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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 16, 1978

Re: 76-1660 Hutto v. Finney

Dear Lewis:

Please show me as joining your opinion.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 19, 1978

RE: No. 76-1660 Hutto v. Finney

Dear John:

I have a paragraph or two in response to Lewis that I'll get around today.

Sincerely,

Bill

Mr. Justice Stevens

cc: The conference

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 15, 1978

Re: No. 76-1660 Hutto v. Finney

Dear John:

In response to your memorandum of June 14th indicating changes in your footnotes 9 and 34, I propose to add the following to the dissenting opinion I circulated on June 12th:

Page 3: Following the phrase "(footnotes omitted.)" at the end of the quotation on page 3, I will insert a footnote 1 reading as follows:

> "The Court suggests in its footnote 9, ante, that its holding is consistent with Milliken v. Bradley, supra, because it 'was not remedying the present effects of a violation in the past. It was seeking to bring an ongoing violation to an immediate halt. . . .' This suggestion is wide of the mark. Whether exercising its authority to remedy the present effects of a violation in the past, or seeking to bring an ongoing violation to an immediate halt, the Court's remedial authority remains circumscribed by the language quoted in the

text from Milliken II, supra. If anything, less ingenuity and discretion would appear to be required to 'bring an ongoing violation to an immediate halt' than in 'remedying the present effects of a violation in the past.' The difficulty with the Court's position is that it quite properly refrains from characterizing solitary confinement for a period in excess of thirty days as a cruel and unusual punishment; but given this position, a 'remedial' order that no such solitary confinement may take place is necessarily of a prophylactic nature, and not essential to 'bring an ongoing violation to an immediate halt'."

Page 12: I will add as text at the end of the last sentence on this page the following:

"The Court in its footnote 34 insists that it is 'manifestly unfair' to leave the individual state officers to pay the award of counsel fees rather than permitting their collection directly from the state treasury. But petitioners do not contest the District Court's finding that they acted in bad faith, and thus the Court's insistence that it is 'unfair' to impose attorneys' fees on them individually rings somewhat hollow. Even in a case where the equities were more strongly in favor of the individual state officials (as opposed to the state as an entity) than they are in this case, the possibility of individual liability in damages of a state official where the state itself could not be held liable is as old as Ex Parte Young, 209

U.S. 123 (1908), and has been repeatedly reaffirmed by decisions of this Court. Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Edelman v. Jordan, 415 U.S. 651. Since the Court evidences no disagreement with this line of cases, its assertion of 'unfairness' is not only doubtful in fact but irrelevant as a matter of law."

Sincerely,

W.H.R.

Mr. Justice Stevens

Copies to the Conference

H.A.B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 15, 1978

Re: No. 76-1660 - Hutto v. Finney

Dear John:

Please join me.

Sincerely,

HAB.

Mr. Justice Stevens

cc: The Conference

HAB

June 14, 1978

MEMORANDUM TO THE CONFERENCE

RE: 76-1660 - Hutto v. Finney

In the absence of objection, I intend to add two passages to the opinion in this case.

Footnote 9 will begin:

> As we explained in Milliken v. Bradley, 433 U.S. 267, 281, state and local authorities have primary responsibility for curing constitutional violations. "If, however '[those] authorities fail in their affirmative obligations . . . judicial authority may be invoked.' Swann [v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1,] 15. Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is wrong, for breadth and flexibility are inherent in equitable remedies.'" Id. In this case, the district court was not remedying the present effects of a violation in the past. It was seeking to bring an ongoing violation to an immediate halt.

I will also rewrite footnote 34 as follows:

> The Attorney General is hardly in a position to argue that the fee awards should be borne not by the State but by individual officers who have relied on his office to protect their interests throughout the litigation. Nonetheless, our dissenting brethren would apparently force these officers to bear the award alone. The Act authorizes an attorney's fee award in this case; no one denies that. The Court of Appeals' award is thus proper, and the only question is who will pay it. In the dissenters' view, the Eleventh Amendment protects the State from liability. But the State's immunity does not extend to the individual officers. The dissenters would apparently leave the officers to pay the award; whether the officials would be reimbursed is a decision that "may safely be left to the State involved." . Post at ____ (REHNQUIST, J., dissenting). This is manifestly unfair when, as here, the individual officers have no personal interest in the conduct of the State's litigation, and it defies this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to "exercise their discretion with undue timidity." Wood v. Strickland, 420 U.S. 308, 321.

Respectfully,

June 15, 1978

Re: No. 76-1660 - Hutto v. Finney

Dear John:

I would feel a little more comfortable if, in your footnote 2, you indicated the Eighth Circuit's review and disposition of Jackson v. Bishop. I do not wish to be named, but the Eighth Circuit's holding there was a significant ruling. It served to give impetus to Smith Henley, who did not sit on Jackson and, I think, it broke the ice in what theretofore had been a reluctance on the part of federal courts at the appellate level to interfere with state prison administration. I realize that later in the opinion (page 6) there is a quote from Jackson v. Bishop.

All this is just by way of a little intimate Eighth Circuit history with which I was fairly familiar.

Sincerely,

Mr. Justice Stevens

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 13, 1978

No. 76-1660, Hutto v. Finney

Dear Bill,

My separate opinion in this case does no more than rely on the express holding of the Court in Edelman v. Jordan, that § 1983 did not effect a waiver of the Eleventh Amendment immunity, and that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, Ex parte Young, supra, and may not include a retroactive award which requires the payment of funds from the state treasury, Ford Motor Co. v. Department of Treasury, supra." 415 U.S., at 676-677. That holding rests squarely on the Eleventh Amendment immunity, without adverting in terms to the Sherman Amendment or the definition of "person" in § 1983. Since my discussion of Edelman is necessary to my treatment of the Attorney's Fees Awards Act, I see no cause for dispute that this holding may be relied upon until it is rejected by the Court in a subsequent decision.

I note your reliance on language in Fitzpatrick, not essential to the Court's holding in that case, suggesting that Edelman may have rested on Monroe's misreading of the Sherman Amendment. Monroe was overruled as to local governments in Monell, but footnote 54 of your opinion makes quite clear that there is no "basis for concluding that the Eleventh Amendment is a bar to municipal immunity," and that the "holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes."

But even if § 1983 should now be read as providing for literal inclusion of the States within the term "person," Edelman makes clear that a second inquiry into congressional purpose to abrogate the States' immunity is required. I find nothing in Monell's reading of the Sherman Amendment debates that supports the view that Congress intended to override the constitutional immunity of the States. I would require a most persuasive showing that Congress entertained such a purpose in 1871.

In sum, although I appreciate your calling my attention to your concerns, I must say that - as I understand the situation - I do not share them.

Sincerely,

Lewis

Mr. Justice Brennan

Copies to the Conference

LFP/lab

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 13, 1978

Memorandum re: No. 76-1660, Hutto v. Finney

Dear Lewis,

I note with alarm your separate opinion in this case, which appears to prejudge the issue of whether States are suable under § 1983 after Monell. See your opinion at 5-6. As you will recall, Fitzpatrick reached the conclusion that states were not covered on the following reasoning:

> "We concluded that none of the statutes relied upon by plaintiffs in Edelman contained any authorization by Congress to join a State as defendant. The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in Monroe v. Pape, 365 U.S. 167, 187-191 (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.

Monell overruled that portion of Monroe relied on. Moreover, Monell reads § 1983 in light of the "Dictionary Act" which makes "bodies politic and corporate" suable under § 1983. See generally Part I-C of Monell and in particular slip op., at pp. 28-29. You will also note that the United States was clearly a body politic and corporate in 1871, see id., at 29 n. 51, and I would suppose that by very clear implication that language would include States as well.

Moreover, the federalism principle which so troubled Congress was peculiarly related to units of local government. Opponents of the Sherman amendment had little doubt that the States could be held liable under an amendment of even that stringent nature. See id., at 14 n. 30; id., at 20.

In light of this and the fact that cases squarely presenting the issue whether § 1983 applies to the States are even now on our cert. lists, don't you think your reaffirmation of Fitzpatrick is wrong -- or at least should await plenary review of the applicability of § 1983 to the States in light of Monell?

Sincerely,

Bill

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 13, 1978

Re: 76-1660 - Hutto v. Finney

Dear John,

I join part I of your circulating opinion but disagree with part II dealing with attorney's fees. As to that issue, I agree with part II of Bill Rehnquist's dissenting opinion.

Sincerely yours,

Byron

Mr. Justice Stevens

Copies to the Conference

HH

JUSTI

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 10, 1978

Re: 76-1660 - Hutto v. Finney

Dear John,

I shall await the dissent in this case.

Sincerely yours,

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1978

Re: 76-1660 - Hutto v. Finney

Dear Potter:

The letter which I have just received from Lewis explains why I felt it necessary to include the "bad faith" discussion. If we all agree that the statute applied, I would be happy to omit the entire discussion of the "bad faith" exception.

Respectfully,

Mr. Justice Stewart

Copies to the Conference

#43

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 9, 1978

No. 76-1660 Hutto v. Finney

Dear John:

I am glad to join Part II A of your opinion.

Although my vote at Conference was to the contrary on the Eighth Amendment issue, I am now inclined also to join Part I of your opinion. I will, however, await WHR's dissent.

As I stated at Conference, I have a different view as to the applicability of the Attorney's Fee Act of 1976 to the states. I therefore will not join Part II-B. I may file a brief statement of my position.

Sincerely,

Lewis

Mr. Justice Stevens

Copies to the Conference

LFP/lab

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 9, 1978

No. 76-1660 - Hutto v. Finney

Dear John,

I shall join your opinion for the Court in this case, upon the understanding that you are quite willing to make the basically stylistic changes that we orally discussed. I wonder, however, why it is necessary to rely on the "bad faith" exception in affirming the District Court's award of attorneys fees (in II-A of your opinion) in view of your reliance upon the 1976 statute in affirming the award of attorneys fees by the Court of Appeals (in II-B of your opinion). It seems to me that if the 1976 statute is retroactive and not violative of the Eleventh Amendment, then it would fully support the award of attorneys fees by the District Court, and that the discussion of the "bad faith exception" in II-A would be quite unnecessary.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

JUST

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1978

Re: No. 76-1660 - Hutto v. Finney

Dear John:

Please join me.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 8, 1978

Re: No. 76-1660 Hutto v. Finney

Dear John:

As indicated at Conference this morning, I will write a dissent in this case.

Sincerely,

Mr. Justice Stevens

Copies to the Conference

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 8, 1978

RE: No. 76-1660 Hutto v. Finney

Dear John:

Please join me.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 21, 1978

No. 76-1660, Hutto v. Finney

MEMORANDUM TO THE CONFERENCE

Absent dissent, I propose to add the following footnote 6, to appear in the fourth line from the bottom of p. 5 of my separate opinion. This change, set out in a separate sheet, has been sent to the printer along with stylistic changes.

L.F.P.

L.F.P., Jr.

New Footnote 6 (to appear after "§ 1983" in the fourth line from the bottom of p.5):

6. MR. JUSTICE BRENNAN's concurring opinion asserts that the Court's holding in Edelman has been undermined, sub silentio, by Fitzpatrick and the reexamination of the legislative history of §1983 undertaken in Monell. The language in question from Fitzpatrick was not essential to the Court's holding in that case. Moreover, this position ignores the fact that Edelman rests squarely on the Eleventh Amendment immunity, without adverting in terms to the treatment of the legislative history in Monroe v. Pape, 365 U.S. 167 (1961). And there is nothing in Monroe itself that supports the proposition that § 1983 was "thought to include only natural persons among those who could be party defendants ...." Ante, at ___. The Monroe Court held that because the 1871 Congress entertained doubts as to its "power ... to impose civil liability on municipalities," the Court could not "believe that the word 'person' was used in this particular Act to include them." Id., at 190, 191. As the decision in Monell itself illustrates, see n. 2, supra, the statutory issue of municipal liability is quite independent of the constitutional question of the State's immunity.

Mr. JUSTICE BRENNAN's opinion appears to dispense with the "clear statement" requirement altogether, a position that the Court does not embrace

today. It relies on the reference to "bodies politic" in the "Dictionary Act," Act of February 25, 1871, 16 Stat. 431, as adequate to override the States' constitutional immunity, even though there is no evidence of a congressional purpose in 1871 to abrogate the protections of the Eleventh Amendment. But the Court's rulings in Edelman and Employees are rendered obsolete if provisions like the "Dictionary Act" are all that is necessary to expose the States to monetary liability. After a century of § 1983 jurisprudence, in which States were not thought to be liable in damages, Edelman made clear that the 1871 measure does not override the Eleventh Amendment. Indeed, a contrary view would have permitted Ex parte Young, 209 U.S. 123 (1908), to be written quite differently. I would give force to our prior Eleventh Amendment decisions by requiring explicit legislation on the point.

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 23, 1978

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Hutto v. Finney - 76-1660

Four cases were held for Hutto v. Finney. I am enclosing my recommendation that we deny three of them.

Since I am disqualified in the fourth (Stanton v. Bond - 77-270), I am enclosing the memorandum from my law clerk, Stew Baker, to me recommending a denial, but I will not participate.

Respectfully,

JPS

Enclosures

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 23, 1978

MEMORANDUM TO THE CONFERENCE

Cases held for Hutto v. Finney, 76-1660.

1. 77-1107 - Alabama v. Pugh and 77-1422 - Newman v. Alabama

Charging that Alabama's prisons constituted cruel and unusual punishment, several inmates brought class actions under § 1983. Two suits were consolidated, and the declaratory and injunctive aspects were severed from the individual damage claims. A hearing revealed conditions comparable to those found in Hutto. The District Court (Johnson) declared the prison system unconstitutional and entered a comprehensive order setting minimum standards dealing with overcrowding, isolation, classification of inmates, mental health care, protection from violence, living conditions, food, correspondence and visiting rights, rehabilitation opportunities, physical facilities, and staff. The court set up a 39-member Human Rights Committee to monitor implementation of its order. On appeal, CA5 (Coleman, Kunzig of Ct. Clms., Gee) affirmed with some modifications. The Court of Appeals stated that, although much of the relief ordered was not constitutionally compelled, the sweeping injunction was within the District Court's remedial discretion in light of the massive constitutional violations revealed at trial. Petitioners argue: (1) that the District Court's comprehensive order requires more than the Eighth Amendment does; (2) that, under the Eleventh Amendment, the State of Alabama and the State's Board of Corrections were improperly joined as defendants; and (3) that severing the injunctive claims from the individual damages claims and trying the injunctive claims before a judge deprived the defendants of their Seventh Amendment right to a jury trial. Respondents filed a conditional cross petition (No. 77-1422) attacking CA5's modification of the relief.

Hutto is relevant only to the first two questions. Hutto recognizes that federal district courts have considerable flexibility in remedying unconstitutional prison conditions and that the courts may address each aspect of a violation separately. As interpreted by CA5, the District Court's order is consistent with that approach. CA5 dissolved the Human Rights Committee and told the District Court simply to name one monitor for each prison subject to the remedial decree. Other modifications also reduced the intrusive force of the District Court's action, and the remaining relief is justified by the shocking conditions that prevailed in Alabama's prisons when suit was brought.

The Eleventh Amendment claim, although not raised at trial, has merit. As Byron's earlier circulation in this case indicated, States should not be named as parties in federal court. But only declaratory and injunctive relief was awarded below, and because several state officers were also defendants, striking the State and its Board of Corrections from the list of named parties would have no practical effect. Byron suggested that striking the State would immunize it from a contempt judgment if the court's injunction were disobeyed. In Hutto, however, we approved an award of attorney's fees out of state funds when a court order was disobeyed by state officers. Hutto stands for the proposition that federal courts may enforce injunctions by imposing liability on State treasuries, even in cases where the State is not formally named. It would thus be pointless to strike the State from the suit summarily. I will vote to DENY.

2. 77-881 - Fasi v. Pokini

Respondent brought a 1983 action against city and county officers, objecting to his segregated confinement in a local jail. The case was settled when the defendants agreed to adopt certain procedures in transferring prisoners. Although the District Court (King) found that respondent's attorneys had invested $5,000 worth of time in the case, it denied attornev's fees, relying on Alyeska. CA9 (Ely, Hufstedler, Wright) reversed, relying on the 1976 Fees Act. The District Court was instructed to award respondent $5,000 in fees and an additional $1,000 to cover appellate services.

Petitioners argue: (1) that the award ignores either their good faith immunity or the city's immunity under Monroe v.

Pape; (2) that the respondent has not been shown to be the prevailing party; and (3) that the 1976 Fees Act should not be applied retroactively.

The immunities to which petitioners refer are statutory, and there is no reason to think that Congress intended to write them into the 1976 Fees Act. To the extent that petitioners fear personal liability, the legislative history and the opinion in Hutto make it clear that the government, rather than the individual defendants, should pay the fees in cases of this kind.

The Court of Appeals probably should not have simply assumed that respondent was the prevailing party. It is often difficult to say who prevailed when a 1983 suit is settled. Moreover, the 1976 Fees Act seems to call for an exercise of the District Court's discretion before an award is made. At most, however, this is a fact-specific error, arising only because the Act passed after the District Court entered judgment. Once the period of transition is over, the issue will disappear.

Petitioner's argument that the 1976 Fees Act should not be applied retroactively was rejected squarely in footnote 25 of Hutto. I will vote to DENY.

3. 77-684 - Greenblatt v. King

In 1974, respondent brought a 1983 suit against several State officers in their official capacities. He challenged certain state prison disciplinary procedures. The suit was settled after a day of trial, and the District Court (Wyzanski) awarded attorney's fees to respondent. Remanded in light of Alyeska, the award was reinstated by the District Court under the 1976 Fees Act. The primary issue on appeal was whether or not the amount of the fees should be determined by analogy to the Criminal Justice Act, 18 U.S.C. § 3006A(d)(1). CA1 (Coffin, Lay of CA8, Campbell) determined that compensation should be more generous than the CJA. The court also rejected a claim that the Act should not apply retroactively.

In this Court, petitioners argue the 1976 Fees Act does not authorize awards that will be paid from State treasuries and that the Act is not retroactive. Both issues were resolved against petitioners in Hutto. I will vote to DENY.

Respectfully,

MEMORANDUM

TO: Mr. Justice Stevens
FR: SAB
RE: Hold Memorandum in Stanton v. Bond, 77-270
DT: June 23, 1978

You were on one of the panels below in this case, so you will not be voting. In case you want to give the Conference some help despite your disqualification, I will outline the effect of Hutto on the case.

Respondents' suit, brought under § 1983, charged State officials with failing to conform to certain federal statutes and regulations governing Medicaid programs. The District Court (Sharp) awarded attorney's fees, relying on the "private attorney general" doctrine and on the defendants' bad faith before and during the litigation. On appeal, CA7 (Stevens, Tone, Hoffman of N.D. Ill.) affirmed on the bad faith ground. We GVR'd in light of the 1976 Fees Act, and CA7 (Cummings, Tone, Hoffman of N.D. Ill.) concluded that the Act also justified an award.

Petitioners argue: (1) that the Eleventh Amendment prevents an award of fees against State defendants, (2) that the 1976 Fees Act does not apply to 1983 suits because the State cannot be a named party under § 1983, and (3) that the 1976 Fees Act does not authorize awards against states when the underlying cause of action has nothing to do with the Fourteenth Amendment.

The first two issues are foreclosed by Hutto. The last is interesting, and Hutto, which dealt with a claim under the Eighth and Fourteenth Amendments, does not directly address it. The legislative history does not support such a distinction, however, and Hutto holds that costs statutes need not meet the clear statement requirement. Petitioners' only plausible argument after Hutto is that Congress lacks power to override the Eleventh Amendment and to approve costs awards in cases not arising under the Fourteenth Amendment. Whatever the

merits of that claim, this case is an inappropriate vehicle for reaching the issue. We held in Hutto that state litigants' bad faith in the course of litigation would support an award against the State even in the absence of the 1976 Fees Act. Such an award is "ancillary" to prospective relief and thus not covered by the Eleventh Amendment immunity. Because the District Court's award was originally based in part on bad faith, the Court would probably find it unnecessary to reach the statutory question. I would recommend that cert be denied.