

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: RICHARD DEMAREST, Petitioner

v. JAMES MANSPEAKER, ET AL.

CASE NO: 89-5916

PLACE: Washington, D.C.

DATE: November 6, 1990

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   RICHARD DEMAREST,                   :

4                   Petitioner                   :

5                   v.                   :   No. 89-5916

6   JAMES MANSPEAKER, ET AL.                   :

7   - - - - -X

8                                   Washington, D.C.

9                                   Tuesday, November 6, 1990

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:38 a.m.

13   APPEARANCES:

14   JAMES E. SCARBORO, ESQ., Denver, Colorado; on behalf of  
15   the Petitioner.

16   MICHAEL R. LAZERWITZ, ESQ., Assistant to the Solicitor  
17   General, Department of Justice, Washington, D.C.; on  
18   behalf of the Respondent.

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P R O C E E D I N G S

(11:38 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in No. 89-5916, Richard Demarest v. James Manspeaker.

Mr. Scarboro, you may proceed.

ORAL ARGUMENT OF JAMES E. SCARBORO

ON BEHALF OF THE PETITIONER

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

The question presented for review in this case  
is whether a convicted prisoner who is summoned to appear  
as a witness in a proceeding in the court in the United  
States is entitled to a witness fee pursuant to 28 United  
States Code, section 1821 --

QUESTION: This was a convicted State prisoner?

MR. SCARBORO: That's correct, Your Honor -- for  
the time that that person spends in attendance at a court  
of the United States. The petitioner here, Richard  
Demarest, was in 1988 and continues to be a prisoner  
incarcerated in the State of Colorado, by the State of  
Colorado.

In March of 1988, Judge Jim Carrigan of the  
United States District Court in Denver issued a writ of  
habeas corpus ad testificandum by which Mr. Demarest was  
transported from prison in Crawley, Colorado to Denver

1 County jail where he remained for a little more than a  
2 month.

3 During 8 days of that period the trial in the  
4 underlying criminal case took place. On one of those days  
5 Mr. Demarest testified as a witness for the defense. When  
6 the case was over Mr. Demarest made an application to the  
7 deputy clerk in the district court to certify his  
8 entitlement to a witness fee pursuant to 28 United States  
9 Code, section 1825. That is the statute that governs the  
10 procedure whereby a witness applies for a fee when the  
11 witness is being paid by the United States.

12 QUESTION: Do you mean when the witness -- the  
13 United States would pay the fee in this case?

14 MR. SCARBORO: That's correct, Your Honor.

15 QUESTION: What, because, what -- that's because  
16 of this provision of 1825?

17 MR. SCARBORO: That's correct, Your Honor.  
18 There are several related provisions involved. One is  
19 1821, which provides generally that witnesses are entitled  
20 to a fee. Another is section 1825 which sets forth the  
21 procedure for receiving payment of a fee when the witness  
22 is being paid by the United States.

23 QUESTION: And when does it say the witness  
24 shall be paid by the United States?

25 MR. SCARBORO: In a case in which the United

1 States is a party and the, the -- in the case of a witness  
2 for the United States by the United States; in the case of  
3 a defense witness when the fees cannot be paid by the  
4 defendant or the party.

5 QUESTION: And this was, this was a Federal  
6 trial in the, in the district court?

7 MR. SCARBORO: That's correct, Your Honor. And  
8 just, just to --

9 QUESTION: Mr. Scarboro?

10 MR. SCARBORO: Yes?

11 QUESTION: If it's an ordinary witness does he  
12 pay his own travel or does somebody pay his travel?

13 MR. SCARBORO: No, in the ordinary case, Your  
14 Honor, if a person is going to serve as a witness in a  
15 case and the parties are able to pay the fee, you tender a  
16 witness fee and travel expenses to the witness when you  
17 serve the subpoena. That's what happens in the ordinary  
18 case.

19 QUESTION: A fee plus travel.

20 MR. SCARBORO: That's correct.

21 QUESTION: Now, in this case the Government paid  
22 travel?

23 MR. SCARBORO: In this case the State of  
24 Colorado or the United States Government. I don't know  
25 which paid for the travel. That's right.

1 QUESTION: Well, he didn't pay it.

2 MR. SCARBORO: That's correct. He did not, Your  
3 Honor.

4 QUESTION: Who paid his food?

5 MR. SCARBORO: It was paid by the Denver County  
6 Jail, I assume. The fact is not --

7 QUESTION: So the county jail fed him.

8 MR. SCARBORO: That's correct.

9 QUESTION: So his out-of-pocket expenses were  
10 zero?

11 MR. SCARBORO: That's correct.

12 QUESTION: And he is not asserting any right to  
13 expenses in this case. There is a specific provision in  
14 the statute in section 1821 and subsections (c) and (d)  
15 which entitle a witness to reimbursement for expenses.  
16 Mr. Demarest is not seeking reimbursement for any  
17 expenses. What he is seeking is a witness -- the payment  
18 of the \$30 per day witness fee pursuant to subsection a(1)  
19 of section 1821 which provides for the payment of those  
20 fees.

21 Mr. Demarest made his application to the clerk  
22 of the court in Denver --

23 QUESTION: May I ask you -- was he a defense  
24 witness or a prosecution witness?

25 MR. SCARBORO: Defense witness, Your Honor.

1 QUESTION: He was a defense witness.

2 MR. SCARBORO: Mr. Demarest made his application  
3 to the clerk and the clerk referred the request to the  
4 assistant United States attorney. The assistant United  
5 States attorney denied the request on the ground that Mr.  
6 Demarest was a convicted prisoner and therefore unentitled  
7 to receive a witness fee.

8 Mr. Demarest, proceeding on his own behalf,  
9 thereafter filed this lawsuit. And he sued both the  
10 clerk and the deputy clerk seeking to compel them to pay  
11 to certify his entitlement to a fee, which then would be  
12 paid by the United States Marshal.

13 QUESTION: Mr. Scarboro, the Government says  
14 that a witness has to be subpoenaed under the statute  
15 before he can be deemed to be in attendance under the  
16 terms of the statute.

17 MR. SCARBORO: That's correct, Your Honor. That  
18 is the technical argument that the Government makes with  
19 regard to the meaning of the statute. Mr. Demarest's  
20 position is very simple and that is that if this statute  
21 means what it says, he is a witness and he was in  
22 attendance in at a court of the United States and served  
23 as a witness. If the words in attendance mean someone who  
24 appears and gives testimony, then he is that person. He  
25 also served as a witness as we ordinarily understand the

1 meaning of the word witness.

2 The Government makes a technical argument with  
3 regard to the language in attendance and says that Mr.  
4 Demarest was not in attendance because he wasn't  
5 personally subpoenaed. Instead he appeared pursuant to a  
6 writ of habeas corpus ad testificandum. That's accurate.  
7 He did appear pursuant to that, to that writ.

8 Section 1821 doesn't mention the word subpoena.  
9 Never uses it. Section 1821 doesn't define the word in  
10 attendance except to say, in attendance.

11 QUESTION: But section 1825 uses the term  
12 subpoena?

13 MR. SCARBORO: Yes, yes, it does. It does use  
14 the word subpoena, Your Honor. That word is used in  
15 section 1825 in the following way. Section 1825 first  
16 sets out how a witness for the Government, in a case where  
17 the Government is a party, is to be paid when the person  
18 is being paid by the United States. Then the statute goes  
19 on to say, in the case of defense witnesses summoned  
20 pursuant to a subpoena, the following procedure shall be  
21 used for payment. The word subpoena is not defined in  
22 section 1825 but I submit that all it means, that the  
23 common sense of it is, that there be some kind of formal  
24 process by which a court certifies that --

25 QUESTION: Well, are you, are you now arguing

1     that a writ of habeas corpus ad testificandum is a  
2     subpoena within the meaning of this section?

3             MR. SCARBORO:  Yes, Your Honor.  Certainly -- I  
4     certainly --

5             QUESTION:  So we're getting a little bit away  
6     from pure plain language now.

7             MR. SCARBORO:  Yeah, well, Your Honor, perhaps  
8     we, we are.

9             QUESTION:  Yeah.

10            MR. SCARBORO:  The word subpoena also appears in  
11     Federal Rule of Criminal Procedures 17(a).  That's the  
12     rule whereby a court -- that requires a court to order, to  
13     issue subpoenas for the attendance of witnesses in  
14     criminal trials.

15            QUESTION:  What do you say with respect to a  
16     volunteer witness?

17            MR. SCARBORO:  Your Honor, I would say that a  
18     volunteer witness ought to be paid.  I know there  
19     are -- yes --

20            QUESTION:  Well, maybe he ought to be but the  
21     statute requires it --

22            MR. SCARBORO:  In, in --

23            QUESTION:  -- because he's in attendance.

24            MR. SCARBORO:  In my view, Your Honor, the -- in  
25     the first place, it's not necessary to answer that

1 question in order to decide this case we submit, because  
2 Mr. Demarest did appear pursuant to a formal procedure.  
3 Judge Carrigan --

4 QUESTION: I see.

5 MR. SCARBORO: -- issued an order that gave him  
6 oversight, judicial oversight over the proceedings. There  
7 are cases in the lower court cases, district court cases,  
8 that have held even -- that even a witness who appears  
9 voluntarily is entitled to receive a fee. That seems to  
10 me to be the better view. But it's not necessary to  
11 decide that question --

12 QUESTION: What does -- what does in attendance  
13 mean in, in that event. I thought -- I was going to ask  
14 you what you thought -- I, I assumed in a subpoena in  
15 attendance might mean the dates set forth in the subpoena.  
16 You're in attendance on those days, but if you're coming  
17 voluntarily you know, suppose you -- you don't know how  
18 long the trial is going to be. You come. You hang around  
19 for -- it's only the days you appear, or are those the  
20 only days?

21 MR. SCARBORO: This is, this Court has held that  
22 in attendance in Hurtado, the 1973 opinion from this Court  
23 which is the only case construing section 1821 that in  
24 attendance refers to the time spent in readiness to  
25 testify while the trial is taking place.

1 QUESTION: So if you choose to come 5 days  
2 early, so long as the trial is going on at that time,  
3 you're in attendance.

4 MR. SCARBORO: As you know when you're trying a  
5 case, Your Honor, some -- you may subpoena --

6 QUESTION: Right.

7 MR. SCARBORO: -- witnesses for the opening day  
8 of trial. You may --

9 QUESTION: Sure.

10 MR. SCARBORO: -- you may subpoena them for the  
11 opening day of defense. It's hard to know when exactly  
12 they'll be, they'll be required to attend, but the time  
13 they spend away from their ordinary occupations and in  
14 readiness to testify, as I understand this Court's opinion  
15 in Hurtado, they're in attendance. And incidentally  
16 the -- the Congress subsequently amended section 1821 to  
17 incorporate the Hurtado ruling and, it seemed to me,  
18 adopted that view of the word in attendance.

19 QUESTION: Well, the technical arguments made by  
20 the Government weren't made below, were they?

21 MR. SCARBORO: They were not. There, there were  
22 no opinions. The, there is nothing about section 1825 in  
23 the Tenth Circuit Court of Appeals' opinion or in the  
24 district court opinion. And as I understand this Court's  
25 ordinary rule, when certiorari is not granted to review a

1. particular question and the issue has not been either  
2. raised or decided below, the Court will not ordinarily  
3. reach out to decide it. The Government does not, as far  
4. as I can tell, offer any special reasons --

5. QUESTION: Well, the respondent can, the  
6. --respondent can ask the Court to decide a case on another  
7. ground.

8. MR. SCARBORO: The respondent can always --

9. QUESTION: If the record does -- supports it.

10. QUESTION: But a respondent --

11. MR. SCARBORO: Yes, Your Honor. The respondent  
12. can always ask.

13. QUESTION: A respondent is also expected to  
14. raise any nonjurisdictional objections to reaching the  
15. question presented in the motion -- the brief in  
16. opposition to certiorari.

17. MR. SCARBORO: That's correct, Your Honor, and  
18. it was not raised in the brief in opposition to  
19. certiorari.

20. QUESTION: If we construe --

21. MR. SCARBORO: It seems only -- excuse me, sir.

22. QUESTION: If we construed subpoena to mean only  
23. subpoena would that -- and imposed in effect the subpoena  
24. requirement as the Government argues, would that be  
25. consistent in every respect with the practice which is

1 actually obtained?

2 MR. SCARBORO: It depends on what you mean by  
3 the practice, Your Honor. The Government has taken --

4 QUESTION: I think you probably know more about  
5 that than I do, so I'm going to let you define that.

6 MR. SCARBORO: Okay, the Government has taken  
7 the position, at least with regard to prisoner witnesses,  
8 that there -- that they do not ever pay the fees of  
9 prisoner witnesses. Those persons are not --

10 QUESTION: Regardless of who calls them?

11 MR. SCARBORO: Yes, that's my understanding,  
12 Your Honor.

13 QUESTION: Umm.

14 MR. SCARBORO: If you mean the practice as  
15 employed by the courts under rule 17(a), the rule of  
16 criminal procedure, that, that by which courts issue  
17 subpoenas. The courts routinely issue writs of habeas  
18 corpus ad testificandum pursuant to rule 17 as well as  
19 subpoenas directed to individuals who are free to move  
20 about.

21 As Judge Ebel said dissenting below in this  
22 case, suppose the case of a person who is in a mental  
23 hospital, a mental institution is not free to go. That  
24 person may not be personally subpoenaed. That person may  
25 be brought to court by virtue of a process other than one

1 entitled a subpoena. Is that person not entitled to  
2 receive a witness fee? Or suppose --

3 QUESTION: What other, what other process would  
4 it be for a person? I don't understand why a person in a  
5 mental hospital has no special process for --

6 MR. SCARBORO: It might be a writ of habeas  
7 corpus, Your Honor.

8 QUESTION: Oh, then they'd be comparable to  
9 this --

10 MR. SCARBORO: Yes.

11 QUESTION: -- if they're in custody.

12 MR. SCARBORO: And then --

13 QUESTION: But not if they're in a private  
14 mental institution I don't suppose?

15 MR. SCARBORO: Probably not.

16 QUESTION: No. But you're just saying if  
17 they -- in a different area of Government custody. I  
18 don't know why that's a different case than this one.

19 MR. SCARBORO: I don't either, Your Honor. But  
20 I take it the Government's position would be that person  
21 is not entitled to a fee.

22 QUESTION: Correct.

23 MR. SCARBORO: For example, in the case of a  
24 witness who was detained because he's unable to post a  
25 bond for his own trial which is coming up and is then

1 subpoenaed for it or is compelled to attend as a witness  
2 in another trial. Is he unentitled to a fee because he's  
3 not going to be personally subpoenaed? He's going to be,  
4 he's going to be compelled -- his jailer is going to be  
5 compelled --

6 QUESTION: Well, you raise an interesting  
7 question -- what about the defendant in his own trial? Is  
8 he in attendance? And does he get a fee?

9 MR. SCARBORO: The defendant --

10 QUESTION: I don't think he does.

11 MR. SCARBORO: -- in his own trial is, is, I  
12 would say he's in attendance.

13 QUESTION: But they've never paid them fees.

14 MR. SCARBORO: That's right, Your Honor. The  
15 normal understanding of the word witness is to the best of  
16 my knowledge a person who is not a party but a person who  
17 attends a trial of a party and testifies. It's also true  
18 literally that a person who is a party may testify.

19 QUESTION: You say that the -- when a defendant  
20 is testifying the defendant is not a witness within the  
21 meaning of the statute?

22 MR. SCARBORO: That's correct, Your Honor, not  
23 with the meaning of 1821.

24 It seems to me that the Government's position in  
25 this case rests not really upon these linguistic

1 distinctions about the words in attendance and witness,  
2 but instead about -- on a perception of the purpose of  
3 this statute combined with administrative practice, and I  
4 would like to spend just a few moments dealing with those  
5 two, I think, more central points.

6 The argument is made by respondents from the  
7 legislative history of this statute that its purpose is to  
8 compensate the average witness for the time that that  
9 witness spends testifying and the costs that the witness  
10 incurs. From this the Government leaps to what I think is  
11 a remarkable conclusion and that is --

12 QUESTION: Cost, Mr. Scarboro, in the sense of  
13 loss of income and that sort of thing?

14 MR. SCARBORO: Yes. Two kinds of costs, Your  
15 Honor. One would be lost income. The other would be out  
16 of pocket expenses some of which are reimbursed but as a  
17 practical matter probably all are not.

18 QUESTION: The, the -- don't witnesses get some  
19 sort of reimbursement for -- for travel?

20 MR. SCARBORO: Yes, they do, Your Honor and  
21 subsections (c) and (d) of section 1821 deal with the  
22 situation in which you can -- a witness is entitled to  
23 receive actual reimbursement for certain kinds of  
24 transportation and entitled to an allowance --

25 QUESTION: Subsistence.

1                   MR. SCARBORO: A subsistence allowance depending  
2 on other needs.

3                   QUESTION: But here what, which of the purposes,  
4 if any, of having a witness fee was incurred by this  
5 defendant?

6                   MR. SCARBORO: That -- I --

7                   QUESTION: He wasn't out-of-pocket in this  
8 instance.

9                   MR. SCARBORO: That, that's, that's what I  
10 wanted to turn to, Justice White, and the point is simply  
11 this, that the Government says it wouldn't serve any  
12 purpose to compensate a person like Mr. Demarest. He  
13 incurs no costs. He is not losing any compensation.  
14 Incidentally, that's not a point that is established in  
15 this record. It is known from this record whether,  
16 whether Mr. Demarest worked in the prison, if so, whether  
17 he made wages, and if he made wages whether he lost them  
18 when he was transported to Denver County jail to testify.

19                   But be that as it may, it seems to me that the  
20 Government's methodology stands the ordinary principles of  
21 statutory construction that have been announced by this  
22 Court in case after case after case on, on its head. And  
23 by that I mean that ordinarily this Court has said a  
24 supposed purpose is not used to override the plain meaning  
25 of a statute when the words are clear and the reason for

1 that is that ordinarily the meaning that Congress  
2 intended, its purpose, is to be understood from the  
3 language it uses. Congress doesn't speak in terms of  
4 purposes. It speaks in terms of legislative commands and  
5 it is those legislative commands that are ordinarily the  
6 best evidence about what Congress intended.

7 Furthermore, there is nothing inconsistent  
8 between the purpose that the Government supposes Congress  
9 had and paying a fee to convicted prisoners. And the  
10 reason is this. Congress was undoubtedly aware that  
11 people do not suffer the same kinds of economic losses or  
12 lose the same amount of compensation for testifying.  
13 Congress undoubtedly was aware that many people don't lose  
14 money at all, people who live on fixed incomes, people who  
15 are -- who survive by independent means. There are all  
16 kinds of people who do not necessarily suffer any economic  
17 loss by virtue of testifying, but the statute simply says  
18 all witnesses, a witness is entitled to a fee.

19 QUESTION: Mr. Scarboro, how do you -- what is  
20 your explanation of 1825(a)? Let's assume that we agree  
21 with you that they're entitled to a fee. 1825(a) says  
22 what procedures, what certifications are needed with  
23 respect to those witnesses entitled to fees who have been  
24 subpoenaed. Now what about witnesses who haven't been  
25 subpoenaed?

1 MR. SCARBORO: It's not clear from section 1825  
2 at all.

3 QUESTION: Which is peculiar.

4 MR. SCARBORO: Yes, it's very -- section 1825  
5 is -- has got a lot of problems if you look at a variety  
6 of situations. For example, it might be that a witness  
7 that does not appear pursuant to a subpoena is required to  
8 be paid by the United States without regard to these  
9 requirements.

10 QUESTION: Yes, well, I, I would say that is  
11 some indication that a witness who is not subpoenaed is  
12 not to be paid fees period since there's no provision for  
13 how they're to be paid. If there's any ambiguity about  
14 whether nonsubpoenaed witnesses get fees, I'd say that  
15 certainly indicates how that ambiguity ought to be  
16 resolved, wouldn't you think?

17 MR. SCARBORO: That's possible, Your Honor, but  
18 it seems to me that the main point ought to be what is  
19 intended by the use of the word subpoena in this statute,  
20 in, in section 1825. The same word appears in section  
21 17(a), exactly the same word. Courts routinely issue  
22 writs of habeas corpus ad testificandum pursuant to, to  
23 17(a). There's -- no distinction is made between personal  
24 subpoenas and subpoenas directed at the custodian of an  
25 individual who's going to be produced for a trial. It

1 seems to me that the purpose of this language if,  
2 if -- the idea being expressed is that there is some kind  
3 of formal process, judicial oversight, if you will, that  
4 enables a court to screen the number of people who are  
5 called as witnesses and determine that they are material  
6 and necessary --

7 QUESTION: So we should construe 1825 according  
8 to its purpose, but not 1821?

9 MR. SCARBORO: I don't think you should construe  
10 1825 at all, Your Honor. It's not within the grant. It  
11 wasn't reached below. It was an argument made for the  
12 first time in the briefs and the merits.

13 QUESTION: But --

14 MR. SCARBORO: All the Government --

15 QUESTION: But we could nonetheless take it into  
16 consideration along with 1821 if we feel it's relevant, I  
17 suppose, in deciding the question presented.

18 MR. SCARBORO: Certainly. Certainly.

19 QUESTION: Mr. Scarboro, would I be helping you  
20 out if I suggested that 1825(a) was directed not to the  
21 question of who gets paid, but to the question of who has  
22 to issue the certificate, which is a condition precedent  
23 to being paid and that, and that it is with respect to  
24 certain defense witnesses subpoenaed that there is a  
25 distinction made about the issuance of the certificate as

1 evidence for the payment and that that's the only thing  
2 that 25(a) is directed to.

3 MR. SCARBORO: That is a possible reading of  
4 section 1825, Your Honor.

5 QUESTION: Can you think of a better one from  
6 your side right now?

7 MR. SCARBORO: Certainly, it sounds so to me,  
8 Your Honor.

9 QUESTION: Okay.

10 MR. SCARBORO: I want to underscore, it -- that  
11 this Court in Hurtado -- the Government -- one of the  
12 cases, the principal case the Government relies upon for  
13 its, its definition of the word in attendance is Hurtado  
14 against the United States. And in Hurtado this Court held  
15 that the alien witnesses were in attendance. You will  
16 recall that in that case, the, the alien witnesses had  
17 been arrested for failure to post a bond pursuant to  
18 formal rule of criminal procedure 46, incarcerated by the  
19 United States Marshal and produced by the Marshal at the  
20 trial. They were not personally subpoenaed any more than  
21 Mr. Demarest was personally subpoenaed. They were  
22 detained witnesses. It just seems to me farfetched to  
23 think that Congress in section 1821, not having used the  
24 word subpoena at all and using the word in attendance we  
25 presume in its common sense and ordinary meaning, intended

1 to require a document with a particular label, an  
2 instrument with a particular label before a witness is  
3 entitled to receive a fee.

4 QUESTION: Mr. Scarboro, did Mr. Demarest think  
5 up this claim by himself?

6 MR. SCARBORO: Yes, he did, Your Honor, he  
7 thought it up all by himself. I guess. I mean there  
8 are -- have there been any prior occasions? Yes, there  
9 have.

10 QUESTION: And there -- has, has ever -- has a  
11 prisoner ever been paid a witness fee?

12 MR. SCARBORO: Yes, actually prisoners have been  
13 paid witness fees and there's a 1939 comptroller opinion  
14 in which the United States Marshal paid 3 prisoner  
15 witnesses a fee and then got into trouble getting  
16 reimbursement.

17 CHIEF JUSTICE REHNQUIST: We'll resume at 1:00.

18 (Whereupon, at 12:00 noon, oral argument in the  
19 above-entitled matter was recessed, to reconvene at 1:00  
20 p.m., this same day.)  
21  
22  
23  
24  
25

A F T E R N O O N   S E S S I O N

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll resume argument now in Demarest against Manspeaker.

Mr. Scarboro.

MR. SCARBORO: Thank you, Chief Justice. I just have a couple more points that I'd like to make and then I will sit down.

I want to make a couple of points about the purpose of this statute. We left off before lunch talking to some extent about the purpose of the law. The language of section (a)(1), of section 1821, 28 United States Code, states as follows: "Except as otherwise provided by law, a witness in attendance at any court of the United States," and here I'm skipping a bit, "shall be paid the fees and allowances provided by this section." Congress does not state witnesses who lose compensation shall be entitled to a fee. Congress does not state witnesses who incur certain kinds of expenses. It simply says witnesses.

Mr. Demarest may not be the average witness. He may not have incurred out of pocket expenses. He may or may not have actually lost compensation, but that fact I submit entitles him no less to a fee than it does to other classes of people who suffer no loss either in

1 compensation or expenses and there are many such classes  
2 of people that immediately come to mind, including people  
3 living on retirement incomes, people living on fixed  
4 incomes, many others. Very often employers --

5 QUESTION: People who have no income.

6 MR. SCARBORO: People who have no income.  
7 People -- very often employers actually continue to pay  
8 wages to their employees even though those employees are  
9 taking a day to serve as a witness in a case. There are  
10 many good reasons why Congress may have chosen to  
11 legislate in an overinclusive fashion or in a generality,  
12 such as the use of the word witness, including  
13 administrative convenience and there may have been another  
14 reason. Members of Congress may have felt that witnesses  
15 are -- should receive some token compensation for acting  
16 as a witness in a court case. It might improve --

17 QUESTION: But on that point -- I'm just  
18 curious -- well, you point out in your brief at page 37  
19 that back in the earlier days, the prison inmates  
20 forfeited all their rights and their time and services  
21 belonged entirely to the Government. That was the  
22 prevailing view. If that was the view of Congress when  
23 this statute was addressed -- drafted, which way does that  
24 cut?

25 MR. SCARBORO: The statute has been, of course,

1 amended 11 times since its original adoption in 1792. As  
2 we understand it, prisoners could not even testify. They,  
3 they were infamous persons. There were lots of categories  
4 of people who could not testify and convicted prisoner was  
5 one such category. That disability which existed at  
6 common law in various States and under Federal law fell  
7 away over the period from 1850 to 1920.

8 During that period of time, of course, Congress  
9 amended this statute. And it seems to me the best  
10 operating assumption is that whatever witnesses are  
11 competent to testify under the laws evidence to be  
12 witnesses are, are to be included in the term witness.  
13 Otherwise it would be necessary to go back over this  
14 entire history and to go through categories of witnesses  
15 of, of, for example, children -- people -- atheists, there  
16 were all kinds of categories of disability -- and go  
17 through each of those categories one by one and decide  
18 whether Congress intended to include or exclude them.  
19 There's nothing in the legislative history of this statute  
20 that provides one scintilla of evidence that Congress ever  
21 intended to exclude convicted prisoners from --

22 QUESTION: Children get \$30 a day, by the way?  
23 Do children get --

24 MR. SCARBORO: Children?

25 QUESTION: Yes.

1 MR. SCARBORO: I don't know the answer to that  
2 question. I assume if they're witnesses, they would. But  
3 I don't know.

4 It just seems to me that it is --

5 QUESTION: Mr. Scarboro --

6 MR. SCARBORO: Yes?

7 QUESTION: If he is there for 10 days and  
8 doesn't testify --

9 MR. SCARBORO: That's correct, Your Honor.

10 QUESTION: -- he would get 300 bucks.

11 MR. SCARBORO: That's correct. And that's what  
12 he sought. He sought \$300.

13 QUESTION: That's good work if they're paying  
14 him.

15 MR. SCARBORO: Well, he was doing as well as he  
16 could, I guess. He, he, he was very careful to try to  
17 follow this Court's opinion in Hurtado. This Court's  
18 opinion in Hurtado said that you're in attendance even  
19 though you're not testifying when you're in readiness to  
20 testify and, and that's the only claim he made.

21 QUESTION: You would think this would have been  
22 settled long ago, Mr. Scarboro, but this is one of the few  
23 people who had the nerve to make this claim I suppose.

24 (Laughter.)

25 QUESTION: But has it ever been adjudicated

1 before?

2 MR. SCARBORO: It has been adjudicated, Your  
3 Honor. There --

4 QUESTION: But in his favor?

5 MR. SCARBORO: Not adjudicated in his favor,  
6 Your Honor, no, it has not.

7 QUESTION: What?

8 MR. SCARBORO: No, it has not ever been  
9 adjudicated in his favor.

10 QUESTION: It's been adjudicated not in his  
11 favor?

12 MR. SCARBORO: That's correct.

13 QUESTION: Many times?

14 MR. SCARBORO: Five times.

15 QUESTION: Five times, especially when Congress  
16 is amending the law?

17 MR. SCARBORO: Most, the most recent -- the  
18 oldest opinion is 1970. All of the opinions take place  
19 between 1970 and 1986, I believe.

20 QUESTION: Well, has the, has the, the practice  
21 was up til -- maybe up til now not to pay these fees.  
22 Congress must have known that when it was amending the  
23 law.

24 MR. SCARBORO: There is not one bit of evidence  
25 that Congress knew anything about it.

1 QUESTION: Okay.

2 MR. SCARBORO: The, the Government does make the  
3 point here that there have been 200 years of unbroken,  
4 consistent administrative practice. It seems to me that  
5 that's quite an exaggeration.

6 The idea --

7 QUESTION: You mean it's 190?

8 (Laughter.)

9 MR. SCARBORO: Well, no --

10 (Laughter.)

11 QUESTION: 198, 198.

12 MR. SCARBORO: There may have been an incident  
13 occurring every other decade, Your Honor, that could have  
14 come to the attention of Congress. There's a handful of  
15 judicial opinions and a handful of administrative  
16 opinions. This is not the sort of thing that made the  
17 front headlines of the newspaper, the sort of thing that  
18 is apt to have come to the attention of Congress. And  
19 indeed there is no evidence in the legislative history  
20 that this ever came to the attention of Congress.

21 As I understand this Court -- as I understand  
22 the Government's position -- I'm not sure I do, but I, but  
23 I think I do -- in 1978 when Congress last amended the  
24 statute, there existed such an unbroken line of  
25 administrative determinations that Congress' failure to

1 explicitly provide that convicted prisoners may receive a  
2 fee was in effect an amendment of the statute to adopt an  
3 administrative interpretation that convicted prisoners may  
4 not receive a fee. As I read this Court's cases and the  
5 cases cited by the Government in support of this, this  
6 idea of congressional acquiescence, some link is required  
7 between the practice and Congress' knowledge. Indeed,  
8 this Court's cases I think are, are, are -- require much  
9 more than knowledge. They require some kind of  
10 substantial evidence of oversight, of adoption, of, of  
11 approval of the administrative practice. There is no such  
12 evidence in this case. This is a statute addressed to the  
13 courts. It's not a statute that is addressed peculiarly  
14 to an administrative agency. It's, it's the business of  
15 the courts to interpret it.

16 QUESTION: Thank you, Mr. Scarboro.

17 Mr. Lazerwitz, we'll hear now from you.

18 ORAL ARGUMENT OF MICHAEL R. LAZERWITZ

19 ON BEHALF OF THE RESPONDENT

20 MR. LAZERWITZ: Thank you, Mr. Chief Justice,  
21 and may it please the Court:

22 Witnesses in Federal, and State court  
23 proceedings for that matter, have received a modest fee  
24 for their service since at least the days of the first  
25 Congress. But despite such a 200-year record, no one has

1     been able to find a single instance in either Federal or  
2     State practice where a convicted prisoner lawfully and  
3     properly received a witness fee.

4             Petitioner would write off this record as --

5             QUESTION: Excuse me, there, there was an  
6     instance as I record where they received a witness fee,  
7     three of them in the, the --

8             MR. LAZERWITZ: Yes, in 1939 the Marshal's  
9     service mistakenly provided witness fees to convicted  
10    prisoners.

11            QUESTION: Or correctly did so and did, and did  
12    not do so mistakenly in all the other instances, as the  
13    case the may be.

14            (Laughter.)

15            MR. LAZERWITZ: Well, we think that, we think  
16    that you should not write off this practice as nothing  
17    more than one of the longest running violations of a  
18    statute's plain meaning in our legal history. Instead, we  
19    submit that a closer look at the statute and the  
20    historical record shows the opposite is the case. As  
21    currently enacted, the Federal witness fee statute  
22    provides that fees and allowances -- excuse me, allowances  
23    shall be paid to witnesses in attendance at Federal court  
24    proceedings. And the particular question here is whether  
25    petitioner, a convicted state prisoner, is entitled to

1 receive the fees under the statute where he testified in a  
2 Federal criminal case. In our view, petitioner is not  
3 entitled to receive the fees under the statute because he  
4 was not in attendance within the meaning of the statute.  
5 As the statute's structure and history suggests, in  
6 attendance means more than just being there. It also  
7 includes the process under which the witness appears in  
8 court.

9 A prisoner such as petitioner appears in court  
10 under a particular process directed to his custodian and  
11 that process is the writ of habeas corpus ad  
12 testificandum. In other words, in attendance in this  
13 statute means a witness who has been summoned to appear,  
14 summoned himself, and who then makes himself available and  
15 complies with that process.

16 QUESTION: I suppose that --

17 MR. LAZERWITZ: Excuse me.

18 QUESTION: Why do you read that much into the  
19 phrase in attendance?

20 MR. LAZERWITZ: Mr. Chief Justice, we read the  
21 statute in that way for a number of reasons. One, it  
22 is -- we start with the language of the statute and  
23 second, the structure of the statute, the structure of  
24 section 1821 and 1825 which does not drop out of this  
25 case, notwithstanding our failure to raise the point in

1 our brief and opposition that petitioner doesn't qualify  
2 to receive the certificate because of his default.

3 1825 speaks in terms of subpoenas and a subpoena  
4 is the ordinary process for summoning witnesses to court.

5 QUESTION: Well, Mr. Lazerwitz, may I ask you  
6 two questions about that? The first is the same one which  
7 I, I asked your brother before lunch and I, I in a way I  
8 made it, I guess a made a dangerous move in doing that  
9 because I just looked at the statute again and it struck  
10 me that it might simply be addressing the question of who  
11 has to certify that the witness was there as opposed to  
12 who has to -- as opposed to identifying the kind of  
13 witness or the process by which it -- a witness may be  
14 identified as compensable. Do you think that is a sound  
15 analysis or a sound suggestion?

16 MR. LAZERWITZ: It's a sound, but one that we  
17 don't agree with for these reasons. 1825 speaks in terms  
18 of -- it's the procedure for paying the witness. How does  
19 a witness get paid? You can't be so -- 1825 relates to  
20 1821. If you're a witness -- the only parties that 1825  
21 speaks about -- it's not parties but persons -- are those  
22 who would otherwise qualify under 1821. It doesn't make  
23 sense to provide for payment of fees under 1821 that do  
24 not establish a procedure. The statutes should be read  
25 together which makes, makes sense to us.

1                   QUESTION: Well, what I'm, what I'm suggesting  
2 is that the procedure that 1825 addresses may well be  
3 simply a procedure for distinguishing some witnesses who  
4 cannot be paid without the certification of a public  
5 defender or a clerk of court as opposed to witnesses who  
6 may be paid on certification of a United States Marshal.

7                   MR. LAZERWITZ: Well, that's true because in  
8 1825(a) you'll notice that there's no provision for  
9 paying -- when the Government subpoenas a witness the same  
10 requirements don't obtain.

11                  QUESTION: So, I guess what that -- well, that  
12 leads to my second question and that is on your reading,  
13 which if I understand it correctly is that there must a  
14 subpoena before a defense witness may be paid, that would  
15 still allow the payment of a defense witness -- I'm sorry,  
16 that would still allow for the payment of the witness fee  
17 to a prisoner called by the Government, wouldn't it?

18                  MR. LAZERWITZ: No, and let me explain why.  
19 First of all, 1825 -- there are two separate questions and  
20 one is -- the first question, the first point that we  
21 raise in our brief, admittedly belatedly, which is whether  
22 this particular witness -- we do concede that Mr. Demarest  
23 was a witness -- presented the right pieces of paper to be  
24 paid. The second question, and the broader question  
25 that's before this Court, is what is the meaning of 1821,

1 and we submit that it makes sense to look at section 1825,  
2 the procedures, in order to understand what Congress was  
3 dealing with in section 1821. And the use of the word  
4 subpoena and again this -- there are no smoking guns in  
5 this case for our position. We are trying to piece  
6 together what's out there and understand the statute. And  
7 the fact that there's been this 200-year practice,  
8 starting with the first witness fee statute, suggests to  
9 us that you can't write this case off out of plain  
10 meaning.

11 QUESTION: Well, fair enough, but the  
12 administrative practice issue is the, is really a separate  
13 argument. Isn't it true that the only textual basis that  
14 you have for distinguishing between some prisoners, at  
15 least, and nonprisoner witnesses is the language of  
16 1825(a). You have no other textual basis for doing that,  
17 do you?

18 MR. LAZERWITZ: Well, our textual basis is in  
19 1821, which is in attendance. And we can --

20 QUESTION: But you're then, as I understand it,  
21 you're defining in attendance by reference to the process  
22 by which the person comes into attendance and that's why  
23 you place the emphasis on the need for a subpoena for a  
24 defense witness as indicated in 1825.

25 MR. LAZERWITZ: That's, that's part of it,

1 Justice Souter. But our position is somewhat -- is  
2 broader and that is, it's not -- I don't want to mislead  
3 the Court, but our position is if you have a subpoena, you  
4 get paid. If you don't, you don't get paid. It's a  
5 little bit more subtle than that.

6 QUESTION: Then, then why don't you forget 1825  
7 completely.

8 MR. LAZERWITZ: Because we think 1825 supports  
9 our position and helps understand what in attendance means  
10 in 1821.

11 QUESTION: Yeah, but if 1825 is supposedly  
12 reflecting your theory of what in attendance means, you've  
13 got to face the fact, haven't you, that 1825 only refers  
14 to defense witnesses, by which I assume they mean  
15 witnesses called by the defense, which would lead you to  
16 the conclusion that a prisoner called by the Government  
17 would get paid and a prisoner called by the defense would  
18 not.

19 MR. LAZERWITZ: If all we were relying on were  
20 section 1825, then your point would be well taken. But  
21 that's not all that we're relying on. A part from 1825's  
22 reference to subpoenas, and I refer you also to 1825(c)  
23 which speaks more generally in terms of subpoenas, we have  
24 first of all the, the older statutes. If yo look at where  
25 this statute came from, the earliest witness fee statutes

1 in 1792 and 1799 spoke in terms of summoning witnesses.  
2 Summoning is the ordinary -- summoning means subpoenaing a  
3 witness. And we know that from Blackstone. We know that  
4 from Contemporary Practice that we cited in our brief.  
5 Congress then changed to the word attend, and it did so in  
6 1796, but then returned to the word summoned in 1799.

7 QUESTION: Did it ever put a subpoenaed witness,  
8 quote and unquote?

9 MR. LAZERWITZ: No, Justice Marshall, no.

10 QUESTION: Well, don't you need that for your  
11 argument?

12 MR. LAZERWITZ: It would make it easier, but we  
13 don't think we need it.

14 QUESTION: Don't you need it?

15 MR. LAZERWITZ: It would help.

16 QUESTION: The statute just says witness.

17 MR. LAZERWITZ: The statute says witness in  
18 attendance.

19 QUESTION: And witness is witness. With or  
20 with -- if a witness walks in out of the street and says  
21 I'd like to talk. If the judge let's him talk, that's a  
22 witness.

23 MR. LAZERWITZ: Well, one of the reason's why we  
24 think it's not that --

25 QUESTION: Is it not?

1 MR. LAZERWITZ: Yes, that's true, Justice  
2 Marshall.

3 QUESTION: And nobody called him. He just  
4 volunteered.

5 MR. LAZERWITZ: And he would not be entitled to  
6 receive the fees under our position.

7 QUESTION: Why not, under your rule?

8 MR. LAZERWITZ: Because he again --

9 QUESTION: Why not?

10 MR. LAZERWITZ: -- and going back to the  
11 hypothetical that was raised this morning before lunch.  
12 Take the example of a party. The party testifies in his  
13 own behalf. It's been settled and no one disputes,  
14 including petitioner, that a party witness is not entitled  
15 to the fees. Petitioner would defend that result by  
16 saying that a party is not a witness.

17 QUESTION: We're not talking about parties.  
18 We're talking about the Government and defendants.

19 MR. LAZERWITZ: Yes, Justice Marshall. I'm  
20 trying to show that the statute's plain terms are  
21 in -- are more ambiguous than at first glance. Now we  
22 submit that a party witness isn't entitled to the fee not  
23 because he isn't a witness, because of course he's a  
24 witness. He testifies in court. That's what a witness  
25 does. But because he is not summoned to court --

1 QUESTION: Where did he -- where did you get  
2 that out of the statute? The statute says witness.

3 MR. LAZERWITZ: It says witness in attendance.

4 QUESTION: You know what a witness is and I know  
5 what a witness is.

6 MR. LAZERWITZ: Yes, I do.

7 QUESTION: And everybody in town knows. And it  
8 applies to about 25 different types, those who are  
9 subpoenaed, those who volunteer, those who are a party,  
10 those who testify under the, the writ. In all, they  
11 didn't draw the line. You've drawn the line, and when you  
12 talk about how this never came up before, I don't know too  
13 many lawyers who will take a case that involves \$30.

14 (Laughter.)

15 MR. LAZERWITZ: I don't know either, Justice  
16 Marshall.

17 QUESTION: All right.

18 MR. LAZERWITZ: The fact that there's been this  
19 consistent practice requires us -- consistent practice,  
20 not just administratively but from the courts and through  
21 history, suggests that there's something more going on  
22 here.

23 QUESTION: Mr. Lazerwitz, is, is the practice  
24 consistent as -- with your entire theory? That is to say,  
25 has it always been the practice uniformly not to pay

1 witnesses unless they are subpoenaed?

2 MR. LAZERWITZ: No, and let me --

3 QUESTION: Ah.

4 MR. LAZERWITZ: -- let me clarify this, the  
5 apparent preoccupation with subpoena.

6 QUESTION: That's your preoccupation.

7 MR. LAZERWITZ: No, it's not. Our preoccupation  
8 is with process. And it's the particular process. The  
9 ordinary process for getting a witness to appear in court  
10 happens to be a subpoena. But for example, let's say the  
11 assistant United States attorney needs a witness to come  
12 down to court tomorrow. He doesn't have the opportunity  
13 to subpoena him. He calls him up and says, I want you  
14 here in court tomorrow and the witness, the man appears in  
15 court tomorrow. He is entitled to a witness fee, because  
16 the process, although he doesn't have the piece of paper  
17 in his hand, he is summoned by the equivalent, so to  
18 speak, of a subpoena to appear in court and he complies  
19 with that subpoena.

20 QUESTION: Well, is it the same if the defendant  
21 calls up his friend and says, come on down and testify for  
22 me and he shows up?

23 MR. LAZERWITZ: He would be a witness. The  
24 problem he would face would be 1825, the procedure for --

25 QUESTION: Well, your answer is that wouldn't be process

1 that you're talking about even though he just uses the  
2 phone like the prosecutor does.

3 MR. LAZERWITZ: If that case occurred, I would  
4 imagine that the witness would be able to be paid, but  
5 there would be -- he would have to have --

6 QUESTION: Despite 1825?

7 MR. LAZERWITZ: Well, he wouldn't be paid unless  
8 he received the subpoena. The difference between treating  
9 those two situations differently is that --

10 QUESTION: You like your witnesses and you don't  
11 like the defense witness.

12 (Laughter.)

13 MR. LAZERWITZ: No, Justice Scalia, it's not  
14 that at all. It's -- the Marshal Service is under 1825  
15 pays witness fees and the Marshal Service can rely on the  
16 United States attorney that this witness in fact was  
17 summoned and he appeared. He doesn't have that same  
18 relationship with the defense attorneys, and so he needs  
19 the piece of paper saying that this man in fact was  
20 called.

21 QUESTION: And why is it that a writ of habeas  
22 ad testificandum isn't a form of compulsory process?

23 MR. LAZERWITZ: It is a form of compulsory  
24 process, but it's not -- there is a difference between a  
25 writ and a subpoena and what was said this morning was

1 somewhat misleading. Although we acknowledge that courts  
2 under rule 17 use the terms writ and subpoena loosely and  
3 interchangeably for that matter, the authority to issue a  
4 writ is not rule 17, it's the habeas corpus statute, 28  
5 U.S.C. 2241 and that's what -- some of the cases that  
6 we've cited in our brief, I believe the Third Circuit  
7 case, United States v. Story, makes that point.

8 QUESTION: Well, I don't see why that's so  
9 critical when you get back to figuring out what in the  
10 world 28, 821 means and you haven't come to grips I think  
11 with the provisions in 1821 that say for example a  
12 subsistence allowance shall be paid to a witness other  
13 than a witness who's incarcerated and down in subsection  
14 (e), an alien who has been paroled and so forth or is  
15 deportable is ineligible to receive the fees. Congress  
16 certainly knew how to say who was going to get fees and  
17 who wasn't.

18 MR. LAZERWITZ: Yes, and we think that the way  
19 to read the statute and the way, the way we read the  
20 statute is to look at (a)(1) and (d)(1) differently. In  
21 (a)(1) the limiting factor is attendance. In (d)(1), the  
22 limiting factor is incarcerated. For example, if -- the  
23 two subsections are perfectly consistent, because if  
24 (d)(1) didn't accept incarcerated witnesses, a prisoner  
25 witness would be entitled to claim the subsistence

1 allowance. But that doesn't mean he's back in (a)(1),  
2 because our submission is he was not in attendance.

3 QUESTION: You say he's, he's not in attendance  
4 unless he's subpoenaed except that, that if he's a witness  
5 for the prosecution he doesn't have to be subpoenaed.  
6 That's, that's the, that's the clear meaning you think  
7 adheres in attendance?

8 MR. LAZERWITZ: No.

9 QUESTION: It means subpoenaed unless it's a  
10 prosecution witness?

11 MR. LAZERWITZ: No, the meaning of in attendance  
12 refers to the process by which they're summoned and that  
13 you make yourself available by complying..

14 QUESTION: But you say that you don't have to be  
15 summoned at all if you're going to be a witness for the  
16 prosecution.

17 MR. LAZERWITZ: Yes, you are summoned, Justice  
18 Scalia. You may not be summoned by the formal piece of  
19 paper in those few instances where that's not practicable.  
20 But you're still summoned. You've summoned yourself. A  
21 prisoner witness is in a much different situation.

22 QUESTION: It just takes somebody to call me up  
23 and summon me? I mean, I mean could -- why can't the  
24 defendant call up somebody and say, I summon you to  
25 appear. The prosecution has no power to summon the

1 person, does it?

2 MR. LAZERWITZ: No, it's -- if you don't have  
3 the subpoena, you can --

4 QUESTION: Right. I mean --

5 QUESTION: Try this hypothetical. They subpoena  
6 John Blue. They issue a subpoena for him and they find  
7 he's in jail. And if he was not in jail he would get  
8 paid, but if he is in jail, he's got a subpoena and a  
9 writ. He wouldn't get paid under your theory.

10 MR. LAZERWITZ: Yes, Justice Marshall, and --

11 QUESTION: And that makes good sense to who?

12 (Laughter.)

13 MR. LAZERWITZ: Well, we think it makes good  
14 sense because that's what Congress has enacted and that's  
15 the way it's been since 1792.

16 QUESTION: Mr. Lazerwitz, may I ask you a  
17 specific question about subsection (d)(1)? That reads, a  
18 subsistence allowance shall be paid to a witness other  
19 than a witness who was incarcerated when an overnight stay  
20 is required at the place of attendance and so on. As I  
21 understand it on your theory, this place of attendance  
22 implies that the witness being referred to is one who has  
23 been summoned in the manner you describe. Is that  
24 correct?

25 MR. LAZERWITZ: Yes.

1 QUESTION: If that is so, then why isn't the  
2 exception other than the witness who was incarcerated a  
3 redundancy?

4 MR. LAZERWITZ: Again --

5 QUESTION: Because it would never apply to such  
6 a person.

7 MR. LAZERWITZ: A witness who was  
8 incarcerated -- if --

9 QUESTION: Because we have a separate subsection  
10 for the witnesses who are detained, so --

11 MR. LAZERWITZ: Yeah, we --

12 QUESTION: -- so this, I assume, can only apply  
13 to a witness who is incarcerated as a prisoner or  
14 otherwise and it seems to me that on your reading the  
15 exception is redundant because such a witness would never  
16 be in attendance.

17 MR. LAZERWITZ: That's one way of reading it,  
18 Justice Souter. We don't -- again, this is not the most  
19 perfectly drafted statute that I've ever come across.

20 QUESTION: No, but I, I guess my problem is I  
21 don't see how I can accept your theory of what attendance  
22 means without finding a redundancy in the exception.

23 MR. LAZERWITZ: Well, there's another, there are  
24 other witnesses, potential witnesses who need to be  
25 excepted under (d)(1). For example, a witness is

1 subpoenaed to appear, an ordinary witness, who is not in  
2 prison. And he comes to court and he's housed overnight  
3 and for the week while the trial is going on and he ends  
4 up in jail on unrelated charges. He's otherwise in  
5 attendance at that point.

6 QUESTION: Well, on your theory didn't he start  
7 out in attendance but once he gets committed to jail on  
8 the unrelated charges, he is no longer?

9 MR. LAZERWITZ: Well, he is in attendance in the  
10 sense that he's, he has complied with the process, he has  
11 been summoned, but he's not entitled to the subsistence  
12 allowance because he finds himself in jail.

13 QUESTION: Okay.

14 MR. LAZERWITZ: Again, the -- under our reading  
15 of the statute, in attendance is critical and does make  
16 sense of the rest of the subsections. It takes care of  
17 the exclusion for the aliens, because otherwise aliens  
18 would, the few aliens --

19 QUESTION: Mr. Lazerwitz, let me just go back to  
20 Justice Souter's question. It seems to me you may have  
21 given up more than you should. Why does the witness have  
22 to be one who's in attendance for that to apply? Why  
23 couldn't it be a witness who's not been summoned? He's a  
24 volunteer witness or he's the defendant himself. If the  
25 term witness includes witnesses who are in attendance and

1 also the defendant, the defendant is not in attendance  
2 within the meaning of your statute because he wasn't  
3 compelled. Why couldn't it -- why couldn't that refer to  
4 the defendant?

5 MR. LAZERWITZ: Well, that's, that's true,  
6 Justice Stevens, and again --

7 QUESTION: And also, why couldn't it also  
8 include volunteer witnesses who would not be in attendance  
9 under your -- but you know you haven't really answered the  
10 question that was put to you earlier. Is a volunteer  
11 witness in attendance or not? There must be a practice  
12 that the Government follows.

13 MR. LAZERWITZ: The hypothetical, the one I can  
14 think of that isn't so farfetched is the prosecutor's in  
15 court trying a case and at the luncheon recess a guy in  
16 the back of the room says, psst, I heard something or I  
17 know something. Put me on the stand. That person would  
18 not be entitled to receive the witness fee because he  
19 hasn't been summoned. He's just there. But he's willing  
20 to testify -- that's fine.

21 QUESTION: I bet he normally gets the fee if he  
22 wants it.

23 MR. LAZERWITZ: Well, in terms of real practice  
24 the -- not to make it more informal, but there's -- the  
25 distinction is pretty much, on the street, off the street.

1 The Government goes out of its -- will go out of its way  
2 to pay witnesses who make an effort or who testify other  
3 than those who are excluded from the statute.

4 QUESTION: I'm more interested in the volunteer  
5 witness for the defense. His brother comes in and  
6 testifies. You don't need to subpoena your brother. Does  
7 he get paid or doesn't he?

8 MR. LAZERWITZ: I think he would, probably in  
9 the sense that the same practice that the Government  
10 follows. After he testifies the defense attorney would  
11 get him a subpoena and then he --

12 QUESTION: It seems to me that really under --

13 QUESTION: The Government will pay people that  
14 they aren't authorized to pay.

15 MR. LAZERWITZ: Well, one example, Justice  
16 White, is the prisoners who aren't convicted. Now under  
17 our construction of the statute those persons fall outside  
18 the scope of the statute and under the Department of  
19 Justice regulation which draws a distinction between in  
20 custody and not, that person would fall out. But in 1900,  
21 the Comptroller General drew a distinction between  
22 convicted and nonconvicted prisoners and said that if  
23 you're not convicted yet, you're entitled to the fee. So  
24 it's not as pristine as we'd like it to be. There are  
25 people that have received witness fees that otherwise

1 perhaps might not. But --

2 QUESTION: I don't know whether we've gotten it,  
3 but you admit that there's nothing in the legislative  
4 history that will help you?

5 MR. LAZERWITZ: Oh, I think there's quite a bit  
6 in the legislative history that helps.

7 QUESTION: Give me just a little bit of it.

8 MR. LAZERWITZ: Again, in the -- the earliest  
9 statutes spoke in terms of summoning witnesses, which by  
10 definition would exclude --

11 QUESTION: Well, isn't -- wasn't this witness  
12 summoned?

13 MR. LAZERWITZ: No, Justice Marshall.

14 QUESTION: You don't say a writ of habeas corpus  
15 ad testificandum is not a summons? It's, it's -- you just  
16 don't obey one of them and you'll see what will happens.

17 (Laughter.)

18 MR. LAZERWITZ: Well, actually that points to  
19 what --

20 QUESTION: You don't call that a summons? No, I  
21 mean seriously --

22 MR. LAZERWITZ: In the sense that it's process.  
23 But the summons is directed to the custodian and that's  
24 one of the distinguishing features here. The prisoner has  
25 no choice. He is going to be in court or at the jail

1 outside the court whether he wants to or not.

2 QUESTION: Isn't that kind of a subpoena?

3 MR. LAZERWITZ: No, it's different. You at  
4 least have --

5 QUESTION: Well, you disobey one and you'll find  
6 out.

7 MR. LAZERWITZ: Yes, you will, but the prisoner  
8 doesn't even have that option unless he goes and -- I --

9 QUESTION: Well, then he's summoned.

10 MR. LAZERWITZ: He's -- again, we are  
11 speaking -- we are using words that on the one hand could  
12 be termed colloquial.

13 QUESTION: I'm not. I'm only using the word,  
14 one word, witness. I don't need any other words.

15 QUESTION: In the case of a prisoner, of a  
16 prisoner awaiting trial, who, who is wanted as a witness,  
17 you say the Comptroller General's ruling allows him to be  
18 paid?

19 MR. LAZERWITZ: In 1900, he drew that  
20 distinction.

21 QUESTION: He would surely have to have a  
22 subpoena, a habeas corpus ad testificandum to get -- a  
23 subpoena wouldn't do it, I would think.

24 MR. LAZERWITZ: A subpoena would not and again  
25 that's -- in terms of where the custodial status of a

1 witness moves away from the convicted prisoner, we do get  
2 into a gray area of whether they're entitled to fees under  
3 the statute. Under our construction of the statute and  
4 under the DOJ regulation, if you're in custody that's the  
5 distinguishing feature. Custody in the sense of the  
6 State's custody, loss of liberty.

7 QUESTION: Well, do the DOJ, DOJ regulations  
8 cover this case?

9 MR. LAZERWITZ: They do, but not in the sense  
10 that the -- they're not -- we don't rely on them as a law  
11 or for chevron purposes. Because the department, the  
12 Attorney General promulgated those regulations as a matter  
13 of, so to speak, housekeeping.

14 QUESTION: Well, that may be, but does the  
15 regulation -- under the regulation this particular  
16 prisoner would not be entitled?

17 MR. LAZERWITZ: He would not be because the only  
18 persons in custody who are entitled to receive witness  
19 fees are the ones set out in the statute itself.

20 QUESTION: How long has that regulation been in  
21 effect?

22 MR. LAZERWITZ: It's only been -- it's only been  
23 promulgated since '86, but that has been the Department's  
24 practice since, since we can document the practice  
25 from -- this has been the practice from the 18th century

1 and the practice -- if you -- the reason why the history  
2 is important is the idea of a witness isn't simply the  
3 testimony in court. We think the process is part and  
4 parcel of being a witness and we know that because of the  
5 idea of attendance. Attendance connotes getting there and  
6 it brings out the point of the, of the volunteer witness.  
7 And a prisoner is in a much different position from  
8 everyone else who can be a witness, because he is going to  
9 be at the courthouse whether he wants to or not, whether  
10 he's going to testify or not. And that's the  
11 distinguishing feature that's consistent throughout the  
12 legislative record and, yes, we don't have statements in  
13 the legislative history that, well, of course, prisoners  
14 don't get paid. But this has been the practice and the  
15 practice we submit stems from the earlier statute.

16 In terms of policy, the policy is somewhat murky  
17 but to look at it from a practical standpoint, today it's  
18 obvious that most prisoners, and convicted prisoners, do  
19 work in their penitentiary. In the Federal system the  
20 average pay is 30, 40 cents an hour and you can't work  
21 more than 7 hours a day. Congress provided the witness  
22 fee not only to compensate for the burden of testifying  
23 but as some sort of an inducement, as a -- it's your duty.  
24 We will pay you. It seems somewhat farfetched that  
25 Congress would be paying only \$30 a day to your ordinary

1 witness and the general category witnesses, which is less  
2 than the minimum wage but then turn around and provide  
3 that to convicted prisoners, which would be a bonanza.

4 QUESTION: Do little children get the witness  
5 fees?

6 MR. LAZERWITZ: Yes, they do. And the  
7 Department will usually make special arrangements to pay  
8 travel expenses for the child's guardians or parents.

9 QUESTION: Including children who are too young  
10 to work under State law I would assume?

11 MR. LAZERWITZ: Yes, including those.  
12 Prisoners, of course, are in a different position. And in  
13 terms of if the Court wishes to look at the policy and how  
14 it makes sense, providing this sort of bonanza to prisoner  
15 witnesses would, could create disincentives. And the  
16 disincentive would be to become a good witness. I want  
17 to be a witness. I have information to give to the court  
18 for both the defense and the Government. And  
19 we -- Congress -- there's no reason to assume that  
20 Congress wanted to encourage that when we have this  
21 unending practice of drawing the distinction between  
22 convicted prisoner witnesses and all others. And we  
23 concede that as you get away from these -- this -- these  
24 two ends of the spectrum there are difficulties. But the  
25 one thing we do know and no one has been able to dispute

1 is that convicted prisoners have fallen outside the scope  
2 of the statute since the beginning and the reason is, we  
3 submit, is the process. And I don't want to leave the  
4 Court with the impression it's just a piece of paper  
5 calling it a subpoena or a writ, but the process of how  
6 the prisoner gets to court. And because he gets to court  
7 differently from everyone else, and differently from the  
8 way Congress envisioned witness attendance in 1792 and  
9 throughout its history, he's not entitled to receive that  
10 fee under the statute as it's currently written.

11 If there are no other questions, thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

13 Lazerwitz. The case is submitted.

14 (Whereupon, at 1:35 p.m., the case in the  
15 above-entitled matter was submitted.)  
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# CERTIFICATION

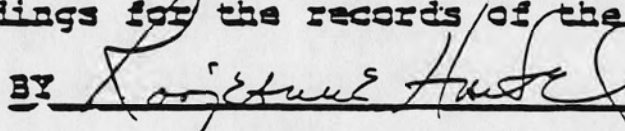
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