



JUDGE UPHOLDS RIGHTS FOR TARGETS OF PARALLEL CIVIL AND CRIMINAL PROSECUTIONS

by

Robert J. Ridge

As he approaches eighty, Louis Posada Carriles' lifelong war against Fidel Castro's regime appears to be nearing its end. That's at least the conclusion many observers drew when, in March of 2005, the notorious anti-Castro militant entered the United States on a shrimp boat and requested political asylum. Two years later, in an El Paso, Texas courtroom, Carriles demonstrated that, while his personal war with Castro may be waning, he can still put up a good fight. Charged by the United States with multiple counts of immigration fraud, Carriles complained to United States District Court Judge Kathleen Cardone that lawyers for the government improperly elicited from him the statements which served as the foundation for his prosecution. On May 8, 2007 Judge Cardone dismissed charges of immigration fraud against Carriles holding that the Department of Justice violated Carriles' due process rights in its investigation of his immigration case.

As Judge Cardone noted, Carriles has "spent his life opposing Fidel Castro."¹ Published reports suggest that Carriles was not above using violent means to further his political objectives. Carriles is purportedly linked to a series of anti-Castro terrorist attacks. He is alleged to have masterminded a series of bombings of Havana hotels in 1997 and is also alleged to have played a role in the bombing of a Cubana airliner in 1976. Predictably, in light of his reputation, Carriles' entry into the United States caused quite a stir: Promptly upon his arrival, the Venezuelan Government made a formal request for his extradition to Venezuela to stand trial for the 1976 bombing of the Cubana airliner. The Cuban Government is also seeking to try Carriles for the Havana hotel bombings.

Yet, when Carriles appeared before Judge Cardone on May 4, 2007, it was not *his* covert activities that were at issue. Rather, Carriles appeared before Judge Cardone seeking to hold the United States Government accountable for *its* covert actions arising out of its consideration of Carriles' application for naturalization. Judge Cardone's opinion focuses attention once again on the murky line that separates the government's law enforcement efforts from the execution of its civil responsibilities.

Not long after he entered the United States, Carriles withdrew his request for asylum and applied for naturalization under Section 329 of the Immigration and Naturalization Act based upon his honorable discharge from the United States Army during a time of hostilities. In furtherance of his

¹*United States v. Carriles*, 2007 WL 1433458 (W.D. Tex.) (May 8, 2007), at 2.

application for naturalization, Carriles submitted to an interview with Susana Bolanos, an adjudications officer with the United States Citizenship and Immigration Service. Bolanos specializes in cases involving fraud and national security. She traveled from her duty station in Washington D.C. to El Paso, Texas to conduct an interview with Carriles on April 26 and 27, 2006. In preparation for the interview, Bolanos met with Jo Ellen Ardinger, an attorney with the Department of Homeland Security, and Nick Perry, an attorney with the Department of Justice, Office of Immigration Litigation and another unnamed Department of Justice attorney. Ardinger, Perry and a Spanish language interpreter attended Bolanos's interview with Carriles, as well as a "special response team" which videotaped the event.

The purpose of a naturalization interview is to determine whether an applicant satisfies the eligibility requirements set forth in the particular section of the statute under which they are seeking naturalization. During the suppression hearing in Carriles' case, defense experts testified that most immigration hearings involve one interrogator, last a maximum of thirty minutes and do not involve government-supplied interpreters. Carriles was interviewed for eight hours over the span of two days. Both Bolanos and Ardinger questioned Carriles and the interview was videotaped and audio taped. Moreover, Bolanos and her team asked Carriles a series of questions that went well beyond his request for naturalization including questions relating to his involvement with violent activities in Havana, his activities in Panama and Venezuela, and his use of aliases and false passports. Indeed, the defense expert testified that the government's decision to interview Carriles was itself anomalous since his Panamanian conviction for aggravated assault rendered him "clearly ineligible for naturalization."²

As a preliminary matter, Carriles argued that the tapes of his interviews and the statements he made during those interviews were inadmissible because of: (1) the poor quality and excessive inaudible portions of the tape; (2) the inaccurate transcriptions and translations of the tapes by an uncertified translator; and, (3) inaccurate translation during the interview conducted by an uncertified translator. Following a detailed and highly critical analysis of the tapes and the translation Judge Cardone held:

[t]he Court finds that the incompetent interpretation prejudiced the outcome of Defendant's proceeding and potentially affected the outcome of both those proceedings and the criminal indictment. The Court further finds that the danger of prejudice resulting from the admission of the interpreted statements far outweighs any probative value they may have because the interpretation was so inherently unreliable. In the end, the statements at issue are not merely evidence of the crime, they are themselves the relevant crime in this case. Accordingly, the Court will suppress the tapes and transcript as evidence, and further hold that the testimony given at the April 2006 interview should not be considered as evidence in any further hearing because the poor interpretation casts doubt upon its accuracy.³

The court then turned its attention to Carriles' more troubling and far-reaching contention that the government used the naturalization interview as a pretext for gathering evidence for an ongoing criminal investigation. The court noted that, although Carriles had couched his argument in terms of the Fourth, Fifth and Sixth Amendments, the issue was more precisely considered as a violation of due process rights. The court then proceeded to analyze a series of prior decisions from courts throughout the country involving allegations that the government had surreptitiously used civil and regulatory mechanisms to gather evidence for criminal investigations.⁴ The cases cited by Judge Cardone have

²*Id.* at 5.

³*Id.* at 12.

⁴*United States v. Blocker*, 104 F.3d 720 (5th Cir.1997); *SEC v. ESM Gov't Sec., Inc.*, 645 F.2d 310 (5th Cir.1981);

several recurring themes: First, each of the cases involved instances where the government had parallel responsibilities for the enforcement of both civil and criminal laws.⁵ Second, the cases involved the government using mechanisms created to facilitate the gathering of information in furtherance of civil and regulatory enforcement to advance a criminal investigation.⁶ Third, the defendant prevailed only in those cases where the government deliberately misrepresented the true purpose of its investigation or actively concealed the existence of the criminal investigation during the civil proceeding.⁷ The court noted the dangers involved when an individual confronts the government in parallel civil and criminal arenas, not the least of which are tactical decisions regarding the invocation of the Fifth Amendment right against self-incrimination.⁸ Waiver of those rights is only valid when knowingly and voluntarily made. Waivers obtained by deception are neither knowing nor voluntary.

Applying her analysis of the law to the facts before her, Judge Cardone held that “the evidence is overwhelming that the Government improperly manipulated the administration of criminal justice in order to secure a criminal indictment against Defendant.”⁹ In support of her conclusion, the Court noted that the adjudications officer, Ms. Bolanos, had already concluded that Carriles was probably not eligible for citizenship but elected to proceed with the interview nonetheless. The Court found “completely disingenuous” the government’s attempt to argue that the only purpose of the interview was to complete the naturalization process.¹⁰ Citing anomalies such as the length of the interview, the number of interviewers, the use of an interpreter, and the recording of the interview, the Court concluded that “there was no genuine administrative interview and the entire interview was, instead, a pretext for a criminal investigation.”¹¹ In a scathing rebuke of the government’s behavior, Judge

United States v. Mahaffy, 446 F. Supp. 2d 115 (E.D.N.Y. 2006); *United States v. Stringer*, 408 F.Supp.2d 1083 (D. Or. 2006); *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005); *United States v. Teyibo*, 877 F. Supp 846 (S.D. N.Y. 1995); *United States v. Parrott*, 248 F. Supp. 196 (D.D.C. 1965); *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1997); *United States v. Guerrina*, 112 F. Supp. 126 (E.D. Pa. 1953).

⁵*Blocker*, 104 F.3d at 723-24 (state insurance auditor); *ESM Government Securities*, 645 F.2d at 310 (SEC regulation of securities brokerages); *Mahaffy*, 446 F. Supp. 2d at 126 (SEC enforcement action); *Stringer*, 408 F. Supp. 2d at 1088 (SEC enforcement action); *Scrushy*, 366 F. Supp. 2d at 1138 (SEC enforcement action); *Teyibo*, 877 F. Supp. at 855-57 (SEC enforcement action); *Parrott*, 248 F. Supp. at 199 (SEC enforcement action); *Tweel*, 550 F.2d at 299 (IRS civil audit); *Guerrina*, 112 F. Supp. at 128 (IRS civil audit).

⁶*Blocker*, 104 F.3d at 723-24 (state insurance auditor); *ESM Government Securities*, 645 F.2d at 310 (SEC regulation of securities brokerages); *Mahaffy*, 446 F. Supp. 2d at 126 (SEC enforcement action); *Stringer*, 408 F. Supp. 2d at 1088 (SEC enforcement action); *Scrushy*, 366 F. Supp. 2d at 1138 (SEC enforcement action); *Teyibo*, 877 F. Supp. at 855-57 (SEC enforcement action); *Parrott*, 248 F. Supp. at 199 (SEC enforcement action); *Tweel*, 550 F.2d at 299 (IRS civil audit); *Guerrina*, 112 F. Supp. at 128 (IRS civil audit).

⁷Compare *ESM Government Securities*, 645 F.2d at 310 (SEC sought defendant’s cooperation purportedly as part of the investigation of an unrelated broker); *Scrushy*, 366 F. Supp. 2d (USAO improperly manipulated SEC enforcement action); *Parrott*, 248 F. Supp. at 199 (concealing government’s counsel’s identity at SEC enforcement depositions); *Tweel*, 550 F.2d at 298 (IRS agent misrepresented purpose of inquiry); *Teyibo*, 877 F. Supp. at 856 (SEC and DOJ investigations not intertwined); *Blocker*, 104 F.3d at 723-24 (no due process violation where state insurance auditor provides information from legitimate audit to DOJ).

⁸*Carriles* at 14.

⁹*Id.* at 15.

¹⁰*Id.* at 16.

¹¹*Id.*

Cardone held that the “Government engaged in fraud, deceit, and trickery when it misrepresented to Defendant that the purpose of asking him such extensive questions about his means of entry into the United States, his conduct in Panama and Venezuela and his use of various aliases and passports was merely to ‘clarify the record.’”¹²

In her concluding remarks, the judge took pains to dispel any notion that her decision was politically motivated. The court explained that “[t]he realm of this case is not, as some have suggested, terrorism. It is immigration fraud.” Accordingly, the court noted that Carriles, like “each and every defendant who comes before this Court. . . is entitled to certain rights under the United States Constitution. This Court will not set aside such rights nor overlook Government misconduct because Defendant is a political hot potato. This Court’s concern is not politics; it is the preservation of criminal justice.”

Judge Cardone’s dismissal of the indictment against Luis Posada Carriles is likely to be received skeptically by those members of the international community who oppose the violent means Carriles allegedly used to advance his political ends. Within the United States, however, the decision should be viewed as a reaffirmation of the long standing principle that a government with both civil and criminal enforcement responsibilities cannot advance the latter by sacrificing the integrity of the former. Fundamental fairness dictates that government representatives describe truthfully the motivation behind their interactions with an individual. Judge Cardone cited, with approval, the Fifth Circuit’s reasoning in *ESM Government Securities*:

Inherent in our democracy is a belief that, since the government represents the will of the people, the people will accept its dictates voluntarily. There is a sense of trust between the government and the people. It was the abuse of this trust which we could not accept. . . .

645 F.2d at 316.

Carriles’s victory, though satisfying, may be short-lived. On June 5, 2007 the government appealed Judge Cardone’s order to the United States Court of Appeals for the Fifth Circuit thereby ensuring that Carriles will have at least one more battle to fight.

¹²*Id.* at 16-17.