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FEDERAL LAWYERS SEEKING TO SOFTEN CONFESSION CURB

Will Test '68 Law in Move to Induce Supreme Court to Ease '66 Decision

By FRED P. GRAHAM

The Justice Department has taken steps to prompt the Supreme Court to soften a controversial decision that limited the authority of the police to interrogate suspects and obtain confessions.

In a memorandum now being circulated throughout the department, its lawyers have been instructed that they may offer confessions as evidence in court, even though the suspects who confessed were not given all of the warnings required by the Court's decision in Miranda v. Arizona.

Federal law enforcement agents have been instructed to continue to follow the Supreme Court's decisions in obtaining evidence, despite the new policy. However, if agents inadvertently fail to give all of the Miranda warnings, the Government intends to use the confessions anyway in an effort to "salvage some cases which otherwise might be lost."

Court May Get Case

When President Nixon named Warren E. Burger to succeed Earl Warren as Chief Justice, Mr. Nixon said he hoped that the Burger Court would reverse some of the Supreme Court's liberal criminal law doctrines. This Justice Department action seems likely to bring the confessions controversy back before the Court, this time with Congress firmly on record in opposition to the Miranda decision's rigid curbs on police questioning.

The new Justice Department policy is based on a portion of the omnibus Crime Control Act of 1968 known as Title II.

It states that confessions shall be admissible as evidence in Federal prosecutions if the trial judge finds that the confessions were voluntarily given. Under the statute, a failure to warn a suspect of his rights is only a factor to be considered in deciding if his confession was voluntary.

Law Is Questioned

Congress passed Title II to express its displeasure over the 1966 Miranda decision, in which the Supreme Court interpreted the Constitution to preclude the use of any statement given by a suspect in custody unless he had first been warned of his rights to silence and to counsel, and had waived those rights.

Title II also contains a section aimed at changing a 1967 Supreme Court decision, United States v. Wade, which says that all suspects are entitled to lawyers at police lineups. Title II says that witness to a crime can identify suspects in court, whether lawyers were present at the suspects' lineups or not.

Since the law appeared to be an attempt by Congress to reverse constitutional rulings by

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the Supreme Court by means of a statute, instead of a constitutional amendment, many lawyers have questioned its constitutionality.

It has never been tested, however, because former Attorney General Ramsey Clark instructed his lawyers to ignore it and to offer only evidence that had been obtained in compliance with the procedures set out in the Miranda and Wade cases.

The new Nixon Administration policy was set out in a memorandum dated June 11 and signed by Will R. Wilson, Assistant Attorney General in charge of the Criminal Division.

"In enacting Title II, Congress was, in effect, expressing its concern with the inflexible results of the Miranda and Wade decisions, and seeking to induce a judicial re-examination of the underlying bases for those holdings," Mr. Wilson said.

He outlined a legal argument that United States Attorneys will use in an attempt to persuade the courts to uphold the constitutionality of Title II. He said the Government's interpretation of the statute "attempts to avoid a direct conflict" between the Congressional act and the Court's decisions, and yet persuade the Supreme Court to soften the impact of its rulings.

Points to New Method

He instructed the attorneys to argue that the warnings set out in the Miranda decision were only one method for protecting suspects' rights against compulsory self-incrimination, and that Congress had now specified another method in the form of Title II.

"Congress has reasonably directed that an inflexible exclusionary rule be applied only where the Constitutional privilege itself has been violated, but not where a protective safeguard system suggested by the Court has been violated in a particular case without affecting the privilege itself," Mr. Wilson said. "The determination of Congress that an inflexible exclusionary rule is unnecessary is within its constitutional power."

If the Burger Court should accept this argument and uphold the constitutionality of Title II, the effect would be to eliminate the Miranda decision's rigid, objective test for the admissibility of all confessions. It would reinstate the previous "voluntariness" rule that considered each confession's validity according to the methods used by the police in obtaining it.

This would be tantamount to a reversal of the Miranda decision.

Mr. Wilson's 15-page legal memorandum instructed the government lawyers not to urge the courts to disturb the Wade decision's insistence on the right to counsel at all lineups. Instead, he argued that under Title II any witness could identify a suspect on the basis of the witness's observations at the scene of the crime, ignoring the lineup issue.