In the

Supreme Court of the United States

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FELIPE JUAREZ HURTADO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 71-6742

Washington, D. C.
January 17, 1973

Pages 1 thru 40

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v.	:	No. 71-6742
UNITED STATES OF AMERICA, Appellee.	:	

Washington, D. C.,

Wednesday, January 17, 1973.

The above-entitled matter came on for argument at 11:26 o'clock, a.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ALBERT ARMENDARIZ, SR., ESQ., 609 Myrtle, El Paso, Texas, 79901; for the Appellants.

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C., 20530; for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in No. 71-6742, Hurtado against the United States.

Mr. Armendariz.

ORAL ARGUMENT OF ALBERT ARMENDARIZ, SR., ESQ.,

ON BEHALF OF THE APPELLANTS

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

The case that we are going to consider today, gentlemen, arises out of a right that the United States Government and, for that matter, State governments have in securing the services of witnesses in cases in which the Federal Government and the State are -- this involves the Federal Government only, but in general, the States are -- interested in having, in other words, witnesses for the State, witnesses for the United States Government.

And, in the process of securing these witnesses, Congress has passed Rule 36(b) of the Rules of Criminal Procedure, which authorizes the incarceration of these witnesses during the pre-trial procedure to guarantee that they will be there should they not be able to make bond, and that they will be there to testify during the proceedings involved.

Then, we have in conjunction with this -- and, by the way, I might say here that there are other ways that a witness may be detained, such as, an example, the Mafia, or a

Mafia witness who the Federal Government fears may be killed, may be detained.

So, there are other ways of detention other than through 46(b).

But, then we have an article which is found in the law regarding the payment of these witnesses, and this is the statute which is in question here.

The main issue here, as I see it, is the interpretation of 1821, regarding the payment of witnesses. This is the main issue.

The main issue arises because -- and if it is interpreted a certain way then, of course, the constitutional issues can be reached. But the main issue arises because we have a statute which is in three pieces. It is a tripod.

The statute is in three pieces or three sections. The first section is that no person shall be held -- excuse me, I am reading. The first section involves the payment of a per diem, a per diem to all witnesses.

Now, the second section involves itself with the payment of that part of the money that a person, or a witness, would spend in hotels and eating, or sustenance.

And then, the statute, in its involvement, has a last section which refers to incarcerated witnesses, and states that such witnesses will receive $1 a day compensation.

The interpretation of the statute is really the

important thing here.

I think we have a very similar case in the way that the Court should proceed, and that is the Dandridge case, that is, that the interpretation of the statute is of first consideration because if the interpretation is that it is $20 a day then we don't reach the constitutional issues.

Now, it is important, then, to look very carefully at the words of the statute and to look to the rules of interpretation of statutes. And this is what we feel has not been done by the courts below.

First you must look at the fact that the very first section refers to a per diem. It calls it a per diem.

Now, this is, of course, a daily payment, and if we look at the statute itself, and we look at the intention of Congress in all of these things, we are faced, as lawyers, as judges, with this situation.

We must recognize that Congress, in its scheme of things, has provided for payment for services for all court attaches.

It has provided for payment to each one of you as judges of the Supreme Court.

It has provided for payment for we lawyers who might be asked to participate in the defense of a person.

Congress has provided for payment for the bailiffs, for the janitor of the court.

And Congress has provided likewise for the payment of witnesses $20 per day.

Now, must Congress say that -- in that first section -- that a per diem shall be paid to witnesses, including those incarcerated?

This is what the 5th Circuit seems to think, but that is not the rule of interpretation of statutes.

Look at the second section that we have here, gentlemen. The second section excludes salaried employees of the Government from the $16 payment.

Now, there is rationale there. The rationale is that salaried employees of the Government receive money from the Government to pay their daily expenses, their hotel.

It excludes witnesses in custody. This is reasonable. It excludes them from the $16, specifically, because they are having their room and board paid for in the local pokey.

It excludes witnesses who reside near the court. This is also reasonable because if you live near the court you go home and you eat at home and you don't need to pay a hotel bill.

Now, the second section excludes those that Congress intended to exclude.

The first section doesn't. The first section says all witnesses.

Now, we come then to, of course, the word, or the

term, "attending court."

And this is where the 5th Circuit has stated that a witness in jail is not attending court.

They seem to say -- I mean they say -- although they don't quote a case to us, that this is a stage of the proceeding.

But we are not dealing with semantics and words. We are dealing with fairness and equality, and we are dealing with the interpretation of the statute of Congress in which we should not attribute to Congress such a disposition to give to one witness who is free who is in the hotel enjoying himself, $20 a day while he waits and the person who is placed in jail, give him $1 a day while he waits.

Q A witness is subpoenaed from the penitentiary, the Federal penitentiary, in Leavenworth, Kansas, and subpoenaed down into Texas or Florida and put in detention while he is waiting. Does he get $21 a day?

MR. ARMENDARIZ: You are referring to a case which is already decided. I believe we quote it in our brief. And the court distinguished -- I forget which court it was -- but this has been decided already -- but the court distinguished that case as -- and I think rationally so, because this was a person who was arguing that his right to work within the penitentiary -- but this is a prisoner who is being held for another reason. He would be held anyway. And I think the Government concedes that in its original brief in opposition to this granting of the

writ, where the Government concedes there is very little reason to differentiate between these people when they are being held for no other reason than to testify.

And this, I submit, is the situation here.

Q If your client were actually testifying he would get $20, wouldn't he?

MR. ARMENDARIZ: Your Honor, the answer to that is not in the record.

Q What's your position as to --

MR. ARMENDARIZ: Our position -- they were not paid in any case that we have found -- but this is not in the record because this case came up --

Q What's your position? Is your position that the statute does not provide for payment to clients such as yours even for the period when they are actually testifying?

MR. ARMENDARIZ: Oh, no, sir. Our position, of course, would be, in line with the position of the court below, that they should get a payment of $20 for the day of the trial. At least for the day of the trial, whether they testify or not.

But it is very interesting to note, and we asked -- or we sent --

Q How then is your client treated differently from other witnesses?

MR. ARMENDARIZ: He is treated differently in a very, very substantial way, and that is that in the example that was

quoted by one of the other justices.

Let us say he is not in prison. All right, you are subpoenaed from here to El Paso, Texas. You are going to testify before the Western District of Texas. You get $20 a day from the minute you leave here whether you testify or not.

Now, you go to El Paso. You take two days if you drive, if you fly.

Now, let's suppose the case is set for Monday morning, which is the case in most of our courts.

And he gets there and he reports to the District Attorney and the District Attorney tells him, "Well, we've got six cases ahead of you. We won't need you until Thursday. Where are you?"

"Well, I'm at motel so and so."

"Well, you stay there and stick around and we will call you when we need you."

He gets $20 a day while waiting in the hotel. While the man who is waiting in the jail gets $1.

Q He is in attendance for purposes of the trial.

MR. ARMENDARIZ: Well, so is the man in jail, Your Honor.

I submit to you that he is very much so.

Q Was there a trial going on?

MR. ARMENDARIZ: I submit to you, Your Honor, yes, sir.

The minute that a complaint is filed against a person and that man is put in under 46(b), there is a trial stage or there is a trial going on, and it is the same stage, because you are in that stage of the game.

Q You would argue that if there weren't a trial contemplated the Government would have great difficulty justifying holding them at all.

MR. ARMENDARIZ: Your Honor, we have -- in our whole position, we have evaded the issue of procedural due process.

We have limited our position to the fact that given the right to hold -- and it is only in the matters presented by the defendant -- I beg your pardon, by the Government -- that we have reached this particular point.

Of course, we would go into it a little bit more in rebuttal. I intend to.

But, specifically, what you have here, of course, is an interpretation of attending in court.

I agree with you, Mr. Chief Justice, that this is one of the issues here, but I fail to see how interpretation of statutes and logic, or anything else, can lead to the conclusion that a person that is in jail because of a case being initiated and is in progress is not attending in court, simply because he is in jail waiting for His Honor to call the case.

Q Is it correct that if they were not being held in jail they would be or would have been deported by now? Is the

record silent on that?

MR. ARMENDARIZ: Yes, in this particular case, I think the record will show that there was no reason to hold them other than as witnesses at this time. They would have been gone.

Q If you are going -- if we should agree with you that $20 per day applies as well to the man in jail, what do you do then with the last sentence? To what does that apply?

MR. ARMENDARIZ: Your Honor, the Court of Appeals downstairs, in its decision, stated what we contended at the time, that this is a recognition by Congress that a man in jail -- now, mind you, look at the whole statute --

Q My question is to whom, to what witness, does the last sentence apply, if we were to agree with you that your man was entitled to $20 a day.

MR. ARMENDARIZ: It applies to those persons who are in custody, who are in jail, in order to provide toiletries and things that they need while they are in jail.

Notice that the other witness who is free gets $16. Asks yourselves, why $16? Why not $15?

Q I am afraid I haven't made myself clear.

If we agree with you that your man was entitled to $20 a day, and that anyone in the position of your client is entitled to $20 a day, and read the statute that way, what do we do with the last sentence?

MR. ARMENDARIZ: It's an addendum -- it's called

something else.

Q Applicable to whom?

MR. ARMENDARIZ: Applicable to persons in jail.

Q But you would want $21 instead of $20.

MR. ARMENDARIZ: Because $20 is the per diem and $1 is for toiletries and other things that a man needs in jail.

I suggest that the statute suggests also that the payment be made on a daily basis so that they can have those -- and it uses the word "per day."

Q So you relate the $1 to the $16 for the man outside?

MR. ARMENDARIZ: Yes, sir, and it is reasonable. This is logical that it is relating to the $16 --

Q The man outside, unless he is in Government service, really gets $36 a day, and you feel that since your man is in prison he ought to at least get $21.

MR. ARMENDARIZ: $21, yes, sir. The $15 --

Q That's what this is all about?

MR. ARMENDARIZ: This is what this is all about, yes, sir.

And I want to reserve whatever rest of the time I have for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLEE

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

This is a troublesome case and it is good, I think, that the problem has been brought to light.

Whether there is anything that this Court can, properly, or should do about it is not so clear.

In the first place, it seems to me important to put before the Court what I conceive to be the basis of the jurisdiction of the District Court in this case.

There is in the Appendix the original complaint, beginning on page 4 of the Appendix. And there is also a first amended complaint beginning on page 28 of the Appendix.

It isn't wholly clear to me which one is actually the one upon which the District Court acted, but I would assume that the first amended complaint is the one which is before the Court.

The United States is the sole defendant named in this complaint.

There is no officer of the United States, no marshall and no United States attorney and no Cabinet officer; no one but the United States is named as a defendant.

If you look at the complaint, paragraph 2, it says that "this suit seeks to enjoin the enforcement of a Federal statute," to wit, Title 28, U.S.C. 1821, and it requests a three-

judge court.

And, then, if you look at paragraph 3, you find that it is alleged that there is a case of actual controversy, and there is a reference to the declaratory judgment statute.

Now, I think it is perfectly clear that Congress has never consented to a suit by citizen or an alien against the United States to enjoin the United States from anything.

It may have in some special acts, but it has not in any statute which is applicable here.

And, similarly, I think that sovereign immunity is a barrier to a suit for a declaratory judgment against the United States, unless the case is in some other way brought within the jurisdiction of the District Court.

When we examine the statutes which relate to the jurisdiction of the District Court,the only one which can have any application here --

Q You say this is a jurisdictional question?

MR. GRISWOLD: I am just trying to find out what is the question.

Yes, I say that it is quite clear, it seems to me, that this cannot be a suit to enjoin the United States because the United States has not consented to any such suit.

Q You think that is equivalent to the lack of power in the District Court. If you had interposed it, I suppose it would be --

MR. GRISWOLD: I don't think any officer of the United States has authority to waive the sovereign immunity --

Q Congress, Congress.

MR. GRISWOLD: Congress has power to, and the only place that I know of that Congress has waived its sovereign immunity,with respect to suits against the United States, is Section 1346 of Title 28. And the first provision of that is Internal Revenue tax cases. And the second is the Tucker Act.

The Tucker Act provides that the District Court shall have jurisdiction in any claim not exceeding $10,000. And, incidentally, in order to come in with respect to Federal question, it would have to exceed $10,000, which is simply another technical reason why, quite apart from sovereign immunity, that would not be there.

Q They allege 4682, which is the one you are reading. They allege that,specifically, that it should come under that.

MR. GRISWOLD: Yes, I understand, and I am trying to narrow it down and say that this case is solely and simply a case under the Tucker Act, Section 1346(a)(2).

There is Section 1346(b), which is the Federal Court Claims Act, but this does not purport to be such a suit, though conceivably someone might contend that there was a basis for that.

Nor does it purport to be a suit with respect to Civil Rights Act.

So, I am suggesting that this case can be before the District Court and can be considered by this Court, not as a question of enjoining anything.

It is not a question whether if the people are now in custody they can be held, Conceivably a writ of habeas corpus might be filed to release someone on the ground that detention under Section 46(b) without proper compensation violates some provision of the Constitution.

These people are not now in custody. They have been released sometime since.

And so this is -- and, perhaps, I should not have taken this much time to bring this out, but I think it is important. This case is before the District Court and, therefore, here only as a suit under the Tucker Act, which means that it must be not exceeding $10,000 in amount, founded either upon the Constitution or any act of Congress or any regulation of an Executive Department, or upon any express or implied contract with the United States in cases not found in torte.

Well, now, it obviously is not upon an express or implied contract, nor does it rest on a regulation of an Executive Department, so it has to be, in order to allow recovery, founded either upon the Constitution or any act of Congress.

Q Of course, they expressly allege that each claim is

based on an act of Congress.

MR. GRISWOLD: Yes, Mr. Justice, I understand that, and so that gets us down -- there are also a lot of other things --

Q I mean in that respect. Even on your argument, that that's within the Tucker Act.

MR. GRISWOLD: That is within the Tucker Act, but the act of Congress is Section 1821.

And, so, we are now confronted with the problem of construing Section 1821, and my opponent contends that the proper construction of that is that it provides for a per diem of $21 per day to the detained witness.

And, this Court can, of course, make a statute mean anything it feels it ought to mean, but I find it extraordinarily difficult to find that that is even the literal proper construction of the statute, or that it is the construction of the statute which can be supported in terms of its history or the practice under it.

Before I go further, I think it is not unimportant to have the facts of this case somewhat more fully before the Court.

Q -- but his alternative is if you don't construe it that way, then it is unconstitutional.

MR. GRISWOLD: Yes, Mr. Justice, but if it is unconstitutional, I find no basis for sustaining a --

Q That's what I wanted to ask you.

Can the Tucker Act permit a claim founded --

MR. GRISWOLD: Yes, Mr. Justice. The Tucker Act permits a claim if it is based upon the Constitution.

But suppose you find this statute unconstitutional? What basis is there for writing a judgment against the United States?

Q It doesn't help any, in this respect, if he says, "Denying me compensation when the statute gives compensation to somebody else, denies me equal protection of the law, and in order to remedy my denial of equal protection of the law you must pay me."

MR. GRISWOLD: I have one little trouble. The Fifth Amendment has no equal protection clause.

That is a problem that the Court has wrestled with in other circumstances.

Moreover, even under the Equal Protection Clause, you have the question of proper classification, and that, it seems to me, is where the facts I would like to put before the Court --

Q Assuming he won on his equal protection argument, that to deny him $20 a day when you pay it to other witnesses is a denial of equal protection. And he says, "I must then have the $20."

Is that a Tucker Act claim?

MR. GRISWOLD: Yes, Mr. Justice, I think that would be a Tucker Act case.

Q Okay. That was the purpose of my question.

MR. GRISWOLD: But I would not agree that that was the solution or analysis. Yes, it is a Tucker Act case.

Q You don't think then, Mr. Solicitor General, that the Tucker Act, when it refers to the Constitution, speaks only of the eminent domain or conndemnation.

MR. GRISWOLD: No, I don't see how it can be limited solely to that, although that, of course, was a large part of the basis upon which suits under the Constitution are brought, either in District Courts for less than $10,000, or in the Court of Claims for greater sums.

Q The upshot is, as I understand the theorizing of my brothers on the other end of the bench, that if he prevails on the statutory claim, on the construction of the statute, he gets $21 a day, and if he prevails on the constitutional claim, he gets $20 a day.

MR. GRISWOLD: Yes, that would seem to be that, if the Court concludes that on the constitutional claim some kind of automatic authority is required despite the basis for proper classification which I would like to put before the Court.

Q That is a substantial question. I agree with that.

MR. GRISWOLD: It seems to me not irrelevant that all

of the main plaintiffs in this case, and as far as anything appears -- and I don't understand class actions, particularly as applied to this sort of a situation -- as far as appears, with respect to the numerous people who are said to be of the same class involved -- but all of the main plaintiffs in this case are people who illegally entered the United States, who were arrested, together with the people who brought them into the United States, who were under the benign policy of the Immigration and Naturalization Service, treated very gently as illegal immigrants, but whose services were rendered for the purposes of proceeding against those who were apparently engaged in the business of bringing Mexicans into the United States illegally.

All of the people involved in this case were subject to deportation. All of them were proceeded against criminally, and were convicted of the crime of illegal entry. All of them were given a sentence of a year, but placed on immediate probation.

And, I would like to call attention, not only to Rule 46(b), which, after all, is a rule of this Court and must have at some time obtained approval by this Court, and there are cited in our brief various cases which support the holding of witnesses who would not otherwise be available for criminal trial, and the brief also shows that this goes back to the very earliest days of the Republic under the Constitution. Statutes

passed in 1789 recognized that people could be held as material witnesses and it has always been done.

The business of payment has had an experience of what I would call neglect.

Back in 1850, 120 years ago, there was provided a separate fee of $1 a day for witnesses held in custody and at that time there was provided a fee of, I think, a $1.50 a day for other witnesses.

Over the years, but only, really, within the past 20 years, the regular witness fee has escalated and has gotten now to $20 a day, plus $16 a day for subsistance.

But no one has ever changed the $1 a day for people who are held in custody, except that in 1948 even that was omitted when the Judicial Code was revised in 1948.

And, a year or two later, in a comprehensive amendment to the Judicial Code for the purpose of correcting errors which were made when it was put together, the $1 a day was put back in.

Q During that interim, the statute was not interpreted to mean that people incarcerated got the $20, too, I take it?

MR. GRISWOLD: Mr. Justice, I do not know, but I don't think so.

My guess is that they just went ahead and paid them $1 a day on the ground that this was going to be straightened out anyhow.

Now, I think it is also relevant to point out, as we have in our brief on page 31, that Section 1821 is not the only statute -- this, I think, has some bearing on the construction of Section 1821 -- is not the only statute which provides for detaining persons in this situation at a fee of $1 a day.

This is printed in the footnote in the bottom half of page 31: "The Attorney General, under such conditions as are by regulations prescribed, may stay the deportation of any alien deportable under this Section," and these aliens were, "if, in his judgment, the testimony of such alien is necessary, on behalf of the United States, in the prosecution of offenders against any provision of this chapter or other laws of the United States."

All of these people were held for the purpose of being available to testify against the people who introduced them into the United States.

All of those persons who were prosecuted pleaded guilty, and all of these persons were discharged immediately after the conclusion of that criminal case.

(Whereupon, at 12:00 o'clock, noon, the oral arguments in the above-entitled case were recessed, to be resumed at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may resume whenever you are ready.

MR. GRISWOLD: Insofar as this case turns under the Tucker Act on the construction of a statute, and we have referred, primarily, to Section 1821, but I have also mentioned the corresponding immigration statute, Title 8, Section 12, 27(d), I do not think that there can be a construction of the statute which would lead to the payment of $21 a day to these detained witnesses.

Not only is that not a feasible or reasonable construction on the face of the statute, but the contrary is provided by the regulations of the Department of Justice which are printed on page 16 of our brief.

Incidentally, I would call particular attention to the second paragraph of the United States Marshalls Manual of the Department of Justice.

Witnesses detained under Rule 46(b) of the Federal Rules of Criminal Procedure should be paid the compensation of $1 per day, except for the days they attend in court, when they are entitled to the regular witness fee of $20.

And the same construction appears in this record, in the answer of the United States Attorney, which, since the petitioner here filed a motion for summary judgment, is admitted

for the purposes of this case.

This is on page 23 of the Appendix where the United States Attorney alleged that it was the practice to pay $1 in these cases, but whenever a witness who is detained in custody is in attendance in court, or before a United States Commissioner or before a person authorized to take his deposition, he receives the witness fee of $20 for each day's attendance.

Q Mr. Solicitor General, my reading of the Appendix, on page 3, indicates that on April 8th the District Court granted the defendant motion for summary judgment, which would be the Government, I take it. So that -- I would think that your statement that the answer of the Government be taken as true wouldn't necessarily be applicable.

MR. GRISWOLD: Mr. Justice, here, again, I am not wholly clear, but there joint motions for summary judgment, and when the matter is before the court on joint motions for summary judgment that is on the ground that there is no material issue of fact in either way, and I had in mind the fact that it was the Government's motion which was granted, but there was also a motion for summary judgment by the petitioners here.

I don't greatly care whether this is regarded as admitted or not, I believe that it is the practice, and that that is plainly evident by the United States Attorney -- United States Marshalls Manual, which is printed on page 16.

If there is a question with respect to the constitutionality of the statute as so construed, I find it difficult to see that the answer is that this Court should somehow or other rewrite the statute, and provide that an amount should be paid.

Suggestion has been made in equal protection terms if they are applicable to the Federal Government -- and I have tried to argue in opposition -- that there is no constitutional right to any sort of a witness fee and that there is a proper basis for classification, or discrimination, here, with respect to people like these particular petitioners who were, themselves, violators of the law, who were subject to a one-year sentence in jail, whose grant of probation was coincident with the holding as material witnesses, and who were then held until the people who introduced them into the United States pleaded guilty and were then immediately discharged.

As I understand the situation, no one of these petitioners was paid $20 for any day, because no one of these petitioners appeared in court because the people who introduced them into the United States pleaded guilty.

Q Their convictions, I take it, followed the events we are talking about, did they? They were not under conviction while they were being held.

MR. GRISWOLD: The dates are stated on pages 8, 9 and 10, but the chronologies are a little -- certainly too

difficult for me to keep in mind.

Q My point, that I am driving at is if they were under the sentence they could have been held without any question --

MR. GRISWOLD: They were under the sentence and could have been held except that the sentence granted immediately probation.

Q I see, but it could have done otherwise, couldn't it?

MR. GRISWOLD: It could have done otherwise and was, I am sure, done as a part of the process by which they were dealt with and then held until the people who introduced them into the United States came to trial, which, in one case, was about six weeks later, and in another case was about a month later.

Q If that had not been suspended until after these events, we wouldn't be here on this case.

MR. GRISWOLD: There wouldn't have been any problem as to this, except, conceivably, under the Bail Reform Act, they might have been entitled to bail before trial, whereas, here, they were, in fact, --

Q I am speaking of the after-trial period. After they had been found guilty, if, instead of suspending the sentence, the judge had put them in the same building and said, "I'll consider motion for modification of the sentence and suspension of the sentence after you have testified."

MR. GRISWOLD: After the trial, there would have

been no problem about that at all.

Q It was on March 26 when, apparently, they pleaded guilty to the misdemeanor which resulted in the six months imprisonment, and then suspended and supervised probation for one year.

And that same day, they were committed as material witnesses.

So, it must have happened almost simultaneously, I gather, Mr. Solicitor General.

I am reading from what you say at page 7 and 8.

MR. GRISWOLD: Yes.

Q You say at page 7 that it was on the 26th that these petitioners pleaded guilty and got the six months execution, which was suspended, and they were put on probation for one year.

MR. GRISWOLD: That's right.

Q And, then on the next page, it says on that day they were committed as material witnesses.

MR. GRISWOLD: On the same day. My interpretation is that it is all part of one process designed to deal appropriately with these people who had broken the law,and to provide the evidence which was necessary to appear against the other persons who had not.

Q That's quite right. If there hadn't been that suspension of execution of sentence, there wouldn't be any case.

MR. GRISWOLD: If there hadn't been the suspension, there wouldn't be any problem.

Now, let me say, as I indicated in our brief in opposition, that I have tried to do a little good in this matter.

I have called it to the attention of the Deputy Attorney General, and of the Attorney General, and it has proceeded this far, that on January 10, 1973, the Attorney General sent a letter addressed to the Speaker, a corresponding letter to the Vice President, but the letter has not yet been sent to the Speaker or to the Vice President.

The form I have has a big rubber stamp on it, "To Budget for clearance. Not sent to Congress."

And under the form, there has to be clearance from the Office of Management and Budget and the last paragraph of the letter says, "The Office of Management and Budget has advised that enactment of this legislation is consistent with the objectives of this Administration."

Now, when clearance is obtained from the Office of Management and Budget, and my influence at that office is not always very great, but the Attorney General has recommended it to them.

If it is obtained, then this proposal will be sent to Congress.

The proposal, as it is indicated, raises the $1 per

day in both cases, that is both in Section 1821 and in the Immigration Provision, to $20 per day.

It also takes advantage of this opportunity to make a change in the provision with respect to transportation costs for ordinary witnesses, where the statute now provides that there should be first class,and the suggestion is made that in modern times economy class air fare is adequate, and they are doing that.

However, I am told that this will be simply a means of putting it before Congress, if it gets before Congress, and the Department may well not support the full $20 a day.

And there is a very real problem here which needs to be considered.

$20 a day for 30 days in a month is $600 a month. And, in this particular area of Mexico, 70% of the people have an income of less than $80 a month.

And there is great concern that if we provide a built-in way to make $600 a month by illegally entering the United States, and being detained as a witness, that the number of people who do this may be very greatly increased.

Q But you may be detained as a prisoner.

MR. GRISWOLD: May be detained as a visitor?

Q As a prisoner and paid nothing.

MR. GRISWOLD: Yes, but if that is -- works out to be eight times as much as you can make working in the fields in

Mexico, it may look pretty good.

And the suggestion has been made that if this does come before Congress that representatives of the Department will recommend that there be added a proviso to this effect -- this wording is not final, but explains the idea -- provided that any alien who has entered the country illegally, and who is held not more than 30 days as a material witness in a case involving the illegal entrance of himself or another, or any violation of the Immigration Law, shall receive only $5 per day for such period of incarceration, when not attending in court.

And this, I mention because it seems to me to emphasize the fact that this is a problem which ought not to be resolved in some kind of rigid constitutional terms, that the Equal Protection Clause requires that everybody be treated the same, that it obviously has practical connotations.

This is not just a mechanical thing, but the protection of our borders against the introduction of illegal immigrants who compete for jobs against American citizens, in areas where jobs are not readily available, is a legitimate matter of American policy, is a matter which can appropriately receive the attention and consideration of Congress, and, which it seems to me, in a proper allocation of function, should be determined in detail by the Congress and not by this Court.

Now, it is very appropriate, I think, that the issue

has been raised, and that steps are being taken so that it will be put before Congress for active consideration there.

I would think that the ultimate resolution of the problem would be better in the hands of Congress than by any solution which, it seems to me, this Court can make.

This Court cannot spell out a detailed statute which will say well, in case of illegal immigrants, and so on.

The only analogy that has been suggested for proceeding by this Court is in terms of some equal protection idea, which idea, I think, is not relevant here in the facts of this case.

Accordingly, we would submit that the judgment below should be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Armendariz.

REBUTTAL ARGUMENT OF ALBERT ARMENDARIZ, SR., ESQ.,
ON BEHALF OF THE APPELLANTS

MR. ARMENDARIZ: If the Court please. If I may respond.

Gentlemen, we have listened --

First, let me tell you that up to the -- in the lower court, as in the Court of Civil Appeals, the Government did not argue that there was a rational basis for this invidious discrimination that exists in this statute.

The Government --

Q Was it required to?

MR. ARMENDARIZ: I would say yes.

Q You have the burden in the lawsuit, don't you?

MR. ARMENDARIZ: Yes, sir, I recognize that, but --

Q You have the burden not only of showing a discrimination, but an invidious discrimination.

MR. ARMENDARIZ: Invidious. Yes. And the point that I am making is that they resorted to 201, which is a -- which is something -- all of this argument which counsel has made is subject to a motion to strike, because they have added to this record in a rule that doesn't come into effect until July 1, 1973.

And we had submitted a stipulation as to the appendix, and now he has added an appendix under this rule which isn't a rule yet.

But the real reason for it is because up to now they had advanced no reason, Your Honor, regarding the rationale under which this statute might stand constitutionally.

Q What is it you say the Government has added?

MR. ARMENDARIZ: They have added all of this business about the -- that they were charged, that they had six months given to them, that they were granted voluntary departure --

Q Oh, no. You mentioned some rule that you said --

MR. ARMENDARIZ: On page -- they make a statement in their brief and I will find it in a minute.

Here it is. It is on page 5.

"Although we do not suggest that additional facts are in any way necessary to the resolution of the case at this stage, we believe the court may find pertinent," so on and so forth, "under Rule 201(b)(2) of the new Federal Rules of Evidence."

Then they add, 'all the argument of counsel regarding what actually happened in this case --

Q There aren't any new Federal rules yet, are there?

MR. ARMENDARIZ: No, sir. Not until July 1st.

Q This is just to reference (c).

MR. ARMENDARIZ: The point that I am making, Your Honor, is that --

Q They can cite that as expressing the prevailing practice. They don't rely on that new rule.

MR. ARMENDARIZ: Well, they do, because they have added the whole addendum.

Q Well, we won't waste your time, I just --

Q It was not in the record, that's the point.

MR. ARMENDARIZ: And to evade the fact that here we are talking about witnesses who are in jail. They would like to isolate this into a class.

Q You say that you do not traditionally notice the records of the United States District Court, that these people were charged, indicted, found guilty or entered a guilty plea,

and they were sentenced.

MR. ARMENDARIZ: Your Honor, in this Landridge case, this Court established clearly the right of this Court to establish judicial, due judicial notice. Those things -- in that case it was that women act more as -- but these are specific facts about specific people that has to be placed --

I knew nothing about this until I received this.

But the point I am really making is that this is trying to sustain on a rational basis on irrational generalizations which are present in every case of invidious discrimination. It is a wonder that they don't argue that you should because they are brown, because they have long hair, because --

Q Classification differs between the generality of citizens and aliens who have been found guilty of illegally entering the country and have been sentenced to a term of imprisonment for that purpose, even though that sentence was suspended.

Your burden is to show that that is an irrational classification, isn't it?

MR. ARMENDARIZ: Precisely. This is what we say, that is irrational because they -- these are only generalizations. They haven't --

Now, they say there is another statute. Now, that other statute -- notice the words -- it is another per diem because they are being held in another agency, to give authority

to the other agency to give them that $1 a day that they need for their -- for their --

Now, they come in and admit that they are going to go to Congress. Give us $20 or give us $5, in the case of this type of alien.

Now, notice, Your Honor, that there is a limitation there.

I suggest, Your Honor, that in the added material we find, for instance, that the Government has fined the principals. There is a guid pro quo. One of them was fined $1500, the other $1500, another $300, which fully covers the cost. That Congress had this in mind -- that there are other solutions other than -- that this is not rational. There is no rational --

The classification statute applies to all witnesses detained, all witnesses alike.

Q What is the maximum money fine that could be imposed on an alien in these circumstances?

MR. ARMENDARIZ: Your Honor, the Statute, Title 8, 1325, and 1326, categorize these things as felonies and misdemeanors, which is at the discretion of the --

Q What is the most?

MR. ARMENDARIZ: $500 and six months in jail.

I am not talking about the people who had them that transported them.

Q No, I am speaking of these right here -- your petitioners.

How much could they have been fined for the offense?

MR. ARMENDARIZ: $500 and six months in jail, is the maximum for each offense.

Q But if the judge had fined them $500 and six months, then he could take -- if you are right on your argument -- he -- the Government could, nevertheless, take the $20 a day out of that $500, couldn't they? As an offset.

MR. ARMENDARIZ: It would seem to me that that might be one of the solutions to the problem, yes.

Q Suggesting a premium on judges to impose the maximum sentence in every case.

MR. ARMENDARIZ: No, sir, this doesn't necessarily follow, because you also have to take into consideration the purpose of the statute, and this is what we haven't considered.

What is the purpose of 1821?

The purpose of 1821 is to make payment to witnesses, to see that they don't lose out of their own pocket. The Government admits that in their briefs. They have a statement that it is not reasonable -- it is on page 21 -- "It is unreasonable to expect and require witnesses to attend court at a personal financial loss."

Now, either they are witnesses or defendants, because if they are defendants, they have to be provided counsel, they

may not want to testify, and the whole case may fall.

This is a convenience of the Government, Your Honor. This is something that the Government --

Q They did not fall because there were verdicts or there were judgments of guilt by some process.

MR. ARMENDARIZ: Yes, sir, there was a judgment of guilty, and the whole legal process, administrative and criminal, had terminated. They had been granted voluntary departure. They could leave for Mexico immediately. They didn't have to be witnesses. They had been given a suspended sentence. They could leave for Mexico. They didn't have to be witnesses. They were held here at the convenience of the Government, and the Government received $1500 from one, $1500 from another, and got convictions because of this.

The Government, I submit to Your Honor, either has witnesses -- and I think that this is the reason they have gone to Congress. They realize that this statute is unconstitutional. They are going to have to change it. They are going to have to do something because it is unconstitutional as it is.

And they have gone to Congress because it is unconstitutional, and they recognize that there might be some differences, but the statute itself at this time is invidious.

Q How long were they held as witnesses after they were convicted?

MR. ARMENDARIZ: Well, two of them were held almost 90 days, sir.

But we have some that were held six months, some of them nine months. They can put them in jail and throw away the key.

Q Some of the named petitioners?

MR. ARMENDARIZ: Yes, sir. Two of the named petitioners were held 90 days, Justice Marshall.

And they throw away the key.

Now, they could have taken their deposition. They could have done several things, but if you have to pay them $1 a day, there is no reason to do that, is there? Keep them. It is cheaper.

Q Are you asking for $20 a day for the whole time or just the time after conviction?

MR. ARMENDARIZ: No. For the time after the conviction, yes, sir.

Q That's all you are asking for?

MR. ARMENDARIZ: All we are asking for, sir.

Q That's not the way I read your complaint.

MR. ARMENDARIZ: That's what we meant.

I think that we are off base if we look at this thing in the alien only, because 36(b) is for all witnesses, all witnesses who are detained, and this is the whole matter as it stands.

I think, Your Honors, we have an unconstitutional statute.

I notice the white light. I wanted to take one minute to thank Your Honors for allowing me to sit my son who is my partner and who helped me, and who is not a member of this bar, for the permission that you gave me, for the attention that you gave me. I sincerely appreciate it.

I would like to cite just one case more. In Graham v. Richardson you have dealt with this issue of differentiation because of alienage and I suggest that that is the case in point here.

Thank you.

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

Mr. Griswold.

MR. GRISWOLD: Mr. Chief Justice, if the Court pleases, I will lodge this submission to the Budget Bureau with the Clerk so that the Clerk will have the information available.

Q That measure, when passed, wouldn't affect this case, would it?

MR. GRISWOLD: No, Mr. Justice.

Q It is not retroactive?

MR. GRISWOLD: I assume it could be made retroactive, but the proposal is simply prospective, and whether anything will come of this, I have no idea.

MR. CHIEF JUSTICE BURGER: Well, thank you,

Mr. Solicitor General.

The case is submitted.

(Whereupon, at 1:27 o'clock, p.m, the oral arguments in the above-entitled case were concluded.)