SUPREME COURT OF THE UNITED STATES

No. 92–1949

ROBERT L. DAVIS, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

[June 24, 1994]

JUSTICE SCALIA, concurring.

Section 3501 of Title 18 of the United States Code is "the statute governing the admissibility of confessions in federal prosecutions." *United States* v. *Alvarez-Sanchez*, 511 U. S. ___, ___ (1994) (slip op., at 1). That provision declares that "a confession . . . *shall be admissible in evidence if it is voluntarily given*," and that the issue of voluntariness shall be determined on the basis of "*all* the circumstances surrounding the giving of the confession, *including* . . . whether or not [the] defendant was advised or knew that he was not required to make any statement . . . [;] . . . whether or not [the] defendant had been advised prior to questioning of his right to the assistance of counsel; and . . . whether or not [the] defendant was without the assistance of counsel when questioned . . . ." §§3501(a), (b) (emphases added). It continues (lest the import be doubtful): "The presence or absence of any of the above-mentioned factors . . . need not be conclusive on the issue of voluntariness of the confession." §3501(b). Legal analysis of the admissibility of a confession without reference to these provisions is equivalent to legal analysis of the admissibility of hearsay without consulting the Rules of Evidence; it is an unreal exercise. Yet as the Court observes, see *ante*, at 5, n., that is precisely what the United States has

undertaken in this case. It did not raise §3501(a) below and asserted that it is "not at issue" here, Brief for United States 18, n. 13.[1]

This is not the first case in which the United States has declined to invoke §3501 before us—nor even the first case in which that failure has been called to its attention. See Tr. of Oral Arg. in *United States* v. *Green*, O.T. 1992, No. 91–1521, pp. 18–21. In fact,

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[1]The United States makes the unusually self-denying assertion that the provision "in any event would appear not to be applicable in court-martial cases" since (1) court-martial cases are not " `criminal prosecutions' " within the meaning of the Sixth Amendment and "therefore would not appear to be `criminal prosecution[s]' for purposes of Section 3501(a)," and (2) courts-martial are governed by Article 31 of the Uniform Code of Military Justice, 10 U. S. C. §831, and Rules 304 and 305 of the Military Rules of Evidence. The first point seems to me questionable: The meaning of terms in statutes do not necessarily parallel their meaning in the Constitution. Moreover, even accepting the premise that §3501 does not apply to courts-martial directly, it does apply indirectly, through Rule 101(b)(1) of the Military Rules of Evidence, which requires courts-martial to apply "the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." As for the second point: The cited provisions of the Uniform Code and the Military Rules may (though I doubt it) be independent reasons why the confession here should be excluded, but they cannot *possibly* be reasons why §3501 does not prevent *Miranda* v. *Arizona*, 384 U. S. 436 (1966), from being a basis for excluding them, which is the issue before us. In any event, the Court today bases its refusal to consider §3501 not upon the fact that the provision is inapplicable, but upon the fact that the Government failed to argue it—and it is *that*

with limited exceptions the provision has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago. See Office of Legal Policy, U. S. Dept. of Justice, Report to Attorney General on Law of Pre-Trial Interrogation 72–73 (1986) (discussing "[t]he abortive implementation of §3501" after its passage in 1968).

I agree with the Court that it is *proper*, given the Government's failure to raise the point, to render judgment without taking account of §3501. But the refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary. See *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. ___, ___ (1993) (slip op., at 5-8) (proper for Court of Appeals to consider whether an allegedly controlling statute had been repealed, despite parties' failure, upon invitation, to assert the point). As far as I am concerned, such a time will have arrived when a case that comes within the terms of this statute is next presented to us.

For most of this century, voluntariness *vel non* was the touchstone of admissibility of confessions. See *Miranda* v. *Arizona*, 384 U. S. 436, 506–507 (1966) (Harlan, J., dissenting). Section 3501 of Title 18 *seems* to provide for that standard in federal criminal prosecutions today. I say "seems" because I do not wish to prejudge any issue of law. I am entirely open to the argument that §3501 does not mean what it appears to say; that it is inapplicable for some other reason; or even that it is unconstitutional. But I will no longer be open to the argument that this Court should continue to ignore the commands of §3501 simply because the Executive declines to insist that we observe them.

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refusal which my present statement addresses.

The Executive has the power (whether or not it has the right) effectively to nullify some provisions of law by the mere failure to prosecute—the exercise of so-called prosecutorial discretion. And it has the power (whether or not it has the right) to avoid application of §3501 by simply declining to introduce into evidence confessions admissible under its terms. But once a prosecution has been commenced and a confession introduced, the Executive assuredly has neither the power nor the right to determine what objections to admissibility of the confession are valid in law. Section §3501 of Title 18 is a provision of law directed *to the courts*, reflecting the people's assessment of the proper balance to be struck between concern for persons interrogated in custody and the needs of effective law enforcement. We shirk our duty if we systematically disregard that statutory command simply because the Justice Department systematically declines to remind us of it.

The United States' repeated refusal to invoke §3501, combined with the courts' traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of "*Miranda*" issues that might be entirely irrelevant under federal law. See, *e.g.*, in addition to the present case, *United States* v. *Green*, 507 U. S. ___ (1993) (dism'g cert. as moot); *United States* v. *Griffin*, 922 F. 2d 1343 (CA8 1990); *United States* v. *Vazquez*, 857 F. 2d 857 (CA1 1988); *United States* v. *Scalf*, 725 F. 2d 1272 (CA10 1984). Worse still, it may have produced—during an era of intense national concern about the problem of runaway crime—the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this. Perhaps (though I do not immediately see why) the Justice Department has good basis for believing that allowing prosecutions to be defeated on grounds that could be avoided by invocation of §3501 is consistent

with the Executive's obligation to "take Care that the Laws be faithfully executed," U. S. Const., Art. II, §3. That is not the point. The point is whether *our* continuing refusal to *consider* §3501 is consistent with the Third Branch's obligation to decide according to the law. I think it is not.