THE COURT SHOULD HAVE REMAINED SILENT:
WHY THE COURT ERRED IN DECIDING
DICKERSON V. UNITED STATES

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I. THE UNDERLYING ISSUE IN *DICKERSON V. UNITED STATES*:
WAS THE CONSTITUTIONALITY OF § 3501
PROPERLY BEFORE THE COURT?

The Supreme Court's decision in *Dickerson v. United States*¹ will be most remembered for its emphatic reaffirmation of *Miranda v. Arizona*.² Chief Justice Rehnquist, writing for the majority in a seven to two decision in *Dickerson*, declared: "We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."³

Dickerson also will be remembered, especially by students of constitutional law and the federal court system, for its importance in defining the relationship between Congress and the Supreme Court in the area of constitutional remedies. The issue before the Court in *Dickerson* was the constitutionality of a federal statute, 18 U.S.C. § 3501, which sought to overrule *Miranda v. Arizona*. Adopted as part of the Omnibus Crime Control and Safe Streets Act of 1968, § 3501 provided that confessions shall be admissible in federal court so long as they are voluntary.⁴ The statute declares: "In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given."⁵ The statute's goal, as the Court observed in *Dickerson*, was to overrule

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¹ 120 S. Ct. 2326 (2000).

² 384 U.S. 436 (1966).

³ 120 S. Ct. at 2336.

⁴ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197.

⁵ *Id.* at 210.

Miranda v. Arizona and restore the law to what it was before 1966.⁶

In *Dickerson*, the Court held that *Miranda v. Arizona* is "constitutionally based"⁷ and states a "constitutional rule."⁸ Therefore, the Court held § 3501 unconstitutional because, of course, "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."⁹ If the Court had ruled otherwise, Congress and the states would have had the authority to eliminate the requirement for *Miranda* warnings. More generally, if the Court had decided that *Miranda* was just "constitutional common law,"¹⁰ then that might have opened the door for Congress to eliminate other judicially created remedies in constitutional cases. If Congress could overrule the Court's command that confessions be excluded from evidence if they were obtained without proper administration of *Miranda* warnings, then perhaps it could also overturn judicial orders in other cases, such as for busing in school desegregation litigation or for damages in suits against federal officers.

Dickerson thus will be remembered both for its practical significance in requiring that the police and courts continue to follow *Miranda* and for its broader theoretical significance in limiting the ability of Congress to overturn such judicially created devices for protecting constitutional rights. Unfortunately, what seems surely to be forgotten about *Dickerson* is how the issue of the constitutionality of § 3501 was raised at all. Neither party—not the prosecutor, the United States, nor the defendant—invoked § 3501. Instead, it was presented to the United States Court of Appeals in *Dickerson* by a conservative public interest group in an amicus curiae brief and argued to the Supreme Court by an attorney for that group who was appointed by the Court. The only hint of this in the Supreme Court's decision is in a footnote in which Chief Justice Rehnquist states: "Because no party to the underlying litigation argued in favor of section 3501's constitutionality in this Court, we invited Professor Paul Cassell to assist our deliberations by arguing in support of the judgment below."¹¹

This simple statement fails to disclose that the United States Department of Justice, the prosecutor, made the conscious choice in the

⁶ *Dickerson*, 120 S. Ct. at 2332.

⁷ *Id.* at 2334.

⁸ *Id.* at 2336.

⁹ *Id.* at 2332.

¹⁰ The phrase was coined by Henry P. Monaghan in *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

¹¹ *Dickerson*, 120 S. Ct. at 2335 n.7.

United States District Court, the United States Court of Appeals, and the Supreme Court, not to invoke § 3501. The United States Court of Appeals for the Fourth Circuit stated in *Dickerson*:

[T]he applicability of § 3501 was not briefed by the Government on appeal. We note, however, that this was no simple oversight. The United States Department of Justice took the unusual step of actually prohibiting the U.S. Attorney's Office from briefing the issue. To be sure, this was not an isolated incident. Over the last several years, the Department of Justice has not only failed to invoke § 3501, it has affirmatively impeded its enforcement.¹²

Indeed, almost without exception, every Justice Department since 1968 has refused to invoke § 3501 and has taken the position that § 3501 is unconstitutional in that Congress impermissibly sought to overrule a Supreme Court decision that interpreted the Constitution.¹³ Although federal prosecutors have an obvious desire to have confessions used as evidence against criminal defendants, for over thirty years the statute has not been used by Justice Department attorneys.¹⁴

Nor was it invoked in the prosecution of Charles Thomas Dickerson. Dickerson was arrested and indicted for bank robbery.¹⁵ Dickerson made incriminating statements to federal agents, but the United States District Court suppressed the confession on the grounds that *Miranda* warnings were not properly administered.¹⁶ The United States Government appealed solely on the issue of whether there had been a violation of *Miranda*. In its brief to the Fourth Circuit, the Government declared: "[W]e are not making an argument based on section 3501 in this appeal."¹⁷ The Washington Legal Foundation, a conservative public interest group, filed an amicus curiae brief in the

¹² *United States v. Dickerson*, 166 F.3d 667, 680-81 (4th Cir. 1999) (footnote omitted), *rev'd*, 120 S. Ct. 2326 (2000).

¹³ See Eric D. Miller, Comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1034 (1998) (indicating that the Nixon Justice Department used the statute, but since then the statute has not been relied on by federal prosecutors).

¹⁴ Justice Scalia observed: "In fact, with limited exceptions the provision has been studiously avoided by every Administration, not only in this Court, but in the lower courts, since its enactment more than 25 years ago." *Davis v. United States*, 512 U.S. 452, 463-64 (1994) (Scalia, J., concurring).

¹⁵ The facts are set forth in detail in the Fourth Circuit's opinion in *Dickerson*, 166 F.3d at 673-77.

¹⁶ See *id.* at 671 ("[T]he district court erred in suppressing Dickerson's voluntary confession on the grounds that it was obtained in technical violation of *Miranda*.").

¹⁷ *Id.* at 695 (Michael, J., dissenting) (quoting Appellant's Opening Brief at 34).

Fourth Circuit urging the court to raise § 3501 sua sponte.

The Fourth Circuit accepted this invitation and gave the following explanation:

Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted. Despite that fact, the Department of Justice, elevating politics over law, prohibited the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501. Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it.¹⁸

The statement is remarkable in its assumption that the Justice Department's choice to refrain from invoking § 3501 was based on a desire for political gain. There is no imaginable political benefit to the incumbent administration from not using § 3501. The reality, of course, is that the prosecution of Dickerson, whether it led to a conviction or acquittal, would have no political significance whatsoever. He is one of countless individuals prosecuted by the United States every day for federal crimes. If the Fourth Circuit had not chosen his case as the vehicle for invoking § 3501, the case would have attracted no attention. More importantly, today's politics obviously favor the Justice Department using § 3501 and gaining convictions. The general public does not want criminals to get off on what it sees as "technicalities" and surely would prefer the government to use § 3501 where necessary to gain the admission of confessions and ultimately convictions.

The Fourth Circuit falsely attributed a political motive to the Justice Department to pave the way for it to consider § 3501 sua sponte. In doing so, the Fourth Circuit obscured the Justice Department's choice to refrain from using § 3501 because of a view that the statute is unconstitutional. Although the Justice Department wants convictions at least as much as the Fourth Circuit, for over thirty years it has refused to invoke the statute even in cases where it might have made the difference between the government winning or losing. By trivializing the Justice Department's refusal to invoke § 3501 as a mere "political" choice not based on "law," the Fourth Circuit ignored an extremely important underlying issue: is it appropriate for a federal court, on its own, to invoke a federal law not pertaining to the court's jurisdiction, over the objections of the federal prosecutor?

¹⁸ *Id.* at 672 (citation omitted).

The United States Supreme Court simply assumed that the issue of the constitutionality of § 3501 was properly before it. As mentioned above, it appointed Paul Cassell, the attorney for the conservative public interest group and a law professor who long has criticized *Miranda*, to brief and argue the case.¹⁹ Not a single justice in *Dickerson* questioned whether it was appropriate for the federal courts to invoke § 3501 when the federal prosecutors had expressly chosen not to do so.

Nor is it likely in hindsight that there will be attention to how § 3501 and its constitutionality was raised in *Dickerson*. Those who wanted to see *Miranda* reaffirmed, and who are thus happy with the Court's ruling, certainly have no reason to complain over the decision. Conservatives, who wanted *Miranda* overruled, are in no position to complain because conservative opponents of *Miranda* brought the issue to the Supreme Court. In *Davis v. United States*, in 1994, Justice Scalia urged in a concurring opinion that federal courts consider § 3501 sua sponte in a future case.²⁰ A conservative public interest group and a conservative panel of the Fourth Circuit followed this suggestion and raised the constitutional issue decided in *Dickerson*. As much as conservatives such as Justice Scalia lament the Court's choice in *Dickerson* to reaffirm *Miranda v. Arizona*,²¹ they cannot and surely will not complain that the Court reached the issue improperly.

Thus, the story of how § 3501 came to be considered in *Dickerson* at most will soon be a forgotten historical footnote to an important

¹⁹ Articles written by Paul Cassell, a law professor at the University of Utah School of Law, criticizing *Miranda v. Arizona*, and arguing that it has led to the release of many criminals, include Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops?: A Thirty Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998). For the arguments of others who strongly disagree with Professor Cassell see, for example, Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) (asserting *Miranda* safeguards do not pose any serious impediment to effective law enforcement); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987) (arguing *Miranda* rules pose no serious problems that would make law enforcement more difficult).

²⁰ *Davis*, 512 U.S. at 465 (Scalia, J., concurring) ("The point is whether *our* continuing refusal to *consider* § 3501 is consistent with the Third Branch's obligation to decide according to the law. I think it is not.").

²¹ Justice Scalia wrote a scathing dissent in *Dickerson*. *Dickerson*, 120 S. Ct. at 2337-48 (Scalia, J., dissenting). For example, Justice Scalia concludes his dissent by declaring: "Today's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance." *Id.* at 2348.

case about criminal procedure and the relationship between Congress and the Supreme Court. This, however, ignores the significant underlying constitutional issue raised by actions of the Fourth Circuit and the Supreme Court. In invoking § 3501 over the objections of the federal prosecutor, these courts violated basic principles of separation of powers.

In this article, I argue that the Fourth Circuit and the Supreme Court seriously erred in considering the constitutionality of 18 U.S.C. § 3501. There are three separate reasons why the courts should not have done so. First, the courts violated separation of powers by usurping the judgment of the executive branch about how to exercise its prosecutorial authority. Second, the courts exceeded the appropriate judicial role in raising a major constitutional issue not presented by the parties that in no way concerned the jurisdiction of the federal courts to hear the matter. Third, the courts ignored the legislative history of § 3501, which clearly placed discretion with the Justice Department as to whether § 3501 would be raised. Each of these points is developed respectively below in Parts II, III, and IV of this Article.

In other words, the actions of the Fourth Circuit and the Supreme Court in considering the constitutionality of § 3501 presents a trifecta of separation of powers violations: the courts simultaneously usurped executive power, exceeded judicial authority, and undermined legislative decisions. However much one likes or dislikes the result in *Dickerson*, the courts' reaching the issue of the constitutionality of § 3501 is gravely troubling.

II. THE COURTS VIOLATED SEPARATION OF POWERS BY USURPING EXECUTIVE POWERS

The executive branch of the federal government, through the United States Department of Justice, interpreted the United States Constitution and concluded that 18 U.S.C. § 3501 was unconstitutional. This was entirely within the authority and prerogatives of the executive branch. The executive, as much as the judiciary, has the right and duty to interpret the United States Constitution. The oath of office of the President and the Attorney General demand that they do so. The President's power under Article II to "take care" that the laws be faithfully executed provides the executive with broad discretion as to when and how to conduct criminal prosecutions.²² The choice of whether to proceed with a criminal case and the decisions

²² U.S. CONST. art. II, § 3.

about how to do so are thus entirely within the discretion of the executive branch. The Fourth Circuit's decision to invoke § 3501 over the objections of the Justice Department, and the Supreme Court's consideration of the issue on this basis, thus usurp executive authority and violate separation of powers.

There is no doubt that the executive has the power and the duty to interpret the Constitution. Constitutional interpretation is not, and never has been, the exclusive province of the Supreme Court and the judiciary. Every holder of government office takes an oath to uphold the Constitution. Even if the judiciary is regarded as the ultimate arbiter of the Constitution's meaning,²³ until there is a judicial interpretation to follow, government officials *must* interpret the Constitution. Legislators must do so in drafting and evaluating proposed legislation. Executives must do so in deciding whether to veto bills and whether and how to enforce laws.

This view finds support from the earliest days in United States history. For example, Thomas Jefferson wrote:

[N]othing in the Constitution has given [the judges] a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.²⁴

Similarly, President Andrew Jackson declared in vetoing a bill to recharter the Bank of the United States:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who

²³ Arguably, *Marbury v. Madison* endorses the view that the Court is the ultimate arbiter in Chief Justice John Marshall's famous declaration: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803). I have previously argued that the judiciary should be the ultimate arbiter of the meaning of the Constitution. ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 81-105 (1987).

²⁴ Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 8 *THE WRITINGS OF THOMAS JEFFERSON* 310, 311 n.1 (Paul Leicester Ford ed., New York, The Knickerbocker Press 1897).

takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.²⁵

Interestingly, in recent years, it has been conservatives who have most championed the authority of the executive branch to interpret the Constitution independently. This is ironic because it was conservatives who, in their desire to see *Miranda* overturned, chose to disregard the executive's responsibility to interpret the Constitution. A decade ago, then Attorney General Edwin Meese declared: "The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions."²⁶

I am not arguing here that the executive has the right to disregard judicial interpretations of the Constitution if there is a disagreement between the branches. The point is a much narrower and much more unassailable one: The executive branch has the constitutional authority and the constitutional duty to interpret the Constitution. Just as a legislator should interpret the Constitution in deciding whether to vote for a bill,²⁷ so should a prosecutor interpret the Constitution in deciding whether to invoke a particular law.

The Constitution's text vests prosecutorial authority solely in the executive branch of government. Article II, section 1 of the Constitution states that the "executive power shall be vested in a President of the United States of America." More to the point, Article II, section 3 declares that the President "shall take care that the laws be faithfully executed." The Supreme Court long has interpreted this language as giving the executive sole authority to handle all criminal prosecutions

²⁵ ANDREW JACKSON, VETO MESSAGE, reprinted in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576, 582 (James Richardson ed., Washington D.C., United States Printing Office 1896).

²⁶ Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985-86 (1987).

²⁷ See, e.g., Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (arguing for an independent duty of legislators to assess the constitutionality of proposed legislation).

on behalf of the United States government. In *United States v. Nixon*, the Supreme Court declared that “the executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”²⁸

The executive branch has complete discretion in deciding whether to prosecute violators of federal statutes.²⁹ This executive prerogative includes the ability to choose not to prosecute under federal laws that it regards as unconstitutional. Indeed, in *United States v. Nixon*, the Court also declared: “In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”³⁰

The power of the executive branch to refuse to enforce laws that it regards as unconstitutional is a key element of the checks and balances created by the Constitution.³¹ The Constitution’s structure requires both that two branches of government (the legislative and the executive) participate in creating a law, and that two branches of government (the executive and the judiciary) participate in enforcing a law. Either branch, in either situation, can interpret the Constitution and prevent a law from being enacted (subject to override of the veto by Congress) or from being enforced.

The Supreme Court has expressly recognized the authority of the executive to refuse to enforce laws that it regards as unconstitutional.³² For example, Justice Scalia has observed that the President has “the power to veto encroaching laws or even to disregard them when they

²⁸ 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869)).

²⁹ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’” (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))).

³⁰ 418 U.S. at 703.

³¹ See Christine E. Burgess, Note, *When May a President Refuse to Enforce the Law?*, 72 TEX. L. REV. 631, 633 (1994) (“[A] President may refuse to enforce certain provisions of legislation because of the provisions’ purported unconstitutionality.” (footnote omitted)); see also Arthur S. Miller, *The President and the Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 399 (1987) (“Executive officers, particularly those in high-level positions, administer statutes as they think is best (rather than as Congress spoke) and are limited only by the pressures of politics, including judicial decisions, rather than by the interdicts of law.”).

³² See *Myers v. United States*, 272 U.S. 52, 163-64 (1926) (“Article II grants to the President the executive power of the Government, i. e. [sic], the general administrative control of those executing the laws . . .”).

are unconstitutional.”³³ In fact, there is a strong argument that the President must refuse to enforce laws that he regards as unconstitutional in order to be faithful to the oath to uphold the Constitution.³⁴

This means, of course, that the executive branch had the authority to conclude that § 3501 was unconstitutional and, therefore, not to invoke that statute, just as it has the right to choose not to prosecute under any federal statute that it deems unconstitutional. Moreover, the prosecutorial discretion vested in the executive branch provides it with complete control over criminal prosecutions. The executive, alone, decides whether to prosecute, what charges to bring, what evidence to present, and what arguments to make. Judge Bork, for example, observed:

[T]he 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.³⁵

Thus, the Fifth Circuit observed that “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.”³⁶

The United States government could have chosen not to prosecute Charles Thomas Dickerson for bank robbery, and no court could review that decision.³⁷ In fact, even if a grand jury indicted Dickerson, federal prosecutors had complete discretion to refuse to proceed with the matter.³⁸ Once the government decided to prosecute Dickerson, it was entirely the choice of federal prosecutors as to what crimes to

³³ *Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (citation omitted).

³⁴ See Walter Dellinger, *Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva*, 48 ARK. L. REV. 313, 315-17 (1995) (describing situations in which the President is duty-bound not to abide by certain statutory enactments in order to take care that the law be faithfully executed).

³⁵ *Nathan v. Smith*, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J., concurring).

³⁶ *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (en banc).

³⁷ The judiciary can hear claims of impermissible selective prosecution. See, e.g., *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (explaining that the executive may not selectively prosecute based on “an unjustifiable standard such as race, religion, or other arbitrary classification”). Selective prosecution, however, is used to protect against improperly motivated prosecutions, not to force the government to prosecute any specific individual or group of individuals.

³⁸ See *Cox*, 342 F.2d at 172 (explaining that a federal prosecutor may not be compelled by the court to sign an indictment prepared by a grand jury).

charge.³⁹ Moreover, as the case proceeded to trial, it was completely within the discretion of the prosecutors as to what evidence to present against Dickerson. The government, for example, could have chosen to not present Dickerson's confession as evidence. It is unthinkable that a federal court could order the United States Attorney prosecuting the case to introduce Dickerson's confession against him if the prosecutor had made the choice, for whatever reason, to forego that evidence.

If the government could decide not to use Dickerson's confession, it then follows that it could choose to use it only subject to whether the court decided that *Miranda* warnings were properly administered. In other words, the prosecutor was making an implicit choice that it would use confessions only under certain circumstances. These obviously included determining that the confession was reliable, that it was incriminating, and that on balance it would do more to help the prosecution than harm it. The United States Department of Justice also made the judgment that it would use confessions only if there were no violations of *Miranda v. Arizona*. This gave the executive branch complete authority to ignore § 3501 and decide that it would use confessions only when courts found that *Miranda* warnings were properly administered.

It thus violates separation of powers for a court to invoke § 3501 and consider a confession in circumstances in which the Justice Department chose not to use it. That is exactly what the Fourth Circuit did. The Justice Department expressly told the court that it was not invoking § 3501, and thus, that it would use the confession only if the courts found that *Miranda* warnings were properly administered. The Fourth Circuit disregarded this executive decision and ruled that the confession's admissibility was to be decided based on § 3501.⁴⁰

Separation of powers is violated either when one branch prevents another from carrying out its constitutional powers, or when one

³⁹ Courts may initiate prosecutions, but only for criminal contempt because the court is upholding its own authority in such situations. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (holding, in part, that federal district courts have the authority to appoint private attorneys to prosecute criminal contempt actions based on the "long settled [rule] that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders"); Miller, *supra* note 13, at 1055 n.129 ("The one exception to the rule that courts may not order prosecutions arises in the context of contempt proceedings.").

⁴⁰ I also argue below that this made the Fourth Circuit's decision an impermissible advisory opinion because the courts ultimately could not force the prosecutors to use the confession as evidence at the subsequent trial.

branch takes over the functions of another branch. Justice Powell explained that "the doctrine [of separation of powers] may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another."⁴¹

The Fourth Circuit violated separation of powers in both of these ways. The Fourth Circuit usurped the executive's sole discretion to decide how to handle a criminal prosecution. The court also prevented the executive branch from making the choice as to the circumstances under which it would use Dickerson's confession as evidence. The Supreme Court erred in not reversing the Fourth Circuit on this basis, but instead choosing to review the merits of the Fourth Circuit's decision on the constitutionality of § 3501.

There are two arguments that might be made in response to this position. One is that § 3501 is directed at the courts, not the executive. Justice Scalia took this position in *Davis v. United States*, when he said that "[s]ection . . . 3501 of Title 18 is a provision of law directed to the courts."⁴² The basis for this conclusory statement is unclear, however.⁴³ The argument seems to be that § 3501 determines the admissi-

⁴¹ *INS v. Chadha*, 462 U.S. 919, 963 (1982) (Powell, J., concurring) (citation omitted).

⁴² 512 U.S. 452, 465 (1994) (Scalia, J., concurring).

⁴³ Professor Devins forcefully makes this argument and states: "The 1968 statute, 18 U.S.C. § 3501, is a command to the courts, not to the executive branch." Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering Miranda*, 149 U. PA. L. REV. 251, 264 (2000). The core of Professor Devins argument is that the "rule of law" requires that courts correctly apply the law and that the judiciary thus needed to consider § 3501 sua sponte to ensure the law was properly applied.

There are several problems with this argument. First, the argument wrongly assumes that inaccurate applications of the law are inconsistent with the "rule of law." To the contrary, there are many instances in which the legal system accepts incorrect applications of the law. For instance, the "independent and adequate state grounds doctrine" provides that state court decisions that are totally wrong as to federal law will not be reviewed by the Supreme Court if they also rest on an independent and adequate state law grounds of decisions. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 665 (3d ed. 1999) ("[T]he doctrine permits inconsistent and incorrect interpretations of federal law to remain unreviewed.").

Also, and even more closely analogous, courts will allow evidence in at trial, even though prohibited under the Rules of Evidence, if parties do not object or object on the wrong grounds. The result is that the law of evidence is not followed. The adversary system, which often allows parties to choose what arguments to make, inevitably means that courts, at times, incorrectly apply the law.

Second, Professor Devins mischaracterizes the legal issue before the courts in arguing that they would misapply § 3501 unless it was raised sua sponte. The issue raised by

bility of evidence and that rulings about this are within the domain of the judiciary.⁴⁴ Although, undoubtedly, judges decide whether evidence is admissible, the choice whether to introduce evidence is entirely within the realm of the prosecutor.

Imagine, for example, that the Federal Rules of Evidence were altered to create a new exception to the hearsay rule. If federal prosecutors decided that the new provision was unconstitutional as violating the Confrontation Clause in the Sixth Amendment, they could choose never to raise that exception to the hearsay rule as a basis for introducing evidence. The judiciary decides on the admissibility of evidence, but the prosecutor decides what arguments to make in favor of its admission. If the prosecutor chooses not to use the testimony or decides to argue for its introduction without using the new exception, there is nothing a court can or should do.

The above example is directly analogous to § 3501. The federal government had expressly chosen to use confessions as evidence only when federal courts found no violation of *Miranda v. Arizona*. Federal prosecutors might have decided—but did not—to make use of confessions when they met the more relaxed voluntariness standard of § 3501. Clearly, this was a choice for the prosecutors, and Justice Scalia is wrong in saying that it was a choice for the courts. As former Attorney General Benjamin R. Civiletti argued:

[T]he 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

the defendant, Dickerson, was that the admission of his confession would violate the Fifth Amendment to the United States Constitution. The United States Government's argument is that it would not violate the Fifth Amendment because *Miranda* warnings were properly administered. Thus, the sole issue was whether admitting the confession would violate the Fifth Amendment. The constitutionality of § 3501 was totally irrelevant to the legal issue before the court: whether admitting the confession violated the Fifth Amendment.

Professor Devins argues that "the Fourth Circuit thought it had a choice between (a) applying the correct legal standard and allowing the admission of a valid confession or (b) applying the wrong legal standard and keeping the confession out of evidence." Devins, *supra*, at 269. This ignores another a third option before the Fourth Circuit: rule solely on the issue presented to it by the parties, whether the admission of Dickerson's confession violated the Fifth Amendment. The courts could have applied the correct legal standard—*Miranda v. Arizona*—to this question.

⁴⁴ See Miller, *supra* note 13, at 1057 ("[There is] a fundamental difference between control over whether to begin or end a prosecution and control over what arguments may be considered when the prosecution is carried on in court. The former is committed exclusively to the executive. The latter . . . is generally within the domain of the judiciary.").

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 constitutional[] authority.⁴⁵

A second argument for the court raising § 3501 sua sponte is that unless the court did this, the constitutionality of the provision never would be considered by the judiciary. The Fourth Circuit made this point in justifying its action:

Because the Department of Justice will not defend the constitutionality of § 3501—and no criminal defendant will press the issue—the question of whether that statute, rather than *Miranda*, governs the admission of confessions in federal court will most likely not be answered until a Court of Appeals exercises its discretion to consider the issue.⁴⁶

But this argument begs the question of whether such inaction justifies the court raising the issue sua sponte. Consider any federal statute which is not enforced by the Justice Department because of its stance that the law is unconstitutional. The federal courts are denied any opportunity to rule on its constitutionality until either a federal prosecutor brings an action or a party initiates a declaratory judgment action challenging it. No court has the authority to raise a statute sua sponte in order to consider its constitutionality.

Moreover, the Supreme Court repeatedly has held that federal courts are not justified in hearing matters otherwise not properly before them, so as to ensure a judicial ruling on a constitutional issue. For instance, the Court has ruled that plaintiffs who lack standing because they assert generalized grievances cannot have their claims heard simply because, otherwise, no court would be able to hear the matter. In *United States v. Richardson*, the plaintiff claimed that the statutes providing for the secrecy of the Central Intelligence Agency budget violated the Constitution's requirement for a regular statement and accounting of all public expenditures.⁴⁷ The Court ruled that the plaintiff lacked standing because his case presented a generalized grievance; the plaintiff did not allege a violation of a personal constitutional right, but instead claimed injury only as a citizen and taxpayer. The Court held that the plaintiff lacked standing because he was "seeking to employ a federal court as a forum in which to air

⁴⁵ Brief of Amicus Curiae Benjamin R. Civiletti at 11-12, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525).

⁴⁶ *Dickerson*, 166 F.3d at 683.

⁴⁷ 418 U.S. 166, 168-69 (1974).

his generalized grievances about the conduct of government.”⁴⁸

The Court deemed irrelevant the plaintiff’s claim that if he could not sue, no one could. The Court stated:

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.⁴⁹

Likewise, the appropriate check on the executive branch’s exercise of discretion in not invoking § 3501 is through the political process. As Judge Michael of the Fourth Circuit argued in his dissenting opinion: “The majority’s fallback position is that if we do not press the use of § 3501, no one else will. This overlooks Congress. If another branch is to question and investigate the executive’s 30-year policy of not using § 3501, it should be Congress.”⁵⁰ Congress certainly could investigate the failure to use § 3501 and the resulting effects, and perhaps try to “prod” the Justice Department to change its position.⁵¹

Moreover, a presidential candidate could raise the prior administration’s failure to invoke § 3501 as a political issue. This is not unrealistic in light of the importance of crime as an election issue and strong public support for ensuring that the “guilty” are convicted and not released on what are perceived as “technicalities.”

The desire to rule on the constitutionality of a law simply does not justify the courts raising it *sua sponte*. The Fourth Circuit, and ultimately the Supreme Court, violated separation of powers by invoking and considering § 3501 over the objections of the executive branch.

⁴⁸ *Id.* at 175 (citations and quotation marks omitted).

⁴⁹ *Id.* at 179. Similarly, in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the Court denied citizen and taxpayer standing to plaintiffs who sued to enjoin members of Congress from serving in the military reserves. The Court said: “Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.” *Id.* at 227.

⁵⁰ *Dickerson*, 166 F.3d at 697 (Michael, J., dissenting).

⁵¹ *Id.* at 697-98. Congress, too, could intrude on separation of powers depending on how it tried to exercise control over prosecutions. This obviously would depend on what Congress chose to do.

III. THE COURTS VIOLATED SEPARATION OF POWERS BY RAISING § 3501 WHEN NONE OF THE PARTIES TO THE LITIGATION DID SO

Apart from the Court's intrusion on the powers of the executive branch, there was a distinct violation of separation of powers: the judiciary exceeded its own authority by raising and considering § 3501 when none of the parties did so. The nature of the adversary system is such that courts are to rule on the arguments made by the parties to the litigation only. Except for issues of subject matter jurisdiction, it is not for the courts to raise arguments themselves. In addition to the prudential justifications for this rule, there is a strong constitutional basis: the courts in this case put themselves in the position of rendering unconstitutional advisory opinions.

None other than Antonin Scalia, while a judge on the United States Court of Appeals for the District of Columbia Circuit, declared: "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."⁵² Indeed, this is a core characteristic of the adversary system: a passive decisionmaker who rules on the arguments made by the parties. Professor Stephan Landsman explains: "The adversary system relies on a neutral and passive decision maker to adjudicate disputes after they have been aired by the adversaries in a contested proceeding."⁵³

Indeed, such judicial passivity, with judges solely deciding the issues raised by the parties, is crucial to maintaining the fairness and integrity of the justice system. Professor Landsman continues:

Adversary theory further suggests that neutrality and passivity are essential not only to ensure an evenhanded consideration of each case, but also to convince society at large that the judicial system is trustworthy. When a decision maker becomes an active questioner or otherwise participates in a case, she is likely to be perceived as partisan rather than neutral. Judicial passivity helps to ensure the appearance of fairness.⁵⁴

In fact, in *Dickerson*, the Fourth Circuit invoked § 3501 over the objections of the parties precisely because it wanted to reach a particular result: upholding its constitutionality. Justice Scalia obviously had the same motivation in his opinion in *Davis v. United States*, when he urged

⁵² *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

⁵³ STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988).

⁵⁴ *Id.*

courts to consider § 3501, because he spoke of how the Justice Department's failure to use that statute "may have produced . . . the acquittal and the nonprosecution of many dangerous felons."⁵⁵

The principle that courts should rule solely on the issues and arguments raised by the parties serves many laudable goals. As one commentator summarized:

First, when an issue is considered *sua sponte*, parties lack notice that it will be raised. This may be unfair to litigants (and potential intervenors or amici) who may see the case decided against them based on an argument that they had no chance to rebut. . . . Second, *sua sponte* consideration of issues is an inefficient use of judicial resources. Courts are able to save time by relying on litigants to present arguments in cases. . . . Third, it may seem unseemly for a court actively to seek out its own issues to consider.⁵⁶

The only exception to this principle is that courts are required to raise issues of subject matter jurisdiction even if the parties do not do so.⁵⁷ This is in accord with the principle that "federal court jurisdiction cannot be gained by consent of the parties."⁵⁸ Allowing, and indeed requiring, courts to raise the issue of subject matter jurisdiction *sua sponte* engages the important values of federalism and separation of powers. "[L]imiting federal court authority preserves the role of the state courts. Also, constraining federal judicial power helps to limit the role of the judiciary in the federal system."⁵⁹

Section 3501, however, is obviously not in any way jurisdictional. Nor do the justifications for allowing courts to raise subject matter jurisdiction *sua sponte* apply to it. The Fourth Circuit thus exceeded the proper judicial role when it chose to raise § 3501 as a basis for allowing Dickerson's confession into evidence even though none of the parties asked the court to do so.

One response to this argument is that it is entirely prudential: although it is not a constitutional requirement, prudent judicial administration demands that the courts wait for the parties to raise arguments. Nor is the principle of restraint—that federal courts should avoid constitutional questions—a constitutionally mandated require-

⁵⁵ 512 U.S. at 452 (Scalia, J., concurring).

⁵⁶ Miller, *supra* note 13, at 1050.

⁵⁷ See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977) ("[W]e are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction.").

⁵⁸ CHEMERINSKY, *supra* note 43, at 259.

⁵⁹ *Id.*

ment.⁶⁰ There certainly is an argument, from a separation of powers perspective, that courts exceed their proper role when they disregard the basic principles of the adversary system and decide a constitutional issue not presented by the parties and unrelated to subject matter jurisdiction.⁶¹

In *Dickerson*, however, the reason the Fourth Circuit acted unconstitutionally in considering § 3501 is clear: it rendered an unconstitutional advisory opinion. The Supreme Court did the same when it reversed the Fourth Circuit and upheld the constitutionality of § 3501. The prohibition against federal courts issuing advisory opinions is at the very core of Article III.⁶² As the Court explained in *Flast v. Cohen*:

[T]he implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions. . . . [The rule] implements the separation of powers . . . [and] also recognizes that such suits often are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.⁶³

The Fourth Circuit's decision to invoke § 3501 clearly put it in the position of issuing an advisory opinion. Imagine if the Supreme Court had affirmed the Fourth Circuit, upheld the constitutionality of

⁶⁰ The classic statement of judicial avoidance is by Justice Brandeis in *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (explaining how "[t]he Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision"); see also Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (analyzing the historical development and implementation of, as well as the justification for, the "last resort rule").

⁶¹ I am not arguing that courts on their own should never raise issues of law except for subject matter jurisdiction. The question of when, if at all, courts should do this is a difficult question, but one that need not be answered to demonstrate that the courts acted inappropriately in raising § 3501 sua sponte. The argument is that courts act inappropriately in raising legal issues when they (a) undermine prosecutorial discretion; (b) risk rendering advisory opinions; or (c) ignore legislative intent to leave choices to the executive. As argued throughout this paper, the courts were wrong to raise § 3501 sua sponte for all of these reasons. Although Professor Devins presents several examples where courts raised issues on their own, see Devins, *supra* note 43, at 258-62, in none were any of these factors present. For example, Professor Devins points to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), as an instance of the Court raising a legal issue on its own. *Erie*, however, was a private tort suit; no issue of prosecutorial discretion or executive interpretation of the law was present. Nor did *Erie* risk an advisory opinion; the Court's determination of the law to apply was decisive as to the outcome of the case. Nor, of course, was there any argument that the legislature had left any choices to executive discretion.

⁶² CHEMERINSKY, *supra* note 43, at 48.

⁶³ 392 U.S. 83, 96-97 (1968) (citations and quotations omitted).

§ 3501, and ruled that Dickerson's confession would be admissible if it were voluntary. The case would have been remanded to the United States District Court for a determination as to whether the confession was voluntary, and ultimately, for trial.

At that point, the United States government could simply have chosen to proceed without the confession or even to dismiss the prosecution against Dickerson. As explained earlier, the Justice Department has made the implicit choice that it will use confessions, even if voluntarily obtained and admissible under § 3501, only when *Miranda* warnings were deemed by the federal courts to have been properly administered. The rulings by the Fourth Circuit and the Supreme Court that § 3501 was constitutional would have been entirely an advisory opinion in the context of Dickerson's case.

It is firmly established that in order for a case to be justiciable and not an advisory opinion, there must be a substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect. This requirement can be traced back to the Supreme Court's earliest days. In 1792, the Court considered *Hayburn's Case* to determine whether federal courts could express nonbinding opinions on the amount of benefits owed to Revolutionary War veterans.⁶⁴ Congress adopted a law permitting these veterans to file pension claims in the United States circuit courts. The judges of these courts were to inform the Secretary of War of the nature of the claimant's disability and the amount of benefits to be paid. The Secretary could refuse to follow the court's recommendation.

Although the Supreme Court never explicitly ruled the statute unconstitutional, five of the six Supreme Court Justices, while serving as circuit court judges, found the assignment of these tasks to be unconstitutional. The Justices explained that the duty of making recommendations regarding pensions was "not of a judicial nature."⁶⁵ They said that it would violate separation of powers because judicial action might be "revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts."⁶⁶

In other instances, the Supreme Court has said that a case is a nonjusticiable request for an advisory opinion if there is not a substan-

⁶⁴ 2 U.S. (2 Dall.) 408 (1792).

⁶⁵ *Id.* at 411.

⁶⁶ *Id.*

tial likelihood that the federal court decision will have some effect. For example, in *Chicago & South Air Lines v. Waterman Steamship Corp.*, the Supreme Court said federal courts could not review Civil Aeronautics Board decisions awarding international air routes because the President could disregard or modify those judicial rulings.⁶⁷ The Court declared:

Judgments within the powers vested in courts by [Article III] may not lawfully be revised, overturned or refused faith and credit by another Department of Government. To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form.⁶⁸

There is a striking analogy between these cases and *Dickerson*. If the Court had upheld § 3501, the judiciary would have advised that *Dickerson's* confession could be admitted under § 3501; the executive branch would have listened to that advice and then could have decided not to use the confession. The Court's rulings would truly have been nothing but an advisory opinion. This is the inevitable result of a court raising and considering an issue such as this on its own. The prosecutor has complete discretion as to what evidence to present. For a court to act as the Fourth Circuit did necessarily risks an advisory opinion as the Justice Department inescapably has the last word: it decides whether to present the confession as evidence, as well as whether to proceed with the criminal prosecution.

Thus, basic principles of the adversary system, prudent judicial administration, and the prohibition against advisory opinions all support the well-established rule: only issues of subject matter jurisdiction should be raised *sua sponte* by courts; for all other issues, courts should rule solely on the matters raised by the parties. The Fourth Circuit and the Supreme Court acted improperly in disregarding this keystone aspect of the American judicial system.⁶⁹

⁶⁷ 333 U.S. 103, 110 (1948); *see also* *United States v. Ferreira*, 54 U.S. (40 How.) 13 (1852) (denying jurisdiction because the Secretary of Treasury could refuse to pay claims under a treaty if the claims were deemed not to be just and equitable).

⁶⁸ *Chi. & S. Air Lines*, 333 U.S. at 113.

⁶⁹ Professor Devins makes the clever argument that the failure of the courts to consider § 3501 would have meant that they were rendering advisory opinions. Devins, *supra* note 43, at 265-66. This argument, however, is based on an inaccurate definition of what constitutes an advisory opinion. In order for a case to avoid being an impermissible advisory opinion, two requirements must be met: there must be an actual dispute between adverse litigants and there must be a substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect. CHEMERINSKY, *supra* note 43, at 51. Both of these requirements were met in *Dickerson* without the consideration of § 3501. There obviously was a dispute between the

IV. CONGRESS LEFT TO THE JUSTICE DEPARTMENT THE CHOICE AS TO WHETHER TO INVOKE § 3501

The separation of powers problems discussed in the prior two Parts are particularly acute with regard to § 3501 because the legislative history clearly shows that Congress intended to leave to the executive branch the choice as to whether to invoke that provision. An amicus brief to the Supreme Court in *Dickerson*, by the House Democratic Leadership, carefully reviewed the legislative history of § 3501 and persuasively argued that Congress meant to leave the issue of § 3501 entirely in the hands of the executive branch. The brief states:

A review of Section 3501's background and legislative history reveals that Congress provided little or no basis for expecting the executive branch to mount a successful challenge to *Miranda*. Before enactment, the executive branch had manifested (with strong support in Congress) its commitment to adherence to *Miranda* practices and to *Miranda*'s application, especially in federal cases.⁷⁰

The provision was favored by those "much more interested in an election-year symbolic statement about law and order than in mounting an effective challenge to *Miranda*."⁷¹ The amicus brief thus observes: "In context, Congress had every reason to expect and to intend what ultimately transpired, namely, that section 3501 has not been used by the executive branch to challenge *Miranda*."⁷²

When § 3501 was first enacted, the Justice Department, via a letter from the Attorney General, informed the Senate Judiciary Committee that the proposal to overrule *Miranda* was unconstitutional.⁷³ Then-President Lyndon B. Johnson, in a letter to the Senate Majority leader, said that the bill raised "grave constitutional questions."⁷⁴ In response to this, Congress, in an election year compromise and to make a statement about law and order, included the provision but left it to

United States and *Dickerson* over whether his confession would be admitted. Also, the court's decision on the *Miranda* issue would be dispositive as to whether the confession would be admitted. In other words, the court's ruling obviously would have an effect. The court thus did not need to consider § 3501 in order to avoid rendering an advisory opinion.

⁷⁰ Brief of Amicus Curiae House Democratic Leadership at 5, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525). An excellent review of the legislative history of § 3501 is found in Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883 (2000).

⁷¹ Brief of Amicus Curiae House Democratic Leadership at 5, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525).

⁷² *Id.* at 8.

⁷³ *Id.* at 12.

⁷⁴ *Id.* at 16.

the executive branch to decide whether to invoke it in the future. Congress expressly deleted a proposal to apply § 3501 to the states and this clearly reflected the choice to let the Justice Department decide whether to ever use the law. As Professor Charles Tiefer, the author of the amicus brief, wrote: "By eliminating the provisions that would have let state authorities challenge *Miranda*, the amending Senators set up a situation where they had every reason to expect that it remained up to the federal Attorney General whether to mount a challenge to *Miranda* using the pared-down Title II."⁷⁵

The Fourth Circuit's choice to raise § 3501 over the objections of federal prosecutors is thus inconsistent with the legislative judgment that it was for the Justice Department to decide whether to invoke the statute. Every time Congress enacts a law, it knows that its enforcement depends on the actions of the Justice Department. That is inherent in the system of checks and balances and separation of powers created by the Constitution. The Fourth Circuit and the Supreme Court violated these principles by considering the constitutionality of § 3501 in *Dickerson*.

CONCLUSION

The system of separation of powers embodied in the United States Constitution reflects the judgment that the ends do not justify the means when it comes to allocating government power. The means matter enormously. The Fourth Circuit obviously very much wanted to uphold the constitutionality of § 3501 and its overruling of *Miranda v. Arizona*. The Supreme Court was just as anxious to decide the constitutional question, although with seven Justices concluding that § 3501 is impermissible. But both courts violated basic principles of separation of powers in considering the issue at all because it was not raised by the parties.

This aspect of *Dickerson* should not be forgotten or ignored. The courts should have exercised their right—in fact, their constitutional duty—to remain silent on the issue of § 3501's constitutionality until and unless it was raised by the United States Department of Justice in a criminal case.

⁷⁵ *Id.* at 17-18.