No. 99-5525

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES THOMAS DICKERSON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF *AMICUS CURIAE* URGING AFFIRMANCE OF THE FOURTH CIRCUIT DECISION

Filed March 6, 2000

Filed by Center for the Original Intent of the Constitution

QUESTION PRESENTED

The trial court found that Charles Dickerson voluntarily confessed to a series of bank robberies after he was taken into custody and before he was read his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). 18 U.S.C. § 3501 permits voluntary confessions to be used in a criminal case in federal court, whether or not the defendant was read his rights.

Are the *Miranda* warnings actually compelled by the Constitution or are they judicially-created rules that can be overruled by a valid Act of Congress?

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INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the Founders is the only safe basis for the preservation of limited government and all rights including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

Our Founders established a federal government with limited and enumerated powers. The limits on federal power were originally intended to protect the autonomy of the States and the liberties of the people. The Founders viewed vigorous State governments and limited federal government as essential to personal liberty. So do we.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

they are ancient and deserve veneration, but because they were the elected representatives of the people.

Self-government demands that the intention of the elected Framers should always prevail over the views of unelected judges guided by floating notions of a "living Constitution." Our Founders made promises to the people who ratified the Constitution. It is those promises that are ultimately at stake in this case.

SUMMARY OF ARGUMENT

The problem in this case is that both Congress and this Court have established rules about the admissibility of confessions, and those rules conflict. This Court said, in *Miranda*, that no confession would be admissible unless certain warnings were provided first. Congress said, in 18 U.S.C. § 3501, that *voluntary* confessions would be admissible in federal courts with or without the *Miranda* warnings. This Court must now determine which rules shall prevail.

The federal judiciary can exercise some legislative power for the same reason that the other branches of government can exercise some judicial power. Each branch of government *has* to make internal rules, make internal decisions, and settle internal disputes. But these are not exercises of the powers of the United States. When Congress sanctions one of its members (a judicial function), it is exercising the judicial power of *Congress*, not the judicial power of the United States. Likewise, when the military courts render judgment, they exercise the judicial power of the executive branch, not the judicial power of the United States. Thus, when federal courts establish rules of evidence and procedure, they only exercise the *legislative* power of the federal *judiciary*, not the legislative power of the United States.

Each of these three levels of legislative power takes precedence over the ones below it. Congress cannot use its delegated subset of legislative power to override the ultimate exercise of legislative power in the Constitution. Likewise, the courts cannot use the legislative power of the federal judiciary to override the legislative power of the United States.

The question in this case is whether the prophylactic rules in *Miranda* are a command which flows from the Fifth and Fourteenth Amendments or whether these rules occupy the same place in our constitutional scheme as the Federal Rules of Evidence.

If *Miranda* simply spells out what the Constitution means, then the legislative authority for *Miranda* is the Constitution itself: the ultimate exercise of the legislative power of the United States. In that case, § 3501 is void. But if the *Miranda* warnings are *not* compelled by the Constitution, then the *Miranda* Court was merely exercising the legislative power of the federal judiciary. In that case, § 3501 controls.

The Constitution does not compel *Miranda's* warnings. As this Court recently noted, "what we know of the circumstances surrounding the adoption of the Fifth Amendment, however, gives no indication that the Framers had any sense of a privilege more comprehensive than common law practice then revealed." *United States v. Balsys*, 524 U.S. 666, 674, n. 5. Our Founders ratified the Bill of Rights to protect the *existing* common law privileges from encroachment by Congress, not to open up a fountain of new rights.

The *Miranda* warnings may be the very best statutes a legislature could draft, and the best policy the executive branch could employ, but they are not required by the Constitution. Therefore, they are merely an exercise of the legislative power of the federal judiciary, and Congress's superior legislative power must control. This conviction should therefore be upheld.

ARGUMENT:

THE FIFTH AMENDMENT WAS INTENDED TO PROTECT RECOGNIZED RIGHTS FROM FEDERAL ABUSE, NOT TO CREATE NEW RIGHTS

A. THE LEGISLATIVE POWER OF THE FEDERAL JUDICIARY

1. SEPARATION OF POWERS

This case is not about whether the *Miranda* warnings are wise or unwise, good public policy or bad public policy. This case is about whether the *Miranda* Court properly exercised its judicial power or whether it intruded upon the legislative power of the United States.

The dictionary defines "judicial activism" as a:

> Judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for *social engineering* and occasionally these decisions represent *intrusions into legislative and executive matters*.

Black's Law Dictionary (5th ed.) [*emphasis supplied*].

Miranda v. Arizona, 384 U.S. 436 (1966) is a textbook example of this dictionary definition. Chief Justice Warren was explicitly trying to reshape society when he overturned 175 years of Fifth Amendment precedent. The Warren majority was *legislating*, not *judging*, when it established a set

of rules that were intended to apply in all future cases. That violates the constitutional doctrine of separation of powers.

The most potent words in the Constitution may well be those that appear at the beginning of each of the first three Articles. "All legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const. Art. I, § 1; "The executive Power shall be vested in a President of the United States of America," U.S. Const. Art. II, § 1; "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," U.S. Const. Art. III, § 1. This separation of powers is our *structural* guarantee of lasting liberty, and that guarantee is what is at stake here.

2. The Judiciary Has Its Own Legislative Power

We must compare three different levels of legislative authority in this case. The highest level of authority is the Fifth Amendment, which (like the rest of the Constitution) is the ultimate exercise of the legislative power of the United States. The next level of authority is an Act of Congress: Section 3501 was an exercise of that portion of the legislative power of the United States that was conferred upon Congress in Article I, § 1. The lowest level of legislative power is found in the federal rules of evidence and procedure, which are not an exercise of the legislative power of the United States, but only an exercise of the legislative power of the *federal judiciary*.

Separation of powers does not mean that *every* judicial act must be performed by the judiciary, or that every executive act must be performed by the executive. Each branch of government has to operate from day to day, and that takes

rule-making, decision-making, and administration. Inside its own walls, each branch of government has to do all three.

Thus, when the Supreme Court administers its own business, it is not exercising the "executive power of the United States." It is executing the executive power of the *federal judiciary*, instead. Likewise, when the Supreme Court establishes rules of evidence and procedure, it is exercising the legislative power of the federal judiciary.

3. Congress Can Overrule the Legislative Power of the Judiciary

Congress, by an exercise of the legislative power of the United States, can override an exercise of the legislative power of the federal judiciary. As Justice Scalia has noted:

> Just as Congress may to some degree specify the manner in which the inherent or constitutionally assigned powers of the President will be exercised, so long as the effectiveness of those powers is not impaired, cf. *Myers v. United States*, 272 U.S. 52, 128 (1926), so also Congress may prescribe the means by which the courts may protect the integrity of their proceedings. A court must use the prescribed means unless for some reason they are inadequate.

Chambers v. NASCO, Inc., 501 U.S. 32, 59-60 (1991) (Scalia, J., *dissenting*).

Congress's power to write rules for the courts is unquestioned in principle, although there are difficulties in practice.

See Carlisle v. United States, 517 U.S. 416, 426 (1996)[2]; *Bank of Nova Scotia v. United* States, 487 U.S. 250 (1988); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959). Congress's power to write rules of court is limited by the Constitution, of course: Congress cannot override a rule of Court that is mandated by the Constitution.

4. OVERRULING THE "UNNECESSARY DELAY" CASES

Prior to *Miranda*, this Court decided a whole series of similar cases involving the Federal Rules of Criminal Procedure. Rule 5(a) required that an arrested person be brought before a magistrate without unnecessary delay, and this Court excluded a number of statements because of "unnecessary delay." *See Upshaw v. United States*, 335 U.S. 410 (1948); *United States v. Mitchell*, 322 U.S. 65 (1944); *Anderson v. United States*, 318 U.S. 350 (1943); *McNabb v. United States*, 318 U.S. 332 (1943). These cases would now fall under the *Miranda* rule.

Congress overrode this line of cases in 1968 by a provision in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 88 Stat. 197, 210-11. That Act (which also contains the provision at issue here, § 3501) provided that a voluntary confession by a person in custody is not inadmissible solely because of delay in bringing the person before a magistrate if the confession is made within six

[2] In *Carlisle*, Justice Kennedy dissented, insisting that courts *always* retain the inherent power to do justice, which, in that case, consisted of allowing a judge to acquit an innocent defendant after the expiration of a time limit set by the federal rules of criminal procedure. This case presents the opposite question: whether courts may rely upon an Act of Congress to convict a *guilty* defendant who would be acquitted under court rules. Justice Kennedy's legitimate concern to maintain the court's inherent *judicial* power to "do justice" is therefore not implicated here.

hours of the arrest. Congress replaced the subjective phrase "unnecessary delay" with a bright line rule of "six hours."

McNabb and its progeny could be overruled by a single Act of Congress because they were based on the Federal Rules of Criminal Procedure, not the Constitution itself. If *Miranda* is just a court-created rule of evidence or procedure, it can be overruled in the same way, and § 3501 has done so. If *Miranda* is compelled by the Fifth Amendment, on the other hand, it cannot be overruled, and § 3501 is void. So this whole case turns upon the constitutional status of the *Miranda* warnings.

B. THE ORIGINAL INTENTION OF THE FIFTH AMENDMENT

Miranda's status depends on the true meaning of the Fifth Amendment. This *amicus* believes that the true meaning of the Constitution can never be determined without reference to the original intentions of those who drafted and ratified it. The original intent of the Fifth Amendment was to protect Americans from compelled testimony, not to keep voluntary confessions out of court. *Miranda* is therefore not compelled by the Fifth Amendment.

1. A PATRIOTIC ZEAL FOR COMMON LAW LIBERTIES

It is easy to forget how new and frightening the federal government seemed to the founding generation. Some of the most well-known patriots were sure that the Constitution had created a monster that would devour individual liberties and State autonomy. Anti-Federalists like Patrick Henry and George Mason fanned the flame of fear in a last-ditch effort to keep the Constitution from being ratified. In the Virginia

Ratification Debates, Patrick Henry delivered a fiery speech demanding a bill of rights:

> In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity.

3 Elliot, Jonathan, Debates on the Federal Convention 447-48 (2d ed. 1863) [hereafter, "Elliot's Debates"].

2. THE INEXHAUSTIBLE COMMON LAW

One way to solve the problem would have been to draft a bill of rights that spelled out the limits of the new federal government. The problem with that approach was that our Founders wanted to preserve *all* their common law privileges and immunities. A bill of rights, by definition, could only protect those privileges it enumerated, and that would leave out many rights protected at common law.

To our Founders, the common law was an ancient, complex, and inexhaustible source of liberty. They knew they could never list every traditional privilege or immunity, and they were initially unwilling to itemize rights for fear some might view it as an *exhaustive* list. In the ratification debates, the Federalists kept insisting that a bill of rights was not needed because Congress was limited to its *enumerated* powers. It just could not do what the Anti-Federalists feared. James Wilson of Pennsylvania explained the matter thus:

> In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people.

2 Elliot's Debates, *supra*, 436-37.

3. THE ANTI-FEDERALISTS FEARED CONGRESS'S "EXCLUSIVE POWER OF LEGISLATION" IN THE NEW FEDERAL DISTRICT

This enumerated powers argument, unfortunately, had a chink in its armor: Congress had an "exclusive power of legislation" within what was to become the District of Columbia. The Anti-Federalists quickly concentrated their fire upon that point:

> Mr. GEORGE MASON thought that there were few clauses in the Constitution so dangerous as that which gave Congress exclusive power of legislation within ten miles square. Implication, he observed, was capable of any extension, and would probably be extended to augment the congressional powers. But here there was no need of implication. This clause gave them an unlimited authority, in every possible case, within that district. This ten miles square, says Mr. Mason, may set at defiance the laws of the surrounding states, and may, like the custom of the superstitious days of our ancestors, become the sanctuary of the blackest crimes.... Now, sir, if an attempt should be made to establish tyranny over the people, here are ten miles square where the greatest offender may meet protection. If any of their officers, or creatures, should attempt to oppress the people, or should actually perpetrate the blackest deed, he has nothing to do but get into the ten miles square. Why was this dangerous power given? Felons may receive an asylum there and in their strongholds.

3 Elliot's Debates, *supra*, 431-32.

Much of the Bill of Rights was intended to respond to Anti-Federalists fears that the new federal government would not be subject to the principles of the common law. Anti-Federalist patriots argued that Congress could make any laws it wished, since it would meet outside the boundaries of any State and within the boundaries of a new capitol district. They argued that a tyrannical Congress could compel citizens to come and be tried within that district, where no law would protect them but that which Congress chose to make. To men like Patrick Henry, who had stood on common law rights against the British Empire, the exclusive power of legislation within the capitol district made the new government into a unchecked monster in a lawless lair.

Anti-Federalists in other States raised the same concerns. This frustrated the Federalists. Richard Dobbs Spaight, of North Carolina, struggled to rebut claims made by William Lenoir:

> He objects to giving the government exclusive legislation in a district not exceeding ten miles square, although the previous consent and cession of the state within which it may be, is required. Is it to be supposed that the representatives of the people will make regulations therein dangerous to liberty? Is there the least color or pretext for saying that the militia will be carried and kept there for life? Where is there any power to do this? The power of calling forth the militia is given for the common defence; and can we suppose that our own representatives, chosen for so short a period, will dare to pervert a power, given for the general protection, to an absolute oppres-

> sion? But the gentleman has gone farther, and says, that any man who will complain of their oppressions, or write against their usurpation, may be deemed a traitor, and tried as such in the ten miles square, without a jury. What an astonishing misrepresentation!

4. PROPOSED SOLUTIONS

The Anti-Federalists failed to stop the Constitution, but they did raise enough concerns to assure some kind of a bill of rights. The various proposals put forth by different States show that the Founders' primary purpose was to make sure the District did not become a seat of tyranny.

For example, in the New York ratification debates, Melancton Smith proposed an amendment that would specifically make common law rights apply to cases within the District. He proposed:

> Resolved, as the opinion of this committee, that the right of the Congress to exercise exclusive legislation over such district, not exceeding ten miles square...shall not be so exercised as to...authorize any inhabitant of the said district to bring any suit in any court, which may be established by the Congress within the same, against any citizen or person not an inhabitant of the said district. And it is understood that the stipulations in this Constitution, respecting *all essential rights*, shall extend as well to this district as to the United States in general.

2 Elliot's Debates, *supra*, 410 [*emphasis supplied*].

Pennsylvania suggested limiting the legislative power of Congress over the District. It resolved:

> That the clause respecting the exclusive legislation over a district not exceeding ten miles square be qualified by a proviso that such right of legislation extend only to such regulations as respect the police and good order thereof.

2 Elliot's Debates, *supra*, 545.

Virginia and North Carolina agreed upon identical language to solve the perceived problem:

> That the exclusive power of legislation given to Congress over the federal town and its adjacent district, and other places, purchased or to be purchased by Congress of any of the states, shall extend only to such regulations as respect the police and good government thereof.

3 Elliot's Debates, *supra*, 660; 4 Elliot's Debates, *supra*, 245.

In the end, of course, Congress chose to enact our Bill of Rights instead of establishing the common law within the District of Columbia or limiting congressional power over the District. But the *meaning* of the Bill of Rights cannot be divorced from its *purpose*. The purpose of the Fifth Amendment was to provide the same basic protection within the District that the common law would provide. We must therefore examine what those protections were in 1791.

C. THE PRIVILEGE AGAINST SELF-INCRIMINATION

1. SELF-INCRIMINATION IN THE ENGLISH COURTS

By 1791, criminal defendants in England and America had a time-tested right to remain silent. Our Founders drafted and ratified the Fifth Amendment to protect this right. They wanted to make completely sure that Congress could *never* subject a criminal defendant to what this Court later described as the "cruel trilemma" of perjury, contempt, or self-accusation. *Murphy v. Waterfront Comm'n of New York Harbor,* 378 U.S. 52, 55 (1964).

England had developed the privilege against self-incrimination the hard way. The long dynastic struggle of the Wars of the Roses had come to an end when Henry Tudor took the throne as Henry VIII, but it took a divorce, a break with the Roman Catholic Church, and wife after wife to keep that new dynasty going. England wobbled between religions: Henry went Protestant; his daughter Mary turned the country back to Catholicism; and Elizabeth returned to Protestantism. In this religious strife, ecclesiastical courts like the Court of High Commission took the lead in hunting down heretics. Defendants before the ecclesiastical courts could be required to take an oath — the *oath ex officio* — to answer truthfully all questions that might be put to him. Courageous defendants could refuse to take the oath, citing the maxim, "*nemo tenetur prodere seipsum*," which means, "no one is bound to accuse himself." Yet this refusal might result in fines, imprisonment, corporal punishment, or even, occasionally, death. Office of Legal Policy, *Report to the Attorney General on the Law of Pretrial Interrogation*, 22 *Journal of Law Reform* 451, 454 (1989) [hereafter, "Pretrial Interrogation"]; *see* L. Levy, *The Origins of the Fifth*

Amendment, 3-4, 23-24, 44-51, 55, 66-67, 77-78, 101-05, 127, 130-33, 141-43, 154-59, 166, 174-79, 250, 266-71, 274-77 (1968).

The Pilgrims fled England for Holland in 1607, then left Holland for Plymouth Rock in 1620. Their neighbors, the Puritans, began arriving in Massachusetts Bay a few years later. While they built homes in a new world, the religious pressures they left behind finally resulted in the English Civil War. The "Long Parliament" that convened in 1640 struck out against the ecclesiastical excesses, adopting statutes that abolished the Court of High Commission and the notorious Court of Star Chamber. This legislation further provided that all trials were thereafter to be determined "in the ordinary Courts of Justice and by the ordinary course of the law," the source of our modern concept of "due process." Pretrial Interrogation, *supra*, 455; *see* Levy, *supra*, 228-313. (The English experience with Oliver Cromwell led to even more reforms, later.)

England placed a high value on these hard-won rights, but Massachusetts had to experience its own version of ecclesiastical excess. The Salem witch trials only lasted from May to October of 1692, but the nineteen hangings that resulted from those coerced confessions branded the conscience of the colony and the nation down all three centuries since.

By the start of the eighteenth century, therefore, there was a true right against compulsory self-incrimination in English and American courts. Defendants and witnesses claimed a right to refuse to answer incriminating questions, and this right was increasingly accepted by the courts. Pretrial Interrogation, *supra*, 455-56; *see* Levy, *supra*, 283-85, 313-20, 323.

2. Self-Incrimination Before Trial

Miranda dealt with out-of-court interrogation, so we must look further if we are to understand how the Fifth Amendment was intended to apply in *pretrial* interrogations. Professional police forces did not exist at the time the Constitution and Bill of Rights were ratified. In 1791, the constables who made arrests were not authorized to question the suspects they took into custody. That function was carried out by justices of the peace or other judicial officers in the preliminary examination. Pretrial Interrogation, *supra*, 457; *see* J. Goebel & T. Naughton, *Law Enforcement in Colonial New York* 134, 339-41, 565, 633-36, 653-56 (1944); Levy, *supra*, at 29-30, 35, 325; L. Mayers, *Shall We Amend the Fifth Amendment?* 16, 175-76, 179-80 (1959); A. Scott, *Criminal Law in Colonial Virginia* 48-49, 55-56, 59-60 (1930) ; G. Williams, *The Proof of Guilt* 44 (1963); Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224, 1231-33, 1235-36 (1932); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 14, 19 (1949).

After the American Revolution began, in 1776, nine states adopted constitutions which incorporated, to varying degrees, enumerations of the rights of defendants in criminal cases. Pretrial Interrogations, *supra*, 459-60. The federal Bill of Rights was intended to make sure that the federal government could not take away these recognized rights. But, as the author of one comprehensive historical study on the Fifth Amendment explains:

> The fact must be emphasized that the right in question was a right against compulsory self-incrimination, and, excepting rare occasions when judges intervened to protect a witness against incriminating interrogatories, the right had to be claimed by a defendant. Historically it had been a fighting right: unless invoked, it offered no protection. It vested an option to refuse answer but did not bar interrogation nor taint a voluntary confessions as improper evidence. Incriminating statements made by a suspect at the preliminary examination or even at arraignment could always be used with devastating effect at his trial. That a man might unwittingly incriminate himself when questioned in no way impaired his legal right to refuse answer. He lacked the right to be warned that he need not answer, for the authorities were under no legal obligation to appraise him of his right. That reform did not come in England until Sir John Jervis's Act in 1848, and in the United States more than a century later the matter was still a subject of acute constitutional controversy. Yet if the authorities in eighteenth-century Britain and her colonies were not obliged to caution the prisoner, he in turn was not legally obliged to reply. His answers, although given in ignorance of his right, might secure his conviction, but by the mid-eighteenth century the courts, at least at Westminster, were willing to consider the exclusion of confessions that had been made involuntarily or under duress.

Levy, *supra*, at 375.

D. The Constitution Does Not "Evolve"

Despite the evidence of the original intent of the Fifth Amendment, Petitioner argues that the Framers thought the rights against self-incrimination "not only were part of a complex of other trial rights, but also were *evolving* rights

that changed as criminal procedures developed." Petitioner's Brief, p. 35. Thus, Petitioner argues that a right that was *not* protected by the Constitution in 1791 is protected *now* through a process of evolution.

Petitioner must stretch his argument considerably further than that to win in this case. He must not only explain why the Constitution *now* protects something that it did *not* protect when the Fifth Amendment was ratified in 1791, but also why this Court should reject what it said when it addressed these issues in 1895, 1896, 1897, 1912, 1951, 1964, 1974, 1976, 1979, 1984, 1985, and 1994.

This Court has consistently said that the Fifth Amendment is only violated when suspects are subjected to actual compulsion in custodial interrogation. Mere departures from *Miranda* do not entail any constitutional violation. *See Davis v. United States*, 512 U.S. 452, 457-58 (1994); *New York v. Quarles*, 467 U.S. 649, 654-55 (1984); *Oregon v. Elstad*, 470 U.S. 298, 306-09 (1985); *New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979); *Michigan v. Tucker*, 417 U.S. 433, 443-46 (1974). The current precedents relating to custodial interrogation are, of course, consistent on this point with the Fifth Amendment precedents from other contexts, which similarly recognize that warnings, waivers, and the like are not required by the Fifth Amendment. *See Minnesota v. Murphy*, 465 U.S. 420, 427-39 (1984) (in questioning of probationer by probation officer, as in questioning of witness at trial or before grand jury, Fifth Amendment right affords no protection unless asserted on the initiative of the person questioned; *Miranda* warnings are not required); *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976) ("an individual may lose the benefit of the [Fifth Amendment] privilege without making a knowing and intelligent waiver"); *Rogers v. United States*, 340 U.S. 367 (1951) (answer to incriminating question constituted waiver of the Fifth Amendment right by grand jury witness who was unaware of the existence of the right).

Judicial precedent shows the same historical understanding: The admissibility of defendants' pretrial statements obtained in custodial interrogation historically depended on their voluntariness—which was identified with the Fifth Amendment standard—and the various procedural restrictions imposed by the *Miranda* decision were held not to be constitutionally required. Thus, for example, in *Sparf v. United States*, 156 U.S. 51 (1895), the Court upheld the disclosure at trial of pretrial admissions made by the defendant while under restraint on suspicion of murder, because the statements were voluntary. *See id.* at 55-56. Shortly thereafter, in *Bram v. United States*, 168 U.S. 532 (1897), the Court explicitly equated the voluntariness standard and the Fifth Amendment standard:

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution, commanding that no person "shall be compelled in any criminal case to be a witness against himself."

Bram, 168 U.S. at 542.

Other early cases directly considered the question whether *Miranda*-like procedures are necessary. In *Wilson v. United States*, 162 U.S. 613 (1896), a defendant challenged the admission of pretrial statements he had made when questioned by a federal commissioner, essentially on

the ground that his interrogation had violated many of the rules that were later imposed in the *Miranda* decision. He had not been advised that he need not answer; he had not been advised that his statements could be used against him; he not been advised of a right to representation by counsel; and he had not in fact been afforded counsel. The Court responded that the admissibility of a defendant's statements depends on their voluntariness, and that the absence of warnings and counsel would not warrant their exclusion. *See* 162 U.S. at 623-24.

The Court again addressed this question, this time in explicitly constitutional terms, in *Powers v. United States*, 223 U.S. 303 (1912). *Powers* involved the admission at trial of a statement made by the defendant in response to questioning by a deputy marshal at a preliminary hearing. The defendant claimed that the admission of his statement "worked a violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution, which protects him against self-incrimination." 223 U.S. at 313-14. The Court rejected this claim—citing the decision under the voluntariness standard in *Wilson v. United States* as controlling precedent—on the ground that warnings and counsel are not required and that voluntary statements "cannot be excluded when subsequently offered at...trial." 223 U.S. at 313-14. *Powers* further demonstrates both that *Miranda*-like procedures were regarded as unnecessary for compliance with the Fifth Amendment, and that the Fifth Amendment standard was not considered to require more than the voluntariness standard.

The same point appears from *Malloy v. Hogan*, 378 U.S. 1 (1964). Decided only two years before *Miranda*, *Malloy* held that the Fifth Amendment right against compelled self-incrimination applied to the states. The decision in *Malloy* was premised in part on the fact that the admissibility of confessions in state cases was already governed by the voluntariness standard, which was identical to the Fifth Amendment standard: "[T]he admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since...*Bram v. United States*...held that...the issue is controlled by...the Fifth Amendment." 378 U.S. at 7; *see Pretrial Interrogations, supra*, 22 U. Mich. J. L. Ref. at 494-95 (noting historical fallacies of *Miranda* decision); *id.* at 453-91 (comprehensive review of pertinent history).

Petitioner goes too far. Our Founders ratified the Bill of Rights to apply the ancient traditions of England to a brand-new federal government, not to serve as fountain of judicial novelty. Our Founders thought of the judiciary as "the least dangerous branch," not the source of an "evolving Constitution" detached from any text, unchecked by any tradition, and beyond the power of any legislative check or balance. This Court has consistently held that the Fifth Amendment prohibits compelled testimony, not voluntary confessions. It should do the same in this case.

CONCLUSION

The question before this Court is *not* whether § 3501 is "better" than the *Miranda* warnings. This case is about power, not wisdom. If § 3501 is unconstitutional, Congress does not have the power to enact it. If § 3501 is constitutional, then it makes no difference how wise or foolish it is. That is a matter for legislators—and ultimately, voters—to consider, not judges. Our Constitution does not set up a "good government contest" with prizes going to the cleverest branch: it *divides* the specific powers of government.

This *amicus* thinks the *Miranda* warnings generally lead to good police practice. We think they are wise public policy. We like a system where police demonstrate real respect for the rights of the accused much better than the bad old days of hot lights and rubber hoses. But none of those things makes *Miranda* an exercise of the *judicial* power of the United States. *Miranda* is legislation.

The Fifth Amendment prohibits the federal government from compelling any criminal defendant to be a witness against himself. If the government has *compelled* Petitioner to testify against himself in this case, this conviction must be overturned. But if, as a matter of fact, the Petitioner has confessed voluntarily, this Court should not perpetuate the fiction that the *Constitution* bars his conviction. It is the Court, not the Constitution, that stands in the way. And since the Court was *legislating* when it decided *Miranda*, it should now get out of the way. This conviction should be upheld.

Respectfully Submitted,

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