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Evans v. Jeff D.

475 U.S. 717 (1986)

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

84-1288

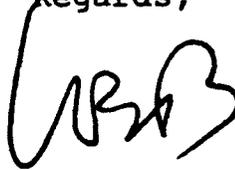
January 29, 1986

Re: No. 84-1288 - Evans v. Jeff D.

Dear John:

I join.

Regards,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 15, 1985

No. 84-1288

Evans v. Jeff D.

Dear Thurgood and Harry,

We three are in dissent on the waiver issue in the above. I will be glad to take on the dissent on that question.

Sincerely,



Justice Marshall
Justice Blackmun

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 30, 1985

No. 84-1288

Evans v. Jeff D.

Dear John,

I shall be circulating a dissent in
the above in due course.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

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

From: Justice Brennan

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1288

JOHN V. EVANS, ET AL., PETITIONERS *v.*
JEFF D. ET AL.

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

[April —, 1986]

JUSTICE BRENNAN, dissenting.

Ultimately, enforcement of the laws is what really counts. It was with this in mind that Congress enacted the Civil Rights Attorney's Fee Awards Act of 1976, 42 U. S. C. § 1988 (the "Act" or "Fees Act"). Congress authorized fee-shifting to improve enforcement of civil rights legislation by making it easier for victims of civil rights violations to find lawyers willing to take their cases. Because today's decision will make it more difficult for civil rights plaintiffs to obtain legal assistance, a result plainly contrary to Congress' purpose, I dissent.

I

The Court begins its analysis by emphasizing that neither the language nor the legislative history of the Fees Act supports "the proposition that Congress intended to ban all fee waivers offered in connection with substantial relief on the merits." *Ante*, at 11. I agree. There is no evidence that Congress gave the question of fee waivers any thought at all. However, the Court mistakenly assumes that this omission somehow supports the conclusion that fee waivers are permissible. On the contrary, that Congress did not specifically consider the issue of fee waivers tells us absolutely nothing about whether such waivers ought to be permitted. It is blackletter law that "[i]n the absence of specific evidence of Congressional intent, it becomes necessary to resort to a

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

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES 5, 6

From: Justice Brennan

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1288

JOHN V. EVANS, ET AL., PETITIONERS v.
JEFF D. ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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To: The Chief Justice
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Justice Stevens
Justice O'Connor

From: Justice Brennan

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1, 5, 6, 9, 12, 13, 16, 18, 21, 23

3rd DRAFT

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4th DRAFT

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JEFF D. ET AL.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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[April —, 1986]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and
JUSTICE BLACKMUN join, dissenting.

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Justice Blackmun
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Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

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17-18

5th DRAFT

SUPREME COURT OF THE UNITED STATES

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**JOHN V. EVANS, ET AL., PETITIONERS v.
JEFF D. ET AL.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 31, 1985

84-1288 - Evans v. Jeff D.

Dear John,

Please join me.

Sincerely yours,



Justice Stevens

Copies to the Conference.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 30, 1985

Re: No. 84-1288 - Evans v. Jeff D.

Dear Bill:

I await the dissent.

Sincerely,

T.M.
T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 3, 1986

Re: No. 84-1288-Evans v. Jeff D.

Dear Bill:

Please join me in your dissent.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 20, 1986

Re: No. 84-1288, Evans v. Jeff D.

Dear John:

I am, of course, awaiting the dissent in this case.

Sincerely,

Harry

Wait for the dissent

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 8, 1986

Re: No. 84-1288, Evans v. Jeff D.

Dear Bill:

I would like, if possible, to join your dissenting opinion in this case. It would have been impossible for me to have gone along with the first draft in view of the aspersions cast upon Byron's opinion in Alyeska, which I joined. Your second draft, circulated yesterday, softens the comments about Alyeska and removes much of my concern regarding your treatment of that case.

I am also somewhat disturbed, however, by the general tone of the dissent and its critical comments about John's reasoning for the majority. Would you at least consider making the following changes in your opinion? If you make them, you have my vote.

1. Make the sentence in the middle of the full paragraph on page 5 read "in May 1975, however, this Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), ruled that"
2. On page 6, eliminate the first sentence and replace it with the following: "In the wake of Alyeska, Congress acted to correct 'anomalous gaps' in the availability of attorney's fees to enforce civil rights laws. S. Rep. No. 94-1011, p. 1 (1976) (hereafter S. Rep.)²"
3. In the first line of footnote 3 on page 9, eliminate the words "albeit begrudgingly"
4. On page 12, last paragraph, eliminate the second sentence and the subsequent citation
5. In the paragraph beginning on page 13, eliminate the phrase "much less another Alyeska"
6. On page 16, last line of the text, eliminate the words "I am sorry, but"
7. In the first line of the last paragraph on page 18, eliminate the words "a weak" and replace them with the word "an"
8. On page 22, fifth and sixth lines, eliminate the words "the bounty conferred on civil rights defendants by the Court" and replace them with the words "the Court's decision"

9. On page 23, fifth line of part IV, make the sentence read "It is to be hoped that Congress will repair" See Style Manual §10.3, page 158
10. On page 23, make the last sentence of the first paragraph of part IV read "Such efforts are to be commended and, it is to be hoped, will be followed by other state and local organizations concerned with respecting"

If these suggestions are too much and too many to accept, I, of course, shall understand.

Sincerely,



Justice Brennan

cc: Justice Marshall

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 9, 1986

Re: No. 84-1288, Evans v. Jeff D.

Dear Bill:

Please join me in your dissent.

Sincerely,



Justice Brennan

cc: The Conference

December 31, 1985

84-1288 Evans v. Jeff D

Dear John:

Your opinion is excellent and very well written, and I will join it.

I do make two suggestions that, at least for me, are quite important. You and I know from personal experience - we having practiced law fairly recently - that simultaneous negotiations of the merits and lawyer's fees are customary and serve the public interest in the settlement of litigation.

Your opinion implicitly recognizes the appropriateness of simultaneous negotiations and probably would be read to that effect. Yet, as you point out on p. 6, the rule in CA9 disapproves "simultaneous negotiation of settlements and attorney's fees" absent a showing of "unusual circumstances". Moreover, in this case CA9 found no such circumstances. Although perhaps not necessary to the opinion, I think it would be appropriate - and helpful - if you added a note making explicit that ethical considerations rarely militate against the desirability of simultaneous negotiations.

On p. 17, your opinion states that "the District Court must determine . . . whether a 'multiplier' or other adjustment is appropriate." We have granted cert in Pennsylvania v. Delaware Valley Citizens Council, No. 85-5, to consider the issue of fee multipliers. Delaware Valley involves whether a multiplier may be appropriate to compensate for the risk of loss. I think a case can be made for prohibiting multipliers altogether, as they will be requested in almost every case. But apart from that, would it not be desirable to leave the question open? We could simply note that some District Courts have increased fee awards by use of a multiplier, without suggesting they "must" consider doing this.

Sincerely,

Justice Stevens

lfp/ss

January 8, 1986

84-1288 Evans v. Jeff D.

Dear John:

As I may not have an opportunity to visit with you on the telephone before Friday's Conference, I write this note.

Thank you for making the change on page 17 of the second draft of your opinion in this case. I am a little disappointed, however, in note 29 added in response to my other suggestion. I am afraid the note, as now drafted, can be read as reflecting a negative view by this Court of simultaneous negotiations. There was general agreement at Conference - at least by a majority - that simultaneous negotiations particularly in class action cases, frequently are desirable as they facilitate settlement rather than prolonged litigation. What would you think of adding language in footnote 29 along the following lines:

"Simultaneous negotiations often facilitate settlement of a case. The public interest, as well as that of the parties, may be furthered by settlement - particularly of civil rights class action cases."

Your Chambers advise that even in sunny Florida you have had the flu. I have been at home with a similar ailment for the last five days, but feel much better today.

Sincerely,

Justice Stevens

lfp/ss

4

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 13, 1986

84-1288 Evans v. Jeff D.

Dear John:

Please join me in your opinion for the Court.

Sincerely,

Lewis

Justice Stevens

Copies to the Conference

LFP/vde

22 1/13 11.86

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 8, 1986

Re: No. 84-1288 Evans v. Jeff D.

Dear John,

I have only one objection to your circulating opinion in this case, and that is with respect to its intimations (if such they be) about "disproportionately large" attorney's fees. You use this phrase toward the bottom of page 8, and in the sentence carrying over from page 15 to 16 you cite in a footnote the awards in City of Riverside v. Rivera (CA9 1984) and Cunningham v. City of McKeesport (CA3 1985).

While your opinion does not say so in so many words, I draw from it an inference that one of the reasons why attorney's fee awards are of such concern to defendants is that they may be in an amount many times that of any money judgment awarded. Because we have granted certiorari in Rivera, and are holding McKeesport for it, I would suppose that the question of whether this sort of disproportionality is authorized is an open one, and I would not think we would want to foreclose that question in any way by what might be said in your presently circulating draft.

My concerns could be easily met by simply referring to the fee negotiated by the attorney which you discuss on page 8 as a "large" fee, without describing it as "disproportionately large" or "not excessive." My concern with respect to the carry-over sentence on pages 15 and 16, and with the footnote to that sentence, could be met by any sort of suggestion that disproportionality of this size is extraordinary, or by revising the sentence to make clear that it is lower courts, not this court, who have approved such awards. Even with these changes, your point remains a perfectly valid one: "The defendant's potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits." (Last full sentence on page 15.) But this point can be made, and you have made it,

without intimating that awards such as those in Rivera or McKeesport are proper.

Sincerely,



Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 13, 1986

Re: No. 84-1288 Evans v. Jeff D.

Dear John,

Please join me.

Sincerely,

WHR

Justice Stevens

cc: The Conference

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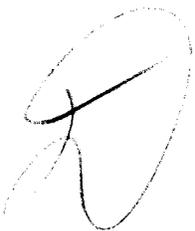
CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 23, 1986

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 84-1288 Evans v. Jeff D.

No. 85-465 Mountain Plains Congress of Senior
Organizations et al. v. Malchman et al.,



Because John is a member of one of the respondent organizations (the American Association of Retired Persons (AARP)), he has recused himself and asked me to circulate this memorandum, the first draft of which was prepared by his law clerks. I believe they correctly conclude that certiorari should be denied.

Petitioners object to the Second Circuit's affirmance of an antitrust class action settlement. In 1976 and 1977, class actions were filed in state and federal court, respectively, on behalf of insurance-buying members of the AARP against Colonial Penn Group (CPG). The suits were directed against CPG's exclusive insurance underwriting relationship with AARP and with a second nonprofit association of retired persons, the National Retired Teachers Association. In 1980, the parties to the federal action agreed to settle. The settlement agreement obligated CPG to pay \$11 million to the associations and \$2.35 million in attorney's fees. It required competitive bidding procedures for the placement of insurance by the associations. It also broadened the plaintiff class to include all persons who were members of the associations as of November 1, 1980 (thereby increasing class membership from 2 million to more than 11 million persons); ordered that notice and an opportunity to "opt out" be provided to the class members; and provided an escape clause for CPG in the event that more than 10,000 association members opted out. The District Court approved the settlement twice (once after a remand for further findings), and a divided Second Circuit affirmed.

Petitioners' first and principal contention is that the Second Circuit should not have approved a settlement in which the merits and fees were simultaneously negotiated;

~~WJB~~
~~James [unclear]~~

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

From: Justice Stevens

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1288

JOHN V. EVANS, ET AL., PETITIONERS v.
JEFF D. ET AL.

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

[December —, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

The Civil Rights Attorney's Fees Awards Act of 1976 ("Fees Act"), provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" in enumerated civil rights actions. 90 Stat. 2641, 42 U. S. C. § 1988. In *Maher v. Gagne*, 448 U. S. 122 (1980), we held that fees *may* be assessed against state officials after a case has been settled by the entry of a consent decree. In this case, we consider the question whether attorney's fees *must* be assessed when the case has been settled by a consent decree granting prospective relief to the plaintiff class but providing that the defendants shall not pay any part of the prevailing party's fees or costs. We hold that the District Court has the power, in its sound discretion, to refuse to award fees.

I

The petitioners are the governor and other public officials of the State of Idaho responsible for the education and treatment of children who suffer from emotional and mental handicaps. Respondents are a class of such children who have been or will be placed in petitioners' care.¹

¹The number of children in petitioners' custody, as well as the duration of that custody, fluctuates to a certain degree. Although it appears that

~~WJP~~

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SEE PAGES:

8, 17, 19

From: Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

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8, 15, 16, 19
Style also 13, 11, 13

From: Justice Stevens

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 13, 14-20

4th DRAFT

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From: Justice Stevens

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5th DRAFT

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✓

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

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CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 3, 1986

No. 84-1288 Evans v. Jeff

Dear John,

Please join me.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference