

In the
Supreme Court of the United States

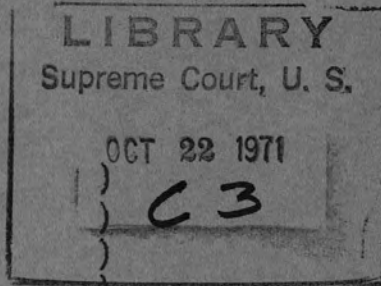
UNITED STATES OF AMERICA,,

Petitioner,

v

DIMAS CAMPOS-SERRANO,

Respondent.



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SUPREME COURT, U.S.
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No. 70-46

Pages 1 thru 45

Washington, D.C.
October 14, 1971

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546-6666

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: UNITED STATES OF AMERICA, :
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: Petitioner, :
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v. : No. 70-46
: :
DIMAS CAMPOS-SERRANO, :
: :
Respondent. :
: :
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Washington, D. C.,

Thursday, October 14, 1971.

The above-entitled matter came on for argument at
1:44 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

WILLIAM BRADFORD REYNOLDS, ESQ., Office of the
Solicitor General, Department of Justice,
Washington, D. C., for the Petitioner.

JOHN J. CLEARY, ESQ., Federal Defenders of San Diego,
Inc., 325 West "F" Street, San Diego, California
92101, for the Respondent.

C O N T E N T SORAL ARGUMENT OF:PAGE

William Bradford Reynolds, Esq.,
for the Petitioner

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John J. Cleary, Esq.,
for the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 46, United States against Campos-Serrano.

Mr. Solicitor General.

MR. GRISWOLD: Mr. Chief Justice, may it please the Court:

I move the admission pro hac vice of Mr. W. Bradford Reynolds of my staff for the purpose of arguing this case. I may say that his three years expires on Saturday, and if the case had gone over until Monday it would not have been necessary to make this motion.

MR. CHIEF JUSTICE BURGER: We are happy to grant your motion, and we will be happy to welcome Mr. Reynolds on a more permanent basis.

ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. REYNOLDS: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the United States Court of Appeals for the Seventh Circuit, to review the decision of that court reversing a judgment of conviction by the District Court.

It presents important questions relating to the manner in which Immigration investigators can, without infringing on the individual right against self-incrimination

under the Fifth Amendment, carry out their statutory responsibility to determine whether aliens, or persons believed to be aliens, are lawfully in the United States.

The facts are essentially these:

On the morning of November 19, 1968, approximately eight agents of the Immigration and Naturalization Service conducted an investigation of employees of the Rulan⁷ Manufacturing Company in Chicago, Illinois, where it was suspected that aliens unlawfully in the United States were working.

Some 15 or 16 aliens were arrested for being in the country in violation of the Immigration laws, including one Miguel Rico. All were placed in agents' automobiles, and, as is customary practice, they were driven to their respective residences to gather their personal belongings.

Upon arriving at Rico's residence, at approximately 8:45 a.m., Rico and two INS investigators, Jacobs and Burrow, went to the door of his apartment. Rico knocked and respondent opened the door and admitted the three men.

The agents identified themselves and explained to respondent in Spanish that Rico had been arrested and that they were there to collect his personal belongings. No search was made of the premises.

Agent Burrow accompanied Rico into his room, Agent Jacobs remained in the living room with respondent.

Jacobs, who, as an INS investigator, is authorized by statute to interrogate without warrant any alien or person believed to be an alien as to his right to be or remain in the United States, inquired in Spanish as to respondent's citizenship. Respondent replied that he was Mexican, and when asked about his alien status he stated that he was a resident alien.

Jacobs then asked for proof, and respondent produced his alien registration receipt card, which is the identification card that is issued by the Immigration Service to all aliens who have been lawfully admitted into the country in a permanent resident status.

Q Is that what's called the blue card?

MR. REYNOLDS: The green card, Your Honor.

Q Green card.

Q And the alien is required to have that on him at all times?

MR. REYNOLDS: At all times, yes, Your Honor, by statute.

Q And to display it?

MR. REYNOLDS: The statute does not require that he display it, the statute requires that he retain it in his possession at all times. And the statute does permit interrogation of the alien's status by investigators; it authorizes them to request him to display it, but the statute does not require that he display it as such.

Q When you say in his possession, do you mean on his person?

MR. REYNOLDS: On his person, yes, Your Honor.

Q Just like a draft card?

MR. REYNOLDS: Exactly. Just like a draft card.

Q Could he prove his status in some other way than by displaying the card?

MR. REYNOLDS: Well, he could prove his status in another way, although not in as direct a way perhaps.

Q I suppose under the broad interpretation of the best-evidence rule, the card is the best prima facie evidence of his status, isn't it?

MR. REYNOLDS: Well, his -- he is required by law to register at the time that he is admitted into the country, and his status is on the registration form. It is information that is in the government's possession. And if he has a passport, for instance, and can show that he is in the country, has a valid passport, and gives his name, you can determine his status from the alien registration form which is on file with the government.

But the card is, I think, the most direct way to establish his status.

Q If you know, how long does it take, as a practical matter, to execute that, carry out that exercise?

MR. REYNOLDS: Well, I would assume a relatively

short time. I don't know. No great length of time. I think it could be ascertained, perhaps by an agent making a phone call, I believe, it could be determined in a relatively short period of time.

Q If he had found that he didn't have the card, and admitted that he was illegally there, would the government have done anything other than deport him?

MR. REYNOLDS: Well, the government could have done something other than deport him; whether --

Q Would they have done anything else as a matter of policy? What is the policy?

MR. REYNOLDS: I think as a matter of policy that they would have done nothing other than deport him. There is a -- it is a misdemeanor to be in the country illegally, and there is that possibility. But, as a matter of policy, the government would have deported him. In fact, that is what the government did with Rico in this case. They deported him. He was in the country unlawfully. They --

Q But they didn't in this case.

MR. REYNOLDS: In this case, this man was indicted, but he was indicted for possession of a forged alien card -- registration receipt card.

Q Well, he was indicted for registration of a false document required for entry into the United States. That's one of the issues in this case, isn't it?

MR. REYNOLDS: For possession of --

Q And that covers an alien registration card?

MR. REYNOLDS: That is correct, Your Honor.

Jacobs inspected the alien registration receipt card and also respondent's social security card, which had been produced on request. And he showed both the cards to Agent Burrow.

The lighting conditions were extremely poor, and on this viewing the agents found nothing amiss.

They returned the documents to respondent, and then left the apartment with Rico, who had by then collected his personal effects.

Now, respondent raises no objection to this initial inquiry, and the Court of Appeals found that it did not violate respondent's Fifth Amendment privilege. This initial inquiry occurred in what the Court of Appeals characterized as "the normal immigration inquiry situation", and thus was permissible, the court concluded, "since the card served the non-criminal purpose of enabling the government to be aware of the number of aliens in the country, and their status."

When the agents returned with Rico to the car, a third investigator, Agent White, motioned toward another individual approaching them, and suggested that he had acted suspiciously on seeing the agents, and should be questioned.

Agent Burrow spoke to this individual, Jose

Rodriguez-Ortiz, and inquired as to his citizenship. Ortiz produced an alien registration receipt card which, upon examination, both Burrow and White found to be altered. Ortiz was then placed under arrest. He was put in Jacobs' car and given Miranda warnings in Spanish by Jacobs.

He was asked if he wanted to obtain any personal belongings. He stated that he did, and indicated that he lived in the same apartment building from which the Agents had just emerged with Rico.

Agents White and Burrow then went with Ortiz. Unexpectedly, he led them to the same apartment that was occupied by Rico and respondent. Ortiz opened the door with a key, and as the three men entered, respondent came out of a back room, into the living room. While Agent White accompanied Ortiz in to his room to collect his clothing, Agent Burrow spoke with respondent in the living room.

He explained to respondent in Spanish that Ortiz was under arrest and was being permitted to collect his clothing. Then Agent Burrow, thinking that if Ortiz' card was altered, there was a possibility that respondent's card, too, was altered. And recalling that his earlier inspection of respondent's card had been in the dimly lit living room, asked to see respondent's registration card, alien registration receipt card again.

Respondent gave him the card, and Burrow examined it

a second time. The card was shown to Agent White, and both agents inspected it under a flashlight.

Q Now, incidentally, Mr. Reynolds, I think you have already answered this, but I just want to be sure. The agent could compel him to exhibit the card?

MR. REYNOLDS: No, Your Honor. The agent could not compel him to exhibit the card.

Q Could not.

MR. REYNOLDS: The agent could appropriately ask for the card, and in this case he produced the card. But the agent had no authority to compel him to produce it.

Q And he might refuse to exhibit it?

MR. REYNOLDS: He might.

Q Nothing would follow from that?

MR. REYNOLDS: Well, not directly; no, Your Honor. Nothing could follow and in these circumstances nothing would follow.

Q I suppose the agent could draw some inferences that might be to the disadvantage of the subject?

MR. REYNOLDS: That, I suppose, could well be, Your Honor, and might warrant some further investigation on the part of the agents as to this subject; but in terms of what they could do at that time, they had no authority to do anything more.

Q They didn't have authority to arrest him?

MR. REYNOLDS: No, Your Honor, they did not have authority to arrest him. Now --

Q But they arrested the other man who didn't have a card?

MR. REYNOLDS: Well, Your Honor, the agent's authority to arrest, under the statute, arises -- an Immigration agent's authority -- arises where he has reason to believe that the agent is in the country unlawfully, and that the agent might try to escape or flee.

Q The alien.

MR. REYNOLDS: I'm sorry; the alien. Excuse me, Your Honor.

Q Then why did they?

MR. REYNOLDS: Your Honor, in these circumstances, we submit that there was, if -- we are now positing that the card had not been produced. There was not reason to believe, in these circumstances, that respondent was in the country unlawfully. Nor was there any reason to believe that he would try to escape.

Q Then there's a question on that point. Was this man -- whatever his name is -- Serrano, did he know that they could have arrested him: One, did he know that he didn't have to show the card? If he said that he didn't know that. The man had come in and said, "I've got Ortiz; I just arrested Ortiz, and I'm going to take him away. Now let me

see your card."

Don't you think that that man assumed that he had the power to arrest him? Or that he was under a duty to show it?

MR. REYNOLDS: Your Honor, as to what the respondent felt, the record is silent on that. I don't think it is unreasonable to assume, as you suggest, that he might have thought that. But our position is that that is not the test in terms of whether you need to give Miranda warnings, which, I believe, is the question you're directing your remarks to.

Q Well, Mr. Reynolds, but does this all add to what the government is taking the position that he is not in custody?

MR. REYNOLDS: Yes, Your Honor, I believe that that is right.

Q And if he was not in custody, that's the end of this case under that theory?

Q At least it --

MR. REYNOLDS: Well, that -- yes, Your Honor?

Q The circumstances fall short of when Miranda warnings would be required; that's your position?

MR. REYNOLDS: That's our position, Your Honor.

Q And it really doesn't make any difference whether the document is a public record or protected by the Fifth Amendment or anything else.

MR. REYNOLDS: Well, I believe that if the document is

a public record, it doesn't make any difference whether Miranda warnings -- whether the situation was custody or not custody, Your Honor.

Q The point is that you can't make them turn it over.

MR. REYNOLDS: Well, because --

Q Because the point wouldn't be whether the document is protected, but whether he's been coerced to turn it over.

And Miranda would be a -- you're forcing him to -- I mean if the situation -- let me --

MR. REYNOLDS: Well, Your Honor, if it's a public record, then you are not -- if it's a required record, even if, in the circumstances here, you were to say that there was custody and you therefore were forcing him to turn it over, you would not be forcing him to incriminate himself under the Fifth Amendment.

Q You think -- let's assume that he was in custody, could you ask him, "Do you have an alien card?" "Yes." "Is it forged?" "Yes." Do you think that answer would be admissible?

MR. REYNOLDS: And you --

Q Without warning?

MR. REYNOLDS: If -- is your question if he's in custody?

Q Let's assume he's in custody, the circumstances are such that Miranda applies; you ask him, "Do you have a card?" "Yes." "Is it forged?" "Yes." Is that answer admissible, without warning?

MR. REYNOLDS: I think, Your Honor, that if he went ahead and answered -- I don't think he needs to answer the second question.

Q Well, I know, but if he answers it, Miranda would exclude it. Unless there's been proper warning.

Do you think that situation is different if you say, "Do you have a card?" "Yes." "Show it to me, please," and he pulls it out of his pocket and shows it to you?

MR. REYNOLDS: Well, I think that is a different situation than if he does show the card, and the card is a document which is a required record, such as a driver's license or --

Q Not if he doesn't have to turn it over; and you said he is under no compulsion to turn it over.

Q You have to turn over to a police officer your driver's license, don't you?

MR. REYNOLDS: Well, Your Honor, I don't think that it -- I think it turns on the State statute as to whether or not you have to show him, on his request, that you have to turn over this -- your driver's license.

Q Under the motor vehicle laws.

MR. REYNOLDS: But I think in most State statutes.

Q But you say it is not a crime to refuse to display your alien card?

MR. REYNOLDS: That's correct, Your Honor.

Q And there's no compulsion in the law for you to answer a request to display your card?

MR. REYNOLDS: That's right. And if you --

Q Well, isn't this alien in the same position that I am, if an Immigration Officer comes to me and says, "Let me see your alien card," and I simply say, "I have no alien card, I'm not an alien, and if I did have one I wouldn't show it to you." He doesn't know that the man is an alien by looking at him, does he?

MR. REYNOLDS: Well, no, sir, he would not know if --

Q So, a request for an alien card is not something which officers throw around carelessly, I would assume.

MR. REYNOLDS: No. But our point -- the proposition of Mr. Justice White is that the man is in a custodial situation, as I understand it.

Q On the assumption that he was in a custodial situation --

MR. REYNOLDS: That's --

Q -- may he -- if he's then asked to display his card, he does. And it proves to be forged. Is the evidence of the forgery admissible?

MR. REYNOLDS: If the card is a required record.

Q Yes. I am assuming it is.

MR. REYNOLDS: Then I think it would be admissible.

Q Even though if you ask him, "Is your card forged", and he answered it "Yes", it would not be admissible?

MR. REYNOLDS: I think that's correct as to the question. Because we are not talking -- if we have a required record, we are not in a Fifth Amendment area that we are in in terms of interrogation, that you are positing when you said, Do you ask the question?

Q Mr. Reynolds, I tell you what's confused me. Your position today, I think may be inconsistent with that statement in your brief -- I'm reading from page 6 of your brief: "It is, rather, a public document, like a driver's license or a selective service card, which must be maintained by the individual" -- you said that; but the rest -- "and produced upon request by appropriate governmental agents under the 'required records' doctrine."

Q That's the watershed right there.

Q Well, you haven't said anything inconsistent with that today, that I've heard -- maybe I haven't been listening.

Q Maybe I haven't heard it right.

MR. REYNOLDS: But --

Q Must it be produced upon request, or not?

MR. REYNOLDS: It may be requested legitimately under the law, lawfully, by the lawful authorities. But it -- there is nothing in the law which requires that he produce it at the time of that request.

Q Well, in this case --

MR. REYNOLDS: But Shapiro, Your Honor, I believe, suggested that if you have a record which is required to be kept, and it is a required record, that then if an officer asks for the record that the law will assume that it should be produced, under the required records doctrine.

Q Then you say yes, if it is a public record, then he must produce it?

Q Yes.

MR. REYNOLDS: Yes, Your Honor.

Q Mr. Reynolds --

Q So there is an obligation in the law for him to produce it?

MR. REYNOLDS: To the -- yes, Your Honor. Well, in that respect, yes. I assumed you were asking whether there was an obligation under statute to produce it. But our position is that if it's a required record, and it is asked, then there is an obligation to produce it without the protection of the Fifth Amendment.

Q All right. Now I think I understand, in your position. In which case, then, that obviates the application

of Miranda --

Q Right.

MR. REYNOLDS: Correct.

Q -- or, in any event, he was not in custody within the requirement of Miranda, and on that ground Miranda was inadequate?

MR. REYNOLDS: That is our position.

Q Mr. Reynolds --

MR. REYNOLDS: Yes, Your Honor.

Q -- my problem is that assuming that you didn't have any Miranda problems, you go and ask the man, "Are you an alien or not", solely because of the statute which gives the agent the right over aliens; right?

MR. REYNOLDS: That's right.

Q If you assume that, does it automatically follow that the same alien and the same officer is in this identical position of no Miranda ruling when the purpose is to find evidence to convict him of a crime? Again I come back to the difference between deportation and criminal conviction.

MR. REYNOLDS: Your Honor, I believe that the answer to that is that when you are talking in the Miranda area you are talking of custody. I think that in this respect --

Q Well, isn't an alien always in the custody of an Immigration Officer?

MR. REYNOLDS: Not in the Miranda sense, Your Honor.

Q But can he stop him any time and ask him anything he wants to ask him, under any circumstances?

MR. REYNOLDS: He may stop him, I believe, at any time and interrogate him as to whether he is lawfully in the United States.

Q Right.

Q That's close to custody.

MR. REYNOLDS: Well, Your Honor, I don't believe that Miranda defines custody as meaning focus. I think that what Miranda said quite explicitly is that focus in the Escobedo sense, under the Sixth Amendment question, that focus means custody, but that custody does not mean focus.

Now, our position is that in the first instance, when he first was in the room and asked the initial time, that was not a custodial situation. And we submit that there is nothing at the second -- on the second occasion, if you look at the surrounding circumstances of the second request, that would have changed what was a clearly non-custodial situation into a custodial situation.

Now, it may be that there was heightened suspicion on the part of the agent, not probable cause but --

Q Was the alien free to go?

MR. REYNOLDS: The alien was -- well, he was --

Q Well, he was home, wasn't he?

MR. REYNOLDS: He was in the home. The agent went --

Q But he was free to leave home?

MR. REYNOLDS: Well --

Q People sometimes do.

MR. REYNOLDS: Yes, Your Honor. I would have to submit that he would have been -- well, he was not deprived from freedom of action in any significant way, which I believe is the Miranda test. The agents, after they were given the card, went into the kitchen and left the respondent alone in the living room, while they examined the card. So I think in that respect --

Q He could have taken the chance; is that what you're saying?

MR. REYNOLDS: Well, I'm not -- I'm not saying that -- what I am saying is that I believe that if you have a non-custodial situation in the first instance, that what the agent was doing, even though there was heightened suspicion in the second instance, was still making the routine request -- I mean routine interrogation as to whether this alien was lawfully in the country.

It was no less routine because he might have been a little more suspicious that he had a forged card, he was still trying to determine whether this alien was lawfully in the country. And in our view there is --

Q He, himself, was not deported, but in the penitentiary?

MR. REYNOLDS: That is -- that is the result, the end result, Your Honor. I think that's right, but --

Q That's just the point. What I'm worrying about is why it wasn't sufficient to deport him. That's what I'm trying to get. Why do you have to put the man in jail before you deport him? You're going to deport him when he gets out, aren't you?

MR. REYNOLDS: Well, Your Honor, that's a determination I was not privy to, and --

Q Wouldn't you assume so?

MR. REYNOLDS: -- I'm not -- but I think that when you are trying to determine whether there was custody in the Miranda situation, that is not determined by what subsequently the decision might be as to whether you deport this alien or you prosecute him criminally.

Q I suppose if the man is asked for his card, asked to exhibit it, whether he's home or on the street, he might much rather prefer to do that than being directed to report to the Immigration Office on the following day at 10 o'clock in the morning, at greater inconvenience to himself; is that not a reasonable assumption?

MR. REYNOLDS: Well, I think that is a reasonable assumption, Your Honor. I agree with that.

Q And he did not -- if he refused to exhibit the card, would that be the sort of remedy that the Immigration

Officer would pursue? Is that one of the alternatives?

MR. REYNOLDS: Well, Your Honor, I think that that is a possibility. Whether or not that would be -- the request for him to report would have to await further investigation, to determine if there was anything on file that indicated that he had lawfully registered, those intervening circumstances may have occurred. But I think that that might possibly be one of the --

Q Is it not a fairly common thing for the holders of these cards to be requested, by writing or otherwise, to report to the Immigration Office, without knowing, at the time, what they're reporting for?

I thought that was a matter of common knowledge.

MR. REYNOLDS: Well, I think that that does -- that is a practice.

I would like to say just a word about the public -- the required record doctrine.

Our view is that this is a public record, and it is a record that is required by law to be kept in the possession of the alien for very legitimate regulatory purposes. And in that sense it is, in the most traditional sense, within the required records doctrine. It's a record of public origin, it's one that is -- contains information that is public in nature. It is information that is already in the possession of the government. It has only information as to identity;

name, sex, date of birth, his alien status, his registration number, his photograph.

It is issued pursuant to, or incident to, and required to be maintained incident to, a very legitimate regulatory purpose; that of controlling immigration in the United States.

Now, because it is --

Q Excuse me, Mr. Reynolds. I gather you said -- you described the required record as something which, by law, one is required to maintain. But is there also an element of that doctrine, in addition to maintaining, he must also produce it upon request of the appropriate government agent?

MR. REYNOLDS: Well, I believe that the Shapiro case indicated that where one is required by law to maintain a record, that he may --

Q He has a duty to produce it?

MR. REYNOLDS: He has a duty to produce it.

Q Was Shapiro a subpoena, or was it a --

MR. REYNOLDS: I believe that Shapiro was a subpoena. I believe. It just popped -- I'm not -- I don't remember for the moment. I believe it was a subpoena, in connection with a request for sales records of a wholesaler.

The element in Shapiro that is not present here is that Shapiro was addressed to what are essentially private records, and here we have what are, in the most traditional

sense, public records. And for that reason, the additional factor that was suggested in Shapiro and appeared again in Marchetti and Grosso, that is that the record be of the kind customarily kept, is one that, in our view, has no relevance here. That that --

Q Well, would you say that if in this case the officer said, "Would you please show me your alien card?" and he said, "No, I will not do so"; and you say, "Well, you're obligated under the law to keep the card and produce it upon request." He says, "Sorry, I won't do it", and then he is searched and the card seized. Is that the kind of a requirement to produce that you're talking about?

MR. REYNOLDS: Well, that of course raises Fourth Amendment questions. I think that the Davis case would indicate that that is essentially the type of requirement that we're talking about. Whether or not they could have at that point searched him, or whether there would have been legal process required; but that is a type of requirement. Davis indicates that in those circumstances where you're dealing with a public record, the police officer may well, on Fourth Amendment grounds, be able to go a little further than he would normally be able to go, in terms of obtaining the document.

But I think that is essentially what we do -- what we are talking about.

Q It's hard for me to understand how a forged

document could be a required document.

MR. REYNOLDS: Well, Your Honor, that, I think, is what was troubling the Court of Appeals. The required records doctrine turns on the recordkeeping requirement, possession of a card; and if that card, under the statute, that possession-keeping requirement is one that is not aimed at a highly selective group inherently suspect of criminal activity, which we maintain is the case here. Here you deal with all aliens.

Then the fact that, in this particular instance, we are dealing with a forged card is not -- is not -- enough to take this particular case out of the required records doctrine. You have to look at the scheme, the statutory scheme, and see where the statutory scheme is directed at criminal activity alone. I believe that was the thrust of the plurality opinion in California v. Byers, last term. And I think that it's the scheme itself that's important, and if, in this particular instance, the respondent is maintaining that he alone, because he acted in an unlawful manner, would have to incriminate himself by producing it, that does not take the document out of the required records, requiring it.

Q Suppose that it's "required" -- to put "required" in quotation marks -- the only thing that required him to produce it was his own desire to pass it off as a valid document; is that not so?

He was trying to pass it off as a valid document.

MR. REYNOLDS: Well, I believe that that is so, I think, Your Honor.

Q But he didn't volunteer anything, it was in response to a request?

MR. REYNOLDS: It was in response to a request.

Q Mr. Reynolds, your time has run out, but there is another and quite separate issue that has been brought into this case by the respondent, by the appellee, rather. Yes, by the respondent, having to do with whether or not this indictment charges an offense under the statute, 18 United States Code 1546. You dealt with that in your Reply Brief, did you not?

MR. REYNOLDS: We did deal with it in some detail in our Reply Brief. That turns, Your Honor, I believe, on the history of the statute, the legislative history and the background of this particular legislation.

Q At least one court has held that it does not charge an offense, that an alien registration card is not the kind of document covered by that section of the Code; is that true?

MR. REYNOLDS: That is correct.

Q Any other?

MR. REYNOLDS: That is the only one that I am aware of. I don't know of any other court that has.

And we, for the reasons set forth in the Reply Brief,

we disagree with that decision.

And as to the other issues that were also raised initially in the answering brief, we have dealt with them in our Reply Brief. I will rely on the discussion there.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Reynolds.

Mr. Cleary.

ORAL ARGUMENT OF JOHN J. CLEARY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CLEARY: Mr. Chief Justice, may it please the Court:

In response to one of the questions earlier put concerning the requirement, I would like to point out to the Court, in 8 United States Code, Section 1357, subparagraph (a), subparagraph (1), it deals with the right of an Immigration Officer to interrogate any person, any alien or any person believed to be an alien, concerning his citizenship. There is not the next step to it that because there's another statute requiring this individual to carry his alien registration receipt card, that he must then produce the card. There are two separate statutory sections.

One of the problems confronting the defendant in this case, which of course he felt was not needed to be raised, is possibly the discriminatory inherent defect within this statute; which means to say that anyone could be inquired or interrogated in this fashion.

In this case the defendant contends that the interrogation conducted in this case, under these circumstances, calls for the application of the Fifth Amendment.

We would even contend that it's even stronger than Miranda, because of the circumstances involving the nature of the interrogation.

Q Now, you mention in the introduction of evidence about the interrogee's subsequent criminal trial.

MR. CLEARY: Yes, Your Honor.

Q What was the evidence introduced against your client here? Just the false card, wasn't it?

MR. CLEARY: Government's Exhibit 1 for identification was his false card. I think they used a social security card; I'm not sure. They also introduced a statement of Mrs. Diana Vargas-Garcia concerning her statement requesting another card because she lost the card; and of course we have asserted that this is patent hearsay and a violation of his confrontation, to introduce this statement of another person. Those two items were, in essence, the basis of his conviction.

Q Of his conviction. But what evidence, specifically, was introduced that was secured in violation, under your submission of the Miranda rule?

MR. CLEARY: Several. First, the actual knowledgeable possession, and that was manifested by "Show me proof of your citizenship" or, upon the second interrogation, "Produce

your card." It was no longer -- proof was the term asked the first time; the second time, "Produce your card". So, by producing a card, he would then portray a verbal act that he had knowledgeable possession of that card. One of the elements in the offense is knowledgeable possession.

Two, the card itself. And the result, the actual production of the card, turning over the card, which was introduced in evidence against him.

Those were the items that incriminated him. In other words, there was a combination of both a physical and a verbal act. There was also a statement of this man, that he was, and acknowledged the card; and there was one confession I was able to knock out on the grounds of the Valenti or McNabb-Mallory rule, and the District Court did grant that, but they let in another one, an earlier statement to the authorities.

At this time, with leave of Court, I would like to ask permission to be able to cite two additional authorities concerning my case.

The first one deals with the Court of Military Appeals, and that is U. S. vs. Nowling -- N-o-w-l-i-n-g -- 9 United States Court of Military Appeals 100, 1958; and the other case I would like to cite, and that is on the issues 1 and 2 dealing with the Fifth Amendment and the production of the card, on item 4(c), requirement of defense counsel to be allowed to interview witnesses before they're deported, as

effective assistance of counsel, I would cite to the Court an -- well, it's not in the Fed 2d Reports as yet; U. S. vs. Mendez Rodriguez, 9th Circuit No. 71, 1238, dated 13 July 1971.

Q What was your first citation in the U. S. Court of Military Appeals?

MR. CLEARY: U. S. vs. Nowling.

Q Yes, but I mean what's the volume and page?

MR. CLEARY: 9 U.S.C.M.A. 100. That case dealt with -- almost head-on with this type of situation that we have here, in the sense that -- in accord with the lower court and certainly not binding on this Court. It was where an Air Force policeman thought that an airman did not have a proper pass, a required document possibly by the military service. He went up and, thinking that he might possibly not have an appropriate pass, said "Produce your pass."

The man produced a pass, and the court held that this was in violation of Article 31 of the Uniform Code of Military Justice, which is the precursor to the Miranda position on the warning that must be given servicemen.

Q Are the decisions of that court reviewable anywhere?

MR. CLEARY: That's a question that I wouldn't be able to really respond to, Your Honor.

The question of the interrogation in this case. One has to take a look at the total circumstances. This was a

task force arrest group of the Immigration and Naturalization Service. This is a sweep type of procedure whereby they apprehend certain aliens. It was brought out in the transcript that they knew of people that they had planned to apprehend. They apprehended them and then extended to them the courtesy of securing their own clothes.

In this case there was an entry made into the apartment the first time. That time the authority of the officers was present and it was demanded of the defendant, to say, "Produce proof of your citizenship." He complied. A certain production was made at that time.

Thereafter they left. When they left, they arrested another one on the street, another alien, as they determined, because this man now had a forged card; the other had not.

With this knowledge, the agent most candidly stated for the record that "I now thought that the other man, when he entered the apartment, had a forged card." He had that knowledge.

He then, going back into the apartment, entered the apartment again for the alleged purpose of securing clothes of their prisoner; but it's our contention, of course, as stated in the brief, that this went beyond the legitimate ambit of their entry into the apartment, and then interrogated this defendant with the express design of producing that which would incriminate him.

The Court of Appeals felt that this was the equivalent of making a man produce the very evidence of his guilt, which in fact it was, as clearly demonstrated in this case.

These are the circumstances that would trigger, if at all, the application of the Fifth Amendment privilege.

It is our contention that the required records doctrine, as really initiated and formulated in Shapiro, deals with a quite different situation. In that case there was business records. In this case we have a personal card belonging to the individual.

The Shapiro case was further refined in the language of Justice Harlan, in Marchetti, and he sets out certain requirements. The third one is the key requirement, and that is the requirement dealing with the Albertson rule, and that is to say, when it focuses in on certain suspect class. Our contention is it's not even a class, it's an individual, one defendant. And when that class can be penalized, and here the penalty is most obvious.

In Miranda, the man only gave a statement of complicity -- excuse me, that was Escobedo. In Miranda, he did give evidence of his guilt, or at least statements leading to evidence.

In this case it was the whole act was the admission of guilt.

Isn't there some relationship in the intensity that

would require, for the interplay of the Fifth Amendment, especially when here the status of the agents is greatly enhanced?

For example, if they were suspecting him of some ordinary criminal offense, they could not so interrogate him. With this case, they can ask as to citizenship; they can ask anyone. And isn't there possibly a danger when you have a man who is from a foreign land, does not speak our language, would not necessarily be enlightened as to our laws or as to his right to resist, if at all?

Q Is there anything in the record that shows what he was arrested for? Was he arrested for illegal entry, or arrested for having a forged card?

MR. CLEARY: Your Honor, you're touching upon a matter that was just briefly hit upon in the record, and since I served as defense counsel at trial, I have done my utmost to secure a deportation order for the defendant, and in the nature of plea bargaining had spoke with the judge, with of course the presence of the U. S. Attorney, and almost literally begged for a misdemeanor violation under 8 U.S.C. 1325.

The Immigration was adamant, their general contention was he had fooled an INS agent on the first time, by the first go-around, and hence they would enforce what I felt were Draconian penalties. The position --

Q Well, my point is, when he was arrested --

MR. CLEARY: He was arrested for a forged card.

However, --

Q Does that appear in the record?

MR. CLEARY: Yes, it appears in the characterization of Judge Lynch, where Judge Lynch said, "At the time you arrested him, you did have him for the forged card, which is a violation of Title 18."

And their contention was, the Immigration contention was, "Well, we had him for that, but really we don't have to do anything with him under Rule 5 of the Federal Rules of Criminal Procedure, because we have him administratively; and we don't need to bring him before a magistrate." And Judge Lynch discounted that, and said, "No, when you have him for a federal crime, you must comply with Rule 5 and bring him before a magistrate."

He was not brought before a magistrate, but was held a month until counsel was appointed. And one of the arguments we have laid before in the trial court, in the Court of Appeals, and again before this Court, is the delay in the appointment of counsel.

The nature of the interrogation here was unique, it was in the man's home. The status of the investigators had been clearly demonstrated by counsel for the -- the Solicitor General has indicated that they stated their purpose why they were in there. They readily had apprehended two of his room-

mates, and had demonstrated their power to seize and apprehend persons.

The critical point that we try to raise is that -- trying to understand what the Fifth Amendment was trying to do, and that is the disparity. Here we have light years of difference between an alien from a different country on foreign soil, unfamiliar with the laws, unfamiliar with the language, dealing with a federal investigator, experienced, bi-lingual, knowledgeable, on his own home ground. There was no place that was safe from this Immigration examination or questioning.

And somewhere along the line the Fifth Amendment protects this type of conduct.

We contend that the circumstances here are far more coercive, are far more detrimental than those existing in Miranda. If anything we would try to draw upon the analogy in Orozco vs. Texas, to indicate that the Fifth Amendment should be applied, not in terms of a geographical setting but in terms of the rights or privacy of the individual. Isn't there some zone or right of the individual to be protected, and that right to be protected against self-incrimination should not depend upon whether he's in the jailhouse or in his own flat. But a fortiori that being in his own flat he was entitled to some deference by the Immigration agents.

Q Mr. Cleary, do you carry the right of privacy so far as to say that it's unconstitutional to require aliens

to carry an alien card?

MR. CLEARY: No, sir. In fact, --

Q What's the purpose of the card, then, if no one can look at it?

MR. CLEARY: The purpose of the card, Your Honor, is that it is a form of identification in several respects. It can --

Q Just for his benefit?

MR. CLEARY: I would have to say that it's for a mutual benefit: that of the government and that of the individual.

For example, if the man was an alien and asked to produce some evidence, he could only show maybe a passport or a birth certificate, that is not legitimate authority that he's here in the United States lawfully. So, hence, he would have to maybe check with the INS or something like that. The card would give him that advantage.

The benefit of the government, of course, is to regulate the aliens, which was the very basis of the Act when it was passed, I believe, in 1941.

Q Is that the primary purpose?

MR. CLEARY: Primary purpose is to merely identify and provide a means of authority. The contention of the defendant would be that Congress hasn't spoken on this Act, and the question is, the card is there. Congress felt it was

appropriate for them to produce the card, and I think it should have made legislation to that effect. There is no such legislation.

In fact, in the same way that if the man could have produced other evidence, I'm sure that would have been equally satisfactory; but that this is a convenient form to show a person's legitimate status.

I think the point made by Justice Douglas, and that considered by the defendant, touches upon the matter that when the inquiry went in the second time it wasn't dealing with the legitimate alien registration receipt card, it was dealing with a piece of -- for lack of a better term -- contraband or evidence that would be able to prove guilt.

And at that time this defendant was required to produce that evidence, and it was no longer using, which we went along with and we didn't argue with the Court of Appeals, nor do we assert in this Court, that the government cannot make general interrogation, Sullivan vs. The United States, to attack, the right to make neutral inquiries, I think it's totally permissible, and I think that's fully within and consistent with the Fifth Amendment.

But to focus in on this type of defendant, I think it transcends that and the government should not be able to use a bootstrap statutory right to make interrogations to justify this type of seizure.

Q You've given great emphasis to the fact that this -- well, both times were in his home. Do I detect from that that you would not be here had this all taken place at the manufacturing establishment where he was working?

MR. CLEARY: Your Honor, that I can't -- that argument wasn't reached in the Court of Appeals. The contention was dual. We had made the contention that interrogation had gone beyond the legitimate scope of the entry. That is one of the additional arguments in support of our position.

And my contention is that the basic inquiry, even conducted out in the street, given these circumstances, the agent walking up, thinking that the man has a forged card, and then asking him to produce it under the semblance of his authority, I still feel would violate the Fifth Amendment.

However, it is our contention that this circumstance is greatly aggravated by the fact that it took place within the man's own apartment.

Q Mr. Cleary, suppose, instead of in his own apartment, the request for exhibiting the card the second time came, suppose the agent had said, "Will you please report to the Immigration Office tomorrow morning at 10 o'clock. Here's the address. Here's my card."

So at 10 o'clock the following morning this gentleman came in and the first request was, "Do you have your card with you?" "Yes." "May we see it?" "Yes." And then all the

events transpired as they have here. What would you say about that?

MR. CLEARY: That's a most difficult situation, because --

Q Well, he's in a much more -- he's in a custodial atmosphere, as compared to being in his home now. In his home, in the privacy of his own home before.

MR. CLEARY: I think one has to look at the nature of the intrusion. If --

Q The intrusion? Which is the intrusion?

MR. CLEARY: The intrusion is into his apartment, concerning the way he gained --

Q Well, I'm not talking about -- no. We're now down in the Immigration Office.

MR. CLEARY: Right. One would --

Q They are asking for a routine check on his card.

MR. CLEARY: The -- no matter how one might try to characterize a, so to speak, little chat with the Immigration Office, I would dare say that it would be somewhat coercive. The only case I can think of is a California Supreme Court decision, where a woman was asked to come down to speak to a friendly D.A. about the case, and the court held that that was coercive.

Q Well, but the D.A. is apparently a prosecutor.

The Immigration Office is a different category. They are required to report there from time to time, are they not?

MR. CLEARY: Well, Your Honor, I would dare say that in my experience with Immigration, I find them to be one of the most fiercest and enthusiastic enforcers of the law, so it depends upon --

Q Your testimony on that is not relevant, Mr. Cleary.

MR. CLEARY: Yes, sir.

Q What about this gentleman in the Immigration Office routinely exhibiting his card; do you think that's a violation of the Fifth Amendment?

MR. CLEARY: Your Honor, I would have to say yes, in the absence of a statute that requires compulsory production. I think the answer lies here very simply, if the agents thought that they had probable cause that he had a bad card, they could have seized him, having probable cause for a valid arrest, and then taken the card from him, and then they would have had him.

On the other grounds, even in the office, I feel that, absent a statute or absent some regulatory scheme to require production, that the Fifth Amendment would protect him from this situation.

Q Your real argument is that anybody with a forged one has protection that the guy with a legitimate one doesn't

have, isn't that your argument?

MR. CLEARY: No, Your Honor. The man with the legitimate card has the same exact right, because there's no statute. However, if he was interrogated, as the Chief Justice pointed out, as a matter of convenience he might wish to show the card and thereby end the interrogation as authorized under the statute.

Q Well, if he had a good forgery, wouldn't he be willing to show it to them?

It depends on how good the forgery is.

MR. CLEARY: Well, that's something we don't know. But that in some circumstances, if it was a voluntary situation; if it was one where a man could be shown that he had, so to speak, knowingly and understandingly tried to perpetrate some type of fraud on the government agent, then I think we might run into some problem of a waiver of the Fifth Amendment.

No such evidence is present in this record. All we have is the demand of the agent, and a demand for the card.

Q Well, what's the purpose of the card?

MR. CLEARY: The purpose of the card is to identify those in the United States who are aliens, lawfully admitted as immigrants; that is to say, on a more permanent duration.

Q What's the reason to identify them?

MR. CLEARY: The reason to identify --

Q What if they aren't legally a resident here,

MR. CLEARY: The required record? Yes, sir, that there will be no Fifth Amendment claim, and I believe Justice Frankfurter has covered the point far more adequately than I could in his dissenting opinion, and also one comment there by another one of the dissenting judges, I think it was in Wilson, which I cited in my brief, which pointed out that -- I think it was --

Q Are you saying that Shapiro should be overruled?

MR. CLEARY: No, sir. I am just saying that there was a concurring or dissenting opinion in Shapiro, where the judge said that this case now applies to business records. However, it can be pushed to its extremes. It has been our experience that given these type of opportunities on statutes, it can be pushed to its limits.

And what I am saying in this case, it's been pushed to the limits, because it's far beyond the business records designed to be secured in Shapiro,

Q Well, I thought, Mr. Cleary, you were taking the position, anyway, are you not, that because it was forged it cannot fall within the required records doctrine?

MR. CLEARY: Well, I would take -- yes, definitely. And in fact I think I made the statement earlier that this is not the regular inquiry for a card, that we're not dealing with a contraband item in that --

Q It wasn't a public record because it wasn't the

kind of a card that the law requires him to keep.

MR. CLEARY: It wasn't -- that's right.

Q Because the law doesn't require him to keep forged cards.

MR. CLEARY: That's right.

Again the logical extreme.

If I could comment briefly on the contentions we made concerning an equally important point, but a jurisdictional point, touched upon by Justice Stewart; and that is the application of 18 U.S.C. 1546 to an alien registration receipt card.

The card here served as some type of entry document, but the document is a re-entry document. On the card there is a back portion where aliens leaving the country can re-enter with the alien registration receipt card. The contention made here is that the statute does not cover this particular card.

The first one is that entry is distinguishable from re-entry. And of course we cite the precedent of this Court in the Lau Ow Bew case, as interpreted by the McFarland Second Circuit opinion.

The second point that we make is the regulatory characterization of the card by the Immigration authorities. There is a two-categorization: registration cards and evidence of registration. This card is secured within thirty

days after entry into the United States. Not at entry.

That is our contention that the ambit and scope of 1546 was directed at those who would put forth some type of legal documentation to indicate lawful status in the United States. That is to say, false birth certificates or other items, to give them the aura of legitimacy within the United States. That this was not the intent of Congress.

Further, it can be easily reviewed by taking a look at the regulatory scheme. Justice Marshall touched upon it earlier. And that is that there is a scheme of removal of those unlawfully in the United States, who misconstrue the, so to speak, poem on the Statute of Liberty, who look for a better land as, in this case, this defendant.

And that is first as a voluntary return; no deportation necessary. A person can be returned with government funds or without government funds to Mexico.

Two, deportation.

Three, the unlawful entry under 8 U.S.C. 1325, first offense, \$500, six months; second offense, two years, \$1,000.

Next step, moving on, 1326, the person who has been deported unlawfully returns, two years, \$2,000.

Then moving on to the more serious one, 1546, then we have the five years; and then 1306(d), and that is the one who counterfeits the alien registration receipt card.

The further point is that within the statutes we have a patent inconsistency, and that is, that in the second paragraph of 1546 there is set forth a statute to deal with the counterfeiting of documents required for entry.

In 1306 of Title 8, in subparagraph (d), there is also a like provision dealing with counterfeiting, but this time specifically dealing with alien registration receipt cards. True, this counterfeiting provision does not meet our situation, where we have only possession. But it is submitted by the defendant that if a specific statute deals with alien registration receipt cards as other than documents required for entry, in that both of these statutes were enacted as part of the same package legislation, the Immigration Nationality Act; therefore, giving effect to both statutory sections, there is an inconsistency.

Applying the principle of leniency, I think the only answer is that this type of violation -- and it's treated that way in most ordinary cases, even aggravated cases -- is no more than a misdemeanor under 8 U.S.C. 1325.

The other arguments contended by the respondent in this case dealt with the search, and that was the aggravating factor upon the entry into the premises, under Katz vs. The United States, the Fourth Amendment protects persons not places; and that here there can be no showing that the defendant consented to this type of interrogation, even though

the agents might have the right to conduct that interrogation on the street or at their office. Their going into his own home, there is no showing of that. They gained access by the use of these other prisoners to secure clothing, that did not give him, the agent, the right to conduct this type of criminal inquiry.

The hearsay rule was the statement of Miss Diana Vargas. We do not take, so to speak, opposition to the public records exception, which the Solicitor General would contend.

We contend that if it's statements, like a selective service file or other public documents, made by the public official, they can come in as a traditional exception to the hearsay rule.

However, what we do take exception with is when there is a statement of a witness which is made and then becomes a part of the file, and then the file is introduced, not so much the whole file but that statement is introduced, and there is no showing of unavailability of the witness, we contend that that denies the right of confrontation.

Further, the question of defense counsel. I was appointed in this case, I think approximately four days after the two witnesses, the last of the two witnesses had been deported back to Mexico, beyond the reach of any type of subpoena. In my motion to dismiss the indictment, I alleged

this prejudicial delay, because here counsel was unable to effectively prepare his case by interrogating two key witnesses who would have very definite information as to the circumstances surrounding their consent to the INS agent to enter the apartment.

The government cites U. S. vs. Perlman in their Reply Brief -- which I received only Tuesday -- but in reading that case, one can see that it's totally distinguishable. Because counsel in that case was appointed, or at least entered his appearance in August, and the man wasn't deported until the following January.

In this case, my appointment followed the deportation. Too, in the Perlman case there was no showing that the prosecution was aware of the transportation. Here the prosecutor was present in court when the court ordered the man remanded to the INS for deportation.

So I say that in this case it was prejudicial and was not speculative, because it deals with one of the essential issues here: consent.

Q You were appointed because the man was indigent?

MR. CLEARY: Throughout the case.

Q I'm a little curious, why should an Illinois district court appoint a man from San Diego, California?

MR. CLEARY: Your Honor, I served as a member of the Federal Defender Panel in Chicago. I was then the Deputy

Director of the National Defender Project.

Q I see.

MR. CLEARY: And I am now Director of the Federal Defenders of San Diego. And this Court was kind enough to allow me to continue on the appointment.

Q I know we --

MR. CHIEF JUSTICE BURGER: Mr. Cleary had moved in the interim.

Mr. Cleary, as Justice Stewart has just observed, you were appointed by the Court and came here at our request. And we thank you for your assistance to the Court, and your assistance, of course, to the man you're representing.

MR. CLEARY: Thank you very much, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, we will not ask you to divide your argument between Thursday and next Monday, and so we'll let you begin afresh next Monday morning.

[Whereupon, at 2:45 p.m., the Court was adjourned, to reconvene at 10:00 a.m., Monday, October 18, 1971.]

[The case was submitted.]