ORIGINAL

SUPREME COURT OF THE UNITED STATES

In the Matter of:

FEDERAL DEPOSIT INSURANCE CORPORATION,

Appellant,

V.

JAMES E. MALLEN, ET AL.

No. 87-82

Pages: 1 through 37

Place: Washington, D.C.

Date: March 22, 1988

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JAMES E. MALLEN, ET AL.

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Washington, D.C.

Tuesday, March 22, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10;09 o'clock a.m.

APPEARANCES:

JOHN C. HARRISON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the appellant.

MARY E. CURTIN, ESQ., minneapolis, Minnesota; appointed by this Court, on behalf of the appellees.

I N D E X

P R O C E E D I N G S

(10:09 A.M.)

CHIEF JUSTICE REHNQUIST: We will hear arguments first this morning in Number 87-82, Federal Deposit Insurance Corporation versus James E. Mallen.

Mr. Harrison, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN C. HARRISON, ESQUIRE

ON BEHALF OF THE APPELLANT

MR. HARRISON: Thank you, Chief Justice Rehnquist. May it please the Court, this is a direct appeal from a judgment of the United States District Court for the Northern District of Iowa. The District Court held unconstitutional 12 U.S.C. 1818(g) and enjoined the FDIC from enforcing it against appellee Mallen.

Under Section 1818(g), when an officer of a federally insured bank is indicted for a felony involving dishonesty or breach of trust, the appropriate federal banking agency, in the case of this bank the FDIC, may suspend him from office and order him not to participate further in the conduct of the affairs of the bank pending the resolution of the criminal charges if it determines that his continued service would pose a threat to the interests of depositors or threaten to impair public confidence in the bank.

If a conviction becomes final the suspension ends and the officer is then subject to permanent removal.

Because of the risks posed to the bank and to public confidence by the presence there of an officer who has been indicated, the FDIC may under the statute impose a suspension immediately, as soon as the indictment is authorized. Once the suspension has been ordered, the statute gives the suspended officer the right to request an opportunity to be heard before the agency and to show that his return to the bank would not threaten the interests that the statute seeks to protect.

If he makes that request, his opportunity to appear must be given him within 30 days, and then once he has had the opportunity to be heard, the agency must decide within 60 days whether or not to terminate, modify, or continue the suspension. When he makes his appearance before the agency, the officer may submit written material and oral argument, and in the discretion of the agency, oral evidence.

The District Court found that the suspension procedures that I have just outlined were unconstitutional and enjoined the FDIC from enforcing them because of the 90-day time period that is allowed for the agency's decision after the suspension is ordered and because the agency has discretion as to whether to accept oral testimony. Neither ground of decision was correct.

Congress in fixing the time limits for the hearing and for the decision after the hearing had to accommodate the competing interests, here the suspended officer's interest in having a prompt disposition of his possible return to the bank and the public interest in making sure that the indicted officer is not returned to the bank until the FDIC has had a chance to satisfy itself that it would be safe to do so because, of course, he has been indicted.

QUESTION: Who was the District Judge?

MR. HARRISON: The District Judge was Judge O'Brien.

QUESTION: Mr. Harrison, why are we examining this thing in gross? This is a facial challenge that we have, right?

MR. HARRISON: That's correct.

QUESTION: Why is that? As I understand it, he didn't go through the whole process anyway, and it is quite possible that the government would have given him his hearing within 17 days or something like that.

MR. HARRISON: The hearing had been scheduled for a date 19 days after he requested it. It never was held because it was enjoined, the entire process was enjoined by the District Court the day before the hearing would have been held, so we don't know how long it would have taken the agency to decide the case.

QUESTION: Well, is it the government's position that it is proper to attack the statute on its face in those circumstances?

MR. HARRISON: We think that the statute clearly survives a facial challenge.

QUESTION: That is not what I asked, though.

MR. HARRISON: And that it is unusual for the District Court to decide that the statutory process is completely meaningless, that it does not provide meaningful review because of the time that is permitted by the statute.

QUESTION: That is still not what I asked. Is this a proper facial challenge? Why shouldn't we say as far as we can tell there is no assurance here that this individual would have been deprived of due process, even accepting his contentions as to what due process requires?

MR. HARRISON: That would be a sound ground for decision, yes. The District Court should not have reached the question until it had seen what the agency would have done and would have determined whether he would have had a hearing that would have taken place within a time period that the District Court would have regarded --

QUESTION: Mr. Harrison, I guess this respondent was later convicted in a criminal proceeding.

MR. HARRISON: That's correct.

QUESTION: And that conviction is on appeal, is it?

MR. HARRISON: It is.

QUESTION: Has the Eighth Circuit ruled yet?

MR. HARRISON: It has not.

QUESTION: If it were to do so, is this case moot?

MR. HARRISON: Once the criminal process for Mallen is exhausted the case may become moot. It is not entirely clear whether it does because of the possible relationship between the suspension proceedings and any future removal proceedings which can also be instituted under Section 1818(g), but the case might well be moot after a decision in the criminal proceeding.

QUESTION: Well, I take it what you mean in answer to that question is, after the direct appeal in the criminal proceeding becomes final, not after the Eighth Circuit rules, but after a petition for rehearing time, petition for certiorari time has gone by.

MR. HARRISON: Yes, that's right. Once the judgment becomes final.

QUESTION: And the United States appealed, too, didn't it?

MR. HARRISON: Yes, we did.

QUESTION: And if dismissal of that

count is reversed, there may be another trial.

MR. HARRISON: That's right. That's right. So the case may go on for a while.

QUESTION: Are they holding the case up for this argument, or was it just recently argued?

MR. HARRISON: It was argued in December in the Eighth Circuit, and as far as I know it is not being held pending resolution of this case.

The balancing of interests that the due process clause requires, we feel, clearly demonstrates that the 90-day period that Congress allowed is a sensible amount of time. The public interest is very heavy, and of course, although Mallen's interest is significant, it is outweighed by the need to protect the banking system.

The 30-day period that is permitted --

QUESTION: Mr. Harrison, is his suspension without pay?

MR. HARRISON: No, the statute does not provide that the suspension is without pay.

QUESTION: So he has been receiving it during --

MR. HARRISON: I believe while the bank was open the bank continued to pay him, and there is certainly nothing in the statute to prevent that.

The 30 days gives the FDIC the opportunity in a case where it knows nothing more than what it knew from the

indictment to investigate the situation to be prepared to answer whatever showing the officer is expected to make.

QUESTION: What happens if the criminal conviction becomes final? Where does he stand then? I know he is probably in jail, but how about his pay then?

MR. HARRISON: Well, he has served his sentence and is currently on probation. The bank is now closed. The Iowa Banking Authority closed --

QUESTION: I see.

MR. HARRISON: -- because it became insolvent, so he is no longer employed there anyway, but -- and -- and he wouldn't be employed by the bank because of a different statute.

QUESTION: Mr. Harrison, are you sure a bank wouldn't be in trouble with its shareholders or indeed perhaps even with federal regulatory authorities if it continued to pay an officer who was not performing any services?

I mean, you say the statute doesn't require that his pay be cut off, but why in the world should a bank continue to pay somebody who is unable to perform?

MR. HARRISON: It is entirely possible that either the bank shareholders or management or state or federal regulatory authorities might object to paying a suspended officer. That is correct.

QUESTION: I would think.

MR. HARRISON: Yes, that's true.

In addition to investigating the situation in the 30-day period, of course, the FDIC has to set up the hearing, it has to schedule its witnesses, usually bank examiners, whose schedules may be difficult to adjust. It has to find an officer to conduct the hearing. Once the hearing has been held, the FDIC has up to 60 days to make its decision. Now, some of that time will be consumed with administrative steps. The hearing officer will prepare his proposed disposition. It will be reviewed in various parts of the FDIC.

But the primary justification for giving the FDIC as much as 60 days to make its decision as to whether to return the officer once he has been indicted to the bank is the danger of sending him back and the fact that in the most difficult case the FDIC may have a hard choice to make.

The FDIC and the system of banking regulation exists to protect the public, to protect depositors, the public in general, and in particular can continue because there is general public confidence in the banking. That is what makes possible the banking system. That is what makes possible the FDIC's deposit insurance system.

So it is extremely important that the FDIC be very sure that it is doing the right thing if it is going to let

the officer go back to the bank.

On the other hand, the officer in the most difficult case may have made a strong showing that there are unique facts explaining why despite the indictment which normally would lead him to be suspended it would be safe in that particular case for him to go back to the bank. Thus the FDIC in the case in which the statute has to be judged on a facial challenge will have to be making a decision that is hard to make, a difficult decision, and in which the down side risk is very serious of letting the officer go back.

Sixty days is, as this Court recognized in cases like Thirty-Seven Photographs, an expedited time period within which to make a decision anyway, and so it was, we think, quite unsound for the District Court to suggest that Congress acted unreasonably in saying that the FDIC could have as much as 60 days if it needed it, and of course, as has been suggested, we do not know how long it would have taken to make the decision as to Mallen.

Now, the District Court did not decide that 90 days was an unreasonable period of time because it thought that the balance between the competing interests shifted in favor of Mallen or because it just couldn't see a reason to need 90 days to have the hearing and then make the decision.

Rather, it analogized the case, unsoundly, we think, to this Court's decision in Barry against Barchi.

In Barry, a horse trainer had been suspended for allegedly drugging a horse. The suspension was a penal suspension imposed for 15 days, and it ended after 15 days. The State Racing Commission had 30 days within which to hold its hearing on the suspended trainer to decide whether to -- not to impose the suspension, and then there was no set time period for it to make its decision.

So the way the system was set up in Barry against Barchi, it was possible that a penal suspension would end on its own, would terminate automatically before any hearing was held, but the analogy does not hold up. What the District Court thought was that since the criminal process might make its decision and thus determine whether or not Mallen could go back to the bank before the FDIC had a chance to hold its hearing and make its decision under 1818(g), that somehow rendered the Section 1818(g) process meaningless, but the difference between the cases is that here Mallen receives review of the FDIC's decision to suspend through both the processes. Either one can bring the suspension to an end. If he is acquitted, of course, the suspension terminates. If the FDIC on the basis of his showing decides that, yes, this is an unusual case in which it would be safe to allow him to come back to the bank, the decision terminates, but review is not cut off.

The situation is not at all like Barry against

Barchi. Also, of course, the District Court's empirical assumption that as a general rule the criminal process would terminate the suspension before the FDIC process did, which was based on the District Court's thinking that the suspension only ran until jury verdict rather than until the end of the criminal process was simply incorrect.

As we have seen, as we were discussing a moment ago, the criminal process is still going on now, and indeed it is possible if the United States prevails on its appeal that there will have to be another trial, and so the -- I am sorry. If the United States prevails on its appeal the jury verdict will be reinstated. I apologize. That means that my earlier answer was incorrect.

In any event, it has now been more than a year since Mallen was suspended, and the criminal process is still going on.

The District Court also held that the hearing that is provided under Section 1818(g) is not a meaningful process, is not meaningful review because the agency has discretion, and in this case the discretion is delegated to a hearing officer to decide whether to allow Mallen to introduce oral evidence, testimony in addition to the written materials and the oral argument that he has a statutory right to introduce.

Now, this Court has never held that as a general

matter due process creates a right to testify, to put on evidence, to put on oral evidence as opposed to a right to be heard, and Mallen, of course, has a right fully to be heard to present the written statements of any individuals whose testimony he thinks would be relevant.

QUESTION: And of course, as was suggested earlier from the bench, we will never know in this case whether the agency would have allowed him to produce oral testimony because he didn't allow it to come to that.

MR. HARRISON: That is entirely correct. It is the general practice of these hearings for oral testimony to be taken from both sides and for cross examination to be conducted. The District Court issued its injunction the day before the hearing was going to be held, presumably the day before, therefore, the hearing officer would have decided whether or not he was going to admit oral testimony. At the very least it would have been appropriate if this is what concerned the District Court for the District Court to wait and see what had happened, to wait and see if there had been any deprivation of the kind of hearing that the Court thought was constitutionally required, or if that was not enough, at least to order the hearing, if the court thought it was necessary for some reason to decide the issue before it had seen what the agency was going to do, to order that oral evidence be accepted, but certainly not to decide the case

the way the District Court did, which was simply to strike down the statute, to reach out to find it unconstitutional on the basis of something that might never have happened, but it didn't know whether it was going to happen, and that in any event could have been cured.

If the Court has no further questions, I will reserve the remainder of my time.

QUESTION: Can I ask you just -- what does the government decide in these cases? What is it looking for at this hearing? Does the degree of probability of guilt of the matter on which he has been indicted have anything to do with the determination?

MR. HARRISON: Absolutely not. The only questions that the FDIC considers have to do with banking regulations, have to do with the protection of the interests of depositors and the threat to public confidence that is posed by having an indicted officer serving at the bank. Then the FDIC is looking in hearing the officer on his opportunity to respond, is looking for the officer to give some reason why, despite the normal expectation that is created in an indictment that Congress thought would make suspensions after indictment virtually routine, for some showing of some unique situation that prevails in that particular bank, why there is extremely heavy supervision of the officer, for example. I don't know what all.

QUESTION: Has it ever -- an officer unsuspended?

MR. HARRISON: Since the 1978 amendments that are under consideration in this case, I believe it has not. There may have been at least one case under the old version of Section 1818(g) when someone was indicted and not suspended, but it is, as Congress thought it would be, virtually routine to suspend an indicted officer.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Harrison.

We will hear now from you, Ms. Curtin.

ORAL ARGUMENT OF MARY E. CURTIN, ESQUIRE

ON BEHALF OF THE APPELLEES

MS. CURTIN: Mr. Chief Justice Rehnquist, and may it please the Court, as this Court has often stated, due process requires some kind of hearing, and that that hearing take place at a meaningful time and in a meaningful manner. The issue before this Court is the application of these general principles to the specific statutory scheme of 12 U.S.C. 1818(g).

Appellee Mr. Mallen contends that the statute is deficient in both respects. There is no statutory assurance of a hearing at a meaningful time. As a mattter of fact, and I believe we have a fact question here, Mr. Mallen was not going to have a hearing.

In response to some questions asked by the Court,

the notice to suspend Mr. Mallen was issued on January 20th, 1986. It was served upon him on January 26th. On January 30th, Mr. Mallen's attorney requested an immediate hearing. The statute says, the hearing will take place within 30 days, the decision will be rendered within an additional 60. On January 30th Mr. Mallen's attorney requested an immediate hearing on February 9.

Mr. Mallen's criminal trial at this point was scheduled to commence on March 16th. In a series of correspondence between the agency and Mr. Mallen's attorney it was finally resolved by the agency that they would afford Mr. Mallen his hearing some time on February 20th. The agency refused to make any representations whatsoever as to how much of the additional 60 days the agency would take or require in order to render a decision. Sixty days from February 20th is April 20th, which is approximately a month after Mr. Mallen's criminal trial has ended.

When the Federal District Court declared the statute unconstitutional on February 17 of 1987, the FDIC asked the judge to reconsider the decision, and at that point said they would afford Mr. Mallen an expedited hearing and an expedited decision. The dates presented by the FDIC to Judge O'Brien would have given Mr. Mallen a decision on his case on April 8th, which was approximately three weeks after his criminal trial ended.

The date of the criminal trial is important because the criminal trial, regardless of the way it is resolved, avoids the necessity of convening any hearing at all or if the hearing has been convened but a decision has not been rendered, it avoids the necessity of rendering a decision. Had Mr. Mallen been acquitted, the suspension would have dissolved of its own weight pursuant to the language of the statute.

Mr. Mallen was convicted. When an individual is convicted of a crime, another statute, 12 U.S.S. 1829, says that he will be immediately suspended from any position as an officer, director, or employee of any bank in this country whose deposits are insured by the FDIC, and this is not --

QUESTION: Well, Ms. Curtin --

MS. CURTIN: -- pending appeal. Excuse me.

QUESTION: -- I gather that you and the government disagree on when that other statute becomes operative.

MS. CURTIN: No, Your Honor, we don't, and the reason we don't is because when Mr. Mallen was convicted the FDIC brought an action which you will see referenced, I believe, in our brief, FDIC versus Mallen, to immediately require Mr. Mallen's suspension from the bank pursuant to 12 U.S.C. 1829.

QUESTION: Do I not understand that they now take the position that the conviction won't be final until after

his appeal?

MS. CURTIN: Well, Your Honor, they are taking the position, as I understand it, that the conviction isn't final until after his appeal, but the language of 1829 does not say that you shall be removed when your conviction is final. It says you shall be removed when you are convicted, period.

I argued the case concerning the application of 12 U.S.C. 1829. I took the position -- there is some humor in this now -- that Section 1829 should not operate to remove Mr. Mallen until the appeal, notwithstanding the language of the statute. The FDIC argued that Section 1829 clearly contemplated an immediate termination upon conviction notwithstanding appeal.

The federal judge ruled in favor of the FDIC and Mr. Mallen was immediately terminated.

QUESTION: It wasn't Mr. Harrison down there, though, was it, anyway?

MS. CURTIN: It was Mr. -- no, it wasn't Mr. Harrison.

QUESTION: That's nice.

(General laughter.)

MS. CURTIN: I am just saying now we have all changed sides, but there is a court case that specifically interprets that statute, the only one that I am aware of,

Your Honor, and it ruled in favor of the FDIC's position that the conviction, the entry of the conviction operated to terminate the individual's ability to work not just in the Kanawha Bank, where Mr. Mallen was employed, but any bank whose deposits are insured.

There is some reference to the reading of those statutes together, their differences and their similarities, in our brief.

QUESTION: Do you think that the District Court was proper to decide this on a facial challenge rather than to wait and see what happened?

MS. CURTIN: It was very clear, Your Honor, and some of this -- all of this correspondence, I believe, is in the appendix that we were not going to get a hearing from the FDIC where a decision would have been rendered even close to when Mr. Mallen's criminal trial had been over. Had that been possible, we would have continued, obviously, to proceed in an attempt to have the issue resolved, but no dates suggested by the FDIC before or after Judge O'Brien ruled on the constitutionality of the statute would have afforded us a decision within even three weeks of his conviction.

QUESTION: Well, let's assume that's correct, but why should the District Court declare the statute unconstitutional? If it is his view that under these

circumstances the FDIC operating under the statute did not give your client a timely hearing, why shouldn't he simply say the statute cannot constitutionally be applied in this manner?

MS. CURTIN: I read Judge O'Brien's decision, Chief Justice Rehnquist, to indicate that he felt that the statute was applied in an unconstitutional manner. I read him to go farther, however, and say because of the FDIC's refusal to accommodate the time periods of the Speedy Trial Act, it was reasonable to conclude that not just Mr. Mallen but any individual who invoked his constitutional right to a speedy trial would not have a hearing by the FDIC on this issue.

We were forced to choose between our constitutional right to a speedy trial and what Judge O'Brien and I felt were our constitutional right to a hearing post-suspension. We could not have both. That was extremely clear from the posture of this case from the beginning, and given the FDIC's repeated assertions that it is just impossible for them to convene and dispose of a case like this within 70 days, no one is going to have their hearing if they insist upon their parallel right to a speedy trial.

QUESTION: How about the District Court's ruling coupling his reservations about the timeliness with the fact that the FDIC would not automatically have admitted oral

testimony? Surely there he would have been better advised to wait and see what happened at the hearing, would he not?

I mean, this is not a First Amendment case. We just don't ordinarily have facial attacks on this kind of statute.

MS. CURTIN: In anticipation of this question, I read a number of cases that attempted to distinguish a facial challenge to a statute from a statute that was unconstitutional as applied, and I am afraid I have to admit to this Court that I concluded that there was an extremely gray area in the middle, and I will tell you quite candidly I am not sure if this is a facial challenge to the statute or if it was just unconstitutional as applied. But I do know, Chief Justice, that when it was all over with, my client had no hearing, and my client was never going to have a hearing.

QUESTION: Well, outside of the First Amendment area, if a statute is to be held unconstitutional on its face, wouldn't it be true that it could never be any circumstances constitutionally applied?

MS. CURTIN: From the cases I read, yes, in order for it to be a facial challenge to a statute, my understanding was that there were no set of circumstances --

QUESTION: Well, you certainly must -- you certainly must concede that the statute could be constitutionally applied.

MS. CURTIN: Well, the set of circumstances that I could foresee that would allow the statute to be constitutional --

QUESTION: Well, if the agency here had given your client a hearing within two days and decided the case within two more days, I would doubt if you would have had much objection to that, would you?

MS. CURTIN: Justice White, if the agency had proposed anything near that kind of timetable with my client I wouldn't be standing here.

QUESTION: I take it, though, you originally asked for a pre-suspension hearing, didn't you?

MS. CURTIN: No, we did not.

QUESTION: You never did?

MS. CURTIN: No, we didn't.

QUESTION: The court said that the agency didn't need to have a pre-suspension hearing.

MS. CURTIN: It has never been contested in any posture of this case that we had a right to a pre-suspension hearing. It has consistently been our position that we had a constitutional right to a post-suspension hearing to the extent that we have discussed the total lack, total lack of pre-suspension procedures, we have discussed them in an attempt to point out to this Court that they put -- the total lack of pre-suspension procedures places a higher

burden on the FDIC as to the nature of the post-suspension proceeding. One of the Matthews tests is obviously the likelihood of an erroneous deprivation. To the extent that there are no pre-suspension procedures whatsoever, clearly the likelihood of an erroneous deprivation is extremely high. That being the case, to correspondingly suggest that we do not necessarily have the right to present witnesses, we do not necessarily have the right to cross examine witnesses, I believe is constitutionally defective.

QUESTION: Ms. Curtin, you say the risk is high. My own guess would be that the risk is pretty small if indeed it is very unlikely that in most -- it is very unlikely that confidence wouldn't be affected, but why is it that you establish the criminal trial as somehow the date by which a hearing has to be afforded. Isn't it reasonable for Congress to say, look, we think -- we think you ought to give this individual a hearing within 90 days, you ought to have his answer within 90 days. If you are doing this -- this suspension longer than that, there is injustice. And they have done that here. They are willing to give it within 90 days. Why does the trial have to be somehow the trigger for some expedited --

MS. CURTIN: Justice Scalia, the reason the trial is important to me and the reason it is the trigger is because whatever the result of the trial, the posture of

the administrative proceeding will then -- if you follow me. Again, I have the trial --

QUESTION: I understand, but Congress would be saying, fine, so much the better. If the trial is over with in 90 days, then there is no problem. If the trial isn't over within 90 days we want to be sure that the fellow has a hearing. It all makes sense. You are really arguing that 90 days is just an inordinately long period. Don't you have to carry that --

MS. CURTIN: The resolution of the trial is going to moot, for lack of a better word, regardless of the nature of the resolution, the administrative proceeding. That being the case, I have suffered a final deprivation without any administrative proceedings whatsoever in the same exact way that Mr. Barchi suffered a final deprivation notwithstanding the fact that 15 days after he was suspended, his job was returned to him.

QUESTION: I suppose that that would be a good argument if it were clear that Congress could not absolutely automatically eliminate officerships when there is an indictment.

MS. CURTIN: The Feinberg Court made that observation. The problem is, as the Feinberg Court noted, Congress understands the difference presumably between the word "shall" and the word "may," and Congress did not say,

if an individual is indicted he shall be removed from the bank. It said may. Which made it discretionary, and Congress proceeded from the discretionary language of May to even farther, put on a certain criteria that should be looked at before that discretion is exercised. This Court has repeatedly held that once there is agency discretion, there is a possibility of an erroneous deprivation, and once there is a possibility of an erroneous deprivation there will be some kind of hearing.

QUESTION: I agree with all of that, but it still seems to me reasonable for the legislature to say there must be some kind of hearing, and this has to be done within 90 days. Now, if the trial occurs before that and takes care of everything, fine. Isn't that a rationale and fair system?

MS. CURTIN: It may be rational. I don't believei --

QUESTION: So long as you assume that Congress could have eliminated him without a hearing and just said everybody who is indicted gets down as an officer of a bank.

MS. CURTIN: I think we need to focus on something else here, Justice Scalia, because perhaps, maybe I am wrong, but perhaps this is the source of the confusion between us, or the disagreement.

If we had had our hearing, the purpose of the

hearing was not to decide whether Mr. Mallen was guilty or innocent.

QUESTION: Yes, I understand that.

MS. CURTIN: Was not to decide any facts pertaining to his indictment or the reason for his indictment. The purpose of the hearing was to determine whether or not Mr. Mallen's continued presence in the institution resulted in a damage to its depositors or impaired the public confidence of the institution. We were never told of the facts, ever, as I speak, of the facts that caused the FDIC to conclude that this factual showing, conclusion could be made.

This bank was in a town of 750 people. Mr. Mallen's indictment got publicity well beyond the town, well beyond the State of Iowa. The normal indicia of lack of public confidence in an institution is deposit runoff, various things having to do with financial integrity. None of that happened.

To the contrary, the people in Kanawha supported Mr. Mallen. Notwithstanding all of this the FDIC makes a discretionary conclusion without, again, benefit of so much as one fact in support of that being told to Mr. Mallen or anyone representing him, that he presents a danger to the bank, that his presence is impairing the public confidence in the institution, and he is gone, and not only is he gone,

but he is never going to have a hearing.

I believe that we can sit here and discuss what that hearing should be . We are saying it doesn't need to come first, it can come later. We can discuss the nature of that hearing. But I don't believe that we can sit here now and discuss whether or not Mr. Mallen has a right to some kind of hearing, or in the alternative, if Mr. Mallen has to waive his constitutional right to a speedy trial in order to secure it.

QUESTION: Hadn't the FDIC started a hearing to remove him under another section?

MS. CURTIN: The previous --

QUESTION: Several months before indictment?

MS. CURTIN: Yes, previous to the indictment in September.

QUESTION: And there was a hearing. It went on before an Administrative Law Judge?

MS. CURTIN: It went on before an Administrative Law Judge. A hearing commenced. The hearing did not finish.

QUESTION: Did your client testify?

MS. CURTIN: My client was on the stand to testify when the judge declared -- the judge recused himself. The hearing never ended.

QUESTION: The hearing was never concluded?

MS. CURTIN: That's correct.

QUESTION: There was an indictment there.

MS. CURTIN: He was indicted in December. The FDIC never --

QUESTION: So the FDIC did know something about the bank.

MS. CURTIN: Yes, Your Honor. The FDIC knew quite a bit about the bank. However, the purpose of that hearing was to determine whether or not Mr. Mallen had engaged in unsound banking practices and or violated --

QUESTION: Well, it was to see whether he should be removed.

MS. CURTIN: Yes, but the standards for removal under 8(e), which was the administrative proceeding, had nothing to do in any way, shape, or form with the standards for suspension under 8(g).

QUESTION: Right. Yes.

MS. CURTIN: Had that hearing been concluded, there would have been no testimony in that hearing having anything to do with impairment of public confidence or damage to the depositors. It had to do with unsound banking practices. The problem of utilizing, as it is suggested, the transcript of that hearing as evidence concerning the factfinding required in 8(g) is twofold.

First of all, the facts were totally different. Secondly, I think we have another constitutional problem

with using a transcript where I hadn't had an opportunity to present my defense.

Again, I don't believe that we are discussing here something that I would consider to be esoteric due process. We are not looking at the finer points of the requirements of a hearing. We are not looking at the finer points of what pre-suspension due process as opposed to post-suspension due process and how the two should come together. We are looking at whether or not there is ever going to be a hearing at all.

I find the Barchi case controlling. The suspension there was 25 days. Mr. Barchi clearly was back working before he had an opportunity for a hearing. Mr. Barchi, this Court said, was denied due process because the deprivation had finally occurred before the hearing occurred, and in this particular situation the deprivation occurred and is completed before the hearing is decided as well. Moving --

QUESTION: Is that because you weren't allowed to have a hearing that you lied?

MS. CURTIN: That I liked?

QUESTION: That you liked, the kind of hearing that you liked. Isn't that the real problem?

MS. CURTIN: Well, I think it's a twofold problem.

QUESTION: Is that the problem?

MS. CURTIN: Well --

QUESTION: You want a fullblown trial

MS. CURTIN: It is our position, Justice Marshall, that had the hearing been convened, and given the total lack of pre-deprivation procedures, that we needed to be afforded the opportunity to confront and cross examine witnesses, but the problem in arguing that past point in this context is, it was -- we were never going to have a hearing at all.

QUESTION: How can you be sure if you didn't participate. You just stayed off and set down your rules and decided that if the government didn't abide by your rules you wouldn't participate. Is that the point?

MS. CURTIN: Justice Marhsall, we did not refuse to participate, as you put it, until it was made clear to us by the FDIC --

QUESTION: Well, did you then refuse to participate afterwards?

MS. CURTIN: Well, in lieu of having a hearing on the 20th of February we did file in Federal District Court challenging the constitutionality of the statute. I suppose in that regard we were refusing to participate.

When the Federal District Court judge agreed with us that the statute was unconstitutional, the FDIC suggested an alternative hearing schedule to him which still would have been well beyond Mr. Mallen's criminal trial, and the Federal District Court judge told the FDIC

that he felt that was too little too late. In all candor, we did agree with the Federal District Court judge.

QUESTION: That was your point.

MS. CURTIN: Yes. However, had we ever at any time been afforded the opportunity for a hearing and decision that would have been over before his criminal trial was over, we would have accepted it. If you look at the correspondence in the appendix, that is all we kept asking for and we were consistently denied it.

You will find a letter in there from the regional counsel of the FDIC in Kansas City who made very clear and very pointedly that we will get the minimum requirements of the statute and no more, either in when the hearing occurs or the nature of the hearing.

We are consistently told here that the FDIC doesn't have a habit of stringing these hearings out and doens't have a habit of denying an opportunity to confront and cross examine witnesses, but in support for that proposition you have no facts.

Mr. Mallen's experience and the letter from the FDIC's attorney certainly stands in opposition to that assertion, and on the one time when a fact was provided it was a citation to a case concerning the Office of the Comptroller of the Currency, which has no more to do with the administrative procedures of the FDIC than it does the

Department of Commerce. Mr. Mallen's experience as far as the record before this Court goes and any other facts notwithstanding, is the norm.

QUESTION: Ms. Curtin, do you think the case is moot?

MS. CURTIN: Do I think the case is moot? No, I don't believe it is, Your Honor.

QUESTION: Mr. Mallen filed a suggestion of mootness some months ago.

MS. CURTIN: Yes, I understand. I understand. I was asked how I was going to handle this --

QUESTION: Do you back off of that suggestion?

MS. CURTIN: I didn't write it. Yes, I do. The 12 U.S.C. 1824, which is the statute that removes Mr. Mallen upon indictment, notwithstanding appeal, is broader than 8(g) in that it removes him not just from the bank in Kanawha but from any bank whose deposits are insured.

It is narrower than 8(g in another respect. It removes him only from his position as an officer, director, and employee of the bank. It does not prohibit him voting his stock in the bank or its parent holding company. 8(g) contains a restriction on participation in the conduct of the affairs of the bank, and that is interpreted to mean a restriction on voting stock.

In that one regard, notwithstanding Mr. Mallen's

removal pursuant to 12 U.S.C. 1829, Mr. Mallen -- 8(g) does continue to impact upon him in this one area having to do with the voting of his stock in the bank and the parent bank holding company.

That also I would offer as some suggestion concerning mootness. Mr. Mallen and the shareholders of the bank have taken an appeal from the closing of the institution, which is pending in federal court -- excuse me, state court in Iowa. Should the state court determine that the closing of the institutions violated state law, that would in turn impact upon the mootness of this case as well.

QUESTION: Ms. Curtin, is the Lindquist and Venom office still in the case or not?

MS. CURTIN: Your Honor, I was a partner at Lindquist and Venom. I left and opened my own firm approximately five months ago. Mr. Mallen is now represented by my firm.

QUESTION: But you were in the Lindquist office before?

MS. CURTIN: Yes, I was, Your Honor.

Unless anyone has any further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Curtin.

Mr. Harrison, you have 14 minutes remaining.

ORAL ARGUMENT OF JOHN C. HARRISON, ESQUIRE

ON BEHALF OF THE APPELLANT - REBUTTAL

MR. HARRISON: Thank you, Chief Justice Rehnquist.

First, the suspension that is imposed under Section 1818(g) is not a penalty. It is a preventive measure to get an indicted officer out of the bank while the criminal process is under way to protect the shareholders and to protect public confidence.

There are two ways in which the indicted officer can get back into the bank. He can be acquitted, or the FDIC through the FDIC process can decide that it is in fact safe for him to go back.

QUESTION: Well, if he were acquitted he wouldn't necessarily be entitlted to return to the bank. The FDIC might still remove him.

MR. HARRISON: That is under a different --

QUESTION: Well, nevertheless, he wouldn't be automatically entitled to go back.

MR. HARRISON: That's true. I'm sorry. The suspension would be over, however, and there are two process processes that can end the suspension, but the suspension continues until one of them -- quite reasonably continues until one of them decides that the suspension can come to an end, and the suggestion that it is necessary to have a hearing on all the possible issues, that every way in which the suspension could be brought to an end has to be decided for there to be meaningful process, is just not correct.

What Mallen is suggesting is that it is very important for the FDIC's decision to be reconsidered rather than some other way of ending the suspension to take effect, and that is just not sound. As Ms. Curtin explained in explaining why this case is not moot, Section 1818(g) has significant consequences that Section 1829 does not.

We agree that the Section 1829 bar attaches as soon as a judgment of conviction is entered in the District Court. That does not end the Section 1818(g) suspension and it does not make the Section 1818(g) suspension unimportant. In particular under Section 1818(g), as Ms. Curtin explained, the indicted officer can't participate in the conduct of the affairs of the bank. In Mallen's case that meant that he couldn't act as the controlling shareholder of the holding company that ran the bank.

Obviously, it may be extremely important to get the dominant figure out of the bank pending the resolution to criminal charges, and it is just as important to get him out of his position of control from which he can direct what the bank does as it is actually to stop him being an officer or director.

So, Section 1818(g) not only has a consequence that Section 1829 doesn't have that continues past conviction in the District Court, but a very important consequence, and one that in this case was very important

until the bank was closed.

Now, even after the bank has been closed, Section 1818(g) has collateral consequences, as we explain in Footnotes 10 and 12 of our main brief and Footnote 2 of our reply brief that keep the case alive and not moot, but not only -- the bank is open. Not only is it not moot, it is really very important.

Also, the discussion that Ms. Curtin gave of the need for larger and more rapid post-suspension proceedings ignores the fact that the FDIC is proceeding into the suspension on the basis of the indictment, and acts as if when the indictment is entered that is just the trigger for the FDIC to inquire into whether it would be safe for the indicted officer to remain at the bank, but the premise of the statute is that the indictment creates a danger and that that's the mean reason that the FDIC imposes the suspension, and the suggestion that there is a lot to be asked about about what other grounds the FDIC may have had for thinking that the indictment creates a threat to the interests of depositors or a threat to public confidence is just not persuasive, and in this case Mallen obviously knew why he had been indicted, and in fact knew a great deal about the FDIC's reservations about his conduct at the bank.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Harrison.

The case is submitted.

(Whereupon, at 10:55 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

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CASE TITLE: FDIC v. Mallen et al

HEARING DATE: March 22, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: 3/28/88

Margaret Daly

Official Reporter

HERITAGE REPORTING CORPORATION
1220 L Street, N.W.
Washington, D.C. 20005