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A Republic, If You Can Keep It

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A Republic, If You Can Keep It

*Address by the Honorable Edwin A. Meese III**

Well, thank you very much, John, and thank you, ladies and gentlemen, for your warm welcome.

You know, John mentioned about that speech that I gave. You may not realize this, but I am greatly indebted to Justice Brennan. He may not be the Justice with whom I at that time most agreed, but he did a very beneficial thing. He replied to my speech. If it had not been for his reply, that speech probably would have been gone where most ABA speeches go—forgotten. But instead, he gave a speech in which he responded to my remarks about originalism, and so the fight was on. And so it has been a continuing topic ever since, and they tell me even in law schools that occasionally they discuss this in constitutional law classes.

As a matter of fact, shortly after I had raised this point about the Constitution being important as well as constitutional law, and in that speech I mentioned that in the leading constitutional casebook, the constitutional law casebook, the Constitution didn't make it until Appendix H. And pretty soon, about two weeks later, I got a letter from a professor whose name will go unmentioned. And he said, "You talked about the leading casebook. It must be mine. And I want you to know that in the next edition, the Constitution will be Appendix A." So I thought we made a little progress there.

John [Eastman], I want to certainly thank you for your very kind introduction, but also thank you for all you do. John, as you all know, besides all he does as a professor, now as an administrator, also, with his constitutional work. I always know that John is working because I will wake up in the morning and go to my fax machine and get a brief that he and I were working on. Actually, you know, it's kind of a 99%/1% type of brief. And John will have it there, and the time noted is 2:00 a.m., or 3:00 a.m. I

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think he doesn't sleep at all. But he certainly is a great adjunct to your school here.

And it's great to see my good friend Daniele Struppa, who was such an outstanding administrator. And definitely, Chapman's gain was George Mason's loss. But I know he's very happy here in this entrepreneurial university that you have. And so it's great to see him.

And also Grover Trask, whom I've had the pleasure of working with over the years, most recently when he was Chairman of the American Prosecutors Research Institute, and was really, in my view, the role model of what a responsible professional prosecutor should be. And so it's a pleasure to be with them and others that I know here.

I must confess—this is a day of confessions, no pun intended, but I must confess that I too like *Dirty Harry*. And my kids know that. And so for my birthday last year, I was presented with this collection of *Dirty Harry* movies. There's a box that has five *Dirty Harry* movies. And they presented them to me. And so on several occasions, I must confess that I have been watching it with my 14-year-old grandson.

Now after seeing that, and what I've heard today, I think that every one of those boxes ought to have a warning that says something like this: "If shown to children, please advise that *Dirty Harry's* conduct is not judicially acceptable behavior."

I want to congratulate Chapman Law Review on this conference. Besides the fact that it is being tremendously well-organized and well-run, just the selection of the topic I think is very appropriate. We've had four decades which give us now I think a little perspective on what was at the time a novel policy pronouncement by the Supreme Court in 1966. And it enables us to see some of the results, and also to talk about where we are as a nation, where we are in the criminal justice system today, and to some degree because of that decision.

It's also worthwhile, I think, to examine the *Miranda* rule in the light of what we might call modern legal issues, such as is being done here. Corporate criminality, which will be discussed later on today. The new style of warfare that emerges, as we heard this morning. Concepts of military action and law enforcement, and many other things that are being discussed. The media, which I found all the panels this morning extremely interesting, and look forward to this afternoon.

My topic, as you saw, is "A Republic, if You Can Keep It." As you probably know, that's a play on the comment of Benjamin

Franklin, when the Constitutional Convention had adjourned in 1787, and a lady stopped him on the street and said, “Mr. Franklin, what kind of government have you given us?” And he said, “A republic, if you can keep it.”

And the reason I chose that is that I think the founders’ concept of ordered liberty, which resulted in our Constitution, served the interests of the people then and continue to serve in terms of having an effective government, and at the same time having freedom and liberty for the people.

And I think it is particularly appropriate to discuss the *Miranda* decision and its progeny in the light of what the founders intended in the Constitution, and where we are today, because I would suggest to you that the *Miranda* decision is the epitome of what was then considered the new jurisprudence of the Warren Court, which from the 1950’s, the late 1950’s through the 1970’s, and then continuing under Chief Justice Berger, impressed a series of novel concepts onto constitutional law.

I’m going to discuss the *Miranda* decision in regard to two questions that we might ask. One is, was it legitimate? And is the *Miranda* doctrine today legitimate. And secondly, is it wise?

Going back to 1787, the founders were very much concerned with this whole idea of liberty and power. Liberty on the part of the people, and power on the part of government. And they felt that liberty had to be contained and had to be harnessed, if you will, because of the tremendous power that inherently government has.

And so to do that, they divided power both horizontally and vertically. Vertically in the sense of allocating certain powers, certain limited powers, to the federal government, to the central government, and then the rest of governmental power to the states, which were diffuse, and would become more diffuse as more states joined the Union. And they devolved it and diffused it horizontally by having three separate powers, three separate locus of powers, the legislative, the executive, and the judicial authority.

And it was this scheme that they thought up, that they felt was important in order to contain the coercive power of government in a way that it would not be used to oppress the people.

Well, I would suggest to you that in some ways, *Miranda* as a decision then and as it has continued, is at odds with both of those concepts. It has—did, in fact, at the time, with its companion decision, the Mapp against Ohio decision, both of which invoked the exclusionary rule—nationalized criminal procedure.

Up until that time it had been for the federal government to handle criminal procedure on national matters, matters before the federal courts, but leaving it to the states pretty much to develop their own jurisprudence, their own criminal procedures where most crime occurred, where most crimes were prosecuted; in state courts, where murders, robberies, rapes, burglaries, and the things that people thought of in general as crimes, were being investigated and prosecuted.

Well, in 1966, state prosecutions at that time were quite different from federal prosecutions. As I mentioned, they had these more serious crimes, the more violent crimes. In those days, federal prosecutions were primarily limited to white collar and administrative offenses, things like violations of the tax law. Probably the most violent type of crime you got had to do with those things, relating to organized crime and interstate crime. That sort of thing.

But by and large, there was pretty much of a dichotomy. And so even the rules that then pertained to the FBI, which were rules of procedure more than constitutional limitations, concerning the warnings they would give when they made arrests and so on, were much easier to apply because they dealt with essentially white collar criminals, and a different type of criminal investigation than what normally took place at the state and local level.

And so the *Miranda* decision essentially violated the traditional concept of leaving state procedures to the state legislatures, and to some extent, to the state courts. But it also violated the separation of powers. Nino Scalia, in the *Dickerson* decision some years later, of course, put it this way. He said that the court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people. Because what they did was essentially take away from the people's representatives—by invoking the Constitution—the ability to determine what the procedures should be in regard to arrests and custodial interrogation.

In effect, the Court provided a single national standard, overruling the states, even though the states were supposed to be, as another justice in a different case said, “laboratories of democracy,” so that they could experiment. And indeed, in 1966, the different states were dealing with this problem in different ways. California had the *Dorado* rule, which in effect was very similar in many ways to the *Mapp* rule. Michigan had a little different rule. Other states were trying out other things.

But of course, as the *Miranda* decision came down, it essen-

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tially eclipsed what the state was doing, and made a single standard for the entire nation. Likewise, it violated the concept of separation of powers. As the dissent pointed out, the original *Miranda* decision was based on policy grounds rather than constitutional grounds. As a matter of fact, as again stated in the dissent, examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due compensation for its weakness in constitutional law.

And then the author of the dissent went on to say, legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every state and county in the land.

Well, applying the exclusionary rule to the statements of suspects may or may not be a good idea. And indeed, over the years, we've had people on both sides of the criminal process opine on this. We've had some defense attorneys who have been willing to say that they felt that the exclusionary rule was not a good idea, based upon their experience. We've also had prosecutors in some cases and even some police executives say that the exclusionary rule helped professionalize the police.

So there have been arguments on both sides, as indeed we've heard already in the panels today. But I would suggest to you that this is a policy decision that should be left to Congress and the state legislatures. And in effect, the Court compounded what was an arrogation of power and the misuse of their power in the *Miranda* decision when, in the *Dickerson* decision, they deliberately defied the policy decision by Congress on how to deal with interrogations in cases before the federal courts.

As most of you know, and it was referred to in a couple of the talks this morning, Congress, within two years or so after the *Miranda* decision, felt there was a better way, and that was when they passed a statute embodied in 18 U.S. Code section 33501, which provided that federal judges should determine, outside the presence of the jury, whether a particular confession or statement was voluntary or not, based upon several criteria that they set forth in the decision, and looking at a totality of the circumstances.

Well, in considering that statute in *Dickerson*, the Court considered that congressional action was an affront to their exercise of judicial power, and so we got, as a result, the *Dickerson* deci-

sion.

Dickerson was a striking example, in my opinion, of the Court pulling itself up by its own bootstraps to make *Miranda*, the *Miranda* rules, a constitutionally required doctrine. The Court in the original decision had been somewhat tentative, because they knew they were on thin ice, I think, constitutionally. And in numerous subsequent cases, the Court took the position that the *Miranda* rules were not constitutionally required.

They were somewhat ambivalent, as I say, and very hesitant, in the *Miranda* case itself, but in other cases, they talked about the procedural safeguards adopted in *Miranda*, and they said that they were not themselves rights protected by the Constitution, but were instead measures to ensure that the right against compulsory self-incrimination was protected. They talked about the standards as being prophylactic rather than constitutionally required, and so on.

And as a result, they went on to say—they encouraged it, actually—that state legislatures and the Congress should find alternative ways to deal with the problem of preventing involuntary confessions, which was ultimately a question—from common law days on, as we heard this morning in the history of this provision—of involuntary confessions or confessions that were obviously bad and should not be countenanced.

And they said things like this. It is impossible for us, the Court said, to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the states in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.

And yet in *Dickerson*, suddenly the Court abruptly changes this approach and says that the *Miranda* rules are now constitutionally required. Now, the specious reasoning that they used then was a sort of constitutional sleight of hand. Indeed, as was discussed this morning by a couple of the speakers, they first said, well, it must be constitutional because it applies to the states. And if it was not constitutional, we couldn't have authority over the states to apply it.

Now this is kind of being—when I say pulling yourselves up by your own bootstraps, this was, I would suggest, arrogance and speciousness carried to the nth degree. But then they went on to say, as it was—as many people have noted—that stare decisis entrenched the decision. They even admitted this, the Chief Justice

writing in *Dickerson*, saying, “We might not have made the same decision today if we had this before us as a first instance, but it was enacted several decades ago, and so we have, on the basis of stare decisis, we won’t correct our earlier mistake.” He didn’t say it quite that boldly, but that was the gravamen of what he had to say.

And so that was the second. And then the third reason, as has been discussed in some detail today, they said: *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. And you heard about Jack Webb, who made the same observation when I read that passage, as well as the others, where it is—I hadn’t realized, though, until I heard the excellent presentation this morning, that it’s been embedded and now un-embedded in the national culture.

But be that as it may, those were the reasons they gave for making a total change, a major change, in what the constitutional effect of the decision was.

And so as a result of that, we have the situation which we have today. And so I think it’s important to say that, in terms of the legitimacy of the *Miranda* decision originally, that the decision initially in *Miranda* raised serious questions as to its constitutional legitimacy. And the case of *Dickerson* raises serious questions as to the ability of a court, essentially exercising its own power. As was said in dissent in *Dickerson*: To justify today’s agreed upon result, the Court must adopt a significant new, if not entirely comprehensible, principle of constitutional law. As the Court chooses to describe that principle, statutes of Congress can be disregarded. Such as Section 3501, which was at issue in *Dickerson*.

“Not only when what they prescribed violates the Constitution, but when what they prescribe contradicts a decision of this Court, that ‘announced a constitutional rule.’” And then the dissent goes on to say that the only thing that this can possibly mean in the context of this case is that this Court has the power merely to apply the Constitution and to expand it, imposing what it regards as useful prophylactic restrictions upon Congress and the states. And then the conclusion that the author comes to says: That is an immense and frightening anti-democratic power, and it does not exist.

Well, let’s turn to the second question that I raised, and that is, is it wise? Justice Scalia raised that question when he wrote in the dissent in *Dickerson*. He said, what is most remarkable

about the *Miranda* decision and what made it unacceptable as a matter of straightforward constitutional interpretation in the *Marbury* sense is in its palpable hostility toward the act of confessions per se rather than toward what the Constitution abhors, which is compelled confession.

We heard a great deal of discussion about the difference of that this morning. I would suggest to you that the exclusionary rule itself is at the bottom of the major problem with both *Mapp* as well as *Miranda*. It appears to me, at least, that it is improper for any court to exclude—it's at odds with the purpose of a criminal trial, and that is that the trial should be a search for the truth. And on that basis, then, to determine the culpability and the liability of an accused person.

But the exclusionary rule deliberately obscures from the trial a portion of the truth, and valid, probative, relevant, and accurate evidence is kept from the decider of fact for policy reasons that are unrelated to the purpose of judicial proceedings.

Now, it's important to state why a statement is important in a case. It's not the fact that a police officer arriving on the scene or apprehending a defendant necessarily expects or is intent just on getting a confession. Sometimes that happens. But what the police officer wants to do is to pin that defendant down to a particular story so that he can't remain silent, and then, when he gets to the trial, make up a story—unfortunately often with the compliance of his attorney—that weaves its way around the evidence the prosecution is able to put forward before the jury.

Whereas if you pin him down at the time, at the scene, or when he's arrested, to a particular story, then he's not able to tell something else in court, which he has made up to try to exonerate himself. And that's why the statement is so important in a police investigation, not merely a confession. And this is something that is often left out when discussion is made about compelled confessions and that sort of thing.

I don't think any of us is in favor of a coerced or a compelled confession. But on the other hand, getting the defendant pinned down. Of course, this thing was compounded—this whole problem was compounded by subsequent decision, including *Griffin* against California and others, which says that a prosecutor can't even comment on the fact that this person, when questioned by the police, refused to explain why he was there or what he was doing, something that any innocent person would logically do. And so you have this *Catch-22* that first of all, you have to give them the warning to discourage them from saying anything, and

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then the fact that he acts in a way very different from an innocent person can't even be commented on at the time of trial.

The original *Miranda* conclusion was based on a dubious factual basis. As a matter of fact, if you read *Miranda*, you saw a regurgitation by Earl Warren of a bunch of cases and a bunch of articles that were long since overcome or eclipsed by actual police conduct in the 1960s. They relied on the Wickersham Report from 1931. They relied on an article in *Southern California Law Review* in 1930. They relied on a *Michigan Law Review* article in 1932. They relied on a *University of Chicago Law Review* article in 1936.

I happened to be a prosecutor in 1966. And the things that they were relying on in order to justify this unusual change, major change in criminal procedure, was totally at odds with the District Attorney's Office and the police departments that I knew about, that I worked with every day, and I think with what most of the prosecutors worked with throughout the country.

Now, the impact of *Miranda* on public safety also is a factor that ought to be considered. The dissent in the original case was really prophetic. The dissent said that there can be little doubt that the Court's new code would markedly decrease the number of confessions. And while that has perhaps not been as great as might have been anticipated, there's no question that particularly immediately following the decision and since that time, that there has been a decrease in confessions or at least in statements given by defendants because of the *Miranda* rules, which quite frankly are intended and do have the effect of discouraging a suspect from saying anything.

And then the dissent said: How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy, but we do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control. It went on to say that there was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions and the responsible course of police practice that they represent are to be sacrificed to the Court's own fine-spun confession of fairness, which I seriously doubt is shared by many thinking citizens in this country.

One of the justices writing in dissent said: I have no desire to share in the responsibility for the impact on the present criminal process. And he went on to say: There is, in my view, every reason to believe that a good many criminal defendants who other-

wise would have been convicted on what this court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all, or will be acquitted if the State's evidence minus the confession is put to the test of litigation.

Well, this warning was indeed confirmed by the facts. An econometric analysis of the precipitous drop in clearance rates—that's the rate at which police officers are able to clear through arrest and prosecution—have found that tens of thousands of crimes go unsolved each year as a result of the *Miranda* decision.

Indeed, Paul Cassell, now a judge on the Federal Court, but at that time a professor, did a study of prosecutions and clearance rates, primarily clearance rates, from 1950 to 1995. And he found that in the four-year period immediately after the *Miranda* decision, there was a precipitous drop in clearance rates for violent crimes: in the period between 1950 and 1965 or 1966, anywhere from 60% to 65% of violent crimes were cleared by arrest, whereas immediately after—by 1969, four years later—that had dropped to something in the neighborhood of the 40% area, a drop of over 25% in crimes cleared by arrest.

And finally, I'd like to ask the question in terms of the wisdom of *Miranda*. Is it necessary to accomplish the purpose, which as we know is preventing involuntary or coerced statements? And I would suggest to you that things have changed a great deal, even from 1966, because federal statutes and related bodies of law provide now for civil, criminal, and administrative penalties against police officers who coerce suspects. Almost all of this law has been created since *Miranda*, and certainly has made the legal incentives for non-coercive police questioning almost unrecognizably greater than it was when *Miranda* was decided.

And so as we look at *Miranda* 40 years later, the question is whether *Miranda* really makes sense in terms of the facts. Officers who forcibly extract confessions are now subject to criminal sanctions under 18 U.S. Code, as we all know, sections 241 and 242. We have the Federal Tort Claims Act. We have the *Bivens* cases, and so on.

So that those who coerce confessions, these other disincentives, these other penalties, are much more effective than the *Miranda* decision or the *Miranda* rules, or the exclusion of evidence on the basis of the *Miranda* rules not being followed, because actually, as has been stated, the exclusion of evidence does not apply any direct sanction to the individual officer or the indi-

vidual official whose illegal or alleged illegal conduct is at issue.

And so there's a real question as to whether indeed there is a need in the light of modern circumstances, and certainly that was true at the time of *Dickerson*, but apparently was unavailing to the court as they made that decision.

Well, what does all this mean in view of the *Dickerson* holding and the place of *Miranda* in today's state of criminal procedure? Regretfully, I don't believe the *Dickerson* and *Miranda* cases will be overruled in the foreseeable future. I think I can almost guarantee it in my professional lifetime. By the way, John was kind enough to mention that I was 75. I view that as middle-aged, John. Halfway between 50 and 100.

But nevertheless, I think it's worthwhile considering *Miranda*, and going back and looking at it originally, looking at it in light of *Dickerson*, and looking at it where we are today. I think a conference like ours today is valuable both to critique the original decision as well as to assess its validity and its usefulness in the ensuing decades right up to the present time.

For one reason, first, perhaps an objective evaluation of the original decision done in the perspective of 40 years of experience will be a warning against judicial activism in the future.

Secondly, an analysis of *Miranda* can perhaps prevent its expansion to areas for which it is not appropriate. Such, in my opinion, as the battlefield in time of war. That was discussed, of course, in much detail this morning.

And third, a careful examination of *Miranda* can point towards ways in which the doctrine should be applied and also the ways in which it should be limited to accomplish its purported goal, and that is to protect against coerced and involuntary confessions, while at the same time limiting its negative effect on public safety.

Then, as a result of conferences like this, as a result of give and take, as we have here, from people with very different points of view on *Miranda*, I think we will be carrying out what we should be doing as members of the legal profession and legal education, and that is working to keep our nation safe and free. Thank you.

