

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BILL MARTIN, DIRECTOR, MICHIGAN DEPARTMENT
OF CORRECTIONS, ET AL., Petitioners v. EVERETT
HADIX, ET AL.

CASE NO: 98-262 c-1

PLACE: Washington, D.C.

DATE: Tuesday, March 30, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BILL MARTIN, DIRECTOR, :
4 MICHIGAN DEPARTMENT OF :
5 CORRECTIONS, ET AL., :
6 Petitioners :
7 v. : No. 98-262
8 EVERETT HADIX, ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, March 30, 1999

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:06 a.m.

15 APPEARANCES:

16 THOMAS L. CASEY, ESQ., Solicitor General, Lansing,
17 Michigan; on behalf of the Petitioners.
18 DEBORAH A. LaBELLE, ESQ., Ann Arbor, Michigan; on behalf
19 of the Respondents.

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1 PROCEEDINGS

2 (10:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 98-262, Bill Martin v. Everett
5 Hadix.

6 Mr. Casey.

7 ORAL ARGUMENT OF THOMAS L. CASEY

8 ON BEHALF OF THE PETITIONERS

9 MR. CASEY: Mr. Chief Justice, and may it please
10 the Court:

11 Congress intended the PLRA attorney's fee cap to
12 apply to cases precisely like the two before the Court
13 this morning. Congress intended not only to limit
14 frivolous claims in cases and to limit Federal court
15 involvement in the details of State prison management, but
16 it also intended to relieve States of some of the
17 financial burden of such cases and, in particular, some of
18 the financial burden of attorney's fees ancillary to such
19 cases.

20 42 U.S.C. 1988 provides that a district court
21 may allow reasonable fees to prevailing parties. The
22 PLRA, in effect, has defined prevailing party and
23 reasonable fee.

24 QUESTION: Mr. Casey, some of the fees in this
25 case are not -- reasonable fees to prevailing party. I

1 normally think it applies to the -- the fees that have
2 been expended in the course of the litigation before the
3 judgment. But some of these fees were for the purpose of
4 policing the injunction after it was issued?

5 MR. CASEY: That's correct.

6 QUESTION: The attorneys' efforts undertaken in
7 -- do the courts have the power to do that, to sort of
8 hire, you know, a private marshals force to -- to see that
9 their injunctions are being complied with? Is this a
10 common practice? I frankly was unaware of it.

11 MR. CASEY: My understanding is that it is a
12 common practice. Once a consent decree or a judgment
13 after trial has been entered, the district court
14 frequently retains jurisdiction to monitor compliance.
15 Remedial orders are entered, and the court monitors
16 compliance. In Michigan, we've had these remedial
17 orders --

18 QUESTION: Oh, I now it monitors compliance,
19 but --

20 QUESTION: Who pays for it?

21 QUESTION: -- who pays for it? That's --

22 MR. CASEY: The State pays for it.

23 QUESTION: Why is that?

24 MR. CASEY: The court has in one case determined
25 after trial and in another case by consent decree that

1 there has been constitutional violations sufficient to
2 require the defendant to make -- to rectify the
3 constitutional violations.

4 In this case --

5 QUESTION: Well, that's fine. And if they
6 should -- if they should commit the violation again and
7 you should sue again, then I assume the attorney's fees
8 expended in demonstrating that they continued the
9 violation would be fees expended by the prevailing party
10 in that later litigation. But once litigation has been
11 completed, the -- the injunction has -- has issued, I -- I
12 find it -- I find it extraordinary --

13 MR. CASEY: Your Honor --

14 QUESTION: -- that you can hire attorneys to --
15 to oversee the -- the prisons for -- for the court.

16 MR. CASEY: The States have objected loudly and
17 long against that practice, and now in the PLRA, Congress
18 has directed its attention to it. And in --

19 QUESTION: Well, that -- that feature colors my
20 whole view of this case, and I'm -- I'm worried that --
21 that how I come out in this case is -- is going to be
22 dependent on a -- on a practice that I'm not sure is even
23 -- is even authorized. But there's -- there's no
24 challenge to that here I gather.

25 MR. CASEY: Not in this case, no.

1 QUESTION: Would you give us a little more
2 background? There are two cases here: one in class
3 actions I take it, one involving female prisoners and one
4 male prisoners?

5 MR. CASEY: That's correct.

6 QUESTION: In both cases is there still an
7 ongoing monitoring or has one of them been concluded at
8 last?

9 MR. CASEY: We filed a supplemental brief a few
10 weeks ago, Your Honor. In the Glover case, 6 months ago
11 or so the circuit court remanded the case to the district
12 court with instructions to make findings as to whether
13 there are current violations. The district court has now
14 made those findings, has found that there are no current
15 violations, and has terminated its jurisdiction. The
16 Sixth Circuit had retained jurisdiction, so now briefs are
17 scheduled to be filed.

18 QUESTION: Well, now on -- on that one, do we
19 have an issue remaining as to attorney's fees for
20 monitoring in the Glover case --

21 MR. CASEY: Yes.

22 QUESTION: -- post PLRA and until the
23 termination of the suit?

24 MR. CASEY: Yes. I believe that termination of
25 the suit does not moot out the current attorney fee

1 requests.

2 QUESTION: And -- and the Hadix suit is one
3 where there is still an ongoing monitoring?

4 MR. CASEY: Yes.

5 QUESTION: And there's been no petition to end
6 that one?

7 MR. CASEY: There have been. We have
8 unsuccessfully appealed portions of it. The case most
9 recently was remanded from the Sixth Circuit back to the
10 district court for further proceedings to determine
11 whether there are current constitutional violations.

12 QUESTION: Now, one other housekeeping sort of
13 question. Has the State paid all the fees to the
14 attorneys for monitoring up to the effective date of the
15 PLRA?

16 MR. CASEY: The mechanism for attorney's fees in
17 these cases was that each 6 months the plaintiffs'
18 attorneys would submit a request for attorney's fees. We
19 would make objections, as we saw appropriate, and then the
20 district court would enter an order. So --

21 QUESTION: Well, I asked a pretty simple
22 question. I -- I thought PLRA became effective April
23 26th, 1996. Is that right?

24 MR. CASEY: That's correct.

25 QUESTION: Has the State paid the attorney's

1 fees up to that date?

2 MR. CASEY: There is a period of 4 months where
3 we are challenging. The fee cycle started January 1 of
4 1996, and we are asserting that the determinative date
5 under the PLRA is the date of the award. And the cycle
6 that is at issue is for the 6 months starting December of
7 1996. The PLRA took effect, as you say, in April of 1996.
8 So, we have in Michigan --

9 QUESTION: So, the answer is that the State has
10 not paid everything.

11 MR. CASEY: That's correct. We have not paid
12 the entire fee.

13 QUESTION: Up to the effective date.

14 MR. CASEY: Correct.

15 QUESTION: Would you tell how long each of these
16 two cases has been going on?

17 MR. CASEY: One was filed in 1977 and the other
18 in 1980.

19 QUESTION: So, they were cash cows, in effect,
20 weren't they?

21 MR. CASEY: They were, indeed, Your Honor, and
22 the Sixth Circuit stated that in one of its opinions,
23 which we've quoted in the brief. Particularly since --

24 QUESTION: Well, the record before us of the
25 extent of the violations of the injunction -- we don't

1 know that. It may be that these -- that there were
2 consistent violations and the monitoring was necessary so
3 that the officials would abide by the court's orders.

4 So, but that's -- the sole issue here is how
5 much per hour, as I understand it, and not whether these
6 injunctive decrees were needed.

7 MR. CASEY: That's correct, Your Honor. As --
8 as the case is postured now, we are only dealing with the
9 attorney fee cap in section 803(d)(3) of the PLRA.

10 QUESTION: May I ask just one other question?
11 Your -- your position is that the date of the award
12 governs. Supposing there's an award before the statute
13 was passed, but you challenged it and appealed it, and
14 then it became final after the statute was passed, how
15 would you deal with that?

16 MR. CASEY: For an award which has not been
17 liquidated and finalized, we believe that the PLRA would
18 apply.

19 QUESTION: I see.

20 MR. CASEY: We -- we are not seeking to reopen
21 old --

22 QUESTION: I understand that, but I just --

23 QUESTION: Is there any -- I mean, the common
24 sense of this I guess would be Congress passes a statute
25 saying put a cap on rates. All right?

1 MR. CASEY: Yes.

2 QUESTION: Somebody who knew nothing about it
3 would say, I guess they mean that the cap applies to
4 people for future work, and it doesn't apply for past
5 work. All right. I guess knowing nothing about it,
6 that's what I would say.

7 Now, why is it knowing a lot about it, I'd have
8 to say something else?

9 (Laughter.)

10 QUESTION: Well, some of this is future work. I
11 mean, lest --

12 MR. CASEY: Oh, yes.

13 QUESTION: -- lest it be thought the --

14 MR. CASEY: Some of it is --

15 QUESTION: I mean, I assume you're not going to
16 object to that part of it, but the -- the common sense --
17 what I think is the common sense of it. And the other
18 part --

19 MR. CASEY: Well, as -- as this Court has told
20 us in Landgraf, you first look to see if Congress has made
21 a clear statement about its intention, and to do that, you
22 first look at the text of the statute and the legislative
23 history.

24 QUESTION: Well, the statute here doesn't say
25 anything about what is supposed to happen. It just says

1 there is this cap on attorney's fees, and we know it
2 became effective in April of 1996. Isn't that right?
3 That's all we know from looking at the statute.

4 MR. CASEY: We believe that the text of the
5 statute does clearly show Congress' intent that it apply
6 to pending cases. Section 803(d)(1) refers to in any
7 action brought by a prisoner who is confined. Those are
8 words of the present tense. We believe they apply to
9 pending cases.

10 In *Hutto v. Finney*, this Court said of similar
11 language in section 1988 that the words any action could
12 not be broader and contained no hint of an exception.

13 QUESTION: Of course, the word brought was not
14 in that statute.

15 MR. CASEY: That's correct.

16 We are not saying that any individual word here
17 by itself is determinative. To determine the intent, you
18 must look at the entire statute. There are three
19 subsections: the one I've just read and also section
20 803(d)(3), which says no award of attorney fees shall be
21 greater than 100 percent. Again, these are all
22 encompassing words. No award we say means no award.

23 Thirdly, the definition of prisoner in section
24 8038 says any person incarcerated who is convicted or
25 sentenced for. Again, words in the present tense which

1 are all-encompassing and contain no exception and no
2 limitation to solely prospective application.

3 QUESTION: And yet, there is another section
4 that does state it is to be retrospectively applicable,
5 and this section that we're dealing with conspicuously
6 does not contain any such explicit instruction.

7 MR. CASEY: Section 802 of the PLRA was an
8 amendment to the Code of Criminal Procedure, 18 U.S.C.
9 3626. In that section, the -- there is an explicit
10 statement that section 802 applies to pending cases. We
11 believe that Congress knew after this Court's opinion in
12 Landgraf that in order to make that section apply to
13 pending cases, they had to do it explicitly because that
14 was a substantive section. It applied to the relief to
15 which plaintiffs would be entitled and to terminating
16 current relief.

17 The sections that we are talking about,
18 particularly section 803(d), we submit is more of a
19 procedural than a substantive section. All of the
20 sections of the PLRA, except section 802, are sort of a
21 grab bag of different kinds of statutes. They deal with
22 such things as filing fees, exhaustion of administrative
23 remedies. We have the attorney fee provision. There is
24 a --

25 QUESTION: Well, I don't understand the

1 principle you're espousing, that all procedural things --
2 I don't understand. The line between retroactivity and
3 non-retroactivity or between a presumption of
4 retroactivity and a non-presumption of retroactivity is
5 the same as the line between substance and procedure?

6 MR. CASEY: That is one of the factors the Court
7 identified in Landgraf.

8 QUESTION: I thought that -- that the
9 distinctive feature of 802(b)(1) is the fact that it says
10 it shall apply with respect to all prospective relief
11 whether such relief was originally granted or approved
12 before, on, or after the date of enactment of this title.
13 I mean, that -- that is a degree of retroactivity,
14 admitted retroactivity. You're not arguing for
15 retroactivity here, are you? You -- you don't think that
16 this applies before.

17 MR. CASEY: Section 802 is -- is not at issue
18 here. What --

19 QUESTION: No, but that's the section we're
20 comparing it with. We're saying that 802 has this
21 explicit statement.

22 MR. CASEY: Yes.

23 QUESTION: And it seems to me the explicit
24 statement was necessary in 802 to make it clear that 802
25 was retroactive.

1 MR. CASEY: That's correct.

2 QUESTION: That is, it applied to matters before
3 the date of enactment of this title.

4 MR. CASEY: That's correct.

5 QUESTION: You don't assert that 803 applies to
6 matters before the date of this title. You just -- you
7 just assert that it applies to all fees awarded.

8 MR. CASEY: We say it applies to all awards made
9 after the effect of the statute.

10 QUESTION: Right.

11 QUESTION: But it does apply to awards made for
12 work done before the date of the statute.

13 MR. CASEY: That is our contention, yes, Your
14 Honor.

15 QUESTION: Let's assume, for the sake of
16 argument, that I don't think the -- the text really
17 answers the question so that we have to go to step two in
18 -- in the retroactivity analysis and ask sort of the
19 Justice Story questions which in this case I guess would
20 be the question whether the act imposes a disability with
21 respect to completed acts as of the date of its enactment.
22 And I take it in this case that would translate into the
23 question whether the -- whether the act in effect
24 interferes with the -- sort of the -- the fee agreement or
25 the -- the terms of the fee that had been set before the

1 date of the act.

2 Now, my -- my question I guess is this. Is it
3 -- is it your argument that the -- as it were, the
4 expectations for payment of fee, the fee arrangement, was
5 simply a fee which in the terms of 1988 was a reasonable
6 fee, whatever that might turn out to be, so that if the
7 statute comes along at a later time and says, well, we
8 think reasonable is this lesser amount, the statute
9 applies?

10 MR. CASEY: Yes.

11 QUESTION: Or -- that's -- that's your position.

12 MR. CASEY: Yes.

13 QUESTION: Why shouldn't -- why shouldn't the -
14 - the analysis be that we're talking about the real world
15 here and the -- the fee arrangement was the fee
16 arrangement which the -- which the lawyers and the court
17 had at the time they began their work? And at the time
18 they began their work, and certainly at all -- at the time
19 that they did the work up until at least the effective
20 date -- forget the later period -- their -- their
21 expectation was that they would be paid on whatever the -
22 - sort of the going rate was at that time, which was the
23 higher amount. Why isn't the proper analysis -- the kind
24 of real world factual analysis that the -- that the terms
25 were that they would be paid at that higher amount?

1 If you impose the -- the act with respect
2 certainly to -- to work done prior to the date of the act,
3 you are imposing a disability. You are interfering with
4 that kind of fee arrangement. And therefore, it's
5 retrospective. Why isn't that the proper analysis?

6 MR. CASEY: Our position is that the plaintiffs
7 and their attorneys do not have a reasonable expectation
8 in a particular rate.

9 QUESTION: Well, why don't they?

10 MR. CASEY: The most that they --

11 QUESTION: I mean, why -- that's -- I know
12 that's your position, but why -- why don't they? At the
13 time they -- they did this work, there was no reason to
14 suppose that the -- that the practice of the court was
15 going to be, in effect, interfered with.

16 MR. CASEY: Well, I disagree with that, Your
17 Honor. In fact, there have been many changes in the fees
18 paid here.

19 QUESTION: Have -- have any of those changes
20 been retrospective in the sense of applying to work
21 previously done before the change was announced?

22 MR. CASEY: Every 6 months plaintiffs submit a
23 bill for their expenses, and at that time they say what
24 they want their fee to be.

25 QUESTION: So, in effect, every -- every award

1 of fees is for work previously done.

2 MR. CASEY: Correct.

3 QUESTION: Yes, but did -- did they argue about
4 the amount of the work they've done and whether they have
5 earned the fee, or did they argue about the -- the terms
6 upon which they will be compensated for work done once the
7 amount of work is determined? What's -- what's the --
8 what is the -- the contest at the time they submit the
9 bill, about the one point or the other?

10 MR. CASEY: They submitted a -- a bill for fees
11 for January 1 through June of '96. They are asking for an
12 increase in the rate of pay from \$150 to \$200 an hour
13 because that they say is the prevailing market rate.

14 QUESTION: Has that happened --

15 QUESTION: Okay.

16 QUESTION: -- all -- all along? Have -- have
17 they asked for years -- periodically they ask for more --

18

19 MR. CASEY: Yes.

20 QUESTION: -- in hourly rate? And then the
21 court decides whether to increase it or not?

22 MR. CASEY: That is -- that is --

23 QUESTION: But that hasn't --

24 QUESTION: Yes, but --

25 QUESTION: Go ahead.

1 QUESTION: No, please.

2 QUESTION: There --

3 QUESTION: It seems to me beside the point that
4 you can always increase the rate. A windfall is lovely,
5 but can you decrease the rate if there is an understanding
6 that there is at least a -- a floor, and if you -- can you
7 decrease that rate? Do you have any instances of past
8 practice in which the court has said, well, I've been
9 approving rates at -- at \$100 an hour, but I think I'll
10 drop down to \$80 with respect to the -- to the work you've
11 previously done? I think it was just too high. Any
12 instances of that?

13 MR. CASEY: I don't believe there have been any
14 instances like that.

15 QUESTION: Well, then why --

16 MR. CASEY: But there --

17 QUESTION: -- isn't the actual expectation that
18 -- that we should bear in mind when we're doing a
19 retroactivity analysis, the expectation that, in fact,
20 there -- there was at least a floor? They may or may not
21 succeed in getting it raised, but there was at least a
22 floor and that floor is the -- sort of the benchmark that
23 we should consider for retroactivity analysis.

24 MR. CASEY: Our position is that that floor is
25 subject to change.

1 QUESTION: Well, I know that's your position,
2 but why? I mean, what reason do you have for me to accept
3 your position?

4 QUESTION: Mr. Casey, can the -- can the
5 district court disappoint the expectations of the
6 defendants?

7 MR. CASEY: Of course. The district --

8 QUESTION: By -- and every time it increases the
9 fees beyond the fees that it gave the last time around, I
10 suppose it is disappointing the expectations of the
11 defendants, isn't it?

12 MR. CASEY: That's correct.

13 QUESTION: And that's perfectly okay.

14 MR. CASEY: Yes.

15 QUESTION: Well, maybe on your analysis --

16 QUESTION: Presumably it could -- it could
17 disappoint the expectations of the plaintiffs as well
18 should it decide at some time that it has been giving too
19 much money in the past.

20 MR. CASEY: That's -- that's correct.

21 QUESTION: Have you ever objected to an increase
22 in the fees?

23 MR. CASEY: Yes.

24 QUESTION: Yes. So, I -- I assume you didn't
25 think that was proper.

1 MR. CASEY: That's correct.

2 QUESTION: And by a parity of reasoning, I
3 suppose it would not be proper to -- to decrease
4 retroactively.

5 MR. CASEY: If, for example, the economy went
6 into a depression --

7 QUESTION: Well, isn't that -- is my logic
8 correct?

9 MR. CASEY: If there was a -- if there was a
10 decrease in the prevailing market rate of attorney fees,
11 then the plaintiffs in one of their 6-month cycles would
12 be entitled to a lesser amount than they received the
13 preceding cycle.

14 QUESTION: Well, why?

15 MR. CASEY: Because under their view, the
16 prevailing market rate would have -- instead of being \$150
17 an hour, say it was \$100 an hour.

18 QUESTION: Well, so you're -- you're saying that
19 the only arrangement -- that the only expectation ever
20 expressed was whatever the market rate is you'll get.

21 MR. CASEY: Under -- under 1988 --

22 QUESTION: If it goes up, you get it. If it
23 goes down --

24 MR. CASEY: That's correct.

25 QUESTION: -- yours goes down.

1 MR. CASEY: That's correct.

2 QUESTION: Now, what about -- and I'm not sure
3 that this really is to the point, but I want to explore
4 it. What about the feature in this case, as I understand
5 it, that at least after the judgment for the period in
6 which counsel was -- was policing the judgment, acting as
7 monitor, and so on, that the court actually set fees in
8 terms of specific figures. Didn't -- wasn't there an
9 order in one or the other of these cases or perhaps both
10 saying you will get paid at such and such an hour for this
11 prospective work?

12 MR. CASEY: For a particular fee cycle, yes.

13 QUESTION: Okay.

14 QUESTION: For the future?

15 MR. CASEY: I don't believe for the future, no.
16 For the billing cycle that was before the court.

17 QUESTION: Which was past.

18 MR. CASEY: Which was past.

19 QUESTION: So that it was never forward looking.

20 MR. CASEY: It's my understanding. We certainly
21 never agreed to any order which would say that plaintiffs
22 are henceforth entitled to a particular amount.

23 QUESTION: Now, let me go back to my question
24 and I won't -- I won't occupy your whole argument. I just
25 want to go through one -- one time on this.

1 You say they cannot look backwards and say the
2 reasonable fee is less than we have been paying. And as I
3 understand it, you're saying they can't do that because
4 the actual understanding between court and counsel was
5 simply a general understanding. You get what's
6 reasonable --

7 MR. CASEY: On the date of the award.

8 QUESTION: -- not any specific amount.

9 MR. CASEY: Yes.

10 QUESTION: Okay. What is the basis for your
11 saying that?

12 Was that -- was that proposition that you are
13 putting forward ever set forward on the record? Is it in
14 writing anywhere? How do we know that that was the
15 arrangement?

16 MR. CASEY: I don't think it was articulated in
17 those terms in front of the district court. It was
18 essentially every 6 months, they would submit a bill. We
19 would object. But I -- I don't think we got into this
20 level of subtlety.

21 QUESTION: Are -- are you saying that in light
22 of the statute, amounts previously awarded are now known
23 to be unreasonable?

24 MR. CASEY: We are not --

25 QUESTION: Or put it another way, would it be

1 unreasonable to award more than the statutory amount?

2 Assuming no retroactivity, we know that there's a policy
3 in the Congress to put this cap on. Does that mean
4 anything above that is unreasonable --

5 MR. CASEY: Yes. Section 1988 --

6 QUESTION: But isn't there a range of
7 reasonableness?

8 MR. CASEY: Of course, and what we are saying is
9 that all the plaintiffs are entitled to is a reasonable
10 fee on the date of the award, and that reasonable fee
11 changes.

12 QUESTION: I would have thought -- I would have
13 thought that you'd look at when the work was performed.
14 And one line you could draw with this statute that
15 wouldn't pose a retroactivity problem, I assume, would be
16 to say that work performed by the lawyer after the
17 effective date is governed by the provisions of the PLRA.
18 But you don't take that position.

19 MR. CASEY: We do take that position.

20 QUESTION: I thought you said it turned on the
21 date of the award, regardless of when the work was
22 performed.

23 MR. CASEY: The court has specified --

24 QUESTION: That's what I heard you to say.
25 Which is the line you're drawing?

1 MR. CASEY: The court has specified two issues:
2 one for work performed before the date of the PLRA and one
3 for work performed after the date of the PLRA.

4 QUESTION: Well --

5 MR. CASEY: We say that the date of the award is
6 the operative date.

7 QUESTION: Yes, but what I'm saying to you is I
8 would think a line could be drawn saying it depends on
9 when the work was performed, and if it was performed after
10 the effective date, the statute applies. But you do not
11 take that view.

12 MR. CASEY: The statute applies to all awards
13 after the effective date of the statute regardless of when
14 the work was performed. That is our position.

15 QUESTION: That's your view, yes.

16 MR. CASEY: That's correct.

17 QUESTION: And I think one could make an
18 argument for a different approach.

19 MR. CASEY: I think a stronger argument can be
20 made for work performed after the date of the statute.

21 QUESTION: Let me ask you one more thing. Do
22 you think that an attorney who is involved in the
23 monitoring would have the right to withdraw, go to the
24 court and say, I'd like to withdraw because I don't want
25 to work for the amount provided in this statute?

1 MR. CASEY: They would need the court's
2 permission, but yes, they could seek it.

3 QUESTION: Yes, but that's possible to do.

4 MR. CASEY: Yes, yes.

5 QUESTION: Excuse me. They -- they would need
6 the court's permission. Are they designated by the court
7 or they just happen to be the attorneys for -- for the
8 client and they -- they need to get the court's permission
9 to cease being attorneys for the client?

10 MR. CASEY: They were the plaintiff class
11 counsel from the beginning of the lawsuit, and I don't
12 believe they could unilaterally just withdraw at this
13 point. The court would have to -- I assume would look to
14 see if there is substitute counsel available and make
15 sure --

16 QUESTION: They would -- do they have court
17 appointments? Because I assume --

18 MR. CASEY: No.

19 QUESTION: They did not have court appointments.

20 MR. CASEY: No. These are -- these are private
21 counsel. They're not appointed by the -- by the court.

22 Again, we think you look to the relevant
23 activity affected by this statute and that is the award of
24 attorney fees.

25 And I'd like to reserve the rest of my time.

1 QUESTION: Very well, Mr. Casey.

2 Ms. LaBelle, we'll hear from you.

3 ORAL ARGUMENT OF DEBORAH A. LaBELLE

4 ON BEHALF OF THE RESPONDENTS

5 MS. LaBELLE: Mr. Chief Justice, and may it
6 please the Court:

7 I would first like to just clarify briefly one
8 of the inquiries of Justice O'Connor and that in this
9 case, both in the Glover and Hadix, the defendants have
10 paid at pre-PLRA rates all of the fees up to the date of
11 enactment of the act. The way that happened is the --

12 QUESTION: The date of the enactment or the
13 effective date of the act?

14 MS. LaBELLE: Up through April 26th, 1996.

15 QUESTION: The fees have been paid, contrary to
16 what counsel has just told us.

17 MS. LaBELLE: Yes. They did not seek review of
18 the Sixth Circuit's prior opinions in both Hadix and
19 Glover awarding specifically that pre-enactment --

20 QUESTION: So, in your view, the only thing at
21 issue is fees earned, if you will, after the effective
22 date of PLRA?

23 MS. LaBELLE: Absent this Court ruling that
24 defendants, which they sought to come back and get those
25 fees back, yes. They've already paid them and before the

1 Sixth Circuit and at the later opinion they asked that
2 they be able to go back and reclaim them.

3 QUESTION: Did they pay them because the
4 district court required them to? I mean, they did contest
5 them all, didn't they?

6 MS. LaBELLE: They did contest them. They paid
7 them because the court of appeals affirmed the district
8 court and they did not seek review of that.

9 QUESTION: Yes, but it was not a voluntary
10 payment and then they sought to get it back.

11 MS. LaBELLE: That's correct.

12 QUESTION: They didn't pay until ordered to do
13 so by the court.

14 MS. LaBELLE: That's correct, Your Honor.

15 And clarifying one other point --

16 QUESTION: Excuse me. That means then that --
17 that really question 1 in the questions presented is not
18 really before us. Is that -- yes. I'm sorry. No.
19 Question 1 is not before us.

20 MS. LaBELLE: It is true that they have paid all
21 those monies.

22 QUESTION: Wait a minute. Oh, it's question --

23
24 QUESTION: But they

25 QUESTION: -- question 2 that's not before us.

1 MS. LaBELLE: Correct.

2 QUESTION: They have paid them, but are they
3 still able to contest them procedurally?

4 MS. LaBELLE: I don't know the answer to that
5 question.

6 QUESTION: Didn't they challenge that in the
7 Sixth Circuit?

8 MS. LaBELLE: They challenged it in the Sixth
9 Circuit, but the Sixth Circuit ruled that they had to pay
10 it. They did not seek review of that prior opinion. It
11 was the subsequent opinion which covered both pre and post
12 awards, pre and post fee awards, that they sought review
13 of and that is before this Court now.

14 QUESTION: Why did the subsequent opinion
15 address it if it had been paid under the earlier opinion?

16 MS. LaBELLE: Because the original opinion dealt
17 with a time period way before the passage of the act from
18 June 1995 through December 1995, which the court, because
19 they contested some other matters, didn't hold a hearing
20 and get around to awarding until after the passage of the
21 act. Therefore, they said, okay, it's an award for fees
22 from June through December 1995. Now we want to apply the
23 PLRA. Subsequent to that came a time period of January
24 '96 through June '96 which encompassed both pre and post
25 enactment hours. And that is the matter which they sought

1 review and is before the Court.

2 For whatever reason, they decided that when the
3 Sixth Circuit ruled even as to that matter to pay all of
4 the fees up through April 1996 at the pre-PLRA rate.

5 QUESTION: Ms. LaBelle, let me get at least
6 myself straight. Maybe my colleagues are already
7 straight.

8 Question 2 is whether in such litigation this
9 fee provision applies to fees awarded after the act's
10 effective date for services rendered before that date.

11 Now, do you say that that question is not before
12 us?

13 MS. LaBELLE: I think that it's not before the
14 Court --

15 QUESTION: And why is that?

16 MS. LaBELLE: -- Mr. Chief Justice, because they
17 paid all of those fees, did not contest them, did not --
18 did not contest them at the time of paying it, did not say
19 we retain the right, and in fact, did not seek in their
20 petition for review before this Court to review that
21 matter.

22 QUESTION: So -- go ahead.

23 QUESTION: I just -- does the record show that
24 they were paid?

25 MS. LaBELLE: Yes.

1 QUESTION: Why did they not seek to pursue that
2 matter if it's included in the questions presented? Or
3 it's not in the cert petition?

4 MS. LABELLE: It's not in their cert petition,
5 Your Honor, and this Court then issued them the two
6 questions splitting the matter.

7 QUESTION: It's our fault. You're blaming it on
8 us.

9 (Laughter.)

10 QUESTION: Yes, it was framed much more
11 generally in the question presented. It would have
12 embraced both, though, whether the attorney fee provision
13 applies to fees for services in litigation pending on the
14 effective date of the PLRA. That would include both, but
15 it didn't split them out.

16 MS. LABELLE: And, Your Honor, I think that
17 there's a good reason actually to include both in this
18 Court's inquiry because I do not think that the statute,
19 by the language of the statute itself, allows for the
20 distinction. And in fact, that's one of the problems.

21 QUESTION: Let me just be sure I get -- you do
22 tell me this in the record, the fact that they were paid
23 before.

24 MS. LABELLE: I do not know if it's in the
25 record, Your Honor, in the joint appendix. The decision

1 -- the prior decision of the court is in there, and I
2 would have to look at the joint appendix to see if there
3 is a specific notation of them paying it. I don't think
4 it was included in their joint appendix, Your Honor.

5 QUESTION: I see.

6 QUESTION: Well, is it in the record of --

7 QUESTION: Well, because he has a different
8 memory.

9 QUESTION: I was -- is it in the record of a
10 Michigan court, whether it got --

11 MS. LABELLE: Yes, it's certainly --

12 QUESTION: -- into the portion you sent to us?

13 MS. LABELLE: Yes, Your Honor. It's certainly
14 in that record.

15 I would -- I would like to address the fact that
16 we think that the -- the plain language of the statute at
17 issue here does not evince a congressional intent with
18 regard to its temporal reach.

19 However, if you apply this Court's other general
20 rules of statutory interpretation, there are several bases
21 for concluding that Congress intended the statute only to
22 apply to actions brought after the passage of the act
23 because, while Congress did not state in any --

24 QUESTION: So, your -- your position then is --
25 is you reject all of the previous positions that have

1 either been suggested from the bench or by -- by your
2 opponent. It applies only to a lawsuit that is brought
3 after the act.

4 MS. LaBELLE: I think that's correct, Your
5 Honor, to an action brought after the passage of the act.
6 And it does not apply to pending cases because, while this
7 Court has, certainly in Landgraf, told Congress that if
8 they want to apply things to pending cases, they should
9 clearly make that evident in the language of the statute.
10 Here Congress did in one section of the statute, in 802,
11 clearly say that this applies to pending cases. What
12 they --

13 QUESTION: Well, we didn't say that in Landgraf.
14 I mean, it depends on what the rule is. I mean, if -- if
15 Congress changes, for example, a rule of evidence, as to
16 the admissibility of evidence, I didn't understand
17 Landgraf to say that we would treat that as inapplicable
18 to cases filed before the rule of evidence was adopted.

19 MS. LaBELLE: I think that's true, Your Honor.
20 I think that in Landgraf the Court set out some narrow
21 lines in saying in purely procedural matters, for example,
22 or in matters that have occurred in the past, that -- in
23 purely procedural matters, that this Court would not have
24 a presumption against retroactivity.

25 QUESTION: But this is procedural a fortiori.

1 It's really tertiary conduct that we're talking about
2 here. You don't need to look at the clock either.

3 We're looking at presumably actions taken by
4 Michigan correctional authorities some time ago dealing
5 with prisoners. That would be the primary conduct. Now,
6 here we get to something. We're talking about the rate at
7 which attorneys for the prevailing party which prevailed
8 somewhere back in the '70's are to be paid in the '90's.

9 MS. LaBELLE: But I think, Your Honor, Mr. Chief
10 Justice, what we're talking about here is that the way
11 these cases were filed were based upon a reliance on the
12 act that existed at that time and which this statute
13 amends. And the -- the understanding at that time is that
14 if you bring these cases -- and in fact, Congress evoked
15 the act to induce parties to bring these cases and
16 attorneys to represent these parties who didn't have the
17 wherewithal to challenge their constitutional rights in
18 any other manner -- if you bring these cases, you will
19 have an entitlement to reasonable attorney fees.

20 QUESTION: Well, only if you win. I mean, this
21 -- this was crap shoot anyway. You -- you didn't know you
22 were going to get any attorney's fees whatever, much less
23 were you guaranteed the absolute amount of them. You knew
24 you would get attorney's fees if you won.

25 MS. LaBELLE: That's correct, Your Honor, but

1 that is exactly the balancing act that goes on when a case
2 is filed. You know that you may not win, but if you do
3 win --

4 QUESTION: But it's a good deal less certain
5 than the kind of reliances that -- that we typically say
6 cannot be upset by future legislation. I mean, there's
7 all sorts of reliance. I mean, the person who -- who
8 builds a nuclear plant may rely on the existing state of
9 the law and make substantial investments on the basis of
10 it, but the law changes and he's just -- he's just out his
11 investment. Why isn't this that kind of reliance? There
12 was no guarantee you were going to get attorney's fees at
13 all, much less the fixed amount of them.

14 MS. LABELLE: Well, I want to distinguish two
15 things. The facts of this case which, in fact, the court
16 did rule in both of these cases that you would for your
17 future work have an entitlement to attorney fees at a set
18 market rate. And these are orders in both of these cases
19 establishing at that time that you would have \$150 an
20 hour. It was the market rate established.

21 QUESTION: The court can bind Congress that way
22 for the future? I would think at least as soon as
23 Congress says we repudiate that court's pronouncement for
24 the future, Congress wins rather than the court.

25 MS. LABELLE: That the Congress, Your Honor, can

1 say that -- that that -- that fees worked -- Congress can
2 say that, Your Honor, but I don't think they said it in
3 this act. And I think that that's an important point.

4 What the Congress did say is they said -- in
5 802, they said, yes, it's going to apply to pending cases,
6 and in fact in a case where it involves specifically
7 prospective relief. In a prospective relief, which I
8 think has a little more ambiguity as to whether that
9 applies anyway, the retroactive analysis, but Congress
10 there said it will apply in 802.

11 It did not have that language in 803, and it did
12 something more significant. It took --

13 QUESTION: The reason they did it in 802, as I
14 suggested earlier, was -- was that 802 -- they had to say
15 it because they -- they said whether the relief was
16 originally granted before the date of enactment. There's
17 no contention here that we're going to go back before the
18 date of enactment.

19 MS. LABELLE: Well --

20 QUESTION: And he just says all orders entered
21 after the date of enactment. Now, had they wanted in this
22 case to cover even attorney's fees orders entered before
23 the date of enactment, then they would have had to have
24 something like what was said in 802. But -- but that
25 wasn't what -- what they wanted here according to the

1 other side.

2 MS. LaBELLE: Or what will be covered is three
3 things because I don't think you can separate the act.
4 What will be covered is fees worked prior to the passage
5 of the act by the language of the act, which were worked
6 under an entitlement, an order of the court saying you
7 will be entitled to future monitoring fees at this rate.

8 And I do want to note and clarify for the Court,
9 the way the court has always awarded fees is for future
10 fees. Defendants have always fought the concept that we
11 can then -- at the time we are petitioning for fees, we
12 could raise the rate and get it for the time worked.
13 Defendants have said no, and the court has agreed. Only
14 work --

15 QUESTION: But you're saying they cannot do
16 that. You're saying that even as to future rates set
17 after a hearing for the purpose of determining future
18 rates. As I understand your argument, you're saying in
19 this case the rate as determined by the statute may not,
20 in fact, be applied.

21 MS. LaBELLE: That's correct. That's what would
22 happen.

23 QUESTION: The statute -- yes.

24 QUESTION: Well, why -- why could not the
25 statute be given effect as of its effective date to work

1 performed after that date? Because after that date,
2 counsel must know, of course, that the statute was enacted
3 and that it might well apply.

4 MS. LaBELLE: The -- I think that if you go by
5 the language of the statute, it doesn't allow parsing the
6 statute in that manner because it speaks in terms of any
7 action brought by a prisoner who is incarcerated, the
8 court -- fees shall not be awarded except to the extent
9 that. And it does not have, as any of its delineation,
10 hours worked, when the hours are worked, what the time
11 period, and so it's --

12 QUESTION: But it's a very simple line to draw
13 and certainly could be I think on the face of the statute.
14 In fact, that's the most common sense reading of it I
15 would think.

16 MS. LaBELLE: I think that it is a simple line
17 to draw, Your Honor, but I don't think Congress drew that
18 line. And I -- I think that what --

19 QUESTION: It was the line the district court
20 drew, though, wasn't it?

21 MS. LaBELLE: The district court drew that line,
22 Your Honor, finding that not that the statute's wording
23 provided that, but that there would be a retroactive -- an
24 impermissible retroactive effect if you got past the
25 congressional intent --

1 QUESTION: Well, how -- how is it retroactive if
2 you say it applies to work performed after the effective
3 date? How is that retroactive?

4 MS. LaBELLE: I think because what we're looking
5 at is what is the conduct and what is the triggering event
6 here, what is the event you look at for purposes of
7 determining whether it has that kind of effect.

8 QUESTION: Well, how could -- how could
9 attorney's fees at an hourly rate be applied on any basis
10 other than work performed?

11 MS. LaBELLE: Because the attorney fees --
12 first, the attorney fees are only provided if you prevail
13 in a litigation that you've filed under the prior act. In
14 terms --

15 QUESTION: Yes, but we're over the point of
16 getting paid for the litigation, and we're talking I think
17 only about these endless monitoring arrangements, these
18 open-ended, ongoing monitoring arrangements. Isn't that
19 what we're talking about here?

20 MS. LaBELLE: In this case you're talking about
21 the monitoring arrangements, but certainly if it's allowed
22 to apply, it will apply to cases in which have not yet
23 prevailed and which work has performed. The statute comes
24 in in between filing the case and prevailing. And then
25 the -- at that time -- and there are a number of cases

1 certainly out there in which it's before prevailing in
2 which you file the case with the understanding that if you
3 did vindicate the constitutional rights of your client,
4 that you would obtain reasonable fees.

5 QUESTION: If you have a trial court that said,
6 you know, counsel, we've been working with this case for 2
7 or 3 years. I've been making attorney fee awards. I want
8 to tell you that henceforth, I'm going to put a cap on the
9 fees of X dollars an hour, which is lower. You're telling
10 us that that is retroactive. That's a very strange way to
11 use the term retroactive.

12 MS. LaBELLE: Because I think that it does
13 unsettle expectations and disrupt and injure the client in
14 a way that it should not, in the sense that what the
15 attorney may do in that case, who has committed to the
16 client to represent them, is withdraw. It's the --

17 QUESTION: Well, except the attorney never had
18 the expectation that he would get anything more than a
19 reasonable fee.

20 MS. LaBELLE: But this does not provide for a
21 reasonable fee now. This caps the fee at a certain rate,
22 which is not a reasonable fee.

23 QUESTION: Well --

24 QUESTION: Well, I suppose by a miracle that
25 they -- which I think they should do -- that they increase

1 or double the rate that's paid to counsel in criminal
2 cases, then what would you be saying? Would you be saying
3 that doesn't apply to us? In other words, instead of the
4 \$75 an hour max, which is awfully low -- I think far too
5 low -- they said, very well, it will be \$150. And then
6 your fees would go way up and would you be in here saying,
7 no, no, no, that doesn't apply? It's all --

8 MS. LaBELLE: I think defendants would, Your
9 Honor, because --

10 QUESTION: Yes, yes, but I mean, your point --
11 the issue, I would have thought, was not retroactivity. I
12 don't see this retroactivity jurisprudence as relevant
13 either. It's just an issue of whether or not the statute
14 applies to future work in pending cases.

15 MS. LaBELLE: I think --

16 QUESTION: And normally you'd think it does
17 apply to future work in pending cases, but -- but you
18 produce some reasons why not, and that's what I want to
19 hear.

20 MS. LaBELLE: I think it's true. I don't think
21 this Court needs to get to the retroactivity analysis
22 because you only get there if you find that there is --
23 it's not clear what congressional intent was.

24 QUESTION: I don't think you'd be making this as
25 a set deal -- years ago we decided initially what all the

1 future rates would be -- if tomorrow they come along and
2 they double the -- the base rate for the -- for the
3 defendant. That's my point. I'm trying to focus you on
4 reasons. What are your reasons why you say, gee, this
5 seems awfully -- if it favors you, it does; if it doesn't
6 -- that isn't going to be a reason.

7 MS. LABELLE: Well, I think that in some sense
8 this is a flip side of Landgraf in which the Court said
9 there that although it was just potential, that you could
10 not tell -- you could not grant or extend a potential
11 benefit to -- to the plaintiff, a right of compensation,
12 that had the potential of extending the liability of the
13 defendant after the case had been filed. And in this
14 case, what you're doing is you're decreasing the
15 entitlement to the plaintiff in such a way not just with
16 fees, Your Honor --

17 QUESTION: But you're -- you're not just --
18 you're talking again about secondary or tertiary conduct.
19 Landgraf was dealing with primary conduct: What is the
20 basis for liability? We're not talking about liability in
21 the lawsuit at all here. We're talking about compensation
22 of attorneys.

23 MS. LABELLE: Well, I think you're talking
24 about, Mr. Chief Justice, more than compensation of the
25 attorneys, both -- for two reasons. One, the statute,

1 which also controls -- is -- is controlled. The
2 subsection of the statute also talks about the damages to
3 the client. In this act, what it says is that in any
4 awards in any case brought, the party also loses a portion
5 of their damages and has to move those damages over to pay
6 for --

7 QUESTION: But that's not involved here.

8 MS. LABELLE: It's not involved here, but it's
9 necessitated by this Court's opinion because they are both
10 -- both subsections are under, in any case brought, fees
11 shall not be awarded except to the extent that, and one is
12 -- sets the cap on attorney fees.

13 QUESTION: Well, if you drew the line at the
14 mechanics of awarding, I can understand your concern. If
15 you drew the line at when the work is performed, that's a
16 different question it seems to me.

17 And I -- is there any reason why a lawyer who is
18 governed by the act in a situation where the lawyer is
19 providing monitoring services -- is there any reason why
20 the lawyer couldn't withdraw if the lawyer thought, well,
21 this is just not enough for me?

22 MS. LABELLE: I think that the lawyer could
23 withdraw, but then the concern comes in terms of the
24 effect on the client who is now deprived of the lawyer
25 with the experience and the ability --

1 QUESTION: Ms. LaBelle, didn't Judge Wald bring
2 up some ethical constraints that might operate on a lawyer
3 in that situation? She apparently didn't think that the
4 lawyer could just walk away from this kind of undertaking.

5 MS. LaBELLE: I think, Your Honor, it probably
6 -- I think it does involve ethical concerns certainly,
7 especially in the circumstance where you would be saying
8 whether you should withdraw because it's overwhelming you
9 in terms of the -- the financial burden where you know
10 that it is unlikely to have any other -- to get any other
11 counsel to represent the client.

12 QUESTION: It may be a good reason to stop
13 monitoring if -- if the rates are such that you can't get
14 competent counsel to do it. Maybe the district court
15 should take another look at that.

16 MS. LaBELLE: I think that the monitoring, Your
17 Honor, came in only after, in the Glover case, the Sixth
18 Circuit found these defendants in omnibus contempt of the
19 court's orders and then ordered a development of a plan
20 that actually complied with the court's orders.

21 QUESTION: When -- when was that, Ms. LaBelle?

22 MS. LaBELLE: The order of the Sixth Circuit
23 initial one was in 1991, and the district court
24 subsequently in 1995 found again that defendants were not
25 complying and were in contempt.

1 The -- it has not been, at least in the Glover
2 case, ongoing monitoring. There was a period in which
3 everyone expected the defendants to obey the court's
4 orders and it was only after 5 or 6 years in which no
5 action was done, that the parties for the class of women
6 prisoners came back in and said, excuse me, we don't have
7 any compliance here. And then that started again the
8 contempt and the monitoring award.

9 QUESTION: Ms. -- pose of this provision to be to

10 help parties? QUESTION: That was the Glover case?

11 MS. LaBELLE: That's correct. true, Your Honor,

12 but this QUESTION: And that was the one from 19 -- that
13 started in 1977?

14 MS. LaBELLE: Yes, it did, Your Honor.

15 QUESTION: Ms. -- turn that portion of your

16 damages over? QUESTION: Go ahead.

17 attorney? QUESTION: I'm sorry.

18 Ms. LaBelle, is it -- is it the expectations of
19 the lawyers we ought to be looking at in this case anyway?
20 These -- these fees are not really awarded to the lawyers,
21 are they?

22 MS. LaBELLE: The fees are the fees of the
23 client.

24 QUESTION: Now frequent is it in these prison

25 reform litigation? QUESTION: Right, and -- and in what respect was
the expectation of the client disappointed?

1 MS. LaBELLE: I think in -- in these cases that
2 what happens when they are filed is that the -- it is the
3 party that has a right to, under the act prior to this
4 amendment, reasonable attorney fees and --

5 QUESTION: The party is going to turn over
6 whatever attorney's fees the party gets to the lawyers is
7 what's going to happen. I don't think the party really -
8 - really cares whether the party turns over more or less.
9 I understood the -- the purpose of this provision to be to
10 help parties, not to -- not to help lawyers.

11 MS. LaBELLE: I think that's true, Your Honor,
12 but this -- this statute does more. It takes from the
13 party up to 25 percent of their damages when they win, and
14 it's found that they are the victims of constitutional
15 violations and says you must turn that portion of your
16 damages over to pay the defendant's obligation to pay
17 attorney fees. So, it certainly does affect the party in
18 a way more than just paying the lawyers. They must now,
19 under this subsection, pay up to 25 percent of any damages
20 awarded to them to offset the award to the wrongdoer, the
21 defendant in this case, as obligation for attorney fees.
22 So --

23 QUESTION: How frequent is it in these prison
24 reform litigation cases that -- that there is any
25 significant monetary award to the plaintiffs?

1 section. MS. LaBELLE: I think that in -- the most
2 significant awards do occur in situations of wrongful
3 death and in rapes. Certainly that's my familiarity, more
4 in the women's prison situation. There are -- cases

5 QUESTION: Those cases would tend to be brought
6 not as these large class actions, would they? The
7 wrongful death case? Yes.

8 MS. LaBELLE: There are cases brought as class
9 and as individuals, Your Honor, addressing both where
10 there is a pervasive condition that is alleged. But I
11 think in -- in the general situation where there are
12 damages, I would agree that in general they are brought in
13 individual circumstances.

14 QUESTION: May I ask you to clarify one point to
15 make sure I got it right? Did you respond, in answer to a
16 Justice Breyer's question, that you would take the same
17 line with respect to a Congress that doubled the fee,
18 because it wanted to give people incentive to bring these
19 actions, that the word brought would mean that the
20 increase applied only to actions brought after the
21 effective date?

22 MS. LaBELLE: If the statute had the same and we
23 evolution, Your Honor, and the procedure that I think we
24 have here, where Congress took that section out of a
25 section that applied to pending cases and put it in a

1 section that did not and did not specify that it applied
2 to pending cases, I think that you would have to use your
3 general rules of statutory interpretation to say that
4 Congress did not intend it to apply to pending cases.

5 QUESTION: So, the answer is yes. It would have
6 the same --

7 MS. LABELLE: Yes.

8 QUESTION: -- words, the same history.

9 MS. LABELLE: The answer is yes.

10 QUESTION: It would work both ways.

11 MS. LABELLE: It would work both ways, Your
12 Honor, because it would -- in that circumstance I would
13 not argue that the defendants who also work under these
14 circumstances with the knowledge as to what the fees would
15 be should have to, in pending cases, then have to reassess
16 that and now be told not that it will be market rate, but
17 that it might be double market rate, and especially in
18 circumstances where they can't go back and change their
19 conduct, as is urged here, where we worked under an
20 entitlement of a court order to what had been defined as
21 market rate and performed that work, and then the act came
22 into effect. And so that certainly we can't alter and we
23 can't go back and make a decision whether to withdraw.

24 But -- but I would think that here, where
25 Congress -- I think that although I do believe that there

1 is a retroactive effect on the parties by applying this
2 act to cases that are pending, I think that Congress --
3 you don't need to get to that if you look at what Congress
4 did here.

5 QUESTION: Well, may I raise a question here? I
6 have one basically simple problem with your statutory
7 argument, to the extent that you are arguing that at no
8 time may the court prospectively change the rate in this
9 case to conform to the new -- to the new act. The problem
10 that I have with it is that I assume -- I have to assume
11 -- that Congress legislated against a background of -- of
12 fee award practices in -- in which we -- we all find it a
13 familiar feature of the system, that the court is
14 constantly reexamining fee orders in -- in these
15 continuing cases. Lawyers come in, just as I guess -- I
16 don't know whether you did, but I gather a lawyer did in
17 this case and said I ought to paid more, and that was even
18 for work that had been completed. But in any case, I
19 ought to get a higher rate. And it seems to me that the
20 -- that the background principle against which Congress
21 probably legislated was the principle in which adjustments
22 are made as we go along.

23 Now, we may fight about the retroactive effect
24 of making that adjustment with respect to a post-enactment
25 period for work done before the adjustment is made. Let's

1 leave that aside.

2 But with respect to an adjustment which is by
3 any standard totally prospective, the adjustment that is
4 made when the court says, from now on any work that you do
5 is going to be compensated at the -- at the rate under the
6 new statute, it seems to me that that is probably in
7 conformance with what Congress would have assumed as a
8 background principle for the way fee awards in continuing
9 cases are made.

10 Now, is -- is my simple problem subject to a
11 simple answer?

12 MS. LABELLE: Your Honor, if -- perhaps in cases
13 where you're in monitoring, but that would not be the
14 way --

15 QUESTION: Which is what we have here.

16 MS. LABELLE: Correct, but this would also apply
17 to cases where attorneys are in midstream on a case, where
18 they started the case under the understanding that they
19 would get those fees.

20 QUESTION: Well, what -- may I question that?
21 How many -- this is really a question. It's not just a
22 rhetorical question. How many lawyers begin cases --
23 let's say, prison litigation cases -- with a -- a clear
24 understanding about what the hourly rate is going to be if
25 they win? Is that -- is that commonly done? Do we go

1 into court and pretrials in these cases and say, if you're
2 the prevailing party, you're going to get X dollars an
3 hour?

4 MS. LaBELLE: I think, Your Honor, the answer to
5 some extent is not X dollars an hour, but prevailing
6 party, yes, that you will not suffer --

7 QUESTION: Do they say that at pretrials, or is
8 that again just kind of a background principle upon which
9 everybody behaves?

10 MS. LaBELLE: I think in these difficult cases,
11 it is the background principle, that if in these difficult
12 cases, you do prevail, you will not -- it will not be a
13 punishment. You will -- you're not sacrificing other work
14 in order to do these cases.

15 QUESTION: But is the prevailing rate understood
16 as the prevailing rate for fee awards in the Federal
17 courts for assigned counsel cases or the prevailing rate
18 in the bar in general? I assume the former, but maybe I'm
19 wrong.

20 MS. LaBELLE: I think that it has -- it has been
21 determined both by Hensley and in the precedents in -- in
22 the district circuit that we practice in, that it is the
23 prevailing market rate in the community in which you
24 practice.

25 QUESTION: Is that so?

1 QUESTION: Thank you, Ms. LaBelle.

2 MS. LaBELLE: Thank you.

3 QUESTION: Mr. Casey, you have 4 minutes
4 remaining.

5 REBUTTAL ARGUMENT OF THOMAS L. CASEY

6 ON BEHALF OF THE PETITIONERS

7 QUESTION: Mr. Casey, would you clarify a
8 factual matter for me? I had thought that you had said
9 that all of the awards here were retrospective; that is,
10 you came in after 6 months of work, and at that point the
11 court would tell you what rate you would get for the 6
12 months preceding.

13 But I understood Ms. LaBelle to say the
14 opposite, that the court was -- was saying for the next 6
15 months, you're going to get such and such a rate.

16 MR. CASEY: My understanding is that every 6
17 months, they submit a bill and they ask to be paid at a
18 certain rate for that work which was performed in the
19 past.

20 QUESTION: And the order does not say, moreover,
21 this rate will continue for the next 6 months.

22 MR. CASEY: Correct. I do not believe the
23 orders say that.

24 QUESTION: Is there any indication here that
25 Congress focused specifically on what I'd call prison

1 litigation, long, ongoing cases, 20-year cases, 15-year
2 cases, as compared to just an ordinary case where a
3 prisoner says I'm being held under bad conditions, one
4 person, one time, et cetera?

5 MR. CASEY: Yes. What legislative history there
6 is available is focused on these consent decree cases
7 which go on for decades, not just in Michigan's, although
8 Michigan's cases were specifically mentioned because
9 Senator --

10 QUESTION: Do you have any empirical data on --
11 on how many old cases there are hanging around forever as
12 compared to the number of new that are brought from year
13 to year?

14 MR. CASEY: I don't know.

15 QUESTION: No is the answer.

16 MR. CASEY: There was a letter introduced into
17 the record from the National Association of Attorneys
18 General which indicated I believe 54 cases as of 1994, but
19 I do not know how many -- Michigan has 4 pending --

20 QUESTION: Is it correct that the theory on
21 which the cases go on so long is that the plaintiffs
22 contend -- maybe their wrong -- that the violations of the
23 Constitution have not been terminated?

24 MR. CASEY: That's correct.

25 QUESTION: And the district court must find that

1 to be true in order not to terminate the litigation.

2 MR. CASEY: That's correct. And the problem, as
3 Congress recognized in the PLRA, is that district courts
4 have gotten bogged down in the minutia of management. The
5 Sixth Circuit in Hadix in an opinion we've included at
6 page 164 of our brief, in which they remanded the case
7 back to the district court, pointed out that the district
8 court had gotten bogged down in the minutia of remedial
9 activities rather than focusing on the alleged
10 constitutional violations. They sent the case back to the
11 district court and they said just determine whether there
12 is a current constitutional violation. The district court
13 examined it, found no current violations, and now that
14 case will be dismissed.

15 QUESTION: General Casey, could I clarify one
16 more factual matter? Am I correct that none of the fees
17 involved in this case involve the fees incurred in
18 litigating the initial -- to the initial judgment?

19 MR. CASEY: Correct.

20 QUESTION: They are all later --

21 MR. CASEY: Monitoring has been --

22 QUESTION: Monitoring fees.

23 MR. CASEY: -- going on for 15 or 19 years.

24 QUESTION: And may I ask with respect to my
25 previous question that if -- if Ms. LaBelle is of a

1 different view, namely, is of the view that these judicial
2 orders were prospective and said that you're entitled to
3 so much of a rate for the future, that perhaps she -- or
4 where that -- where that would -- would appear in the
5 record. This is an important fact for me and I think the
6 two of you have said different things. And -- and --

7 MR. CASEY: The orders of the court are included
8 in the joint appendix. If they're not all in the joint
9 appendix, then certainly they would be --

10 QUESTION: But they're all in the same --

11 MR. CASEY: Yes, I believe so. I believe so,
12 Your Honor.

13 QUESTION: How much has the State paid in -- in
14 the Glover case to date? Everything.

15 MR. CASEY: I don't know specifically over the
16 past 22 years. For the four cases, consent decree cases,
17 class actions we have pending now, the difference, if the
18 PLRA limit applies, for '96 through June of '98 is
19 \$550,000 apparently.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Casey.

21 The case is submitted.

22 (Whereupon, at 11:06 a.m., the case in the
23 above-entitled matter was submitted.)
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

BILL MARTIN, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL., Petitioners v. EVERETT HADIX, ET AL.

CASE NO: 98-262

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

BY:

Jonathan M. May
(REPORTER)