# The Burger Court Opinion Writing Database

*Hutto v. Finney*
437 U.S. 678 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University




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 8, 1978

RE: No. 76-1660 Hutto v. Finney

Dear John:

Please join me.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

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,

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

Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Mr. Justice Brennan

Circulated: 21 JUN 1978

Recirculated: _____

No. 76-1660

Terrell Don Hutto et al., Petitioners, v. Robert Finney et al.

On Writ of Certiorari to the United States Court of Appeals for the Eight Circuit

[June --, 1978]

MR. JUSTICE BRENNAN, concurring.

I join fully in the opinion of the Court and write separately only to answer points made by MR. JUSTICE POWELL.

I agree with the Court that there is no reason in this case to decide more than whether 42 U.S.C. § 1988 itself authorizes awards of attorneys fees against the States. MR. JUSTICE POWELL takes the view, however, that unless 42 U.S.C. § 1983 also authorizes damage awards against the States, the requirements of the Eleventh Amendment are not met. Citing Edelman v. Jordan, 415 U.S. 651 (1974), he concludes that § 1983 does not authorize damage awards against the State and, accordingly, that § 1988 does not either. There are a number of difficulties with this syllogism, but the most striking is its reliance on

p. 4

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

1st DRAFT

From: Mr. Justice Brennan

# SUPREME COURT OF THE UNITED STATES

Circulated: _____

21 JUN 1978

Recirculated: _____

No. 76-1660

Terrell Don Hutto et al., Petitioners, *v.* Robert Finney et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 23, 1978]

MR. JUSTICE BRENNAN, concurring.

I join fully in the opinion of the Court and write separately only to answer points made by MR. JUSTICE POWELL.

I agree with the Court that there is no reason in this case to decide more than whether 42 U. S. C. § 1988 itself authorizes awards of attorneys fees against the States. MR. JUSTICE POWELL takes the view, however, that unless 42 U. S. C. § 1983 also authorizes damage awards against the States, the requirements of the Eleventh Amendment are not met. Citing *Edelman* v. *Jordan,* 415 U. S. 651 (1974), he concludes that § 1983 does not authorize damage awards against the State and, accordingly, that § 1988 does not either. There are a number of difficulties with this syllogism, but the most striking is its reliance on *Edelman* v. *Jordan,* a case whose foundations would seem to have been seriously undermined by our later holdings in *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976), and *Monell* v. *Department of Social Services,* — U. S. — (1978).

It cannot be gainsaid that this Court in *Edelman* rejected the argument that 42 U. S. C. § 1983 "was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." 415 U. S., at 676-677. When *Edelman* was decided, we had affirmed monetary awards against the States only when they had consented to suit or had waived their Eleventh Amendment

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

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
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

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

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

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,

HAB

Mr. Justice Stevens

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

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

lfp/ss 6/12/78

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 12 JUN 1978

Recirculated: _____

No. 76-1660 HUTTO v. FINNEY

MR. JUSTICE POWELL, concurring in part and dissenting in part.

While I join Part II-A of the Court's opinion, I cannot subscribe to Part II-B's reading of the Eleventh Amendment as permitting counsel-fee awards against the State on the authority of a statute that concededly does not effect "an express statutory waiver of the States' immunity." Ante, at 22.

Edelman v. Jordan, 415 U.S. 651, 676-677 (1974), rejected the argument that 42 U.S.C. §1983 "was intended to create a waiver of the State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." In a §1983 action "a federal court's remedial power, consistent with the Eleventh Amendment, is

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

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

1st PRINTED DRAFT Recirculated: 16 JUN 1978

# SUPREME COURT OF THE UNITED STATES

No. 76–1660

Terrell Don Hutto et al., Petitioners, *v.* Robert Finney et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1978]

MR. JUSTICE POWELL, concurring in part and dissenting in part.*

While I join Parts I[1] and II–A of the Court's opinion, I cannot subscribe to Part II–B's reading of the Eleventh Amendment as permitting counsel-fee awards against the State on the authority of a statute that concededly does not effect "an express statutory waiver of the States' immunity." *Ante*, at 22.

*Edelman* v. *Jordan*, 415 U. S. 651; 676–677 (1974), rejected the argument that 42 U. S. C. § 1983 "was intended to create a waiver of the State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." In a § 1983 action "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective

*MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join this opinion to the extent it dissents from the opinion and judgment of the Court.

[1] The principles emphasized by MR. JUSTICE REHNQUIST, *post*, at —, as to the limitation of equitable remedies are settled. See *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977); *Milliken* v. *Bradley*, 433 U. S. 267 (1977). On the extraordinary facts of this case, however, I agree with the Court that the 30-day limitation on punitive isolation was within the bounds of the District Court's discretion in fashioning appropriate relief. It also is evident from the Court's opinion that this limitation will have only a minimal effect on prison administration, see *ante*, at ~~9–10~~, an area of responsibility primarily reserved to the States.

8-9

1, 2, 5-6

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

Stylistic Changes Throughout

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT

Recirculated: 16 JUN

19 Jun 1978

# SUPREME COURT OF THE UNITED STATES

No. 76–1660

Terrell Don Hutto et al., Petitioners, *v.* Robert Finney et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1978]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.*

While I join Parts I[1] and II–A of the Court's opinion, I cannot subscribe to Part II–B's reading of the Eleventh Amendment as permitting counsel-fee awards against the State on the authority of a statute that concededly does not effect "an express statutory waiver of the States' immunity." *Ante*, at 18.

*Edelman* v. *Jordan*, 415 U. S. 651, 676–677 (1974), rejected the argument that 42 U. S. C. § 1983 "was intended to create a waiver of the State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." In a § 1983 action "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective

*MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join this opinion to the extent it dissents from the opinion and judgment of the Court.

[1] The principles emphasized by MR. JUSTICE REHNQUIST, *post*, at —, as to the limitation of equitable remedies are settled. See *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977); *Milliken* v. *Bradley*, 433 U. S. 267 (1977). On the extraordinary facts of this case, however, I agree with the Court that the 30-day limitation on punitive isolation was within the bounds of the District Court's discretion in fashioning appropriate relief. It also is evident from the Court's opinion that this limitation will have only a minimal effect on prison administration, see *ante*, at 8–9, an area of responsibility primarily reserved to the States.

Wm Brennan 06177

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

FILE COPY
PLEASE RETURN
TO FILE

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 21, 1978

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

Dear Bill:

Just before receiving your letter, I was prepared to send to the printer a revision of the footnote beginning on page 5 of the 2d draft of my opinion and carrying over to page 6 responsive to the concern that you express. I propose to change the sentence in question, as follows:

> "Whether or not the standard of cases like Wood v. Strickland, 420 U.S. 308 (1975), was rejected with respect to counsel-fee liability, see id., at 9 & n.17, neither the Act nor its legislative history ... etc."

I would rather not avoid all reference to the legislative history on the point, but I do agree that we should keep the question open. I hope this is satisfactory to you.

Sincerely,

Lewis

Mr. Justice Rehnquist

Copies to the Chief Justice
and Mr. Justice White

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

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

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

Wm Brennan
6/17

> 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,

Bill

Mr. Justice Stevens

Copies to the Conference

Pp 247

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

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1st PRINTED DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 76–1660

Terrell Don Hutto et al., Petitioners, *v.* Robert Finney et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

The Court's affirmance of a District Court's injunction against a prison practice which has not been shown to violate the Constitution can only be considered an aberration in light of decisions as recently as last Term carefully defining the remedial discretion of the federal courts. *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977); *Milliken* v. *Bradley*, 433 U. S. 267 (1977). Nor are any of the several theories which the Court advances in support of its affirmance of the assessment of attorneys' fees against the taxpayers of Arkansas sufficiently convincing to overcome the prohibition of the Eleventh Amendment. Accordingly, I dissent.

## I

No person of ordinary feeling could fail to be moved by the Court's recitation of the conditions formerly prevailing in the Arkansas prison system. Yet I fear that the Court has allowed itself to be moved beyond the well-established bounds limiting the exercise of remedial authority by the federal district courts. The purpose and extent of that discretion in another context were carefully defined by the Court's opinion last Term in *Milliken, supra*, at 289–281:

> "In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 21, 1978

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

Dear Lewis:

The second draft of your concurring and dissenting opinion in this case, which circulated on June 19th, contains a new footnote 6 beginning on page 5 of the printed opinion and carrying over to page 6. I am somewhat troubled by the following sentence in that footnote:

> "While the standard of cases like Wood v. Strickland, 420 U.S. 308 (1975), apparently was rejected with respect to counsel-fee liability, see id., at 9, neither the Act nor its . . . etc."

Though Byron may have a better view of the point than I do because he wrote Zurcher v. The Stanford Daily, it is my impression that this issue -- whether counsel fees could be awarded under the statute against defendants who qualified for Wood v. Strickland immunity -- was argued in Zurcher, but not reached because of our ruling on the underlying issue of liability. Although the government and the Stanford Daily took the position in Zurcher which is summarized in the language quoted above from your footnote, the petitioners argued to the contrary. I would prefer to see the question left open, an

True

Yes

end which could be attained by deleting all of the sentence in the footnote before the word "neither". If you will not go that far, would you at least consider changing the word "apparently" in the sentence to the word "arguably"?

Sincerely,

WEB

Mr. Justice Powell

Copies to the Chief Justice
and Mr. Justice White

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JAN 7 1978

Recirculated: _____

76-1660 - Hutto v. Finney

MR. JUSTICE STEVENS delivered the opinion of the Court.

After finding that conditions in the Arkansas penal system constituted cruel and unusual punishment, the District Court entered a series of detailed remedial orders. On appeal to the United States Court of Appeals for the Eighth Circuit, petitioners[1/] challenged two aspects of that relief: (1) an order placing a maximum limit of 30 days on confinement in punitive isolation; and (2) an award of attorney's fees to be paid out of Department of Correction funds. The Court of Appeals affirmed and assessed an additional fee to cover services on appeal. 548 F.2d 740. We granted certiorari, _____ U.S. _____, and now affirm.

This litigation began in 1969; it is a sequel to two earlier cases holding that conditions in the Arkansas prison system violated the Eighth Amendment.[2/] Only a brief summary

1/ Petitioners are the Commissioner of Correction, members of the Arkansas Board of Correction, and the superintendents of two prisons.

2/ This case began as Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969). The two earlier cases were Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965), and Jackson v. Bishop, 268 F. Supp. 804) (E.D. Ark. 1967). Judge Henley decided the first of these cases in 1965, when he was Chief Judge of the Eastern District of Arkansas. Although appointed to the Court of Appeals for the Eighth Circuit in 1975, was specially designated to continue to hear this case as a district judge.

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

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,

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 sente

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,

/s/

Mr. Justice Stevens

Copies to the Conference

pp. 8, 14-20

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 16 '78

Recirculated: _____

1st PRINTED DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 76–1660

Terrell Don Hutto et al., Petitioners, *v.* Robert Finney et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1978]

MR. JUSTICE STEVENS delivered the opinion of the Court.

After finding that conditions in the Arkansas penal system constituted cruel and unusual punishment, the District Court entered a series of detailed remedial orders. On appeal to the United States Court of Appeals for the Eighth Circuit, petitioners[1] challenged two aspects of that relief: (1) an order placing a maximum limit of 30 days on confinement in punitive isolation; and (2) an award of attorney's fees to be paid out of Department of Correction funds. The Court of Appeals affirmed and assessed an additional attorney's fee to cover services on appeal. 548 F. 2d 740. We granted certiorari, 434 U. S. 901, and now affirm.

This litigation began in 1969; it is a sequel to two earlier cases holding that conditions in the Arkansas prison system violated the Eighth and Fourteenth Amendments.[2] Only a

[1] Petitioners are the Commissioner of Correction, members of the Arkansas Board of Correction, and the superintendents of two prisons.

[2] This case began as *Holt* v. *Sarver*, 300 F. Supp. 825 (ED Ark. 1969). The two earlier cases were *Talley* v. *Stephens*, 247 F. Supp. 683 (ED Ark. 1965), and *Jackson* v. *Bishop*, 268 F. Supp. 804 (ED Ark. 1967), aff'd, 404 F. 2d 571 (CA8 1968). Judge Henley decided the first of these cases in 1965, when he was Chief Judge of the Eastern District of Arkansas. Although appointed to the Court of Appeals for the Eighth Circuit in 1975, was specially designated to continue to hear this case as a district judge.

STYLISTIC CHANGES THROUGHOUT

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 20 '78

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

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[June —, 1978]

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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.

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