No. 99-5525

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES THOMAS DICKERSON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF BENJAMIN R. CIVILETTI *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES OF AMERICA

Filed January 28, 2000

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF BENJAMIN R. CIVILETTI *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES OF AMERICA

INTEREST OF *AMICUS CURIAE*

Benjamin R. Civiletti, having obtained the written consents of the parties pursuant to Rule 37.3, submits this Brief *amicus curiae*.[1] Mr. Civiletti is a distinguished lawyer with a long career that spans public service and private practice. His background and experience in criminal law provide a basis for

[1] This brief was not authored, in whole or in part, by counsel to a party, and no monetary or other contribution to the preparation or submission of this brief was made by any person or entity other than the amicus and his counsel. The consents of the parties have been filed with the Court.

his analysis, from the point of view of Federal prosecutors, of the effects of the *Miranda* warnings on the operation of the criminal justice system and of the adverse effects of the lower court's decision on the ability of the Department of Justice to carry out its role, as the President's delegate, in helping him discharge his constitutional responsibility to "take care that the laws be faithfully executed."

From 1962 until 1964, Mr. Civiletti served as an Assistant United States Attorney. In 1977, he joined the Department of Justice as the Assistant Attorney General in charge of the Criminal Division. In 1978, he was appointed Deputy Attorney General. In 1979, he was appointed Attorney General and served in that capacity until the end of the Carter Administration in 1981. During his tenure at the Department, Mr. Civiletti was responsible for the development and publication of the Department's Principles of Federal Prosecution. Mr. Civiletti is presently engaged in private practice in Washington, D.C. at the firm of Venable, Baetjer, Howard & Civiletti, where he serves as Chairman of the firm's Board. The views expressed in this Brief are those of Mr. Civiletti and his counsel in their personal capacities and do not necessarily reflect the views of the firm.

SUMMARY OF ARGUMENT

The decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), is a victim of its own success. In the 34 years since the case was decided, prosecutors at all levels, as well as State and Federal courts, have largely been spared the extensive litigation over the voluntariness of confessions that marked administration of the prior totality-of-the-circumstances test. *Id.*, at 476, 490. Memories of the pre-*Miranda* prior period have dimmed for many lawyers and many judges.

The majority and the dissent in the Fourth Circuit discussed at length whether the *Miranda* warnings are required by the Constitution. At bottom, this is a fruitless scholastic debate over nomenclature. All sides agree that, in *Miranda*, this Court established a functional requirement as to the level of protection that must be met in order to preserve the rights of subjects of custodial interrogations. While the precise words of the *Miranda* warnings are not constitutionally required, in order to devise an alternative protocol that satisfies the Fifth Amendment, a State government or Congress must establish procedures that provide a degree of protection against involuntary confessions that is greater than or equal to that provided by the classic formulation of the four *Miranda* statements. The statute on which the Fourth Circuit relied, 28 U.S.C. § 3501, plainly does not provide the required level of protection and therefore cannot, by itself, provide a constitutionally sufficient basis for admission of a custodial confession in the prosecution's case-in-chief. For this reason, regardless of the taxonomic category in which one places the *Miranda* warnings, the position of the United States should be sustained.

Rather than discuss this issue, which will be covered at length by the Solicitor General and the amicus party who participated below, this Brief *Amicus Curiae* will present two issues that are not addressed by the parties. First, the current *Miranda* warnings are of substantial benefit to Federal *prosecutors* in the administration of the criminal laws. By reviewing whether the police have complied with four bright-line rules before conducting custodial interrogations, Federal prosecutors can determine efficiently, and with a high degree of accuracy, whether the defendant's confession is likely to be admitted into evidence and thus whether the government

possesses sufficient admissible evidence to warrant proceeding with a criminal charge.

Second, the court of appeals violated the principle of separation of powers by considering the question whether Dickerson's confession was admissible under Section 3501, when the United States made a considered decision not to attempt to justify its admission on that basis. Under the Constitution, the President, acting through his delegate the Attorney General and her subordinates, has exclusive authority to enforce the criminal laws. As long as the prosecutor does not exceed legal or constitutional limitations, the Department of Justice has unreviewable discretion as to whether to initiate a prosecution, the terms under which a prosecution will be conducted, the evidence that will be presented in support of a charge, and whether to dismiss a prosecution.

The Attorney General has formally informed Congress that the Department of Justice believes that Section 3501 is unconstitutional and that it will not argue for admission under that provision of confessions that violate the *Miranda* warnings. The decision by the prosecution in this case, not to argue before the court of appeals for admission of Dickerson's statement on the basis of Section 3501, was a considered application of the general Executive Branch policy. The Fourth Circuit has usurped the exclusive authority of the Executive Branch to determine how to prosecute this criminal case, in overturning the suppression decision under Section 3501 in response to an argument made by an amicus that contradicted the express policy decision of the Department of Justice not to seek admission of the confession on that basis.

ARGUMENT

I. THE *MIRANDA* RULES AID THE ENFORCEMENT OF FEDERAL CRIMINAL LAWS BY FACILITATING DECISIONS BY PROSECUTORS CONCERNING WHICH CRIMINAL CASES SHOULD BE PURSUED.

Miranda prevents the introduction in the prosecutor's case-in-chief of statements obtained from the defendant in a custodial interrogation, unless the suspect was given prescribed warnings and knowingly waived his rights to remain silent and to have legal counsel.

A Federal prosecutor, seeking to determine whether the government has sufficient evidence to prosecute and obtain a conviction against a suspect, derives substantial benefits from the *Miranda* rules. The easily understood, bright-line nature of the tests provides the prosecutor with a highly reliable mechanism for determining whether statements made during a custodial interrogation will be found to be voluntary and thus be deemed admissible at trial. With a clear understanding as to whether this critical aspect of the government's proof is admissible, the prosecutor may make an informed judgment as to whether the government has enough information to initiate a criminal proceeding and whether it must obtain additional information about the defendant and the crime in order to increase its prospects of obtaining a conviction at trial.

By contrast, under a totality-of-the-circumstances approach to admission of a custodial confession, a Federal prosecutor faces a more difficult calculus, whose results are less predictable. The prosecutor must weigh whether a Federal district judge will determine that the defendant's statement was

made in a custodial setting; whether the police properly apprised the defendant of his rights; and whether, balancing all the aggravating and extenuating factors surrounding the interrogation, the judge is likely to admit the evidence or preclude its admission in the government's case-in-chief.

At a minimum, a totality-of-the-circumstances regime would generate increased litigation over the admissibility of statements made by criminal defendants during interrogation. This would impose increased time and resource demands on United States Attorneys and their assistants. Further, Federal prosecutors would no longer be able to verify, quickly and with minimum investigation costs, whether Federal law enforcement personnel had properly warned the defendant before taking his statement. Therefore, uncertainty and a risk of error would be introduced into the prosecutor's pre-trial determination as to whether the government has a case that would prove guilt beyond a reasonable doubt. The clearest showing on this point is the extensive litigation over the voluntariness issue that occupied the Federal courts of appeals and this Court in the years immediately before *Miranda* was decided.

In sum, the benefits of the current *Miranda* protocols to Federal prosecutors, and the problems for the prosecution that would be reintroduced by a return to a totality-of-the-circumstances regime, counsel strongly that the Court should follow the doctrine of *stare decisis* and reject the argument that Section 3501, rather than *Miranda*, governs admission of custodial confessions in Federal criminal trials.

II. THE COURT OF APPEALS VIOLATED THE PRINCIPLE OF SEPARATION OF POWERS AND USURPED EXECUTIVE AUTHORITY, BY BASING ITS DECISION ON A GROUND THAT THE EXECUTIVE BRANCH EXPLICITLY DECLINED TO INVOKE.

In *Davis v. United States*, 512 U.S. 452 (1994), the Court declined, as a prudential manner, the invitation of an *amicus curiae* that it consider whether a confession that was not obtained in compliance with *Miranda* could nonetheless be admitted under Section 3501. *Id.*, at 457-458 n. *. Since that time, the Attorney General has formally notified Congress, pursuant to 2 U.S.C. § 288k(b), that the Department of Justice will not defend the constitutionality of Section 3501. In the appeal to the Fourth Circuit, no party in this criminal prosecution raised the issue of whether Section 3501 provided an independent ground for admission of Dickerson's statement or whether the statute, if so applied, was constitutional.

Under these circumstances, the Fourth Circuit violated the principle of separation of powers in addressing the admissibility of the confession under Section 3501, when the question was not presented by either the prosecution or the defendant. By ignoring the Attorney General's explicit decision that the Department of Justice would not argue in any case that Section 3501 permitted admission of a confession that was invalid under *Miranda*, the court of appeals usurped the exclusive, discretionary authority of the Executive Branch to determine how it would prosecute this criminal case.

The Executive Branch, no less that the Judiciary, has a sworn duty to uphold the Constitution. That duty requires

Executive Branch prosecutors not to assert legal arguments that are inconsistent with the Constitution. Where, as here, mature consideration persuades the Attorney General that a statute is unconstitutional, the Executive Branch should not seek to enforce it, and the courts are without authority to force prosecutors to rely on a potential argument in support of their case that they have determined not to use. Review of the Department's policy decision rests with Congress. If Congress has a different view, Congress has remedies through its powers of oversight, appropriations, confirmation and impeachment. There is no need for the Judiciary to intervene to, in effect, provide an advisory opinion on the issue.

A. Governing Legal Authority.

Art. II, § 1 of the Constitution provides that the "executive Power shall be vested in a President of the United States of America." Art. II, § 3 further states that the President "shall take care that the laws be faithfully executed . . . ." These provisions establish the core of the President's constitutional responsibility to enforce the criminal laws, an area that the Court has characterized as a "special province" of the Executive. *United States v. Armstrong*, 517 U.S. 456, 464 (1996), quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

The Executive Branch "has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). Neither the Judicial nor Legislative Branches may interfere with the discretion of the Executive by directing the Department of Justice to prosecute particular individuals or by dictating the

positions that the United States shall take in prosecuting those cases.[2]

The Attorney General and her subordinates, including the United States Attorneys, have broad discretion to enforce the criminal laws, because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to take care that the laws be faithfully executed. 28 U.S.C. §§ 516, 547; *Armstrong*, 517 U.S. at 464. *See United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888); *The Grey Jacket*, 72 U.S. (5 Wall.) 370 (1866). *See* 2 Op. Att'y Gen. 482, 486 (1831)(the President has supervisory power over the prosecution of lawsuits by United States Attorneys as a necessary consequence of the duty to take care that the laws be faithfully executed).

As then Judge (later Chief Justice) Burger stated in *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967):

> Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

The broad scope of the Attorney General's discretion was further confirmed in *United States v. Cox*, 342 F.2d 167

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[2] *See United States v. Thompson*, 251 U.S. 407, 412-13 (1920)(the Executive Branch has an absolute right to determine whether to initiate prosecutions for crime, which is not subject to control by judicial discretion); *Ex parte United States*, 287 U.S. 241 (1932) (district court may not refuse to issue arrest warrant after indictment, because this would negate the absolute right of the Executive Branch to prosecute).

(5th Cir.)(en banc), *cert. denied*, 381 U.S. 935 (1965). There, the court overturned a district court order that the United States Attorney must file an indictment that the grand jury had voted to return.

> The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings, and in the prosecution of offenses, be faithfully executed. . . . The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. . . . [I]t is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

342 F.2d at 171. In a concurring opinion concerning the application of the former Independent Counsel Act, Judge Bork also explained:

> the principle of Executive control extends to all phases of the prosecutorial process. . . . If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments, some of which courts may control and some of which the President's delegate may control. It is all the law enforcement power and it all belongs to the Executive.

Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984)(per curiam)(Bork, J., concurring).

Article III gives Federal courts the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before the court for resolution. *Muskrat v. United States*, 219 U.S. 346, 356 (1911). This Court consistently has taken a strict approach to defining the powers of Article III courts, in part to safeguard the independence of the Judiciary against encroachments by the other Branches, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 74 (1982), but also from the recognition that the courts should not interfere with authority "committed by the Constitution to another branch of government." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Article III courts possess the authority, of course, to make certain that Federal prosecutors do not exceed legal or constitutional limitations in investigation or prosecution of crimes. This Court's prior decisions establish, however, that so long as the United States Attorney is operating within the proper sphere of his or her authority in prosecuting a crime, the Judicial Branch may not interfere with the discretion of the Executive as to how it will seek to enforce the law. This principle of judicial non-interference extends to such basic subjects as what evidence to introduce, what witnesses to call, or what legal arguments the prosecutor will present in opposition to defense motions to suppress evidence. Interference by an Article III court with the prosecutor's

discretion on these basic questions impinges upon the Executive's constitutionality authority.

B. The Decision by the Court of Appeals, to Overturn the Suppression of the Defendant's Statement on a Ground that the Executive Branch Expressly Chose Not to Present, Violated the Principle of Separation of Powers.

In accepting an invitation by an amicus to consider whether Dickerson's confession was admissible under Section 3501, an issue that was not presented by either the prosecution or the defendant in this criminal prosecution, the court of appeals violated the principle of separation of powers.

In considering an argument raised only by an amicus and deliberately not presented by the prosecution, the Fourth Circuit intruded into an area of discretion reserved to the Executive Branch and impaired the discharge of a constitutional function assigned to the President and his subordinates. The function of determining what evidence to introduce in a criminal prosecution, and what authority to bring to bear to justify actions by Federal law enforcement personnel, is inherently Executive in nature, and is not analogous to the functions that Federal courts perform in any other context. The action of the court of appeals therefore should be overturned as inconsistent with Article III.

In considering an argument for admissibility that the Attorney General has refused to offer in any Federal court, the court of appeals intruded into the power of the Executive to determine how potential evidence will be utilized in a criminal prosecution and what arguments will be made in support of its

admission. It thereby violated the principle of separation of powers because it reduced the ability of the Department of Justice to control the prosecutorial powers that the Executive, and the Executive alone, may exercise.

This is, in Justice Scalia's phrase, an issue that has come before the Court "clad . . . in sheep's clothing," *Morrison v. Olson*, 487 U.S. 654, 699 (1988)(Scalia, J., dissenting), because the immediate effect of the lower court's intrusion into the sphere reserved for Executive authority would be the admission of Dickerson's statement. Whatever the short-term effect in this case, there is no assurance that in other cases, the effect of similar judicial intrusions would be benign. The lower court's unprecedented assumption of the power to second guess prosecutorial decisions about the evidence to be presented in a criminal case and the grounds to be argued for its admissibility is conceptually no different from assertion of a judicial right to review Department of Justice decisions about whom to prosecute, and for what offenses, in circumstances in which the Executive has made a considered decision not to file charges.

In this connection, it is significant that the Fourth Circuit's rationale for reaching out to decide the Section 3501 issue was its assertion that, by "elevating politics over law," the Department of Justice prohibited the local prosecutor from arguing that Dickerson's confession was admissible under the statute. 166 F.3d at 672. This claim is answered by Justice Scalia's observation that:

> Almost all investigative and prosecutorial decisions – including the ultimate decision whether . . . prosecution is warranted – involve the balancing of innumerable legal and practical considerations. Indeed, even political

> considerations (in the nonpartisan sense) must be considered . . . . [T]he balancing of various legal, practical and political considerations, none of which is absolute, is the very essence of prosecutorial discretion.

Morrison v. Olson, 487 U.S. at 707-708 (Scalia, J. dissenting).

In sum, by asserting a right to invoke *sua sponte* an argument for admissibility not raised by the prosecution in this criminal case -- indeed, deliberately rejected by the Attorney General on a nationwide basis -- the Fourth Circuit has impermissibly undermined the discretionary authority of the Executive Branch to enforce the law as it sees fit, within legal and constitutional boundaries, and has thereby interfered with the Executive's ability to accomplish an important function assigned to it by the Constitution.[3]

Although an Article III court may not consider the constitutionality of Section 3501 in a criminal case in which the Executive Branch determines not to raise this argument for admission of the suspect's custodial statement, this does not

[3] This case is in a fundamentally different posture from the hypothetical situation discussed by Justice Scalia in *Davis v. United States*, where he asserted that "once a prosecution has been commenced and a *confession introduced*, the Executive assuredly has neither the power nor the right to determine what objections to admissibility of the confession are valid in law." 512 U.S. at 465 (Scalia, J. concurring) (emphasis added). This statement, by its terms, applies only after the confession has been introduced, and the defendant is challenging an alleged violation of his right to a fair trial. The situation before the Fourth Circuit was different, because the incriminating statement was never entered into evidence. The case thus remained in a posture where the prosecution has full discretionary authority over the evidence to be introduced and the arguments to be made in support of admission of its own evidence.

mean that the Department of Justice's position is immune from review under our political system. It is subject to review, but in other forums – by Congress and ultimately by the people at election time. In particular, Congress may exercise its oversight authority and the power of the purse to try to influence the Executive Branch's policy position. Upon the appointment of a new Attorney General or her Assistant Attorneys General, the Senate may exercise its power to advise and consent. Finally, if Congress so choses, it can initiate impeachment proceedings based on an assertion of dereliction of duty.

Further, the Fourth Circuit's decision to reach out to consider the relationship between Section 3501 and *Miranda* appears to have been based on the calculation that, if the court did not decide the question in this case, this important legal issue, which has been framed by academics for many years, would continue to evade judicial resolution. Its decision is erroneous for two reasons. First, as the dissenting judge below correctly observed:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.

166 F.3d at 697.

Second, there is no reason for Article III courts to reach out to decide this issue prematurely. A future President may exercise his or her discretion to reverse the policy decision of

prior Administrations and to seek to enforce Section 3501 in the manner recommended by the amicus below. If and when that happens, there will be ample occasion at that time for the Judicial Branch to consider the proper relationship between the law and the Fifth Amendment, as interpreted in *Miranda*, upon the appeal of one of the parties to a criminal case. Until a future President makes that determination and the issue of voluntariness under a totality-of-the-circumstances test is presented by an actual dispute between the prosecution and a criminal defendant, the Court should not disrupt the proper relationship between the Branches and prevent the Executive Branch from exercising the power to enforce the criminal laws that is confided in it by the Constitution.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* Benjamin R. Civiletti respectfully submits that the judgment below should be reversed and that the Court should decline, on separation of powers grounds, to decide whether Dickerson's confession may be admitted under Section 3501, since neither of the two parties to this criminal prosecution has raised that question and it therefore falls outside the power of Article III courts to consider. Should the Court reach the merits, it should hold that Section 3501 does not trump the *Miranda* decision and reverse the judgment of the court of appeals.

Respectfully submitted,

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