IN THE SUPREME COURT OF THE UNITED STATES

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

Washington, D. C.,

Tuesday, January 9, 1979.

The above-entitled matter was resumed for argument at 10:10 o'clock, a.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
THURSGOOD 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:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments in United States against Caceres.

Mr. Brosnahan, you may continue.

ORAL ARGUMENT OF JAMES J. BROSNAHAN, ESQ.,

ON BEHALF OF THE RESPONDENT -- Resumed

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

Yesterday the government argued that the Court need not address itself to the more serious issues in the case because the fact was, so the government argued, that the Attorney General had in fact, or at least somebody in the office had approved electronic surveillance after the fact, and that this Court should rest its judgment upon that position, thus undercutting respondent's request that the heavier issues of the case be addressed.

There are a number of reasons why that, we think, is not appropriate.

First, in Fourth Amendment cases, where there is suppression, there is no examination to determine whether or not a warrant would be issued.

No. 2, the only document that ever went to the Attorney General's office, which is on page 78 of the record, contains in it a statement, and I seek not to use the prejorative term but some accurate term, contains in it a

statement which is false, which is relevant, and highly relevant; and on page 78, the statement that I refer to is, and I quote from the Internal Revenue Service to the Department of Justice:

"During a telephone conversation on January 29, 1975, Caceres referred to his January 27, '75, offer to Yee and asked Yee to meet with him on January 31, 1975."

Not true, clearly not true, and relevant, highly relevant to the question of why approval had not been asked for before that.

A third point is that in Exhibit 1, which is Government's Exhibit 1, it is a memorandum of 1972 from the Department of Justice to agencies, talking about this regulatory plan, and in there, on page 7 there is a quote which says, "It should be clearly understood that the use of consensual devices will not be authorized retrospectively."

And finally our position is that the Court, this Court should not be asked to try to piece together from inconclusive evidence what the Attorney General might have done had it been presented in a proper way.

Yesterday I was also discussing the legislative history, which I'd like to mention again in a couple of respects, because I think it is tremendously helpful to understand the nature of these regulations, and our position which is that they were intended to convey benefits to a

group of people which included the respondent in this case.

The hearings in the Senate -- and this is in our brief -- included findings that there were routine eavesdroppings on meetings between federal tax agents and taxpayers. That was thought to be a grievance. It was thought to be something that should be prevented.

And our position here really, and this case, at least to me, seems to be quite different than the usual Fourth Amendment analysis, this case involves a determination by federal officials as to what was right and what was not right. What the privacy interests were and what they were not. How comprehensive the rule should be, or how narrow it should be. And all of this was set out in writing, and went into an announcement to the public and to the Senate. And we think that it is at least helpful that at a time when the Senate was considering legislation, the Executive Branch went and said, "We have passed regulations". The clear import of which is that the Legislature need not examine this particular item further.

And, as I mentioned yesterday, Attorney General Levi in 1975 again was referring to these regulations as an important part of the protection that was being offered.

We submit to the Court that these regulations are not housekeeping regulations, and so the Sullivan case doesn't help the government very much.

More than that, and we see this as an issue that certainly would concern the Court, rights were to be given, so said the officials who talked about these regulations, and they were to be given to a group of people and that group of people included the respondent, my client, because he was a taxpayer and he was talking to a federal agent; and that was precisely the class of people that were to be protected by this regulation.

We do not think, respondent does not think that when the officials passed these regulations they had in mind two classes of evidence, and this really is the government's position here, and it is hard, at least for me, to comprehend it. When the Attorney General favored these regulations, when the Commissioner of Internal Revenue favored these regulations, and when the President of the United States indicated general support for regulations of this kind, we think they did not have in mind two classes of evidence, one which would be obtained in pursuant to the authority, and the other obtained in violation of it. And so the argument by the government that there's no intention to have this suppressed, we think is wide of the mark.

We also say that the distinction offered by the government between whether these regulations are law or not does not carry them very far. Our position is that these regulations are law, and that it is really not a very attractive

distinction to argue that they are just regulations and therefore are to be given a sort of a second-class status.

QUESTION: Would you agree, Mr. Brosnahan, that this issue arises only,to a court at least, when there is a motion to suppress the evidence?

MR. BROSNAHAN: I think that's right, Mr. Chief Justice.

QUESTION: And the motion to suppress is made in the context, as here, where the evidence obtained was evidence of an effort of the taxpayer to bribe the agent?

MR. BROSNAHAN: Well, that -- that is true, but of course the regulation is geared to the investigatory stage. I think that's one point I'd like to make, thinking about yesterday's argument, is that we have not gone and gotten some obscure regulation and brought it in and said somehow it should play a part in the criminal case. We come, in a case in some ways I think is stronger for the defendant than the Jacobs case was, because the regulation is geared to govern the activities of Internal Revenue Service agents as they gather evidence in the criminal context. This is a regulation aimed at criminal procedure. So we think that it is very close to the strongest kind of case that one can have for a regulation, and then, as Your Honor points out, it would arise in the motion to suppress.

QUESTION: If you prevail, would, in your view, this

apply to all regulations and rules governing law enforcement officers, policemen?

MR. BROSNAHAN: No, Your Honor, I don't think it would.

QUESTION: Why not?

MR. BROSNAHAN: I think that there would be sorting out to be done, but, as far as I'm concerned, arguing here, you can immediately sort out the housekeeping kinds of regulations, some of which have already been identified by this Court in the past, that don't really go to conferring benefits to private citizens.

QUESTION: What, for example, if a police regulation of an ordinary city police force required that before making any forcible entry under a warrant, or otherwise, where it was justified, or force was justified, a policeman should not only announce that he is a policeman, but give his name, rank and serial number, so that the person inside would have some means of knowing that this was indeed a policeman authorized to make an entry? Would a violation of that lead to suppression of the evidence obtained inside?

MR. BROSNAHAN: I wouldn't want to argue today forcefully that it would necessarily, or that it follows as night the day that it would be suppressed. I think that I would have to examine the purpose of that regulation, Your Honor, that said it's for the purpose of letting the people

inside know who it is. And then I guess you would really have to examine the case pretty closely.

But I would say this, this case presents the question of a federal regulation aimed at federal officials, and it has -- and I don't think this is an artificial argument, I hope that it's not -- it has a quality to it that is not found in almost any other ruling that this Court could make. If the Court rules that the curtilage, which is a term sometimes used, does or does not include the front porch, the officer, particularly the State officer is standing out there trying to remember what the major opinion was and what the dissenting opinion was, and whether he can or cannot arrest on the front porch.

In this case we have regulations drafted by the Executive that really are quite clear. Certainly in this context they say to the agent and everyone -- these are federal agents, and in the record we show that they were teaching them about these regulations -- that they cannot proceed unless they have the authority from the Attorney General's office. That's clear. That does not present the kind of justifiable confusion or difficulty that law enforcement officers have.

So we think that that's a distinction.

I think that I would like to talk about Accardi and due process, because the government has come to the Court and

has argued that Accardi really doesn't involve due process, and that due process -- if I understood my colleague, Mr. Geller's argument yesterday -- in the criminal context is somehow lower than in the employment context. I believe that that's the government's argument.

But, at any rate, of course, our position is that in the criminal investigatory process due process has a great part to play and that it should be applied in this case.

Let me make an assertion and the Court can judge whether it is accurate or not. We think that it has been the uninterrupted judicial belief, at least since the government conceded the due process point in the Dulles case, 21 years ago, that the government's obligation to follow its own rules was rooted in the due process clause.

QUESTION: Well, Mr. Brosnahan, Accardi certainly wasn't a due process case, was it?

MR. BROSNAHAN: I think that it was, Justice Rehnquist.

QUESTION: Did it say so?

MR. BROSNAHAN: It does not use the term.

QUESTION: And didn't Horowitz last year say that Accardi and those cases were grounded in federal administrative law?

MR. BROSNAHAN: That's what I would call the residual clause in Footnote 8, the very bottom of footnote 8,

there is a comment.

QUESTION: You feel that Footnote 8 isn't a part of the opinion?

MR. BROSNAHAN: I feel that will be up for the Court. But I do note that it is at the very bottom of the footnote, and that one other Justice described it as confusing dictum.

QUESTION: The majority joined it, didn't it?

MR. BROSNAHAN: Yes, surely. And I'm serious about my observation, I don't think that I can argue what the Court should or should not do with Footnote 8, but I would say this, that there may be -- and I've tried to make an accurate number estimate of the number of cases out there in the Circuits and in the district courts, where judges, for 20 years, have thought that Accardi meant due process; and my guess is that there's somewhere over a hundred cases.

QUESTION: And you think we're bound by them as opposed to Horowitz?

MR. BROSNAHAN: No. I don't think -- clearly this Court is not bound by what lower courts do, except that we would argue that when hundreds of lower courts take a position, that that is simply something that can be judged along with everything else.

QUESTION: Maybe they were following each other instead of this Court.

MR. BROSNAHAN: That's entirely possible.

And I realize that here this is a matter, in some ways, of first impression.

But we do say that the number, and even the quality of some of those opinions, would be something that could be considered. We also say that in Bridges vs. Wixon the rules in that case, before Accardi, and it is cited in Accardi, as Your Honor knows, in the Accardi decision, that there there was involved the government taking of statements -- pretty close to our case, really; although there is a phrase in Bridges that indicates that there was an indication that such statements would not be used.

QUESTION: And you've emphasized, Mr. Brosnahan, that various federal officials, including the former Attorney General, had taken a position on this, the present Attorney General and present Solicitor General have taken a different view of what those officers meant, does he not, by bringing this case to the Court?

MR. BROSNAHAN: Absolutely. But we say, and we don't mean to be -- I wish to put this correctly and nos disrespectfully to their position -- I mean to say, if the Court please, that I rather doubt that the officials in the federal government who made this promise to the public would take the position that is here. And since it is a promise, and I don't mean it in the loose sense, this is a due process sense, when the

people are told that a certain thing will happen, we are here today to argue that the government must do that. And that that is due process. That is Accardi. And that whatever else heppans in this case, whatever this Court might decide, to accept the government's position today that this Court should whittle away on due process, it's --

QUESTION: Well, it's one thing, Mr. Brosnahan, to suggest that that promise, as you call it, should be enforced, which it can be by dismissal of the employees who fail to comply with it, as the regulations provide; it's quite another to say that the hard, undisputed evidence of a taxpayer bribing an Internal Revenue Agent should be excluded from the jury as a consequence of that, in addition to the dismissal or discipline of the employee.

MR. BROSNAHAN: Let me speak to that, Mr. Chief Justice, because I think in many ways that is the most important issue in the case.

QUESTION: Because this is an -- you are proposing an extension, are you not, of the exclusionary rule?

MR. BROSNAHAN: We don't think so, and I think Franks really deals with the question of what is or is not an extension. At least our view of it is that when due process is violated, by our view, under the Fifth Amendment the courts have the power to suppress that kind of evidence. And we don't believe that this is an extension. Yet it has some new

aspects to it, but we don't believe that it's an extension.

Let me speak to why the respondent believes that this is a proper case for suppression.

First of all, this Court has carefully examined the rationale for suppression and it comes to the view that the dominant rationale is deterrence, and we accept that for the purposes of this argument. And here the deterrent -- and I think the Ninth Circuit saw this, the deterrence here is direct. Here are federal agents, told by their superiors to proceed in a certain way, and they do not; Conceded by the government, the violation is conceded by the government.

Now, the deterrence of the Court, taking the same position that the executive official took, to wit, if you do this you are in violation of this regulation, is consistent and would lead to direct and logical and fair types of deterrence of federal officials.

It is interesting to note that Agent Hill [sic] in this case stated, under examination, that he was familiar with these regulations -- something that very few agents could say with regard to the more complicated Fourth Amendment analysis that's sometimes required to know whether they're doing the right thing.

The cases that this Court has considered recently, where you have found that suppression was not the proper remedy, include Calandra, Stone and Janis, and in each of those

cases the Court was faced with a problem of suppression in a proceeding other than a federal criminal trial, habeas corpus, grand jury witnesses, civil proceedings.

Here the government proposes to introduce in a federal criminal trial evidence which it has obtained in violation of this regulation.

There is an argument, or certainly an inference by the government that other sanctions are adequate, and we say that Franks is an answer to that.

We also note that in nineteen, I believe it's either '72 or '74, when an audit was done of how the compliance was going with regard to these regulations, the facts are in our brief, and it shows that it wasn't going very well. And so we say it is not an isolated instance, as argued by the government, but rather a matter of serious import.

QUESTION: Mr. Brosnahan, you make the point, as I understand you, that there was a violation of the due process clause.

MR. BROSNAHAN: Yes, sir.

QUESTION: When did the violation occur?

MR. BROSNAHAN: I would say, Mr. Justice Stevens, that when the government seeks to use the product against the defendant, that the violation occurs at that point.

QUESTION: It would be a violation to use evidence obtained in this illegal way against a defendant at his

criminal trial, that's your point?

MR. BROSNAHAN: Yes, Justice Stevens. That's our position.

QUESTION: Well, that question contains a conclusion of course that it's illegal, whereas you have said it's a violation not of a law but of a regulation governing employees of the --

MR. BROSNAHAN: It is a regulation, but --

QUESTION: Is that, per se, illegal when it's done, when the act is performed?

MR. BROSNAHAN: We think --

QUESTION: Taking up Mr. Justice Stewart's point.

MR. BROSNAHAN: We think that it's illegal when it is done. And one reason --

QUESTION: But it isn't a violation of due process until they offer it in evidence?

That's what I understood was your answer to -- the combined answer to Mr. Justice Stevens and Mr. Justice Stewart.

MR. BROSNAHAN: It is certainly a violation of due process by our view when it is sought to be introduced.

QUESTION: You're not giving up your right of privacy point, are you?

MR. BROSNAHAN: No, I'm not. I almost did, but I'm not, Justice Marshall.

QUESTION: If there had been no regulation, would

there have been a violation of due process?

MR. BROSNAHAN: If there had been no regulation?

QUESTION: No regulation.

MR. BROSNAHAN: I would say no.

QUESTION: You would say no?

MR. BROSNAHAN: I would say no.

QUESTION: There was -- some of the language in your brief, which I perhaps misunderstood, led me to believe that you thought there may be a constitutional duty on the Executive Branch to adopt a regulation of this character.

MR. BROSNAHAN: We have two points, Justice Powell. You've just referred to one. Our major point, if I may say so, is that this is a violation of due process under the Fifth Amendment and should be suppressed.

A second point, the one you just referred to, is that really in cases like Martinez-Fuerte, for instance, it was only the existence of regulations that saved that, at least by our reading of the opinion. And so we say that there is some constitutional obligation to have regulations in certain areas; but that is a separate argument on our part, and that we do not have to prevail on that argument to succeed.

May I just say on the question of suppression, the government will not stop enacting regulations if this Court holds that the regulations must be followed. In the Jacobs case, while this Court heard argument of that very nature, the

Attorney General took those regulations and made them nationwide. The regulations in Leahey and Heffner are still in place.

There is no reason to believe that conscientious federal officials will suddenly hold that they are not bound or they don't have to pass regulations. And finally a question of good faith versus bad faith or, as I prefer to choose to call it, deliberate violation of the regulation, Agent Hill knew in March of 1974, in the record on page 24, that a personal electronic surveillance of my client was contemplated, and yet in early 1975, when they did it, they didn't have the authorization from the Attorney General's office. We say that's deliberate.

QUESTION: Mr. Brosnahan, if I understand your brief, you'd make the same argument even if it were not deliberate. Just that there's a regulation for the benefit of people like your client that was violated. Isn't that the whole argument?

MR. BROSNAHAN: Well, I think our case might not be as strong.

QUESTION: I don't understand why not. What difference does it make whether it's deliberate or not, if you've got the regulation, you get it violated?

MR. BROSNAHAN: Well, our main position is that it makes no difference. The government has strenuously argued that

we should look at the intent of the agents to solve the problem. And, as a reaction to that, we have said that this is deliberate.

QUESTION: I see. I see.

MR. BROSNAHAN: This is deliberate. And it was deliberate -- and this is a finding of fact in the district court; the court found no explanation for the ten-month hiatus. The Ninth Circuit felt the same way, and I see that my time has expired.

Thank you.

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

Do you have anything further, Mr. Geller?

MR. GELLER: Not unless the Court has any questions, Mr. Chief Justice.

QUESTION: May I just ask one, Mr. Geller?

Would it make any difference to the government's position if this were a statute rather than a regulation?

REBUTTAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GELLER: It would make a difference in the sense (a) the statute might itself have an exclusionary rule such as that --

QUESTION: Well, let's take 3.109, the Chief Justice suggested earlier, the announcement of presence before you execute a search warrant.

MR. GELLER: The Court has the power, in construing a

statute, to impose an exclusionary remedy in order to carry out the will of Congress.

QUESTION: Is that what you regard Miller v. United States as having done?

MR. GELLER: Yes.

QUESTION: Well, the Court has the power to do the same thing with respect to regulation.

MR. GELLER: I think not, because --

QUESTION: The chief one is a matter of power -- you think not?

MR. GELLER: -- in this case the Court -- I think not, because in one case you're dealing with the law, in another case you're not dealing with something that's --

QUESTION: But my question goes to power.

MR. GELLER: I think that the Court, this Court obviously has the power to construe a statute and --

QUESTION: I mean, until Weeks v. United States, in 1914, there was no exclusionary rule.

MR. GELLER: That's correct, but the Court was construing the Constitution there. We don't contest that the Court --

QUESTION: No, it wasn't in Weeks, it doesn't say anything about the Constitution -- it just says it was enforcing the Constitution.

MR. GELLER: Exactly. We think it's up to the agency

which has created and defined the legal standard to be applied when it promulgates a regulation, to determine how that regulation is --

QUESTION: Well, that's your argument.

MR. GELLER: Exactly.

QUESTION: But certainly you're assuming the answer to this case if you say there's no power on the part of the Court to uphold an exclusionary rule. After all, the Court of Appeals of the Ninth Circuit did precisely that.

MR. GELLER: We think incorrectly. We think the Court has to find that it's only --

QUESTION: Maybe it's incorrect, but certainly it had the power to do it.

MR. GELLER: Well --

QUESTION: Well, Mr. Geller, would you say the Attorney General has the power to impose on the Court the duty to exclude evidence just by including that -- a provision like that in his regulation?

MR. GELLER: No, no.

QUESTION: In this particular regulation, suppose there had been an exclusionary provision?

MR. GELLER: I think that --

QUESTION: Would the Court have to follow it?

MR. GELLER: No, it wouldn't. I think it would like in the petit situation in which the United States Government

moves for dismissal, but it's obviously up to the Court to decide whether to grant such a motion.

QUESTION: Right.

QUESTION: You don't buy the 800-pound gorilla theory of this Court's power, then.

[Laughter.]

MR. GELLER: I certainly -- am sure I don't.

QUESTION: Let me ask the power question another way. Supposing the regulation had a paragraph that said that any evidence obtained in violation of this regulation shall not be admissible in any court in the United States in any proceeding for any purpose. Would that deprive a State judge of the right to hear such evidence if it had it?

QUESTION: No.

MR. GELLER: I still think it would be up to the United States to determine whether to seek enforcement of that provision of its own --

QUESTION: No, I'm assuming the United States doesn't take the position one way or another, just two civil litigants happen upon this evidence. Would such a regulation deprive a State court of the power to receive such evidence?

MR. GELLER: I think not. It's still not -- the regulation is not law, it's merely an internal guideline for whatever agency has promulgated it.

I think the court would have to find it's either

been a constitutional or statutory violation before it could exclude the evidence.

QUESTION: Mr. Geller, of course Luna v. United States was not a constitutional decision, was it?

MR. GELLER: Section 3109.

QUESTION: Just 3109 --

MR. GELLER: Yes.

QUESTION: -- and where did -- 3109 said nothing about suppression, did it?

MR. GELLER: No, it doesn't, but we don't --

QUESTION: Well, I know. It did not, did it?

MR. GELLER: It did not. We don't --

QUESTION: But this Court directed the suppression, didn't it?

MR. GELLER: We think the Court obviously has the power in construing and enforcing the federal statute, just like the Constitution, to order suppression if that's the only appropriate remedy.

QUESTION: But not in construing and enforcing a regulation of the Attorney General, does it?

MR. GELLER: That's correct.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 10:36 a.m., the case was submitted.]