No. 76-1660 CFX
HUTTO [Comm'r of the Dept. of Corrections] v. FINNEY

Cert to CA 8 (Heaney, Ross, Van Pelt)

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I. INTRODUCTION

Petrs in this case are the Commissioner of the Arkansas Department of Correction and other Correction Department officials. The state of Arkansas itself is not named as a petr here and was not a party below. Resps are inmates of penal institutions administered by the Arkansas Department of Correction. To borrow CA 8's description below, this petn is another chapter "in the seemingly endless litigation involving the constitutionality of the Arkansas state prisons." Petn Appx at 1.

This case raises several related questions concerning the validity of the DC's award of attorney's fees to resps which--though nominally against petrs--will be paid and should be paid out of state funds." Petn Appx at 83. Those questions are:

a) Whether the Civil Rights Attorney's Fees Awards Act of 1976 (reprinted in Petrs Br. at 3-4) authorizes an award of attorney's fees to be paid from the funds of a state department of correction;

b) Whether the Act authorizes such an award when the state is not a formal party to the litigation;

c) Whether the Act applies to cases pending on the date of enactment;

d) Whether, if the Act does not authorize an award of attorney's fees in this case, such an award is authorized under the "bad faith" exception to the American Rule on attorney's fees. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

A further question presented by this case is whether the DC was correct in its conclusion that the Eighth Amendment's prohibition of cruel and unusual punishment precludes use of indefinite punitive isolation (without rehabilitative purpose) for infractions of prison discipline.

As a preliminary matter, it should be noted that resps have filed a Motion to Dismiss Writ as Improvidently Granted, claiming that the issues noted above are--in light of circumstances of which the Court was unaware when granting cert--not really presented by this case. Resps note that the Arkansas legislature, subsequent to CA 8's decision below, enacted a law expressly permitting state officials against whom damages are awarded in state or federal court litigation to receive indemnification from the state. See Resps' Br. at 3-5 for the text of the statute. Resps argue that the effect of the state law on the instant case is that whatever the Court decides on the various attorney's fees questions, the practical result will be the same: resps will be able to recover attorney's fees paid out of the state treasury.

Resps' Motion to DIG also called attention to a Clarifying Memorandum Opinion issued by the DC after the initial decision in this case which, for some reason, was not included in petrs' appx or discussed in any of the earlier submissions to this

Court. In that unreported Opinion, the DC stated that inmates could be sentenced to additional time in punitive confinement beyond the thirty-day maximum if they commit new offenses while serving in such punitive status. Motion to DIG at 4. Resps contend that this Clarifying Opinion attenuates the DC's original holding and renders unnecessary plenary consideration of the punitive isolation question.

The Court did not rule on the Motion to DIG and did not request a response. Rather, it postponed disposition of the Motion until oral argument. As of this writing, petrs have not responded, sua sponte, to the Motion.

In my opinion, the argument for DIG-ing the case is not persuasive, at least not on the basis of the submissions now before the Court. Neither of the points made in the Motion to DIG speaks to the Court's jurisdiction--both are no more than prudential reasons for DIG-ing. As to the attorney's fees issue, three specific points should be made. First, it is not clear that the Arkansas statute applies to this case which had already been affirmed on appeal when the law was enacted. Further, the law is limited to "actual, but not punitive, damages" which may not include attorney's fees. And, most importantly, if this Court were to conclude that attorney's fees can not be awarded against states under any circumstances, then reversal of the decision below would be compelled without regard to the Arkansas statute.

The punitive confinement issue has, similarly, not disappeared. The DC specifically found that "[w]hile most inmates sentenced to punitive isolation are released to population within less than fourteen days, many remain in the status in question for weeks or months, depending upon their attitudes as appraised by prison personnel." Petn Appx at 68. It would seem plain from this statement that the DC's holding, even as amended in the Clarifying Memorandum, does effect a change in prison policy in limiting punitive confinement to 30 days (absent proof of another serious infraction of prison discipline). And the rationale for this limitation--consisting partly of the assumption that such confinement was unconstitutional because it served no rehabilitative purpose--still merits judicial review.

II. FACTS

The various stages of the litigation over Arkansas' prison conditions have stretched out over almost a decade. The facts pertinent here can, however, be summarized briefly. Resps instituted this action as a class suit under 42 U.S.C. §1983 as a challenge to allegedly unconstitutional conditions of confinements for inmates of Arkansas penal institutions.

The DC (Cir. J. Henley, sitting by designation) held the Arkansas prison system unconstitutional in certain respects. The court ruled, inter alia, that the conditions of confinement for inmates placed in indefinite punitive isolation constituted cruel and unusual punishment. The court ordered the upgrading of the conditions of those placed in punitive isolation and appeared to prohibit resps from confining any inmate in punitive isolation for more than 30 days. Petn Appx at 12-13. The DC awarded resps' certain litigation costs, including an attorney's fee of $20,000 to be paid from funds allocated to the Department of Correction. Petn Appx. at 14. The DC based its award on the principle that attorney's fees can be awarded against a state as "ancillary" to prospective relief if the state litigated the case in bad faith.

Shortly after the DC's opinion was issued, petrs submitted a Motion to Vacate and Alter the opinion. It was in response to this Motion that the DC issued its clarifying order which was discussed supra and which is reproduced in resps' Motion to DIG.

On appeal, CA 8 affirmed (with almost no discussion) the DC's ruling in its initial opinion which appeared to limit the duration of sentences to punitive isolation. CA 8 also affirmed the award of attorney's fees and awarded the resps an additionaly $2,500 in attorney's fees for services on the appeal.

CA 8 relied, for this latter holding, on The Civil Rights Attorney's FeesAwards Act of 1976, which had been enacted since the DC's decision and on the "bad faith" exception to the "American Rule" on attorney's fees. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

III. PETITIONERS' CONTENTIONS

A. The Civil Rights Attorney's Fees Awards Act

This Act, approved on October 19, 1976, states:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979 [42 U.S.C. §1983], 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. 1979, 42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Petrs submit that the language of the Attorney's Fees Act does not authorize a federal court to require any State to pay attorney's fees. The basis of petr's argument is that, in passing the Act, Congress failed specifically to amend 42 U.S.C. §1983 to allow states to be sued thereunder.

Petrs concede that this Court in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), held that in a suit brought pursuant to 42 U.S.C. §2000 et seq. there was statutory authorization for the award of attorney's fees against a state. But petrs argue that Fitzpatrick is not controlling in this case since The Attorney's Fees Act does not expressly contain "threshold . . . congressional authorization" to allow a state to be named as a defendant in a suit brought pursuant to 42 U.S.C. §1983. 427 U.S. 445 at 452. Such authorization is, according to Fitzpatrick, a necessary prerequisite to the award of attorney's fees.

The statute construed in Fitzpatrick, 42 U.S.C. §2000e(a), provided that those subject to suit include "governments, governmental agencies [and] political subdivisions." The Attorney's Fees Act did not amend 42 U.S.C. §1983 to include a State as a person subject to its provisions. And, as the Court said in Fitzpatrick (explaining its decision in Edelman):

> The Civil Rights Act of 1871, 42 U.S.C. §1983 had been held in Monroe v. Pape, 365 U.S. 167 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant.

427 U.S. at 452. Because The Attorney's Fees Act did not amend §1983, petrs argue, Congress could not have intended to change this (by now well-established) limitation on the scope of the section.

Petrs also take issue with CA 8's holding below that The Attorney's Fees Act should be applied to this case even though the DC had made the award of attorney's fees prior to the enactment of the statute. In support of its holding, CA 8 relied on Bradley v. Richmond School Board, 416 U.S. 696 (1974), and the legislative history of the Attorney's Fees Act. In Bradley, Justice Blackmun for a unanimous court held that the provison of the Education Amendments Act of 1974 granting federal courts authority to award the prevailing party a reasonable attorney's fee when appropriate on entry of a final order in a school desegregation case applied to attorney's services that were rendered before such provision was enacted where the propriety of the fee award was pending resolution on appeal when the statute became effective. In that case it was said that "a Court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice . . ." 416 U.S. at 711.

In this case, petrs claim, CA's decision to apply the Act--unlike this Court's decision in Bradley--did result in manifest injustice, since it directly affected "the budgetary and fiscal policy of the State." Petr's Br. at 10.

Moreover and more importantly, petrs claim that application of the Act to a state infringes on Eleventh Amendment rights.

Conceding that Congress can override the Eleventh Amendment--as it did pursuant to section 5 of the Fourteenth Amendment in enacting Title VII (see Fitzpatrick v. Bitzer, supra)--petrs argue that Congress manifested no such intent in passing The Attorney's Fees Act.

B. The Eleventh Amendment

CA 8, in affirming the DC's award of attorney's fees, relied not only on The Attorney's Fees Act, but also, as an alternative ground, on the DC's finding of bad faith on the part of petrs. CA 8 said:

> Although in view of the statute, we are not required to pass on the issue of bad faith, the record fully supports the finding of the district court that the conduct of the state officials justified the award under the bad faith exception enumerated in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-259.

Petrs argue that an award of attorney's fees against a state under the bad faith exception is prohibited by the Eleventh Amendment. In making this argument, petrs point out that although the Eleventh Amendment bars suits against the state by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in federal courts by its own citizens as well as by citizens of another state. See Edelman v. Jordan, 415 U.S. 651, 662-63 (1974), and cases cited therein.

Petrs also argue that the absence of the state of Arkansas as a named party to this action does not make the Eleventh Amendment infringement any less offensive since the DC's order awarding attorney's fees clearly requires that the payment be made from the state treasury. "It is also well established that even though a state is not named as a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." Edelman v. Jordan, 415 U.S. 651, 663 (1974); Ford Motor Company v. Dept. of Treasury, 323 U.S. 459 (1945).

Petrs argue that the state has not waived its Eleventh Amendment protection by operating a prison system which rightfully can be subject to suits for injunctive relief under 42 U.S.C. §1983.[1] Petrs again quote Edelman: "In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'" 415 U.S. at 678. Petrs argue that, on this analysis, waiver simply cannot be found on the facts of this case.

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[1] This proposition is undoubtedly correct. Resps do not even suggest that petrs have waived their Eleventh Amendment immunity. As indicated infra, however, resps do argue that, for other reasons, the Eleventh Amendment is no bar to the attorney's fee awarded below.

Petrs also argue that attorney's fees cannot be awarded against a state on the theory that they are merely "ancillary" to an award of prospective effect. See Edelman v. Jordan, supra, 415 U.S. 651, 668. Rather, the effect is direct and substantial. Accordingly, the award is unconstitutional:

> The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting state. Employees of the Dept of Public Health v.Missouri,411 U.S. 651, 668.

Thus, in petrs' view, the award of attorney's fees that was ordered below is invalid, on Eleventh Amendment grounds, whether the ostensible justification is the Attorney's Fees Act or the "bad faith" rationale.

C. Indefinite Punitive Isolation.

The DC, in enjoining the use of indefinite punitive isolation,stated: ". . . . punitive isolation as it exists at Cummins [one of the Arkansas prisons] today serves no rehabilitative purpose, and . . . is counter-productive. It makes bad men worse. It must be changed." Petn Appx at 71. CA 8 quoted this passage from the DC's opinion and stated that it affirmed "this holding on the basis of Judge Henley's well reasoned opinion." Petn Appx at 3-4.

Petrs take strong exception to any suggestion in the courts below that punitive isolation must, in order to satisfy the Eighth Amendment's mandate, serve a rehabilitative purpose. Petrs argue that the test as to what constitutes cruel and unusual punishment is:

> First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime. Gregg v. Georgia, 428 U.S. 153 (1976).

This test does not preclude a particular form of punishment because it serves no rehabilitative purpose--but that is what the DC purported to do. Petrs rely, inter alia, on a recent statement by CA 1: " . . . we are not persuaded that courts' occasional references to the penological purposes served by various punishments establishes a constitutionally based test for reviewing prison practices." Nadeau v. Helgemoe, 561 F.2d 411, 416 (1977). More to the point, the practice of indefinite sentences to punitive isolation for violation of prison disciplinary rules has been upheld by two CA's. Sostre, v. McGinnis, 442 F.2d 178, 193 (CA 2 en banc,1971); Mukmuk v. Comm'r of the Dept. of Correctional Services, 529 F.2d 272, 277 (CA 2 1976).

Petrs contend that there was no evidence introduced in DC to show a systematic abuse of punitive isolation, and the DC did not give sufficient weight to the views of the pertinent prison officials concerning the need for indefinite punitive isolation.

IV. RESPONDENTS' CONTENTIONS

Resps address the same three, broad issues as petrs, although in different order.

A Indefinite Punitive Segregation

Resps noted that the Eighth Amendment, which limits how long (Weems v. United States, 217 U.S. 349 (1910)) and whether (Robinson v. California, 370 U.S. 660 (1962)) a person can be sentenced to jail, restricts as well the treatment to which he can be subjected while so incarcerated. The Eighth Amendment prohibits not only the barbarous methods of torture and mutilation generally outlawed in the 18th Century but prohibits also practices repugnant to "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86,101 (1958).

Application of the constitutional requirements to the circumstances at a particular facility will raise a variety of factual and legal issues. Some practices, such as the deliberate withholding of medical attention, are per se violations of the Eighth Amendment. Estelle v. Gamble, 50 L.Ed. 2d 251 (1977). Assessing other possible abuses, such as an alleged inadequacy of food or heat, will involve a question of degree. In other cases, although no single practice may violate the Constitution, the combined effect of several practices may do so. Gates v. Collier, 501 F.2d 1291, 1309

(CA 5 1974).

The disputed 30 day limitation on punitive segregation was part of the court ordered remedy for the unconstitutional conditions the DC found in the punitive facilities in 1976. The principal elements on which the DC based its finding of a constitutional violation included severe overcrowding, the lack of an adequate diet, and physical attacks on inmates by guards and other inmates. Petrs do not question the holding of the lower courts that the 1976 conditions constituted cruel and unusual punishment.

However, in resps' view, this case does not--contrary to petrs' suggestion--present the question whether indefinite punitive segregation is unconstitutional. Its opinion declared only that "segregated confinement under the punitive conditions that have been described" (Petn Appx at 73, emphasis in original) in its exhaustive opinion violated the Eighth Amendment. The primary if not the exclusive impact of the decision below is on the operation of one building (the East Building at the Cummins facility) among all of the buildings in the Arkansas prison system. While other lower courts in other cases have been asked to declare such indefinite isolation impermissible in all cases, no such determination was made in this case.

Even those courts which have addressed that issue and concluded that indefinite segregation is now unlawful per se have emphasized that such segregation might be unconstitutional "depending on the conditions of segregation." Sostre v. McGinnis, supra, 442 F.2d 178, 193, n.23 (CA 2 1971).

There is no dispute in this case as to whether the 30 days of punitive isolation permitted by the DC is too short to serve as an adequate punishment for any particular major infraction. If, as resps contend, some limit on the use of punitive segregation was appropriate, petrs do not urge that a period other than 30 days should have been chosen. On the contrary, petrs' own internal regulations prohibit the imposition for a particular offense of more than 15 days of punitive isolation. Further, as the DC noted in its Clarifying Memorandum Opinion, petrs can impose successive sentences of punitive segregation for successive major infractions.

Resps close their argument on this point by claiming that the 30 day limitation was reasonably adapted to remedy the proven violation. The 30 day rule limited the extent to which an inmate would be subject to the conditions found by the DC, many of which would have been difficult to alter directly. The limitation also lowered the average population in the punitive facilities and thus reduced the degree of overcrowding. This was a less intrusive remedy than

attempting to regulate and monitor in great detail the events and practices in the punitive facilities.

B. The Eleventh Amendment

The DC awarded resps attorney's fees on the ground that petrs had acted in bad faith and the court directed that petrs pay that award out of state funds under their control. The finding of bad faith was affirmed by the CA and is not questioned here. The general authority of the federal courts to award fees in light of such conduct is well established. Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240, 259 (1975).

Resps argue that the Eleventh Amendment does not preclude such an award of counsel fees. State officials may be directed to make expenditures from public funds under their control so long as that expenditure is "ancillary" to the injunctive relief. Milliken v. Bradley, 53 L.Ed. 2d 745 (1977). This Court, by its decisions and practice, has recognized--resps claim--that costs are ancillary and thus may be awarded against a state. Fairmont Creamery v. State of Minnesota, 275 U.S. 70 (1927). Counsel fees, where awardable, are traditionally regarded as part of costs. Like costs, counsel fees are not the gravamen of an action, are not incurred to a significant degree if the action is resolved immediately after filing, and are not measured in terms of the monetary loss resulting from the defendant's violation of a legal duty.

However, resps contend that even if--as petrs suggest--counsel fees must be regarded as a form of damages, the state is still liable. As explained in Part I, supra, recently enacted state legislation requires the state to pay "actual . . . damages adjudged by a state or federal court." Thus, resps argue, the state would be legally required to pay the attorney's fee even if this Court were to hold that such a fee can be awarded only against state officials but not against the state itself.[2]

C. The Attorney's Fees Act

Resps also argue in support of CA 8's holding below that an award of attorney's fees against petrs is authorized by the Attorney's Fees Act. Although the Act does not specify against whom fee awards are to be made, such awards are traditionally made, not only against the named defendant, but also against an interested party which interjects itself into the case and controls the litigation (as the state did here). In §1983 cases, the city commonly interjects itself into the case in this manner. The House and Senate Reports on the legislation that became the Attorney's Fees Act expressly stated that city or state funds should be used to pay counsel fees awards in civil rights actions in which the named defendant is a city or state official.

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[2]The obvious fallacy in this contention has already been pointed out. The Arkansas statute in question conditions the state's liability on there being a valid award of damages against a state official. If the Court holds that attorney fees cannot be awarded against a state or one of its officials acting in his official capacity, then the state statute would not come into play.

Congress has the authority under section 5 of the Fourteenth Amendment to subject states to monetary awards in federal court. Fitzpatrick v. Bitzer, 427 U.S.445 (1976). The legislative history demonstrates that Congress intended to invoke that authority. Resps argue, in short and contrary to petrs' assertions, that Congress framed the Attorney's Fees Act in a manner sufficient to achieve the purpose of making attorney's fees awardable against states in §1983 actions.

V. AMICUS CURIAE BRIEFS

A. Brief of the United States in Support of Respondents

The amicus brief of the United States addresses only the attorney's fees question. It noted that the Attorney's Fees Act was passed in response to this Court's decision in Alyeska, supra. The Act permits a federal court, in its discretion, to award reasonable attorney's fees to prevailing parties in suits to enforce the provisions of a number of civil rights statutes, including R.S. 1979 (42 U.S.C. §1983), pursuant to which this action was brought.

In the government's view, CA 8 correctly ruled that the Act authorizes the award of attorney's fees in this case, to be paid from the funds of a state agency. The Act specifically authorizes an award in cases--such as this one--brought under

§1983. Defendants in cases brought under §1983 typically are state officials acting under color of state law, whose legal defense ordinarily is provided by the State. Congress not only intended the Act to authorize the award of attorney's fees in such cases, but also specifically anticipated that such awards would normally be paid from state funds. Since the Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment, it abrogates any Eleventh Amendment immunity that the State might otherwise have enjoyed. Fitzpatrick v. Bitzer, supra. Further, the government contends, because under Edelman v. Jordan, supra, 415 U.S. 651, 668, the attorney's fees award has only an "ancillary effect" on the state treasury, it therefore, under the rationale of Ex parte Young, 209 U.S.123, falls outside the prohibitions of the Eleventh Amendment. Lastly, the government states simply that, for the reasons discussed in the brief for the United States in Zurcher v. The Stanford Daily, No. 76-1484, and Bergna v. The Stanford Daily, No. 76-1600, the fact that this action was commenced before the passage of the Act does not defeat the award in this case.

B. Other Amicus Briefs in Support of Respondents

Briefs in support of respondents--though limited to the attorney's fees question--were also filed by the Lawyers' Committee for Civil Rights Under Law, and by a group of

public interest organizations headed by the ACLU. These briefs add nothing to the arguments already discussed.

C. Amicus Briefs in Support of Petitioners

Briefs in favor of petitioners--also limited to the attorney's fees question--have been filed by, respectively, Texas, Pennsylvania, Mississippi, Iowa, and California. The tenor of each of these arguments is as follows.

The Eleventh Amendment bars the recovery of attorney's fees from a state treasury. Those circuits which have held otherwise have misconstrued this Court's opinion in Edelman v. Jordan, 415 U.S. 651 (1974). This conclusion cannot be altered by labeling an award of attorney's fees against the state an "equitable remedy" or a "taxation of costs." The Attorney's Fees Act does not abrogate a state's Eleventh Amendment immunity and any attempt by Congress to do so would exceed the permissible scope of section 5 of the Fourteenth Amendment.

Even if the Act does otherwise allow the award of attorney's fees in this situation, CA 8's retroactive application of the Act is manifestly unjust.

VI DISCUSSION

A. The Attorney 's Fees Act

1. It should first be noted that the fact the state is not a named party to this action is irrelevant. (Petrs mention this issue only in the statement of their first question and do not return to it; nonetheless it should be addressed in the Court's opinion.)

The established rule is that the Eleventh Amendment may come into play "even though the State is not named a party to the action." Edelman, supra, 415 U.S. at 663; see also, eg, Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945). More fundamentally, the argument misapprehends the nature of states vis-a-vis the Fourteenth Amendment and the Amendment's understanding of the manner in which the states act. As the first Mr. Justice Harlan stated in Chicago B & Q R.R. v. City of Chicago, 166 U.S. 226, 233-34 (1896), citing inter alia, Ex parte Virginia, 100 U.S. 339, 346, 347 (1880):

> But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, "violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state." This must be so, or, as we have often said, the constitutional prohibition has no meaning, and "the state has clothed one of its agents with power to annul or evade it."

2. It is equally clear that the suggestion that the Act does not apply to cases pending when it was enacted is without merit. See Civil Rights Attorney's Fees Awards Act of 1976--Source Book: Legislative History, Texts, and Other Documents, at 202-203 (comments of Senator Abourezk); 212 n. 6 (House Report); 247 (Rep. Anderson); 255-56 (Rep. Drinan); 272-75 (motion by Rep. Ashbrook to recommit the bill to add an amendment to "exempt from the coverage of this act all of those hundreds of cases which are pending right now" defeated). See also Bradley v. Richmond School Board, supra, 416 U.S. 696 (1974). The lower courts which have considered the question are in agreement that that the Act does apply to pending cases. See, e.g., Gore v. Turner, 563 F.2d 159 (CA 5 1977); Wharton v. Knefel, 562 F.2d 550 (CA 8 1977).

3. Petrs accurately note that Congress did not provide (when they passed the Attorney's Fees Act) for the naming of states or their agencies as defendants in cases brought under 42 U.S.C. §1983. Thus, it seems that Congress did not intend, in passing the Act, to expand the class of defendants who can be sued under §1983. And under Fitzpatrick v. Bitzer, supra, 427 U.S. at 452, following Monroe v. Pape, 365 U.S. 167, 187-191 (1961), municipalities and states cannot be sued under §1983. (Of course, the Court is presently considering, in Monell v.

Dept. of Social Services, No. 75-1914, whether to overrule Monroe.) Although no one suggests that §1983 prohibits a suit against state officials (as in this case) there is the question--which, indeed, is raised in Monell--whether damages can be awarded against a state official in a §1983 suit when those damages would come out of the state treasury.

But the preliminary and essential question is whether an award of attorney's fees can be considered "damages" at all. If such an award can be considered "damages" then it would appear to be proscribed not only under §1983 (subject, of course, to the Court's decision in Monell) but also under the Eleventh Amendment as interpreted in, e.g., Edelman.

4. Of course, it can be argued--as resps do--that in enacting the Attorney's Fees Act, Congress overruled, pursuant to its authority under Section 5 of the Fourteenth Amendment, the Eleventh Amendment to the extent that it prevents an award of attorney's fees. And this view has been adopted by some of the lower courts. See, e.g., Gates v. Collier, 559 F.2d 241 (CA 5); Bond v. Stanton, 555 F.2d 172 (CA1); Rainey v. Jackson State College, 551 F.2d 672 (CA 5).

However, without going in to an exhaustive discussion, I must express my view that the legislative history is simply too equivocal to support such an interpretation. When Congress purports to abrogate a constitutional amendment--acting pursuant to its authority under a different constitutional amendment--its intentions should be manifest. Abrogation of a constitutional amendment by implication should not be tolerated.

Accordingly, since I do not believe the Eleventh Amendment was abrogated by the passage of the Act, the question becomes whether the Eleventh Amendment precludes the award of attorney's fees against a state.

B. The Eleventh Amendment

The question whether counsel fees are among the remedies ordinarily precluded by the Eleventh Amendment has been before the Court on three previous occasions. In Sims v. Ames, 340 F.Supp. 691, 695 (N.D. Ala. 1972), counsel fees were awarded against elected Alabama state officials in their official capacity. The state attorney general appealed, claiming such an award was tantamount to the award of a money judgment against the state of Alabama in direct violation of the doctrine of sovereign immunity, but this Court unanimously affirmed the award without opinion. 409 U.S. 942. In Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975), the majority, while finding no occasion to discuss

the Eleventh Amendment issue, 421 U.S. at 269, n. 44, noted that the award upheld in Sims rested inpart, as here, on the bad faith of the defendants. 421 U.S. at 270, n. 46. In Fitzpatrick v. Bitzer, supra, the majority again did not reach the issue, 427 U.S. at 457, but Mr. Justice Stevens concurred on the ground that counsel fees, like other litigation costs, were not subject to the Eleventh Amendment. 427 U.S. at 460.

The CA's are divided on the question. Three circuits have held such awards permissible. Souza v. Travisono, 512 F.2d 1137 (CA 1 1975); Class v. Norton, 505 F.2d 123 (CA 2 1974); Jordan v. Fusari, 496 F.2d 646 (CA 2 1974); Brandenburger v. Thompson, 494 F.2d 885 (CA 9 1974). Two circuits have concluded that the Eleventh Amendment prohibits such awards. Jordan v. Gillegan, 500 F.2d 701 (CA 6 1974); Taylor v. Perini, 501 F.2d 899 (CA 6 1974); Taylor v. Perini, 501 F.2d 899 (CA 6 1974); Skehan v. Board of Trustees, 503 F.2d 31 (CA 3 1974). Two circuits are divided. Thonen v. Jenkins, 517 F.2d 3 (CA 4 1975) (awards permissible); Hallmark Clinic v. North Carolina Dept. of Human Resources, 519 F.2d 1315 (CA 4 1975) (awards prohibited); Milburn v. Huecker, 500 F.2d 1279 (CA 5 1974) (awards permissible); Named Individual Member v. Texas Highway Dept., 496 F.2d 1017 (CA 5 1974)(awards prohibited).

1. Bad Faith Attorney Fees Awards

The legitimacy of bad faith attorney's fee awards is, I think, an easier question than the legitimacy of attorney's fees awards under the Attorney's Fees Act. A federal court, like any other court, must have control over the behavior of the parties before it to ensure that litigation will proceed in a fair and efficient fashion. Thus federal courts are invested with a broad array of powers which help them to deal effectively and sensitively with the diverse problems which arise in the course of litigation. (e.g., summary contempt power, power to punish court officers). This array of powers is equally important to the proper functioning of the court in cases involving states or their officials.

Indeed, since the public interest is often implicated in lawsuits involving state government, it would seem particularly important that the federal courts be fully capable of regulating the conduct of the litigation by the parties. Because the power to award attorneys' fees to a party who meets with bad faith in his opponent's conduct of the litigation is a means of controlling a potentially important problem in the trial process, the federal courts ought to be permitted to retain this power in litigation involving states or their officials.

2. The Attorney's Fees Act

Attorney's fees awards under the Act would seem, initially, to be inconsistent with the Court's decision in Edelman where the Court approved burdens upon the state treasury when they flowed inevitably from valid prospective decrees. An award of fees is not a logically inevitable consequence of a decree. However, the idea of awarding fees as a mean of achieving future compliance with federal law seems consistent with the prospective thrust of the Edelman opinion. Edelman implicitly recognized the importance of the federal courts' ability to require future compliance by the states. It would seem consistent with this emphasis on future compliance to impose on the states not only the cost of that compliance, but also the costs of achieving it.

Moreover, these awards would not seem to be the kind of "retroactive" relief proscribed by the Edelman Court. In refusing to approve retroactive payments in Edelman, Justice Rehnquist emphasized their resemblance to damages. 415 U.S. at 668. The DC's retroactive award, he noted, was "a form of compensation . . . measured in terms of a monetary loss resulting from a past breach of legal duty on the part of the defendant state officials." Awards of attorney's fees do not seem to fall within this definition. While they reimburse litigants for past expenses incurred as a result of officials' prior actions, they differ from damages in several respects. First, they do not compensate for injuries sustained by the plaintiff, but rather reimburse expenses incurred in the process of obtaining a remedy. Second, because the basic purpose of these awards is to induce litigants to vindicate the public interest, rather than to compensate the victims of unlawful state action, fee awards are properly not measured solely in terms of the time and money expended in winning the suit. While the market value of the services rendered by the lawyer may be the prime factor in evaluating the size of the fee award, the impact of the case on the law and on the and on the lives of private citizens may also be taken into account. And even if attorney's fees are regarded as compensation for prior losses, these losses arise in the course of obtaining

prospective relief and hence, unlike damages, may be characterized as a financial burden created by the process of adjusting future state policy to the demands of federal law.

Finally, it should be noted that, because the sums involved in such awards would not generally be large, serious disruption of the state's budget seems unlikely to occur.

Accordingly, I think that the attorney's fees awarded below are permissible both under the Act and under the bad faith exception. However, since the bad faith exception is the clearer case, the Court may wish to affirm on this alternative ground without reaching the validity of the attorney's fees award under the Act

C. The Indefinite Punitive Isolation

In purporting to limit the period of time during which a prisoner may be kept in punitive isolation, the DC's exhaustive opinion took careful note of the many features that made punitive isolation so very unpleasant. These factors include overcrowding, inadequate diet, lack of exercise, abuse by other prisoners, and the removal of mattresses from the cells during the day which deprives prisoners of a place to lie down during the day.

In light of all these conditions, the DC felt that the

period of confinement should not exceed 30 days. (As noted supra, this was amended by the DC to allow for extensions of confinement if there were new violations by the prisoner.) Thus limiting the period of confinement also serves secondary purposes, of course, such as reducing the problem of overcrowding in the punitive isolation cells. (It should be noted that "isolation" is something of a misnomer--sometimes the isolation cells contain as many as four prisoners.)

However, in the course of its opinion, the DC did say that:

> The Court agrees with Dr. Arthur Rogers, a clinical psychologist who testifed as an expert in the 1974 hearings, that punitive isolation as it exists at Cummings today serves no rehabilitative purpose, and that it is counterproductive. It makes bad men worse. It must be changed. Petn Appx at 71.

CA 8 noted that the DC had held "inter alia, that confinement in punitive isolation for more than thirty days is cruel and unusual punishment and thus impermissible. Petn Appx 3-4. CA 8 went on to "affirm this holding on the basis of Judge Henley's well reasoned opinion." Petr Appx at 4.

Thus, both lower courts intimated that a rehabilitative purpose was necessary to justify punitive isolation beyond a certain period of time. There is no support for such a view in any of this Court's precedents interpreting the cruel and unusual punishment clause. I think the Court might

wish to indicate its disapproval of any such theory and remand the case for reconsideration. However, I feel quite strongly that the actual holding of the DC is correct (and will be adhered to on remand). Its limitation of punitive confinement to 30 days (barring new violations) was a response to a fact specific problem with which it had been dealing for several years. It clearly was not a holding that indefinite punitive confinement is always and necessarily a violation of the cruel and unusual punishment clause. Accordingly, the holding does not suggest a conflict in the circuits and this Court need not consider whether such a per se holding would ever be valid.

VII. CONCLUSION

I recommend that the Court affirm the award of attorney's fees relying on the alternative ground of the bad faith exception to the American Rule on attorney's fees. The constitutionality of the Attorney's Fees Act need not be reached.

I think the Court should also indicate that prison confinement does not have to serve a rehabilitative purpose in order to escape invalidation under the Eighth Amendment. On that limited ground, the DC's holding on punitive confinement should be remanded.

VIII. QUESTIONS

A. For Petitioners

1. Resps brought this suit to vindicate their constitutional rights. Is not the cost which they incurred in this vindication fundamentally different from the award of damages against a state which this Court was concerned about in Edelman?

2. Don't courts have an interest is preserving the order of the judicial system by assessing attorney's fees against a state which litigates in bad faith? Do you really believe the Eleventh Amendment was intended to prohibit courts from exercising such a traditional power?

3. Do you agree that the Attorney's Fees Act applies to this case, which was pending at the time of the Act's passage?

B. For Respondents:

1. In Edelman, this Court refused to approve retroactive payments ordered by the DC, noting that this was "a form of compensation." Aren't attorney's fees a form of compensation such as was proscribed under the Eleventh Amendment in Edelman?

2. How can you deny that the effect of an affirmance of the decision below will have a direct impact on Arkansas' treasury? Isn't this precisely the sort of impact that the Eleventh Amendment was intended to proscribe?

response

See comments attached at end of memo. LE

January 13, 1978 Conference
List 3, Sheet 3

No. 76-1660

Motion to Dismiss Writ as Improvidently Granted

HUTTO, Comm'r.,
Arkansas Dept. of
Correction, et al.

v.

FINNEY, et al.

SUMMARY: On Oct. 17, 1977, the Court granted cert to consider petrs' challenge on statutory and constitutional grounds to the award of attorneys' fees against the State in a §1983 suit and to consider whether the use of indefinite punitive isolation in response to infractions of prison discipline constitutes cruel and unusual punishment. On Dec. 1, petrs filed their brief on the merits. Resps' brief is due on Jan. 16. Resps have now filed a motion to dismiss the writ of certiorari as improvidently granted.

CONTENTIONS OF RESPS: (1) Pursuant to Ark. Act 543 of 1977, effective March 18, 1977, the State will indemnify its officials

against damage awards in suits like the instant one. The new law recites, in pertinent part, that the State "shall pay actual. . . damages adjudged by a state or federal court. . .against officers or employees of the State of Arkansas. . .based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his employment and in the performance of his official duties." Accordingly, by reason of the enactment of this state law, whatever the Court's ruling on the attorneys' fee question, the practical result will be the same: attorneys' fees can be awarded against individual officials and the State will then reimburse them

(2) A Clarifying Memorandum Opinion issued by the DC in 1976 allows an extension of the maximum 30 days punitive isolation established in its decree in this case where an inmate is found to have committed a serious disciplinary infraction while confined in isolation. The instant decision on the use of punitive isolation is fact-specific and forms a part of a comprehensive plan directed at a single facility. Accordingly, and as is suggested by the Clarifying Opinion, upon analysis, no true conflict with other circuits exists on this issue.

(3) It appears that some nine days of testimony, presented at separate hearings in 1974 and 1975, were not transcribed and made part of the instant record. Resps object to consideration in this Court on the present incomplete record and note that they have moved in DC for a free transcript.

DISCUSSION: The Court may wish to request petrs promptly to respond to this motion or, in the alternative, to postpone consideration of resps' request to the argument on the merits.

There is no response.

1/11/78 See attached. Goltz

PJN

HUTTO v. FINNEY
No. 76-1660

The attorneys' fees question has definitely been answered by the new state statute and review on this point is no longer required.

It would appear that the Clarifying Memorandum Opinion may also have avoided the need to review the punitive isolation question. However, this is not so clear that the case should be DIG-ed without a response from petr.

CFR on the question whether this case still presents a certworthy issue in light of intervening developments since the grant of cert.

1/12/78 Ellison

To: Mr. Justice Blackmun
From: KE
Re: No. 76-1660, Hutto v. Finney 6/11/78

Mr. Justice Stevens' proposed opinion incorporates your views on each of the various issues involved in this case.

Part I, of course, affirms the DC's inclusion of a 30-day limitation on sentences of punitive isolation as part of its comprehensive remedy. In affirming on this point, the opinion makes clear that it is not to be read as proscribing, as a matter of constitutional law, any sentence of punitive isolation exceeding 30 days. Rather, the affirmance is based on the particular facts of this case and on the Court's deference to the district court judge's familiarity with these facts and with the course of this litigation.

Also in Part I, Mr. Justice Stevens satisfactorily deals with a concern that you and I shared: that is, that the opinions below might be interpreted as requiring that all forms of prison discipline have a rehabilitative function. Footnote 8 on page 7 emphasizes that the lower court opinions should not be so read and that, indeed, there is no such requirement. ✓

Most of the discussion and the separate writings among the justices will, I am confident, focus on Part II of the proposed opinion. However, I find that part to be careful,

correct, and altogether unobjectionable. To be sure, if the entire Court agreed with Part II-B (i.e., concerning the applicability of the Attorney's Fees Act), the discussion in Part II-A (i.e., concerning the bad faith rationale for attorney's fees) would not be necessary. But, as is obvious from LFP's memo of June 9, the entire Court does not agree with Part II-B. In any event, the discussion in Part II-A should be helpful if clarifying the relationship between the bad faith rationale and the Eleventh Amendment--an issue that has long vexed lower courts.

The only omission that I should, perhaps, mention is that resps did file a pre-argument motion to DIG the case, consideration of which was postponed until oral argument. The motion is without merit but the Court has not yet denied it. How the Court chooses to deny it is a matter of procedure rather than substance but I did take the liberty of informing Justice Stevens' clerk of the omission and he said that something will be circulated shortly. Accordingly, I do not think it is necessary for you to write JPS about it.

In short, I see no problem with your joining.

To: Mr. Justice Blackmun
From: KE
Re: HUTTO v. FINNEY

2/17/78

Since completing my bench memo on Hutto v. Finney, I have had cause to take another look at the legislative history of the Civil Rights Attorney's Fees Awards Act. On reflection, I am forced to reverse my position--expressed at p. 24 of the bench memo--that the legislative history is too equivocal to show that Congress, in passing the Act, intended to override pro tanto the Eleventh Amendment.

I am of the opinion that the legislative history does show that Congress, under its Fourteenth Amendment powers, did mean to abrogate the operation of the Eleventh Amendment. This is clear not only from the House and Senate Reports, but also from the fact that several proposed amendments to the Act designed to exempt state or state officials from the Act's operation were rejected. (As indicated in the memo (at p. 23), the lower courts that have considered this question have all reached the same conclusion.)

In view of my revised conclusion on this point, I think that the decision below can be affirmed on the ground that Congress intended to override the Eleventh Amendment when it passed the Act and that the Act does authorize the attorney's fee award made below. If the Court does adopt this rationale, it need not reach the difficult questions whether the Eleventh Amendment places any limitations on the award of attorney's fees in the absence of congressional abrogation.

I apologize for the misstatement in my bench memo. However, I thought it best to correct the error now rather than later.