ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION:	JOHN E. MALLARD, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, ET AL.,
CASE NO:	87-1490
PLACE:	WASHINGTON, D.C.
DATE:	February 28, 1989
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IN THE SUPREME COURT OF THE UNITED STATES

JOHN E. MALLARD,

Petitioner,

v. : No. 87-1490

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, ET AL.,

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Washington, D.C.

Tuesday, February 28, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

JOHN E. MALLARD, Fairfield, Iowa; on behalf of Petitioner.

GORDON E. ALLEN, Deputy Attorney General of Iowa, Des Moines, Iowa; on behalf of Respondents.

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C O N T E N T S

P R O C E E D I N G S

12:59 p.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1490, John Mallard versus the United States District Court. Mr. Mallard.

ORAL ARGUMENT OF GEORGE E. MALLARD

ON BEHALF OF PETITIONER

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

The question presented in this case is whether a federal court is empowered by 28 U.S.C. Section 1915(d) to require an unwilling attorney to undertake a representation.

The Court of Appeals for the Eighth Circuit has effectively held that such a power exists. This interpretation conflicts and splits with the decisions of the Fifth, Sixth, Seventh, and Ninth Circuits.

In Nelson v. Redfield, the Eighth Circuit directed the United States District Court for the Southern District of Iowa, the Respondent herein, to prepare a list of attorneys practicing in the district who would be available for pro bono appointments under Section 1915(d). The Petitioner herein, John Mallard, was selected from this list for an appointment. Since I am --

QUESTION: That's you. Is that right? That's you.

MR. MALLARD: Yes --

QUESTION: Yes.

MR. MALLARD: -- your Honor. Since I am the Petitioner herein, for ease of communication, I will hereafter use the first person in my presentation of this case.

I was admitted to the California Bar in 1981 and the Iowa Bar in 1984. Since June of 1984 I have been employed by the law firm of Marcus & Mallard in Fairfield, Iowa where I have practiced primarily in the area of corporate and securities law.

In the fall of 1986 our firm, which consisted of three lawyers at the time, decided to take on a fourth lawyer who had substantial experience in litigation and could develop a litigation practice within the firm. Because this lawyer was not yet in a position to seek admission to the Southern District, I obtained admission so that our firm could appear as counsel in two cases in the Southern District. I had no intention to undertake the responsibility of litigating those cases.

Because I appeared before the Southern District, my name was added to a list of attorneys

available for pro bono service. In June 1987 I was informed by the Volunteer Lawyer's Project that I had been appointed to represent the plaintiffs in the case of Traman v. Parkin.

This case involved complaints by three prison inmates against eight prison guards and administrators alleging physical mistreatment, that the role of the inmates as informants had been exposed to other inmates and that the plaintiffs in that case, their lives had been endangered. The plaintiffs in that case were seeking both damages and injunctive relief.

In June 1987, several weeks after I had reviewed that file, I filed a motion to withdraw on the grounds that adequate representation of the plaintiffs in that case would require substantial discovery and extensive examination and cross examination of multiple parties and other witnesses. In my estimation, I was not competent to provide the services that would be required for effective representation of those parties.

QUESTION: I thought that --

QUESTION: Mr. Mallard, your argument that the statute -- or, rule doesn't vest the authority -- I suppose however competent you were it still wouldn't vest the authority when it says appoint -- to conscript you against your will.

MR. MALLARD: Yes, your Honor, that is correct.

QUESTION: And, in any event, the District Court found you were competent?

MR. MALLARD: Yes. Both -- the motion that I made was originally submitted to the magistrate who found that I was competent. And then --

QUESTION: So, don't we take it as though you are in fact competent to do this work?

MR. MALLARD: Yes, your Honor.

QUESTION: Yes.

MR. MALLARD: As an objective matter, the District Court has so found. I think that, you know, I had been applying perhaps a different standard, a higher standard based on the services that I would like to see provided and that I believe that I commonly provide to my other clients in a business setting.

I offered, in my motion, to provide alternative pro bono service, but that offer was not considered by the District Court as being sufficient.

In connection with my appeal of the ruling on competence, I also brought a motion to the District Court on the ground that 1915(d) did not empower the District Court to require an unwilling attorney to undertake a representation.

QUESTION: Does the court have authority to

appoint someone to represent this indigent litigant?

MR. MALLARD: Your Honor, the way I read 1915(d) the answer is -- is yes, that the court has authority to request an attorney to become involved in the case. And I believe that --

QUESTION: Well, what if everyone in the district says no? They're all like you and they say, "We just don't want to do it"?

MR. MALLARD: Your Honor, I believe that that is actually -- probably the only point that I am aware of that is a possible grounds of merit on the Respondent's side. I think there are at least three answers or responses to that question. And if I might address them in turn.

I think the Respondent bears a heavy burden to show that it could not obtain counsel by making a request. Just because the first lawyer who is requested to undertake a representation declines, I do not believe that that is evidence that other lawyers who felt more comfortable with the task would not step forward upon request. I believe that attorneys have been very giving of their time and that as a practical matter when a litigator has developed a relationship with a certain judge and receives a call from that judge and a request, that it would be very unlikely that that person would

decline the judge's request.

QUESTION: Well, yeah, I think in my day it would have been unthinkable to tell the judge you wouldn't do it. It must be a new era out there.

MR. MALLARD: Well, your Honor, I believe it's not quite that new, although I think my circumstances are more unusual in that I had a lot of discomfort with undertaking those responsibilities. I don't think that requests are always declined. I think -- as an example in this case, the Respondent's counsel, the Attorney General for the State of Iowa, is appearing on behalf of the Southern District based upon a request made by that court.

QUESTION: Well, you really haven't answered Justice O'Connor's question completely. She asked if it was your position that the judge under this particular section lacks the authority to appoint an unwilling lawyer.

MR. MALLARD: Your Honor, I regret if there is any ambiguity in my response, but I think it's based upon the usage of the word appoint. I think certainly that the court possesses authority to appoint an attorney who -- who accepts a request. And to bestow him with the power and title and authority to go forward and represent, you know, indigent --

QUESTION: But how about the authority to appoint someone like you who declined the request? And to in effect say you must do it even though you refuse?

MR. MALLARD: Your Honor, I do not believe that that authority exists or was granted by Congress under 1915(d).

QUESTION: And this is a civil action, right?

MR. MALLARD: Yes, your Honor.

QUESTION: What if it were a criminal action?

MR. MALLARD: If it were a criminal action, I believe the court does possess the authority. I think that Congress has generally distinguished between the nature of the legal rights and interests which are involved, and even the Constitution, in terms of --

QUESTION: On the criminal side does it rest on the inherent power of the court? Something to do with the Sixth Amendment or what?

MR. MALLARD: Well, partially, your Honor. I think yes. I think there is really -- if it's considered as a continuum, certainly on one side with the Sixth Amendment, a right to counsel, rights where the potential for heavy penalties, severe penalties, are so great that counsel must be provided. And I know Congress has enacted several statutes aimed at that effect.

And certainly in the middle of the continuum other statutes where Congress has addressed rights that they believe to be of such importance. For example, being represented in a contempt proceeding or in certain child custody proceedings that Congress has spoken and said counsel should be appointed or assigned. And in those other statutes used those words, appoint or assign.

At the final end of the continuum where we find Section 1915(d), there is no -- it's all other civil rights and cases. There -- there is no specification of rights. And consequently because Congress could not know how serious the case might be and how essential the need for counsel would be, I would submit that it left it under 1915(d) to the discretion of the court to determine whether to request an attorney to be involved, and to the attorney's discretion also --

QUESTION: Mr. Mallard, --

MR. MALLARD: -- in accepting.

QUESTION: -- may I just be sure I understood something you said earlier. You do -- did I understand correctly? You concede that if this were a criminal case, you could be compelled against your will to serve?

MR. MALLARD: Thank you, your Honor. I concede, yes, except perhaps in certain limited circumstances --

QUESTION: Well --

MR. MALLARD: -- to the extent there would be a constitutional right involved possibly --

QUESTION: Well, the --

MR. MALLARD: -- under the First Amendment.

QUESTION: -- defendant has a constitutional right. But what's that got to do with your right to say no, if you think you have such a right? I don't understand. Your brief certainly didn't suggest you -- in fact, I think if you concede that you must be giving up all your constitutional objections.

MR. MALLARD: Well, I raise my constitutional objections only for the purpose that to the extent this Court found the plain meaning of 1915(d) to be unclear or ambiguous and upon looking --

QUESTION: You're merely arguing we should avoid the constitutional question by construing the statute in your favor? That you're not really --

MR. MALLARD: Yes.

QUESTION: -- and you really don't think you have a constitutional claim on its own bottom?

MR. MALLARD: I think that there would be serious constitutional claims if the statute were construed in the manner that the Respondent suggests, that the word "request" should mean require. But,

you're correct, your Honor, in that I did not submit the constitutional arguments as the reasons for overturning the statute. I present them on the grounds that this Court should construe the statute narrowly in order to avoid serious constitutional objection.

In July 1987, after my motion had been refused and denied by the District Court, I appealed the decision and sought appellate review to the Eighth Circuit by applying for a writ of mandamus. The Eighth Circuit denied my application without issuing an opinion. The Eighth Circuit did, however, stay the proceedings in the Traman case, the underlying litigation, so that I could seek appellate review to this Court.

The holding of the Eighth Circuit should be reversed. 1915(d) provides, in relevant part, that the Court may request an attorney to represent a person who is unable to employ counsel. The plain meaning of the words "may request" implies that an attorney may decline a requested representation.

The Respondent argues that the use of the word, "request" in 1915(d) is ambiguous, and, consequently, that the legislative history must be examined for the purpose of determining the intent of Congress. But the Respondent bears a heavy burden to show that this

language has ambiguity.

There are many cases which use the words "appoint" or "assign" loosely as synonyms for the word "request" in the context of describing cases involving 1915(d). But, other than the Eighth Circuit, all of the circuit courts which have considered the meaning of a request made to an unwilling attorney have concluded that the statutory --

QUESTION: Counsel --

MR. MALLARD: -- language may request --

QUESTION: Counsel, did -- does the judge need a statute to request somebody to do something?

MR. MALLARD: No, your Honor.

QUESTION: Well, the statute means more than just request, doesn't it?

MR. MALLARD: In this instance I believe the answer is no.

QUESTION: Well, then he didn't need the statute. It was just a wasted statute.

MR. MALLARD: No, your Honor. I believe if you examine the historical context the enactment of 1915(d) goes all the way back to 1892. And at that time -- and the main purpose of that statute was to open the courts so that the poor would have access. And that was the principal purpose that Congress had in mind in

passing the Act, and it's my belief that since courts were not commonly confronted with the question at the time of how did the poor have counsel, because the poor were not even allowed through --

QUESTION: Well --

MR. MALLARD: -- the door --

QUESTION: -- the judge doesn't need the statute to request anything, does he?

MR. MALLARD: No, your Honor.

QUESTION: Well, this is wasted material.

MR. MALLARD: It's --

QUESTION: Don't you have to admit that?

MR. MALLARD: Well --

QUESTION: You could admit it. He can request it. But is requesting it the same as requesting it appropriately? I can request anybody to do all sorts of things, but many of those requests would be inappropriate, wouldn't they?

QUESTION: But when a statute says it, doesn't it mean more than that?

MR. MALLARD: Your Honor, I believe the answer is no. I --

QUESTION: It doesn't mean any more than that he can request, just like he can request the janitor to clean out spittoons.

MR. MALLARD: In my opinion, that is correct.

QUESTION: That it couldn't mean anything more, then could it?

MR. MALLARD: No, I don't believe Congress intended --

QUESTION: I just don't see where you get your rights under that statute.

MR. MALLARD: I would submit from the plain meaning. But perhaps if we look to the legislative history and examined certain of the points which are instructive on the point of legislative intent, it will provide further meaning to this Court. Because I believe that if this Court believes the words "may request" are ambiguous on their face, that the intent can be inferred for four reasons.

First, the legislative history reveals, as I mentioned, that the main purpose was to open access to the courts for poor persons. This purpose must be distinguished from providing counsel. The difference in the treatment of these two objectives by Congress is apparent from the distinction in the language which is employed in Sections 1915(c) and 1915(d).

Subsection (c) deals with officers of the court such as persons serving process, which was distinguished from attorneys, and provides that these

persons shall issue and serve process. While subsection (d) provides only that the court may request an attorney to represent a person unable to employ counsel.

Congress knew how to use language which suggests an element of compulsion. It chose to do it in subsection (c) and it chose not to do it in subsection (d) relating to attorneys.

As a second point on Congressional intent, it is instructive to consider the manner in which the language was most likely chosen. Legislative history shows that 1915(d) was inspired by certain state statutes in existence at that time. In fact, there were 11 such state statutes and all of them describe the power of the court to obtain counsel by using the words "appoint" or "assign".

However, while Congress must have been aware of these state statutes and likely referred to them as a model for 1915(d), it chose the words "may request" in substitution for the words "appoint" or "assign".

QUESTION: Mr. Mallard, you say the legislative history shows this. Are you referring to a committee report or a conference report?

MR. MALLARD: Yes, your Honor. I believe it is in the Joint Appendix and -- it's in a committee report by the Committee of the Judiciary, and it's near

the end of the Joint Appendix where the Committee states or the member of the Committee who was filing the report, that the statute is inspired by the humane, enlightened laws of several states.

An historical study shows that there were 11 statutes in effect and, again, as I mentioned, they all used the word "appoint" or "assign". The change in that language in 1915(d) was presumably made with the intent to change the meaning of the federal provision and the degree of power conferred upon the federal courts.

The third argument supporting the proposition that Congress intended 1915(d) to give the courts authority to request rather than require an attorney to take a case is that Congress did not provide for any compensation under the statute. In contrast to this, federal statutes that expressly empower a court to appoint or assign an attorney typically provide for compensation. The fact that Congress did not do so under 1915(d) is further evidence that Congress expected attorneys to appear as volunteers only.

As a fourth and final point on Congressional intent, I would refer to the response made to Justice O'Connor earlier with respect to the different types of legal interests involved which the Constitution or Congress would have a desire to protect, and the other

end of the spectrum where it's not possible to know of the importance of those rights in leaving it to the discretion of the courts.

QUESTION: Mr. Mallard, can I ask you, since you've raised this matter of the compensation and the like, what is the practice in the Southern District of Iowa in a case of this kind if you had to take depositions? Say you'd accepted the appointment and had to take depositions. Would you have to advance the costs out of your own pocket or is there some provision for financing?

MR. MALLARD: Your Honor, it's my understanding that an attorney who is representing a person under that statute who wants to take depositions has to make a motion or request to the district court identifying the need, and that then if the court approves it, that it has some funds that are available to reimburse that particular cost.

QUESTION: I see. So the appointment does not contemplate your advancing your own funds for that sort of thing?

MR. MALLARD: No, your Honor.

QUESTION: I see.

QUESTION: Does the District Court sit in Fairfield?

MR. MALLARD: No, your Honor. It sits in Des Moines, which is approximately a two hour drive from Fairfield.

QUESTION: So, in order to represent this party you would have had to go from Fairfield to Des Moines then?

MR. MALLARD: Yes, your Honor. And, in addition, I would have to travel approximately an hour and a half further south, to Fort. Madison, Iowa, to represent the plaintiffs because that's where --

QUESTION: Is Fort. Madison --

MR. MALLARD: -- the Iowa State Penitentiary is.

QUESTION: -- on the river?

MR. MALLARD: Yes, your Honor. In short, an analysis of legislative history and intent supports my reading of 1915(d).

The final consideration for this Court to hold in my favor involves the fundamental principle that a statute should be construed narrowly so as to avoid serious constitutional questions. The Respondent argues that the word "request" should be read broadly to mean "require". But such a broad reading could render 1915(d) unconstitutional under the First and Fifth Amendments in accordance with the arguments set forth in

my brief.

Consequently, this Court should resolve any doubts it has regarding the meaning of 1915(d) by construing the statue narrowly in accordance with its commonly-understood meaning.

In connection with the argument that's made by the Respondent that the statute would be rendered null or that the District Court's power would be helplessly ineffective if this Court were to rule in my favor, again, I submit that the system of making requests does work and, secondly, that, as discussed earlier, the legislative history suggests that Congress was not ultimately concerned with providing counsel in these cases, but had as its main purpose the opening of the courts to the poor by waiving certain court fees.

Last, even if Congress intended to provide an assurance of representation under 1915(d) and found that the statute when construed in the manner I advocate was ineffective in doing so, Congress might correct this problem by enacting a new statute which either clearly used language of compulsion or, more likely, provided for compensation so that the availability of counsel was not entirely dependent upon volunteerism.

In conclusion, this Court should rule in my favor because the word "request" as used in 1915(d) is

plain and clear. Even if this Court were to find some ambiguity, the legislative history and intent of Congress supports a ruling in my favor also.

QUESTION: Mr. Mallard, as a matter of curiosity, what has happened to these indigents? Has someone else been appointed and carrying on for them?

MR. MALLARD: No, your Honor. It's my understanding, though, the District Court has taken certain steps and I believe asked the Attorney General for the State of Iowa to undertake an investigation and report regarding their safety. But their case has been stayed.

QUESTION: This is Chief Judge Vietor?

MR. MALLARD: Yes, your Honor. Finally, request does not mean require. The Eighth Circuit should be reversed. And unless there are further questions, I would like to save the balance of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mallard.

Mr. Allen, we'll hear now from you.

ORAL ARGUMENT OF GORDON E. ALLEN

ON BEHALF OF RESPONDENTS

CHIEF JUSTICE REHNQUIST: I take it you're not representing the District Court because of your official

position as the Deputy Attorney General of Iowa. Is that correct?

MR. ALLEN: That's correct, your Honor. As the footnote in the original response to the petition for certiorari indicates, our office was charged with representing the defendants in the underlying action filed by Mr. Traman and others. We did not participate at either the District Court level in responding to his original request to withdraw, nor did we respond to the mandamus action filed in the Eighth Circuit.

When the petition for certiorari was filed with this Court, Chief Judge Vietor contacted my office and asked me -- actually, he requested me --

(Laughter.)

MR. ALLEN: -- and I said, "Certainly, Judge, I'd be very glad to do that." And it is for that reason that I appear on his behalf today.

QUESTION: Do you think you had a choice?

MR. ALLEN: Did I think I had a choice?

QUESTION: Uh-huh.

MR. ALLEN: Well, I think in discussing the word "request" -- and it's dealt with extensively in the briefs -- I think you have to look at it contextually. One can get a request from a stranger on the street which, as an Iowan, I come to Washington, D.C. and I see

a lot of those. And I get a certain feeling about what that request means. If I get a request from a friend, I get a somewhat different feeling about that. If I get a request from my spouse, I have somewhat different request -- it's a somewhat higher -- in most cases it's still negotiable but it's nevertheless there.

If I receive a request from a general in the Army or in from a judge, that request in its context to me means I am to do it unless I have extraordinary reasons for not. And in answer to your question, I think the plan which is imposed by the District Court provides that accommodation to Mr. Mallard, both on the front end during the application and appointment process where it gives leeway for geographical needs, it gives leeway for time schedules, it gives leeway for prior pro bono work. In effect it makes a decision as to whether Mr. Mallard in this particular case can conduct the litigation.

QUESTION: I may well do something if a general asked me to do it and I happened to be a lieutenant and it's just put to me as a request. But it's another question whether I can be court-martialled if I don't do it. I may never get a promotion.

MR. ALLEN: And I agree.

QUESTION: And I may get pretty bad

assignments if I don't comply with the request.

MR. ALLEN: And I agree.

QUESTION: But to use request as synonymous with command is just -- I mean, words have no meaning if one starts talking like that.

MR. ALLEN: Well, I think if you'll -- I have two answers to that. If you'll look at the definition of the usage of the word "request" in 1892 when it was used by Congress, I think most of the dictionaries that we have cited indicate that the word "request" came from the same root word as "require" and in some instances meant demand.

Congress' use of that word --

QUESTION: Can you give me an example where it was used that way? Not a dictionary definition of the noun, but of a verb -- the verb "request" used in any -- any literary example you like where it's used to mean command or require.

MR. ALLEN: We did not cite the literary examples. We cited the dictionary usage. And --

QUESTION: Of the noun.

MR. ALLEN: -- they were verbs.

QUESTION: Of the noun.

MR. ALLEN: Of the verb also, sir.

QUESTION: Well, what was that?

MR. ALLEN: Well, not cited in the brief -- there is Anderson cited. But not cited, your Honor, is Abbott's Law Dictionary of 1879 which specifically says -- quote -- in law a request is substantially equivalent to a demand -- close quote.

QUESTION: What does that mean? In law a request is --

MR. ALLEN: In law?

QUESTION: That could be with a promissory note or something.

MR. ALLEN: Correct. Correct. I think -- the word, I think -- and this all goes to Mr. Mallard's specific request, specific statement here that this statute is not ambiguous. I think it is ambiguous. The use of the word "request" in 1892, the use of the word "request" in the context of current usage I think is ambiguous. I think the split in the circuits and the very split within the circuits of the decisions that they have handled indicates to those courts and to this court that the usage of the word "request" is not as clear and literal and as emphatic as Mr. Mallard would suggest that it is.

QUESTION: Well, it would have been awfully easy for Congress to use the terms "appoint" or "assign" which Mr. Mallard says were in existence in the other

state statutes on which Congress based Section 1915. The fact it didn't suggests very arguably a conscious desire on the part of Congress to do something different than those state statute did.

MR. ALLEN: That's Mr. Mallard's argument. And if you look at it very carefully, it is exactly the opposite. For instance, if we look at the legislative history and it's silent upon what they meant by the word "request" or why they chose request, we come up with three options.

Either Congress believed that they had the power to order and therefore the word "request" did not need any comment, it just meant we're going to order it. Or that attorneys historically and traditionally had responded to the judge's request and therefore we need not explain it. Or the third option is that we did not have the power, Congress did not have the power. So, the usage of the word "request" has no meaning, we need not comment on it in legislative history.

QUESTION: Or the fourth is they had the power but didn't want to exercise the power.

MR. ALLEN: But that is inconsistent with the legislative history. For four hundred years the Henry VII statute had provided that paupers in England could by the signing of an affidavit of poverty and an

affidavit of merit by two attorneys then the pauper could go to the court and request an attorney. Eleven states had followed that history and had used the word "appoint." Congress, in my view, looked at the word "appoint," looked at the 400 years of history wherein the pauper had to go to the court and make the request, and said, no, we're going to order in the first three sections of 1915(d) -- we're going to order the court officers to serve without pay.

In the fourth section, subsection (d), we're going to turn that request around. We are, first of all, going to eliminate the affidavit necessary to be filed by two counsel of the bar that this case has merit. We're going to eliminate that. We're going to eliminate the request from the pauper to the court and we're going to turn it around and we're going to give the court the power to request of the pauper a request of the attorney for service to that case.

In other words, the use of the word "request" was directed to the court. And, in fact, a subsection of the statute specifically goes to the court may request.

In answer to the question by Justice Marshall, the statutory construction requires that we give some meaning to --

QUESTION: Let me follow that argument.

MR. ALLEN: Fine.

QUESTION: You mean request used to be used for something that was made from the other direction.

MR. ALLEN: Correct.

QUESTION: And your explanation of why request is used in this statute is we're doing it the other way and therefore we're going to use the same word. Is that it? The request used to go from the pauper to the court.

MR. ALLEN: Correct.

QUESTION: And Congress used request here -- why? Because they thought --

MR. ALLEN: Because we're changing the request flowing from the pauper to the court and we're flowing from the court to the attorney.

QUESTION: Uh-huh.

MR. ALLEN: We're placing the onus of responsibility on the --

QUESTION: Was it an order from the pauper to the court? When the pauper made the request to the court, did the court have to snap to and do it or --

MR. ALLEN: No.

QUESTION: -- could the court -- the court could do it or not do it?

MR. ALLEN: Of course.

QUESTION: So it was a request?

MR. ALLEN: Of course. Similar to the question --

QUESTION: where does that leave you? Then in reversing it I assume it's still a request.

MR. ALLEN: It is a request. That is the word they chose. And that takes us then to Justice Marshall's position. If the court and if the statutory intent of this statute is to open the doors and provide greater access to the pauper, then if we construe the statute that it is merely a request and it does nothing more than what the court could do without the statute, and if the attorney, unwilling as they are in some instances, and I think because of the imposition of this plan in 1986 demonstrates are certainly to the great extent unwilling in the Southern District, but for a few, four percent as referenced in the briefs -- if we give the attorneys the option of saying no, I'm not going to do it, and if we create a statute which gives to the court something that they had already and really didn't need the statute, then the statute becomes meaningless.

QUESTION: I don't -- I don't think that's necessarily true. Just based on my own practice before I went on the bench, the district judges in Arizona used

this most of the -- of the complaints filed under Section 1915 appeared to them to have no merit. But occasionally they would feel one might have merit.

And they used this device to single out those ones with merit and get ahold of a lawyer and say, "Look, I think there might be something to this. This guy deserves representation. So, under this, I request you to do it."

MR. ALLEN: And that's essentially the same plan that is in operation --

QUESTION: It's --

MR. ALLEN: -- in the Southern District.

QUESTION: -- a mechanism for calling lawyer's attention to a case that a district judge thinks may stand out among the numerous IFP filings that don't seem to have merit.

MR. ALLEN: And that is essentially the same plan that's in operation in the Southern District. I think, as Justice Marshall suggests, the court would have the power to do that irrespective of whether the statute were passed. I --

QUESTION: Are you sure about that? There are a lot of requests that judges may make. For example, I -- would I feel -- feel it proper as a judge when I have a speech coming up, as a district judge, to call up a

member of the bar and say, "You know, Mr. Smith, I have this speech coming up. How would you like to give me a hand writing this speech?"

MR. ALLEN: Are you asking me if you would feel it proper --

QUESTION: Well, I could make that request, couldn't I?

MR. ALLEN: You could --

QUESTION: But it would be inappropriate.

MR. ALLEN: Yes.

QUESTION: And don't you think it would be inappropriate for a district judge to call one of the counsels who comes before him every day and say, "You know, just as a favor to me, how about representing this fellow?" He could theoretically do it, but it would be inappropriate because most requests, especially to the bar that appears before the district judge every day, will be complied with, and it's a form of coercion.

Couldn't the statute be explained on that basis? Although ordinarily it would be inappropriate for a district judge to do this, we say it's appropriate.

MR. ALLEN: Well, as I started to answer to your question a while ago, the plan in the Southern District of Iowa provides for an accommodation on the front end. And in answer to your specific question of

inappropriate request, it answers that accommodation need at the other end.

The suggestion of the Respondent and of the District Court before you is that the proper way to review this decision, this exercise of discretion by the District Court, is under the standard of abuse of discretion. It is not to declare that the statute means that the District Court cannot ask this question of an unwilling attorney. It is not to suggest that the District Court does not have the power. But it is to review that decision as a discretionary judge decision and then review it on the standard of abuse.

If Mr. Mallard comes to the District Court and demonstrates, as the record reflects he did not in this case -- demonstrates his incompetence, demonstrates that he has a high case load and is unable to take the case at this time, demonstrates a conflict of interest, or, in your suggested example, demonstrates that the request is inappropriate -- he doesn't need to write the speech -- then he reviews that. It is then appealable on the standard of abuse of discretion, and the judge's decision of making that inappropriate request, for whatever reason -- either as you suggest or as Mr. Mallard might suggest to the District Court -- that then that decision is then reviewed under that standard.

It is not, however, to suggest that 1915(d) is either a violation of the statutory rights of this particular attorney, or, as he more appropriately and perhaps more dangerously says in his brief, is unconstitutional.

What Mr. Mallard is here before you today saying is that the literal reading of 1915(d) -- if you don't read it literally, which I suggest the legislative history provides that we need not -- but if you don't read it literally, you cause constitutional problems with his appointment. That causes a broad pattern of difficulty because I would suggest that there is very little difference between the appointment -- albeit, the statute says appoint -- of an individual attorney to represent a criminal defendant on an unwilling basis than there is representing a civil case.

Now, the argument might flow that in the Sixth Amendment rights of counsel the government has an obligation to provide that counsel, and, therefore, the governmental obligation can be transferred over to the attorney and the attorney nevertheless has to comply even though unwilling.

QUESTION: Mr. Allen, one of my present clerks is a member of the New Jersey Bar. He has just received a request to represent an indigent in New Jersey.

Suppose he were a member of the Iowa Bar, what is his -- what may he do at this point?

MR. ALLEN: What he would do -- would do was -- as Mr. Mallard had done. And that is go to the district court, first to the magistrate and then to Chief Judge Vietor, and indicate that this particular request was inappropriate because he lives here in Washington, D.C. and would be unable to geographically represent this defendant.

QUESTION: I'll give you a better reason than that. We have a Rule 7 here, a Supreme Court rule, which says that no clerk shall practice law while he is serving as a clerk.

MR. ALLEN: Then Judge Vietor would --

QUESTION: But I have a suspicion that some of these state judges might not be influenced very much by that kind of a rule. I think I find myself in a dilemma.

MR. ALLEN: I would suggest that Chief Judge Vietor would honor Rule 7 and he would not appoint your law clerk to any case. And if he did, I would suggest that an appeal to the Eighth Circuit for mandamus would lie and the Eighth Circuit would certainly honor Rule 7.

QUESTION: Well, we could always request him to withdraw the appointment.

MR. ALLEN: You could request him to withdraw

the appointment.

QUESTION: Uh-huh.

QUESTION: Mr. --

QUESTION: But your -- excuse me.

QUESTION: Go ahead.

QUESTION: But your bottom line is that the judge may require the attorney to serve?

MR. ALLEN: My bottom line is that the judge --

QUESTION: And you have to have the -- get the authority from somewhere. And you say that it lies in the -- in 1915 with the word "request."

MR. ALLEN: I believe it lies in 1915(d). I also believe that 1915(d) is a recognition of the inherent power of the court.

QUESTION: Have any federal or state cases explicitly relied on inherent authority of a trial court to appoint counsel in a civil case? Have you found any case?

MR. ALLEN: I have not found any that have said specifically, "We rely upon inherent power." However, the case which Mr. Mallard specifically cites, that is, United States v. 30.49 Acres of Land, that case specifically reviews the Eighth Circuit's decision that yes, they have the power, and said, no, you don't.

However, in footnote 16 in Land they specifically say this decision is construing 1915(d) and it specifically does not say anything about the inherent power of the court, which may lie in certain appropriate cases for the appointment of an attorney in a civil case.

QUESTION: The appropriate cases may include only those cases where no member of the bar willing to serve steps forward. Isn't that possible? That whatever inherent power there exists in the court is exercisable against the will of the attorney only if none of his fellow attorneys is willing to undertake the representation.

MR. ALLEN: That's the --

QUESTION: Isn't that the minimal inherent authority that a court would need?

MR. ALLEN: That -- That is certainly the minimal power. I would suggest that in most cases it would certainly more than that.

QUESTION: Mr. Allen --

QUESTION: I don't see why.

QUESTION: -- can I get to the root question that comes up all the time? You appoint a probate lawyer to defend a murderer. Is that -- would that be required under this statute?

MR. ALLEN: Well, this statute applies, your

Honor, only to civil cases.

MR. MALLARD: I know, but --

MR. ALLEN: So it would not appoint --

QUESTION: -- it seems --

MR. ALLEN: -- to murderers.

QUESTION: -- that a similar statute applies to criminal cases.

MR. ALLEN: The Criminal Justice Act --

QUESTION: Yeah.

MR. ALLEN: -- applies to criminal cases.

QUESTION: Yeah.

MR. ALLEN: That's been in existence since 1790, by the way.

QUESTION: Well, I mean, the whole purpose is what good is an inexperienced lawyer to a client? What good is he?

MR. ALLEN: Well, the inexperienced, incompetent attorney in that particular case, I concede, is not good for that client.

QUESTION: Well, what would happen in a case like this?

MR. ALLEN: In a case like that the individual attorney -- be it Mr. Mallard or others -- would go to the court and say, "I'm a probate lawyer, I cannot handle a murder." We'll use your example.

The resources which the plan makes available -- and, again, that's cited in the brief -- makes co-counsel available. In extraordinary cases where the probate attorney is to defend the murderer and is absolutely incompetent, withdrawal is permitted.

If Mr. Mallard had sufficiently demonstrated to Judge Vietor that he was in fact incompetent, then his withdrawal would have been allowed. I would suggest to you that the briefs he filed in both the District Court and the Circuit Court, and in this Court, and his presentation today demonstrates, as it did to Judge Vietor, that he's not an incompetent lawyer.

He may have to study 1983, but he's not incompetent.

QUESTION: Well, what -- that I happen to know about when the federal trial and the defense lawyer that was appointed had never heard of the Jenks Act. I mean, what would go with somebody like that?

MR. ALLEN: What would I, as the judge, do? I would allow withdrawal.

(Laughter.)

MR. ALLEN: As a discretionary act under the statute, I would allow withdrawal.

QUESTION: And if he told you -- when he was appointed -- that he never heard of the Jenks act, you

wouldn't appoint him.

MR. ALLEN: Probably not.

QUESTION: Well, in this case this man said, "I don't know about this business."

MR. ALLEN: No. What he said is and his affidavit is that "I don't remember much about it. I'd have to study." He did -- instead of saying, "I've never heard of the Jenks Act," he said, "I know about 1983. I'd just have to read about it."

I would suggest that that's not a standard of incompetency, forcing an attorney to read a book.

QUESTION: Well, Justice Marshall's attorney would say the same thing. You know, Jenks Act, well, I'll have to look it up. I mean, there's nothing we can't learn. Just give us enough time.

QUESTION: Right.

QUESTION: You're saying there's never anybody who is not qualified.

MR. ALLEN: No, I'm not, your Honor.

QUESTION: Unless he's uneducable?

MR. ALLEN: No. I'm not -- certainly not saying that. What I am saying it is, that if the extraordinary circumstance is demonstrated such that the discretionary act of the judge should be exercised, then the judge will either refuse to appoint or, subsequent

to the appointment if incompetency is demonstrated, exercise discretion by appointing co-counsel or by ultimately allowing withdrawal. The plan allows for that.

QUESTION: Yes, but I really think the judge in the hypothetical will say to the lawyer, "You'd better read the Jenks Act." I don't think he'd say, the fact you don't know about the Jenks Act is a sufficient reason for not appointing him because there's certainly a lot of statutes that lawyers are unfamiliar with when they first get involved in a matter.

MR. ALLEN: At the first instance I --

QUESTION: And I think most appointing judges do that. So, you'd better learn something about those matters.

MR. ALLEN: At the first instance I would suggest that he would say what Judge Vietor said to Mr. Mallard, read Section 1983. If after reading it, he demonstrated no proficiency whatsoever, then withdrawal might be --

QUESTION: Reading Section 1983 is maybe one sentence.

(Laughter.)

QUESTION: But it's a by-reference. It's the whole constitution and federal statute.

(Laughter.)

MR. ALLEN: I understand that.

QUESTION: But I take it that the position that you're -- that you disagree with is that the judge has no power under any circumstances to order an attorney to serve.

MR. ALLEN: I adamantly disagree with that.

QUESTION: That is -- that is the position on the other side. The word "request" means request. It doesn't mean an order.

MR. ALLEN: I adamantly --

QUESTION: And --

MR. ALLEN: -- disagree.

QUESTION: -- so the lawyer doesn't have to show incompetence or that -- or some hardship or anything else. He just doesn't want to do it.

MR. ALLEN: All he need do under Mr. Mallard's hypothesis to -- is to express unwillingness.

QUESTION: "Sorry, judge."

MR. ALLEN: "Sorry, judge, I'm busy." He doesn't even have to say, I'm busy." He just says, "Sorry, judge."

QUESTION: Would professional rules in the State of Iowa speak to that question in any way?

MR. ALLEN: I believe they do. And our brief

did indicate that we believe --

QUESTION: Even though the statute might not?

MR. ALLEN: Yes.

QUESTION: Maybe the professional rules of conduct would --

MR. ALLEN: Well, we --

QUESTION: -- require the attorney to --

MR. ALLEN: -- read the rules to --

QUESTION: -- do more than just say, "I won't"?

MR. ALLEN: Yes. We read the rules in Iowa to require the individual ethical obligation of the attorney to be imposed upon that attorney.

QUESTION: Well, if --

MR. ALLEN: And then the system helps them out.

QUESTION: Well, if you're going to reach those, then there are a lot of rules that would indicate that -- that there are many circumstances where the lawyer shouldn't serve.

MR. ALLEN: And that, again, is Mr. Mallard's position.

QUESTION: Yes.

MR. ALLEN: Mr. Mallard --

QUESTION: Well, I --

MR. ALLEN: -- and I read the same rules --

QUESTION: -- that's what the rules say.

MR. ALLEN: He suggests that if he reads the rules and determines that he is incompetent, or for whatever reason, he cannot serve, then his say goes.

QUESTION: But --

MR. ALLEN: As a matter of fact, he can go to the judge and say, "As I read the rules, I should not serve."

QUESTION: But the rules would not be enforced by the federal district court if -- if request means what Mr. Mallard says it does. The fact that there are rules in Iowa's court of professional responsibility that might suggest an obligation would not, to me, mean that the district court could enforce it. That would be up to the Iowa Bar, wouldn't it?

MR. ALLEN: Correct.

QUESTION: What the Iowa Bar thinks is sufficient inexperience for a lawyer to decline may be quite different from what a particular district judge thinks.

MR. ALLEN: Oh, absolutely. An administrative disciplinary action against Mr. Mallard for handling an action for which he was incompetent would be judged by, I think, a different standard than Judge Vietor applied in the initial determination. And I say initial determination because I think the exercise of the

judge's discretion throughout the case is exercised continually.

QUESTION: If he took this case voluntarily -- a client walked in with this case and he took it, he probably would have been violating some of the cannons in taking a case for which he's not competent.

MR. ALLEN: I don't think so, your Honor.

QUESTION: You don't think so?

MR. ALLEN: No. As demonstrated by this record, there is nothing in this record which proves in any way that Mr. Mallard is incompetent to handle this case.

QUESTION: There surely has got to be a first case for every lawyer in every field, unless he works for a giant law firm.

MR. ALLEN: I agree. What Mr. Mallard is attempting to do by his reading of the statute is call into question not only the appointment in the civil context but the appointment in the criminal context as well because if in fact the court has no authority to appoint an unwilling attorney, albeit if the word is request or appoint, that calls into question the very authority of the court to utilize an unwilling attorney to further the Sixth Amendment obligation of the government to provide right to counsel.

QUESTION: Do we know what the criminal statutes, what the criminal counterpart says?

MR. ALLEN: The criminal counterparts since 1790 has said appoint. It has provided that without compensation, however, up until 1964 when the Criminal Justice Act was passed. So, from 1790 until 1964 district courts were presumed to have the authority to appoint attorneys -- albeit the word "appoint" was utilized in the statute -- to represent, even though unwilling -- to represent defendants in criminal court. And there was no --

QUESTION: Without pay?

MR. ALLEN: Without pay. Up until 1964. In answer to the question issued by you, Justice Stevens, all costs are paid for by this plan. Not only deposition, but transportation costs. Geographical modifications are made during the initial appointment. For instance, Judge Vietor would not appoint a northwest Iowa attorney to represent an inmate at Fort Madison.

And, in fact, by another local custom -- this is not in the record, but let me in answer to your question -- most of the trials of the Fort Madison inmates are held at Fort Madison. The District Court goes down to Fort Madison. So that Mr. Mallard would be within about 60 miles of not only his client and all the

investigation, but also the trial. Transportation, lodging --

QUESTION: That's a practice --

MR. ALLEN: -- would be paid.

QUESTION: That's a practice that's been followed for some time, isn't it?

MR. ALLEN: Some time. That's been in existence at the request of not only the Attorney General but the Department of Corrections, that we have our trials down there to forgo transporting inmates all over the state.

QUESTION: Mr. Allen, by any chance is there any British experience with this problem?

MR. ALLEN: The British experience is approximately 400 years, as I was discussing with Justice Scalia. For 400 years the British provided that we appointed counsel. However, they did it --

QUESTION: The way you described it, the only thing you said is that the proper mix -- the request to the judge.

MR. ALLEN: Files an affidavit of poverty --

QUESTION: Yes. Exactly. But then you never told us what the judge did.

MR. ALLEN: The judge would normally appoint counsel. Having an affidavit of merit --

QUESTION: Well, was there -- well, was there a practice of forcing lawyers to do it?

MR. ALLEN: Well, --

QUESTION: was it -- would it have been -- would it have been contempt for him not to take the -- or, just a professional wrong?

MR. ALLEN: Well, it was deemed to be a professional obligation. But the difficulty in determining how it was to be applied was because the affidavit from the two attorneys that the case had merit would go to the judge along with the request for appointment of counsel. And, lo and behold, the judge would turn around and appoint one of the two counsel who signed the affidavit --

QUESTION: Well, so --

MR. ALLEN: -- of merit.

QUESTION: -- you still haven't told us then that the English practice was to force reluctant lawyers to take an appointment.

MR. ALLEN: I think in the British tradition, it is essentially the same as the Iowa tradition. There were so few lawyers who said no. It's difficult to determine whether it was compulsory or not.

QUESTION: Well, all right. So you --

QUESTION: It's probably still the case. So,

what's the big deal? I mean, if -- if this is not going to be a problem, why --

MR. ALLEN: Well, it is going to be a problem if -- if you look at how this plan originated. The plan originated on a voluntary basis through the Volunteer Lawyer's Project whereby attorneys signed up to augment the services of Legal Services Corporation. Eight hundred lawyers volunteered in the Southern District, and in 1988 they closed 1,432 cases. There was an absolute certainty that you would get a case on referral from legal services.

Those 800 hundred cases, the District Court felt, were -- those 800 attorneys -- it was unfair to require them or to request them to service also the many, many, many federal cases that we had in the civil. So, they augmented the plan by saying we're going to have 3,500 attorneys who have participated in federal court and are members of that bar and have consented, through their oath. That way, based upon the appointment process, you will only get a case once every seven or eight or nine years.

Mr. Mallard opted not to sign up for the Volunteer Lawyer's Project whereby appointment would be almost a certainty. He then put his name in the barrel because he got into the federal bar. And got -- when

his name was pulled he said, after having played the numbers game and his number came up, "Ah, wait a minute. Now I'll go back to the Volunteer Lawyer's Project. I want another bite at the exemption apple," so to speak.

Had he signed up for that originally, he would not have been requested to take a federal case. And, as he suggested here, he would have been allowed to do bankruptcy and creditor's rights because the checksheet says -- when you fill out for Volunteer Lawyer's Project what kind of cases would you like. He could have taken the case that he wanted. He opted not to do that and went into the federal plan.

What is at stake today I think is really the perception of justice. It's really, as 1915(d) was to address, it was to address opening the doors to the pauper. It was -- it is, I would submit, in furtherance of the lawyer's ethical obligation.

As I come into this Court, I am always -- as I walk under the portico and it says Equal Justice Under Law, and I'm allowed to walk past the line and I don't have to stand out with the public. And then I'm allowed to sit in front of the bar. And then, more particularly, I'm allowed to stand up here and for a minimal period of time I'm allowed to participate in

history. That, to me, is an awesome obligation. It is an awesome privilege.

With those privileges and with those obligations comes, I think, the responsibility that when the court requests, I answer. That I am a partner in the administration of justice, and that contrary to what I think Mr. Mallard is positing to this Court the law is more than a business, it is a profession. I think that Judge Vietor had the authority to ask Mr. Mallard, and absent those extraordinary circumstances which the plan would allow Mr. Mallard to demonstrate in order to allow him to withdraw, I think his appointment should have stayed, and I think the Eighth Circuit was correct in saying so.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Allen.

Mr. Mallard, do you have rebuttal?

REBUTTAL ARGUMENT OF JOHN E. MALLARD

ON BEHALF OF PETITIONER

MR. MALLARD: Yes. Mr. Chief Justice, and may it please the court:

This is not a part of the record in the proceedings below, but I do not know what the Jenks Act is. I don't even know how to spell it. I don't know whether it's --

QUESTION: Mr. Mallard, may I interrupt you?

MR. ALLEN: -- of this --

QUESTION: May I interrupt you, please? Before you -- this matter arose, how many cases had you argued in this Court? How much did you know about our rules and the --

MR. MALLARD: Nothing.

QUESTION: -- certiorari procedures?

MR. MALLARD: Nothing.

QUESTION: Do you think you were competent to represent yourself in this case? You must have. You picture yourself as a lawyer.

MR. MALLARD: Your Honor --

QUESTION: You had exactly the same experience for this assignment as you had for the one down there that you declined.

MR. MALLARD: Your Honor, I believe the skills are substantially different. I was about to say --

MR. MALLARD: You mean it's much easier to come up here than it is to file a 1983 case in representing a prisoner?

MR. MALLARD: The tasks --

QUESTION: You don't have -- don't need any skills up here, but you need a lot of skills down there? Is that it?

MR. MALLARD: Skills are required in both areas. But I think the tasks are substantially different. I do believe that I can effectively convey a concept, construe laws, and act accordingly. But the difference in the proceedings below were that there would be a requirement of substantial discovery where one must --

QUESTION: Much harder --

MR. MALLARD: -- confront witnesses --

QUESTION: -- to take a deposition? Is that the point?

MR. MALLARD: -- witnesses and be able to elicit testimony before a jury. Those types of skills, which I think are substantially different. Certainly, I didn't know anything more about 1915(d) a year and a half ago than I know about the Jenks Act today. But I would find no reason to decline a request on that basis. I construe statutes in my practice commonly, and the Federal Securities Act and difficult statutes.

I offered to provide alternative service and, again, did not feel comfortable in that area.

One other point on the derivation of 1915(d). Respondent has suggested that it was derived from an English statute. And it's true, I think, that the state court statutes which had been enacted prior to 1915(d)

were derived form that statute because they used the same language as the statute of Henry VII, appoint or assign. Actually, both words appeared in the English statute.

But the English statute was not in effect at the time Congress considered 1915(d). It had been in effect for almost four centuries but was abandoned in England in 1883. And the system that was actually in effect at that time required a request. And there is a quote from a historical study at page 21 of my reply brief. I refer the Court to it.

QUESTION: Who was appointed under the English statute? Were solicitors appointed or barristers appointed?

MR. MALLARD: Your Honor, I cannot recall the distinction made, but some of the legal scholars who have worked in the area have suggested that the two types of lawyers, that the one was like a court employee or closer to the court, and that it was that class of attorneys who had to accept a court request.

QUESTION: The point is, if it was barristers, there would be no problem about a lawyer feeling himself inexpert in the conduct of trials.

MR. MALLARD: Yes, your Honor. So why Congress chose to depart from the state statutes and

also the English statute which was no longer in existence is difficult to know. But I would like to submit that there was potentially a very serious constitutional issue, or could have been in the minds of Congress. Prior to that time three state supreme courts, including the courts in Iowa, Indiana and Wisconsin, had held that there could be a takings involved where there was no compensation --

QUESTION: You just don't like the statute, do you?

MR. MALLARD: No, your Honor. I like it very much in that I construe it to give me the flexibility to be able to respond. Or to -- the freedom to deny a request if it's in an area of service that I don't feel capable of --

QUESTION: You agree --

MR. MALLARD: -- capable of providing.

QUESTION: -- with the statute that it gives you your freedom.

MR. MALLARD: Yes, your Honor.

QUESTION: And your freedom is to tell the court no.

MR. MALLARD: Yes, that's the way I read 1915(d).

QUESTION: And that's all?

MR. MALLARD: Yes, your Honor.

QUESTION: That's all you want?

MR. MALLARD: Yes. I have no further argument on rebuttal. If there are no --

CHIEF JUSTICE REHNQUIST: Very well, Mr. Mallard.

The case is submitted.

(Whereupon, at 1:55 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

John E. Mallard. Petitioner v. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, ET AL.,

Case No. 87-1490

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)