickerson, and overturned the suppression order, upholding Congress' power to enact Section 3501 and giving it precedence over *Miranda* in federal cases. n12

Last July, Dickerson's attorney filed a petition for review in the Supreme Court seeking to raise three questions. Only the first was accepted for review by the Court. It dealt with the constitutionality of Section 3501 as a purported attempt to overrule *Miranda*. The Justice Department and the Washington Legal Foundation separately urged the Court to grant review of that question and the Court did so on December 6. Because the Justice Department was not defending Section 3501, but indeed was asserting that it was unconstitutional, the Court invited Professor Cassell to brief and argue in support of the Fourth Circuit's decision.

Now we come to the question: Why was the Court interested in Dickerson's [*1171] case? We know that it seldom grants petitions in any case these days, but it seldom grants petitions in cases in which there is no circuit conflict and there was no genuine conflict about Section 3501 and its impact, if any, on *Miranda*. But I think we are entitled to assume that Justice Scalia was a lively and persuasive internal advocate for hearing *Dickerson*. His publicly expressed dismay over federal prosecutors' reputed failure to rely upon Section 3501 suggests to us that he would probably be eager for the Court to take on the question. Moreover, a chance to review the issue would in fact rarely arise. The Justice Department, while it maintains its present position, is unwilling to press Section 3501 and one cannot imagine a defendant arguing that an involuntary confession should be admitted against him as evidence. True, the Fourth Circuit did reach out to get to the 3501 question, but Dickerson attempted in his petition to the Supreme Court to challenge the Fourth Circuit for doing so and the Supreme Court refused to hear that question--which, of course, means that they, in effect, denied it. But this was in fact one of those cases, perhaps rare these days, where a grant was not only quite predictable but perhaps inevitable.

That is some of the history and now let's debate it. First, we will turn to Mr. Cassell for his opening statement followed by Mr. Litt, and then we will alternate the responses and the questions back and forth between the two.

PROFESSOR CASSELL: Well, you've set the stage very nicely, and let me, before turning to the merits of the debate, thank Stacey and Adriana and the other members of the *American Criminal Law Review* staff for setting up this debate and for arranging such a distinguished moderator. Lyle Denniston's writings have set the pace for Supreme Court coverage for forty years now, or more, and it's great to be on the stage with him. Bob Litt has also established a reputation for very skillful advocacy on behalf of positions of the Department of Justice, and I'm sure you'll see that here tonight. Also, I am pleased to acknowledge Paul Kaminar from the Washington Legal Foundation who is here in the audience today. The Washington Legal Foundation has joined me in litigating this issue for six or seven years now, and we're glad to see the case finally reach the Supreme Court. Paul has brought along with him some students from George Mason Law School. I understand in the curriculum over there, Section 3501 does show up occasionally. My wife was a student here at Georgetown about ten years ago, and 3501 did not find its way into the curriculum then. I hope that that will change next year as the Supreme Court decision is taught.

But turning to the subject of tonight's debate, I'm afraid that some of you and maybe perhaps the editors of the Law Review will be a little bit disappointed. The title they promised you, or the debate they promised you, is whether *Miranda* warnings will survive. But I'm not here tonight to argue against *Miranda* warnings. To the contrary, I think *Miranda* warnings will survive regardless of which way the Court rules in the *Dickerson* case. For reasons that we can talk about, I have no doubt that federal law enforcement officers will continue to give *Miranda* warnings should the Supreme Court affirm the Fourth Circuit decision. [*1172] The statute at issue in the *Dickerson* case, Section 3501, makes it very much in the interest of federal law enforcement officers to continue to give those warnings. So tonight's debate is not at all about the practice of the *Miranda* warnings. But before you start heading to the exits, let me assure you that I think Bob and I do have something that we disagree about tonight. As I understand our disagreement, it's about the breadth of the exclusionary rule. Specifically, in what circumstances should voluntary confessions be excluded from evidence?

Let's take the *Dickerson* case. I think, if you looked at the record in that case objectively, you'd say what happened there was that prosecutors simply dropped the ball in proving that Mr. Dickerson had gotten his warnings. In fact, there's in the record a handwritten note by Mr. Dickerson acknowledging that he had received his *Miranda* warnings, but the prosecutors failed to put that into evidence at the proper time. Nonetheless, the district court judge had no difficulty in concluding that the confession was voluntary. So the issue we have is whether Mr. Dickerson's concededly voluntary statement should, nonetheless, be kept out of evidence because of this failure to prove that *Miranda* warnings were given.

I will be arguing tonight, as I will to the Supreme Court next month, that that voluntary confession should be admitted in evidence and should be given to the jury. I understand that Mr. Litt will argue tonight that that evidence should be kept out, just as his former colleagues at the Justice Department have argued that position to the Supreme Court. And they rest their argument not on grounds of social policy, that this is a good idea, but on grounds that the Constitution absolutely forbids Congress from specifying an alternative result. I disagree with that position, as does the Fourth Circuit, as does every federal court that has squarely reached the issue over the last twenty-five years. n13 Nothing in the Constitution requires a draconian rule that a voluntary confession be suppressed whenever there has been some departure from the *Miranda* procedures. The relevant language in the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself," n14 and under this provision, a confession must be excluded then if it is compelled--that is, if it's somehow involuntary.

Now, for more than twenty-five years the Supreme Court has repeatedly held that when prosecutors or police simply depart from the *Miranda* procedures that does not produce a compelled confession. In fact, there are three separate lines of cases that point to this result. The first line of cases is the public safety line of cases starting with *New York v. Quarles*. n15 There, the Court said there is no constitutional imperative requiring the exclusion of an unwarned statement. There is a second [*1173] line of cases, *Oregon v. Hass* n16 and *New York v. Harris*, n17 involving the impeachment of defendants who testify one way at trial but have given a voluntary confession obtained in violation of *Miranda* that's different than that. The Court has allowed those [confessions to be used], distinguishing mere departures from *Miranda* from truly involuntary confessions. And finally, there is a third line of cases in which the Court has allowed police to use the so-called "fruits" of non-Mirandized statements, that is, statements that are taken in violation of *Miranda* and produce leads--prosecutors have been allowed to use that evidence. Why? The Court has said a simple failure to administer *Miranda* warnings, "is not in itself a violation of the Fifth Amendment."

I think under these three lines of cases it's undeniable that the *Miranda* rules extend beyond what the Constitution requires. So I challenge Mr. Litt tonight to explain whether he would have the Court overrule those three lines of cases, because under these cases, it's clear that *Miranda* warnings are not constitutionally required. Therefore, under our constitutional system of government, Congress is free to modify the *Miranda* rules.

MR. DENNISTON: Thank you Professor Cassell. Mr. Litt.

MR. LITT: Thank you. I'll take that challenge. I don't think its necessary to overrule any of those cases.

I would like also to thank the editorial board of the *American Criminal Law Review* for giving me the opportunity to debate the world's leading expert on *Miranda*. Professor Cassell is renowned throughout the legal profession and legal academia for the length, and breadth and depth of his work in this area, and he has done it in a scholarly and restrained fashion that I think everybody appreciates. And, of course, as he said, Lyle Denniston is a legend to anybody who has read the *American Lawyer* or any of his many articles in the paper.

For thirty-two years, the *Miranda* decision has been the guiding principle by which admission of confessions has been governed in this country. More than that, it stood as a symbol of our country's commitment to the rule of law, to the judicial control of police behavior, and to individual dignity and self-determination. Now at a time when crime rates are falling all over the country but when mistrust of the police is increasing, we are being asked to cast this rule aside. I don't think we should do so, I don't think we have to do so, and I don't think that Congress had the power to do so in

Section 3501.

I want to begin by identifying some areas of common ground between Professor Cassell and myself. In the area of legal analysis, we both agree that parts of *Miranda* are dictated by the Constitution and parts are not, and I'll explain a little more if you have some doubts about that in a second. We also both agree that to the extent that *Miranda* is dictated by the Constitution, Congress has no power to [*1174] overrule it, and we agree to the extent that *Miranda* isn't dictated by the Constitution, Congress can modify it to that extent. I think where we disagree is where exactly *Miranda* stops being constitutionally compelled, what parts of *Miranda* Congress is free to tinker with. Now because the *Dickerson* case is a legal case and the Supreme Court's decision is going to be based on the law, I'd like to focus on the legal rather than the policy aspect of the argument today, and so what I'm going to talk about in this opening statement is to what extent is *Miranda* required by the Constitution. It seems to me that the best place to start with that is the *Miranda* decision itself.

What did the Court say it was doing in *Miranda*? At the beginning of the opinion it said that it had granted cert.--and I'm leaving out a few unnecessary words here--"to explore some facets . . . of applying the privilege against self-incrimination to in-custody interrogation and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." n18 Not prophylactic guidelines, or remedial guidelines, or improvised guidelines, but constitutional guidelines. And then, after setting forth its analysis, in announcing its disposition of the particular cases before it, it said that it had concluded that the statements were taken from the defendant in each case "under circumstances that did not meet constitutional standards for protection of the privilege." n19 Given that language and much else that's in that opinion, I think it is pretty hard to argue that *Miranda* was not based on the Constitution.

Well, what about the subsequent decisions? Professor Cassell says, and has argued at substantial length in his brief and in his articles, that subsequent cases have established that *Miranda* was in fact not required by the Constitution. But, apparently, that has escaped the notice of the justice system. Despite this argument, the Court has never retreated from the fundamental constitutional holding of *Miranda*. Let me just read you how the Court described *Miranda* in 1981 in the case of *Edwards v. Arizona*. n20 It said "in *Miranda v. Arizona*, the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." n21 And nine years later, in another case, the Court said that *Miranda* held that the Fifth Amendment privilege against self-incrimination prohibits admitting statements without the warnings. Now these are clear and unambiguous holdings. But how do you reconcile them with the cases that Professor Cassell cites, particularly how do you reconcile them in one minute, which is what I have left in my opening statement here? The answer, which I hope to develop at greater length given an additional opportunity, is that Professor [*1175] Cassell is confusing the *Miranda* warnings, which are not constitutionally required, with the *Miranda* holding, which is.

In brief, there are three aspects to *Miranda*, three separate holdings. The first is the holding that Mr. Denniston alluded to, that the Fifth Amendment Self-Incrimination Clause governs in-custody interrogations. Prior to that, confessions had been examined under the Fourteenth and Fifth Amendment Due Process Clauses. That's clearly a constitutional holding--that you've got to analyze this under the Fifth Amendment--and Congress has no power to modify that. The Court then looked at the practice of interrogation and came to its second conclusion, which was that in-custody interrogation is inherently coercive, and unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. That's the second holding of the Court. The third holding of the Court was that one way of dispelling that coercion was by the familiar warnings and waiver. But it is clear from the *Miranda* opinion and from the subsequent decisions, that while the specific warnings were not constitutionally required, the requirement of safeguards to protect the privilege was constitutionally required. Once you understand the essential difference between the constitutional holding and the specific warnings, then I think all of the cases that Professor Cassell cites are easy reconcilable. None of them has to be overturned, but *Miranda* remains firmly grounded in the Constitution.

MR. DENNISTON: Very good. Now we will turn to alternating questions with the other side entitled to a response.

I'm not sure who has the burden of persuasion here tonight, but we will begin the questioning with Professor Cassell. Assume for the sake of the argument that the Court in 1966 intended to say that the *Miranda* decision mandated as a constitutional matter the types of warnings or equivalent alternatives. Has *Miranda* been overruled by the subsequent decisions?

PROFESSOR CASSELL: Well, I don't think *Miranda* has been overruled by the subsequent decisions. I think *Miranda* has certainly been clarified by the subsequent decisions, and let me take my full five minutes then to expound that answer. You started us in 1966 in your background statement, and I think it's important to understand what the historical background was in its entirety leading up to *Miranda*.

For 180 years in this country under various rationales the voluntariness test essentially governed the admissibility of confessions in both federal and later in state courts. And in making that voluntariness determination, courts could look at a number of factors including whether *Miranda* warnings were given. But those [warnings] were simply one factor in the totality of the circumstances test that was used by the courts. Now, I mention this 180 years of history leading up to *Miranda* not because I'm arguing that the original intent to the Constitution should somehow dictate the result in *Dickerson*. On the other hand, if there is any ambiguity in what *Miranda* means, it seems to me that we should give considerable [*1176] weight to an unbroken 180 year tradition of allowing voluntary confessions into evidence.

Now, let's turn to the *Miranda* decision itself. I think even its supporters would describe it as a somewhat unusual opinion. In fact, one academic commentator who supports the opinion said *Miranda* really reads like a statute with an accompanying legislative report. There is a 50-page opinion that rattles off a series of dicta and then directives and then some historical information. Finally, at the end of all that, there's brief mention of, oh yes, there were a couple of cases that we were looking at here, and here's how they come out.

If you look at the 50 pages in the opinion, characteristically you'll see the opinion speaking about the "potentiality" for compulsion or the need for appropriate "safeguards" or the fact that something must insure against the Fifth Amendment rights being jeopardized. n22 Now, to be sure, in those 50 pages you can find some language that seems to suggest *Miranda* is constitutionally required, and Mr. Litt has skillfully extracted those portions of the opinion. But there was equally the kind of language that I have just recited to you from the opinion talking about how the Fifth Amendment might be implicated in certain situations.

To the extent *Miranda* was ambiguous on June 13, 1966, I would suggest that the ambiguity was rather quickly clarified. Just one week later on June 20, 1966, the Court handed down its decision in *Johnson v. New Jersey*. n23 The issue in the *Johnson* case was whether to apply *Miranda* retroactively. The Court said, well, no, we're not going to apply *Miranda* retroactively. Why? Well, to do that would require the release of convicted criminals, even where it would require the retrial or release of numerous prisoners found guilty by trustworthy evidence. How could the evidence have been trustworthy if it was not obtained in compliance with *Miranda*? Well, the reason, of course, was that those were, in many circumstances, entirely voluntary statements.

Now, what did the later cases do? I still have to suggest that Mr. Litt has not answered the challenge here, because, I think, the later cases leave no doubt that *Miranda* is not constitutionally required. *New York v. Quarles* allows a non-Mirandized statement into evidence. Mr. Litt has talked about the second and third holdings that he sees in the *Miranda* case. As I understand those holdings, they are that no statement can be used by the prosecution unless it is preceded by *Miranda* warnings. How then, Mr. Litt, was Mr. Quarles' statement, taken as the product of custodial interrogation but not preceded in any way by *Miranda* warnings, allowed into evidence? *New York v. Quarles* is not some sort of outlier decision. There is also the line of cases involving impeachment. Statements taken in violation of *Miranda* can be introduced at trial to impeach the testimony of a defendant. Why? Well the Court has been very careful to distinguish between what it calls mere [*1177] technical *Miranda* violations, on the one hand, and involuntary statements. Surely a statement that's taken in . . . an involuntary statement cannot be used in any way, but a non-Mirandized statement can be used for these impeachment purposes.

And finally, there is the case of *Oregon v. Elstad* n24 written by Justice O'Connor. There the Court says specifically that the fruit of the poisonous tree doctrine, that is, the doctrine that applies to violations of the Constitution, has absolutely no application to *Miranda* violations. Why? Well, the fruit of the poisonous tree doctrine, the Court said, assumes the existence of a constitutional violation. To violate *Miranda* is not to violate the Constitution. So I think it's really hard to see how you could somehow claim that *Miranda* is a constitutional requirement. And, again, if there was any doubt on this point, Mr. Litt was just recently in the Department of Justice, and they issued a 100-page report on this subject in 1986. Here's what the Department of Justice, Office of Legal Policy concluded after extensive research and analysis: "*Miranda* should no longer be regarded as controlling in Federal cases because of Section 3501." n25 So I think if you look at all those sources together--the constitutional history, the *Miranda* opinion itself, subsequent decisions, and even what the Department of Justice has said--you'd have to conclude that *Miranda* is not a constitutional requirement.

MR. DENNISTON: In response.

MR. LITT: It's interesting that although the Reagan Administration Justice Department did come to that conclusion, in twelve years of the Reagan and Bush Administrations they somehow couldn't find a single case in which it was appropriate to invoke Section 3501.

There is an unspoken premise behind Professor Cassell's argument, and that is that the only thing that the Self-Incrimination Clause prohibits is the use of involuntary statements, and if a statement can be used for any purpose, therefore, it is not a constitutional violation. But neither of those is true.

First, the Self-Incrimination Clause, even apart from *Miranda*, deals with more than compelled testimony. For example, in *Griffin v. California*, n26 the Court held that a defendant's failure to testify could not be used against him in any way. Now a defendant's failure to testify isn't coerced in any sense of the word that has any meaning to me. In fact, it's the essence of the voluntary choice that the Fifth Amendment protects, but the Court said that comment on that silence violates the Self-Incrimination Clause.

Second, and this is a very important point, the protections afforded by the Self-Incrimination Clause can vary according to the context. For example, the classic example of a coerced statement is a statement given under a grant of immunity. The court tells you, you go in there and testify or else. But a statement [*1178] given under grant of immunity can be used in a prosecution for perjury. Not only the false part of the statement but the entire statement, and I would venture to say that a classically coerced statement, something that had been tortured out of you, couldn't be used as the basis for perjury prosecution either.

My point is only that the fact that statements are accorded different levels of protection in different contexts doesn't mean that the Court in *Miranda* was wrong when it said that this was a requirement of the Fifth Amendment, and the Court in *Edwards v. Arizona* and the subsequent cases was wrong when they said this was a requirement of the Fifth Amendment. They created a sort of intermediate zone of statements where indeed you could not establish in the particular case that a particular statement was coerced, but nonetheless the Court held quite clearly in *Miranda* and has never retreated from that, that the Constitution required a certain degree of prophylaxis to insure that the inherent coercive atmosphere of in-custody interrogation was guarded against interrogation of individuals.

MR. DENNISTON: We go now to a question for Mr. Litt. Is it possible to interpret the sequel decisions beginning with *Michigan v. Tucker* n27 in 1974, those decisions which describe *Miranda* as prophylactic, as having reestablished the voluntariness standard as the appropriate constitutional standard for coerced confessions?

MR. LITT: I believe that in each and every one of those cases the Court has reiterated the central holdings of *Miranda*. It has never retreated from the central holding that says that you have to give the warnings and get a voluntary and intelligent waver of the *Miranda* right. It has refused to expand that, it has limited it in some areas in terms of what sort of statements will be suppressed and under what circumstances statements will be suppressed. But I don't believe

that the Court has ever said, no, we are returning solely to the voluntariness test.

Now if by your question you mean is the totality of the circumstances still the test for voluntariness, the answer to that is yes. *Miranda* didn't change that, but what *Miranda* did was create an additional constitutional inquiry, which was, at least unless other equally adequate remedies are shown for protection of the privilege, were the warnings given and were the rights voluntarily waived.

MR. DENNISTON: Could you clarify for the audience the difference that you perceive between an involuntary standard and a totality standard?

MR. LITT: Yes, between involuntary standard and. . .

MR. DENNISTON: You said that the Court had not disturbed the totality standard.

MR. LITT: That's correct, for determining whether a statement was voluntary or not.

MR. DENNISTON: That is a standard and voluntariness is what, the goal?

MR. LITT: That's the test by which the voluntariness of a statement is assessed.

[*1179] MR. DENNISTON: And is that not virtually identical with Section 3501?

MR. LITT: Yes.

MR. DENNISTON: And therefore 3501 squares precisely with *Miranda*.

MR. LITT: No.

MR. DENNISTON: And would you elucidate?

MR. LITT: Because *Miranda* imposed an additional requirement above and beyond the requirement that in a particular case a confession be found voluntary. In *Miranda*, the Court said that because of the inherently coercive nature of in-custody interrogation there must be adequate safeguards shown to ensure that the defendant is aware of his rights and has a continuous opportunity to exercise them. It went on to say that we're not going to limit Congress and the state courts in their ability to experiment with ways of fulfilling this constitutional mandate of creating these safeguards, but until somebody comes up with another set of safeguards that are equally as effective, we're going to require that you give these warnings and you must obtain a knowing and intelligent waiver. That is in addition to the voluntariness test in individual cases.

MR. DENNISTON: All right. Do you want to respond?

PROFESSOR CASSELL: Yes. I agree with Bob Litt that *Miranda* imposed an additional requirement. Our issue tonight, though, is whether that additional requirement is constitutionally required. I have not challenged the authority of the Court to promulgate the *Miranda* rules. The issue in *Dickerson* is whether Congress could scale back that additional requirement. And here, I think, it's interesting to compare the position that I think I hear Mr. Litt articulating tonight with the brief that he filed in the U.S. Supreme Court of several weeks ago. There, if you read his brief, it says that *Miranda* rights are "rooted in the Constitution." He does not say that they are constitutional requirements. In fact, if you look at his brief, if you look at the other briefs that have been filed by the parties, they have an extensive list of synonyms here for what they say the *Miranda* rights are.

MR. DENNISTON: Surely you're not suggesting that he has the authority to override his client's interest.

PROFESSOR CASSELL: Absolutely not, but I think his clients, a number of law enforcement representatives,

realize that you could not say *Miranda* rights are constitutional requirements. Here's what the parties have said. They have not said *Miranda* rights are constitutional requirements. We are told that *Miranda* rights have "constitutional weight;" they have "constitutional force;" they have "constitutional underpinnings;" they have "constitutional footings;" they are of "constitutional dimension;" they rest on a "constitutional basis;" they have a "constitutional foundation;" and, for good measure, they have "constitutional grounding." n28 You notice that between Mr. Litt's brief and all the briefs that have been filed for the [*1180] parties, we are never told that they are in fact "constitutionally required," which is the lynchpin issue in the *Dickerson* case.

The reason they do not make that assertion, I suspect, is they know it's not true; they know the Court has said exactly the opposite. Listen carefully to what the Court has said, and these are holdings, not simply brief passages that Mr. Litt has collected. These are holdings on which the particular decisions and particular cases turn. The Court has said the *Miranda* rights are "not themselves rights protected in the Constitution." n29 They are "not constitutional in character." n30 They "sweep more broadly than the Fifth Amendment itself." n31

Now, let me give you this one case that I've been talking about tonight that I think Mr. Litt again has not been able to square with his theory--*New York v. Quarles*, a 1984 case involving a rape suspect the police apprehended. They noticed he was wearing a shoulder holster in which the firearm was missing, and they had received information that he had had a firearm just a short time ago. The police interrogated him and asked, "where is the gun?" He told them where it was, and they recovered the gun. The Supreme Court allowed that statement by Mr. Quarles to be used in evidence even though it was the product of custodial interrogation and even though no *Miranda* warnings of any type were given. Why? The Court said that the officers had merely departed from the "technical" *Miranda* requirements, n32 not from the voluntariness requirements at all. So if *Miranda's* requirements are constitutionally required, *Quarles* would have to be overruled. If there is inherent compulsion in [custodial interrogation], the Fifth Amendment requires the exclusion of statements that are not preceded by warnings. *Quarles* would have to be overruled. But, of course, the Court is not going to overrule *Quarles*; it's going to reaffirm *Quarles*. And, for that reason, it's going to uphold what the Fourth Circuit did in *Dickerson*.

MR. DENNISTON: All right. Let's turn now with a question to Professor Cassell. The one issue that seems to be alive in the Supreme Court, with which the Fourth Circuit almost did not deal, mentioned it only in passing, as an interesting academic question: If *Miranda* is not constitutionally based, how is it that the Supreme Court acquires the authority, as it has done repeatedly since 1966, to apply *Miranda* in appeals from state courts and in federal habeas cases from state courts?

PROFESSOR CASSELL: Our brief lays out in considerable length the explanation for this. And let me, just before answering the question, just note what I think is the underlying premise of the question--certainly the underlying point that Mr. Litt and his allies have tried to draw from them. The underlying implication that they try to draw from this application of *Miranda* to the states is that the *Miranda* [*1181] rights are constitutionally required. That's an implication and that's an implication that stands directly opposite to the language that I've just cited from the Supreme Court in which it has said that the *Miranda* warnings are not constitutionally required.

Well, how then does *Miranda* apply to the states? I think the explanation has been laid out by a number of academic commentators. There is a description indeed of what the Court is doing when it applies doctrines like *Miranda* to the states. It's known as "constitutional common law." n33 Essentially the Court has created a remedial structure for a constitutional right and then applied it to the states. There are a number of examples where the court has done something quite like this. To cite one example, *Bivens v. Six Unknown Federal Narcotics Agents*, n34 a 1971 case, involved the Supreme Court allowing federal officers to be sued in court when they violated constitutional rights. The Court, however, was quick to recognize that this prophylactic structure that it created to protect the constitutional rights that might be implicated in these tort actions could be scaled back by Congress. Just to cite one more example, in 1983 a case known as *Bush v. Lucas* n35 involved a situation where a federal worker's First Amendment rights had been violated. He sought to file a *Bivens* action, a tort action against the federal officials who had violated his constitutional rights. The Court said, oh no, you can't do that. Why? Because Congress has created an alternative structure for dealing

with these types of claims. Was that alternative structure equally effective with the *Bivens* action? No, in fact, the Court emphasized that this other remedy, the federal personnel statutes governing federal workers, were not fully effective; however, it provided some relief, and it was up to Congress to decide what sort of relief to apply in this situation.

Now, again, this is not just an isolated case. There are other cases we could talk about. Let me mention one that was decided just two months ago, because it may foreshadow what's going to happen with the *Dickerson* case. Just two months ago, in January, in a case known as *Smith v. Robbins*, n36 the Supreme Court dealt with the situation involving frivolous appeals by prisoners and what should defense attorneys do in those situations. You might recall a case known as *Anders v. California*, n37 in which the Supreme Court laid out a series of procedures that defense attorneys should go through in that sort of circumstance. In *Smith v. Robbins*, the issue was whether California could substitute a different procedure from the one the Supreme Court itself had laid out in *Anders v. California*. The holding, just two months ago, was "yes." California could substitute a different procedure. Why? Well, the Court said the only question was whether California [*1182] had substituted a different procedure that meets the minimum safeguards of the Constitution. As a Court, "we do not address the question of what is prudent or appropriate." Our only issue, the Court said, is what's "constitutionally required," and in that case the California procedure did meet the constitutional minimums.

If you look at that test, again it's just two months old, you can see very clearly that Section 3501 will be upheld by the Supreme Court. Does it [Section 3501] meet the constitutional minimums? We all will have a chance tonight to talk about some of the other things Section 3501 does, but absolutely, at a minimum, it excludes involuntary confessions. It maintains that bedrock constitutional principle, so it certainly satisfies the minimum constitutional requirements. And, I think for that reason, it [Section 3501] will certainly be upheld in a few months.

MR. LITT: So much to say and so little time. Let me talk about *Smith v. Robbins*, because I actually think that *Smith v. Robbins* is very closely related to this case and it demonstrates that Section 3501 does not in fact pass constitutional muster. Because the important part of what Professor Cassell said about the holding in *Smith v. Robbins* is that states are free to experiment as long as they meet the minimum standards of the Constitution. So you are put right back to the question of what the Constitution requires. And I think *Smith v. Robbins* is kind of an interesting analogy because, as the Court noted in *Smith v. Robbins*, in order to show that the defendant hasn't received effective assistance of counsel on appeal under the standard of *Strickland v. Washington* n38, the defendant has to show both that his counsel's conduct was objectively unreasonable and that he was prejudiced by his counsel's representation. *Anders v. California* set up a prophylactic standard for what a lawyer has to do in order to ensure that the defendant receives effective assistance of counsel on appeal.

But suppose that after *Anders*, Congress had passed a statute that said "we disagree with what the Court said in *Anders*. We just want to stick to the *Strickland* standard that says you have to show prejudice and you have to show objective unreasonableness and anybody who shows this," or to put it differently, anybody who shows that his confession was involuntary "we will allow you to have a new appeal" or "we'll suppress the confession." That would be, according to the standard that Professor Cassell sets forth, that would be completely adequate and yet that clearly is not what the Court had in mind in either *Anders* or *Smith v. Robbins* and indeed in other post-Anders cases where they have struck down state schemes which didn't go far enough to protect the prophylactic right, even though there was no showing in the individual case that the underlying right to counsel had been violated.

Just briefly, with respect to *New York v. Quarles*, what the Court said in *New York v. Quarles* was the *Miranda* warnings aren't constitutionally compelled. I have no problem with that. I agree the *Miranda* warnings aren't constitutionally [*1183] compelled. What the Court did in *Quarles* was say that when we're dealing with this area of statements that are not actually coerced we're going to tailor the scope of the exclusionary remedy to the needs of the situation. But what it didn't do was overturn the underlying *Miranda* constitutional holding that some sorts of safeguards are required. I would like to throw back at Professor Cassell, *Edwards v. Arizona*, where the Court clearly based its holding on the constitutional holding of *Miranda*. I have not heard him mention *Edwards* yet.

MR. DENNISTON: All right. A question then to Mr. Litt. Let us move, if we can, at least partly away from *Miranda* and focus on Section 3501, the part of Title II of the 1968 Safe Streets Act. Mr. Litt, if Section 3501 is a statute legitimately passed by Congress, has Justice Department after Justice Department since then failed faithfully to execute the laws of the United States by ignoring 3501 in federal cases where *Miranda* warnings were not given but the confessions arguably were voluntary?

MR. LITT: I cannot speak for why earlier Justice Departments which concluded that Section 3501 was constitutional did not invoke Section 3501. I can say that I was an Assistant United States Attorney during the Reagan Administration. When you became an Assistant United States Attorney they gave you a little book that was called "Proving Federal Crimes." It told you all about how to get things into evidence, how to go into the grand jury, how to draft an indictment and so on. The section on confessions--I went and actually pulled this book out of my attic the other day--made no mention of Section 3501. It just talked about *Miranda*. Now, as I said before, if they had really felt that Section 3501 was the governing standard, it would have been very easy to send out a directive to all United States Attorneys that says you're going to invoke Section 3501 in every case in which *Miranda* is an issue. That never happened and it was never done.

I do think that when you get to more recent years, when the Department revisited the issues that had been addressed in Judge Markman's work, I think that it's a very different issue when the Department concludes that, in fact, a statute is inconsistent with controlling authority in the Supreme Court. I think the Department does not have an obligation to defend that statute and I think that I was out of the Department by the time this determination was made. I would assume that that was a determination that was made by the Department.

MR. DENNISTON: Response?

PROFESSOR CASSELL: Yes, I think it's been a clear constitutional abdication on the part of the executive branch in the last several years during the tenure of the Clinton Administration. They have an obligation to "take Care that the Laws be faithfully executed." n39 What does that mean? Well, Seth Waxman, the current Solicitor General, was asked during his confirmation hearings by Senator Hatch, will you defend acts of Congress when reasonable arguments can be made on their [*1184] behalf? Mr. Waxman replied, "Absolutely Senator, I will." n40 So the issue tonight boils down to whether there is a "reasonable" argument that can be made on behalf of Section 3501. I am willing to stipulate that Mr. Litt's arguments are reasonable on the other side. I'm wondering whether he's willing to stipulate that my arguments are reasonable on this side because if they are . . .

MR. DENNISTON: It's not required.

PROFESSOR CASSELL: Well, if he won't stipulate, there are twenty-five years of history in the Department of Justice supporting my position. In 1969, then-Attorney General John Mitchell testified before Congress that he would support Section 3501. There then followed six years of conservative litigation all over the country supporting Section 3501, which led to a 1975 decision, *United States v. Crocker* n41 in the Tenth Circuit upholding the constitutionality of the statute. In 1986, the 100-page report that I mentioned concluded that Section 3501 was constitutional.

In answer to Mr. Litt's challenge--why didn't the Reagan Administration use the statute? We did use the statute. I was there and I helped identify a case, *United States v. Goudreau* n42 in the Eighth Circuit where we filed the Section 3501 argument. That ultimately did not lead to a conclusion, but we continued to look for test cases. It was clearly the policy of the Department to defend 3501, as Attorney General Meese, Attorney General Barr, and Attorney General Dick Thornburgh recently testified to Congress. In fact, it's interesting if you look at the Clinton Administration, they told Congress repeatedly during congressional hearings that they had no policy against raising Section 3501. Now, against this background, is it plausible to assert that there is no reasonable argument to defend Section 3501? And it's interesting if you look at what Attorney General Reno said when asked, I don't know whether it was by Mr. Denniston or others: "Attorney General Reno why aren't you defending this law?" Here's what she said. She said, well, "in this Administration and in the other Administrations preceding it, both parties have reached the same conclusion" that the

statute could not be enforced. n43 The history I've just recounted, I think, makes crystal clear that statement is, to put it politely, not true. In fact, Mr. Denniston had a very polite way of putting it in his article on this subject. He said, "Reno's perception that this has always been the federal government's view is mistaken." n44 A very nice word, Lyle, and I think that is absolutely accurate.

MR. DENNISTON: I think Winston Churchill referred to that as a terminological [*1185] inexactitude. A question now for Professor Cassell. Let's assume for the moment, and I think the assumption is at least supported in part by reading the legislative history of Section 3501, that Congress' intent in the beginning was actually to make a constitutional declaration as to what the Due Process Clause of the Fifth Amendment and the Sixth Amendment required regarding voluntary confessions. Was that within Congress's authority to do and if not, why not?

PROFESSOR CASSELL: Yes, it was within Congress authority to do what it did in Section 3501. That was not, however, to make a constitutional declaration about what the Fifth Amendment meant. I think, in fact, what was going on there was put very nicely by Mr. Litt. A moment ago he said to look at what's going on in the *New York v. Quarles* case. There you see the Court "tailoring the *Miranda* rules to the needs of the situation." "Tailoring the *Miranda* rules to the needs of the situation"--that's precisely what Congress decided to do. They decided to "tailor" the *Miranda* rules to the "needs of other situations." And now let's look specifically at what the statute does, because Mr. Denniston was only able to describe it very briefly, and I think a fuller description of the statute will make clear how reasonable the action of Congress was. Let's stipulate that there were some intemperate remarks during the congressional debates. I don't know . . . I won't . . .

MR. LITT: I'll stipulate to that one.

PROFESSOR CASSELL: So I've gotten one stipulation. But the question is not what Congress said, the question is what did Congress do. And, what Congress did was something quite reasonable. And in fact, it actually codified the *Miranda* warnings. If you look at Section 3501(b)(3), you find that the courts are directed to consider, in making voluntariness determinations, "whether or not such defendant was advised or knew that he was not required to make any statement and that any statement could be used against him." Section 3501(b)(4) provides that the court shall consider "whether or not such defendant had been advised, prior to questioning, of his right to the assistance of counsel." Now, what is the practical effect of putting those into the statute and making those factors that every single federal court will consider when deciding whether to admit a confession? I think the practical effect is that federal officers will undeniably continue to give *Miranda* warnings when they are interrogating suspects.

That's my view of the situation. But don't simply take my word for it. If you read the brief from the United States Department of Justice, they say the same thing. They say specifically "federal law enforcement agencies would as a matter of policy continue to comply with the warning requirements of *Miranda* if Section 3501 was upheld." n45 And that, in fact, is what has been happening in the Fourth Circuit over the last year. If you want to know what it looks like to live in a world with Section 3501 in place, let me give you a little suggestion. Hop on the orange line or the yellow line--are those the lines that go out to Virginia? If you pop up off [*1186] the escalator, you will be living in a world where federal officers comply with Section 3501. The only difference you would see compared to, say, living here in the District of Columbia, is that if you do some banking in Virginia, you may be a little less likely to find somebody making an unanticipated withdrawal with the force of a gun, since Mr. Dickerson has been held behind bars for the last several years as a result of the Fourth Circuit ruling.

So that's the difference that you would see between Section 3501 and the world we live in today. And indeed it's interesting, if you look at Section 3501, there is a portion of it that actually extends beyond *Miranda's* requirements. Section 3501(b)(2) provides that the Court shall consider "whether the defendant knew the nature of the offense with which he was charged or with which he was suspected at the time of the confession"--that is, to look at whether the suspect knew what the police were investigating.

Now, that is not part of current *Miranda* doctrine. There is a 1987 decision, *Colorado v. Spring*, n46 that

specifically provides that a suspect's awareness of charges is not part of the *Miranda* inquiry or the Fifth Amendment inquiry. And again, you don't have to rely simply on my reading of the cases to see that that's not part of the voluntariness test. Mr. Litt's brief collects twenty-five factors that he identifies as going to the voluntariness inquiry. The suspect's awareness of charges is not one of his factors that goes into the voluntariness determination. So it's quite clear that there will be some suspects who will be better off under Section 3501 than they would be under the *Miranda* regime, for example, respondent Spring in *Colorado v. Spring*, was simply out of luck when he tried to make his argument. Had he been operating in a world of Section 3501 he could have argued that the fact that the police were looking at him for a murder charge, while he thought it was just a technical firearms violation, had some bearing on the voluntariness of the statement.

But that's just looking at Section 3501 by itself. Of course, the Supreme Court will not construe the statute in a vacuum. It will look at other things that bolster the protections of 3501. I've talked, for example, about the 1971 decision in *Bivens v. Six Unknown Federal Agents*--there we now have federal tort suits directly against federal officers who coerced confessions or violate other constitutional rights. In 1974, Congress amended the Federal Tort Claims Act to allow tort suits against federal agencies who do such things as commit assault, battery, false arrest, false imprisonment, the types of torts that might lead to a coerced confession. And, of course, I don't know whether Mr. Litt will stipulate to this, but I would think there is certainly quite a bit better training for federal law enforcement officers today than there was in 1966. A much more organized system of internal disciplinary rules is in place. And so when you put all of those factors together, not to mention the Hollywood screen writers who have now made *Miranda* warnings [*1187] sort of a collective part of our nation's conscientiousness, we live in a quite different world in the year 2000 than we lived in in 1966. We have, in fact, with Section 3501 and all these other developments, a quite adequate substitute for the *Miranda* regime.

MR. DENNISTON: Before Mr. Litt is given an opportunity to respond, let me clarify: Charles Thomas Dickerson may be a reader of the *Baltimore Sun* because he still lives in Maryland and I think I should come to his defense. He has not yet been tried in this case and he is still at-large somewhere, living in Suitland, and I trust that he will not take offense at our suggesting that he is behind bars. Mr. Litt, do you have a response to the last comment?

MR. LITT: I do, and I wish I could remember what it was. It's not clear whether Professor Cassell's position is that Section 3501 plus these other attributes that he mentions are sufficient to fit within the Supreme Court's prescription in *Miranda* that there have to be adequate safeguards to protect the privilege, or whether he's saying entirely independently of that, you can discard *Miranda* and replace it with these other things. One thing that's perfectly clear is that Section 3501 does nothing beyond restoring the prior voluntariness test. Section 3501 provides that a confession shall be admissible in evidence if it's voluntarily given. It's the voluntariness test that says that the trial judge in determining voluntariness shall take into consideration all of the circumstances surrounding the confession. As we discussed earlier, that's the voluntariness test. And then it lists certain factors that shall be taken into account but provides that the presence or absence of any of these factors need not be conclusive on the issue of voluntariness. It's difficult for me to understand how a statement that says you shall consider all the circumstances, the totality of the circumstances, is changed or buttressed in any way by a specific enumeration of certain of those circumstances that you have to consider. It's sort of like saying, there's a difference between saying everybody should leave this auditorium and everybody should leave this auditorium including the people sitting in the front row. You come out in the same place as long as the test is that you're required to consider the totality of the circumstances. It doesn't make any difference whether you enumerate other factors. And so Section 3501, as Congress intended and said it intended, does nothing more than restate the voluntariness test.

As to the other aspects that Professor Cassell mentioned, I think that there are a couple of problems with suggesting that they form a constitutionally adequate substitute. The first thing you have to do is look at the reality of the situation. How many cases are there where the police have actually been held liable or disciplined internally for violating a suspect's right, at least where there's no physical violence involved? Almost none. This has almost no deterrent effect on the actual behavior of police departments. I doubt that very many policemen, when they are arresting and interrogating a suspect, bear that in mind. Moreover, and this is even more important, I think that these remedies, by definition, cannot

be adequate to address the underlying constitutional violation because they do not in any way prevent the use of the suspect's statements against him. The Fifth Amendment is fundamentally [*1188] different from the Fourth Amendment in this regard. A Fourth Amendment constitutional violation is complete when there is an illegal search and seizure. Nothing can be done about it at that point, and so all you can do by way of remedy, with the exclusionary rule, is try to deter future violations. But the Fifth Amendment is a rule that says your statements shall not be used against you, and the *Miranda* exclusionary rule excludes those statements. Any remedy that does not exclude statements by definition is not as effective.

MR. DENNISTON: A question now for Mr. Litt. Let's move if we can at least partly away from Section 3501 and talk about the consequences of the coming *Dickerson* decision. Mr. Litt, assume for the sake of the argument that *Miranda* survives in some way. Does it make any difference one way or the other, particularly since the technology surrounding police interrogation is maturing and there are other means by which one can test the behavior of the police at the station house?

MR. LITT: Well, I think the Court said in *Miranda*, and I think it has consistently adhered to this principle, that it's not intending to deter any state or Congress from experimenting with those technological innovations, things like those which Professor Cassell has suggested in one of his articles, the videotaping of confessions. I suspect, by the way, from my own experience, that law enforcement would object even more vehemently to the videotaping of confessions then it does to a lot of other things because I think most police probably do not want to have the conduct of their interrogation memorialized on videotape. I also think that the practical problems of videotaping would be fairly substantial because every law enforcement officer would either have to carry a video camera with him everywhere he went or would have to defer any interrogation until you got the suspect in front of the video camera. But the State of Alaska has been moving in that direction. There is nothing in *Miranda* that stops states from experimenting with these. But until they do, the *Miranda* rules do provide protections. In-custody interrogation today still presents all of the same inherent compulsive pressures that the Court recognized in *Miranda*. It is still conducted, by and large, incommunicado, the suspect is isolated from his family and his friends, the techniques that are used by the police are very similar to those identified by the Court in *Miranda*, and the goal of interrogation, as the Court said in *Miranda*, is essentially to try to subjugate the will of the suspect to the interrogating officer.

In fact one of the amici in this case has cited some experimental psychological studies where they use techniques similar to those discussed in the interrogation manuals that the Court reviewed in *Miranda*, and they found that even outside the inherently coercive atmosphere of an arrest and being taken to the station house, people are going to give false confessions in those circumstances, when somebody comes up to you and accuses you in a firm voice and uses all the kinds of police interrogation tricks that are familiar to anybody that watches *Homicide* or *Law and Order* or any of those shows.

[*1189] Does *Miranda* eliminate all false confessions? Of course not. Does it help lessen them? I think it undoubtedly does by lessening the pressures and ensuring that a decision to make a statement is, in fact, the product of a defendant's free will. And it does that unquestionably by requiring that you know what your rights are and you waive them voluntarily. Most importantly, is there any showing that these circumstances have changed since *Miranda*? None whatsoever. Police are more professional, but interrogation in the station house is still interrogation in the station house and the Court concluded in *Miranda* that because that was inherently coercive, you had to have constitutional safeguards in order to protect the privilege. That remains true today.

PROFESSOR CASSELL: Well, let me talk a little bit about alternatives for *Miranda*, because I think this is one of the real tragedies of *Miranda*. Mr. Litt is right--there is nothing in *Miranda* that purports to stop states from looking at alternative ways of dealing with police interrogation. In fact, the *Miranda* majority promised that "nothing in our decision today will handicap sound efforts at reform." n47 The dissenters vehemently objected in *Miranda* that, yes, the inevitable effect of imposing this set of rules and accompanying them with language like the language Mr. Litt has quoted about how they appear to be constitutional requirements, is to handicap efforts at reform and block a more "discriminating treatment" of the issues, is the way Justice White put it in dissent.

Well, now we have more than thirty years of hindsight to decide who was right--the majority or the dissenters--and with the benefit of thirty years of hindsight, there's absolutely no question who was right, at least on this aspect of the *Miranda* decision. The dissenters were correct. There has been no experimentation with a substitute for *Miranda* other than Section 3501. And that's why I think the stakes in this case are particularly high. If the Court rejects the only alternative that has been presented to it for thirty years and says "no," as Mr. Litt has been suggesting, that these are in fact constitutional requirements that the states are obligated to follow, then we are going to lock our country into this particular approach, which was, after all, a 5-4 decision without historical foundation or precedent at the height of the Warren Court, as the be-all and end-all way to regulate police interrogation.

Now that's not the reason that that is such a bad idea--the reason is that there are a number of viable alternatives for dealing with the question of regulating police interrogation. And here it's interesting to contrast what America has done over the last thirty years while it has been essentially laboring under this constitutional straitjacket that the Court imposed with, for example, Great Britain. Great Britain during the 1980s had a number of commissions that investigated police interrogation and proposed reforms. One of the things that Great Britain did in the late 1980s was to set up a videotape regime. Now every station house in Great Britain [*1190] has a videocamera that police officers use when they are doing custodial interrogations. And, I submit, that kind of a regime provides much better protection for suspects against policy brutality. And, at the same time, if we coupled videotaping with the relaxation of some of the harmful features of *Miranda*, we could also have more voluntary confessions which would be good for society.

So that is what I think is really at stake here in the *Dickerson* case: Are we going to lock ourselves in to one approach? Are we going to petrify the law of pretrial interrogation? Or, are we going to really allow experimentation with what could very well be better ways of dealing with the problem?

MR. DENNISTON: I see that we are approaching the point at which we need to stop. Unfortunately I have a multitude of questions that the staff of the Law Review has proposed and I have composed. We need to close and so, since Mr. Cassell had the first word we will give Mr. Litt the last word.

PROFESSOR CASSELL: Well, I have been given thirty minutes to defend Section 3501 in front of the Supreme Court and I have been told the time will just fly by. I feel like the time has flown by tonight.

In closing let me just return to the kinds of themes that I tried to pose in my opening statement. Certainly one can make a variety of policy arguments supporting Section 3501 one way or the other. But tonight we've talked a lot about the constitutional issue, and that, of course, is the issue the Court will decide. Does the Constitution positively forbid Congress from passing Section 3501? I still submit that Mr. Litt has not answered my challenge, which is to reconcile his theory with *New York v. Quarles*. He's challenged me to explain *Edwards v. Arizona*. I have no difficulty with *Edwards v. Arizona. Edwards v. Arizona* created a prophylactic rule. Indeed, the later cases describe it as a "second layer," n48 a second level removed, a prophylaxis to help protect the constitutional right at issue. But the question then becomes, given that there are these layers--in fact multiple layers--of prophylaxis, can they be cut back? Can they as Mr. Litt has suggested, be "tailored" to the needs of the situation? I think they certainly can. And indeed that's what *New York v. Quarles, Harris v. New York, Oregon v. Hass*, and a number of other cases that we've talked about tonight clearly hold. All of those cases hold that the *Miranda* rights are not constitutionally required. Given that stipulation, given that description of the *Miranda* rights, it is quite clear then that Congress can step in and tailor them back, as Mr. Litt says, to the needs of the situation, provided, of course, that they do not go below the constitutional minimum, that is, the Constitution's prohibition of compelled self-incrimination.

So I think the legal case for upholding Section 3501 is quite strong. The argument for overturning it simply cannot be made on the basis of existing precedents, and indeed to accept the position that Mr. Litt and the parties have argued would require overturning all the precedents that I have been talking about [*1191] tonight. So I think the real case against the *Dickerson* argument is one that Mr. Litt's former colleagues in the Justice Department have tried to advance in their brief. They say that *Miranda* has become an established pillar of American law and to cut back on it would be harmful for public confidence. Interestingly, the support for this assertion turns out, in Mr. Litt's brief, to be that every

Hollywood crime drama and television show depicts officers warning suspects of the *Miranda* rights.

Well, that seems to me to be an odd basis to strike down an act of Congress, that it would somehow conflict with what Hollywood screen writers have depicted. But let me take the claim on its own merits. Let me talk about public confidence and whether public confidence would be harmed by upholding what the Fourth Circuit has done. I think it would not. I think, if anything, it would increase public confidence in our judicial system. It would signal that courts are not going to throw out reliable evidence like voluntary confessions simply because there is a debatable or arguable violation of what the Court itself has called technical rules. It would signal that the courts are going to treat seriously the danger to innocent persons when felons are released. It would signal that the states are free to experiment with alternatives, like videotaping that we've talked about tonight. And most important of all, it would signal that the public retains control over its criminal justice system. Remember what we're talking about when we talk about this case, when we talk about Section 3501, it is an act of Congress, an act passed by the people's elected representatives. If *Dickerson* is going to be decided on the basis of public confidence, as several of the briefs have suggested, including both Mr. Dickerson's and the Department of Justice's, then we have to consider what the people have said on this particular subject. What they have said is that they want voluntary confessions admitted into evidence.

Now, of course, however appealing it may be to decided cases on the basis of public confidence, that is not what the Supreme Court will do in *Dickerson*. It will decide the case based on what the Constitution permits and what the Constitution forbids. Nothing in the Constitution forbids using a voluntary statement as evidence in a federal criminal case. That's all that the Fourth Circuit said in *Dickerson*. And that's what the Supreme Court will say in a couple of months when it affirms the Fourth Circuit's decision at the end of this term.

MR. DENNISTON: Thanks very much. Mr. Litt?

MR. LITT: I beg to differ. I do think that something in the Constitution prohibits the use of voluntary statements, at least when there are not constitutionally adequate safeguards for protecting the privilege against self-incrimination. That's what the Supreme Court held in *Miranda*. And it's not isolated statements taken out of context, it's the core of the Court's holding that these are constitutional safeguards, and the Court has continued to so hold when it's squarely confronted with it. Professor Cassell is right that cases like *Edwards v. Arizona* have been characterized as prophylactic. But prophylactic is not the opposite of constitutional. There are many constitutional prophylactic rules and *Miranda* is one of [*1192] them. Another example is the rule of *Bruton v. United States*, n49 which holds that when a co-defendant's confession inculpates the other defendant and the co-defendant doesn't testify, so he can't be cross-examined, you can't introduce the co-defendant's confession even with a limiting instruction because there's a danger that the jury might consider the confession against the other defendant. Now, they don't say the jury does that in every case. It's a prophylactic rule, but it's required by the Constitution. And I think that although *Edwards* is indeed a prophylactic rule, Professor Cassell cannot get around the fact that the Supreme Court, in discussing its holding in *Edwards*, said that this is what the Fifth and Fourteenth Amendment required. It may be prophylactic but it's constitutional, and I think that in *New York v. Quarles*, all these other cases, there is no question that the Court has defined the scope of the constitutional right. But this is the historic function of the Supreme Court, to define the scope of constitutional rights, and there is nothing written in the Constitution that says that a constitutional right has to be inviolable and unchanging in all circumstances.

The Court addressed in the *Miranda* opinion itself the power of Congress to change and I want to read a somewhat lengthy quotation here. I apologize in advance for boring you with the Court's prose. What the Court said is "we have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." n50 And, parenthetically, I don't think anybody contends that Section 3501 meets that standard. "In any event, however, the issues presented are of constitutional dimension and must be determined by the courts. The admissibility of a confession in the face of a claim that it was obtained in violation of the defendant's constitutional rights is an issue the resolution of which has long been

undertaken by this Court. Judicial solutions to problems of constitutional dimensions have evolved decade by decade." n51 And I'm leaving out a couple of sentences. "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." n52

The fundamental difference between Professor Cassell's position and my position, and in one sense it's a very narrow difference, is whether there is something in *Miranda* beyond the holding that the Fifth Amendment applies to in-custody interrogation that is compelled by the Constitution. And I think, based on the language of *Miranda* and the fact that in *Miranda* they were reversing state court convictions, there clearly is. Something must be provided, some form of [*1193] safeguards to protect an individual's privilege against self-incrimination. Section 3501 doesn't do that and I am equally confident that the Supreme Court in several months will agree.

MR. DENNISTON: Thank you very much.

MR. LITT: (applause) Did I convince you, Paul?

MR. CASSELL: (applause) Do they do that at the Supreme Court when I finish giving my argument?

MR. DENNISTON: The trap door is there if you don't do well. Ladies and gentlemen, we would not be here tonight if you were not here and we appreciate your having come. Let me say a word of thanks to our diligent timekeeper and add to it an apology for the latitudinarian way in which I have enforced his judgments. We are all, the three of us here, most grateful to the Law Center and to the staff of the *American Criminal Law Review* and to each other for entertaining ourselves I think as much as we entertained you. We will now conclude. We cannot decide this case here and I will not undertake to test Professor Cassell's thesis that Section 3501 has no friends at the Georgetown University Law Center. I think the better thing for us to do is to conclude and once more thank you for coming and once more express to our two debaters our great gratitude.

STACEY OSTFELD: On behalf of the *American Criminal Law Review* and the Georgetown University Law Center I would like to thank again today's participant debaters, Professor Cassell and Mr. Litt, and our deepest gratitude to Mr. Lyle Denniston for lending his journalistic acumen to today's proceeding. This was certainly an insightful discussion on a topic of great importance. It is a debate that is sure to continue well beyond what was said today. In fact, in just a few weeks on April 19th, it will continue a few blocks from here at the Supreme Court of the United States.

I would like to thank those who helped us put this event together, the Office of Journal Administration, Ms. Elizabeth Monkus and Ms. Monica Stearns. I would like to thank the Executive Board of the *American Criminal Law Review* for a job really well done. I'd like to give specific thanks to Mr. Andrew Loewenstein, Mr. Joshua Hess, Ms. Judy Golden, and Mr. Kenneth Polite for their extra time and effort. The *American Criminal Law Review* would like to thank our advisor, Professor Michael Seidman and also other professors, especially, Professor Julie O'Sullivan and Professor Paul Rothstein who gave us outstanding support. Finally, I would like to thank all of you for joining us. Have a pleasant evening.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureInterrogationMiranda RightsRight to Counsel During QuestioningCriminal Law & ProcedureInterrogationMiranda RightsSelf-Incrimination PrivilegeGovernmentsFederal GovernmentEmployees & Officials

FOOTNOTES:

n1 384 U.S. 436 (1966).

n2 166 F.3d 667 (4th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3361 (U.S. Dec. 6, 1999) (No. 99-5525).

n3 297 U.S. 278 (1936).

n4 *See* Massiah v. United States, 377 U.S. 201 (1964).

n5 *See* Escobedo v. Illinois, 378 U.S. 478 (1964).

n6 372 U.S. 335 (1963).

n7 378 U.S. 478 (1964).

n8 378 U.S. 1 (1964).

n9 504 U.S. 908 (1992).

n10 Transcript of Oral Argument, United States v. Green, No. 91-1521, 1992 WL 687878, at *19 (Nov. 30, 1992).

n11 512 U.S. 452 (1994).

n12 United States v. Dickerson, 166 F.3d 667, 695 (4th Cir. 1999).

n13 *See* Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 198-203, 229 n.241 (1995).

n14 U.S. CONST. amend. V.

n15 467 U.S. 649 (1984).

n16 420 U.S. 714 (1975).

n17 401 U.S. 222 (1970).

n18 384 U.S. at 440.

n19 *Id.* at 491.

n20 451 U.S. 477 (1981).

n21 *Id.* at 480.

n22 *Miranda*, 384 U.S. at 457, 479.

n23 384 U.S. 719 (1966).

n24 470 U.S. 298 (1985).

n25 U.S. DEPT. OF JUST., OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 103 (1986), *reprinted in* 22 U. MICH. J.L. REFORM 437 (1989).

n26 380 U.S. 609 (1965).

n27 417 U.S. 433 (1974).

n28 The citations are collected in Brief of Court-Appointed Amicus Curiae Urging Affirmance of the Judgment Below at 14 n.9, Dickerson v. United States, No. 99-5525 (U.S. Mar. 9, 2000).

n29 Withrow v. Williams, 507 U.S. 689, 690-91 (1993).

n30 *Id.*

n31 *Elstad*, 470 U.S. 298, 306 (1985).

n32 *Quarles*, 467 U.S. at 668.

n33 *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

n34 403 U.S. 388 (1971).

n35 462 U.S. 367 (1983).

n36 120 S. Ct. 746 (2000).

n37 386 U.S. 738 (1967).

n38 466 U.S. 668 (1984).

n39 U.S. CONST. art. II, § 3.

n40 *Nomination of Seth Waxman to be Solicitor General: Hearing Before the Senate Comm. On the Judiciary*, 105th Cong. 8 (1997).

n41 510 F.2d 1129 (10th Cir. 1975).

n42 854 F.2d 1097 (8th Cir. 1988).

n43 Attorney General Janet Reno, Press Conference (Feb. 11, 1999) (transcript available at <www.usdoj.gov/ag/speeches/1999/feb1199.htm>).

n44 Lyle Denniston, *The Right to Remain Silent?: Law Professor, Justice of Supreme Court Aim to Replace Miranda*, BALT. SUN, Feb. 28, 1999, at C5.

n45 Brief for the United States at 49 n.37, Dickerson v. United States (No. 99-5525).

n46 479 U.S. 564 (1987).

n47 384 U.S. at 467.

n48 McNeal v. Wisconsin, 501 U.S. 171, 176 (1991).

n49 391 U.S. 123 (1968).

n50 384 U.S. at 490.

n51 *Id.*

n52 *Id.*