The Burger Court Opinion Writing Database

Hensley v. Eckerhart

461 U.S. 424 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

See my Reply to C. J.

PERSONAL

December 21, 1982

Re: No. 81-1244, Hensley v. Eckerhart

Dear Lewis:

p 14

I am in general agreement but I have several comments. I am somewhat concerned that footnote 14 will be interpreted as requiring a second trial on the issue of whether the lawsuit was the catalyst for voluntary action taken pendente lite. Your opinion, of course, states that "[a] request for attorney's fees should not result in a second major litigation." This is in a sense repeated in note 14. Is note 14 really necessary? Perhaps in note 10 it could be indicated that voluntary actions as a consequence of the judgement may also count as "results." If they had any experience in practice, I believe we can trust the District Courts to understand that the findings required in subsection C will have to include the determination now described in note 14.

More important, I would not minimize the time record factor. Any lawyer who cannot show a record of what every hour was spent for should not recover. This is especially so when the fees are demanded from an adversary. A lawyer's regular clients trust him and he can be fairly terse about how he spent the time.

I consider this aspect crucial to the holding.

Regards,

WEB

Justice Powell

Attached are pages of the opinion with my comments WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

December 23, 1982

Re: No. 81-1244, Hensley v. Eckerhart

Dear Lewis:

I know you feel that the standards for time keeping are clear enough in your opinion, but I think it needs to be stronger.

When a lawyer tries to make his opponent pay fees there is no relationship of confidence as with the lawyer's own client.

For my part a District Judge must have every hour supported in order to allow a fee. I will be writing that, if I join, it is because I read the opinion to require keeping of detailed records of every hour the lawyer is asking his adversary to pay.

Regards,

WEB

Justice Powell

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: JAN 4 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1244

C. DUANE HENSLEY ET AL., PETITIONERS *v.* THOMAS ECKERHART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January ——, 1983]

CHIEF JUSTICE BURGER, concurring.

I read the Court's opinion as requiring that when a lawyer seeks to have his adversary pay the fees of the prevailing party, the lawyer must provide detailed records of the time and services for which fees are sought. It would be inconceivable that the prevailing party should not be required to establish at least as much to support a claim under 42 U. S. C. § 1988 as a lawyer would be required to show if his own client challenged the fees. A District Judge may not, in my view, authorize the payment of attorney's fees unless the attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained.

A claim for legal services presented by the prevailing party to the losing party pursuant to § 1988 presents quite a different situation from a bill that a lawyer presents to his own client. In the latter case, the attorney and client have presumably built up a relationship of mutual trust and respect; the client has confidence that his lawyer has exercised the appropriate "billing judgment," *ante*, at ——, and unless challenged by the client, the billing does not need the kind of extensive documentation necessary for a payment under § 1988. That statute requires the losing party in a civil rights action to bear the cost of his adversary's attorney and there is, of

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

CHAMBERS OF
THE CHIEF JUSTICE

May 13, 1983

Re: No. 81-1244 - C. Duane Hensley, et al. v.
Thomas Eckerhart, et al.

Dear Lewis:

This will confirm my "join."

Regards,

WEB

Justice Powell

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 22, 1982

No. 81-1244 Hensley v. Eckerhart

Dear Lewis:

I have read your proposed opinion in this case with care, and all of us are in your debt for the effort and time you have obviously devoted to the difficult questions raised by attorney's fee awards under § 1988. As you no doubt remember, I have never thought it a good idea for us to become involved in hearing case after case raising questions solely of attorney's fee law. For that very reason, I am disposed to join some opinion representing a consensus of a majority of the Court if it will settle the law somewhat. Thus I think I could join your opinion with relatively few changes. Yet I do have two substantial difficulties with your opinion, and I hope you will bear with me while I try to expose them. First, I am worried that your discussion of adjustment factors in part III-B may encourage insubstantial appeals, especially since the Court vacates the result below for failure to provide an adequate explanation. Second, I seriously question whether simply requiring lower courts to address the "relationship" between fees and results goes far enough toward performing the task with which Congress saddled the courts in § 1988. So here goes.

A.

To a large extent, I agree with the basic principles on which you rely for resolving fee questions. Your part III-A surely states the correct starting points: First, the court must decide whether plaintiff has crossed the statutory "prevailing party" threshold. Then it must establish a basic "lodestar" figure. Having established the lodestar figure, the court must decide whether to award a greater or lesser sum based on factors not already accounted for in the lodestar determination, including (among others) the quality of the results obtained and the extent to which plaintiff prevailed on the case as a whole. Therefore, I agree in principle that fees should be reduced to reflect unsuccessful claims pursued that involved both facts and legal principles wholly separate from the claims on which relief was ob-

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tained, and that defendants can recover their extra fees incurred in responding to frivolous claims even if other claims pursued against them were not frivolous. I also agree that, in some rough way, the total fee should be justified in terms of the results obtained, so that plaintiffs do not receive fees for thousands of hours of work that produced only minor relief, even if the work was not unreasonable at the time it was performed and might be billed to a paying client consistent with DR 2-106(B).

Where I have trouble is when you begin to define the "distinctly different claim" and "reasonable relationship" factors. Specifically, I worry that the first factor is too restrictive, that this approach will encourage litigation, and that other factors, equally if not more important, will be slighted.

B.

Regarding your discussion of severable claims: It might well be that one nonfrivolous civil rights claim involved facts and law that could be defined as "different" from the facts and law underlying a second claim, and yet the economies of bringing the two claims together made it unreasonable to pursue them as separate lawsuits. For instance, both claims might require litigation of the same class certification issues, or a single expert witness might be required to address the separate facts and legal standards on both claims. Furthermore, plaintiff's attorneys in a given case may decide to abandon one claim in the course of negotiating a settlement on other claims. It would hardly matter to the parties that the factual and legal issues of these claims were "wholly separate," as long as there was some basis for exchange. In these circumstances, would it not be unfair to reduce plaintiff's lodestar figure automatically on the ground that the claims were "unrelated"?

These adjustments describe only a minor subset of what your opinion describes as an already-small set of cases. Nevertheless, isn't a phrase like "distinctly different claims" a real invitation to litigation, as parties, district courts, and appellate courts dispute which claims are "distinctly different" from others? Perhaps these concerns are subsumed in your "common core of facts" and "related legal theories" standards and in your observation that much of counsel's time will be devoted to the litigation as a whole, which to a large extent seem to qualify the "distinctly different claims"

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definition, but I do suggest that our opinion should make this clearer.

Your discussion of the "results obtained" factor raises the same concerns. The opinion seems to recognize three different levels of success: "excellent," which entitles the attorney to full compensation, "exceptional," which justifies an enhanced award, and "partial or limited," in which case the lodestar figure "may be an excessive amount." No further definitions are given, except to explain (correctly) that "excellent" as a condition of full compensation cannot mean success on 100% of claims. In any event, may not this classification system cause considerable confusion, as parties dispute whether the results in a case were "excellent" or "partial," and which partial successes should result in a reduction of the lodestar? Furthermore, should "exceptional" results be the sole reason for enhancing a fee? (I explain my concern here further below.)

C.

My second general concern with the approach you have taken is perhaps more fundamental. As I see it, the crucial question in a fees case is not whether claims are "related" or success "partial", but rather what kind of relationship fees should bear to results taking the case as a whole. Should not your opinion provide more guidance than the statement in note 10 to the effect that the relief should justify the hours expended? It is not enough to say, I suggest, that courts or plaintiffs should exercise "billing judgment" as if they were negotiating fees with a paying client. Rather, should we not address the relationship between fees and results with the Fees Act in mind? For isn't that the only way for courts to implement Congress's directive?

Obviously, the cryptic terms of § 1988 embody a complex set of legislative judgments. First, Congress had to decide that it was desirable to induce lawyers to bring actions under the civil rights laws which might not produce monetary recoveries sufficient to cover their fees. Implicit in that policy decision are the conclusions (1) that the availability of compensation to lawyers will determine what claims get raised, and (2) that claims not involving expectations of substantial pecuniary relief but concerning the rights of those who cannot afford lawyers deserve to be litigated. Then Congress decided that defendants should finance the principal expenses of litigating those claims by paying plaintiffs' attorney's fees on the same hourly basis "as is tradi-

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tional with attorneys compensated by a fee-paying client," see S. Rep. No. 94-1011, at 6, without regard to the amount of monetary relief obtained, but only when the plaintiffs "prevailed."

In sum, while Congress sought to ensure full compensation for "good" litigation, it cannot be taken to have meant to make defendants fund "bad" litigation. Implementing this directive, however, creates unique problems for the legal system. The ideal of § 1988 is for civil rights lawyers to be compensated as if they had paying clients when litigation proves meritorious, and every attorney's fee decision from Johnson to your opinion reflects that ideal. But is not the ideal in many ways impossible to achieve? In most situations, lawyers expect to be paid for at least some of the work they do even if they are unsuccessful, or else they adjust their rates (as with contingent fee arrangements) to produce a reasonable level of compensation from a whole array of more-or-less risky cases. The sharp eyes of clients and competition from other lawyers keep both hourly rates and overall compensation levels reasonably related to results. Those checks are not present when one party bears the other's legal expenses. As a result, it seems to me that court-awarded attorney's fees create several predictable risks, depending on how the parties predict courts will set their fees.

If plaintiffs' attorneys think they will win on an important claim they may be tempted either to lard on excess claims, which would not in themselves justify the expense of litigation, or to omit meritorious, but more risky claims which should be pursued in the same litigation, depending on whether they think the court will compensate them for all hours expended or only for hours expended on successful claims. And the court's policies on settlement and severability will determine their willingness to settle.

At the same time, defendants have considerable opportunities for abuse. Because plaintiffs seldom receive any fee payments in these cases until litigation on the merits is concluded, they must bear the considerable cost of financing litigation with no guarantee of payment. Furthermore, courts have often been unwilling to use the Johnson factors to compensate plaintiffs' attorneys for this delay and uncertainty, although Johnson certainly invites courts to bring such considerations into play. As a result, defendants--who generally have deeper pockets than plaintiffs' attorneys, or whose opportunity costs may be lower--have much to gain simply by dragging

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out litigation. The longer litigation takes (with no prospect of improved results), the more pressure plaintiffs may feel to settle or simply to give up. This case itself provides a perfect example.

What I'm trying to say, Lewis, is this: It seems to me that the standards that courts use to set attorney's fees and to review attorney's fee awards substantially affect which claims shall be brought and therefore the extent to which the objectives of § 1988 are met. There is no simple, mechanical test reflecting the relationship between results and fees to apply in individual cases, but several approaches are clearly wrong. Tying fee awards to a ratio of successful claims to total claims, no matter how that is expressed, and failing to take account of delay and risk both encourage overcaution; on the other hand failing to scrutinize hours claimed encourages overlitigation. Defendants should not be forced to pay more than the reasonable cost of getting them to obey the law, but they should also not be encouraged to wear plaintiffs down. Confronting these issues directly may be the only way both to remain faithful to the purposes of § 1988 and at the same time to provide the sort of check on fees that an actual client provides in other areas.

D.

I say I may be able to join your opinion because I don't think it is inconsistent with this analysis. I'd feel easier in my mind, however, if the following specific suggestions could find expression in your next draft.

(1) In the interest of focusing the parties' attention on the merits, abandon the attempt in part III-A to define a set of "distinctly different" claims that can be disregarded automatically for purposes of setting a reasonable attorney's fee. Lack of success on claims involving different facts and different law is clearly relevant to the ultimate rough judgment whether full compensation is appropriate in an individual case, but parties should not be encouraged to litigate definitions.

(2) In discussion of the "results" factor in part III-B make clear that "partial," "excellent," and "exceptional" (not to mention "good" or "substantial") are not hard and fast categories. Rather, courts should address the relationship of results to fees with an eye to the ultimate question under § 1988: Are plaintiffs' attorneys receiving

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adequate compensation, given that Congress has decided that successful civil rights litigation should be funded to the full extent necessary to make sure cases are brought, but that defendants should not have to bear more than the reasonable costs of enforcing their compliance with law?

(3) Expressly reject the approach proposed by petitioners, perhaps in a footnote to the first full paragraph on page 11. I worry that in the absence of more specific guidance district courts will fall back on constructing ratios of successful claims to total claims, whether or not the claims are "related." This would be a mistake because attorneys who win 100% of the claims they raise may well be depriving their clients of effective representation. No one can succeed all of the time without complete avoidance of risk--something that no paying client would tolerate, and something we should hesitate to encourage in public interest lawyers.

(4) Expressly direct courts to consider the other major factors besides quality of results that affect the proper fee level in all cases. These include risk, the cost to plaintiffs of delays in payment, and specific abuses during the course of litigation that may skew the presumptively reasonable relationship of the lodestar figure to results. I question that footnote 8 is sufficient in this regard; perhaps a paragraph should be added to text at the bottom of page 11. Parties should be allowed to come forward with any evidence or arguments respecting the proper level of fees in light of the litigation as a whole.

(5) Finally, in the second paragraph of part III-C or the last paragraph in part IV make clear that where a district court has provided some sort of "clear and concise explanation" it should rarely be reversed except for clear error on the bottom line: a fee that is clearly exhorbitant or inadequate in light of the appellate court's examination of the record and the policies of § 1988. Also, to avoid tying up hundreds of cases unnecessarily, make a statement to the effect that courts of appeals should not automatically follow our example and vacate awards handed down before our opinion in this case when the reasonableness of the fee is apparent on the face of the record but the district court has failed to address the relationship between results and fees explicitly.

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Thank you for hearing me out. Your opinion will be of great importance for state and federal governments, civil rights litigants, and the whole federal court system. I am sure that we can reach an accomodation that emphasizes our considerable areas of agreement.

Sincerely,

WJB, Jr.

Justice Powell

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 5, 1983

No. 81-1244 Hensley v. Eckerhart

Dear Lewis:

I'm much in your debt for your effort to accomodate my difficulties. I guess at bottom my feeling is that Judge Hunter in fact did everything I think was required. So I'll write something along those lines, pretty much accepting your basic principles and concluding that Judge Hunter adequately met their standard, if not in precise terms.

Sincerely,

WJB,Jr.

Justice Powell
The Conference

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Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: APR 29 1983

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–1244

C. DUANE HENSLEY ET AL., PETITIONERS *v.* THOMAS ECKERHART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May ——, 1983]

JUSTICE BRENNAN, concurring in part and dissenting in part.

The Court today holds that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U. S. C. § 1988." *Ante*, at 15. I agree with the Court's carefully worded statement because it is fully consistent with the purpose of § 1988 as well as the interpretation of that statute reached by the courts of appeals. I also agree that plaintiffs may receive attorney's fees for cases in which "'they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit,'" *id.*, at 8, citing *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 278–279 (CA1 1978), and that plaintiffs may receive fees for all hours reasonably spent litigating a case even if they do not prevail on every claim or legal theory, see *ante*, at 10.

Regretfully, however, I do not join the Court's opinion. In restating general principles of the law of attorney's fees, the Court omits a number of elements crucial to the calculation of attorney's fees under § 1988. A court that did not take account of those elements in evaluating a claim for attorney's fees would entirely fail to perform the task Congress has entrusted to it, a task that Congress—I think rightly—has deemed crucial to the vindication of individuals' rights in

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1983

No. 81-1244 Hensley v. Eckerhart

Dear John:

I am quite willing to and shall make all the changes you suggest, except that I would like to retain in some form the sentences following the call to footnote 12, on page 16. My reason is this: the sentences in question constitute an argument about the effect of inadequate awards in one case on attorneys' willingness to undertake other cases. Both the legislative history of the Act and the leading cases interpreting it provide support for such an argument, see House Report 9 (bill should insure that "fees are awarded to attract competent counsel"); Copeland v. Marshall, 641 F.2d 880, 890 (CADC 1980) (en banc) (awards to provide "an incentive to competent lawyers to undertake Title VII work"), and parallel arguments are made elsewhere in my opinion, see pages 7-8. I intend, of course, to meet Lewis's footnote 13 to the extent it is relevant.

Will this suit you?

Sincerely,

WJB, Jr.

Justice Stevens

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1-4, 8, 11, 12, 14, 16-18

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: MAY 11 1983

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1244

C. DUANE HENSLEY, ET AL., PETITIONERS *v.*
THOMAS ECKERHART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May ——, 1983]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part and dissenting in part.

The Court today holds that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U. S. C. § 1988." *Ante*, at 15. I agree with the Court's carefully worded statement because it is fully consistent with the purpose of § 1988 as well as the interpretation of that statute reached by the courts of appeals. I also agree that plaintiffs may receive attorney's fees for cases in which "'they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit,'" *id.*, at 8, citing *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 278–279 (CA1 1978), and that plaintiffs may receive fees for all hours reasonably spent litigating a case even if they do not prevail on every claim or legal theory, see *ante*, at 10.

Regretfully, however, I do not join the Court's opinion. In restating general principles of the law of attorney's fees, the Court omits a number of elements crucial to the calculation of attorney's fees under § 1988. A court that did not take account of those additional elements in evaluating a claim for attorney's fees would entirely fail to perform the task Congress has entrusted to it, a task that Congress—I

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

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'83 MAY 13 A10:03

STYLISTIC CHANGES THROUGHOUT
SEE PAGE: 16

From: **Justice Brennan**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1244

C. DUANE HENSLEY, ET AL., PETITIONERS *v.*
THOMAS ECKERHART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May ——, 1983]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part and dissenting in part.

The Court today holds that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U. S. C. § 1988." *Ante*, at 15. I agree with the Court's carefully worded statement because it is fully consistent with the purpose of § 1988 as well as the interpretation of that statute reached by the courts of appeals. I also agree that plaintiffs may receive attorney's fees for cases in which "'they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit,'" *id.*, at 8, citing *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 278–279 (CA1 1978), and that plaintiffs may receive fees for all hours reasonably spent litigating a case even if they do not prevail on every claim or legal theory, see *ante*, at 10.

Regretfully, however, I do not join the Court's opinion. In restating general principles of the law of attorney's fees, the Court omits a number of elements crucial to the calculation of attorney's fees under § 1988. A court that did not take account of those additional elements in evaluating a claim for attorney's fees would entirely fail to perform the task Congress has entrusted to it, a task that Congress—I

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 27, 1982

Re: 81-1244 - Hensley v. Eckerhart

Dear Lewis,

Please join me.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 3, 1983

Re: No. 81-1244-Hensley v. Eckerhart

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 3, 1983

Re: No. 81-1244 - Hensley v. Eckerhart

Dear Bill:

Thank you for letting me see today a copy of your detailed letter of December 22 to Lewis. I agree with virtually all of what you say, and I suspect I would join an opinion incorporating these several changes. I fear, however, that Lewis will not go very far with these changes inasmuch as he now essentially has a Court.

I feel strongly about this case and would not join the opinion in its present form. For now, I shall continue to wait to see what, if anything, Lewis does by way of response to your letter.

Sincerely,

Harry

Justice Brennan

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 5, 1983

Re: No. 81-1244 - Hensley v. Eckerhart

Dear Lewis:

I know Judge Elmo B. Hunter well, and I regard him as one of the most able and discerning federal trial judges in this country. It seems to me that in this case he met every standard on fees that could be properly imposed, and I wonder, when the case returns to him, whether he will come up with anything very different.

In addition, I dislike to see the federal courts getting into this general business. I suspect that we shall now have a new wave of litigation over who is the prevailing party, what claims are related, etc.

I therefore shall wait to see what Bill Brennan has to say by way of his separate writing.

Sincerely,

Harry

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 3, 1983

Re: No. 81-1244 - Hensley v. Eckerhart

Dear Bill:

Please join me in your dissent

Sincerely,

Harry

Justice Brennan

cc: The Conference

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DEC 17 19

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: DEC 16 19

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1244

C. DUANE HENSLEY ET AL., PETITIONERS *v.* THOMAS ECKERHART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[December ——, 1982]

JUSTICE POWELL delivered the opinion of the Court.

Title 42 U. S. C. § 1988 provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The issue in this case is whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims.

I

A

Respondents brought this lawsuit on behalf of all persons involuntarily confined at the Forensic Unit of the Fulton State Hospital in Fulton, Missouri. The Forensic Unit consists of two residential buildings for housing patients who are dangerous to themselves or others. Maximum-security patients are housed in the Marion O. Biggs Building for the Criminally Insane. The rest of the patients reside in the less restrictive Rehabilitation Unit.

In 1972 respondents filed a three-count complaint in the District Court for the Western District of Missouri against petitioners, who are officials at the Forensic Unit and members of the Missouri Mental Health Commission. Count I challenged the constitutionality of treatment and conditions at the Forensic Unit. Count II challenged the placement of

December 21, 1982

81-1244 Hensley v. Eckerhart

Dear Chief:

Thank you for your letter.

I would like to retain fn. 14, as it is one of the few portions of the opinion that addresses specifically the facts in this case. We may well be criticized for giving an advisory opinion.

Nor do I think the footnote is likely to encourage a second trial. I agree with you that we can trust District Courts to understand that the findings required in subsection C will include the determination described in fn. 14. Thus, the note can do no harm, and it does tie our opinion closer to the case before us.

I am a bit surprised that you think my opinion "minimizes" the time record factor. I hesitate to change the language on page 9 that is now quoted from Copeland. I have read all or parts of a number of CA opinions. Although I do not agree with everything said in Copeland, this quote is one of the best statements. It supports a view that I believe you and I share: that unless hours would be billed to one's own client, they certainly should not be billed to one's adversary.

Moreover, in the preceding sentence, I stated that counsel for the prevailing party is "ethically" obligated - in the same sense as a laywer in private litigation - to exclude hours that properly should be excluded. And in Part C, my opinion states flatly that the burden of establishing entitlement to an award, and documenting the hours claimed, is on the fee applicant. In referring back to the "billing judgment" section (pp. 8-9), I also state quite specifically that the applicant should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims. See p. 12.

I add that the issue how a plaintiff's lawyer must document his hours is not actually before us in this case. Petitioner makes an issue of this here. I agree with you, however, that it is important to afford broad guidance, and I believe my opinion - read in its entirety - substantially accords with your views.

We have a margin of only one vote. Sandra and Bill Rehnquist have joined and I have heard nothing from Byron. I understand that Bill Brennan is making suggestions for changes that, if acceptable to me, may enable him to join. But I doubt - in view of what he said at Conference - that his suggestions will be acceptable.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 4, 1983

81-1244 Hensley v. Eckerhart

Dear Bill:

I am grateful to you for your letter. It gives me an opportunity to respond to your concerns, even if my response is not affirmative in all respects.

On the accompanying draft I have proposed revisions, all of which are prompted by your suggestions with the exception of one - see p. 8 - in response to the Chief's letter.

I cannot very well eliminate the distinction between "related" and "unrelated" claims. At least some of us - perhaps all who voted at Conference with me - thought it was necessary to identify this distinction. You also agree that this distinction should be identified, and thus our difference is only on the particular form of the analysis. I do think my opinion addresses the substance of your concern. See pp. 9 - 11, and particularly the first full paragraph on page 10. What is said there leaves open a broad discretion for a district court in deciding whether claims are "distinctly different."

As to "hard and fast rules", the opinion states flatly at the bottom of p. 11 that "there is no precise rule or formula for making these determinations". The opinion also identifies factors to be considered, and repeatedly leaves the degree of consideration to the district court. I have added your helpful suggestion to disclaim any "mathematical" approach involving ratios. See addition to n. 10, p. 11.

Before circulating my first draft, I considered mentioning "contingency" as a relevant factor, as a few courts have done. In reflecting on this, I question the wisdom of doing so specifically, particularly since the issue is not before us. I have not said this is irrelevant, and I have no doubt that trial judges - most of whom have had considerable litigation experience - will give this appropriate weight when it is deserved.

Unlike England, contingent fee practice is approved and extensively conducted in this country. Of course, in damage suit litigation there is no question about the amount of the fee if the plaintiff prevails. The contingent fee arrange-

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ment certainly has not deterred the instituting of tort claims for damages by the tens of thousands each year. When I last saw the figures, about half of all practicing American lawyers are sole practitioners - most of whom are glad to take any case that is not clearly frivolous.

Civil rights cases are not entirely analogous to tort cases, but American lawyers are accustomed to contingent fee practice. There is no evidence that the contingency element has deterred the bringing of civil rights cases. See the 1981 Annual Report of the Administrative Office, p. 75. One negative in specifically mentioning contingency is that it could encourage the bringing of marginal if not frivolous suits to a greater extent than we now experience. At every Term, we see many frivolous law suits, both civil and criminal.

I believe the only other suggestion of yours that I haven't met is that we make the decision prospective only. We rarely do this in civil litigation, and I do not recall our having done it in a case where courts have as much discretion as they will continue to have in this type of case.

I have added language on page 12 saying explicitly that the district court's discretion normally should be respected by an appellate court. On the same page, I reemphasize the Congressional policy of providing fees adequate to attract competent counsel.

If the changes on the enclosed draft meet with your approval, I will incorporate them into a second printed draft and circulate it.

You saw the note the Chief sent me. Although it was cryptic, he spoke to me separately to express his view that I have not adequately emphasized that a district court should disallow hours that have not been clearly documented by the plaintiff's attorneys. I have expressed to him a reluctance to go any further in this respect. My present understanding is that he probably will join the opinion if necessary to make a Court, but will "interpret" it in a concurring opinion.

I can't afford to lose the "joins" from Byron, Bill Rehnquist, and Sandra. I would expect that they would accept my proposed changes, but I would have to take a second look if they do not.

In sum, I am where one so often finds himself in trying to harmonize views necessary for a Court. I do believe my opinion, with the proposed changes, is about right.

Sincerely,

Justice Brennan
LFP/vde

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 5, 1983

81-1244 Hensley v. Eckerhart

Dear John:

I appreciate your letter and will make some response.

We are certainly together in being "old fashioned" about contingent fee arrangements. My former firm, from its formation in 1901 until I left it, had a policy against accepting employment on a contingent fee basis.

But no basis is better established - and more frequently abused - in this country than the familiar contingent fee (20% to 40%) in personal injury damage suits. Therefore §1988, though dealing with a different type of litigation, did not break entirely with tradition - though it did change the American rule with respect to who pays the fees. Before plainitff's counsel in a civil rights case is entitled to a fee paid by the losing party, the statute requires that his client be the "prevailing party". This surely contemplates success, and I have understood that one of the purposes of our taking this case was to make clear that a reasonable fee should vary with the degree or extent of success. There is nothing unfamiliar to our bar about this where, in most civil litigation (apart from personal injury cases), lawyers are charging their own clients.

I note your concern as to whether my opinion may be read as applying to "all fee awards in federal litigation". I do think it would be applicable where a federal statute authorizes a fee recovery for the prevailing party, as in a Title VII case (e.g., Copeland v. Marshall). Perhaps I should make this explicit.

The opinion, however, does not apply to types of litigation in which each party bears its own attorney's fee. There is less reason to expect that a lawyer will exercise quite the degree of restraint when taxing a fee against his adversary as he would in proposing a fee to a client, particularly a client whom the lawyer hoped to continue to represent. Yet, as I have tried to make clear in my draft, §1988 did not abolish the ethical constraints that should be applicable to lawyers whether billing clients or adversar-

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ies. If prevailing counsel in §1988 cases bear these in mind, the burden on reviewing courts may be lessened.

You mention a preference for according greater weight to the "other 11 factors" mentioned in the legislative history. But as Judge McGowan noted in Copeland, the rates times hours calculation usually covers almost all of the other factors, and my opinion does mention the relevance of the other factors. See p. 9, n. 8.

I understand your preference for not being too specific as to related and unrelated claims. As I think my opinion makes clear (see particularly pp. 9-10), most claims probably will be viewed as related and a DC has discretion to make this judgment. But where claims are "distinctly different" (p. 9), the vote at Conference - as I understood it - was that there should be no fee award. Where the plaintiff has not prevailed on a distinctly separate claim, it seems to me the statute itself forecloses imposition of a fee on the prevailing defendant.

Your final point - that I have "set forth [no] clearly applicable standard" - no doubt is correct. My opinion states that no "precise rule or formula" can be stated. (p. 19) Neither Congress (in its legislative history), nor any court so far as I know, has been able to state such a precise standard for determining a reasonable fee. My opinion does identify relevant factors that merit consideration, emphasizes the importance of careful record keeping, and - in view of the "prevailing" requirement - holds that the degree of success is a major factor. But the actual determination of the fee in a particular case remains an informed judgment by the DC - an exercise of judicial discretion.

In sum, I have no doubt that each of the nine of us would write this type of opinion somewhat differently. In the practice of law, I frequently found determination of a fair and proper fee to be a difficult task - whether reviewing (as a senior partner) a proposed charge by a partner or preparing a bill for clients myself. I have not found writing this opinion any easier. But this Court has not spoken on the subject in a §1988 case, and my purpose has been to try to give the lower courts the guidance of a general framework of analysis.

Sincerely,

Lewis

Justice Stevens

lfp/ss
cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 6, 1983

81-1244 Hensley v. Eckerhart

Dear Harry:

Although I do not know Judge Hunter, I agree that his opinion in this case was a thoughtful one. He followed, as he should have , CA8's precedents including Brown v. Bathke - a decision that in my view erroneously suggests that a partially prevailing plaintiff should always recover for all work on nonfrivolous issues. See n. 13, p. 14 of my opinion.

I suppose all of us here "dislike" for federal courts to "get[] into th[e] general business" of reviewing fees. But Congress put us into this business by enacting §1988, and a great deal of litigation has resulted. It remains to be seen whether an opinion by this Court, providing a general framework of analysis, reduces the volume of this litigation - particularly at the federal level.

Sincerely,

L. Lewis

Justice Blackmun

lfp/ss

cc: The Conference

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Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

JAN 6 1983

From: **Justice Powell**

pp. 8-15

Circulated: _____

Recirculated: JAN 6 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1244

C. DUANE HENSLEY ET AL., PETITIONERS *v.* THOMAS ECKERHART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January ——, 1983]

JUSTICE POWELL delivered the opinion of the Court.

Title 42 U. S. C. § 1988 provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The issue in this case is whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims.

I

A

Respondents brought this lawsuit on behalf of all persons involuntarily confined at the Forensic Unit of the Fulton State Hospital in Fulton, Missouri. The Forensic Unit consists of two residential buildings for housing patients who are dangerous to themselves or others. Maximum-security patients are housed in the Marion O. Biggs Building for the Criminally Insane. The rest of the patients reside in the less restrictive Rehabilitation Unit.

In 1972 respondents filed a three-count complaint in the District Court for the Western District of Missouri against petitioners, who are officials at the Forensic Unit and members of the Missouri Mental Health Commission. Count I challenged the constitutionality of treatment and conditions at the Forensic Unit. Count II challenged the placement of

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Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAY 2 1983

p. 4, 13, 15, 16

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1244

C. DUANE HENSLEY ET AL., PETITIONERS *v.* THOMAS ECKERHART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May ——, 1983]

JUSTICE POWELL delivered the opinion of the Court.

Title 42 U. S. C. § 1988 provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The issue in this case is whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAY 12 1983

pp 7-10, 13-16

MAY 12 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1244

C. DUANE HENSLEY ET AL., PETITIONERS *v.*
THOMAS ECKERHART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May ——, 1983]

JUSTICE POWELL delivered the opinion of the Court.

Title 42 U. S. C. § 1988 provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The issue in this case is whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims.

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May 25, 1983

Cases Held for No. 81-1244 Hensley v. Eckerhart

MEMORANDUM TO THE CONFERENCE:

I apologize for circulating this hold memo so late. In addition to other problems, I have been absent on a quick trip out of the city.

L.F.P., Jr.

ss

May 25, 1983

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 81-1244, Hensley v. Eckerhart

No. 81-1374 Blum v. Stenson

Resps brought a class action against petr, the Commissioner of the New York State Department of Social Services, on behalf of all New York residents who received Medicaid benefits because of eligibility for SSI benefits and whose Medicaid subsequently was terminated because they became ineligible for SSI. The DC (SDNY) imposed certain substantive and procedural requirements on petr in terminating the Medicaid benefits of former SSI recipients.

The DC awarded $118,000 in attorney's fees. The award was based on all hours worked (768). The rates were from $95 per hour to $105 per hour. The DC also granted a 50% "incentive bonus." (The three attorneys all worked at the Legal Aid Society; their levels of experience, by the time this two-year case was completed, ranged from three years to five years.) CA2 affirmed, upholding the bonus because "the procedural and substantive issues ... were extremely complicated, the quality of representation high, the outcome of great benefit to a large class of needy people, and the ultimate resolution uncertain."

Petr raises several issues: (i) a bonus may not be awarded under §1988. See Northcross v. Board of Education, 611 F.2d 624, 638 (CA6 1979), cert. denied, 447 U.S. 911 (1980); (ii) the rates should not have been based on those "normally charged for similar work by attorneys in like skill areas," especially given that these lawyers do not bill their clients; (iii) the DC abused its discretion in refusing to require resps' attorneys to specify how their services were divided to avoid unnecessary and duplicative work; (iv) CA2 abused its discretion in affirming summarily. Twenty-three States have joined in seeking a grant on the "bonus" issue.

The plaintiffs did not prevail on every issue raised below. Petr, however, does not argue that point here, nor is the issue mentioned in CA2's brief order. I therefore do not think this is a GVR in light of Hensley's "results obtained" holding.

The "bonus" issue is the only issue that may be substantial. In Northcross, supra, CA6 held that a bonus -- paid "to compensate the attorneys for vindicating important but often unpopular constitutional rights" -- would be a windfall and is impermissible under §1988. 611 F.2d, at 638. At the same time, however, CA6 permitted a "contingency" increase to account for the risk that the suit would be unsuccessful, as well increases to account for "special circumstances" such as "an unusually unpopular cause." Ibid.

This case has resulted in considerable concern. Some 23 States have joined in an amicus brief objecting primarily to the 50% bonus on top of generous hourly rates for youthful lawyers. The conflict with CA6 is not clearly defined. I could join 3 to grant, subject to discussion.

No. 81-1399, City of Los Angeles v. Manhart

This case involves the attorney's fee award in the Manhart litigation. There were two sets of attorneys: for the individual plaintiffs and for the union plaintiffs. (The lawyers for the union were paid their standard fees throughout the litigation.) The attorneys sought to recover for 1,400 hours, at rates from $55 per hour to $100 per hour, with a multiplier of 75%, for a total of $218,000. They were given $165,000. The DC made no findings, and did not explain how this amount was calculated. It did state:

> "In fixing these fees, I, of course, am taking into account the reasonable time spent by the attorneys, the complexity of the issues, the skill and experience of the attorneys, the results obtained, and the need to adequately compensate lawyers who take on Title VII cases. I have not sat down with a calculator and gone over each hour, and made a determination of an hour-by-hour or minute-by-minute basis applying to that time a reasonable hourly rate. I think that approach, which is mechanical, can lead, in some cases, to an unfair conclusion." (Pet. App. at 7.)

CA9 affirmed, over a dissent.

Petrs raise the following issues: (i) There are "special circumstances" that make the award of any fee unjust here: petrs had no choice but to litigate the issue in Manhart because, as this Court noted, "[t]he employer is in a dilemma; he is damned in the discrimination context no matter what he does." 435 U.S., at 728 n. 38; (ii) the DC erred in failing to make any findings on the number of hours reasonably worked, the reasonable hourly rate, the multiplier, and the extent of success; (iii) the award was excessive because it included a multiplier (which is forbidden, see CA6's Northcross decision), was based on market rates (when these union lawyers in fact were paid their standard fee throughout the litigation), was based on the current hourly rate (when in fact the work was performed years earlier), and was based on all hours claimed.

In my view the DC erred in failing to explain the fee amount in light of the success obtained as well as the hours worked and rates requested. I therefore will vote to GVR in light of Hensley.

No. 81-1830, Miller v. Hughes

Resp filed a Title VII suit alleging that he had been laid off because of his race, had not been called back to work because of his race, and had been discriminated against because he filed a complaint with the state civil rights commission. The DC found against resp on the first two issues, but held that petr, the employer, had retaliated against resp for filing the complaint by failing to call him back. Back-pay damages of $16,000 were awarded. Attorney's fees of $10,000 were awarded, based on rates of $50-60 per hour.

The DC rejected petr's argument that the amount of the fee should be proportionate to the issues on which resp prevailed:

> "[T]he fact that plaintiff proved retaliation but not discrimination, should not cause any reduction in the hours plaintiff's attorney is to be compensated for. In addition, it would be purely speculative for the plaintiff's attorney or the Court to come up with an allocation of plaintiff's attorney's time spent on one cause of action or the other. In addition, ... in a retaliation case, it is necessary for the attorney to investigate and present the facts concerning underlying charges of discrimination, since the retaliation does not occur in a vacuum. For this

reason, the attorney should be compensated for this time." (Pet. App. at 3c.)

CA6 affirmed.

Although the DC noted the interrelationship of the issues, it did not explain why the fee amount was reasonable in light of the success obtained. I therefore will vote to GVR in light of Hensley.

No. 81-2135, Uniroyal v. Chrapliwy

In 1973 resp class of female employees obtained partial summary judgment on the issue of liability in their Title VII suit against petr. The suit stalled because of the death of the district judge and delay by petr. To put pressure on petr, resps sought to have the Federal Government bar petr from receiving federal contracts. Various judicial and administrative proceedings ensued. Ultimately, in 1979, less than a week before petr was about to lose a large federal contract, a settlement was reached. Petr agreed to pay the 526 women in the class $9.3 million, in addition to certain equitable relief.

The plaintiffs requested a fee of $1.5 million for rates times hours (11,000 hours times rates of up to $200 per hour). They further requested multipliers ranging from 1.75 to 3.5 for the various attorneys, which would bring the total award to $5.1 million. Plaintiffs then proposed, as a lower alternative to this amount, that they receive 1/3 of the total settlement (including fees) -- a contingent fee of $4.6 million.

The DC awarded a fee of $833,000: $583,000 for hours times rates, $50,000 for the risks of the litigation, and $200,000 for the quality of representation. The rates times hours figure differed from the request primarily because (i) the DC excluded all hours spent trying to get petr barred from federal contract work and (ii) the DC used attorney rates ($50-$75 per hour) that were closer to those prevailing in South Bend, Ind. (where the case was tried) than in Washington and New York (where the principal attorneys came from).

The plaintiffs appealed, and CA7 reversed on these latter two points. It disagreed with the DC's reading of New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). The DC thought that Carey permitted attorney's fees for collateral proceedings only if recourse to those proceedings was mandatory under Title VII. CA7 held that it sufficed that

the collateral proceedings here contributed materially to the plaintiffs' success. On the rates issue, CA7 held that the DC erred as a matter of law in using South Bend rates. Although the fee customarily charged in the local community is relevant, there are cases, including this one, where it is reasonable to hire out-of-town lawyers to perform difficult or special services.

The issue decided in Hensley was not involved here. I do not believe the Carey issue -- whether fees properly were awarded for the collateral proceedings -- is certworthy. The second issue -- what locality's rates should be used -- is more substantial. Petr points out that Donnell v. United States, No. 81-1471 (CADC 1982), held that "the proper rule is that the relevant community is the one in which the district court sits. ... High-priced attorneys coming into a jurisdiction in which market rates are lower will have to accept those lower rates for litigation performed there." See also Jorstad v. IDS Realty Trust, 643 F.2d 1305, 1318 (CA8 1981). Resp points out, however, that in Donnell CADC noted that there might be unusual cases where a particular out-of-town attorney's services are needed, and expressly cited CA7's decision in this case.

I do not think we need to resolve this issue at this time. I therefore will vote to deny.

No. 82-156, City of Riverside v. Rivera

Resps alleged 22 counts of civil rights and tort violations after the police broke up a party with tear gas and unnecessary physical force. Thirty-one individual officers and the city were sued. The DC granted summary judgment in favor of 18 individual defendants. After trial, the jury found for resps on 4 of the 22 counts, against 5 officers and the city. The jury awarded $33,000 in damages.

The DC then awarded $233,000 in attorney's fees, adopting both the hours and rates requested by the attorneys. CA9 affirmed. Because the claims were related, the DC "properly awarded attorney's fees for hours expended on unsuccessful but related claims." (Pet. at 1-9.) It also held that "[t]he extent to which a plaintiff has 'prevailed' is not necessarily reflected in the amount of the jury verdict. ... That decision rests within the discretion of the district court." (Id., at 1-12 to 1-13.)

The DC provided no explanation of why a fee of this size was reasonable in light of the success obtained. I will vote to GVR in light of Hensley.

No. 82-192, Delta Air Lines v. Thornberry

Resps brought a Title VII suit against petr. Several claims were dismissed. A few days before trial the suit was settled. The DC awarded $218,000 in attorney's fees and $83,000 in costs. This covered all hours spent, though at rates less than requested. The DC did not discuss the issue of unsuccessful claims. In deciding what multiplier to use, the DC did discuss the results obtained, finding them "significant" though "somewhat limited in view of the initial large scope of the lawsuit." (Pet. at A-23.) The DC then awarded a 20% multiplier. CA9 affirmed, rejecting petr's argument that the fee amount was excessive: "[I]t is ... irrelevant that plaintiffs did not obtain every form of relief sought." (Pet. at A-6.)

CA9 erred in rejecting the relevance of the relief obtained. I will vote to GVR in light of Hensley.

No. 82-747, Bond v. Burks

Resps brought a constitutional challenge to conditions at Missouri's maximum-security prison. They prevailed on many but not all issues. The subsequent fee award was $107,000. The DC -- the same as in Hensley -- rejected defendants' proportionality argument "[f]or the reasons expressed in [the Hensley] opinion." (Pet. at A-9.) In discussing the time involved and results obtained, the court stated that it would be "difficult to measure" the impact of the litigation, but that it "will have a significant positive effect on the lives of the inmates." (Pet. at A-20.) CA8 affirmed on the basis of the DC's opinion.

This is virtually a carbon copy of the Hensley case. Accordingly, I will vote to GVR in light of Hensley.

No. 82-1289, Chicago Housing Authority v. Gautreaux

This public-housing litigation began in 1966. In 1969 the DC entered summary judgment for resps, finding intentional racial discrimination in the selection of housing sites. From 1969 to 1979, the only proceedings in the case concerned construction of new public housing contemplated by the 1969 decree. In May 1981 the plaintiffs -- for the first time in the litigation -- requested attorney's fees, for 3,000 hours worked dating back to 1966 at rates of $125 per hour to $175 hour. The DC awarded $375,000 in fees, as an interim award under §1988. It rejected petrs' argument that plaintiffs were not entitled to fees for the post-1976 proceedings because they had not prevailed, e.g., their motion to have a receiver appointed was denied. The DC stated

that "there is no question that plaintiffs have prevailed in this case," that the court "must" allow compensation for all nonfrivolous hours, and, in any event, that plaintiffs' unsuccessful motion was a material factor in causing progress by the defendants.

CA7 affirmed. Section 1988 was enacted in 1976 and applied to all "pending" cases. The issue was framed as whether an "active" issue remained in the case, so that the entire case was pending, or whether the case consisted merely of "supplemental" proceedings to enforce a prior final judgment. CA7 found that, notwithstanding the fact that the liability was resolved conclusively in 1969, the continuing proceedings concerning modifications of the injunction were "active" and not merely "supplemental." CA7 did not address the "proportionality" issue, but did state in a footnote that the plaintiffs' fee request excluded time spent "on unsuccessful aspects of plaintiffs' case." (Pet. at 2a, n. 3.)

The DC clearly erred in stating that fees must be provided for all nonfrivolous hours. But I do not think there actually is a Hensley issue in this case. There is no dispute that resps' prevailed on the substance of the litigation. The only "proportionality" issue concerns subsequent motions on appointment of a master and a receiver. The DC found that these benefited resps' case. Accordingly, there is no real issue about the reasonableness of the award of fees in light of partial success, and I would not GVR.

On the basic question whether fees should have been awarded at all, however, there is much to be said for Judge Pell's argument in dissent that "the district court's allowance of fees of $375,375 to the plaintiffs for work of which approximately two-thirds had occurred during a period spanning a full decade prior to 1976, rendered under the sponsorship of two not-for-profit organizations, neither of which, nor their attorneys, during that decade, expected to be compensated by the opposing party, goes beyond the reasonable boundaries indicated by the Congressional intent." (Pet. at 24a.) I am not inclined to grant, however, as the facts appear to be unusual. My vote is to deny.

No. 82-1335, Rhodes v. Stewart

Resp prison inmate (and one other inmate) complained because they were denied access to Hustler magazine. Subsequently, prison officials adopted new regulations for banning printed matter, including a procedure for appeals of denial of access. Resp did not seek to take advantage of these regulations, but rather filed a §1983 complaint. The

DC ordered petrs to implement their new regulations before proscribing the magazine. A hearing was ordered, but by the time the decision was filed, resp had been released on parole (and the other prisoner plaintiff was dead). No other inmate has ever requested Hustler.

Resp still filed for attorney's fees. The DC awarded $5,000, despite petrs' argument that the litigation had not benefited resp at all. CA6 affirmed. Although "plaintiffs did not gain immediate access to Hustler," they did "achieve the right to a determination of the magazine's obscenity." (Pet. at A-5.) Fees are proper even if the plaintiff was not successful on every issue.

It is not precisely clear what resp "won," but the "victory" seems minor indeed. All resp obtained was a right to have a decision on the banning of the magazine -- a "right" that existed under petrs' new regulations and that resp could have taken advantage of instead of filing a federal-court suit. This extremely minor success should have been taken into consideration. I will vote to GVR in light of Hensley.

L.F.P., Jr.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 21, 1982

Re: No. 81-1244 Hensley v. Eckerhart

Dear Lewis:

Please join me.

Sincerely,

WHR

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

RECEIVED
SUPREME COURT
JUSTICE POWELL

'82 DEC 35 P1:33

January 4, 1983

Re: 81-1244 - Hensley v. Eckerhart

Dear Lewis:

Perhaps I am old fashioned, but I must confess that I retain a slight bias against contingent fee arrangements and therefore find it somewhat difficult to swallow the notion that this Court regards the extent of the plaintiff's success in litigation as the dominant factor in determining the reasonableness of the fee that the lawyer should charge his client. Your opinion construes a statute expressly intended to assure, in the words of the Senate Report, that "counsel for a prevailing party should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" The opinion concludes that the extent of a plaintiff's success is "a crucial factor" in determining the amount of attorney's fees, and that the district court should award only "that amount of fees that is reasonable in relation to the results obtained." Although I am sure you do not intend to do so, I fear that your opinion will be used in the long run to support contingent arrangements that give lawyers a share of their clients' recoveries. (Indeed, in this very case I think your opinion will justify the allowance of a higher fee for the respondent than the District Court actually awarded. The plaintiff achieved success on virtually all of his claims, and the lawsuit induced substantial changes in policy even before the time period for which his counsel sought fees in this case.) I would much prefer to have the opinion place greater emphasis on the other eleven factors endorsed by the American Bar Association and Congress.

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More generally, I am not sure whether your opinion is intended to apply only to civil rights litigation or is to be interpreted as a general directive pertaining to all fee awards in federal litigation. Footnote 4 of your opinion raises this doubt by quoting from the Senate Report: "'It is intended that the amount of fees awarded ... be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases...." If your criteria are limited to awards under §1988, I wonder if you should not explain why a special rule should apply to this type of litigation. If it is not so limited, perhaps it would be appropriate to draw on experience in other contexts.

I am also somewhat troubled by your treatment of "unrelated claims." I think your comments on pages 9 and 10 refer only to unsuccessful claims that are entirely separate and distinct from those on which the plaintiff prevailed. But your discussion of Brown v. Bathke in footnote 13 seems to imply that the reinstatement claim in that case was separate from the claim for lost wages. Normally, I should think, such claims would be classic examples of related claims. In Brown itself, the reinstatement claim may have been based on a different set of facts and a different legal theory from the wages claim, but the footnote does not make this clear. Certainly the plaintiff's lack of success on completely distinct claims is a factor the district court may consider in making a fee award, but I am not sure how useful it is to separate out this rather vaguely-defined factor and make it mandatory.

Further, it is not clear to me that you have set forth any clearly applicable standard for the relationship between success obtained and fees awarded. If not, this opinion might simply generate protracted rounds of essentially unproductive litigation about the definitions of "exceptional," "excellent," and "partial" success and the amounts of fees justified by the results. Especially if these labels are inherently amorphous, there is little point in burdening the district courts of this country with the task of giving them content by the process of case-by-case litigation.

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Frankly, I am not entirely sure what I will do in this case--for I still think the district judge did an excellent job--but thought I should write to let you know that I have read your opinion and am troubled by it.

Respectfully,

John

Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 6, 1983

Re: 81-1244 - Hensley v. Eckerhart

Dear Lewis:

Thank you for your response to my letter.

Perhaps I would be less concerned about the emphasis on the degree of success obtained in the litigation if the opinion made it perfectly clear that this factor is intended to have substantially the same significance as when a lawyer is billing his own client on a matter that was not handled on a contingent basis. In that context, the lawyer is entitled to charge for all time reasonably expended in order to obtain the result, even if the ultimate result was somewhat less than a total success.

My concern about whether your opinion applies to fee awards in all federal litigation was intended to inquire only as to those categories of cases in which there is a provision for the successful party to collect his fees from his opponent. I particularly had in mind fees in antitrust litigation, but I am sure there are other federal statutes that also authorize fee awards.

I will wait to see what Bill Brennan comes up with before deciding what to do in this case.

Respectfully,

John

Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 9, 1983

Re: 81-1244 - Hensley v. Eckerhart

Dear Bill:

Because I have a few relatively minor problems with your opinion, perhaps I should write separately stating that I agree with most of what you have written. Before doing so, however, I would want to be sure that you want to retain the portions of the opinion that trouble me.

First, I find Lewis' new footnote 13 on page 13 quite persuasive and wonder if you might be willing to take a little of the sting out of the paragraph on page 2 (perhaps by omitting the sentence "Such appeals are little more than reverse strike suits, ...", and also the portion of the runover paragraph on page 16 after footnote peg 12).

Second, I believe also that Lewis, as the author of the majority opinion must have the better of the argument in his new footnote 16. Therefore, in the second line on page 16 of your dissent, perhaps you should say something like "find deficient only in minor respects."

Third, I wonder if you would not be wise to avoid the footnote debate in your footnote 12 as opposed to his new footnote 17. After all, he has five votes.

Finally, on page 7 I wonder if it would not be wise to insert a sentence or two pointing out that privately retained counsel often must charge for work performed on claims that ultimately prove unsuccessful, but nevertheless make a contribution to the victory on the successful claim. For example, in taking a deposition of an executive of one's adversary, it is

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often necessary to cover a range of territory that includes both the successful and the unsuccessful claims and it is sometimes virtually impossible to determine how much time was devoted to one category or the other. I think the litigation of overlapping claims is much more interrelated than the majority opinion assumes.

If you prefer not to make any changes in your persuasive opinion, I will understand and will nevertheless be able coattail on most of what you have done by just omitting reference to the few things that trouble me.

Respectfully,

Justice Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 10, 1983

Re: 81-1244 - Hensley v. Eckerhart

Dear Bill:

Although I agree that you do make a valid point in the portion of page 16 following footnote 12, I think the tone of that paragraph opens the door to a more effective response by Lewis than if you modified the language a little bit. I surely have no objection to retaining the basic point, but wonder if you might revise it to read somewhat along these lines:

> "Apart from the result in this case, the prospect of protracted appellate litigation regarding attorney's fees awards to prevailing parties is likely to discourage litigation by victims of other civil rights violations in Missouri and elsewhere. The more obstacles that are placed in the path of attorney's fees awards, the less likely attorneys will be to take the risk of representing civil rights plaintiffs whose prospects of success are uncertain, and the more likely they will be to compromise rather than pursue their clients' statutory claims. Yet this outcome would be contrary to Congress' purpose in enacting §1988--to assure that adequate fee awards would attract competent counsel for civil rights litigants.*/
>
> "*/ See House Report 9 (legislation is designed to insure that "fees are awarded to attract competent counsel"); Copeland v. Marshall, 641 F. 2d 880, 890 (CADC 1980) (en banc) (awards provide "an incentive to competent lawyers to undertake Title VII work"); supra, at 7-8."

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If you prefer to leave page 16 as it is, let me take another look at the entire opinion after you have responded to Lewis and I may well end up simply joining you anyway.

Respectfully,

Justice Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 10, 1983

Re: 81-1244 - Hensley v. Eckerhart

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 20, 1982

No. 81-1244 Hensley v. Eckerhart

Dear Lewis,

Please join me in your opinion.

Sincerely,

Sandra

Justice Powell

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