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In the

Supreme Court of the United States

TERRELL DON HUTTO, ET AL.,

PETITIONERS,

V.

ROBERT FINNEY, ET AL.,

RESPONDENTS.

No. 76-1660

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February 21, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRELL DON HUTTO, ET AL., :

Petitioners, :

v. : No. 76-1660

ROBERT FINNEY, ET AL., :

Respondents. :

- x

Washington, D. C.

Tuesday, February 21, 1978

The above-entitled matter came on for argument at 11:19 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

GARNER L. TAYLOR, JR., ESQ., Deputy Attorney General of Arkansas, Little Rock, Arkansas 72201, for the Petitioners.

PHILIP E. KAPLAN, ESQ., 1650 Tower Building, Little Rock, Arkansas 72201, for the Respondents.

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Philip E. Kaplan, Esq., for the Respondents	20

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1660, Hutto against Finney.

Mr. Taylor.

ORAL ARGUMENT OF GARNER L. TAYLOR, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case presents fundamental issues for the Court's consideration involving the Eighth and Eleventh Amendments to the United States Constitution. The case arose out of litigation concerning the operation of the Arkansas prison system. A number of petitions that had been filed by inmates in the prison system were consolidated by the District Court, counsel was appointed to represent them and an amended and substituted complaint was filed seeking relief under Title 42 of the United States Code, Section 1983.

There are three issues which we ask the Court to consider. First of all, whether Congress in passing the Civil Rights Attorney's Fees Awards Act of 1976 abrogated the States Eleventh Amendment immunity and thereby authorized an award of attorney's fees to be paid from the funds of a State agency that was not made a party to the litigation. And as a corollary to this first argument, we suggest that even if the Court should find that Congress did abrogate the State's

Eleventh Amendment immunity, that that action not be given retroactive application in this particular case because it would work a manifest injustice. Secondly, we ask the Court to consider whether the Eleventh Amendment bars an award of attorney's fees based upon a finding of bad faith against a State or State agency.

And finally, we ask the Court to consider whether the lower courts were correct in ruling that indefinite punitive confinement of recalcitrant inmates is unconstitutional.

The opinion of the District Court was entered on March 19, 1976. It is found at page 141 in the Appendix. The District Court awarded an attorney's fee of $20,000 to the court-appointed attorneys for the inmates and ordered that that fee be paid from the funds of the Department of Correction. Now, the Department of Correction had never been made a party to the litigation. The action was filed -- of course, a 1983 action can't be filed directly against the State, under Court decisions -- the action was filed against the Corrections Commissioner and the members of the Board of Correction.

The court held that such an award would have only an ancillary effect on the State Treasury, citing this Court's opinion in the case of Edelman v. Jordan. Furthermore, the court found that the award was justified under the "bad faith" exception to the American rule which was discussed by this Court in its recent opinion in Alyeska Pipeline Service Company

v. Wilderness Society.

The Eighth Circuit affirmed this award and noted in its opinion that subsequent to the District Court's decision the Civil Rights Attorney's Fees Awards Act of 1976 had been approved. That Act was approved on October 19, 1976. And the Eighth Circuit held that the award of attorney's fees was proper under that Act and was not barred by the Eleventh Amendment immunity of the State of Arkansas.

It is our contention that the Civil Rights Attorney's Fees Awards Act of 1976 did not operate to abrogate the immunity of the State of Arkansas to a monetary judgment, because in passing the Civil Rights Attorney's Fees Awards Act of '76 Congress did not amend Section 1983, Title 42, to include a State within the meaning of the term "person." Therefore, the threshold fact of Congressional authorization, which this Court found present in Fitzpatrick v. Bitzer, was not present in this particular case. The State was not a party to the action. The Department of Correction was not a party to the action. And, in effect, the court lacked jurisdiction over the Department of Correction and had no jurisdiction to order an award of attorney's fees.

In Fitzpatrick, Title 7 of the Civil Rights Act of 1964 had been expressly amended to subject governments and governmental agencies and political subdivisions to suit under that section. But in the present case, 1983 was not

specifically amended, and this case more closely resembles the decision in Employees v. Missouri Public Health Department, a case in which this Court held that Congress had not abrogated the State's immunity because it had not specifically amended Section 16(b) of the Fair Labor Standards Act to include a State within the meaning of the term "the employer," when it enacted amendments in 1966.

Even if Congress had tried to abrogate the State's Eleventh Amendment immunity, in passing the Act, it failed to do so. Because when Congress acts to abrogate a State's immunity in a unilateral fashion, that is without a waiver on the part of the State, pursuant to Section 5 of the Fourteenth Amendment, when Congress acts to abrogate a State's immunity pursuant to Section 5, it should do so in explicit statutory language.

The legislative history of this Act does not need to be consulted because there is no ambiguity on the fact of the Act.

QUESTION: Well, certainly, some of our cases have gone sufficiently far so as to say that you look at everything you can in construing a statute, rather than the more traditional rule, perhaps, of a while ago, that only where the legislative language is unclear do you resort to the history. (tape fades as if microphone was turned off for about 10 seconds) -- they were going to impose attorney's fees against governmental bodies. Don't you think so?

MR. TAYLOR: Yes, sir, but it is our position that Congress simply misinterpreted the decision of this Court in Fitzpatrick v. Bitzer. And Congress did not do what they had to do to abrogate the State's immunity. They did not amend Section 1983 to include a State, within the meaning of the term "person."

QUESTION: Well, is your point that even if Congress had enacted the language that you find in the Committee Report, it would have been insufficient, or that the Committee Reports are not sufficiently weighty, so as to affect the language that Congress did choose to enact?

MR. TAYLOR: It is our position that the Committee Reports -- of course the Court can look at them and consider them, but there is really no need to because there is no ambiguity on the face of this particular statute. If Congress was so certain that they had effectively abrogated the State's Eleventh Amendment immunity, it seems strange that there is now a bill pending in the Senate, Senate Bill 35, which will specifically amend Section 1983 to define the term "person" as any individual, State, municipality or any agency or unit of government of the State.

QUESTION: Was that type of bill introduced before? When was that bill introduced?

MR. TAYLOR: This is pending now, sir, introduced on January 10th of this year.

QUESTION: Was it introduced before then, while this legislation was pending?

MR. TAYLOR: Sir, I am not certain whether or not --

QUESTION: Well, if it was not, could we assume that Congress assumed that it was covered, otherwise they would have introduced a bill like that?

MR. TAYLOR: Your Honor, I believe a more correct assumption might be that the fact that this bill is pending now indicates that Congress is not certain that it followed the guidelines set forth by this Court --

QUESTION: What citation for that?

MR. TAYLOR: In Fitzpatrick v. Bitzer, Your Honor, this Court held that Congress may act. But Congress, in that instance, acted by explicit statutory language, by explicit --

QUESTION: But it doesn't apply to this case, does it?

MR. TAYLOR: No, sir, I don't think it should because we are talking about a very fundamental concept.

QUESTION: Your point isn't just ignore what happened in Congress. You said we can look at the reports, but don't we have to look at them to interpret this statute? Maybe you don't, but don't we have to look at them?

MR. TAYLOR: Your Honor, as a general proposition, courts hold that in statutory construction it is not necessary to refer to the legislative history, unless there is some

ambiguity.

QUESTION: We don't have to look at the legislative history?

MR. TAYLOR: No, sir, although I expect that the Court will look at the legislative history in this particular instance.

QUESTION: You may suspect that some will. You can put your money on that.

MR. TAYLOR: The legislative history does indicate the intent of Congress to abrogate, Your Honor, but it is our position that Congress, even though it may have tried to abrogate the State's immunity, simply botched the job. They simply didn't do what they had to do to abrogate the State's Eleventh Amendment immunity. Because here we are dealing with some very fundamental constitutional issues and a very delicate balance in the relationship between the States and our national Government and our system of government. The Eleventh Amendment is fundamental to that relationship.

And it is our position that when Congress acts to abrogate that immunity it should do so in explicit statutory language so there will be no confusion as there is now across our country as to whether or not States are liable for attorneys' fees under the provisions of this Act. If Congress had acted by enacting a statute with explicit language, there would not be the kind of confusion we see right now.

And in this case there is no waiver by the State of Arkansas, no waiver expressed or implied. In Edelman v. Jordan, this Court held that the Eleventh Amendment barred an award of retroactive benefits under a Federal-State program for the aged, blind and disabled, and the term "ancillary effect" was discussed by the Court in that opinion. Ancillary effect refers to the fiscal consequences that a State may expect in complying with injunctive relief granted by a court in the future. It is a prospective effect.

For example, in this particular case, an ancillary effect of the District Court's decree might be the fact that the State of Arkansas had to spend over $\$\frac{1}{2}$ million to build a new maximum security unit, but an ancillary effect would not be the award of attorney's fees. That would be a direct effect upon the State treasury.

So the District Court's determination that the award of $20,000 in attorneys' fees was an ancillary effect is misplaced, under the decisions of this Court.

QUESTION: General Taylor, let me ask you one question about the procedure. It is your view that it was wrong to order the fees paid by the Department of Correction funds. Would you concede that the Court had the power to order your client, the individual defendant, to pay the fees?

MR. TAYLOR: Your Honor, I don't think so, because the Attorney's Fees Awards Act had not been passed at the time

this decision was made, the award was made.

QUESTION: Well, if the Act applies, your argument about the State --

MR. TAYLOR: My argument would still be that it should not, Your Honor, because we don't feel like the Act should be applied retroactively, because to do that will result in a manifest injustice to the parties.

QUESTION: Your argument strikes me as -- The Department of Correction is not a party to the case, is that right?

MR. TAYLOR: That's right.

QUESTION: So how are your clients hurt by the order for the Department of Correction to pay the fees, the individual litigants here? Aren't they really helped by having the judge order that the Department pay the fees instead of having them individually pay them?

MR. TAYLOR: To them, individually, I don't suppose it makes a great deal of difference, other than the fact that --

QUESTION: If you prevail and it is up to the trial judge, he may say, "Well, I think the individuals better pay the fee." Isn't that a possible consequence?

MR. TAYLOR: If this is sent back to the trial judge?

QUESTION: Yes.

MR. TAYLOR: That is a possibility, but not under the Court's determination that we have right now.

QUESTION: That if you prevail and it is sent back to the trial judge, so you can't order it to be paid by them, under a different order isn't it entirely possible he'll say, "The individual defendants have to pay this fee"?

MR. TAYLOR: Your Honor, I don't know what the court would say in that instance, because it ordered the fee to be paid out of the Department of Correction funds and, in effect, made a finding of bad faith on the part of the Department of Correction.

QUESTION: Did the Department of Correction intervene to object to that order? It didn't, did it?

MR. TAYLOR: No, sir.

QUESTION: I am just wondering whether you are really advancing the best interest of your clients in your argument here, the litigants who are actually effected -- I mean the individual defendants.

MR. TAYLOR: Yes, sir, I think so, because they were sued in their official capacity, as well as individually. And in their official capacities, we have sued the Commissioner of Corrections and the Board of Corrections. And the court's order orders that the fees be paid out of the funds of the Department of Correction, which they control in their official capacities. So we have to --

QUESTION: If the statute applies, would the judge have power to order the fees paid by the individual defendants?

If the statute applies. But we agree with you that it can't be applied against the State.

MR. TAYLOR: Yes, sir.

QUESTION: Then could the judge order individuals to pay the fees?

MR. TAYLOR: The judge could order the individuals to pay the fees, if the Act applies. If the Court gives retroactive application to it. But to do that would definitely result in a manifest injustice, as you have just pointed out -- to give retroactive effect to this Act, under the holding of this Court in Bradley v. School Board of the City of Richmond --

QUESTION: The manifest necessity determination, I suppose, would take into account the finding of bad faith, wouldn't it?

MR. TAYLOR: Yes, sir. And we contest that finding. Bad faith does not just --

QUESTION: But two courts have agreed on it, the District Court and the Court of Appeals.

MR. TAYLOR: The Court of Appeals footnoted it. The District Court held on the basis of bad faith -- the Eighth Circuit -- in the interim, the Civil Rights Attorney's Fees Act of 1976 was passed. The Circuit Court of Appeals affirmed, based upon that particular Act -- although the Circuit Court did note in a footnote that they thought the finding of bad faith was justified. However, the District Court in its opinion,

page 174 of the Appendix, notes that there had been "an erratic but a continuous course of improvement" and a cooperative attitude of State authorities, generally speaking.

So, when you read the court's opinion, it's difficult to read bad faith into it.

QUESTION: Hasn't the correctional provision in Arkansas been under investigation by the Federal Government since around 1960?

MR. TAYLOR: Yes, sir. I am not sure exactly what date it started. This litigation began in 1969.

QUESTION: Didn't they go back way before that?

MR. TAYLOR: There has been litigation --

QUESTION: Investigation by the F.B.I.

MR. TAYLOR: Your Honor, to be honest with you, I am not familiar with the course and scope of F.B.I. investigations, or whether there have been any in our prison system.

QUESTION: You referred to the bad faith conclusions reached by the Court of Appeals and, I guess, by the District Court.

MR. TAYLOR: Yes, sir.

QUESTION: You challenge those determinations, I take it?

MR. TAYLOR: Yes, sir, we challenge the determinations, but more than that, Your Honor, we also challenge the proposition that a court can make an award of attorney's fees, payable

out of the funds of a State agency which is not even a party to the litigation, based upon this bad faith doctrine which is an exception to the traditional American rule. But here, the court didn't have jurisdiction over the Department of Correction. The Department of Correction was not a party in the State of Arkansas.

QUESTION: Is the Department of Correction here?

MR. TAYLOR: Is the Department a party here? No, sir.

QUESTION: Did you try to intervene? Did the Department of Correction try to intervene to challenge the court's jurisdiction to enter a judgment against it when it was not a party?

MR. TAYLOR: No, sir, but under the decisions of this Court, the Attorney General may protect the interests of the State, under the Eleventh Amendment immunity, regardless of whether it is a party.

QUESTION: Doesn't he have to file something?

MR. TAYLOR: No, sir, that's not my understanding of the law, under Ford v. Department of Treasury, if I am not mistaken.

QUESTION: Don't you have to file something more than that? Don't you have to file a paper that makes you a party?

MR. TAYLOR: No, sir. No, sir. I believe the decisions of this Court have held that the State Attorney General may protect the interests of the State, pursuant to the

Eleventh Amendment, regardless of whether or not the State is a party to the action. That argument may be made on behalf of the State.

QUESTION: I am not saying you are wrong.

MR. TAYLOR: But it is our contention that the bad faith doctrine should not justify an award of attorney's fees against the Department of Correction in the State. Furthermore, this Act should not be applied retroactively because to apply this retroactively, to apply the Civil Rights Attorney's Fees Awards Act of 1976 in a retroactive fashion, will work a manifest injustice.

Under the decision of this Court in Bradley v. School Board of the City of Richmond, the Court noted that generally a court will apply the laws in existence at the time it makes its decision unless to do so will result in a manifest injustice. What could be more unjust than to require the State to pay this award when funds have been appropriated, budgets have been made, the State had no notice or knowledge that this award would be assessed against them? It actually affects the heart of the fiscal management of the State of Arkansas.

QUESTION: Well, there is always another fiscal year coming along, isn't there?

MR. TAYLOR: Yes, sir.

QUESTION: If the defendants had been assessed these attorney's fees, would they, as a matter of Arkansas Law, have

been reimbursed by the State?

MR. TAYLOR: Your Honor, at the time, there was no such law. Now we have a law that provides for indemnification, when officials are acting in good faith, for actual damages.

QUESTION: But at the time, there was no law. Have you any reason to suppose that despite the absence of a law they would or would not have been reimbursed by the State? Was there any practice?

MR. TAYLOR: No, sir, to my knowledge, there is no practice that the State would actually pay the damages.

QUESTION: Attorney's fees.

MR. TAYLOR: Attorney's fees, right.

QUESTION: Even under your present statute, would the reimbursement not be barred by the finding of bad faith?

MR. TAYLOR: That's correct, sir. Under the present statute, the State indemnifies the officials for actual damages. There is no mention of attorney's fees in that Act.

This Court, in Newman v. Piggie Park Enterprises, recognized that a major purpose of providing for an award of attorney's fees was to encourage litigants to bring suits to vindicate the public interest. A very valid reason. But, as to pending cases, such an incentive, is unnecessary, because the case is already in litigation.

So, it seems to us that prospective application of this Act will accomplish this goal, while at the same time

enabling the States to better prepare for the increased financial burden that may be placed upon them in the future.

Our third point that we want the Court to consider is whether the lower courts were correct in ruling that indefinite punitive confinement is unconstitutional. Punitive confinement is employed when an inmate simply will not abide by the rules of the institution; it is a recalcitrant inmate. They have stripped him of other privileges, denied other benefits in minor disciplinary proceedings and it's generally employed in instances where there is an escape or an assault on someone or a refusal to work.

This point does not concern the conditions of the confinement, but only the duration of confinement. The District Court found that the procedures employed in the disciplinary proceedings were consistent with the decision of this Court in Wolff v. McDonald. And the Court also made specific rulings so that the inmates now have no more than two in a cell at a time. They have clothing and the same diet, regular diet, as the other inmates, with the exception of dessert. They don't get any dessert. They have a bunk and a mattress. They are entitled to shower three times a week. But the District Court ruled that they could not be held in punitive confinement for more than thirty days. And it is our contention that this was fair on the part of the District Court and the Eighth Circuit in placing a limit on the amount of punitive confinement.

QUESTION: The State wants the right to keep a man as long as the State wants?

MR. TAYLOR: No, sir.

QUESTION: With no limits?

MR. TAYLOR: No, sir. The inmate holds the key to his own release. Any time he wants to conform to the rules and regulations of the institution, do what he is supposed to do -- this is assuming that the rules and regulations are constitutional. The District Court found that the rules and regulations were constitutional. But we have a situation where an inmate simply refuses to abide by the rules and regulations.

QUESTION: If the court had found that this violated the Eighth Amendment, then do you say the court would have no power to limit the solitary confinement? Assuming a correct finding of a violation of the Eighth Amendment.

The court did not find any constitutional violation here, did they?

MR. TAYLOR: The court did hold that it was unconstitutional to hold men in punitive confinement indefinitely and ruled that they could not be held there for longer than thirty days at a time. At that time, they would have to be transfered to the maximum security wing.

QUESTION: My question was directed at your previous statement that the court had not found a consitutional violation, which didn't seem to be consistent with the record.

MR. TAYLOR: The court did not find the constitutional violation in the conditions of confinement, Your Honor, only in the duration. The conditions of confinement meet constitutional muster in the court's decree, at this point.

The court ruled that indefinite punitive confinement serves no real rehabilitative purpose and simply makes bad men worse. But that argument is a penalogical argument. That argument is directed toward the administration of the penitentiary.

MR. CHIEF JUSTICE BURGER: If you wish to reserve any time for rebuttal, your signal is on for that purpose.

MR. TAYLOR: I will reserve the remainder.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Kaplan.

ORAL ARGUMENT OF PHILIP E. KAPLAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

From the beginning of my participation in this case in December of 1969 until today, there have been three published district court opinions, five additional unpublished interim memoranda and orders of the district court and three opinions in the Court of Appeals regarding Arkansas Department of Corrections and the administration of the Arkansas prison system.

All of the findings of unconstitutionality of the Arkansas prison system as cruel and unusual punishment by the district court have either been affirmed by the Court of Appeals or never challenged. Not one of the district court's most recent findings, either of fact or conclusions of law, are challenged here. What is challenged is one small aspect of the remedial portion of the judge's order.

QUESTION: Well, that makes it a relatively easy case for both of you to focus on then, doesn't it?

MR. KAPLAN: That's correct.

And I think that it is necessary for you to have a picture of what life was like in the punitive segregation section of maximum security in 1975.

QUESTION: Well, now, why, if the issue is as narrow as you've just told us it is?

MR. KAPLAN: So that focus can be directly related to the judge's power to impose that particular remedy. It is not in isolation. This order --

QUESTION: You just told us it is.

MR. KAPLAN: No. That is the order of no more than thirty days is not an isolated remedy. It is in connection with a whole panoply of remedies and orders that the judge imposed with regard to the decision.

QUESTION: But none of which are challenged by your opponent.

MR. KAPLAN: None of which are challenged.

Now, with regard to that thirty days, recall that the record will demonstrate that persons were kept in a cell 9½ feet by 7 feet, designed for one person, frequently, most often, with three people in the cell.

QUESTION: Limited to two, as of now?

MR. KAPLAN: Yes, now limited to two.

QUESTION: That's what we have now.

MR. KAPLAN: Yes, but also the judge was deciding this case in a context of his having written decisions since 1968, before Mr. Holt and I entered this case, limiting overcrowding, prohibiting overcrowding, and never once had he found those orders being complied with, never once. And in the context of that series of evasions of court orders since 1968, he finally says, "No indeterminant sentencing," and only two in a cell.

One pallet, one steel pallet --

QUESTION: That's not true now, is it?

MR. KAPLAN: Still true, one steel pallet. Still true. One steel pallet with mattresses during the day, only. No other furnishings except for a single unit lavatory and commode. That's the entire furnishings of the cell. That was true in 1975 and remains true today.

QUESTION: No mattress, no blanket, no nothing?

MR. KAPLAN: Not during the daytime.

QUESTION: Well, at night --

MR. KAPLAN: At night, a person is furnished with a mattress and a blanket.

An atmosphere, a pervasive atmosphere of brutality, from 1968 on and he confirms it in 1975. Between guards and inmates, between inmates and inmates, in this terribly overcrowded situation, just a pervasive atmosphere of brutality. No mail from anyone except the court. No family contact. No contact with anyone else. No visits from anyone, except the occasional visit, perhaps, from a minister. No books, no law books. The only book permitted, the Bible. That's it. But no law books unless he has been there for in excess of 20 days. No exercise, with the exception of, every third day, to the shower.

QUESTION: I repeat what everyone else has said, all this is admitted, is it not?

MR. KAPLAN: All of this is clearly admitted and unchallenged, but the basis for the judge's order or no indeterminant sentencing. And it is within that context that the order arises.

QUESTION: I am just suggesting that you are wasting your time. We are all fully appreciative of this.

QUESTION: Also, you suggest that it is a part of an equitable remedy -- the judge's holding that this particular form of punitive segregation violated the Cruel and Unusual

Punishments Clause, did he not?

MR. KAPLAN: He found that the entire conditions, including the indefinite sentencing, violated the Cruel and Unusual section.

QUESTION: And that is a substantive determination, not just a formulation of an equitable remedy.

MR. KAPLAN: That is a substantive determination, one aspect of the remedy meets that directly.

It is within this context that the judge says no indefinite sentencing and the State challenges nothing else. He relates the remedy exactly to the violation. He doesn't go beyond it. He doesn't go outside of it. He just says, "I am relating it to the remedy as part of an overall remedy. I eliminate gruel and I eliminate more than two people. I require an appealing diet. I say no more brutality, again, for the fourth or fifth time." And one of the other things is no more indeterminant sentencing and that does help with the disease and communicable health problem that he finds in other sections of the prison. It does help with the overcrowding.

QUESTION: Are you arguing this now in support of the bad faith finding, or what is the purpose of this?

MR. KAPLAN: Only for the cruel and unusual aspects.

QUESTION: I thought we indicated that we didn't need any more on that.

MR. KAPLAN: Very well, Your Honor.

With regard to the attorney's fees --

QUESTION: Before you leave that point, do you agree that this so-called indefinite, indeterminant sentencing to isolation is, in fact, sort of akin to a civil commitment, i.e., that the inmate has the keys in his own pocket if he agrees to abide by the rules and he does abide by the rules.

MR. KAPLAN: No.

QUESTION: Well, that's a disagreement of fact. It is very unfortunate if we have that here in this Court because generally we are not triers of the facts, you know.

MR. KAPLAN: I think the record is quite clear that the only way one can be sentenced to punitive segregation is for a violation of a prison rule after a due process hearing, period.

QUESTION: That doesn't settle the question. So he is there because of a violation of a prison rule, after due process hearing. Now, your brother, on the other side, says he can get out of there any time he says, "I will hereafter abide by the rule," and then proceed to do so.

Now, do you disagree with that as a matter of fact? If so, maybe we had better remand this case and have the facts determined. We are not a fact-determining body.

MR. KAPLAN: I disagree with the issue that a person holds --

QUESTION: It is not a matter of agreement or

disagreement, really, because you agree or disagree about an idea or an opinion. This is a matter of fact.

MR. KAPLAN: I disagree with the matter of fact.

QUESTION: You say he is factually mistaken when he tells us that?

MR. KAPLAN: That is correct.

QUESTION: Counsel, did the district judge make any findings of fact on the question of how an inmate terminates his indeterminant sentence?

MR. KAPLAN: He did not.

QUESTION: Did either side ask him to make a finding of fact on that issue?

MR. KAPLAN: They did not.

QUESTION: So, I suppose the question is:who had the burden of establishing this fact? If there is a factual dispute.

MR. KAPLAN: There is in the sense that Mr. Justice Stewart phrased the question. There is no real dispute of fact because the court below did make certain findings with regard to actual sentencing to punitive isolation. The rules of the administration themselves say "there shall be no indefinite sentences." They say that and they are quite clear. There shall be none. Sentences were always imposed and the record shows that from 1970 on, when there were written rules, sentences were always from zero to thirty days or one to thirty days.

That's all there ever was. There has never been, "You are sentenced until you decide to go to work." That has never been the situation. There was never a need for a finding because the factual setting never arose.

QUESTION: Well, then there is no need for this relief, if that's correct.

MR. KAPLAN: Well, there is because the judge also found that inmates, such as Alfonzo Graham, were there for six months on a limited diet, in exactly this situation that I attempted to describe.

QUESTION: Is it going to be a limited diet now?

MR. KAPLAN: No.

QUESTION: Therefore, we have to know -- isn't it true that many of these horribles that you have paraded in front of us have now been ordered to be corrected?

MR. KAPLAN: Many of the physical --

QUESTION: So that punitive segregation does not involve the same conditions that you describe to us?

MR. KAPLAN: It does not involve the same, but what the judge described was a situation of evolving and changing horrors. This is the same judge who found horrible situations in Jackson v. Bishop, with a strap and with a Tucker telephone. And here he finds himself eight years later with an evolving kind of brutality, but just in the same direct tradition.

QUESTION: Well, hasn't he ordered it to be corrected?

MR. KAPLAN: He has always ordered it to be corrected.

QUESTION: And that hasn't been --

MR. KAPLAN: It has never been in compliance --

QUESTION: We don't have that before us. At least for the purposes of the present case your brother is not questioning those orders. Isn't that correct?

MR. KAPLAN: He has not questioned any of those orders.

QUESTION: And there is only this slight, little sliver that you described to us at the opening of your argument.

MR. KAPLAN: That's correct.

QUESTION: Mr. Kaplan, do you take the position -- I mean I am not quite sure of your position -- that if the prison officials comply with the judge's order with respect to conditions of confinement but they then seek to impose indefinite sentences, would that be cruel and unusual punishment?

MR. KAPLAN: It is not to be reached here, but it is our position that that would be true.

QUESTION: Why is it not to be reached here, because you say there was more of a violation in the past which has now been corrected?

MR. KAPLAN: I am saying that their seeking to impose cruel and unusual punishment is not at issue -- I am sorry -- Indefinite sentencing is not at issue. Their rule

suggested that they could not and they are not suggesting that they are now attempting to change the rule.

QUESTION: I really don't understand.

QUESTION: You say the judge says you can't keep him over 30 days, then you say indeterminant sentence is not involved. There is a problem.

MR. KAPLAN: Well, what was happening was that the institution was keeping people --

QUESTION: Well, what do the orders now say? You can't keep them over 30 days.

MR. KAPLAN: You may not do it under any circumstances.

QUESTION: You said that has always been the law.

MR. KAPLAN: It has always been the rule that you couldn't keep them over 30 days.

QUESTION: Well, why are we spending our time on it now?

MR. KAPLAN: I have no idea why the State has made that appeal. I mean what we moved to dismiss has been providently granted on exactly that basis.

QUESTION: Mr. Kaplan, you mentioned Jackson v. Bishop. I've had some exposure to that case. Are you intimating that the Tucker telephone and the strap are still being used?

MR. KAPLAN: Oh, no. Just that there has been an evolving kind of evasion of the same kinds of brutality.

QUESTION: Well, there is a difference in degree, at

least, between the Tucker telephone and what you are talking about now, I would think, maybe. Maybe it isn't very good, but at least the Tucker telephone is gone.

MR. KAPLAN: It is gone, as is the strap.

With regard to the award of counsel fees --

QUESTION: Just a minute, Mr. Kaplan. Let me ask you one more question.

If the State says that there have never been punitive confinements in excess of 30 days, and you say you don't disagree with that, why on earth did the judge make a ruling on that point?

MR. KAPLAN: Because the State doesn't say that there never have been any. That's their rule. They had actually confined people and the record here does show that they have confined people for five and six months.

QUESTION: Well, then is is an issue?

MR. CHIEF JUSTICE BURGER: You may respond to that at 1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock, noon, the Court recessed to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Kaplan, you may resume your argument.

Is there a question pending from the bench?

ORAL ARGUMENT OF PHILIP E. KAPLAN, ESQ., (Resumed)

ON BEHALF OF THE RESPONDENTS

MR. KAPLAN: There was a question from Mr. Justice Rehnquist, I believe.

MR. CHIEF JUSTICE BURGER: Perhaps, you had better address that.

MR. JUSTICE REHNQUIST: I'm not sure I remember it, and perhaps you don't either.

It was something in the nature of if, in fact, people are not confined more than 30 days, why did the District Court make a finding that it would be cruel and unusual punishment for them to be confined more than 30 days?

MR. KAPLAN: I think I can address that, and I have three specific items that I want to refer to to address that question particularly.

One, the judge did make a finding with regard to punitive segregation. It appears at 410 F. Supp. 275. The specific finding is brief. It says, "While most inmates sentenced to punitive isolation are released to population within less than 14 days, many remain in the status in question

for weeks or months, depending upon their attitude as appraised by prison personnel."

So it isn't the key that's in their hands. It's in someone else'e hands, that the judge has said is already poorly trained, responds poorly, responds inadequately and excessively. The record amply supports it.

QUESTION: Who should decide the issue that you have just raised?

MR. KAPLAN: The judge has responded to that exactly. He said, "No more than 30 days deals with that whole issue," and then he clarified it and said, "If there is another rule violation, they may be tried again for a separate rule violation and placed in punitive segregation again, under the rules, for that separate violation."

QUESTION: In other words, a periodic re-examination?

MR. KAPLAN: Well, there are two things he does. He also asked for a periodic re-examination, but then said if there is another serious violation, they be tried again, under all of the other procedures and safeguards and rules that the prison has had.

Now, that's the way the judge has dealt with it.

QUESTION: But they still can't impose a sentence of more than 30 days.

MR. KAPLAN: That's correct. Their rules says --

QUESTION: According to him, under the United States

Constitution, Cruel and Unusual Punishment Clause, they cannot impose this kind of sentence for more than 30 days.

MR. KAPLAN: In the totality of the circumstances that he finds, he does say that under the Constitution he finds that in the totality here, in this case in 1975, the way "I find the conditions" -- not the way we find them two years later and see that some of them have been ameliorated by some of the conditions or some of his remedy. But "As I find them here, the totality of the circumstances, I find that more than 30 days is cruel and unusual."

QUESTION: Do you think he made his cruel and unusual punishment ruling on the assumption that the other parts of his order wouldn't be carried out?

MR. KAPLAN: On the fear that some of them might not, but also in recognition of seven or eight years of history of dealing with these same people under circumstances where there was no carrying out of a remedy. And I think that you can't take one little part and say -- If the 30 days had been the only thing, the 30 days would have been appropriate. It would have relieved over-crowding. It would have stopped inadquate or unappealing diet for a whole long period of time. It would have reached a number of these items.

QUESTION: If he wanted to limit the confinement, the solitary confinement, to 30 days, was it necessary for him to reach the constitutional issue? Could he not have decided,

for example, under the holding of this Court in the Serfass case, the State was obliged to live up to its own rule?

MR. KAPLAN: I think, perhaps, he could have. He had before him, however, a mountain of evidence of persons who had languished in punitive isolation --

QUESTION: The enforcement of the rules would take care of that, would it not?

MR. KAPLAN: The enforcement of the rules would have taken care of it, if they had enforced their own rule. But the rule was always observed in the breach as opposed to in the observance of the rule, itself, in particular to the rule. It was never adhered to, it was breached.

QUESTION: Mr. Kaplan, where is the rule in the record? You started to tell us.

MR. KAPLAN: Your Honor, it's at page 24.

QUESTION: Of what?

MR. KAPLAN: Of our brief. The rule,which is taken directly from their disciplinary procedures, is quoted. And it is in Footnote 11, and at the bottom of page 24 is the statement about 15 days and punitive segregation not being for "indefinite or permanent." It continues in the footnote section of page 25.

QUESTION: But that assumes there is going to be a restricted diet, and the diet is no longer restricted, except the absence of dessert.

MR. KAPLAN: That's correct, it is no longer restricted. But again, this was only one means of dealing with it.

QUESTION: Mr. Kaplan, that says "ordinarily, he shouldn't be retained for more than 15 days" and on page 25 it says "the regular punitive segregation." Do the rules contemplate extraordinary punitive segregation?

MR. KAPLAN: Well, what the evidence shows is that Mr. Lockhart and Mr. Hutto, both the Commissioner and the Warden, said that 14 days was the ordinary situation, and almost all inmates were released in 14 days. The testimony also showed that there was an inmate there for over six months that the Warden never knew about until he heard about it in testimony in court.

QUESTION: I am just asking a very narrow question. I don't read the rule as confining the period of punitive segregation to 15 days.

MR. KAPLAN: The only exception is the next paragraph that says "recalcitrant inmates are to be returned to ordinary diet." That's the only exception that we know about and that is the attitudinal problem that the judge was dealing with.

QUESTION: What do you do with Justice Stevens' inquiry about the second sentence of the Rule 1 at the bottom of page 24, where it says, "Ordinarily no inmate should be retained in punishment segregation on restrictive diet more than

15 days"?

MR. KAPLAN: Well, the facts show -- and that's what I stated before -- the facts show that there never had been a sentence for more than 30 days, that the only time that there was the more than 30 days was this recalcitrant attitudinal problem that the judge specifically addresses.

QUESTION: But then you couldn't say it was a violation of this particular rule, if the prison board found extraordinary circumstances to sentence him for more than 30 days, could you?

MR. KAPLAN: That's correct.

I'd like to pass on to the attorney's fees issue. With regard to the award of counsel fees, we advance two separate and independent arguments. First, we maintain, as Justice Stevens has already urged in Fitzpatrick --

QUESTION: I just want to go back just a moment.

Has the judge, has the District Court determined in the light of the present conditions in the prison whether the 30 day limit should be retained?

MR. KAPLAN: There has never been a petition to modify or to be relieved from the provisions of the award, of that particular injunctive item. We have had, in January of 1978, fifteen more days of hearings and still haven't rested and there has not been yet a motion to be relieved from the provisions of this award.

QUESTION: On the grounds that conditions have so changed that the basis for the order has disappeared?

MR. KAPLAN: That's correct.

There has been no such motion.

The first, again, that counsel fees are not subject to the limitations of the Eleventh Amendment. If this contention is accepted by the Court, it is dispositive of the award of counsel fees. Since the court's award of counsel fees on the basis of bad faith is expressly authorized in Alyeska, and since it is not an unusual item to assess fees under the Souffront doctrine against --

QUESTION: Isn't it a little out of the ordinary to assess fees against a non-party?

MR. KAPLAN: No, I don't think so. I think that is clearly the situation contemplated in Souffront, that one who prosecutes or defends a suit in the name of another to establish or protect his own right, or assists in the prosecution, is as much bound by the judgment as if he had been party to the record. Arkansas statute compels the Attorney General here to represent the interests of the State, that is --

QUESTION: Was the State a party?

MR. KAPLAN: The State was not a named party.

QUESTION: Was the State a party?

MR. KAPLAN: The State was a party by virtue, in our view, of having been there. The Attorney General has represented

the State in connection with it. Pursuant to State law, the Attorney General shall maintain and defend the interests of the State in matters before the Federal Courts and shall be the representative of all State officers, boards and commissioners in all litigation where the interests of the State are involved.

And I don't think that anyone disputes that that is exactly the situation that has occurred in this case since the onset of the litigation in 1965, that is, that the Attorney General has been present representing the interests of the State. And, indeed, pursuant to this same statute, the State has paid the assessments of costs, both attorneys' fees as costs, other expenses of the case, including the law students that we hired over a period of years, including the transcripts for the proceedings before the magistrate, sitting as a special master to hear the evidence. All of those have been paid as costs by warrant on the State Treasury, pursuant to this statute.

QUESTION: Where do you find that in this record?

MR. KAPLAN: It is in the record of the court below, when they satisfied the judgments, they satisfied them based on their drawing of a warrant on the Treasury to us. And we received all of those checks in the course of the history of this litigation, drawn on the Auditor of the State of Arkansas.

QUESTION: You are speaking now of fees, other than

the ones that are before us here?

MR. KAPLAN: That's correct. The $8,000 awarded for the district court proceedings in 1973, these fees to three lawyers for two and one-half years' work on this case, that is, everything from the appeal in the Court of Appeals in what is Fee 1, that amounted to the $20,000.

QUESTION: Mr. Kaplan, what paper do you have signed on behalf of the State of Arkansas, in this case, any place?

MR. KAPLAN: No place, except that all of the documents have been signed by the Attorney General, representing everybody pursuant to the statute.

QUESTION: But, to answer my question --

MR. KAPLAN: There is none.

QUESTION: And you get jurisdictions without that?

MR. KAPLAN: We get jurisdictions pursuant to 1983 and pursuant to the fact that we have all of the board --

QUESTION: 1983 gives you the right of damages against the State of Arkansas?

MR. KAPLAN: We are talking now about --

QUESTION: I am talking about counsel fees, and I want to know what is there in this case that I can read which says the State of Arkansas.

MR. KAPLAN: Nothing is in here that says the State of Arkansas. There are, as it turns out, two cases that were consolidated in 1975, in which the Department of Correction is

a named party. No one ever challenged the fact that they were named in those two cases. In 1975, Judge Henly consolidated approximately seventy 1983 petitions for hearing on the merits of those cases at the same time as we heard Finney remand from the Circuit Court. Two of those cases, one of which is Pittman v. Others and the Department of Corrections, names the Department of Corrections as a State body.

Now, that's the only thing in the record which indicates that the State is a party.

QUESTION: Is that in this case?

MR. KAPLAN: That is in this case, oh, yes.

QUESTION: Where?

MR. KAPLAN: Well, it is in the Docket Entry of the District Court.

QUESTION: Well, you and I understand how much docket entries are representative of a lawsuit, don't we?

MR. KAPLAN: That's the actual pleading. The pleadings were all consolidated with this case, and the judge --

QUESTION: Is there something in this record, other than a docket entry?

MR. KAPLAN: Well, the pleading itself is in the record.

QUESTION: That speaks for the State of Arkansas?

MR. KAPLAN: That says that the State of Arkansas is a named party, was not moved out of the case, was not pled

out of the case in any way.

QUESTION: Where is that?

MR. KAPLAN: That is in Pittman v. Others and the Department of Corrections.

QUESTION: I am talking about this case.

MR. KAPLAN: That case is consolidated with this case by an order of consolidation.

QUESTION: Is it up here?

MR. KAPLAN: It is up here as a consolidated matter, yes, Your Honor.

QUESTION: Is the record here?

MR. KAPLAN: The record has been forwarded from the District Court, the entire record.

QUESTION: You said a minute ago "Department of Corrections." I think, perhaps, you said it another time "the State of Arkansas." Are you using them interchangeably?

MR. KAPLAN: In that case, in response to Mr. Justice Marshall's question, yes.

QUESTION: Which was the named party?

MR. KAPLAN: The named party was the Arkansas Department of Corrections, in the case I referred to Justice Marshall.

The second grounds is that the award of counsel fees is authorized by the Civil Rights Attorney's Fees Act of 1976, which was adopted in response to Alyeska, under Fitzpatrick

and under the -- and was a proper Congressional exercise of power, not with the magic word amending to say that we can say a named -- that the State may be sued, but the legislative history is quite clear, quite explicit, that the Congress intended that States pay these fees. The Senate Report is cited at page 78 of our brief, as is the House Report, both of which are quite clear that these fees assessed against officials are to be collected from the State. And Representative Drinan's report makes it clear, or his statements make it clear, quoted at page 81 of the brief, that it is an enactment pursuant to Section 5 of the Fourteenth Amendment. There is no doubt what the legislative history in this case provides, and that is that the States are to pay these awards.

That $20,000 that the State says will be such a catastrophic burden on it was assessed for three lawyers for two and one-half to three years' work in a $1 billion budget, and it is clearly ancillary, if anything is ancillary, the State paid over $500,000 to build the East Building in response to what the judge required. And here we are not dealing with a catastrophic award of fees which is so going to seriously debilitate the State's ability to function in that year or in any other year.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Taylor, I think you have a few minutes left, if you have anything further.

REBUTTAL ORAL ARGUMENT OF GARNER L. TAYLOR, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. TAYLOR: With regard to the point made concerning our State statute requiring the Attorney General to appear, I want to refer the Court to Ford Motor Company v. Department of Treasury. A similar statute was involved in that particular case. It is at Footnote 11 of the Court's decision. In that case, it was held that there was no waiver, by virtue of the fact that the Attorney General appeared and defended the action.

I believe this Court acknowledged the fact when it decided the landmark case of Fitzpatrick v. Bitzer that it was breaking new ground, that in setting forth the means by which Congress can act pursuant to Section 5 of the Fourteenth Amendment and abrogate a State's Eleventh Amendment immunity without a waiver, expressed or implied, on the part of the State. The Court acknowledged that it was making new law and we urge the Court to adopt the position that when Congress acts pursuant to Section 5 of the Fourteenth Amendment it must do so in explicit statutory language, and urge the Court to so decide in this case and to reverse the decision of the Court of Appeals.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:19 o'clock, p.m., the case in the above-entitled matter was submitted.)

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