The Burger Court Opinion Writing Database

Quern v. Jordan

440 U.S. 332 (1979)

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

January 11, 1979

Re: 77-841 - Quern v. Jordan

Dear Bill:

For the record, I reconfirm that I join.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 4, 1978

RE: No. 77-841 Quern v. Jordan

Dear Bill:

Your proposed opinion in this case reaches to decide that Sec. 1983 is not a statute conferring congressional authorization on federal courts to enter damage awards against the States as "persons" as a means of enforcing the substantive guarantees of the Fourteenth Amendment. The resolution of this issue is clearly in no way necessary to decision in this case. As John noted in his dissent in Alabama v. Pugh, 98 S. Ct. 3057 (1978),* this is an issue debated in Hutto v. Finney, 98 S. Ct. 2565 (1978). I do not believe the issue is foreclosed by Alabama v. Pugh, a case decided without oral argument in which this question was not even briefed. See, e.g., Edelman v. Jordan, 415 U.S. 651, 670-671 (1974). Nor do I believe we should stretch to decide the issue in this case. Surely it is a question of significant importance that ought not be decided without plenary briefing and focused oral argument.

Sincerely,

Bill

Mr. Justice Rehnquist
cc: The Conference

*John stated in a footnote:

"Surely the Court does not intend to resolve summarily the issue debated by my Brothers in their separate opinions in Hutto v. Finney, ___ U.S. ___, ___, 98 S. Ct. 2565, 2579, 56 L. Ed. 2d ___ (Brennan, J., concurring), and ___ n. 6, 98 S. Ct. 2583 n. 6 (Powell, J., concurring and dissenting."

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 13, 1978

MEMORNADUM TO THE CONFERENCE

RE: No. 77-841 Quern v. Jordan

In my note to Bill on December 4 I protested the summary holding that section 1983 does not authorize federal courts to enforce the substantive guarantees of the Fourteenth Amendment against the states as "persons". Op. at 6-7. I earnestly repeat my suggestion that this is a most inappropriate way of deciding this question of manifest importance since it was not addressed at oral argument nor did it receive plenary briefing. Moreover, I don't understand anyone to suggest that this holding is necessary to decide this case. Bill's opinion makes no attempt to analyze the issue but simply states that its decision is foreclosed by Alabama v. Pugh. But that case was decided by summary disposition and the issue wasn't even briefed.

I am frankly surprised that more of my colleagues have so far failed to share my distress that an issue of such significance should be decided in this off-hand manner. I am enclosing a copy of a district court opinion recently filed in the Northern District of Florida which highlights the merits of arguments for regarding states as "persons" that Bill's opinion rejected in silence. At the very least I would hope we can discuss at our next conference on January 5 my suggestion that Bill's discussion be omitted or in any event that the case be set for reargument for briefing and oral argument of the question.

Bill

W.J. B. Jr.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 22, 1978

Memorandum to the Conference

RE: No. 77-841, Quern v. Jordan

I have no desire to waste Conference time if in fact prior cases decided since Monell have settled the question whether the term "person" in Section 1983 includes "States." It is of course true, as Bill said in Fitzpatrick v. Bitzer, that decisions before Monell uniformly held that 1983 contained no congressional authorization to join a State as a defendant. This position, however, rested on the ground that Monroe v. Pape had excluded municipalities from the term "person," and that therefore "it could not have been intended to include states ...." Fitzpatrick, 427 U.S. at 452. This is essentially the reasoning of virtually every decision holding that the Eleventh Amendment immunized states from damage actions under 1983. Many of these cases are collected in United States v. Philadelphia, 413 F.2d 84, 86 n.2: "In view of the Supreme Court's holding in Monroe v. Pape that a municipal corporation is not a 'person'...the conclusion that states are not persons...is inescapable. 'A municipal corporation is but a political subdivision of a state and if a state's political subdivisions are not 'persons' under the statute, then neither is the state.'"

Since Monell held that municipal corporations are indeed "persons," the question whether Congress had intended to include States as "persons" is surely now an open and important one. Bill's memo of December 14 suggests that the debate between Lewis and myself in Hutto and John's dissent in Alabama v. Pugh sufficiently raised the question to justify the Court in considering this question "clearly put to rest by Alabama v. Pugh." I think that reflection upon the history of that decision is persuasive that this is just not so.

Aside from the fact that Pugh is a summary disposition and thus not binding on us, Edelman, 415 U.S. at 670-671, Pugh limited its grant of certiorari to a single question that had two distinct aspects: "Whether the mandatory injunction issued against the State of Alabama and the

Alabama Board of Corrections violates the State's Eleventh Amendment immunity or exceeds the jurisidiction granted federal courts by 42 U.S.C. § 1983." Pugh definitely limited its holding to the first half of this question: "There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit."

There are aspects to the history of Pugh which clearly imply that, while deciding the first half of the question presented, it did not reach the (I concede logically entailed) issue of the relevance of 1983. That an injunction against a State is barred by the Eleventh Amendment is certainly black letter law. Byron's opinion cited three cases in support of the proposition: Edelman, Ford Motor Co. v. Treasury, and Worcester County v. Riley. Of these only Edelman involved an action under 1983, and, as I've indicated, Monell certainly raised considerable doubts concerning its holding. Moreover Byron's Per Curiam tracks almost verbatim his dissent circulated on May 26, 1978, approximately two weeks before Monell came down, and thus was composed at a time when the law still was that States were not "persons" because municipalities were not. Had the original votes to deny certiorari in Pugh held up, the denial would doubtless have been announced before Monell, and thus Byron's dissent would necessarily not have mentioned coverage of States under 1983. I can only venture that the end-of-Term rush explains the conversion of the dissent virtually without change into the Per Curiam that was announced that last day of the Term.

The lack of consideration of the 1983 issue is reinforced by the fact that the briefs in Pugh were filed on February 6 and April 6, 1978, months before Monell was announced, and they thus offer no guidance as to the relevance of that decision. It is true that at pages 11-12 of the Pugh petition for certiorari, Alabama argues that neither the State nor the state agency is a "person," but its reasoning is the standard reasoning before Monell, namely is that a State cannot be a "person" because such a holding would be "in conflict with the holding of Kenosha that municipalities are not 'persons' under section 1983."

The limitation of the holding in Pugh to the first half of the question presented is what I understand to be the meaning of John's comment in dissent that "Surely the Court does not intend to resolve summarily the issue

debated by my Brothers in their separate opinions ...."

Putting to one side, for the moment, the question of whether Pugh "controls" this case, there is an excellent reason why this Court should give more considered reflection to the important question of whether a State is a person for purposes of 1983. Pugh offers no explanation why a state is not such a person; Bill's proposed opinion merely defers to Pugh. Should Bill's proposed opinion be adopted, therefore, this significant issue will have been decided without any public statement of reasons, without any references to legislative history, without any discussion of principles or policies, without proper argument or briefing, without, in short, any of the appurtenances of reasoned decisionmaking. The result is pure judicial fiat. Not even the parties in Quern will have had their say. Although Bill's memo of December 14 states that in this case "Petitioner's reply brief also discussed the issue," in fact the reply brief states:

> "The en banc decision of the Seventh Circuit does not rest upon a conclusion that the term 'person' for purposes of section 1983 includes the sovereign states, as opposed to state officials, within its ambit. That issue is not the issue before this Court on petitioner's writ for certiorari."

In these circumstances I request that the case be listed for discussion on the Conference Agenda for January 5.

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

From: Mr. Justice Brennan

Circulated: 8 FEB 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-841

Arthur F. Quern, Etc., Petitioner,
v.
John Jordan, Etc.

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

[February —, 1979]

MR. JUSTICE BRENNAN, concurring in the judgment.

For the reasons set forth in my dissent in *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974), I concur in the judgment of the Court.[1]

[1] In *Edelman* v. *Jordan*, 415 U. S. 651 (1974), I stated:

"This suit is brought by Illinois citizens against Illinois officials. In that circumstance, Illinois may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States. Rather, the question is whether Illinois may avail itself of the non-constitutional but ancient doctrine of sovereign immunity as a bar to respondent's claim for retroactive AABD payments. In my view Illinois may not assert sovereign immunity for the reason I expressed in dissent in *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279, 298 (1973): the States surrendered that immunity in Hamilton's words, 'in the plan of the Convention,' that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. See *id.*, at 319 n. 7; *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964). Congressional authority to enact the Social Security Act, of which AABD is a part, former 42 U. S. C. §§ 1381–1385 (now replaced by similar provisions in 42 U. S. C. § 8–1–804 (1970 ed., Supp. II), is to be found in Art. I, § 8, cl. 1, one of the enumerated powers granted Congress by the States in the Constitution. I remain of the opinion that 'because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver," 411 U. S., at 300, and thus have no occasion to inquire whether or not Congress authorized an action for AABD retroactive benefits, or whether or not Illinois voluntarily waived the immunity by its continued participation in the program against the background of precedents which

6, 8-10, 12, 19

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 28 FEB 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-841

Arthur F. Quern, Etc., Petitioner,
v.
John Jordan, Etc.

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

[February —, 1979]

MR. JUSTICE BRENNAN, concurring in the judgment.

For the reasons set forth in my dissent in *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974), I concur in the judgment of the Court.[1]

[1] In *Edelman* v. *Jordan*, 415 U. S. 651 (1974), I stated:

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1-10, 12-10

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

From: Mr. Justice Brennan

Circulated: _____

3rd DRAFT

Recirculated: 2 MAR 1979

SUPREME COURT OF THE UNITED STATES

No. 77-841

Arthur F. Quern, Etc., Petitioner, *v.* John Jordan, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1979]

MR. JUSTICE BRENNAN, concurring in the judgment.

For the reasons set forth in my dissent in *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974), I concur in the judgment of the Court.[1]

[1] In *Edelman* v. *Jordan*, 415 U. S. 651 (1974), I stated:

"This suit is brought by Illinois citizens against Illinois officials. In that circumstance, Illinois may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States. Rather, the question is whether Illinois may avail itself of the non-constitutional but ancient doctrine of sovereign immunity as a bar to respondent's claim for retroactive AABD payments. In my view Illinois may not assert sovereign immunity for the reason I expressed in dissent in *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279, 298 (1973): the States surrendered that immunity in Hamilton's words, 'in the plan of the Convention,' that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. See *id.*, at 319 n. 7; *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964). Congressional authority to enact the Social Security Act, of which AABD is a part, former 42 U. S. C. §§ 1381–1385 (now replaced by similar provisions in 42 U. S. C. §§ 801–804 (1970 ed., Supp. II), is to be found in Art. I, § 8, cl. 1, one of the enumerated powers granted Congress by the States in the Constitution. I remain of the opinion that 'because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver," 411 U. S., at 300, and thus have no occasion to inquire whether or not Congress authorized an action for AABD retroactive benefits, or whether or not Illinois voluntarily waived the immunity by its continued participation in the program against the background of precedents which

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 1, 1978

Re: No. 77-841 - Quern v. Jordan

Dear Bill:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 9, 1979

Re: No. 77-841 - Quern v. Jordan

Dear Bill:

Your proposed changes are fine with me.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copy to Mr. Justice White
Mr. Justice Powell
Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 7, 1978

Re: 77-841 - Quern v. Jordan

Dear Bill,

I can accept the new and viable parameters (as they say in the trade) you have established for Edelman.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 4, 1978

Re: No. 77-841 - Quern v. Jordan

Dear Bill:

I do not agree with your opinion. I have read Brennan's letter. If he writes I will join him.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 14, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 77-841 - Quern v. Jordan

I have a memorandum from Brennan asking to discuss certain language in the proposed majority opinion in this case.

I also have a memorandum from Rehnquist--the like of which I have not seen before--urging us to deny this discussion solely because he has five votes for his opinion.

I am opposed to denying any of us the right to bring up anything for discussion at Conference. If there are five votes to start a steam roller, then the steam roller will have to grind me under. I will not move out of the way.

Sincerely,

T.M.

Feb. 15, 1979

77-841 - Quern v. Jordan

MR. JUSTICE MARSHALL, concurring in the judgment.

I concur in the judgment of the Court, for the reasons expressed in my dissenting opinion in Edelman v. Jordan, 415 U.S. 651, 688 (1974), and my concurring opinion in Employees v. Department of Public Health and Welfare, 411 U.S. 279, 287 (1973). Moreover, I agree that an affirmance here follows logically from the Court's decision in Edelman, because the explanatory notice approved by the Court of Appeals clearly is ancillary to prospective relief. But given that basis for deciding the present case, it is entirely unnecessary for the Court to reach the unsubstantiated conclusion that a state is not a "person" within the meaning of § 1983. Accordingly, I join Parts I, II and III of my BROTHER BRENNAN's opinion.

16 FEB 1979

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-841

Arthur F. Quern, Etc., Petitioner,
v.
John Jordan, Etc.

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

[February —, 1979]

MR. JUSTICE MARSHALL, concurring in the judgment.

I concur in the judgment of the Court, for the reasons expressed in my dissenting opinion in *Edelman* v. *Jordan*, 415 U. S. 651, 688 (1974), and my concurring opinion in *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279, 287 (1973). Moreover, I agree that an affirmance here follows logically from the Court's decision in *Edelman*, because the explanatory notice approved by the Court of Appeals clearly is ancillary to prospective relief. But given that basis for deciding the present case, it is entirely unnecessary for the Court to reach the unsubstantiated conclusion that a State is not a "person" within the meaning of § 1983. Accordingly, I join Parts I, II, and III of my Brother BRENNAN's opinion.

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

From: Mr. Justice Blackmun

Circulated: DEC 7 1978

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-841

Arthur F. Quern, Etc., Petitioner,
v.
John Jordan, Etc.

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

[December —, 1978]

MR. JUSTICE BLACKMUN, dissenting.

I dissent for the reasons stated by Judge Pell and Judge Tone in their respective dissenting opinions, *Jordan* v. *Trainor*, 563 F. 2d 873, 878 (CA7 1977), from the result reached by the Seventh Circuit's en banc majority.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 21, 1979

Re: No. 77-841 - Quern v. Jordan

Dear Bill:

I join your recirculation of February 16 and am withdrawing the brief dissent I prepared last December.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 7, 1978

No. 77-841 Quern v. Jordan

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-841

Arthur F. Quern, Etc., Petitioner,
v.
John Jordan, Etc.

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

[December —, 1978]

MR. JUSICE REHNQUIST delivered the opinion of the Court.

This case is a sequel to *Edelman* v. *Jordan,* 415 U. S. 651 (1974), which we decided five Terms ago. In *Edelman* we held that retroactive welfare benefits awarded by a federal district court to plaintiffs, by reason of wrongful denial of benefits by state officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment.[1] The issue now before us is whether that same federal court may, consistent with the Eleventh Amendment, order those state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits. We granted certiorari to resolve an apparent conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case and that of the Court of Appeals for the Third Circuit in *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare,* 551 F. 2d 2 (1977).[2] 435 U. S. 904 (1978).

[1] The history of this case is set forth in greater detail in *Edelman* v. *Jordan,* 415 U. S. 651 (1974).

[2] In *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare,* 551 F. 2d 2 (CA3 1977), the plaintiff class alleged that the manner in

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 4, 1978

Re: No. 77-841 Quern v. Jordan

Dear Bill:

I have received your letter of December 4th, suggesting that the Alabama v. Pugh issue not be decided in this case. I think that the various separate opinions in Hutto v. Finney, and John's dissent in Alabama v. Pugh, surely focused the attention of the Court on this issue to the extent necessary to decide it. I also think it would be a foolish expenditure of the Court's time to decide and write an opinion as to which of two conflicting interpretations of Edelman v. Jordan, 415 U.S. 651, is correct, if indeed there is serious doubt as to whether the underlying premise of that case is still good law. Therefore I think it is appropriate to decide that issue in this case, and my presently circulating opinion proposes to do that. Obviously, if a majority of the Conference disagrees with me, my view on this will not prevail.

I have made two changes in the first draft at John's suggestion. I have deleted the languege "quite correctly" from the description of the Court of Appeas' reversal of the District Court at page 3 of the circulating opinion, and have substituted the word "separate" for the word "various" on the last line of page 6.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

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

Circulated: DEC 5 1978

Recirculated: _____

P.S. 6-47

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-841

Arthur F. Quern, Etc., Petitioner, *v.* John Jordan, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1978]

MR. JUSICE REHNQUIST delivered the opinion of the Court.

This case is a sequel to *Edelman* v. *Jordan*, 415 U. S. 651 (1974), which we decided five Terms ago. In *Edelman* we held that retroactive welfare benefits awarded by a federal district court to plaintiffs, by reason of wrongful denial of benefits by state officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment.[1] The issue now before us is whether that same federal court may, consistent with the Eleventh Amendment, order those state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits. We granted certiorari to resolve an apparent conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case and that of the Court of Appeals for the Third Circuit in *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F. 2d 2 (1977).[2] 435 U. S. 904 (1978).

[1] The history of this case is set forth in greater detail in *Edelman* v. *Jordan*, 415 U. S. 651 (1974).

[2] In *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F. 2d 2 (CA3 1977), the plaintiff class alleged that the manner in

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 14, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 77-841 Quern v. Jordan

As to the merits of the question posed in Bill's memorandum to the Conference of December 13th, both of us have previously had our say in the exchange of memoranda and in my circulating draft which has now acquired sufficient votes to become a Court opinion. I think that Bill's separate concurrence in Hutto, Lewis' partial dissent in Hutto (which between them flushed out the issue of the effect of Monell on Edelman), and John's dissent in Alabama v. Pugh which also focused on the conflicting views of the separate opinions in Hutto, have adequately alerted both us and potential litigants to the issue. In addition, as I note in my circulating opinion, respondent's brief in this case addresses some of the

reasoning of Bill's separate concurrence in Hutto, petitioner's reply brief also discusses the issue. As I stated in my earlier response to Bill, I cannot conceive of a greater waste of the Court's time than to grant certiorari in a case in order to resolve the question of which of two conflicting interpretations of Edelman v. Jordan is correct, if in truth the Court does not think that Edelman itself is any longer a controlling case.

I would say in addition that I, for one, think it would be a mistake to use the time of Friday Conferences prior to weeks of oral argument, or during them, for debating the merits of a circulating opinion in an argued case which has already acquired sufficient votes to become a Court opinion. During my tenure here, the taking up of such cases has been only at the beginning of Conference, and only for the purpose of ascertaining how close they were to being "ready" with respect to dissents, concurrences, and the like. The arguments pro and con with respect to such opinions have genera been threshed out by written exchanges -- as they have in this

case, and as they were last year in Monell. Just as I would not have thought it appropriate, after Bill's opinion in Monell had acquired sufficient votes to become a Court opinion, for me to orally re-argue in Conference the position which I had already spelled out in a memorandum, I do not see why it is any more appropriate to argue whether my presently circulating opinion should or should not contain the language that it does at a Friday Conference: This should be a matter for a separate concurrence or dissent if my opinion has obtained the necessary votes. Obviously, the Conference must determine for itself what it will take up, but I would not think any of us would welcome the addition of new and perhaps protracted deliberations to an already lengthy list of items which we must discuss.

Sincerely,

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 3, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 77-841 - Quern v. Jordan

Since I am uncertain what, if any, question will be before the Conference Friday during the discussion contemplated by Bill Brennan's memorandum of December 22nd, I have had difficulty in composing a reply to that memo. I recognize that my present circulation does not disprove the existence of some yet unmined vein of legislative history in the adoption of the Civil Rights Act of 1871 that would show Congress intended States to be treated as "persons" within the language of § 1983. I do it with a like assumption that Bill has not come upon any legislative history that would prove such an intent; and I assume from his memorandum that he thinks someone outside of our two Chambers should do whatever post-Monell mining, if any, ought to be done.

I think that my present circulation adequately treats the issue which Bill has discussed in the three memoranda he has circulated since I circulated my first draft. I do not agree with Bill's statement that "Pugh is a summary disposition and thus not binding on us, Edelman, 415 U.S., at 670-671" (WJB memo Dec. 22, p. 1). While summary dispositions may be entitled to varying degrees of stare decisis value, I should think that a case like Pugh, where we exercised our discretionary

jurisdiction to grant a petition for certiorari and reverse in part a judgment of a Court of Appeals in a written per cur would be entitled to a fairly high level of deference. If it is not, we are surely spinning our wheels in writing opinions to accompany summary dispositions.

I think that the stare decisis value of Pugh is heighten by the fact that Hutto v. Finney, in which the separate opini of Bill and Lewis debated the continuing vitality of Edelman, was handed down ten days before the per curiam in Alabama v. Pugh. The Court's express reliance on Edelman in the latter case cannot, it seems to me, in the light of the earlier sepa opinions in Hutto, be attributed to "end of the Term rush".

But the thrust of my presently circulating opinion, as set forth on pages 6-7 of the second draft, is that "Monell was limited to local government units which are not considered part of the State for Eleventh Amendment purposes , ___U.S., at ___, n. 54, and our Eleventh Amendment decisions subsequent to Edelman and to Monell have not cast doubt on that holding in Edelman." Thus whatever weight Pugh may be entitled to as precedent, my presently circulating opinion in this case explicitly re-affirms Edelman, and basically sides with Lewis' separate opinion in Hutto.

Consistently with my previously stated position with respect to further Conference discussion of this case, I am unable to elaborate further than I have already done in the opinion why I believe this position is correct. If Bill were to circulate a separate concurrence setting forth in greater detail the faults which he believes exist in the opinion as presently drafted, I would certainly make the same sort of effort to respond to such an opinion as the author of a Court opinion normally does. But until this happens, it is both virtually impossible, and I think unwarranted, to reply to the rather summary statement of reasons for disagreeing with my opinion contained in Bill's memorandum of December 22nd.

Sincerely,

WM

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 9, 1979

Re: No. 77-841 Quern v. Jordan

Dear Potter, Byron, Lewis and John:

Since you four have joined my circulating opinion in this case, I am submitting the proposed changes on pages 6-7 to you in advance of circulating to the Conference generally. The changes are designed to reflect what I think is a reasonable compromise between the present second draft, which relies heavily on Alabama v. Pugh as precedent, and the views of John and Lewis expressed at Conference Friday that somewhat less reliance should be placed on Pugh and the treatment of the separate opinion in Hutto be removed from the text to a footnote. If you find these changes unsatisfactory, let me know; otherwise I shall circulate to the Conference generally.

Sincerely,

WER

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell
Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 10, 1979

Re: No. 77-841 Quern v. Jordan

Dear Potter, Byron, Lewis and John:

In view of the written replies of Potter, Byron, and John, and a telephone conversation with Lewis, all respecting my January 9th recirculation of Quern v. Jordan, I shall return to the earlier circulation because of John's preference for it and what I take to be the willingness, because of the earlier join letters of Potter, Byron, and Lewis, of the rest of you to stay with it.

Sincerely,

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell
Mr. Justice Stevens

I've discussed
this with Bill
& John. I go
along reluctantly

WHR

Of course, my view
is stated in
Hutto

Pp. 6-14

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-841

Arthur F. Quern, Etc., Petitioner, *v.* John Jordan, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case is a sequel to *Edelman* v. *Jordan*, 415 U. S. 651 (1974), which we decided five Terms ago. In *Edelman* we held that retroactive welfare benefits awarded by a federal district court to plaintiffs, by reason of wrongful denial of benefits by state officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment.[1] The issue now before us is whether that same federal court may, consistent with the Eleventh Amendment, order those state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits. We granted certiorari to resolve an apparent conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case and that of the Court of Appeals for the Third Circuit in *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F. 2d 2 (1977).[2] 435 U. S. 904 (1978).

[1] The history of this case is set forth in greater detail in *Edelman* v. *Jordan*, 415 U. S. 651 (1974).

[2] In *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F. 2d 2 (CA3 1977), the plaintiff class alleged that the manner in

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 22, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 77-841 - Quern v. Jordan

I propose to substitute for the present language on page 9 of the third draft which presently reads:

> "We therefore now expressly reaffirm the correctness of our decision in Edelman. 12/"

the following language:

> "We therefore conclude that neither the reasoning of Monell, supra, or our other Eleventh Amendment cases, nor the additional legislative history or arguments set forth by Mr. Justice Brennan in his concurring opinion, justify a conclusion different from that which we reached in Edelman."

Sincerely,

PP 9+12

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-841

Arthur F. Quern, Etc., Petitioner,
v.
John Jordan, Etc.

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

[December —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case is a sequel to *Edelman* v. *Jordan*, 415 U. S. 651 (1974), which we decided five Terms ago. In *Edelman* we held that retroactive welfare benefits awarded by a federal district court to plaintiffs, by reason of wrongful denial of benefits by state officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment.[1] The issue now before us is whether that same federal court may, consistent with the Eleventh Amendment, order those state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits. We granted certiorari to resolve an apparent conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case and that of the Court of Appeals for the Third Circuit in *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F. 2d 2 (1977).[2] 435 U. S. 904 (1978).

[1] The history of this case is set forth in greater detail in *Edelman* v. *Jordan*, 415 U. S. 651 (1974).

[2] In *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F. 2d 2 (CA3 1977), the plaintiff class alleged that the manner in

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 22, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 77-841 - Quern v. Jordan

Sorry to bug you all, but the substitute language referred to in the letter of February 22nd, and now circulated as a fourth draft, should and will read as follows:

> "We therefore conclude that neither the reasoning of Monell, supra, or of our Eleventh Amendment cases subsequent to Edelman, nor the additional legislative history or arguments set forth by Mr. Justice Brennan in his concurring opinion, justifies a conclusion different from that which we reached in Edelman."

Sincerely,

WHR

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 27, 1979

Re: No. 77-841 - Quern v. Jordan

Dear Bill:

I do not plan any changes in response to your circulation of February 26th.

Sincerely,

John

Mr. Justice Brennan

Copies to the Conference

pp 9413

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
Copy: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 28 FEB 1979

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-841

Arthur F. Quern, Etc., Petitioner,
v.
John Jordan, Etc.

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

[December —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case is a sequel to *Edelman* v. *Jordan*, 415 U. S. 651 (1974), which we decided five Terms ago. In *Edelman* we held that retroactive welfare benefits awarded by a federal district court to plaintiffs, by reason of wrongful denial of benefits by state officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment.[1] The issue now before us is whether that same federal court may, consistent with the Eleventh Amendment, order those state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits. We granted certiorari to resolve an apparent conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case and that of the Court of Appeals for the Third Circuit in *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F. 2d 2 (1977).[2] 435 U. S. 904 (1978).

[1] The history of this case is set forth in greater detail in *Edelman* v. *Jordan*, 415 U. S. 651 (1974).

[2] In *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F. 2d 2 (CA3 1977), the plaintiff class alleged that the manner in

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 8, 1979

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 77-841 - Quern v. Jordan

The only case held for Quern is Randle v. Beal, No. 76-6[illegible]. There petitioner brought a class action alleging that the manner in which Pennsylvania's state officials had collected class me[illegible] federal benefits in reimbursement of amounts granted under sta[illegible] welfare laws violated this Court's decision in Philpott v. Ess[illegible] County Welfare Board, 409 U.S. 413 (1973). The DC agreed with petitioners on summary judgment, and while it denied retroacti[illegible] relief against the State on the basis of Edelman v. Jordan, 41[illegible] U.S. 651 (1974), it did require respondents to notify members [illegible] two sub-classes of the plaintiff class that under Philpott they have no legal obligation to make reimbursement out of their fe[illegible] disability benefits and that "as a matter of state law they ma[illegible] have a cause of action against [respondents]."

The CA 3, in three separate opinions, reversed. Chief Ju[illegible] Seitz was of the view that the notice relief was barred by the Eleventh Amendment. Judge Garth, while granting that "Judge S[illegible] opinion may well be correct," held that it was unnecessary to decide the Eleventh Amendment issue because there was no case controversy. Judge Hunter disagreed with Chief Judge Seitz th[illegible] the notice was barred by the Eleventh Amendment and with Judge Garth that there was no case or controversy. However, he woul[illegible] have remanded the case because certain issues of material fact made summary judgment inappropriate.

I think there may be some reason to think that Judge Garth[illegible] is correct that there was no case or controversy here; the Sol[illegible] General argues in the brief that he filed at the request of the Court that this case may now be moot. As can be seen from the various circulations of Bill, Potter, and Lewis in County of L[illegible] Angeles v. Davis, the line between the absence of a case or contr[illegible]

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 4, 1978

Re: 78-841 - Quern v. Jordan

Dear Bill:

Please join me.

Respectfully,

John

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 9, 1979

Re: 77-841 - Quern v. Jordan

Dear Bill:

The changes that I note in your latest circulation are (1) placing the paragraph discussing the separate opinions in Hutto in a footnote, and (2) adding the sentence in the text on page 7 expressly reaffirming the correctness of the decision in Edelman.

At Conference I suggested that I thought the opinion would be stronger if (1) we placed less emphasis on Pugh by placing the entire discussion of Hutto and Pugh in a footnote; and (2) we simply relied on stare decisis and recognized Edelman as controlling authority.

I think your changes give greater, rather than lesser, emphasis to Pugh and instead of merely stating that the viability of Edelman is unimpaired, you reaffirm the correctness of the decision.

I do not believe the new sentence in the text is appropriate without a fresh review of the relevant legislative history. In short, I still would prefer either the approach I suggested at Conference, or if that is unacceptable, the opinion as circulated on December 5, 1978.

Respectfully,

Mr. Justice Rehnquist

cc: Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell

JPS
I talked to John. Altho I agree with him, this in WHR's opinion & P.S. & BRW have approved: I therefore am inclined to