ORIGINAL

In the

Supreme Court of the United States

UNITED STATES, Petitioner,	)	
v.	)	No. 76-1309
ALFREDO L. CACERES, Respondent.	)	

Washington, D.C.
January 8 and 9, 1979

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UNITED STATES, Petitioner,	
v.	No. 76-1309
ALFREDO L. CACERES, Respondent.	

Washington, D. C.,

Monday, January 8, 1979.

The above-entitled matter came on for argument at 2:23 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

KENNETH S. GELLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner.

JAMES J. BROSNAHAN, ESQ., One Market Plaza, San Francisco, California, 94105; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 76-1309, United States against Caceres.

Mr. Geller, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. It presents the question whether a district court may properly suppress probative and otherwise admissible evidence of a crime merely because a government agency fails to follow internal regulations that impose duties upon it not required either by the Constitution or by statute.

We contend that suppression is an inappropriate remedy in such circumstances especially where, as in this case, the agency regulation at issue was not intended to grant enforcible rights to individual defendants. The violation of the regulation was isolated and was not committed in bad faith, and the defendant has been unable to demonstrate any prejudice as a result of the violation.

The facts of this case may be summarized as follows:

In January 1975 Agent Robert Yee of the Internal

Revenue Service was auditing respondent's individual and unemployment tax returns for the year 1971. At the conclusion of a meeting between Respondent and Agent Yee on January 27, 1975, Respondent proposed a so-called personal settlement of his tax difficulties. He offered Agent Yee a thousand dollars if the agent would reduce his estimated tax liabilities by about one-third.

Agent Yee immediately reported the bribe offer to Inspector Hill of the IRS Internal Security Division. At Hill's direction, Agent Yee called respondent on January the 30th and arranged a meeting for the following day at respondent's office. During this meeting, respondent gave Agent Yee a partial payment of $500 for settling the tax audit as respondent has earlier suggested. Unbeknownst to respondent, this conversation was recorded by Agent Yee by means of a tape recorder concealed on the Agent's person.

Agent Yee also met with respondent on February the 6th and February the 11th, 1975. At the February 6th meeting, respondent offered Agent Yee an additional $2,000 to audit his 1973 and 1974 individual income tax returns to respondent's satisfaction. And on February 11th, respondent gave Agent Yee $500 as the second installment for the favorable termination of the 1971 audit. The February 6th and February 11th meetings were also secretly recorded by Agent Yee.

Respondent was subsequently indicted on three counts

of bribery. Prior to his second trial on these charges, he moved to suppress the three tape recordings on the ground that they had not been properly authorized under the applicable IRS internal regulations governing consensual monitoring of face-to-face conversations between agents and taxpayers. Those regulations require that, except in exigent circumstances, advance approval for such monitoring must be obtained by the Director of the IRS Internal Security Division from the appropriate officials in the Department of Justice. The IRS manual --

QUESTION: Does this regulation apply to other types of monitoring or --

MR. GELLER: There's a -- the regulation also applies to telephone monitoring, but there are different authorization requirements there and they are not at issue in this case, the approval of the Department of Justice is not required for telephone, consensual telephone monitoring, only for consensual face-to-face monitoring of conversations.

QUESTION: Is there any history that explains the distinction between the two, the reasons for it?

MR. GELLER: I think that the --

QUESTION: Is it regarded as more offensive to have a microphone under your necktie than to tap the wires?

MR. GELLER: Well, the sparse history that's available to explain the reason for the adoption of these

regulations does suggest, yes, that the Internal Revenue Service and the Attorney General thought it was marginally more intrusive of possible privacy rights to have face-to-face conversations recorded than telephone conversations; the theory being that conversations over a telephone are going through wires, through offices and circuits, and there's just less reasonable of an expectation that they're not being overheard.

Of course, consensual monitoring either by telephone or by face-to-face regulations, as I'll get to, doesn't implicate either the Fourth Amendment or any statute.

And the IRS manual also provides that when exigent circumstances are present, emergency authorization for consensual monitoring may be given by the Director of the IRS Internal Security Division acting alone.

Now, the facts in this case show that on either January the 30th or January the 31st --

QUESTION: Who is able to monitor, make a judgment of the exigent circumstances?

MR. GELLER: It's a judgment that --

QUESTION: Say, if IRS says this presents exigent circumstances, can anyone review that within the government?

MR. GELLER: I think the exigent circumstances that the regulations refer to are merely the matter of time that's involved before the discussions are to take place.

QUESTION: Suppose the IRS makes that determination

and the material is recorded, and then you get a case evolving just the way this one does, is the soundness and correctness of the determination that there were in fact exigent circumstances open?

MR. GELLER: Well, it's our position that the definition "interpretation of an internal regulation promulgated by an agency" should be for that agency and that agency alone.

Now, the lower court in this case found that the emergency provisions of the IRS manual were violated, and while we disagree with that conclusion we haven't challenged it in this Court. And this case reaches this Court on the assumption that the regulations were in fact violated. The question is merely what the remedy should be.

Now, as I was saying, the facts in this case show that after Agent Yee had arranged the January 31st meeting with respondent, but before that meeting took place, Inspector Hill applied for authorization to monitor the conversation between respondent and Agent Yee. The request was transmitted to the IRS National Office here in Washington on January 31st, but it apparently was not forwarded to the Justice Department until February the 7th.

As a result of this delay, the Director of the IRS Internal Security Division, acting pursuant to the exigent circumstances provision of the IRS manual, gave emergency approval to record the January 31st and February 6th conversa-

tions between respondent and Agent Yee.

QUESTION: Mr. Geller, let me go back a moment to follow up on a question the Chief Justice asked you a moment ago. Supposing that in a lower court case a statutory issue and a constitutional issue are both decided against the government. The government decides to seek certiorari but seeks certiorari only on the constitutional issue. Do you think that would be a proper tack for the SG's office to take?

MR. GELLER: Well, I hesitate to answer that question in the abstract, Mr. Justice Rehnquist. I think that properly, both that the statutory issue should be resolved before the constitutional one.

QUESTION: But you don't feel the same problem with respect to whether or not in this particular case the agency regulation was violated, and the more general question of whether or not what the remedy should be conceding it was violated?

MR. GELLER: We have not challenged in this Court that the regulation was violated. I'm not aware what standards the Court would bring to resolving a question like that if the agency itself says that the regulation has been violated. But that's part and parcel of the larger argument that we make here today, that an agency regulation -- violation of an agency regulation standing alone does not give anyone any legal rights that are enforcible in court. It's our position,

which I hope to elaborate on later in the argument, that only if a defendant is worse off by the promulgation and violation of an agency regulation than he would be if the agency had not promulgated the regulation at all might it be appropriate for a court, in construing the due process clause, to grant some form of relief.

Now, the Justice Department eventually approved the IRS consensual monitoring request on February the 10th, and therefore the recording of the February 11th meeting was fully authorized in advance, in full compliance with the IRS manual, and it's not at issue here.

And based on this evidence, the district court granted respondent's motion to suppress the recordings of the January 31st and February 6th meetings. The court found that no true exigency existed, and that the IRS Agent had therefore violated the procedures in the IRS manual by not obtaining approval from the Department of Justice.

The government appealed this suppression ruling, but the Court of Appeals affirmed.

I think it's important, to begin our discussion of this case, by asking a critical question that the Court of Appeals never attempted to answer; and that is: What is the source of the district court's power to suppress the highly probative tape recordings of respondent's conversations with Agent Yee merely because of the violation of an internal

government regulation?

First, there are several -- two answers to this question seem reasonably clear. First, the power can't be found in the regulation itself, the IRS manual doesn't contain an exclusionary rule, and indeed it specifically provides for a wholly separate remedy of disciplinary action in appropriate cases against IRS Agents who violate the manual.

It's also clear that the authority to suppress can't be found in the Fourth Amendment or in any federal statute. This Court has said on a number of occasions that consensual recording of face-to-face conversations does not constitute a search or a seizure within the meaning of the Fourth Amendment. And Title III also specifically excludes consensual recordings by law enforcement officers from its provisions.

Finally, the Court of Appeals didn't purport to be ordering the suppression of evidence as an exercise of its supervisory powers; hence, whatever the legitimacy of a court's ever using its supervisory powers to exclude probative evidence in a criminal case, because of an agency's violation of its own rules,we have substantial doubt as to --

QUESTION: What if the regulation had itself said that if it's violated, the evidence shall be excluded?

MR. GELLER: In that case, we still think it would be up to the agency itself to decide whether or not to seek enforcement of that provision, as in fact it does in -- as the

Department of Justice does in petit policy cases --

QUESTION: Yes.

MR. GELLER: -- or whether or not to, in effect, pro tanto repeal that provision. We think the courts cannot step in unless a constitutional or statutory right of a defendant has been violated.

QUESTION: When you say "supervisory powers of the Court of Appeals", you mean over the district court?

MR. GELLER: I gather the --

QUESTION: Certainly the Court of Appeals has no supervisory power over an agency created by Congress.

MR. GELLER: Well, the district court would have supervisory power over -- presumably the argument would go it would have power over an agency; and the Court of Appeals would determine whether the district court has --

QUESTION: Well, where does the district court get any supervisory powers, unspecified by Congress, over an agency?

MR. GELLER: Justice Rehnquist, I don't want to be put in the position of defending supervisory powers of courts over Executive Branch agencies, because the position of the Executive --

QUESTION: That isn't this Court, is it?

MR. GELLER: Well, we took the position in the Jacobs case last year that district courts don't have any

broad, undefined supervisory powers, and that's still the position of the Justice Department.

QUESTION: Well, but even the defendants in the Jacobs case were just arguing that supervisory powers in the district court or Court of Appeals extends to what shall be admitted as evidence in the district court, weren't they?

MR. GELLER: That's correct. Although in the Jacobs case there was a question of how the United States Attorney or strike force attorney should act in a particular situation.

So that leaves us with the claim that respondent urges most strongly, and that the Court of Appeals appears to have accepted, which is that the power to exclude the tape recordings flows from the due process clause of the Fifth Amendment.

As we understand respondent's argument, he says that as a matter of constitutional due process, every agency must promulgate internal regulations restricting the unfettered discretion of its employees. Every employee must abide by the regulations of his agency. And every violation of an internal regulation constitutes a deprivation of due process.

The key assertion is obviously the last one, that is, that any time an agency fails to comply with one of its mandatory guidelines, the person with whom the agency is dealing has been denied due process. The respondent relies

for this assertion solely upon cases such as Accardi v. Shaughnessy and Service v. Dulles; but, as the Court pointed out last term, in Board of Curators v. Horowitz, that line of cases merely announces the rule of federal administrative law, not a principle of constitutional law applicable in non-adjudicative context. And these decisions certainly didn't equate every violation of an agency's regulations with a violation of the Fifth Amendment. Indeed, Sullivan v. United States, in 348 U.S., was decided only a few months after Accardi, yet the Court failed to mention Accardi in denying the defendant's motion to dismiss an indictment in that case, because of a violation of an internal agency procedure.

I should make clear that we certainly don't dispute that there may be circumstances where the government's failure to follow procedures outlined in its internal regulations might operate to treat a particular defendant unfairly, might cause the defendant demonstrable harm. And there conceivably may also be circumstances in which the magnitude of the unfairness by the government and the harm to the defendant might be sufficiently substantial to constitute a due process violation that would entitle a defendant to judicial relief.

One situation, for example, might be if a defendant reasonably relied on the existence of an internal government regulation and was then prejudiced by the government's unjustified refusal to follow that regulation. Another might

be if a government agent decided not to follow his agency's regulations in a particular case because of some invidious reason, such as defendant's race or religion.

But, in our view, if there are circumstances such as these in which a defendant would be entitled to judicial relief, the relief would be based on the due process violation and not on the violation of the internal agency regulation. Due process, we believe, cannot be violated by a mere agency violation of its own rules. Defendant is not worse off from the violation of an internal regulation standing alone than he would be if the agency had never adopted the internal regulation in the first place.

Hence, the existence of and failure to follow an internal agency regulation, in our view, is, at most, only of evidentiary significance. But one factor among many that must be considered in weighing the defendant's due process claim.

Now, we've identified in our brief a number of the factors that we believe must be looked at to determine whether a particular defendant has been deprived of due process. The essential question, of course, is whether the government's conduct has fallen below a standard of essential fairness that the Court should not tolerate it. It is, as the Court define "due process" in the Russell case, whether the activity of government law enforcement agents was repugnant to

the American criminal justice system, so outrageous that the government should be barred from invoking judicial processes to obtain a conviction.

We think that the facts of this case demonstrate quite clearly that the defendant is not treated unfairly in any way by Inspector Hill's failure to comply fully with the authorization provisions of the IRS manual. Indeed, respondent really makes no effort in his brief to dispute that contention. For one thing, respondent's conduct couldn't have been affected in any way by Inspector Hill's noncompliance with the IRS regulations. Respondent didn't know that his conversations with Agent Yee were being recorded.

QUESTION: Mr. Geller, could I interrupt with just two thoughts: One, you say he couldn't have been hurt. Maybe he would have been turned down if he'd followed the procedure and there wouldn't have been any monitoring; isn't that a possibility?

MR. GELLER: It's not a possibility in this case, as I hope to get to in just a moment; but even if he were turned down, our position would still be that the defendant is no worse off than if the regulations hadn't been promulgated in the first place.

QUESTION: So then, on that point, before you get through, would you make some comments on Vitarelli v. Seaton, where the man was discharged, he would have been no worse off

if they didn't have all these procedures, whether he would have been terminated or not?

MR. GELLER: Yes, well, I think in Vitarelli v. Seaton, just like Accardi v. Shaughnessy and Service v. Dulles, that line of cases, we don't attack the decisions in that line of cases in this case; those are adjudicated cases, and I think that the Courts were announcing rules of administrative law, not due process.

I think what we're dealing with here in this type of case, and in the Leahey, Heffner, Sourapas lines of cases, are judicial scrutiny of internal government regulations in connection with prosecutive or law enforcement decision-making. And I think that the one, the due process standards that the Courts announced in overseeing law enforcement techniques is a much, much lower standard; the standard I articulated a moment ago, whether the government's conduct is so outrageouse that the Court should not allow judicial processes to be invoked to obtain a conviction.

But there are many facets, obviously, to the question of must agencies follow their own rules? And we're only concerned here with the small facet of the question that involves criminal investigative or prosecutive policies, and whether either the dismissal of criminal charges or the suppression of evidence in a criminal case is an appropriate remedy for those types of violations.

QUESTION: Vitarelli was dismissal from government service, was it not?

MR. GELLER: Yes. Yes, it was.

Now, respondent, as I was saying, didn't know that his conversations with Agent Yee were being recorded, and he certainly didn't know that they were being recorded without Justice Department approval. His incriminating statements to Agent Yee in the January 31st and February 6th meetings wouldn't have varied in any respect if Inspector Hill had applied for and obtained monitoring authority pursuant to the routine rather than the emergency provisions of the IRS manual, as the district court insisted he should have done.

And by the same token, in connection with the question asked by Mr. Justice Stevens, there was no prejudice to respondent because if the IRS manual had been fully complied with, there's absolutely no question on this record that the Department of Justice would have authorized Agent Yee to record his conversations with respondent. This is not a case in which the law enforcement technique of consensual monitoring was only of marginal utility. For obvious reasons, instances of attempted bribery by IRS agents have always been considered to be among the most justified uses of consensual recording equipment under the IRS regulations.

Indeed, as I mentioned earlier, the Assistant Attorney General actually approved the monitoring of the

February 11th meeting in advance, with the knowledge that on two prior occasions earlier that week the IRS had engaged in consensual monitoring of respondent's conversations pursuant to the emergency exception in the IRS manual.

In fact, there had been an incident in March of 1974 in which respondent also made a statement to Agent Yee that could have been construed as a bribe offer and at that time Agent Yee also reported this to the Internal Security Division, which had sought approval from the Department of Justice to monitor face-to-face conversations between Agent Yee and, back in March of 1974, the Justice Department had also granted approval and had in fact, I think, extended that approval for five consecutive months. So there's no question that this is a case in which the Justice Department would have granted approval pursuant to the IRS manual and the Attorney General's memorandum.

Therefore, I have a situation here in which the IRS' failure to comply precisely with its internal regulations didn't treat the defendant unfairly in any way, didn't lead to --

QUESTION: Mr. Geller, on that point about certainty of approval, supposing we had a case in which it was somewhat uncertain whether they would have approved it; would you make a different argument?

MR. GELLER: I'd make the same argument, although,

if my same argument would be rejected, then you would have to, I assume, reach the question of prejudice to the defendant. We don't think you have to even reach the question of --

QUESTION: Well, there would always be prejudice, I suppose, if they got some recordings that they would not otherwise have gotten, and they were material to the material evidence.

MR. GELLER: Well, I don't think that's what we mean by prejudice in the due process sense, because --

QUESTION: Well, you mean there's no unfairness is what you --

MR. GELLER: There's no unfairness, because, as I said earlier, we think the inquiry is, Is the defendant any worse off than he would have been if the regulations had not been promulgated in the first place?

QUESTION: But your position -- I just want to get it straight in my mind; your position really is that even if he would have been worse off, the violation of department regulations of this kind shouldn't justify the application of the exclusionary rule?

MR. GELLER: That's correct. We don't think there's been a due process --

QUESTION: I mean that's your broad position --

MR. GELLER: That is my broad position --

QUESTION: -- but if we were to decide each case on

whether we think they might or might not have gotten approval --

MR. GELLER: That's correct.

QUESTION: -- otherwise, it's kind of a tough test.

MR. GELLER: I don't think the Court need reach that in this case, because I think our broader proposition is correct.

We're dealing here then with a regulation that doesn't provide any remedy for an aggrieved defendant, and, indeed as we show in our opening and reply briefs, it wasn't even primarily intended for his benefit.

Finally, there's no finding by either court below of bad faith on the part of any of the IRS agents. We submit that, in these circumstances, there's no conceivable basis on which to find that the government's conduct treated respondent unfairly, much less deprived him of due process, and that accordingly the district court was powerless to order the suppression of the tape recordings.

I would like to touch briefly on one more point before my time expires. The conclusion of some lower courts that the violation of an agency regulation alone should entitle a defendant to the suppression of evidence or the dismissal of criminal charges is premised to a large extent on the notion that, regardless of the absence of harm to the particular defendant, relief must be ordered in order to give agents an incentive to follow their agency's rules.

We think that this notion is misguided for the reasons that were stated by Judge Friendly in the Leonard case at 524 F. 2d. Executive Branch agencies have substantial incentives, wholly apart from any penalties imposed by the courts, to insure that their own procedures are substantially observed.

Executive Branch agencies presumably adopted the particular procedure, which was not imposed by the Constitution or by statute, because it benefitted the agency in some substantial and significant way. And the same factors that caused the agency to adopt the internal procedures should compel the agency to see that they are obeyed.

Even if suppression would have some marginal deterrent effect, however, would be far outweighed, in our view, by the harmful consequences that would inevitably be produced by the exclusion of the evidence.

Inherent in the voluntary adoption by the Executive Branch of internal guidelines is the expectation that the interpretation and enforcement of those guidelines would be left to the Executive Branch. If judicial sanctions are going to be imposed solely for violation of voluntarily adopted internal guidelines, the wisdom of adopting those practices, in the first place, would obviously have to be re-examined. Therefore, suppression would really punish society twice. First, probative evidence of criminal activity

would be excluded, and criminal prosecutions would be impeded; and, secondly, the government would be dissuaded from adopting a great many beneficial rules and practices that go beyond what the Constitution or a statute may require.

Thus, at a time when, as the Court of Appeals candidly conceded, there's been a growing disenchantment with the exclusionary rule, we submit that it would be exceedingly unwise to extend the remedy of suppression to a situation such as this one where the Constitution and federal statutes were fully complied with, and there was, at most, an inconsequential violation of an internal agency regulation.

Thank you.

QUESTION: Are any of the cases cited relied on by the respondent here criminal prosecutions?

MR. GELLER: The only case that was a criminal prosecution was the Yellin case, which was a prosecution for criminal contempt of Congress. The Yellin case is, in many ways, a peculiar case. The Court didn't really explain what the source of the power was it was exercising in reversing that conviction, although there were two threads that seemed to run through the argument; one is that there might have been some reliance interest on the part of Mr. Yellin, and we agree that if there had in fact been a reliance interest created by a regulation, there may well be a due process violation if that regulation is violated; and secondly, there was some

notion in Yellin that it's not fair to prosecute someone for contempt of Congress for failure to comply with the rules of Congress, when Congress itself hasn't followed its own rules.

But the Yellin case is the only case I'm aware of on which respondent relies, the only --

QUESTION: But if I recall the opinion in the Vitarelli case correctly, was there not some analysis by the Court of the -- or at least a contention which was referred to, that the employees in government have the reasonable expectation that the procedures will be followed because they know what the procedures are --

MR. GELLER: That's correct.

QUESTION: -- just as they would with reference to a Civil Service statute providing for procedure?

MR. GELLER: There was a -- the Court did refer to that, of course, just to repeat that Vitarelli, like Service v. Dulles and Accardi were adjudicative cases, administrative law cases. And, of course, even in that context there has to be some finding that a particular regulation was for the benefit of the person who seeks to challenge its violation. And I think that's what the Court was referring to in Vitarelli.

QUESTION: And in Accardi also?

MR. GELLER: In Accardi and in Service v. Dulles.

QUESTION: But these internal procedures for the administrative hearings were made for the benefit of that

category or class of people?

MR. GELLER: Precisely. And of course in those cases all that happened, all that the Court ordered, was the remand for a new hearing at which these procedures would be complied with. Here, of course, the remedy ordered by the district court and affirmed by the Court of Appeals is --

QUESTION: But that's not right, in Vitarelli the Court ordered reinstatement.

MR. GELLER: But I believe the Court also mentioned that this would not preclude the government from immediately discharging Vitarelli under proper procedures.

QUESTION: No, that's right. The procedures were totally unnecessary for the employee, it was just when they charged him with a particular violation, namely Communist sympathy and the like.

MR. GELLER: That's correct.

QUESTION: Thank you.

MR. GELLER: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Brosnahan.

ORAL ARGUMENT OF JAMES J. BROSNAHAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BROSNAHAN: Mr. Chief Justice, --

MR. CHIEF JUSTICE BURGER: You may elevate that lectern if you like, with the crank on the side.

MR. BROSNAHAN: I appreciate that.

[Turning crank] It looks like I might make coffee with it, I'm not sure.

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

We see the case before you differently, and I'd like to state what we think the issue is.

In a case where there is a mandatory published regulation by agencies of the Federal Government, which has been approved on a nationwide basis, for the protection of fundamental interests of citizens, where that regulation is violated, where that violation is deliberate and where the evidence obtained after the violation is sought to be introduced in a federal district court in a criminal case, should that evidence be suppressed because, as we allege, it will deter federal agents from committing future violations?

There's been a lot of briefing in the case, and I thought I would start by stating what we think the issue is, and then saying at the outset that we believe that we can support each element of that standard in this particular case.

QUESTION: Do you suggest, Mr. Brosnahan, that your client here conducted himself in reliance on the existence of this regulation in the sense, for example, that Vitarelli did in his case?

MR. BROSNAHAN: Mr. Chief Justice, only in this sense: that as a citizen, one of many, one of millions, and I don't mean to say to the Court that there was a mental state

in the doctor's mind that he focused on this,clearly he didn't, but there are many other cases where clearly that was true, too. But, as the general sense of a citizen from 1965 he had the right to believe that no one would ever electronically record or transmit what he was saying, even to a federal agent, unless the Attorney General of the United States or somebody designated by the Attorney General had approved it before.

QUESTION: Then you're saying that he had a legitimate or a reasonable expectation of having a private conversation when he offered this bribe?

MR. BROSNAHAN: We say, first, that there's been no conviction of course -- there was a hung jury, and no jury has ever found Dr. Caceres guilty, and he's presumed innocent. But, aside from that, we believe that from at least 1967 everyone in the country, including the Attorney General and the Commissioner of Internal Revenue Service, and other high officials responsible for the passage of this regulation, have the right to assume that there would be no such electronic surveillance. And Dr. Caceres is one of many that would be in that state of mind.

I also would say at the outset that it seems to me troublesome that the government --

QUESTION: Well, what difference does it make to the party involved as to whether the approval of the Attorney General was had or not?

MR. BROSNAHAN: It's usual --

QUESTION: How would he know that?

MR. BROSNAHAN: Well, he would not know that, but the --

QUESTION: Well, what difference does it make to him whether it was or was not?

MR. BROSNAHAN: Precisely because the type of instrument being used is secretive. The fact that he would never know it is a greater reason for insisting on the protection of prior approval.

QUESTION: But he couldn't stop it. The only think you're insisting on is that he should have gotten approval of the Attorney General.

MR. BROSNAHAN: Well --

QUESTION: Isn't that the issue?

MR. BROSNAHAN: I think -- I think what I was about to say, Justice Marshall, is this: the government argues in this case that to succeed the defendant must show personal reliance and harm. That, to me, is an inconsistent way to go at it.

QUESTION: But that's not my question.

MR. BROSNAHAN: No. Well, I was going to say that the regulatory scheme -- and I think this is responsive to your question -- the regulatory scheme is set up in such a way that surreptitious monitoring, which now one knows is going on

except the agents who are doing it, by its very nature will not occur unless the Attorney General or someone designated has previously approved it. And Dr. Caceres or myself or any person had the right to go through the country and talk to a federal agent and believe that there would be no monitoring unless that approval was obtained.

QUESTION: And if it was not obtained, it wouldn't be used? We can assume that?

MR. BROSNAHAN: We know that.

QUESTION: Well, how do you know that?

MR. BROSNAHAN: Because --

QUESTION: It was used in this case.

MR. BROSNAHAN: Well, because if the approval is not obtained --

QUESTION: Well, is it true that it is, from now on, people can't rely on it?

MR. BROSNAHAN: Well, I would say, based upon the audit that was done in '74 and based on what's shown in this case, and particularly if this Court were to hold that it's all right to use it in a criminal case, that the public's perception of whether that regulation is worth protection or not would be that you can't rely on it, and you are not going to know when --

QUESTION: I don't see how -- my one point is --

MR. BROSNAHAN: Yes.

QUESTION: -- I don't see what benefit or harm it is to the party involved as to whether or not the Attorney General had approved the bugging.

MR. BROSNAHAN: I would say for this reason --

QUESTION: That's what I'm listening to.

MR. BROSNAHAN: All right. I would say for this reason: by the very nature that it's the Attorney General, the regulatory scheme, when it was passed, imagined that the high official would exercise very careful discretion --

QUESTION: Did it say the Attorney General himself?

MR. BROSNAHAN: Or his designee. And that's what the --

QUESTION: I thought that's what it said.

MR. BROSNAHAN: I've always used those terms together, because that's what it said from the beginning, and it was for a long time the Deputy Attorney General, it was only the No. 2 person in the Department if the Attorney General didn't do it. We argue from that, and the legislative history -- and I differ in my point of view from my colleague, Mr. Geller, on this -- is not sparse. The record that we have shown shows that the President of the United States, the Attorney General of the United States, and the Commissioner of Internal Revenue all said that from 1965 on there would be a high official that would review this kind of electronic surveillance. And that was because it would be approved in

limited cases, and Attorney General Levi -- and I think this is how -- in 1975 went to Congress, delivered a statement which is in our Appendix, dealing primarily with foreign problems, but in that the Attorney General said, and surely believed it, that these regulations were such that great time was taken by his office to review it, to insure that there would be no violation of private rights, that it was always done in advance, and that the Congress could rely on that.

QUESTION: But you didn't do that in '65.

MR. BROSNAHAN: In '75, I misspoke; '75.

QUESTION: It was started in '65, wasn't it?

MR. BROSNAHAN: In '65 it was started, and when it was started, it was dramatic, and I must say that I disagree with the government's view of this, it was discussed at the presidential level.

QUESTION: It wasn't exactly discussed, it was handed down by the President.

MR. BROSNAHAN: It was handed down, and in the White case in the Appendix there is a quotation from President Johnson in which he said that he would see to it, he asked that the agencies look at this because it involved very important rights.

QUESTION: And none of those statements said anything about asking for court help in enforcing the regulation or disciplining people violating it?

MR. BROSNAHAN: Actually, the statement by Commissioner Cohen attached to the government's reply brief did refer, at least in passing, to suppression of evidence.

QUESTION: Attorney general Levi's statement did not, though, did it?

MR. BROSNAHAN: He did not address the question of suppression.

QUESTION: Of remedy; that's right.

MR. BROSNAHAN: That, we say, is for this Court and for the courts to deal with.

MR. CHIEF JUSTICE BURGER: We'll resume at that point at ten o'clock in the morning, Mr. Brosnahan.

MR. BROSNAHAN: Thank you.

[Whereupon, at 3:00 p.m., the Court was adjourned, to reconvene at 10:00 a.m., Tuesday, January 9, 1979.]