ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1432

TITLE GLADYS PULLIAM, MAGISTRATE FOR THE COUNTY OF CULPEPER, VIRGINIA, Petitioner v. RICHMOND R. ALLEN AND JESSE W. NICHOLSON

PLACE Washington, D. C.

DATE November 2, 1983

PAGES 1 thru 48

ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

- -x

GLADYS PULLIAM, MAGISTRATE FOR :
THE COUNTY OF CULPEPER, VIRGINIA, :
Petitioner, :
v. : No. 82-1432
RICHMOND R. ALLEN and :
JESSE W. NICHOLSON, :
Respondents :

- -x

Washington, D. C.

Wednesday, November 2, 1983

The above-entitled matter came on for oral argument before th Supreme Court of the United States at 2:01 p.m.

APPEARANCES:

GERALD L. BALILES, ESQ., Attorney General of Virginia, Richmond, Virginia, on behalf of Petitioner.

MS. DEBORAH C. WYATT, ESQ., of Charlottesville, Virginia, on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Baliles, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF GERALD L. BALILES, ESQ.

ON BEHALF OF PETITIONER

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

The issue in this case is whether the doctrine of judicial immunity bars the award of attorneys' fees pursuant to 42 U.S.C. Section 1988 against a member of the judiciary acting in his judicial capacity.

The facts of this case arose in 1980 in Culpeper County, Virginia. The Petitioner is a magistrate for that jurisdiction. The Respondents were arrested in Culpeper on misdemeanor charges for which no incarceration was authorized by statute upon conviction.

When the Respondents were unable to post bond after arrest, they were ordered by a petitioner to be held in jail pending trial. Respondents thereafter challenged their pretrial detention by filing in the U.S. District Court for the Eastern District of Virginia, a Section 1983 action against the Petitioner seeking declaratory and injunctive relief.

The District Court declared the Virginia

statues to be unconstitutional as applied, granted injunctive relief, and ordered the petitioner to pay attorneys' fees to the Respondents. The Circuit Court of Appeals for the Fourth Circuit affirmed that decision and held that members of the judiciary are not immune from suit, are not immune from payment of attorneys' fees in cases involving equitable or prospective relief.

In this case, we are seeking and asking this Court to hold that awards of attorneys' fees against judges are not authorized because, one, judicial immunity bars such an award, and two --

QUESTION: Even if it doesn't bar the injunction?

MR. BALILES: That is correct. The Court does not have to reach that point, as I will elaborate in the argument.

The second point, Justice White, is that Congress has not abrogated the doctrine of judicial immunity in enacting Section 1988.

QUESTION: Well, is it your submission or do you take a position as to whether the injunction is permissible?

MR. BALILES: We would argue that the injunctive relief provisions are not permitted by the

doctrine of judicial relief, but as we have pointed cut in our --

QUESTION: The judge is immune from suit for an injunction as well as damages?

MR. BALILES: That is correct.

QUESTION: Absolutely.

MR. BALILES: That is the position we maintain although, as we pointed out in our brief, this Court does not have to reach that question in order to dispose of the question of whether attorneys' fees may be authorized and ordered to be paid by the judge.

QUESTION: I understand that, but you have to reach one or the other of them.

MR. BALILES: Justice White, this Court --

QUESTION: It might be easier to reach the other, I mean --

MR. BALILES: This Court does not have to reach --

QUESTION: If you are right on it.

MR. BALILES: This Court does not have to reach that question. The injunctive relief provision was not appealed in this case because of certain changes that were made in the statutes by the General Assembly of Virginia in 1980 and 1981, so that question of injunctive relief is not before the Court.

The remaining question is one of the validity of the award of attorneys' fees which was raised, which was preserved on appeal to the Fourth Circuit and made a part of our petition for certiorari.

So the attorneys' fees question is really the only issue brought to this Court.

QUESTION: Mr. Attorney General, you do have to assume, I suppose, that in some situations prospective relief will be valid. Otherwise you never get to the attorneys' fee issue, do you?

MR. BALILES: That is correct. If this Court holds that judges are liable under 1988, implicit in such a holding is that prospective relief may be ordered against the judge.

QUESTION: Well, couldn't we assume it without deciding it since the only question presented in your petition is the 1988 one?

MR. BALILES: That is correct, Justice Powell. This Court can reach the question of attorneys' fees, the validity of attorneys' fees being awarded without determining the question of whether prospective relief is proper when sought against members of the judiciary.

QUESTION: We would say if prospective relief is available, attorneys' fees may be awarded.

MR. BALILES: Justice White, I would not --

QUESTION: If we happened to disagree with you, that's what we would say.

MR. BALILES: That is one position the Court could take. But this Court can take the position that attorneys' fees are not permissible because the doctrine of judicial immunity bars such an award and because Congress has not authorized it, even if this Court finds that prospective relief is appropriate.

QUESTION: Would that also apply to mandamus?

MR. BALILES: Justice Marshall, in the case of mandamus and writs of prohibition, the legislature has taken the position not only in Virginia but in certain other states that those are writs that are rarely sought, are seldom granted, and are applicable only under very strict conditions. Those provisions, those remedies that are available under certain circumstances would not be applicable here. They do not raise the same questions that are presented to this Court.

QUESTION: Well, do you think that a judge could award attorneys' fees for a mandamus against a state magistrate?

MR. BALILES: Justice Marshall, I am not aware of any such authority for that proposition. It is nct possible --

QUESTION: Do you know of any authority against it?

MR. BALILES: Yes, sir. The ruling of this Court in the Alyeska Pipeline case said specifically that the American rule that barred fee shifting would not permit the award of attorneys' fees in certain civil rights cases unless Congress specifically authorized such an award. Congress did that in enacting --

QUESTION: My mandamus actually wasn't a civil rights action but just mandamus.

MR. BALILES: That's correct, Your Honor.

QUESTION: And you can't get attorneys' fees.

MR. BALILES: That is correct. I am not aware of any authority for the awarding of attorneys' fees in that type of action that you have just suggested.

QUESTION: And you don't know of any against it.

MR. BALILES: That is correct.

Now, the reason why we are here asking the Court to rule that attorneys' fees are barred by the doctrine of judicial immunity is this: this Court has said in damage cases that judges are immune from such liability, and it has set forth certain policy reasons. We submit that those policy reasons apply with equal and compelling force in barrng attorneys' fees to be paid by

judges because attorneys' fees are the functional equivalent of damages. This Court has barred attorneys' fees for the policy reason that judges should be free from influence or the intimidation of monetary awards that may be issued against their decision.

QUESTION: General Baliles, you said this Court has barred attorneys' fees. You mean to say this Court has barred damages, don't you?

MR. BALILES: I stand corrected. You are correct, damages.

And here's --

QUESTION: Isn't there this possible difference? Is it not correct that under 1988, doesn't the statute expressly provide that the public body shall pay the fee?

MR. BALILES: That is what the language says, Justice Stevens, but that is not --

QUESTION: In other words, the damages have to be paid by the judge himself.

MR. BALILES: That doesn't dispose of the problem here. The question of who pays really should not be a factor in determining whether attorneys' --

QUESTION: Well, it would be a factor to me if I was sued, I'll tell you.

MR. BALILES: I beg your pardon?

QUESTION: I said it would be a big factor to me if I was the defendant. If I knew I didn't have to pay, I might not be quite as concerned.

MR. BALILES: The suggestion that government or some insurance program would pay a fee award really is not helpful here. If that were the case, Justice Stevens, then there wouldn't be a problem in awarding damages against a judge because of that source of payment.

QUESTION: Yes, but the -- but with respect to damages, it's voluntary on the part of the state, as I understand. They don't have to indemnify the person who may be held liable for damages. But as I understand the federal statute, they must pay the fee if the fee is awarded.

MR. BALILES: Justice Stevens, many states have reimbursement or indemnification statutes. Virginia does not. Some states qualify indemnification. Some attach qualification. Some require review by the Attorney General and the Governor. The result is there is no certainty, no guarantee that there will be indemnification in that event. The result is that you face the prospect of a judge going hat in hand to a legislative body or some othe agency of government seeking a special

appropriation, and what that does for the doctrine of separation of powers staggers the imagination.

QUESTION: Well, but if the federal statute provides that the fee should be collected from the public agency, can't -- won't the judgment run against the government agency so he doesn't have to go hat in hand. He takes the judgment and says you people have to pay this.

MR. BALILES: Well, there is nothing, Justice Stevens, in Section 1988 that requires a state to pay. It just simply says that the Court in its discretion may award attorneys' fees to be paid to the prevailing party. And --

QUESTION: Well, was the judgment secured against the Commonwealth?

MR. BALILES: The judgment was against the magistrate, Gladys Pulliam.

QUESTION: For fees, for fees, the fee judgment.

MR. BALILES: Yes, the fees.

QUESTION: The Commonwealth wasn't a party, was it?

MR. BALILES: The Commonwealth was not an official party to this proceeding.

QUESTION: I was trying to clarify what

Justice Stevens suggested that the statute requires that the Commonwealth pay, but there is no judgment here against the Commonwealth.

MR. BALILES: That is correct. It is against the --

QUESTION: So the narrow question we are confronted with is whether or not there can be a fee against the individual judicial officer.

MR. BALILES: That is correct.

QUESTION: My recollection must have been incorrect.

Is it in the legislative history? Doesn't the committee report say that it shall be collected from the public agency?

MR. BALILES: Justice Stevens, I am not aware of any --

QUESTION: Or did I just pick this out of thin air?

MR. BALILES: -- reference in the legislative history that judges or some government agency should pay attorneys' fees awarded against a judge, and I say that for this reason. There is nothing in the legislative history that refers to the authority of a judge to order another judge to pay attorneys' fees. It is not mentioned once in the report, not mentioned by the chief

patrons of the legislation, Senator Tunney in the Senate, Congressman Drinan in the House; not referred to by the floor manager, Senator Kennedy in the Senate, Congressmen Railsback and Kastenmeyer in the House. Not once was there a reference even in the House and Senate reports to the doctrine of judicial immunity being considered by the Congress or being repealed by either body.

The policy reasons that this Court has stated on asserting judicial immunity applies to judges in damage actions, we submit apply equally to actions against judges in which attorney's fees are sought, and it is for this reason, the consequences of monetary awards are not lessened by the label attached to them. A rose by any other name is still a rose, and whether you call that monetary award damages or attorneys' fees, you still have the same compelling, coercive effect upon a judge during the course of judicial decisionmaking.

QUESTION: Mr. Attorney General, would you make the same argument for the normal costs of suit?

MR. BALILES: With respect to the judge?

QUESTION: Yes.

MR. BALILES: I would, Justice O'Connor.

QUESTION: Is that in this case?

MR. BALILES: That is not the issue before

this case although costs were assessed along with attorneys' fees.

QUESTION: Well, costs, $300 some in costs were assessed.

MR. BALILES: Yes, sir.

QUESTION: Is that out of the case?

MR. BALILES: No, sir. Costs as well as attorneys' fees are involved in this particular case.

QUESTION: Well, indeed, Congress tried to treat attorneys' fees as costs, didn't it?

MR. BALILES: Congress in this particular case, Justice O'Connor, did not deal with the question of costs or attorneys' fees with respect to judges being the subject of monetary awards.

QUESTION: But under the statute, did it not attempt to treat attorneys' fees as costs?

MR. BALILES: It mentions attorneys' fees and costs being available for award by the Court in its discretion to the prevailing party, that is correct.

QUESTION: Am I correct in my impression that the Commonwealth did pay these fees?

MR. BALILES: It is not reflected in the record as such, but the magistrate in this case sought a special appropriation from the Executive Secretary of the Supreme Court of Virginia's office, and it was

paid.

In damage cases against judges, this Court has said repeatedly that the doctrine of judicial immunity is essential. It is required for the vitality of the judiciary, and it is essential and necessary in order to promote fearless, principled decisionmaking. And yet the purpose of immunity is not served by protecting judges from damage actions and exposing them to attorneys' fees and awards in prospective relief cases. The financial impact of attcrneys' fees in todays litigation can be just as chilling, just as intimidating as those that may be included in an award for damages.

Now, the issue before this Court is critical because if the Court sanctions the award of attorneys' fees in this case, it will have implicitly limited the doctrine of judicial immunity and approved the suing of justice in prospective relief cases and subjecting them to the payment of attorneys' fees. And the impact of such a step would be staggering.

For example, this Court has said in dealing with damage cases that judges should not be subjected to the distraction, to the diversion from work in order to prepare for trial, to attend depositions, to answer interrogatories and to otherwise assist in the preparation of a defense, but those same types of

distractions and diversions are available and would be required in equitable relief cases.

Equitable relief cases can have the same chilling effect on judges as damage actions because sanctions inherent in the injunctive relief process also include fines and imprisonment which are just as intimidatiung and pernicious as money damages.

At the very heart of the judicial immunity doctrine is the concern that there be no chilling effect on independent judicial decisionmaking caused by the threat of lawsuits. But the chill arises regardless of the type of relief sought in a suit. The chill occurs not simply because a judge may be subject to some pecuniary loss, but because the threat of a lawsuit is intimidating, and that is not in the interest of the public.

In short, what you have is the possibility that a judge would pull his punches instead of exercising the independence of judgment required by one's public responsibilities, and that is the threat to the integrity of the judicial system, regardless of whether the suit is one for damages or whether it is seeking injunctive or declaratory relief.

And if this court sanctions injunctive relief and declaratory suits against judges, the courts of this

country will be flooded with a new wave of litigation brought against judicial officers all across this country, and it should not be overlooked that those cases would be aimed at federal judges as well as state jurists. The impact upon the calendars of the courts of this country and the quality of justice would simply be staggering. And the Court should not allow those types of awards of attorneys fees against judicial officers because of the impact it would have not only on the operation of justice in this country, but upon the doctrine of judicial immunity itself.

Now, may it please the Court, there is another compelling reason why judges should not be liable for attorneys' fees and subject to equitable relief cases, and that is this: Congress simply has not authorized it. The court below, the Fourth Circuit, declared that when the 1976 Civil Rights Attorneys' Fees Award Act was passed, Congress had intended to repeal the common law doctrine of judicial immunity and to require judges to pay attorneys' fees to prevailing parties. But the court below was wrong because the legislative history of that act simply does not support that conclusion.

This Court has said in the case of Pierson v. Ray that the standard to be employed in determining whether Congress has abrogated a well-settled rule of

common law is to determine whether Congess made a clear indication that it intended to abrogate that well-settled rule of common law. There must be a specific provision.

Well, in the Pierson case, this Court found there was no clear indication by Congress when it enacted Section 1983, and therefore the language in 1983 that says every person did not mean every judge.

Similarly, in the case of Tenney v. Brandhove, this Court found that when Congress passed Section 1983, there was no clear indication that it intended to repeal the doctrine of legislative immunity, and therefore the language in 1983 that says ever person did not mean every legislator.

And similarly in this case, if the legislative history does not show a clear indication by Congress that the doctrine of judicial immunity is abrogated, then every person, every judge should not be subjected to an award of attorneys' fees in civil actions brought against them.

I mentioned a moment ago the legislative history when I referred to the floor leaders and the chief patrons of the legislation. The proponents and the opponents of Section 1988 both agree that that bill was a limited and cautious step, creating no new remedy,

overturning no prior practice or policy except to provide the authority that this Court said in the Alyeska pipeline case was required.

QUESTION: General Baliles, what do you make of the reference to the House report relied on by the Fourth Circuit that is contained at page 30 and 31 of the petition?

MR. BALILES: Justice Rehnquist, the Court of Appeals below referred to a paragraph containing two sentences and a footnote as the basis for its conclusion that Congress had abrogated the common law doctrine of judicial immunity. The court below was wrong. The House report doesn't simply support that conclusion. Indeed, there is no reference in that report itself to the doctrine of judicial immunity. It is not found in the Senate report. In fact, what the House passed was the Senate bill, and so the Senate bill and the Senate report were really before the House, not the House bill nd the House report.

But notwithstanding that, the House report cited by the court below is an ambiguous reference at best, and this is ironic. That footnote referred to this Court's decision in Pierson v. Ray where the standard said there must be a clear indication by Congress.

So the fact that that case is cited in the footnote at least should suggest that Congress had tc be aware of the standards set by this Court in Pierson, that there must be a clear indication, a specific provision, and you won't find it in that report.

I suspect that the reference to the Pierson case in that footnote, Justice Rehnquist, is simply a reference to the case because that case also involved not only judicial immunity but the qualified or good faith immunity of police officers who were also subject to that lawsuit.

In light of the standards that have been set by this Court in the Pierson case for determining what Congress intended, this Court should find that Congress did not intend for Section 1988 legislation to authorize the award of attorneys' fees against a member of the judiciary for acts undertaken in his judicial capacity.

Now, there is precedent for this Court to hold that the judicial immunity doctrine embraces both damage cases and actions for equitable relief. This Court held that both federal and state legislators are absolutely immune from civil actions, regardless of whether the actions are for damages or whether they are speaking prospective relief. And here is the interesting part: the policy reasons for legislative immunity are

identical to the policy reasons for judicial immunity. The common law origins are similar, and that is the purpose being to protect the integrity and the independence of the decisionmaker, to protect the independence and the integrity of the judicial system, and to prevent the distraction of attention from one's public responsibility.

And because the policies underlying the doctrines of legislative and judicial immunity are identical and the common law origins are similar, common sense would dictate that the rules also should be similar.

May it please the Court, this is the bottom line in this case. If the Respondents win, this Court will have decided more than just the question of attorneys' fees. It will have limited the doctrine of judicial immunity and authorized the filing of lawsuits against judges in prospective relief cases. But if the Petitioner prevails, this Court can dispose of the 1988 attorneys' fee issue without deciding the 1983 question of whether judges can be sued in prospective relief cases, and here is how.

A, this Court can decide that attorneys' fees are barred by the doctrine of judicial immunity because attorneys' fees are the functional equivalent of damages

and thus barred by that doctrine; and B, this Court can find that Congress did not intend to abrogate the common law doctrine of judicial immunity when it enacted Section 1988.

And the Petitioner thinks that this Court can and should reach the larger issue, the broader question and rule that the doctrine of judicial immunity, like legislative immunity, bars actions, whether for damages or for equitable relief.

And so this is what we ask of this court, reverse the lower court's decision and find the following:

There is no clear indication that Congress intended for Section 1988 to repeal the common law doctrine of judicial immunity and to authorize attorneys' fees to be awarded against judges for actions taken in their judicial capacity; and two, attorneys' fees against judges are barred by the doctrine of judicial immunity.

CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Ms. Wyatt?

ORAL ARGUMENT OF MS. DEBORAH C. WYATT, ESQ.,

ON BEHALF OF THE RESPONDENTS

MS. WYATT: Mr. Chief Justice, and may it

please the Court:

At issue in this case is a $7000 award of attorneys' fees which has been paid by the state, an award which was entered following the correction of a glaring constitutional violation, a violation of the rights of my indigent clients. The question before this Court is whether judicial immunity is going to defeat such an award, defeat such vindication.

As Petitioner described, this case stems from a practice by a local county magistrate of incarcerating persons for nonincarcerable offenses when they could not post bond. It was a practice which in a five month period affected approximately 50 people, 34 of whom were incarcerated, including my two clients. One of my clients was incarcerated for 14 days when he couldn't post a $250 bond for a nonincarcerable offense. The other client was incarcerated four times in a two-month period for nonincarcerable offenses, for charges of nonincarcerable offenses.

QUESTION: What other remedies would your client have had to solve this problem in Virginia? Could he have sought habeas corpus release?

MS. WYATT: Justice O'Connor, I think that is a very important question to this case because they could not have sought any other remedy because along

with the practice of incarcerating persons for nonincarcerable offenses, they were being appointed no counsel, they were being given no advice of rights, they were being locked away. For them there was no appeal.

Now, there is a provision for appealing bail.

QUESTION: There was no habeas corpus relief possible in Virginia?

MS. WYATT: There is habeas corpus relief available, as there are appeals, but not for my clients; not when they had no counsel and no advice of rights. They had no ability to make use of those provisions, and moreover --

QUESTION: They could have filed pro se for habeas.

MS. WYATT: Had they known how, perhaps, and had time permitted, because these incarcerations were as long as 14 days and as short as 2 days, and I think as this Court has recognized in Gerstein v. Pugh, often these issues will not be heard in time to make them -- to make these remedies meaningful.

QUESTION: There is some provision in Virginia law by which pretrial detention orders can be taken up to the next highest court, is there not?

MS. WYATT: That is correct, there are appeal --

QUESTION: Was that available?

MS. WYATT: That was available to them had they had the ability and the time to pursue them. They did not.

Furthermore, we are not dealing with isolated incidents. We are dealing with a practice. Even if they had cured one after the other, it was a continuing practice. Respondent Nicholson, as soon as he got out, he was being reincarcerated, sometimes again for as short as two days, and whether he could have effected an appeal in that period of time I think is doubtful. And again, I think it is very similar to what was recognized in Gerstein v. Pugh along those lines.

Petitioner was sued only in her official capacity, and at that level judicial immunity was really not truly raised. It was never raised at all with regard to declaratory judgment. The only issue appealed, moreover, was the attorney fee award, and that is really the only issue that is properly before this court, and it was the only issue addressed by the Fourth Circuit.

The attorney fee award, when prospective relief has been granted, whatever the validity of judicial immunity, whatever validity it might have had on the merits, had it been properly raised and had it

been considered, that is not before the Court.

QUESTION: May I interrupt?

MS. WYATT: Certainly.

QUESTION: Did I understand you to say the immunity issue wasn't raised?

MS. WYATT: The judicial immunity issue on prospective relief was not raised in the lower court. If I said --

QUESTION: They filed a motion on February 11, 1981, Point D, Defendant is immune from liability.

Doesn't that cover it?

MS. WYATT: Your Honor, I believe if you will review the record, you will see that they raised judicial immunity as to attorneys' fees, as to injunctive relief, but --

QUESTION: Well, they say immune from liability. That is pretty broad.

MS. WYATT: Are you referring to --

QUESTION: I am referring to Appendix 15, page 15. They filed that on February 11, 1981, a few days after you filed your lawsuit.

MS. WYATT: Immune from liability, Your Honor, if you continue and read the memorandum, they make clear they mean liability from damages and attorneys' fees, and they elucidate. They never challenged on judicial

immunity grounds the declaratory judgment. This memorandum that is accompanying that and that follows the motion in that case, I don't believe anywhere in the pleadings you will find any assertion that declaratory judgment is barred by judicial immunity.

Again, when they say liability, they elucidate in the memorandum they mean liability from damages.

QUESTION: Well, the next sentence in their memorandum says the injunction may be appropriate in some actions, but in the case of a judicial officer, there is a real question whether it is permissible.

MS. WYATT: I understand that, Your Honor. Again, I do not believe the record will ever show any judicial immunity with regard to declaratory judgment ever raised. But even if it had been, of course --

QUESTION: But you didn't claim anything except prospective relief. You claimed no damages, did you?

MS. WYATT: That's correct, Your Honor, we did not, but we did ask for attorneys' fees, and they did at that point raise an objection to attorney fee awards, and that is all that is befcre this court because that is all that they appealed.

And the fact of the matter is that Congress passed 1988 --

QUESTION: Did the Petitioner at any time waive immunity?

MS. WYATT: I am sorry, Your Honor.

QUESTION: Did your -- the judge at any time waive immunity?

MS. WYATT: Only insofar as it was not raised. They did raise judicial immunity with regard to injunctive relief.

QUESTION: Did they at any place "waive" the immunity?

MS. WYATT: I believe under Gomez v. Toledo it is a defense to be raised as a defense, and to the extent it wasn't raised with declaratory judgment, it might be considered so. I --

QUESTION: Then the answer to my question is what?

MS. WYATT: It may be considered waived as to declaratory judgment.

QUESTION: Did she ever say "waive?

MS. WYATT: Never said waive.

QUESTION: Thank you.

MS. WYATT: The only issue, however, the only issue that was appealed, whatever happened at the District Court level, was the attorney fee award.

Congress made clear in its language and in the

legislative history that it intended these attorney fee awards to be entered not only against defendants for whom prospective relief is entered, but most particularly in cases in which defendants are immune from damages.

The language on its face is very clear, there was nothing whatsoever for Congress to have abrogated, as Petitioner discusses. First of all, damages do not equal attorneys' fees. To say that damages equal attorneys' fees is like saying interest equal principal or rent equals purchase money: they spend alike, they look alike, but to anyone who has ever borrowed or rented, the difference is a complete one; and to Congress the difference was complete. Congress intended the attorney fee awards to step in most particularly where damages could not be. And this court has recognized that, in Hutto v. Finney and in Consumers Union, Supreme Court of Virginia v. Consumers Union, there this Court recognized that prosecutors immune from damage awards are natural targets for prospective relief, are therefore appropriate defendants for attorney fee awards. Moreover, even if this Court were to consider abrogation necessary, even though Congress intended these to be costs ancillary to prospective rlief, which has always been against judicial officers,

abrogation there is.

This case is an easier one than Hutto v. Finney. In Hutto v. Finney we were dealing with the Eleventh Amendment, and the main concerns expressed in dissent in that case were that in the area of conflicting interest of constitutional dimension, the Eleventh and Fourteenth Amendments, that is a very sensitive area; extra, explicit language for abrogation is necessary, and we didn't even have states as persons under 1983.

In the present case, we are not dealing with conflicting interests of constitutional dimensions, not conflicting interests of statutory dimension. We are not conflicting with really anything but an enactment under the Fourteenth Amendment and a judge-made policy. That is certainly not as sensitive an area as two conflicting constitutional provisions. Yet we have more explicit indication.

Judges are persons under 1983. States are not. And moreover, Congress made very clear that one of the purposes in fact in enacting 1988 was to make these remedies available, available against officials who are immune from damages awards. This Court said that in Consumers Union where this Court stated, and I quote, "The House Committee report on the act indicates that

Congress intended to permit attorneys' fees awards against, when prospective relief is entered against defendants immune from damages awards." This Court recognizes, Congress recognizes, everywhere in Congress', in the Senate and House reports, reference is made to Newman v. Piggie Park which, of course, was a case where it was recognized that when damages are not available, that is when injunctive relief is all that's available, and it is so much more important then to have attorney fees available, and this case exemplifies that.

My clients are indigent. They had no money with which to hire a lawyer. They could not sue for damages to which an attorney might look for a contingent fee. They were dependent on the incentive provided by 1988, and it served that purpose.

QUESTION: Ms. Wyatt, may I ask you this question?

How long did this injunction extend?

MS. WYATT: Your Honor, the way it was framed, it was indefinite.

QUESTION: Indefinite.

MS. WYATT: That's correct.

QUESTION: So if this magistrate made this mistake again ten years from now, she would be guilty of

contempt.

MS. WYATT: She would be, Your Honor.

QUESTION: Do you think that has no influence on the independence of the judiciary, that sort of situation?

MS. WYATT: Your Honor, of course, is reaching the issue of the underlying relief, the prospective relief. I think it may have, but I think this Court has recognized the difference in prospective and retroactive relief as in the Eleventh Amendment cases, and I think in this case it was the only way that this could have been stopped. She was the natural defendant; she was engaged in a practice. There might have been some other people that could have been sued, and in fact, befcre this case was filed, suit was filed in the same court on behalf of the same person, the same practice, but challenging, suing the sheriff and the Commonwealth Attorney.

QUESTION: May I as this question also?

You sued this particular magistrate only in the official capacity.

MS. WYATT: Thuat's right.

QUESTION: Suppose you had sued individually as well as officially and the jury had, or the judge, whoever tried the case, had brought in a judgment only

against the individual? Who would have paid those fees?

MS. WYATT: Your Honor, it is my reading of 1988 that it really is only applicable in cases in which you are suing someone in an official capacity, the specific language in either the House or Senate report indicating that. So I don't think we had 1988.

Now, we may have a bad faith situation, but I think this Court has recognized that that is a totally different analysis.

QUESTION: In your view, there is no situation in which an individual judge would be required to pay fees?

Suppose the legislature or the Attorney General's office or whoever just said, said we have no authority under the laws of Virginia to pay anybody's fees if they have misbehaved.

MS. WYATT: Your Honor, it would be my position that 1988, if it applies, applies regardless of the indemnification statutes. It's --

QUESTION: Do you think a federal judge could compel the legislature of Virginia to provide funds?

MS. WYATT: No, I do not believe it could, but I think that the state probably, if it cares, if it really does think that this is going to be such an

inhibitory effect on its state judges, will, and it has been my understanding that most if not all states had those, and in fact, I thought Virginia had, and again, this has been paid by the state.

But if they didn't, I think that's a determination for the state to make.

QUESTION: Well, may I ask this question also? We see a good many cases that involve no question as to the appropriateness of attorneys' fees but a very long litigation as to the correctness or reasonableness of the amount. No problem in this case, but suppose the fees allowed had been $25,000 instead of $7500? What about those?

MS. WYATT: Your Honor, I would find absolutely no distinction --

QUESTION: Right, but --

MS. WYATT: -- if the District Court --

QUESTION: But my next question is, who would pay the lawyers who represented the Petitioner in this case in the long litigation as to the reasonableness of the attorneys' fees?

MS. WYATT: Your Honor, I think that is a question which is going to vary perhaps from the state. Again, in Virginia, the Attorney General's office from the beginning has defended Petitioner, but that is for

Congress to decide.

QUESTION: You think Congress has decided that the attorneys' fees involved in a case that is litigated with respect to the reasonableness of the fees also would have to be paid? Do you think Congress intended that?

MS. WYATT: That's my understanding of Congress' intent, yes.

QUESTION: Is there anything in the legislative history that supports your view?

MS. WYATT: Nothing right off hand, Your Honor, that comes to mind. I am aware of the fact that they intended these to be, and that I believe this court has recognized that attorney fees are not supposed to be a second major source of litigation. They are in this case because we are now coming in through the back door and challenging the merits. Normally it would be the merits alone.

But I think it also points out the fact that at this stage we are not talking about judicial officers. Maybe somewhere a judicial officer is going to be left with the proverbial hat-in-hand approach. I think it is most unlikely. Again, it is my understanding that almost all states, if not all states --

QUESTION: Let's assume that you are correct, that Congress has the power to tell the State of Virginia or Commonwealth of Virginia to pay some fees, how would that be enforced?

MS. WYATT: Your Honor, if I said that, I misstated myself. I do not believe that Congress would have that power to say that they would have to indemnify them. I think that is something that -- I think if the order were against the state, we would have Hutto v. Finney. I think that they can say that judicial officers can be sued. We have already recognized that in Pierson v. Ray. What they have done instead is said we are going to assess the cost of litigation when injunctive relief is all that can be available for just a case s this. Congress can do that. Congress has done that. Congress intended this. If in some instance some judge is -- finds himself in a situation where he is responsible for his own fees, he is certainly not in a different position than all the other officials, including the President of the United States who is not immune from prospective relief and therefore presumptively from attorneys' fees if they applied, of course, to federal officials.

We have --

QUESTION: Is there anything in the statutcry,

in the Congress that says that we are waiving immunity for all judicial officers?

MS. WYATT: Not in that language, absolutely not, Your Honor.

QUESTION: If you sued this Petitioner here for $7,300, would that stand up?

MS. WYATT: If I sued for damages, for retroactive, prelitigation damages?

QUESTION: I don't care for any, just damages of $7,300.

MS. WYATT: I think it would make a difference if it were for --

QUESTION: Would you have been able to maintain that suit?

MS. WYATT: Not for damages, no, Your Honor.

QUESTION: But you can maintain a suit for $7,300 in attorneys' fees.

MS. WYATT: In fact, in this case we maintained --

QUESTION: Is that right?

MS. WYATT: Maintain a suit for attorneys' fees?

QUESTION: Well, how are you --

MS. WYATT: Possibly so, possibly so. There have been decisions which --

QUESTION: And now you will tell me the difference between the two.

MS. WYATT: There is one case of which I am aware in which prelitigation settlement incurred attorneys' fees, and that is the only situation in which I could even see it characterized as suing for attorneys' fees. But the difference there is this: it does not focus for one moment on the judge's prelitigation conduct. It doesn't even deal with bad faith.

1988 is only going to be between lawyers deciding how much the state pays, in fact. Furthermore, if you, a --

QUESTION: Do you think that answers my question, really?

MS. WYATT: It was my understanding, yes, Your Honor.

QUESTION: Okay.

MS. WYATT: If Your Honor believes that attorney fees equal damages, however, Congress made clear its intent, and this Court has recognized that Congress can do that. Congress can take away the entire immunity under Pierson v. Ray. It didn't do that. Instead, it simply assessed attorneys' fees.

But Congress made clear, it is mentioned all

through the House and Senate reports, the fact that the purpose was to make prospective relief available in theory also available in fact by removing the financial obstacles. It does cite to Pierson v. Ray, but that is not the only indication in these reports that that is what Congress intended.

QUESTION: Well, Ms. Wyatt, is the citation by the Court of Appeals to that provision two sentences from the House one, is that as substantial a thing as there is in the legislative report indicating that the judges should be liable for prospective relief and attorneys' fees?

MS. WYATT: I'm sorry, ae you saing is that one citation as --

QUESTION: Well, I mean, is that as persuasive as any other item of the many that you feel are there?

MS. WYATT: I think it is certainly more persuasive than what was available in Hutto v. Finney. As I note in my brief, they refer to preclusive immunities, and the only preclusive immunity referred to was in Pierson v. Ray, which is immunity from damages of judges.

But there are many, many citations. I note that in the House report there are five references tc Newman v. Piggie Park. In the Senate report there are

two.

QUESTION: How about, take Tenney v. Brandhove, the legislative immunity. Now, there you have immunity from equitable as well as damage relief, I take it.

MS. WYATT: That's correct.

QUESTION: Now, do you think that nonetheless, if this paragraph that the Court of Appeals made, should be read to allow attorneys' fees against legislators?

MS. WYATT: Absolutely not, Your Honor, because that is not -- because a legislator is not going to be a defendant in a suit in 1983 at all. There is no prospective relief, there is no damage relief, there is no suit that can be sustained.

QUESTION: Well, Senator Tenney was certainly a defendant in a -- Senator Tenney, the original party in Tenney v. Brandhove, was certainly a defendant in a 1983 action.

MS. WYATT: But he won upon this Court's enunciation that legislators are absolutely immune in the absolute sense; the legislative process is immune from being examined by the judiciary, and you will not have a legislator, therefore, against whom prospective relief is entered, or damages, for that matter, and therefore you will never have 1988 come into play.

If you did, if a legislator acted in some other capacity and was an appropriate defendant, yes, 1988 would apply to him.

QUESTION: And then he could -- attorneys' fees could be recovered even though neither prospective equitable relief nor damages could be had against him.

MS. WYATT: No. 1988 is confined to the situation in which relief is given. There is a prevailing party in a 1983 action, and I think that was the point this Court made in Consumers Union. Legislators cannot be sued at all. Therefore, there's never going to be attorneys' fees. Prosecutors can be sued, if only for prospective relief, and therefore there are going to be attorneys' fees. That's what Congress intended.

Judges, because their immunities are so like prosecutors', are immune from damges but are not appropriate candidates for prospective relief, and consequently, prospective -- for immunity from prospective relief, and therefore, will be sued for prospective relief, should be able --

QUESTION: Of course, we have never decided that, have we, whether judges are or are not immune from prospective relief.

MS. WYATT: That's correct, and you need not

do so in this case because presumptively it was correct. We don't even know. We don't even know what the District Court found or why because the merits were not appealed.

I would like to add, though, that if this Court were to reach that issue, it is a very dangerous one in a case such as this. There really is not any alternative remedy, as we were discussing previously.

Furthermore, I would like to also point out that Pierson --

QUESTION: May I ask you, is there anything in the legislative history of 1988 that indicates anything about the Congress' assumption about the immunity of judges from prospective relief? Is there any discussion of judges at all?

MS. WYATT: Not -- not the word judges, no.

QUESTION: Judicial officers?

MS. WYATT: The people who are immune from damages, or the unavailability of damage remedies, yes, and judges by implication in the citation of Pierson v. Ray. That's the only official they could have been referring to when they talked about preclusive immunities in cite to Pierson v. Ray.

QUESTION: Might they have been talking about prosecutors?

MS. WYATT: Pierson v. Ray dealt with police officers and judges. Police officers were not entitled to preclusive immunity. There were three cases cited. The only one that had a preclusive immunity was Pierson v. Ray, and that was for judges. But no, they didn't use the term judges.

Throughout, however, 1988, there are references to the principle enunciated in Newman v. Piggie Park, which is where you can't get damages, the private attorney general enforcement is all the more important, and in fact, this case exemplifies that as well, if I may. The public attorney general vigorously defended the conduct in this case, making the private enforcement all the more important.

Now, there has been some discussion about this application of 1988 expanding the use of 1983. I think Justice Harlan concurring in Bivens, had an appropriate perspective to that, that is really Congress' concern and should not cut back on constitutional rights. But certainly, to apply that principle to this case would be to throw the baby out with the bath water. This was a correct application of 1988. It served the vindication purpose. It served the purpose of allowing prospective relief to be had by persons who were indigent, could not have gotten it otherwise. It served the private

attorney general purpose, and this Court has already recognized in Hutto, in White v. New Hampshire, in Consumers Union, that attorneys' fees do not equal damages. Again, they are both money, but they are different. One, Congress said, is to be ancillary -- they said this in the House and Senate reports -- is to be treated as ancillary, which of course ties in with this Court's language regarding the Eleventh Amendment, ancillary to prospective relief, whether we like it or not.

QUESTION: Going back to the Attorney General's point that judges might be just as apprehensive or nearly as apprehensive about the prospect of attorneys' fees being awarded against them as damages, have you given any thought to the fact that in quite a number of cases, under 1988, judges, including federal judges, have awarded costs against the nonprevailing party, and the judge, if he has been doing his homework, would note that even if he won the case, in a situation like yours, he might be charged with some attorneys' fees on the ground that the plaintiff had done something useful?

MS. WYATT: Your Honor, I believe that that principle was killed in Alyeska. What was resurrected in its place was 1988, which does not -- really does not

give any provision for such an award as you were just describing short of bad faith, and if a judge has been vexatious, delaying the litigation, I believe this Court has recognized in furtherance of the Court's docket and its control of its courts, a federal court could give a bad faith award to a judge.

These concerns, let me add, are equally applicable with equal or more force to all other officials who are available to be sued. To the extent that this applies to federal judges, as Petitioner has indicated, it can apply to the President of the United States as well, which this Court has held is not immune from prospective relief. He can be stopped. A local magistrate should be able to be stopped, always has been. And there is no more chilling, inhibiting effect on a local magistrate than on anyone else against whom 1988 attorneys' fees can be assessed, and then paid, in most cases, all cases of which I am aware, by the state.

I would like to make one final point on the prospective relief, if I can. In addition to the fact there was no alternative remedy, there is no sound justification for this extension. Moreover, Pierson, Imbler, Tenney all rested, all rested on the proposition that these immunities there were so firmly entrenched,

so well grounded in history and reason that it had to be assumed Congress took them into account in passing 1983. And because it made no mention of it, they survived 1983.

What can be said about immunity from prospective relief? Judges have never been considered immune from prospective relief, as this Court as recognized as recently as 1981, and therefore, I think it --

QUESTION: No, but is there a history of suing judges for prospective relief?

MS. WYATT: There certainly is, Your Honor, or we would not have had an anti-injunction act almost from the time this country began, and we certainly have cases such as Mitchum v. Foster, Boddie v. Connecticut which really would be thrown out into the twilight zone if this Court were to hold that there was now, for the first time, immunity from prospective relief.

QUESTION: Well, to violate the anti-injunction act, you don't have to sue the judge. You sue the party that is the beneficiary of the state court ruling.

MS. WYATT: Your Honor, I believe the anti-injunction act is aimed at the courts, but this Court has recognized if you sue the party such as the

prosecutor, that that still can come under the anti-injunction act. That is a device that was used and which was criticized, but it is the Court's, and this Court has had cases before it reaching the merits where judges have been defendants for prospective relief.

I think it is very important that when you have -- and it's going to be rare -- a defendant who is a judge who is the natural defendant in a case, who is denying indigents the right of appeal, throwing out all cases brought by blacks, ordering women sterilized on ex parte hearings, incarcerating persons for nonincarcerable offenses --

QUESTION: Do you want our ruling to be limited to judges who do things like that?

MS. WYATT: I think it could be, Your Honor.

QUESTION: Do you think so?

MS. WYATT: For my case it could be. I don't think there's any sound reason for doing so, but in those cases, the federal court must retain the ability to stop them, and Congress has said with that prospective relief, to encourage that prospective relief, to make possible in a case such as mine where my clients are poor, we are providing 1988 attorney fees.

Accordingly, the decision below should be affirmed.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Attorney General?

MR. BALILES: Mr. Chief Justice, unless the Court has further questions, Petitioner waives rebuttal.

CHIEF JUSTICE BURGER: Thank you, Counsel.

The case is submitted.

(Whereupon, at 2:53 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1432-GLADYS PULLIAM, MAGISTRATE FOR THE COUNTY OF CULPEPER, VIRGINIA, Petitioner v. RICHMOND R. ALLEN AND JESSE W. NICHOLSON

---

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)