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NOTES

18 U.S.C. § 3501 and the Admissibility of Confessions Obtained During Unnecessary Prearraignment Delay

Rule 5(a) of the Federal Rules of Criminal Procedure requires that an arrested person be taken before a magistrate for arraignment without unnecessary delay. To enforce this requirement, the Supreme Court held in United States v. Mallory that a confession is inadmissible if it is obtained during an unnecessary delay in violation of rule 5(a). In 1968, dissatisfaction with the Mallory rule and its

1. The rule reads:

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. FED. R. CRIM. P. 5(a) (emphasis added). Rule 5(a) is a "restatement, without substantive change, of several prior specific federal statutory provisions." Mallory v. United States, 354 U.S. 449, 452 (1957).

2. This Note will use the term "arraignment" when referring to the initial presentment envisioned by rule 5(a).


4. A "confession," as defined in 18 U.S.C. § 3501(e) (1985), see note 8 infra, includes "any self-incriminating statement." See also Miranda v. Arizona, 384 U.S. 436, 476 (1966) ("No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense."). In some contexts, however, a distinction is drawn between a "confession" (acknowledgment of guilt) and an "admission" (statement of fact tending to prove guilt). See, e.g., United States v. Valenzuela-Bernal, 647 F.2d 72, 75 n.4 (9th Cir. 1981), revd., 458 U.S. 858 (1982).

5. Rule 5(a) and the Mallory rule are designed to serve three principal purposes: (1) to "minimize the temptation and opportunity to obtain confessions as a result of coercion, threats, or unlawful inducements"; (2) "to effectuate and implement the citizen's constitutional rights by insuring that a person arrested is informed by a judicial officer of such rights; and (3) "to protect the citizen from a deprivation of liberty as a result of an unlawful arrest by requiring that the Government establish probable cause." 113 CONG. REC. 36,067 (1967) (minority views of Sen. Morse); see also Mallory v. United States, 354 U.S. 449, 452-53 (1957). Compare 8 MOORE'S FEDERAL PRACTICE 5.02[1], 5-9 (2d ed. 1986). An early draft of rule 5 contained a provision requiring the suppression of all confessions obtained through interrogation during "unnecessary" prearraignment delay. This provision did not appear in subsequent drafts, or in the rules as approved by the Supreme Court. (The Court is granted power to formulate the Federal Rules of Criminal Procedure under 18 U.S.C. §§ 3771, 3772 (1985).) The reasons for this deletion are unclear, but the omission in no way detracts from the authority of the exclusionary rule fashioned by the Court. See Note, Prearraignment Interrogation and the McNabb-Mallory Miasma: A Proposed Amendment to the Federal Rules of Criminal Procedure, 68 YALE L.J. 1003, 1027-28 (1959). See generally Orfield, Proceedings Before the Commissioner in Federal Criminal Procedure, 19 U. PITI. L. REV. 489-504 (1958).
Section 3501 of the Omnibus Crime Control and Safe Streets Act\textsuperscript{8}

6. In the view of Congress, courts had adopted, under pre-1968 case law, an unreasonably broad definition of "unnecessary delay." Among the cases in which courts reversed convictions because of "unnecessary delay" were: Alston v. United States, 348 F.2d 72 (D.C. Cir. 1965) (arrestee questioned "for at least 5 minutes"); Spriggs v. United States, 335 F.2d 283 (D.C. Cir. 1964) (confession made after 30 minutes in custody); and Ginoza v. United States, 279 F.2d 616 (9th Cir. 1960) (delay of 30 minutes). See 113 Cong. Rec. 36,062 (1967) (remarks of Senator Baker (quoting S. Rep. No. 600, 89th Cong., 1st Sess. 11 (1965)):

[T]he ruling...[was] based on the ground that no interrogation of any length is permissible and, indeed, an arrested person is not to be taken to the precinct or headquarters for booking and fingerprinting, but it is to be taken before a magistrate forthwith. Thus, "without unnecessary delay," was considered to mean "without any delay."

(discussing United States v. Jones, criminal no. 366-63 (D.D.C. 1963) (15 minutes)). These and additional cases are noted at 113 Cong. Rec. 36,062 (1967) (quoting S. Rep. No. 600, 89th Cong., 1st Sess. 11-12 (1965)). For discussion of lower courts' begrudging response to Mallory, see Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L.J. 1 (1958); see also Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 525 n.6 (6th ed. 1986) ("It was not until 1960 that the states' unanimity in refusing to follow the Supreme Court's lead in the McNabb-Mallory line of cases was broken.").


limits the scope of *Mallory*. Specifically, subsection 3501(c) declares that "a confession . . . shall not be inadmissible solely because of delay in bringing [the confessant] before a magistrate . . . if such confession was made or given by such person within six hours immediately following his arrest . . . ."9

Most courts, following the lead of the Ninth Circuit in *United States v. Halbert*,10 have interpreted section 3501 to require the admission of all voluntary11 confessions without regard to prearraignment delay;12 in effect, overruling *Mallory*. Others, most notably the Second Circuit, have held that subsection 3501(c) "codifies" a limited *Mallory* rule, permitting the suppression of voluntary confessions if they are made more than six hours after arrest and during13 an unnecessary delay in arraignment.14

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9. Many courts have ignored § 3501(c)'s prescription that the six-hour period start to run immediately upon arrest. See note 71 infra.

10. 436 F.2d 1226 (9th Cir. 1970).

11. Determining "voluntariness" has proved troublesome. See Miller v. Fenton, 106 S. Ct. 445, 453 n.4 (1985) ("The voluntariness rubric has been variously condemned as 'useless,' 'perplexing,' and 'legal double-talk.' "). Under the traditional formula, a court determines whether a confession was voluntary by examining the "totality of the circumstances" to determine whether the confession is "the product of an essentially free and unconstrained choice by its maker," or whether, instead, the confessant's "will has been overborne and his capacity for self-determination critically impaired." Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)). For a list of considerations relevant under the "totality of the circumstances" test, and a collection of cases employing them, see *United States ex rel. Mattox v. Scott*, 372 F. Supp. 304, 309-10 (N.D. Ill.), aff'd in part and rev'd in part, 507 F.2d 919 (7th Cir. 1974). For discussion of the "voluntariness" test for admitting confessions, see Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 518-24 (6th ed. 1986); Schulhofer, *Confessions and the Court* (Book Review), 79 MICH. L. REV. 865 (1981).


13. The term "during" should be read as "during or following." A confession is obtained "during" an unnecessary delay if such a delay occurred at any time prior to the confession, even though arraignment was not possible at the very moment that the confession was given. See Section I.B infra.

This Note considers the proper interpretation of section 3501 and develops a single theme: *Mallory* continues to govern the admissibility of confessions obtained more than six hours after arrest and, therefore, a post-sixth-hour confession will be inadmissible if it follows a period of unnecessary prearraignment delay. Section 3501 only prohibits the application of *Mallory*'s exclusionary rule to confessions obtained within six hours of arrest.

The issues raised by subsection 3501(c) and addressed in Part I of this Note may be introduced best by way of illustration.

Late one night, Al broke into a federal post office and absconded with cash, stamps, and equipment. He was arrested at 1 p.m. the following day. Officers could have arraigned Al at any time before 5 p.m., but when booking and other administrative tasks ended at 3 p.m., they decided to begin interrogation. At 8 p.m., seven hours after arrest, Al made a full and free confession.

At trial, Al moved to have his confession suppressed on the ground that it was obtained more than six hours after arrest and as a result of an unnecessary prearraignment delay in violation of rule 5(a).

Part I examines the admissibility of Al's confession. Al's case presents two issues. The first is whether a voluntary confession obtained more than six hours after arrest can be suppressed solely because of prearraignment delay. *Halbert* and its progeny say no — that voluntariness is the sole criterion for the admissibility of confessions under section 3501, and, therefore, Al's voluntary confession may not be suppressed. This Note disagrees. Section I.A examines subsection 3501(c) and concludes that voluntariness is not the sole criterion for the admissibility of confessions. A voluntary confession may be suppressed if it is obtained more than six hours after arrest and during an unnecessary prearraignment delay.

The second issue presented by Al's case is whether there was an unnecessary delay in arraigning Al. Prior to section 3501, the delay between 3 p.m. (when booking was complete) and 5 p.m. (when arraignment was no longer possible) would surely have been deemed unnecessary. Some contend, however, that section 3501 has redefined the meaning of "unnecessary delay" as used in rule 5(a).

1193, 1200 (D. Del. 1974) (Subsection 3501(c) is "the statutory codification of the McNabb-Mallory rule."). In United States v. Robinson, 439 F.2d 553 (D.C. Cir. 1970), and United States v. Yong Bing-Gong, 594 F. Supp. 248 (N.D.N.Y. 1984), the courts suppressed confessions on grounds of unreasonable delay. The *Robinson* court noted that "[u]nder Mallory, a confession made during a period of unnecessary delay ... is inadmissible at ... trial." The court also explained that "[18 U.S.C. § 3501(c) does not nullify this judicial rule of evidence, but only restricts its application in circumstances where the confession is obtained within six hours of arrest. 439 F.2d at 563-64. Finally, note United States v. Gaines, 555 F.2d 618, 623 (7th Cir. 1977), where the Seventh Circuit concluded that a voluntary confession obtained more than six hours after arrest may, but need not, be suppressed, depending on whether its suppression will advance the purposes of the exclusionary rule.

15. For the purpose of discussion, this Note assumes that 18 U.S.C. § 3501 is constitutional. But see note 40 infra.
delay within the first six hours of arrest. Under this interpretation, delays within the first six hours would be irrelevant to a determination of admissibility, and the 3 to 5 p.m. delay would not be grounds to suppress Al’s confession. Section I.B of this Note concludes, however, that no redefinition has occurred. The delay from 3 to 5 p.m. was unnecessary within the meaning of rule 5(a) and Al’s confession should therefore be suppressed.

Part I thus argues that the admissibility of post-sixth-hour confessions is governed by Mallory, under which a voluntary confession is inadmissible if, but only if, it follows a period of unnecessary delay. Part II addresses a possible objection to this conclusion — namely, that, with limited exceptions, subsection 3501(c) renders all post-sixth-hour confessions inadmissible without regard to the reasonableness of the prearraignment delay. This interpretation is derived by negative implication from the proviso in subsection 3501(c) and would require courts to suppress confessions even though there has been no unnecessary delay, and even though the confessions would be admissible under Mallory. To avoid this result, courts have expanded the proviso’s narrow exception to include all forms of reasonable delay, thus rendering the proviso as broad as Mallory itself. This Note agrees that courts should not read subsection 3501(c) to imply that all post-sixth-hour confessions are inadmissible, but disagrees that the way to avoid that implication is to expand the meaning of the proviso. The language and the history of the proviso, as well as general rules of statutory interpretation, defy its expansion. Part II argues instead that the proviso’s negative implication was unintended and is inconsistent with congressional purpose, and should be rejected.

I. VOLUNTARY CONFESSIONS, UNNECESSARY DELAY, AND SECTION 3501

A. Subsection 3501(c) and the Survival of Mallory

Consider again the case of Al. Federal agents arrested Al at 1 p.m., but failed to arraign him before his confession seven hours later, at 8 p.m.. Prior to enactment of section 3501, the confession would certainly have been held inadmissible under Mallory. To evaluate the effect of section 3501 on the admissibility of Al’s confession, one must look first to the text of the statute.

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16. See note 8 supra for the text of subsection 3501(c).
17. See notes 77-79 infra and accompanying text. Subsection 3501(c) speaks in terms of “reasonable” delay and rule 5(a) in terms of “necessary” delay. Courts use these terms interchangeably, as will this Note.
18. See note 6 supra.
Under subsections 350l(a) and (b), voluntariness is the sole criterion for the admissibility of confessions. Subsection 350l(a) plainly states that confessions shall be admissible into evidence if voluntarily given. Subsection 350l(b) then lists five factors for the trial judge to consider in determining voluntariness, the first of which is "the time elapsing between arrest and arraignment ...." Prearraignment delay under these subsections is relevant only insofar as it affects the determination of voluntariness. Because Al's confession was voluntary, neither subsection 350l(a) nor 350l(b) offers grounds for its suppression.

Under subsection 350l(c), however, voluntariness is not the sole criterion for the admissibility of confessions. Subsection 350l(c) states that a confession "shall not be inadmissible solely because of delay" if three conditions are satisfied: (1) the confession is made voluntarily; (2) the weight to be given the confession is left to the jury; and (3) the confession is made within six hours after arrest.

The plain implication of 350l(c) is that a confession may be sup-

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20. See United States v. Perez, 733 F.2d 1026, 1031 (2d Cir. 1984); United States v. Erving, 388 F. Supp. 1015 (W.D. Wis. 1975) ("Had Congress stopped with subsections (a) and (b), it would have been clear that voluntariness is the sole issue, and that delay in bringing a defendant after arrest is but one factor . . . in a determination of voluntariness.").


22. The presence or absence of any of the factors is not necessarily conclusive on the issue of voluntariness. See § 350l(b), supra note 8.

23. An examination of § 350l(c) reveals the superfluity of the first and second conditions. According to the first, a confession "shall not be inadmissible solely because of delay" if it is voluntary. Because an involuntary confession is inadmissible without regard to delay or § 350l(c), see note 46 infra, condition one adds nothing to § 350l(c). Nor does condition two, which requires that the weight to be given the confession be left to the jury, This is already required in § 350l(a), and has no relevance to the effect of delay on the admissibility of a confession. United States v. Erving, 388 F. Supp. 1011, 1015 n.2 (W.D. Wis. 1975). For the sake of clarity, therefore, § 350l(c) may be read more profitably as follows: a confession shall not be inadmissible solely because of delay, if such confession was made within six hours immediately following arrest, provided, etc.

24. The Supreme Court has repeatedly stressed that, "absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." United States v. Apfelbaum, 445 U.S. 115, 121 (1980); see also United States v. Locke, 471 U.S. 84, 93 (1985); North Dakota v. United States, 460 U.S. 300, 312 (1983); Perrin v. United States, 444 U.S. 37, 42 (1979). But see United States v. Monia, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting) ("The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."); Guiseppi v. Walling, 144 F.2d 606, 624 (2d Cir. 1944)
pressed "solely because of delay" if the criteria in subsection 3501(c) are not met.\textsuperscript{25} In \textit{United States v. Halbert}, however, the Ninth Circuit advanced a different interpretation, "consistent with . . . a scheme under which the admissibility of confessions turns on voluntariness."\textsuperscript{26}

In \textit{Halbert}, the defendant was arrested on Tuesday, confessed on Thursday, and was arraigned Monday morning. The district court held that the confession was voluntary, but inadmissible because of unreasonable prearraignment delay.\textsuperscript{27} The Ninth Circuit reversed.\textsuperscript{28} The court concluded that the effect of the newly enacted section 3501 was "to remove delay alone as [grounds for suppression] and to make the voluntary character of the confession, the real test of its admissibility."\textsuperscript{29} \textit{Mallory} was nullified, said the court, by subsection 3501(a) which states that voluntary confessions shall be admissible.\textsuperscript{30}

The language of subsection (c) posed an obvious challenge. If subsection (a) overruled \textit{Mallory}, what is the purpose of subsection (c)? A casual reading of that subsection suggests that the six-hour provision was intended to restrict \textit{Mallory}, not somehow to inform one's determination of voluntariness. The court read it differently.

The court read subsection 3501(c) to declare that no confession shall be \textit{involuntary under subsection 3501(b)} solely because of delay if the confession is made within six hours following arrest.\textsuperscript{31} In other words, under the court's reasoning, subsection 3501(c)'s purpose is to prevent a judge from holding a confession \textit{involuntary} solely because of a delay of, say, three hours. (Whereas, if the delay is six hours or

\textit{(L. Hand, J., concurring)} ("There is no surer way to misread any document than to read it literally.").\textsuperscript{23} affd \textit{sub nom.} \textit{Gemsco, Inc. v. Walling}, 324 U.S. 244 (1945).


26. 436 F.2d 1226, 1234 (9th Cir. 1970); \textit{see also} United States v. Cox, No. 82-5176 (6th Cir. Mar. 7, 1983) (Keith, J., concurring) (opinion not recommended for publication).

27. 436 F.2d at 1229.

28. The delay in \textit{Halbert} occurred while the confessant was in state custody. Prior to the enactment of § 3501, it had been settled that state custody was irrelevant in determining a violation of Federal Rule 5(a), and thus would not require the suppression of a confession in federal court unless there was a "collusive working agreement" between federal and state officials. \textit{See Halbert}, 436 F.2d at 1229, and cases cited therein. The court in \textit{Halbert} could have rested upon this ground in reversing the judgment below. \textit{See Note, supra} note 25, at 348. But, while the court expressed its belief that this settled law was unchanged by § 3501, 436 F.2d at 1231, it refused to base its decision on this ground, and proceeded to its analysis of newly enacted § 3501. (The Ninth Circuit subsequently held that "pre-arraignment delay caused by local and federal officials should be considered cumulatively under section 3501(c)." \textit{United States v. Fouch}, 776 F.2d 1398, 1406 (9th Cir. 1985).)

29. 436 F.2d at 1231.

30. \textit{See} 436 F.2d at 1231, 1233; \textit{Comment, supra} note 21, at 332 n.122; \textit{see also} \textit{Virgin Islands v. Gereau}, 502 F.2d 914, 924 (3d Cir. 1974).

31. 436 F.2d at 1234. \textit{Note} that subsection 3501(b) concerns the delay between arrest and arraignment, rather than, as under subsection 3501(c), the delay between arrest and confession. Given that the subsections express different concerns, it seems anomalous to read subsection 3501(c) as relevant only to application of 3501(b).
more, subsection 3501(c) permits a confession to be found involuntary on that basis alone.) The six-hour provision, said the court, is designed to restrict the judge's "discretion" in determining voluntariness under 3501(b).\footnote{32}

The court's interpretation in \textit{Halbert} is open to serious objections. First of all, subsection 3501(c) does not say that a confession shall not be "involuntary" solely because of delay if made within six hours; it says that such a confession shall not be \textit{inadmissible}. "Inadmissible" is a broader term than "involuntary," since a confession may be inadmissible for reasons other than involuntariness.\footnote{33} Equating the two ignores Congress' choice of terms.\footnote{34}

Equating the two also makes the first condition in 3501(c) nonsensical. For if the two terms are synonymous, 3501(c) requires that a confession not be declared involuntary solely because of delay if the confession is found to be voluntary.\footnote{35}

The \textit{Halbert} interpretation is additionally suspect because it renders the enactment of subsection 3501(c) pointless.\footnote{36} At the time section 3501 was enacted, no court had ever held a confession involuntary because of delay alone.\footnote{37} There was no need, therefore, for Congress

\footnote{32. 436 F.2d at 1234; \textit{see also} Virgin Islands v. Gereau, 502 F.2d 914, 924 (3d Cir. 1974) ("Section 3501(c) modifies the trial judge's freedom to determine voluntariness by stating certain instances in which the judge cannot on the basis of delay alone find a statement to have been involuntary.").


34. United States v. Perez, 733 F.2d 1026, 1031 (2d Cir. 1984).


36. It is an established rule of construction that, if possible, "effect shall be given to every clause and part of a statute." Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932); \textit{see also} Mountain States Tel. & Tel. Co. v. Santa Ana, 105 S. Ct. 2587, 2595 (1985). As noted in United States v. Erving, 388 F. Supp. 1011, 1015 (W.D. Wis. 1975), "[p]erhaps even this cardinal rule might be bent if there were in question only a word or a phrase which seems at odds with other provisions of a statute, but subsection (c) is a detailed and lengthy subsection embodying a rather elaborate set of propositions."

37. \textit{See, e.g.}, Smith v. United States, 390 F.2d 401, 403 (9th Cir. 1968) ("The determining factor is not the amount of time elapsing between arrest and confession, but rather the nature of police activities during this period."); \textit{quoted in Halbert}, 436 F.2d at 1230; \textit{see also} Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate, 367 U.S. 433 (1961); Fikes v. Alabama, 322 U.S. 191 (1947); Gallegos v. Nebraska, 342 U.S. 55, 63-64 (1951) (prearraignment delay does not render a confession involuntary). \textit{See generally Comment, supra note 21, at 333 nn.125-26 and cases cited therein. As the court in Perez noted, "were voluntariness the sole consideration, the necessity of the delay would be entirely irrelevant." 733 F.2d at 1034.

[T]he government's excuses for the delay have no logical or legal relevance to the defendant's voluntariness. The proviso in section 3501(c) is clearly aimed at permitting an evalu-
to prohibit a court from holding a confession involuntary solely because of a delay of six hours.

More important, subsection 3501(c) cannot have effect under Halbert's analysis without posing serious constitutional problems or requiring a radical reinterpretation of subsection 3501(b). According to Halbert, subsection 3501(c)'s purpose is to prevent a judge from holding certain confessions involuntary under subsection 3501(b) — namely, confessions obtained within six hours of arrest. This prohibition is effective only if it prevents a judge from doing what he otherwise might do — i.e., only if it prevents a judge from suppressing a confession that he believes is "involuntary" under subsection 3501(b). Subsection 3501(b), however, employs a constitutional standard of voluntariness. With subsection 3501(b), Congress intended to "restore[e] the voluntariness test" employed prior to Miranda v. Arizona, and to broaden the admissibility of confessions as

Note that the language of subsection 3501(b) gives no indication that delay alone could render a confession involuntary; that subsection states that "[t]he presence or absence of any of the [enumerated] factors . . . need not be conclusive on the issue of involuntariness . . . ." 18 U.S.C. § 3501(b). Prearraignment delay was listed as one factor, not to suggest that it alone may render a confession involuntary, but because, as the Senate Report observes, it "historically [has] enter[ed] into . . . a determination of voluntariness." S. REP. No. 1097, 90th Cong., 2d Sess. 51, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2137. But see United States v. Fouche, 776 F.2d 1398 (9th Cir. 1985), where the Ninth Circuit affirmed the district court's decision that a confession was rendered involuntarily solely because of prearraignment delay in excess of six hours.

38. The Halbert court acknowledges this implicitly. It twice states that a confession must be admitted, irrespective of delay, if it is "otherwise voluntary." 436 F.2d at 1234. The insertion of "otherwise" implies that a confession can be involuntary because of delay, but voluntary in all other respects. See United States v. Manuel, 706 F.2d 908, 913 (9th Cir. 1983) ("The confession is admissible per se unless involuntary for reasons other than delay.").

39. See note 11 supra; S. REP. No. 1097, supra note 37, at 2137, 2138, 2146, 2261, 2282 (Section 3501 "would restore the test for the admissibility of confessions in criminal cases to that time-tested and well-founded standard of voluntariness.") (views of Senators Dirksen, Hruska, Scott & Thurmond); see also United States v. Robinson, 439 F.2d 553, 574 n.18 (D.C. Cir. 1970) (McGowan, J., dissenting); Gandara, Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3301 By Law Enforcement Officials and the Courts, 63 GEO. L.J. 305, 305-06, 309 (1974); Note, Title II of the Omnibus Crime Control Act: A Study in Constitutional Conflict, 57 GEO. L.J. 438, 450-51 (1968) [hereinafter cited as Constitutional Conflict]; Comment, Police Interrogation of Suspects: The Court Versus the Congress, 57 CALIF. L. REV. 740, 741-42 (1969) (Section 3501 "is intended to restore voluntariness measured by the 'totality of circumstances' as the constitutional standard for admission into evidence of police-adduced confessions . . . .") (footnote omitted, emphasis added) [hereinafter cited as The Court Versus the Congress]; Comment, Title II of the Omnibus Crime Control and Safe Streets Act of 1968 As It Affects the Admissibility of Confessions and Eyewitness Testimony, 40 MISS. L.J. 257, 278 (1969) [hereinafter cited as Admissibility of Confessions].

40. 384 U.S. 436 (1966). The legislative history of § 3501 evidences a clear intent by Congress to "revise" the Supreme Court's decision in Miranda. S. REP. No. 1097, supra note 37, at 2138; see id. at 2127, 2141 ("The intent of [§ 3501] is to reverse the holding of Miranda . . . ."), 2211 (minority views), 2240 (views of Sen. Fong), 2261 (views of Sen. Scott); 114 CONG. REC.
far as constitutionally permissible. Thus, if subsection 3501(c) has the effect that *Halbert* attributes to it, it prohibits a judge from holding a confession involuntary that he believes is *constitutionally* involuntary. This, of course, it cannot do.

*Halbert* must therefore assume that subsection 3501(b) does not

16,066 (1968) (remarks of Rep. Celler); *see also* United States v. Abell, 586 F. Supp. 1414, 1422 (D. Me. 1984) (“The legislative history makes clear that . . . the congressional intent was to . . . overrule *Miranda* . . . .”).


Gandara, *supra* note 39, at 307-313, reports that federal law enforcement officials continue to adhere to *Miranda* because they doubt § 3501’s constitutionality.

Courts, while acknowledging doubts as to § 3501’s constitutionality, have not yet faced the issue. *See United States v. Poole, 495 F.2d 115, 133-34 (D.C. Cir. 1974) (Fahy, J., dissenting); United States v. Keeble, 459 F.2d 757, 760 (8th Cir. 1972), rev’d., 412 U.S. 205 (1973); Long v. District of Columbia, 469 F.2d 927, 929 (D.C. Cir. 1972). But *see* United States v. Crocker, 510 F.2d 1129, 1136-38 (10th Cir. 1975) (suggesting that § 3501 is constitutional). *

41. In fact, the legislative history suggests that Congress intended to broaden the admissibility of confessions beyond the constitutional limits then recognized by the Court. *See S. REP. No. 1097, supra* note 37, at 2137-38 (Recognizing that *Miranda* purports to impose a constitutional standard, the majority report emphasizes that *Miranda* was decided “by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself.” The report concludes with the hope “that by the time the issue of [§ 3501’s] constitutionality [reaches] the Supreme Court, [it may] be upheld.”). In any case, Congress certainly did not intend to create a standard of voluntariness more strict than that required by the Constitution. United States v. Boffa, 513 F. Supp. 444, 490 (D. Del. 1980) (The argument that a confession may be voluntary under the Constitution, but involuntary under § 3501 “is utterly frivolous. That statute clearly does not extend the rights of criminal defendants beyond the scope of protection afforded by the Constitution.”) (citations omitted); *see also* United States v. Sims, 719 F.2d 375, 378-79 (11th Cir. 1983), cert. denied, 465 U.S. 1034 (1984); United States v. White, 417 F.2d 89, 91-92 (2d Cir. 1969), cert. denied, 397 U.S. 912 (1970); Gandara, *supra* note 39, at 307; *cf. United States v. Crook, 502 F.2d 1378, 1381 (3d Cir. 1974) (§ 3501 prohibits the district court from suppressing statement after full compliance with *Miranda*), cert. denied, 419 U.S. 1123 (1975).

42. The legislature may not tell the court what is or is not “voluntary” under the Constitution. It cannot mandate that all confessions are voluntary if made within a certain time. *See Miranda v. Arizona, 384 U.S. 436, 490-91 (1966); United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872):

   In the case before us no new circumstances have been created by legislation. But the court is forbidden to give effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

   We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power. *See also* S. REP. No. 1097, *supra* note 37, at 2209, 2212 (minority views of Messrs. Tydings, Dodd, Hart, Long of Missouri, Kennedy of Massachusetts, Burdick, and Fong on Title II of S. 917) (“[N]othing in the Constitution gives Congress the power to adopt procedural rules that override specific decisions of the Supreme Court interpreting the fundamental requirements of the Constitution.”).

43. *Halbert*’s reasoning seems to employ three steps:

   (1) Preearrest delay of less than six hours can render a confession involuntary under § 3501(b). (While the court does not refer specifically to delays of less than six hours, it does say
employ a constitutional standard of voluntariness. But this assumption is defeated by 3501(b)'s legislative history and, significantly, refutes the very basis for the Halbert decision. Halbert based its decision on the argument that the intent of Congress was to broaden the admissibility of confessions by reinstating the voluntariness standard. Yet, as demonstrated above, in order to defend the constitutionality of its interpretation and still give effect to subsection (c), Halbert must simultaneously assert that Congress intended to restrict the admissibility of confessions by imposing a standard of voluntariness which is stricter than that required by the Constitution or developed by the courts.

The most important objection to the Halbert interpretation, however, is that it is inconsistent with the legislative history of section 3501. Ironically, legislative history was the principal support offered in Halbert for its interpretation of subsection 3501(c). The legislative history relied upon, however, was wholly irrelevant to the issue decided. The court began and ended its history with Senate Report No. 1097, dated April 29, 1968. The Report accompanied an early

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44. If § 3501(b) does employ a constitutional standard, courts are not at liberty to impose a more stringent one. Courts do not have "discretion" to hold a confession "involuntary" even though voluntary under § 3501. See United States v. Crook, 502 F.2d 1378, 1380-81 (3d Cir. 1974), cert. denied, 419 U.S. 1123 (1975).


47. As explained in note 37 supra, courts had never held a confession constitutionally involuntary because of delay alone.

48. For a helpful discussion of the legislative history of § 3501, see United States v. Perez, 733 F.2d 1026, 1032-33 (2d Cir. 1984).

49. The court stated that its interpretation "is strongly supported by the legislative history." 436 F.2d at 1234.

50. S. Rep. No. 1097, supra note 37, at 2112. Several courts, in reaching the conclusion that voluntariness is the sole standard for admissibility, have relied expressly on Halbert's "detailed" study of § 3501's legislative history. See United States v. Manuel, 706 F.2d 908, 912-13 (9th Cir. 1983); United States v. Keeble, 459 F.2d 757, 760-61 (8th Cir. 1972), rev'd., 412 U.S. 205 (1973); United States v. Marrero, 450 F.2d 373, 377-78 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972); see also United States v. Mandle, 502 F.2d 1103, 1105 (9th Cir. 1974); United States v. Hathorn, 451 F.2d 1337, 1341 (5th Cir. 1971) (relying on Halbert's general analysis); cf. United States v. Gaines, 555 F.2d 618, 623 (7th Cir. 1977) (The court approved of "[t]he legislative history of
version of subsection 3501(c). That version prohibited the suppression of any confession solely because of prearraignment delay "if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury."51 The Halbert court, in interpreting the six-hour provision, relied upon the legislative history of a version of subsection 3501(c) that contained no time provision at all52.

The six-hour provision, the subject of Halbert's interpretation, was added as a floor amendment on May 21, 1968.53 It was added not to limit the judge's "discretion" in determining voluntariness under subsection 3501(b) but, according to the amendment's sponsor, to limit "the period during which confessions may be received."54

The legislative history provides a further insight arguing against Halbert's interpretation. Subsection 3501(c) was based on D.C. Code § 3501 as explored in detail in Halbert, but concluded that voluntariness is not the sole standard for admissibility; United States v. Cluchette, 456 F.2d 749, 754 (9th Cir. 1972) (The court cited Halbert's "exhaustive analysis" of § 3501 but did not reach the issue of criteria of admissibility.). See generally 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 74 n.42 (1982) (citing Halbert and other cases that relied on Halbert). Annot., 12 A.L.R. FED. 377 (1972 & Supp. 1985). Other cases have relied directly on Senate Report No. 1097 — the source of Halbert's confusion. See United States v. Van Lutkins, 676 F.2d 1189, 1192-93 (8th Cir. 1982); Grooms v. United States, 429 F.2d 839, 843 & n.3 (8th Cir. 1970); United States v. Abell, 586 F. Supp. 1414, 1422-23 (D. Me. 1984).


51. In full, that version read:

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury.

52. The Halbert court's failure to recognize its error is particularly startling because the court noted that "[s]everal members of the Senate Judiciary Committee expressed the following minority view on 3501(c): '... Unlike the recently enacted District of Columbia Crime Act, section 3501(c) fails to provide any time limit whatsoever on the period during which interrogation may take place.' " 436 F.2d at 1236 (emphasis added) (quoting S. Rep. No. 1097, supra note 37, at 2216).

The court concluded: "This indicates that the minority of the committee that proposed the legislation did not think that confessions given more than six hours after arrest would be automatically inadmissible under the bill." 436 F.2d at 1237. The Senators' remarks were addressed to a wholly different piece of legislation, in which there was no six-hour provision or time limitation of any sort. Their remarks were made on April 29, 1968. On May 21, 1968, Senator Scott introduced the amendment to insert a six-hour limitation on delays in arraignment. The amendment was adopted that same day. 114 CONG. REC. 14,184-86 (1968).

53. 114 CONG. REC. 14,184-86 (1968).

54. Id. at 14,184 (remarks of Sen. Scott). The six-hour limit was the result of a compromise between those who preferred a three-hour limit, and those who preferred no limit at all. A proviso was added two days later to lift the time limit in certain cases of "reasonable delay," id. at 14,787, but with or without the proviso, the admissibility of confessions was understood to be governed by more than issues of voluntariness.
Ann. § 4-140,55 and Senator Scott, who introduced the six-hour amendment, explained that subsection 3501(c) “is an attempt to conform, as nearly as practicable,” to the District of Columbia statute.56 It is noteworthy, therefore, that section 4-140 envisioned the continued viability of Mallory.57 The purpose of subsection 4-140(b) was not to eliminate Mallory, but to restrict its application for the first few hours of arrest.58

In light of the foregoing, Halbert’s interpretation of subsection 3501(c) is untenable. The purpose of subsection 3501(c) is to prohibit application of Mallory’s exclusionary rule to confessions obtained within six hours of arrest; Mallory still governs the admissibility of confessions obtained thereafter. This interpretation accords with the plain meaning of the statute, is consistent with the legislative history, permits subsection 3501(b) to employ a constitutional standard of voluntariness, and does not leave rule 5(a) as a rule entirely without a remedy.59

B. Rule 5(a) and the Meaning of “Unnecessary Delay” After Section 3501

Having concluded that a court may suppress a voluntary confession because of an unnecessary delay in violation of rule 5(a), the ques-

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(a) Any person arrested in the District of Columbia may be questioned with respect to any matter for a period not to exceed 3 hours immediately following his arrest. Such person shall be advised of and accorded his rights under applicable law respecting any such interrogation.
(b) Any statement, admission, or confession made by an arrested person within 3 hours immediately following his arrest shall not be excluded from evidence in the courts of the District of Columbia solely because of delay in presentment.

56. 114 Cong. Rec. 14,184 (1968). At several points during the hearings on § 3501 senators referred to the D.C. statute, see id. at 14,184-85 (remarks of Senators Scott, Dominick, and Tydings), which was reprinted in the Congressional Record at the request of Senator Dominick. Id. at 14,185; see also Frazier v. United States, 419 F.2d 1161, 1171 n.2 (D.C. Cir. 1969) (Burger, J., dissenting) (section 3501 “substantially incorporates” the provisions of § 4-140). The only prominent difference between the statutes is the presence of the first two conditions in § 3501(c). These conditions, however, add little to that provision. See note 23 supra.

57. “[S]tatements made after the 3-hour period has expired ... may still be admitted ... so long as they were obtained with full regard for the ... rights of the arrested person, including his rights under rule 5(a) and the Mallory decision.” 113 Cong. Rec. 36,063 (1967) (remarks of Sen. Bible discussing the Report of the Committee on the District of Columbia); see Gandara, supra note 39, at 319 n.91.

58. D.C. Code Ann. § 4-140 was designed “to provide at least some limited opportunity for interrogation of arrested persons ...” 113 Cong. Rec. 36,062 (remarks of Sen. Bible). It was passed in response to a series of cases in which courts had adopted, in the view of Congress, an unreasonably broad definition of “unnecessary delay.” See note 6 supra.

59. The proffered interpretation also preserves the remedy for a rule 5(a) violation. See note 1 supra. Halbert’s interpretation removes any sanction for a violation of rule 5(a). United States v. Perez, 733 F.2d 1026, 1032 (2d Cir. 1984). If rule 5(a) can be employed only to prohibit the introduction of involuntary confessions, then it achieves nothing that is not already mandated by the Constitution. See note 44 supra and accompanying text. Thus, rule 5(a) becomes “a rule without a meaningful remedy.” 114 Cong. Rec. 16,068 (1968) (minority views of Senators Tydings, Dodd, Hart, Long of Mo., Kennedy of Mass., Burdick, and Fong on Title II of S. 917).
tion remains whether such a delay occurred in Al's case. Prior to 3501, the delay from 3 to 5 p.m. would plainly qualify as unnecessary delay.60

There is authority in judicial opinions and secondary authorities, however, to suggest that section 3501 redefines "unnecessary delay" in rule 5(a) to exclude delays within the first six hours of arrest.61 If this is so, determination of the necessity of a prearraignment delay need only consider the state of affairs in existence at the expiration of the six-hour term — the first six hours are irrelevant. By this view, the fact that Al could have been arraigned from 3 to 5 p.m. would not render the seven-hour delay "unnecessary" since arraignment was not possible after the expiration of the six-hour term (from 7 p.m. until Al's confession one hour later). The most direct authority for this position comes from Virgin Islands v. Gereau,62 in which Chief Judge Seitz writes:

While the Federal Rules' provision [rule 5(a)] regarding presentation before a magistrate is "procedural," unlike the "substantive" rule of § 3501, the sanction imposed by federal courts for failure to comply with Rule 5(a) is suppression of statements taken during the period of "unnecessary delay." Since § 3501 regulates suppression of such statements, it should be viewed as amending the meaning of "unnecessary delay" as used in Rule 5(a), rather than leaving that term's meaning unchanged and simply allowing the Rule to be violated without sanction.63

This Note rejects this analysis. Section 3501 does not amend the meaning of "unnecessary delay"; it simply removes the exclusionary remedy for violations of rule 5(a) when a confession is obtained within

60. See note 6 supra.

61. See text following note 62 infra; United States v. Manuel, 706 F.2d 908, 913 (9th Cir. 1983) (six hours is "per se reasonable delay period of section 3501(c)"); United States v. Escobar, No. SS84 Cr. 51 (S.D.N.Y. May 29, 1984) (available on WESTLAW, General Federal Library, U.S. District Courts Database) (statements at issue fell within the six-hour limitation of rule 5(a) and 18 U.S.C. § 3501); Interaction of Law and Politics, supra note 40, at 200 (Section 3501 "would modify the McNabb-Mallory rule to the extent that no delay of less than six hours would be considered 'unreasonable' . . . "); Note, Survey of Title II: Omnibus Crime Control and Safe Streets Act of 1968, 18 AM. U. L. REV. 157, 174 (1968) (referring to "[t]he change in wording of Rule 5(a) from 'unnecessary delay' to 'within six hours,' which necessarily results from the enactment of § 3501"); see also United States v. Ramos, 605 F. Supp. 1057, 1060 (S.D.N.Y. 1985) ("Rule 5(a) cannot be said to have been violated when the . . . interview, and the resultant confession, occurs within six hours of arrest, at least not, as here, where that interview in no way affects the speed with which the defendant is presented before a magistrate.") (footnote omitted); United States v. Shoemaker, 542 F.2d 561, 563 (10th Cir.), cert. denied, 429 U.S. 1004 (1976) (confusingly suggesting that a "reasonable time" under rule 5(a) is "specified to be six hours after arrest"). Finally, see the cases cited in note 71 infra. If, as in those cases, courts exclude reasonable delay in calculating the six-hour period, a "seven-hour delay" will require seven hours of unnecessary delay — thus, because a post-sixth-hour confession will always be preceded by a post-sixth-hour unnecessary delay, the first six hours of unnecessary delay will be irrelevant. This is a radical, and unsupported, interpretation of § 3501.

62. 502 F.2d 914 (3d Cir. 1974).

63. 502 F.2d at 923 n.5.
six hours of arrest. An “unnecessary” delay may still occur within six hours of arrest.

The weight of authority suggests that subsection 3501(c) does not redefine “unnecessary delay.” Prior to the adoption of the six-hour amendment, for instance, Congress intended not to “redefine” rule 5(a), but to overrule Mallory. To conclude that the meaning of “unnecessary delay” has been changed by subsection 3501(c), therefore, one must find evidence that, with the passage of the six-hour amendment, the intent of Congress changed from eliminating a remedy for a violation to redefining the violation itself. The available evidence suggests the opposite.

64. The early draft of § 3501(c) simply said that a “confession shall not be inadmissible solely because of delay if it is voluntary . . . .” This version contained no time limitation. See note 51 supra. It could not, therefore, have redefined “unnecessary delay.” See also S. Rep. No. 1097, supra note 37, at 2126. The Report quotes California Attorney General Lynch with approval:

One portion of the bill will eliminate the rule of McNabb . . . and Mallory . . . Eradication of this rule seems to me long overdue and badly needed. While perhaps some incentive should be given Federal officers to obey the prompt-arraignment statutes, the exclusion of confessions obtained in violation thereof is too high a price for society to pay for this type of “constable's blunder.”

Id. (emphasis added, citations omitted).

While there is no indication in the legislative history of § 3501 that Congress intended to redefine “unnecessary delay,” there is some evidence of such intent in the legislative history of D.C. CODE ANN. § 4-140. Sen. Morse explained that it was his understanding that title III, which contained the predecessor to § 4-140, “does not change the wording of Rule 5(a). What it does do is to define the words ‘unnecessary delay,’ which appear in that rule . . . .” 113 CONG. REC. 36,069 (1967) (minority views); see also id. at 36,067-68 (minority views of Sen. Morse). Senator Bible chimed in, saying: “In short, title III is a legislative clarification of the meaning of the statutory term, ‘unnecessary delay,’ as contained in Rule 5(a) . . . .” Id. at 36,062. Finally, in the House District of Columbia Committee report, presented by Rep. Whitener, the Committee said that the time period provided in the statute for interrogation “shall not constitute unnecessary delay.” Id. at 17,208.

There is some indication in the legislative history of § 4-140 that the statute does not redefine “unnecessary delay.” Speaking of an early version of § 4-140, one observer remarked that it does not amend Rule 5(a) of the Federal Rules of Criminal Procedure which provides that an officer making an arrest shall take the arrested person without unnecessary delay before the nearest available magistrate, and that is still the law. Title I only overrules . . . the so-called Mallory rule . . . .

. . . As above stated, it in no respect amends or modifies Rule 5(a), but only provides that statements shall not be inadmissible because of delay.


66. United States v. Perez, 733 F.2d 1026, 1029, 1035 (2d Cir. 1984); United States v. Manuel, 706 F.2d 908, 912-13 (9th Cir. 1983) (“Section 3501 was intended to supersede the McNabb-Mallory rule as the source of federal supervisory power to suppress confessions obtained in violation of Federal Rule 5(a).”); United States v. Robinson, 439 F.2d 553, 563-64 (D.C. Cir. 1970); 114 CONG. REC. 16,068 (1968) (“In effect, Section 3501(c) would leave the ‘without unnecessary delay’ provision of Rule 5(a) . . . . as a rule without a meaningful remedy.”); C.
The text of section 3501 makes no reference to rule 5(a) and gives no indication that section 3501 affects the meaning of "unnecessary delay" as used in that rule. Section 3501 declares that if its three criteria are met, a confession shall not be inadmissible; not that delay shall be necessary. If section 3501 amended the language of 5(a), it did so by the most distant of implications.

There is, in addition, a policy objection to excluding the first six hours from a determination of "unnecessary delay." Suppose that in the hypothetical above, Al was arrested on a Friday afternoon. If no magistrate was available on the weekend, and if the delay from 3 to 5 p.m. was deemed "necessary," the officers' failure to arraign Al would permit them to continue interrogation until Monday morning. In other words, the officers would be rewarded all weekend for their failure to arraign Al on Friday.67

Courts and commentators have refused to interpret section 3501 to permit officers to interrogate an accused for six hours and only then concern themselves with arraignment.68 Failure to arraign within six hours of arrest may not be penalized, for that period is protected by statute, but it should not be rewarded either.69 Officers should not be permitted to interrogate the accused before arraignment and more than six hours after arrest, under a claim of reasonable delay, when the officers themselves are responsible for the failure to arraign the ac-

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WRIGHT, supra note 50, § 72, at 80 ("[T]he 1968 legislation has effectively removed the only meaningful sanction for the enforcement of Rule 5(a)."); id. at § 73, at 93 (Section 3501 "has not altered the procedural rule [Rule 5(a)] but it has changed the evidence rule [i.e., McNabb-Mallory]."); Comment, supra note 21, at 332 ("[S]ince section (c) is not a rule of criminal procedure but a rule of evidence, it does not change the duty of an arresting officer to obey Rule 5(a)'s requirement of arraignment without 'unnecessary delay.' Instead, section (c) simply represents a formula for determining admissibility when delay does occur.") (citing United States v. Keeble, 459 F.2d 757 (8th Cir. 1972), rev'd., 412 U.S. 205 (1973)).

Any reference to § 3501 "limiting" or "overruling" Mallory presupposes that rule 5(a) remains unchanged. Section 3501(c) modified either Mallory or rule 5(a), not both.

67. In rejecting this construction, one court observed that "it implies that law enforcement officers need not bestir themselves during the first six hours, and that the test of reasonableness is to be applied only to the circumstances existing after the passage of six hours . . . ." United States v. Erving, 388 F. Supp. 1011, 1018 (W.D. Wis. 1975).

68. "[T]he circumstances existing during the entire interval from the time of arrest to the time of the confession should be considered in determining reasonableness." United States v. Erving, 388 F. Supp. 1011, 1018 (W.D. Wis. 1975). Professor Wright concurs: "[I]t was not intended that the arresting authorities were to have six hours plus whatever amount of time is necessary for arraignment. C. WRIGHT, supra note 50, § 74, at 114. But see 3 J. WIGMORE, EVIDENCE § 862(a), 623 (Chadbourn rev. ed. 1970) (The proviso in § 3501(c) equates "a six hour plus period with a six hour one, if the delay in excess of six hours constitutes a reasonable period within which to reach a magistrate.") (emphasis added).

69. This interpretation would remove the reward from officers who, for example, arrest a person at 2 p.m., and, knowing that a magistrate will not be available after 7 p.m., fail to arraign him before that time. A confession obtained at 10 p.m. that night would not be admissible. While this interpretation does not create an incentive to arraign promptly (the officers still have no incentive to arraign the person before 7 p.m.), it does reduce the likelihood of reward for failure to do so.
cused prior to the expiration of the six-hour term.  

The foregoing considerations recommend the second interpretation, under which the meaning of "unnecessary delay" and the standard for finding a violation under rule 5(a) remain unchanged. Under this interpretation, section 3501 merely removes the exclusionary sanction from a violation of rule 5(a) when the confession is obtained within six hours immediately following arrest. This interpretation flows most directly from the text of the statute, accords with the congressional intent as expressed in the legislative history, and rightfully removes the reward from officers for their failure to arraign the arrestee within six hours of arrest.

Part I.A has argued that post-sixth-hour confessions should be suppressed under Mallory if they are obtained following a period of

70. This position finds analogous support from the doctrine, developed under Mallory, that if officers intentionally delay an arrest to coincide with the unavailability of a magistrate, the delay is "unnecessary" under rule 5(a). See United States v. Leviton, 193 F.2d 848, 859 (2d Cir. 1951) (Frank, J., dissenting), cert. denied, 343 U.S. 946 (1952); 3 J. WIGMORE, supra note 68, at 616 ("There can be no doubt that detention following an arrest deliberately delayed to coincide with the unavailability of a magistrate would be held unnecessary delay under Rule 5(a) . . . ."); Developments in the Law — Confessions, 79 HARV. L. REV. 938, 991 (1966). But see Rogers v. United States, 330 F.2d 535, 539 (5th Cir. 1964) ("[P]olice officers could circumvent [rule 5(a)] by making arrests on weekends or during the night.").

71. Subsection 3501(c), by its terms, prohibits a confession to be suppressed solely because of delay if "the confession was made or given by [the confessant] within six hours immediately following his arrest." 18 U.S.C. § 3501 (1982) (emphasis added). See note 8 supra. Despite the clarity of this language, many courts have forgotten that the six-hour period starts to run immediately upon arrest. In United States v. Isom, 588 F.2d 858 (2d Cir. 1978), the court held that a reasonable delay between arrest and interrogation, for the purpose of medical attention and lodging, does not count toward the six-hour time limit in subsection 3501(c); the government is given an aggregate of six hours time in which to interrogate. The court wrote:

[The confession], even though made about twenty hours after his arrest, did not follow any period of unnecessary delay. The period during which appellant received medical treatment (at his request) and overnight lodging . . . should not be counted in computing unnecessary delay . . . . Thus, appellant's [confession] was in effect made no more than four and a half hours after his federal arrest, a period within the limits of 18 U.S.C. § 3501(c) . . . . 588 F.2d at 862-63 (citing United States v. Marrero, 450 F.2d 373, 378 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972)) (footnote omitted, emphasis supplied); see also United States v. Manuel, 706 F.2d 908, 914 (9th Cir. 1983); United States v. Bear Killer, 534 F.2d 1253, 1257 (8th Cir. 1976); United States v. Rivera, No. SS 85 Cr. 33 (S.D.N.Y. May 7, 1985) (available on WESTLAW, General Federal Library, U.S. District Courts Database); United States v. Escobar, No. SS84 Cr. 51 (S.D.N.Y. May 29, 1984) (available on WESTLAW, General Federal Library, U.S. District Courts Database). In Escobar, a young woman was arrested at 9:30 p.m. Wednesday night, and confessed over 16 hours later, at 2 p.m. the following day. The court held that the delay in arraignment was "not . . . unreasonable" because "assuming a Magistrate was available to arraign Medina at 9:00 A.M. on Thursday morning, then the statements which she made . . . fell within the six hour limitation of . . . 18 U.S.C. § 3501." No. SS84 Cr. 51. But see Mallory v. United States, 259 F.2d 796, 800-01 (D.C. Cir. 1958) (Bazelon, J., dissenting).

But § 3501(c) says that a confession is not inadmissible if made by the confessant "within six hours immediately following his arrest or other detention," see note 8 supra, and the proviso in § 3501(c), read most broadly, extends the six-hour time limitation only if arraignment is not reasonably possible. Subsection 3501(c) permits interrogation; it does not guarantee it. If Congress had wanted to guarantee an aggregate of six hours for interrogation, it could have so provided. Such a provision was included in an early version of D.C. CODE ANN. § 4-140, upon which § 3501 was modeled. See notes 55-56 supra; Hearings, supra note 64, at 255 (remarks by H. Miller). That provision was rejected. 113 CONG. REC. 36,063 (1967) (remarks of Sen. Bible).
unnecessary delay. Part I.B has demonstrated that Al's seventh-hour confession was obtained following a period of unnecessary delay.

Al's confession should be suppressed.

II. THE MEANING OF THE PROVISO IN SUBSECTION 3501(c)

Subsection 3501(c) creates a "safe harbor" for confessions obtained within six hours of arrest. This is uncontroversial. Part I argued, however, that subsection 3501(c) has no effect on confessions obtained after six hours; the admissibility of those confessions is still determined by Mallory. This Part anticipates and refutes an objection to that argument.

A. The Negative Implication of the Proviso

The proviso in subsection 3501(c) appears by negative implication to turn a "safe harbor" into an exclusionary rule, and to require the suppression of all post-sixth-hour confessions without regard to the reasonableness of delay, except in specific circumstances.\(^{72}\) The proviso, and the text leading to it, state:

[A] confession . . . shall not be inadmissible solely because of delay in bringing [the confessant] before a magistrate . . . if such confession was made or given by such person within six hours immediately following his arrest . . . : Provided, That the time limitation . . . shall not apply in any case in which the delay in bringing such person before such magistrate . . . beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate . . . .\(^{73}\)

Note that the proviso does not extend the six-hour "safe harbor." It renders it inapplicable. It also refers to the six-hour term as a "limitation" that "shall not apply" to a discrete set of cases. The implication is that the time limit itself restricts the admissibility of confessions; it does not merely prohibit their suppression.

This interpretation is supported by the fact that the proviso only has effect if, in its absence, confessions obtained more than six hours after arrest would be inadmissible without regard to the reasonableness of delay. If, on the contrary, the admissibility of such confessions would be governed by Mallory, the proviso serves no purpose — it mandates a limited "reasonableness" test in an area already governed by that standard. The presence of the proviso, therefore, suggests that the six-hour limit is a bar to the admissibility of confessions. If this negative implication is given effect, all post-sixth-hour confessions

\(^{72}\) See The Court Versus the Congress, supra note 39, at 751; Admissibility of Confessions, supra note 39, at 279-80, suggesting that confessions obtained more than six hours after arrest are automatically inadmissible unless the delay is due to problems of transportation. Many courts have recognized this argument, but have rejected it. See, e.g., Virgin Islands v. Gereau, 502 F.2d 914, 924 (3d Cir. 1974).

\(^{73}\) 18 U.S.C. § 3501(c) (1982).
must be suppressed unless the delay fits within the terms of the proviso. Thus, confessions may be inadmissible even though there was no unnecessary delay, and even though they would be admissible under Mallory.74 There are two ways to avoid this result.75 The first, adopted by the courts, is to expand the proviso so broadly that it encompasses all reasonable delay, thus reaching as far as Mallory.76 As Part II.B shows, however, the language, history, and purpose of the proviso do not support a broad reading. The second, and preferable, way of avoiding undesirable restrictions on the admissibility of confessions is to reject the proviso's negative implication. Part II.C advocates this second approach.

B. Judicial Expansion of the Proviso

To avoid suppressing confessions admissible under Mallory, courts have expanded subsection 3501(c)'s proviso well beyond its literal scope, to reach all reasonable delays, not just those due to problems of transportation — e.g., to reach delays due to the fact that the magistrate was off-duty,77 or to the suspect required medical attention,78 etc.79

74. See note 97 infra.

75. There is, in fact, a third way. Many courts avoid giving effect to this negative implication by concluding that § 3501 renders voluntariness the sole criterion of admissibility. These courts then fall back on the observation that the length of prearraignment delay is only one factor to be considered in determining whether a confession is involuntary under 3501(b). They conclude, therefore, that 3501 could not have intended that all post-sixth hour confessions be held "involuntary" solely because of delay.

The premise that voluntariness is the sole criterion for the admissibility of confessions was discredited in Part I, and so this technique will not be addressed here. Even if accepted, however, this premise does not eliminate the negative implication. If voluntariness is the sole criterion, the proviso implies that all post-sixth hour confessions are "involuntary" under § 3501(b) unless excused by the proviso's terms. Instead of trying to resolve this problem, Halbert and its progeny have summarily dismissed it, with a short statement that the implication is contrary to the intent of the statute.76

76. See notes 77-79 infra.

77. United States v. Marrero, 450 F.2d 373, 378 (2d Cir. 1971) ("3501(c) necessarily subsumes the availability of a magistrate"); see also Marrero, 450 F.2d at 379 (Friendly, C.J., concurring).

78. United States v. Isom, 588 F.2d 858, 862-63 (2d Cir. 1978) (medical attention and overnight lodging is not unreasonable delay within the meaning of § 3501(c)).


While Section 3501(c) can be construed to mean that the only confessions obtained more than six hours after arrest that can be admitted are those that were elicited during the time necessary for travel to the magistrate, we agree with the 9th Circuit that Congress did not intend to legislate any such arbitrary edict.

This expansion is effective, but indefensible.

If Congress meant to subsume all forms of reasonable delay within the proviso, it would not have specifically included some forms while obviously excluding others. In 3501(c), an exception to the six-hour limit is expressly provided for only certain types of reasonable delay — specifically, delays caused by the means of transportation or the distance to be traveled. *Expressio unius est exclusio alterius,* a rule of statutory construction, suggests that the proviso should not be broadened beyond these limits.

Furthermore, a literal interpretation of the proviso cannot be dismissed merely because it does not excuse all forms of reasonable delay. Before the proviso was added, Congress presumably intended that all confessions obtained more than six hours after arrest be suppressed. If this was so, Congress had created a general rule of inadmissibility. A partial exception to this rule cannot be condemned simply because it leaves part of the rule intact.

388 F. Supp. 1011, 1018 (W.D. Wis. 1975) (noting that construction expanding proviso in § 3501(c) to include other bases for reasonable delay is "rather radical").

80. Expression of one excludes others.

81. Furthermore, it is not altogether clear that prohibiting all confessions obtained through interrogation more than six hours after arrest would be more restrictive than *Mallory.* Several courts have held that interrogation designed to elicit a confession is not permissible under *Mallory* even during a reasonable delay in arraignment. If this is so, of course, an absolute six-hour limit on interrogation is not more restrictive than *Mallory.* *See United States v. Middleton,* 344 F.2d 78, 82 (2d Cir. 1965); *Ricks v. United States,* 334 F.2d 964, 968-69 (D.C. Cir. 1964); *Coleman v. United States,* 313 F.2d 576, 577 (D.C. Cir. 1962) ("If . . . no magistrate were available, it would not follow that questioning could continue."); *Trilling v. United States,* 260 F.2d 677, 688 (D.C. Cir. 1958) (Bazelon, J., concurring) ("Even if a 'brief delay' in arraignment may sometimes be proper or even inevitable, it does not follow that the police may question the prisoner during the delay for the purpose of getting a confession.") (emphasis in original, footnotes omitted); *United States v. Feguer,* 192 F. Supp. 377, 388 (N.D. Iowa 1961) ("[T]he fact that a committing magistrate is not then available does not justify . . . continued interrogation of the arrested person."); *see also United States v. Poole,* 495 F.2d 115, 135-36 (D.C. Cir. 1974) (Fahy, J., dissenting); *Spriggs v. United States,* 335 F.2d 283, 288 (D.C. Cir. 1964) (Burger, J., dissenting) ("[D]uring the interval while the detained person is awaiting presentment before a judicial officer, substantive interrogation must, under the controlling authorities, be suspended. It is not delay per se which is prohibited by *Mallory*; it is the interrogation process which is restricted.").

But *see United States v. Collins,* 462 F.2d 792, 796 (2d Cir.), cert. denied, 409 U.S. 988 (1972); *Pettyjohn v. United States,* 419 F.2d 651, 656-57 (D.C. Cir. 1969); *Braverman v. United States,* 376 F.2d 249, 251-52 (2d Cir. 1967); *Rogers v. United States,* 330 F.2d 335, 538 (5th Cir. 1964) ("When a commissioner is honestly unavailable . . . there may be no violation of Rule 5(a) even though a confession may have been obtained (unconstitutionally) by brutal physical coercion."); *Comment,* supra note 21, at 326.

82. Senator Scott, when introducing the six-hour amendment to § 3501(c), *see note 54 supra,* and before the proviso had been introduced, explained that "[t]he amendment provides that the period during which confessions may be received or interrogations may continue . . . shall in no case exceed 6 hours." 114 CONG. REC. 14,184 (1968) (remarks of Sen. Scott); *see also United States v. Perez,* 733 F.2d 1026, 1033 (2d Cir. 1984) ("[A]s originally proposed by Senator Scott, the amendment would have placed an absolute six-hour limitation on delays in arraignment."); *United States v. Dodier,* 630 F.2d 232, 236 (4th Cir. 1980) (court refers to "the six-hour exclusionary rule established by 18 U.S.C. § 3501(c)").

83. The proviso would be purposeless if, in its absence, delays in excess of six hours could be judged reasonable, and excused for that reason. Apparently, the courts agree, for many have felt it necessary to broaden the proviso to include all forms of reasonable delay. If § 3501(c), before
It may be argued, however, that since there is no principled reason to distinguish between delays that are reasonable due to the distance to be traveled and delays that are reasonable due to the unavailability of the magistrate, and since Congress provided an exception for the former, the proviso should be read to include the latter as well. This is the principal argument used by the courts to avoid the plain construction and to broaden the scope of the proviso.

Part II.C's examination of the proviso's legislative history, however, suggests that the proviso was inserted in 3501(c) as a result of a misunderstanding, and that its presence therefore does not justify its expansion.

C. Reading the Proviso Out of Subsection 3501(c)

Courts should reject the proviso's negative implication and determine the admissibility of post-sixth hour confessions under Mallory. There are persuasive reasons to believe that the proviso's negative implication was unintended.

The legislative history of section 3501 suggests that the proviso was added because of a misunderstanding. On May 21, 1968, Senator Scott of Pennsylvania introduced an amendment to insert the six-hour time provision in subsection 3501(c). The amendment passed, but during the debate Senator Allott of Colorado expressed concern about the time provision's effect in rural areas of the country, where the distance to the nearest magistrate might preclude arraignment within six hours. Two days later, Senator Allott introduced the proviso now contained in subsection 3501(c), lifting the six-hour time "limit" in cases in which the delay is "reasonable considering the means of transportation and the distance to be traveled to the nearest" magistrate.

This history suggests that the proviso was the result of a misunderstanding for two reasons. The first reason is that the proviso is solely responsible for the problem that it was designed to solve. There was

84. In construing statutes, courts must sometimes acknowledge that the legislature has made a mistake. While trying to make sense of a statute, Justice Stevens has twice confronted "the consequence of a legislative accident, perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should." United States v. Locke, 471 U.S. 84, 118-19 (1985) (Stevens, J., dissenting) (quoting Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 97 (1977) (Stevens, J., dissenting)) (footnote omitted, emphasis in original); see also Citizens to Save Spencer County v. EPA, 600 F.2d 844, 871-72 & nn.126-27 (D.C. Cir. 1979).


86. Id. at 14,185 (Sen. Cotton, agreeing with Sen. Allott, opposed the amendment, saying: "All kinds of things can happen, as I know as a former prosecuting attorney in a rural county. I think it is dangerous for us to try to set a limit on this matter.").

nothing in subsection 3501(c), prior to the proviso, to suggest that the six-hour term restricted the admissibility of confessions. The subsection said only that no confession shall be inadmissible solely because of delay if it is made within six hours of arrest. It said nothing about what happens to confessions if they are not made within that period. One would reasonably assume that the admissibility of such confessions would remain unaffected. It was only when the proviso was added that the six-hour provision appeared to take on a restrictive function. And yet the legislative history demonstrates that the proviso was not inserted in order to restrict the admissibility of confessions — the proviso was inserted because of concern that, in certain circumstances, the six-hour term was too restrictive.

The second reason to suspect a misunderstanding is that the reasons Senator Allott gave for adding the proviso do not justify its limited exceptions, or, indeed, its presence at all. In both rural and urban areas, subsection 3501(c) permits officers to interrogate an accused during the six hours immediately following arrest. Senator Allott was concerned that arraignment in rural areas would not be possible within six hours of arrest. But the fact that arraignment may be delayed does not justify extending the period for interrogation in rural areas.

The proviso in subsection 3501(c) was apparently inserted for fear that, in its absence, any confession would be inadmissible unless arraignment occurred within six hours after arrest. But this concern was unfounded. Under subsection 3501(c) and Mallory, the relevant delay is between arrest and confession, not between arrest and arraignment. Postconfession delay will not render a confession inadmissible.

88. Consider the exchange between Senators Allott and McClellan (Sen. McClellan originally opposed any time limit, but later conceded to the six-hour provision). Sen. Allott: "[Supposing that] you do not have a U.S. commissioner within 200 miles; how do you arraign a man in 3 hours, or in 6 hours, for that matter?" Sen. McClellan: "That is the point. You cannot in 3 hours. But we are trying to make some concession here. There may be instances where [6 hours] would not be adequate . . . ." 114 CONG. REC. 14,185 (1968); see also note 86 supra (remarks of Sen. Cotton).

89. Under § 3501, prior to the inclusion of the proviso, officials in rural and urban jurisdictions were treated identically. They were permitted to arrest a person, sit him down, and interrogate him for six hours, with the understanding that at the expiration of the sixth hour, no confession thereafter obtained through interrogation was admissible if it followed a period of unnecessary delay. It is difficult to conceive how rural jurisdictions were disadvantaged under this arrangement. They faced no penalty for failing to arraign within six hours; subsection 3501(c) did not deprive rural officials of any advantages which accrued to their urban counterparts. The fact that one may "not have a U.S. commissioner within 200 miles" and that arraignment may not be possible within 3 or 6 hours was wholly irrelevant to the merits of § 3501.

90. Note that the relevant delay is that between arrest and confession, not arrest and interrogation. See note 91 infra.

The proviso's history therefore casts doubt on whether the proviso or its negative implication accords with the congressional intent behind subsection 3501(c).

Furthermore, the District of Columbia statute, upon which section 3501 was based, contained a three-hour limit but did not call for the automatic exclusion of confessions obtained more than three hours after arrest. Rather, Congress envisioned that at the end of three hours, Mallory would kick in to render confessions inadmissible only if obtained during an unreasonable prearraignment delay. The similarity of the two provisions suggests that Congress possessed the same intent with regard to subsection 3501(c).

Rejecting the negative implication is also consistent with the congressional intent to encourage the admissibility of voluntary confessions. It is difficult to understand why Congress, in an effort to broaden the admissibility of confessions, would adopt a rule of admissibility more restrictive than the one it sought to relax.

92. See note 55 supra.

93. See note 57 supra.

94. See note 56 supra.

95. This argument is weakened slightly by the fact that the D.C. statute contains a three-hour limit, while § 3501's limit is six hours. Initially, § 3501's drafters, citing the D.C. statute, proposed a limit of three hours. The six-hour limit was reached as a result of compromise between those favoring the shorter period and those favoring no period at all. See note 88 supra. In the spirit of compromise, it is possible, of course, that the supporters of the three-hour limit agreed to six hours in exchange for the other side's concession to make the six-hour limit an absolute bar on the admissibility of confessions, rather than to leave the issue of admissibility to Mallory. To the extent that this is likely, the relevance of the D.C. statute is lessened.


97. The effect of this interpretation is to exclude confessions obtained during delays which would be "reasonable" under Mallory, but which do not fall within the reasonable delay exception of § 3501(c) — for example, delays due to the unavailability of a magistrate. For this reason, the courts, with near unanimity, have rejected the literal interpretation. See United States v. Marrero, 450 F.2d 373, 377 (2d Cir. 1971) (A literal interpretation of the proviso would "expand the protection of potential defendants beyond the scope established by the McNabb-Mallory cases."ksen note 56 supra). In the spirit of compromise, it is possible, of course, that the supporters of the three-hour limit agreed to six hours in exchange for the other side's concession to make the six-hour limit an absolute bar on the admissibility of confessions, rather than to leave the issue of admissibility to Mallory. To the extent that this is likely, the relevance of the D.C. statute is lessened.

Finally, one should note that confessions are a valuable source of evidence.99 "Evidence is the basis of justice: exclude evidence, you exclude justice."100 Absent a violation of the confessant's rights, therefore, courts should not presume the inadmissibility of voluntary confessions. Rather than the automatic suppression of all confessions obtained more than six hours after arrest, the courts should favor application of Mallory.

It is true, nevertheless, that one fact argues against this interpretation. This is the statement by Senator Scott, sponsor of the six-hour provision, that its purpose was to "provid[e] that the period during which confessions may be received . . . shall in no case exceed 6 hours."101 It is possible that Senator Scott misspoke, or intended this statement to apply only to cases in which there has been a violation of rule 5(a). If this was not Senator Scott's intent, one has trouble squaring the avowed purpose of the amendment with its language and with the congressional intent to broaden the admissibility of confessions. No easy reconciliation is possible.

CONCLUSION

Section 3501 creates a safe harbor for confessions obtained within six hours after arrest. It does nothing more. It does not make voluntariness the sole criterion for admissibility; it does not redefine "unnecessary delay" in rule 5(a) to exclude any delay within the first six hours of arrest; and it does not render all post-sixth-hour confessions inadmissible unless the delay fits within the narrow literal bounds of the proviso in subsection 3501(c). Under section 3501, confessions obtained within six hours of arrest are admissible; the admissibility of confessions obtained thereafter should be determined by Mallory. Sloppy legislative drafting and sloppy analysis of legislative history have made section 3501 much more complicated than it needs to be.

— Matthew W. Frank

99. S. REP. NO. 1097, supra note 37, at 2136.
100. 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 1 (J.S. Mill ed. 1827).
101. 114 CONG. REC. 14,184 (1968).