ORIGINAL

In the

# Supreme Court of the United States

SUPREME COURT OF VIRGINIA, ET AL.,

APPELLANTS,

V.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,

APPELLEES.

No. 79-198

Washington, D. C.
February 19, 1980

Pages 1 thru 41

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| SUPREME COURT OF VIRTINIA, ET AL., Appellants, | : | |
| v. | : | No. 79-198 |
| CONSUMERS UNION OF THE UNITED STATES, INC., ET AL., Appellees. | : | |

Washington, D. C.,

Tuesday, February 19, 1980.

The above-entitled matter came on for oral argument at 2:13 o'clock p.m.

BEFORE:

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

APPEARANCES:

J. MARSHALL COLEMAN, ESQ., Attorney General of Virginia, 1101 East Broad Street, Richmond, Virginia 23219; on behalf of the Appellants

ELLEN BROADMAN, ESQ., 1714 Massachusetts Avenue, N. W., Washington, D. C. 20036; on behalf of the Appellees

- - -

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 79-198, Supreme Court of Virginia v. Consumers Union of the United States.

Mr. Attorney General, I think you may proceed whenever you are ready now.

ORAL ARGUMENT OF J. MARSHALL COLEMAN, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This is a case that arises from the holding in the Bates decision on lawyer advertising. Because the Virginia Supreme Court promulgated a rule that banned advertising prior to Bates, it was subject to award of attorneys fees by a three-judge panel. And so at issue in this case is whether judicial immunity will stand or fall.

We are in a period in our history of enormous harmony between the federal judiciary and the state judiciary. But this case is really an anomaly in that because we are confronted with a punitive measure against a court that did not act to the harm or detriment of any party, intended no harm and wished no harm on any party. But because it had a rule that was generally accepted, to be valid throughout the country at the time of the Bates

decision in 1977 the three-judge panel has found that attorneys fees that could amount to $120,000 should be assessed against the Virginia Supreme Court and against our Chief Justice.

QUESTION: Do you concede, General Coleman, that the Supreme Court of Virginia is a person under 1983?

MR. COLEMAN: No. We urged below the question of judicial immunity and we are --

QUESTION: I am not talking about judicial immunity. I had thought that immunity was a defense that one raised. I think in order to have a lawsuit unier 1983 you have to show that the person you are suing is a person for purposes of 1983 as defined by Congress under Monell and related cases.

MR. COLEMAN: Well, during the course of this litigation, which was quite protracted, there was -- and I think in the record there is a proposed order that could give rise to the thought that there was a concession on that point. But during the case as it went forward, the state always took the position that it could not be -- that attorneys fees could not be assessed against it, that they would like to settle the question and that it was a matter that was of great moment and ought to be resolved by the federal courts. But --

QUESTION: Is there any connection between Mr.

Justice Rehnquist's question, the subject he is bringing up and the fact that the party named, the named parties are the Supreme Court presumably as an entity and Lawrence I'Anson, the Chief Justice?

MR. COLEMAN: Well, they were named as was the state bar.

QUESTION: Clearly he is a person.

MR. COLEMAN: That's right. The fees, of course, against him were in his official capacity, but he is a person.

Now, it is our position here that no one was harmed after Bates came down, and I think it is a clear rule of this Court that when a rule or law is declared unconstitutional, then it has no force or effect, that it is not necessary for any party to take any action. And I think it is in fact recent doctrine that if the Court should change that rule and reverse Bates, for example, that that law could come back into effect. But there is no evidence in the record or any suggestion that the Court or any officer of the Court at any time sought to violate Bates or sought to enforce the rule. They clearly did not.

What we tried to present to the court, and it refused to hear it below, was that the machinery was going forward through the offices of the state bar to amend and change the rule consistent with Bates. That is not a matter

that is free of difficulty, I might add. And after I took office I issued an Attorney General's opinion for the bar which was published and promulgated to all lawyers saying what the impact of Bates was on the rule. But there was never any question involved in this case of our Supreme Court not acknowledging the supremacy of this Court or ever trying to enforce a rule that was in violation of Bates, but the court below seemed to believe that because our Supreme Court did not with great haste change the rule subsequent to Bates, that these attorneys fees should properly be assessed under 1988. And it is our position that with today's practice that the awarding of attorneys fees against a court or against the Chief Justice has an inhibiting effect that is just as severe as damages.

Certainly, if the court has to stand when it is acting as the court in its judicial functions against the dread of having attorneys fees assessed against it, the very essence of our system of federalism and constitutional law is at issue, because then the judge is not really in the position to exercise the kind of independent judgment that he ought to in trying cases and in making judicial rulings.

It is interesting that when the doctrine of the case to which we all look for the best articulation of the doctrine of judicial immunity, Bradley v. Fisher was a case that itself was involved with lawyer discipline. That was a

case, as the Court will remember, when the judge sought to remove a lawyer from the rolls within his inherent authority to regulate the bar, and the Court found that he could not be malked for that decision because the doctrine of judicial immunity was such an important one that has been there as long as we have had courts.

The lower District Court seems to be saying that the priorities of our state Supreme Court should be its priorities, and its priorities apparently were that our Supreme Court should amend the rule immediately. Well, many other states didn't and still have not. Our state has now changed that rule, but change it or not, there was no one who was at hazard in Virginia as a result of our not changing the rule because the law in the Bates case applied.

Now, we are not talking about the assessment of costs or filing fees. Obviously, that is not usually of great moment. And in the Fairmont Creamery case, the court was talking about the need to get filing fees to continue in business. We are talking in this case of shifting a fee under the 1988 statute that was put there specifically for one purpose, which was at the invitation in part of this Court, after the ruling in Alyeska, to permit attorneys fees to be shifted, not to create some new remedy, not to abolish judicial immunity or the other immunities that existed at law or in the Constitution. In fact, the report accompanying

bill said that it did not create any new substantive rights.

So it is our position that, first of all, even if you look at a statutory construction without conceding a constitutional dimension to the right of judicial immunity, that certainly in this case our court is being fined because it had a rule that was part of our governance in Virginia that everyone thought was appropriate and valid and legal. Our court should not be held to in effect punishment because that rule was there. Special circumstances should indicate otherwise. There is no hint of any bad faith on the part of our court.

Secondly, looking at the statute itself and looking at the guidance that we have from several cases -- Pierson v. Ray and others -- this Court has found that if the Congress is going to abolish an immunity, that it ought to do it specifically and it ought to be manifested that it wanted to do that. There is no such evidence of that in the reports that accompanied the adoption of 1988.

Finally, it would be our position that the entitlement to judicial immunity is so much at the core and at the heart of a function of government that is necessary for our Virginia Supreme Court, that the Congress ought not to be able to overrule it even if it wanted to do it. This in fact poses a threat to the doctrine of judicial immunity. We are not talking about prospective relief. We are talking

about attorneys fees being awarded for something that happened several years ago, in 1970, when our court adopted this rule. We are not talking about a recalcitrance or bad faith on the part of the court in any respect. But we are talking about the inherent authority to manage by rulemaking the lawyers in Virginia, which is an inherent function being in jeopardy, and every other ruling of the court being in jeopardy if attorneys fees could be assessed in this case.

It strikes me that without an independent judiciary we have to ask what would our history be like, who would protect any of us. It is something that is essential and is needful. The question of who pays the assessments, whether it is the state or whether it is the court, whether it is an individual does not change the question before the Court, and the question before the Court simply is what chilling effect this decision, if it is upheld, would have on our jurisprudence, not only in Virginia and the other states, and in view of Davis v. Passman what effect it would have on other judges. Certainly, in Stump v. Sparkman this Court seemed to take the immunity issue to its very limit and to hold that in that case the judge could not be answerable for an act he did as a judicial officer. Certainly in this case, unlike the characterization in the opposing brief, we don't have a court that was not sympathetic or sensitive to individual rights, we don't have a court that in any way

attempted to trench on the constitutional guarantees of this Court. And I think that three-judge panel certainly underestimated the difficulty and complexity of making a rule for the entire regulation of the bar consistent with Bates, it underestimated the nature and extent of the job that was before it, but the appellees in this case seem to argue that even if the rule had been changed, that that alter the liability of the court in this case to pay attorneys fees.

It is our position that this trenching on judicial immunity is a threat that it would result in the intimidation of the judiciary which would certainly interfere with the functioning of our republican form of government and our system of governance.

MR. CHIEF JUSTICE BURGER: Ms. Broadman.

ORAL ARGUMENT OF ELLEN BROADMAN, ESQ.,

MS. BROADMAN: Mr. Chief Justice, and may it please the Court:

The Virginia Supreme Court's disciplinary rule which is at issue in this case is without question unconstitutional. Although the Virginia Supreme Court now concedes this fact, it claims that it is immune from the underlying action in this case and claims immunities that would leave the public defenseless against its future incursions on constitutionally protected rights.

Here the --

QUESTION: Ms. Broadman, I take it you do contend that the Supreme Court of Virginia as an entity is a person under Section 1983 and under 1341?

MS. BROADMAN: Mr. Justice Rehnquist, we feel that this court does not need to reach that question, because we did name the chief justice in his official capacity as a defendant, so that we clearly do have a defendant who is a person within the meaning of 1983.

QUESTION: Did the Chief Justice promulgate these rules?

MRS. BROADMAN: Well, it was the court, but he is a member of the court.

QUESTION: Well, yes, but he didn't do it, at least not all of them.

MS. BROADMAN: No, not all of them.

QUESTION: He wasn't an appropriate defendant alone in this case, was he?

MS. BROADMAN: That's correct.

QUESTION: Supposing you had sued just the Supreme Court of Virginia, the Supreme Court of Virginia as an entity, is a person within 1983?

MS. BROADMAN: Well, when we refer to the Virginia Supreme Court, we intended to refer to each of the members of the supreme court in their official capacity, so when we refer

to it as an entity, we're really referring to each of the individual justices in their official capacity, and they are persons, but as an entity we would argue that they are persons for purposes of 1983.

Here the consumer groups only means to protect their First Amendment freedoms was to institute this action. The disciplinary rule at issue here prohibited attorneys from participating in an attorney directory that the consumer groups wanted to publish to educate the public about available legal services. Here the consumer groups could not appeal that rule in order to protect their First Amendment freedoms. They could not publish that directory, and challenge the unconstitutional rule through disciplinary proceedings. Their only recourse was to bring this action under 1983.

The consumer groups here needed to join the Virginia Supreme Court as a party in order to obtain complete relief against all entities who had authority to enforce the rule against attorneys who participated in the directory.

QUESTION: What happened, was there a damages claim in this case?

MS. BROADMAN: No. The consumer groups here did not seek damages. They --

QUESTION: But I suppose that if you win, they could have, and should be entitled to damages under 1983?

MS. BROADMAN: Well, that would depend on whether or

not this Court characterizes the issuance and enforcement of the disciplinary rules as judicial or as administrative in nature.

If they are judicial acts, it's our contention that judicial immunity would protect the court from any damage claim; however, it would not protect the court from prospective relief, from preparatory and injunctive relief that protects rights in the future.

QUESTION: What about attorneys' fees for the injunction?

MS. BROADMAN: It's our contention that Hutto v. Finney establishes that the attorney fee award in this case is correct. The award upheld by this Court in Hutto was identical in all significant respects to the award that is now before the Court. Both awards were granted against state officers in their official capacity to be paid from state funds. Congress in passing the civil rights attorney fee award act intended to make reimbursement available from state funds where parties were forced to bring suit and forced to incur litigation expenses in order to vindicate their rights against infringement by the state.

And Congress intended that where governmental immunities did --

QUESTION: Not damages?

MS. BROADMAN: Not damages, no; attorney fees. The

Civil Rights Attorneys Fee Award Act does not authorize damages.

QUESTION: Then Judge Stump, I take it, in Stump v. Sparkman, would have been liable for attorneys' fees.

QUESTION: But not damages?

MS. BROADMAN: If the parties had won on the -- had obtained declaratory and injunctive relief, yes. Then they would be entitled under the Civil RightsAttorney Fee Award Act to damages.

QUESTION: But they got stopped by immunity.

MS. BROADMAN: Well, there, the parties --

QUESTION: -- and I think you say that action in judicial capacity, a judge is immune, at least for damages?

MS. BROADMAN: That's right. There's an enormous body of cases that hold that judges are immune from damage liability. However, damages are very different than attorneys fees. In Hutto v. Finney the Court recognized that distinction.

Moreover Congress in passing the Civil Rights Attorney Fee Award Act clearly intended to abrogate any immunities that might preclude a fee award.

QUESTION: What do you rely on other than the citation to the string of cases in the committee report that Congress in enacting the Civil Rights Attorneys Fee Act intended to abolish damages?

MS. BROADMAN: Okay. There's language in the Senate report that was cited in Hutto v. Finney in which the Senate

recognizes that in these cases state officers usually or often will be the defendants, and that in order to assure that the parties can protect their constitutional rights from infringement, the Congress intends to provide for reimbursement --

QUESTION: Certainly there's nothing in the act itself that suggests that persons who have had immunity in the past should be allowable for attorneys fees, is there?

MS. BROADMAN: Yes. Well, the statute authorizes --

QUESTION: People who have had, say, judicial immunity?

MS. BROADMAN: Uh-huh. Judicial immunity from prospective relief?

QUESTION: Well, I do know that Pierson v. Ray, for example, broke it down that way. They just said judges have been traditionally immune.

MS. BROADMAN: Okay. Pierson v. Ray was a damages case, as was Stump v. Sparkman. The Civil Rights Attorney Fee Award Act authorizes attorneys fees as part of costs, so the statute -- and costs traditionally have been awarded from state funds -- so the statutory language does provide for attorneys fees from state funds. And then if you look at the legislative history, the legislative history generally says that Congress intends to make fee awards available against state officers in their official capacities from state funds, and the House report has a specific reference to Pierson v.

Ray, the judicial immunity case, and specifically says this is one of several immunities that we do not intend to preclude fee awards in these cases.

QUESTION: That's in the House report, not in the statute?

MS. BROADMAN: That's correct. That's in the House report, it's in the legislative history.

QUESTION: The underlying lawsuit here was under Section 1983?

MS. BROADMAN: That's correct.

QUESTION: In which the plaintiffs prevail?

And is the validity of that lawsuit now being attacked, the validity of that judgment, the validity of bringing a 1983 action against the court and its chief justice?

MS. BROADMAN: The Virginia Supreme Court now concedes that its rule was unconstitutional --

QUESTION: Well, that's neither here nor there. A plaintiff could hardly sue a state legislature for passing a concededly unconstitutional law, could it?

MS. BROADMAN: Okay. The Virginia Supreme Court --

QUESTION: Under 1983? Could it?

MS. BROADMAN: Could?

QUESTION: Could a plaintiff sue a state legislature under Section 1983 for enacting a law that was allegedly and concededly unconstitutional?

MS. BROADMAN: No, they could not under Tenny v. Brandhove.

QUESTION: Well --

MS. BROADMAN: Here is the --

QUESTION: Well, couldn't they sue each one of them officially, as you did here?

MS. BROADMAN: Each one of the legislators?

QUESTION: Uh-huh.

MS. BROADMAN: Tenny v. Brandhove seemed to suggest --

QUESTION: You sue each one of these judges, you say, in their official capacity?

MS. BROADMAN: That's correct.

QUESTION: And that's okay. Why couldn't you sue each member of the legislature, quote, "in his official capacity"?

MS. BROADMAN: Well, legislative immunity protects legislators from suits that attempt to interfere with their speeches and debates, so this --

QUESTION: Well, a state legislature might not be a person within the meaning of 1983.

MS. BROADMAN: That's a separate issue.

QUESTION: That's a separate issue?

MS. BROADMAN: Right.

QUESTION: Well, I don't see how you can make the court a person and can't make the legislature a person.

MS. BROADMAN: No, I think you could sue -- I think the legislator individually would be a person, but legislative immunity would preclude the suit.

QUESTION: Going back to my original question before we got a little afield at my behest, is the validity of the 1983 judgment itself here under attack?

MS. BROADMAN: Yes. The Virginia Supreme Court is attempting to defeat that judgment in order to defeat the fee award here. It's claiming that judicial immunity precludes the consumer groups from getting prospective relief --

QUESTION: Quite apart from attorneys fees, which are --

MS. BROADMAN: That's right.

QUESTION: -- auxilliary to this.

MS. BROADMAN: They are attempting to defeat that, but solely to defeat the fee award. Never during the four years of litigation that preceded the granting of the fee award did the Virginia Supreme Court ever claim that legislative or judicial immunity precluded them from the underlying action, protected, immunizes them.

QUESTION: Although arguably it could it could have defended, the defendants could have defended on the basis of judicial immunity, they could have defended on the basis of the fact that the defendants named were not a, quote, "person," unquote, within the meaning of 1983, or many other defenses.

MS. BROADMAN: That's right.

QUESTION: They did not, in fact --

MS. BROADMAN: They never raised those. And in fact, judicial immunity does not preclude declaratory and injunctive relief, prospective relief from constitutional wrongs. The purposes for the judicial immunity doctrine did not apply here. Suits for prospective relief from unconstitutional acts are analogous to appeals in that they merely ask a court with review authority to determine whether or not another court has properly applied the law.

QUESTION: Are you suggesting that the three-judge district court has review authority over the Supreme Court of Virginia?

MS. BROADMAN: Under 1983, the three-judge district court does have authority to issue prospective relief from unconstitutional acts of the Supreme Court of Virginia.

QUESTION: You mean administrative acts?

MS. BROADMAN: Well, either judicial or administrative. It's our contention that here the acts are not judicial in nature, and that they --

QUESTION: Well now, let's just assume that the Virginia Supreme Court decides a case that your clients were involved in and that you happen to think has been decided wrong under the Federal Constitution. And that supreme court orders some relief against you. Can you go into a three-

judge court and get an injunction?

MS. BROADMAN: No. That's a very --

QUESTION: You just said to Justice Rehnquist you could.

MS. BROADMAN: Okay. In that situation, the reason you could not do that is not because of judicial immunity, but because of the doctrines of comity and res judicata.

QUESTION: Well, that may be. So your answer to the question is no, the three-judge court does not have reviewing authority over this?

MS. BROADMAN: Where there is a right to appeal from an unconstitutional act, no.

QUESTION: What do you mean, "where there's a right to appeal"?

MS. BROADMAN: Okay. In the situation we posit where the highest court in the state rules against my client, there's a right to appeal to this Court in order to correct.

QUESTION: Well, let's assume there's a decision in the Virginia Trial Court against your client. And there's a right to appeal to the Virginia Supreme Court. You don't appeal, and you come to the three-judge court, and you want to --

MS. BROADMAN: The three-judge district court should not hear that case because of doctrines of comity.

QUESTION: Res judicata?

MS. BROADMAN: Well, if it weren't up to the highest court --

QUESTION: It just stops there. It didn't go up to the highest court. But it has been finally decided in the Virginia Supreme -- Virginia court system.

MS. BROADMAN: Their doctrines of comity would prevent a party from circumventing --

QUESTION: What doctrine are you talking about?

MS. BROADMAN: Their basic rights to appeal, where a judge enters a decision where there's a right to appeal, that party must take that appeal if the appeal is adequate. Because to do otherwise would completely disrupt our systems of appeal. However, the Court need not reach that issue here, because there was no right to appeal. The act here was not a judicial act. It shares none of the characteristics of judicial immunity.

QUESTION: Well, that's really your answer, isn't it? That's your basic submission, that this is an administrative act, not a judicial act, so there's no question of judicial immunity.

MS. BROADMAN: That is correct. That is one reason that we're saying judicial immunity does not apply. The second reason is that judicial immunity does not preclude suits for declaratory injunctive relief, so that the parties are entitled to prevail on the underlying action, and

therefore are entitled to attorneys fees.

QUESTION: Well, you just said quite the contrary, just the contrary, just three minutes ago.

MS. BROADMAN: Well, let me try and clarify. What I --

QUESTION: Let us say that the Virginia Supreme Court performed a judicial act.

MS. BROADMAN: Correct.

QUESTION: Finally.

MS. BROADMAN: Uh-huh.

QUESTION: Now, are you going to go into a three-judge court and get a declaratory judgment against them?

MS. BROADMAN: Okay. It would depend.

QUESTION: On what?

MS. BROADMAN: Whether there was a right to appeal.

QUESTION: To where?

MS. BROADMAN: Well, where there are appellate processes that a party can follow, doctrines of comity would prevent that party from circumventing those by going and suing a court in a three-judge district court rather than following the appeals. So basically what I'm saying is that judicial immunity there would not prevent the party from bringing the action --

QUESTION: I think that's not your strongest argument.

MS. BROADMAN: Well, let me go on to the administrative act -- or the non-judicial act argument.

Here we don't believe that there is a judicial act at issue because none of the characteristics typical of judicial acts exist. The Virginia Supreme Court in issuing its rules is not resolving cases and controversies between the parties by applying relevant laws. The court is not bound by case precedent in issuing its disciplinary rules, and there is no right to appeal; none of the characteristics typical of judicial acts apply here.

QUESTION: Would you call it a legislative act, then?

MS. BROADMAN: No, we would not call it legislative. The legislature --

QUESTION: Because of Tenny v. Brandhove?

MS. BROADMAN: Because here the Virginia Supreme Court has authority to enforce the rules, it has authority to enforce the rules independently of the State Bar Association. It has inherent authority to enforce the rules, and it also has express statutory authority under the Virginia Code, Section 5474. That section authorizes the Virginia court to bring a disciplinary action whenever it observes an attorney engaging in unethical conduct.

We brought this action against the Virginia court in its enforcement capacity. Legislative immunity --

QUESTION: Supposing you have a case like the Chief

Justice wrote in 1970 or '71 involving the Groppi proceedings in the Wisconsin Legislature, whether Wisconsin Legislature had rules bringing somebody before the bar of the legislature and asking them questions or ordering them confined until the end of the session? Would you say that was a legislative act?

MS. BROADMAN: I'm not familiar with the case. They were basically just asking the state bar association for opinions, or --

QUESTION: No, they were telling him that he was going to either have to desist from certain conduct, or -- I don't remember the particular facts, but it was an action of the legislature enforcing its own rules.

MS. BROADMAN: Well, it's probably if the legislature starts enforcing the rules, the purposes for legislative immunity no longer apply. Legislative immunity is intended to protect legislator's speeches and debates from interference by the executive or judicial branch.

QUESTION: Are you saying that a legislative body doesn't have the right and the power to protect the integrity of its own proceedings? This was what Father Groppi was cited for, contempt, for interfering with the proceedings of the legislature. You say that's something, that's not a legislative act?

MS. BROADMAN: Well, enforcing --

QUESTION: When they find someone in contempt?

MS. BROADMAN: Well, enforcing their own proceedings is somewhat different than enforcing the laws that they issue. At the point when the legislature starts enforcing laws that it issues, it's no longer acting within a legislative capacity.

QUESTION: The Congress of the United States until recent times enforced its contempt determinations by decreeing confinement of a person in contempt, and because it was such a burdensome thing, they finally passed a statute giving that authority to the United States courts. But if they enforced that, they enforced contempt orders, do you say that's not a legislative act?

MS. BROADMAN: No, that is a legislative act because it's inherently involved in permitting them to freely speak, debate, gather information in order to pass laws, and that whole process through which laws are passed is protected by legislative immunity. But once a law is passed, the minute the legislature assumes responsibility for enforcement, typically it's not the legislature that enforces, legislative immunity no longer applies. You're no longer within the legislative realm.

It would be wholly contrary to the doctrine set forth in Ex parte v. Young a hundred years ago to apply legislative immunity here. During the past hundred years, many times this court has held that enforcement entities are subject to actions for prospective relief from unconstitutional --

QUESTION: Well, didn't you just attack these rules on their face, or not?

MS. BROADMAN: That's correct.

QUESTION: You said this rule that you've passed is unconstitutional?

MS. BROADMAN: That's correct.

QUESTION: And the court had either inherent or delegated power from the legislature or from the state constitution to pass these rules?

MS. BROADMAN: That's correct, from the state constitution.

QUESTION: So it had a brand of legislative power?

MS. BROADMAN: Well, its inherent authorities certainly are not legislative.

QUESTION: It may not be, but you do say that these weren't judicial acts, there -- these were something; what do you say they were?

MS. BROADMAN: We characterize them as administrative. To the extent that they're --

QUESTION: They made some rules.

MS. BROADMAN: That's correct.

QUESTION: And that's part of the administrative --

MS. BROADMAN: That's right. The issuance of rules is administrative; the enforcement of those rules is prosecutorial in nature.

QUESTION: What would be -- suppose the Congress passes a law and you sued all hundred Senators, for example, for having passed an unconstitutional act, which you claimed was unconstitutional. Would they have immunity from defending that suit?

MS. BROADMAN: Yes, they would. But that's very different than the case before the Court now.

QUESTION: Does your characterization of this as administrative and not judicial and not legislative, is that motivated in any way by our cases of Pierson v. Ray and Tenny v. Brandhove and Butz v. Economou?

MS. BROADMAN: Well, we argue that it's administrative in nature because we believe it is administrative, and it's not necessarily motivated by all those cases.

I mean, here the act is -- what the Virginia Supreme Court is doing does not look at all like a typical judicial act or typical legislative act. It's involved in enforcing disciplinary rules. It's involved in issuing rules regulating the legal profession.

If the Virginia Supreme Court regulated doctor participation in consumer directories, would it be judicially immune? Would it be legislatively immune? No.

QUESTION: What if the Virginia legislature had passed exactly this same set of standards governing lawyer conduct in the state?

MS. BROADMAN: Uh-huh.

QUESTION: Could you sue the members of the Virginia Legislature?

MS. BROADMAN: No. We would sue whoever was responsible for enforcing that law, which is precisely what we did here. We brought the action against the two entities with authority to enforce the unconstitutional disciplinary rules.

QUESTION: Well, I suppose one easy way, one certainly sure-fire way of raising the validity of the rule is if the Virginia court moved against somebody to enforce the rule.

MS. BROADMAN: We could not do that here. None of the attorneys in Virginia were willing to participate in that directory.

QUESTION: I know. But let's assume that the Supreme Court was enforcing the rule against some lawyer. He could certainly raise then the constitutionality of the rule?

MS. BROADMAN: Sure.

QUESTION: He could resist on the grounds that it was unconstitutional.

MS. BROADMAN: That's true.

QUESTION: And I suppose if he won he could get attorneys fees.

MS. BROADMAN: If he prevailed; that's correct. But I note here the consumer groups, because the attorneys were unwilling to participate in the directory, their only

means to challenge the rule was by instituting a suit. In the record below there is documentary evidence that there were attorneys who wanted to participate in the directory, but would not because that rule was in effect, so consumer groups --

QUESTION: That's what happened in Bates.

MS. BROADMAN: That's the --

QUESTION: In other words, Arizona attorneys are more enterprising than Virginia ones?

MS. BROADMAN: Well, in Virginia the attorneys were not willing to participate in our directory. In Bates there were attorneys who were willing to advertise in order to challenge the rule, but that's not the situation here.

QUESTION: Ms. Broadman, I understood you to say in answer to Justice White's question that you had the procedural situation you had in Bates, that the lawyers could get fees from the court? I don't understand that to be the case.

MS. BROADMAN: Well, I guess -- no, no, that's true, because there --

QUESTION: It's sort of ironic that we have a clear case of standing, the lawyers get no fees, but they have a less clear case as they do here -- I'm not saying it's adequate -- they do get fees.

MS. BROADMAN: Well, in the Bates proceeding, you're correct. They would not have obtained fees against the Virginia Court but against the bar association, in that

situation.

QUESTION: Or even against the bar association. They resisted a disciplinary proceeding, right? This was not a 1983 action or federal action; this was a state disciplinary proceeding.

MS. BROADMAN: You're correct.

QUESTION: And they did not -- I don't know what basis they could get fees in that --

MS. BROADMAN: You're correct; that's right. I stand corrected. They could not have gotten fees in that case.

QUESTION: And of course Hutto, on which you rely very heavily, is a case in which I suppose it would have been appropriate to award damages against the prison officials. But I think you concede no damages could be awarded here.

MS. BROADMAN: We're not seeking damages. All we're seeking is prospective declaratory and injunctive relief so that we can publish this consumer directory.

QUESTION: To the extent that Hutto analogized the free recovery to punative and all the rest of it, analogizes that the damage is, and it seems to me cuts against you to a certain extent.

I think you must concede that you could not get damages because of judicial immunity.

MS. BROADMAN: Well --

QUESTION: You do concede that, don't you?

MS. BROADMAN: Yes. We're not seeking damages.

QUESTION: But you concede that you could not.

MS. BROADMAN: Yes, I'll concede that we could not get damages here. But in Hutto v. Finney, there were two bases for awarding fees. There are two fee awards. The first one was on the basis of bad faith, and --

QUESTION: That basis of the opinion cuts against you, the basis of fees as part of cost cuts for you, or

MS. BROADMAN: My reading of the bad faith -- well, the Court need not reach that question, because you're deciding the case here on the basis of statutory interpretation of the Civil Rights Attorney Fee Award Act. If that act did not exist, though, we would argue that fee awards are ancillary to declaratory injunctive prospective relief, and therefore wholly distinct from damages. Damages are retroactive reimbursements; fee awards are merely awards which enable people to bring actions to obtain prospective relief, to stop unconstitutional governmental acts.

QUESTION: But as I understand your brief, you do rely primarily on the federal statute, the attorneys fee award act, in which reliance you don't have to recover your damages and the question of bad faith and all the rest of it is totally irrelevant?

MS. BROADMAN: Exactly. That's correct.

QUESTION: Well, if the Supreme Court of Virginia moved against a particular lawyer for violating one of its rules, and the lawyer defended on the ground that the rule is unconstitutional. He lost, final judgment against him in the Virginia Supreme Court.

Then your organization brings a suit against the individual justices of the Virginia Supreme Court for an injunction. You sue in the federal court, asking that those judges be enjoined from deciding cases that way because they're wrong.

Would those judges, would they be immune from that kind of a suit?

MS. BROADMAN: I think in that situation what we'd be saying is not that they can't decide the case that way, but --

QUESTION: Well, you'd say, "Your rules are unconstitutional, and therefore you must not decide" --

MS. BROADMAN: I think that's a distinct situation, because there the court is acting in a capacity of deciding cases in controversy.

QUESTION: It is --

MS. BROADMAN: It's not issuing regulations. It's not --

QUESTION: -- at issue final judgment, that the fellow violated the rules. Now, can you -- are they immune

then in your suit in federal court?

MS. BROADMAN: Well, I think as I understand it, you're assuming now that that judgment somehow interferes with our First Amendment rights?

QUESTION: Well, you make the same claim as you do here. "Judge, you've just upheld this rule of yours" --

MS. BROADMAN: Unconstitutional.

QUESTION: -- "and you're wrong. We're going to enjoin you from deciding cases like that any more."

MS. BROADMAN: Well, I think in that situation, the court is interpreting the rule. It's just enforcing the rule. The rule on its face violates constitutional rights. In that situation, consumer groups could sue the court only because it enforces an unconstitutional disciplinary rule, apart from deciding the cases and controversies, because that court can independently go out and initiate proceedings against attorneys in violation of constitutional rights.

So I think there the consumer groups could bring an action, if the court was applying an unconstitutional rule in a way that violated their constitutional rights.

QUESTION: Now, let me ask you a question that relates somewhat to that. It's clear that you brought the action against the Chief Justice I'Anson, including him, because the court had adopted and promulgated this rule. Is that correct?

MS. BROADMAN: That's correct.

QUESTION: Now, suppose Chief Justice I'Anson had dissented from the rule-making and the other justices were the only ones that were responsible for putting it into effect. Could you have joined Chief Justice I'Anson in this action?

MS. BROADMAN: That's an interesting question, and I'm not sure that I know the answer to that. I suspect that we --

QUESTION: Wouldn't he have a perfect defense, that he had no part of this, quote, "wrongful act"?

MS. BROADMAN: That's right. So I suspect we could not have joined him, but I'm not --

QUESTION: Then how would you get here? Where would be the person?

MS. BROADMAN: Well, we would bring an action against an individual, the justices who had approved, had voted for the rule.

QUESTION: You didn't bring that kind of an action here, did you?

MS. BROADMAN: Yes, we --

QUESTION: The named party is the Supreme Court, not the --

MS. BROADMAN: Well, the Chief Justice is also a named party.

QUESTION: Yes, I know. But the names -- the other justices are not named, are they?

MS. BROADMAN: No, they are not.

Let me just point out that many situations, people will bring actions against a board, an administrative board, and they'll bring it against the named head of the board and the whole board, even though everyone on that board may not have voted in favor of the particular regulation, so that I don't think this situation is all that different. I think it was sufficient to name the Chief Justice and the court.

Yes?

QUESTION: Back up a minute. You ask lawyers to take legal action on this on their own, and they refused to.

MS. BROADMAN: We asked attorneys whether they'd be willing, you know.

QUESTION: Now, suppose they did advertise in your directory and they were ordered to be disbarred, and they sued the Supreme Court that disbarred them. One, could they sue the Supreme Court in the federal court?

MS. BROADMAN: Could Consumers Union sue, is that what you're saying?

QUESTION: Could the lawyers?

MS. BROADMAN: The lawyers. Well --

QUESTION: The man that's involved is the lawyer.

MS. BROADMAN: There there are procedures for the

lawyers. The lawyers can appeal --

QUESTION: But, my case is, he had been disbarred. The question is, can you sue in the United States district court in Virginia?

MS. BROADMAN: No.

QUESTION: The lawyer, he can't sue?

MS. BROADMAN: No. Because that --

QUESTION: And No. 2, therefore he can't get counsel fees?

MS. BROADMAN: That's correct.

QUESTION: How does it so happen that you can?

MS. BROADMAN: Because the lawyer has procedures that the lawyer is supposed to follow to review that disciplinary proceeding. The lawyer appeals from the disciplinary decision of the Virginia Bar and to the Virginia Supreme Court, and then has a right to appeal up to the United States Supreme Court.

QUESTION: Yes, but --

MS. BROADMAN: We don't.

QUESTION: But Justice Marshall's question is, those procedures are all over and he's been disbarred.

MS. BROADMAN: Oh, he's already been disbarred, and he appeals to the United States Supreme Court and the cert is denied?

QUESTION: Yes, yes. Then he does, he goes into the United States District Court in Virginia.

MS. BROADMAN: Res judicata. He can't do it.

QUESTION: Is there any other reason he can't do it?

MS. BROADMAN: Well, I would argue comity, both res judicata and --

QUESTION: Comity?

MS. BROADMAN: Well, because if the federal district court takes -- well, really, res judicata --

QUESTION: Could he have filed an action in the district court originally, before he was disbarred?

MS. BROADMAN: No. And the reason for that is because of comity. Once he's filed through the appellate procedures, res adjudicata prevents him from turning around and suing in district court where he hasn't --

QUESTION: My new question is, he wasn't disbarred. He heard he was about to be disbarred, so he went into the district court and asked for everything, damages, injunction, declaratory judgment, and that old thing they used to have in equity procedure, "anything else the court out of its good heart will give me."

MS. BROADMAN: Okay. That raises a difficult question because there he could argue that the appellate procedures were inadequate. If somehow he could show that they were --

QUESTION: Well, my point was, when he -- win or lose, when you get counsel fees.

MS. BROADMAN: Well, if he brings an action and

wins --

QUESTION: Oh, I see: Win or lose.

MS. BROADMAN: Okay. If he loses, he's not going to get counsel's fees because --

QUESTION: But if he wins, he can get counsel fees?

MS. BROADMAN: That's right, if he wins he can. But I don't think where there are proper appellate procedures and those procedures are adequate that a party can turn around and sue a judge. The only time that they can bring these kinds of actions is where there's no appeals, no other recourse.

QUESTION: My point is, aren't you asking us to open the door where anybody can do what a lawyer can't do?

MS. BROADMAN: Well, no. I think you can assure that people follow proper appellate procedures if you clarify where they exist, they must be followed. The doctrines of comity prevent people from bringing these actions to circumvent existing appellate procedures.

QUESTION: But comity doesn't apply to you?

MS. BROADMAN: To us, because -- that's correct, because there was no other recourse that we had.

QUESTION: I want to get this straight, now. If we agree with you this is an administrativa action by the court and there's no immunity therefore, and you can get attorneys fees, you could also get damages?

MS. BROADMAN: Well, the standards applied to --

administrative officials are good faith immunity, so that where the court was acting in good faith, no damages could be obtained, and in general, it --

QUESTION: Just no judicial immunity?

MS. BROADMAN: That's correct.

QUESTION: Just administrative, the standards would apply for administrators?

MS. BROADMAN: If the court finds this to be an administrative act. The court may want to characterize this as an administrative judicial act and preserve the immunities that exist for damages, but not for declaratory and injunctive relief. But if the court characterizes this as a wholly administrative act, then the same standards would apply as apply to other administrative officials.

Where courts are issuing disciplinary rules, there will rarely be any cases where people can obtain damages. People aren't going to be able to show the panel of eight judges are acting in bad faith.

QUESTION: But it's only a qualified immunity that you would then grant?

MS. BROADMAN: That's correct.

If there are no further questions, thank you.

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

ORAL ARGUMENT OF J. MARSHALL COLEMAN, ESQ.,

ON BEHALF OF THE APPELLANTS--REBUTTAL

MR. COLEMAN: A couple of comments, Mr. Chief Justice. It is our position that the remedy in a case like this would be an appeal, that that has been the rule of this Court, that in the Virginia Supreme Court the parties could have appealed the petition to the Supreme Court to have a ruling on the question of the rule and if they had lost they could have then appealed it to this Court. But it is not appropriate for them to go at this collaterally, which in effect is a review of what our highest District Court has done.

There is nothing that the Supreme Court did in its capacity as the Supreme Court that deprived them of any right. In fact, they are not even the prosecutor in these cases. They simply hear cases that are brought to them by the state bar. So in this case the doctrine of judicial immunity is certainly a hazard, whether you call this immunity legislative or judicial, and it has been I think well briefed that judicial immunity is the proper denomination here because it is an inherent right in the court to regulate the practice of law. There is also an argument that this is rulemaking that is legislative in nature. But whatever the immunity is identified as, it is one that should be absolute and that should not be broaches here.

The remedy should simply be a petition by a lawyer or by some other group to the court. And as I said in my opening remarks, there is no evidence, there is no act at all done on the part of the court to the prejudice of the Consumers Union and, despite the finding in Bates and the changing of the rule, this directory has not yet been published but that is not because of anything that the Supreme Court of Virginia did. It should be able to continue to operate on the basis that it is immune from its judicial acts and the judgment below should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 3:01 o'clock p.m., the case in the above-entitled matter was submitted.)

- - -